

No. 10-288 AUG 25 2010

OFFICE OF THE CLERK
In The
Supreme Court of the United States

HILTON HALL,

Petitioner,

v.

JAMES RAY WARD,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's decision was a misapplication of 28 U.S.C. § 2254(e)(1) when it failed to give any deference to the state habeas court's factual findings on Petitioner's juror/bailiff misconduct claim which were clearly supported by the record.
2. Whether the Eleventh Circuit's finding of prejudice conflicts with *United States v. Frady*, 456 U.S. 152 (1982), when the court agreed Petitioner had failed to establish that the trial court did not answer any question posed by the jury and when it disregarded the factual findings of the state habeas court that any information provided to the jury was not reversible error.
3. Whether the Eleventh Circuit's decision which relied on evidence that was not admitted, including testimony relating to the thought processes of the jurors, in assessing prejudice and harm directly conflicts with *Mattox v. United States*, 146 U.S. 140, 149 (1892), and *United States v. Siegelman*, 561 F.3d 1215 (11th Cir. 2009).

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CITATION TO THE OPINION BELOW

The Georgia Supreme Court opinion is reported at *Ward v. State*, 262 Ga. 293, 417 S.E.2d 130 (1992). The state habeas court denied Petitioner's petition on August 27, 1998. (See Appendix 169-190). Following a remand for clarification from the Georgia Supreme Court, the state habeas court entered a second clarifying order denying relief on December 20, 2002. (See Appendix 164-168). The Georgia Supreme Court denied Petitioner's Application for a Certificate of Probable Cause to Appeal on April 30, 2003.

On August 15, 2005, the federal habeas court found Petitioner's claim of improper bailiff/juror communications to be procedurally defaulted. (See Appendix 121-128). On June 29, 2007, without further addressing Petitioner's bailiff/juror communication claim, the federal habeas court denied Petitioner federal habeas corpus relief. The Eleventh Circuit Court of Appeals granted sentencing phase habeas relief on January 4, 2010, which is reported at *Ward v. Hall*, 592 F.3d 1144 (2010), (See Appendix 1-92), and denied Respondent's petition for rehearing *en banc* on May 27, 2010. (Appendix 191-192).



STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) (2006). The Eleventh Circuit entered its judgment on January 4, 2010, and denied Respondent

Hall's timely Request for Rehearing or for Rehearing *En Banc* on May 27, 2010.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment, through the Fourteenth Amendment's Due Process Clause, concerning a defendant's right to a fair trial by impartial jurors.

This case also involves 28 U.S.C. § 2254, which provides:

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

On July 12, 1991, James Ray Ward was convicted of the murder of Nikia Gilbreath, the kidnapping with bodily injury of Nikia Gilbreath, and feticide. The Georgia Supreme Court affirmed Petitioner's convictions and sentences. *Ward v. State*, 262 Ga. 293, 417 S.E.2d 130 (1992).

The state habeas court denied Petitioner's petition for habeas corpus relief on August 27, 1998, and following remand from the Georgia Supreme Court entered a second order denying relief on December 20, 2002. Petitioner filed an Application for a Certificate of Probable Cause to Appeal with the Georgia Supreme Court, which was denied on April 30, 2003.

On June 29, 2007, the district court denied Petitioner federal habeas corpus relief. The Eleventh Circuit Court of Appeals granted sentencing phase habeas relief on January 4, 2010. *Ward v. Hall*, 592 F.3d 1144 (2010). On May 27, 2010, the Eleventh Circuit denied Respondent's Request for Rehearing or for Rehearing *En Banc*.

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STATEMENT OF THE FACTS

In reversing the state habeas court's finding of procedural default, the Eleventh Circuit wholly disregarded 28 U.S.C. § 2254(e)(1) in erroneously finding actual prejudice and granting sentencing phase relief to Petitioner. The Eleventh Circuit found, based on the thought processes of the jurors during deliberations, that Petitioner had established that "there is reasonable likelihood the improper bailiff-jury communication affected Ward's constitutional due process right to a fair penalty phase hearing and a reliable sentence." *Ward v. Hall*, 592 F.3d at 1181. This finding noted, but disregarded, the fact that the state habeas court had not allowed development of the

claim by either party. The finding also ignored the clear evidence before the jury establishing Petitioner's guilt, and the aggravating evidence, statutory and nonstatutory, including Petitioner's history of stalking and violently attacking women.¹ The record also showed that Petitioner had committed an almost identical crime, five months after the death of Nikia Gilbreath. Petitioner was later convicted in Gordon County of the rape of Donna Rich and pled guilty in Floyd County to the kidnapping and rape of Ms. Rich.

Ms. Rich also testified that Petitioner told her that he had killed two people and pointed out a "good place" to "dump bodies."

Further, in Petitioner's home, detectives found notes, handwritten by Petitioner, one of which contained precise directions to the Gilbreath home with a description of Nikia and the comment "fine looking." Also found at Petitioner's home were: a quilted bedspread from the Gilbreath home; a baby blanket from the Gilbreath home; and a bathing suit bottom, which had been owned by Nikia Gilbreath.

Petitioner told the investigating agents, "I don't know if I done anything to [Nikia Gilbreath] or not, I could have done it, and I could not have done it." Petitioner also stated, "I have been a liar all of my

¹ Anna Wallin testified that Petitioner had come to her house unexpectedly to allegedly check on her well, just as Petitioner had done at the Gilbreath's, and thereafter, she received harassing phone calls.

life, I need some help, if I done it, I didn't mean for it to happen and I am sorry." Further, while in jail awaiting trial, Petitioner wrote a letter to a friend and asked him to testify to a false alibi, offering to pay the friend \$500.00.

The Eleventh Circuit relied on an undeveloped record and testimony that was not allowed in the state courts and ignored the mandates of § 2254 in erroneously concluding that any communication to the jury that they had to rely on the trial court's prior instructions denied Petitioner a fair and reliable sentence.

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HOW THE FEDERAL ISSUES WERE RAISED AND RESOLVED BELOW

In the state habeas proceedings, Petitioner alleged for the first time that a bailiff improperly answered a juror's question concerning the possibility of parole during sentencing phase deliberations. The state habeas court found that Petitioner's claim was procedurally defaulted under Georgia law, (O.C.G.A. § 9-14-48(d)), as it could have been raised on direct appeal and Petitioner had failed to establish cause and prejudice or a miscarriage of justice to overcome that default. (Appendix 174-176). The Georgia Supreme Court denied Petitioner's application to appeal.

The federal habeas court held that the state habeas court had properly determined that Petitioner's

juror/bailiff misconduct claim was procedurally defaulted. (See Appendix 121-128).

On appeal, the Eleventh Circuit Court of Appeals held that the state habeas court should have considered the affidavits and then concluded Petitioner had established cause and prejudice to overcome his default. *Ward v. Hall*, 592 F.3d at 1173-1181.



REASONS FOR GRANTING THE WRIT

Although concluding that Petitioner had failed to establish by clear and convincing evidence the basis of his claim, the Eleventh Circuit nevertheless disregarded 28 U.S.C. § 2254(e)(1) and *United States v. Frady*, 456 U.S. 152 (1982), and improperly concluded that Petitioner had established cause and prejudice to overcome his default of his juror/bailiff misconduct claim. This alarming trend of the evisceration of the AEDPA and its policies should not be countenanced.

The Eleventh Circuit based its findings of prejudice and granting of sentencing phase relief on the testimony and thought processes of three of Petitioner's trial jurors, which, as even noted by the Eleventh Circuit, were not in evidence before the state habeas court and on a record that had not been developed in the Court below. By basing its decision on this testimony that was not admitted and not admissible, the Eleventh Circuit's holding is in direct conflict with the opinions of this Court and other Circuit Courts of Appeals. Accordingly, this Court

should grant certiorari review to conduct a proper cause and prejudice analysis based on the evidence in the record.

I. This Court Should Grant Certiorari Review To Correct The Eleventh Circuit's Misapplication Of 28 U.S.C. § 2254(e)(1) In Failing To Give The Mandated Deference To The State Habeas Court's Factual Findings.

Although the Eleventh Circuit even repeatedly noted that the record is unclear as to what occurred in the proceedings below, it is clear the circuit court improperly applied 28 U.S.C. § 2254(e)(1) in concluding that Petitioner had overcome the state habeas court's deferential finding that he had procedurally defaulted his improper bailiff/juror communication claim by clear and convincing evidence.

Following an evidentiary hearing, the state habeas court found that trial counsel could have raised the claim that the bailiff improperly informed the jury that they could not consider life without parole as a sentencing option just as state habeas counsel subsequently raised the claim.² In this regard, the

² O.C.G.A. § 17-10-16(a) states "a person who is convicted of an offense committed after May 1, 1993, for which the death penalty may be imposed under the laws of this State may be sentenced to death, imprisonment for life without parole, or life imprisonment as provided in Article II of this Chapter."

(Continued on following page)

record shows that following the trial, counsel spoke with several of the jurors. Following these conversations, counsel did not raise the issue of improper communications between the bailiffs and the jurors on appeal.

Instead, Petitioner waited until his state habeas proceedings to raise this claim and in support proffered three affidavits. The live testimony of one of those three affiants was also proffered. Notably, in reviewing these affidavits as the basis for their grant of relief, the Eleventh Circuit found that the state habeas court made it clear that it was not considering juror testimony on the issue as it found it was inadmissible under Georgia law. *Ward v. Hall*, 592 F.3d at 1174-1175.

The state habeas court further found that Petitioner had failed to establish that there was any question not answered by the trial court and had failed to establish actual prejudice resulting from any conduct of the bailiffs. (Appendix 166-167). This finding was supported by the evidence that showed that the only question possibly asked by the jurors was whether there was the possibility of life without parole. The evidence showed that the bailiff took the jurors' question to the judge for the judge's response. The bailiff then returned from the judge to give the jurors the judge's response that the jury had to

(Emphasis added). Petitioner committed the murders in this case in 1989.

proceed with the instructions previously given to them by the trial court, which was a correct statement of law and a correct procedure under Georgia law.

A. Presumption Is That The Trial Court Answered Any Question Posed By The Jury

Disregarding the fact that the record was undeveloped on the issue and that the state habeas court had refused to allow development on the issue, the Eleventh Circuit found that Petitioner had established by clear and convincing evidence as required by 28 U.S.C. § 2254(e)(1) that the jury gave a question to the bailiff concerning parole. Even assuming Petitioner established by clear and convincing evidence that the jury gave the bailiff a question concerning parole, the Eleventh Circuit did not take into account that Petitioner did not overcome by clear and convincing evidence the fundamental point of his claim: that the state habeas court found that the trial court, via the bailiff, informed the jury that they were to rely on the trial court's prior instructions, which was not an improper procedure under Georgia law. Significantly, the Eleventh Circuit even conceded that Petitioner had not established by clear and convincing evidence that the trial judge, not the bailiff, gave the information to the jury in response to any question about parole. The Eleventh Circuit specifically held that the record is "unclear whether the bailiff's answer was dictated by the trial court or was

merely a response from the bailiff.” *Ward v. Hall*, 592 F.3d 1144, 1177 (2010).

Under § 2254(e)(1), the Eleventh Circuit was required to presume to be correct any determinations of factual issues made by the state courts. A habeas corpus petitioner “shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).³ See *Bradshaw v. Richey*, 546 U.S. 74, 79-80 (2005). Accordingly, the Eleventh Circuit erred in not presuming, as found by the state habeas court, that the trial court, through the bailiff, answered any question posed by the jury concerning the possibility of parole.

In fact, although the Eleventh Circuit correctly noted that Juror Dunsmore, one of the three jurors on whose testimony the Eleventh Circuit relied, did not say he saw the bailiff take the particular question concerning parole to the trial court, (*Ward v. Hall*, 592 F.3d at 1177, fn. 16), the record shows that Juror Dunsmore could recall the jury asking *only this one question*. Juror Dunsmore specifically testified in the state habeas proceedings regarding how many questions were asked, “I would say at least one, but *I don’t remember any more than one*.” (Emphasis added). Mr. Dunsmore testified that “one occasion we saw [the

³ 28 U.S.C. § 2254(d)(2) does not apply to Petitioner’s claim as Petitioner’s claim was not “adjudicated on the merits” in the state habeas proceedings, but found to be procedurally barred from review.

bailiff] actually go to the Judge's room and give him the question and came back from it. They had told us that they had gotten the answer from the Judge." Thus, the reasonable conclusion being that any parole question that was asked by the jury was taken to the trial judge and answered by the court. Moreover, Juror Dunsmore testified that he could not say parole was not simply a question discussed among jurors and not asked of the bailiff.

B. The Trial Court's Response Was Proper

In further misapplying 28 U.S.C. § 2254(e)(1), the Eleventh Circuit refused to give the proper presumption to the state habeas court's findings concerning state law and the facts found by the state court that the information given to the jury regarding parole was proper.

In denying relief, the state habeas court found that Petitioner had failed to show that he was prejudiced by the communication between the bailiff and the jury. (Appendix 166-167, 174-176). In erroneously concluding that Petitioner had established actual prejudice to overcome his default of this claim, the Eleventh Circuit relied on two Georgia Supreme Court cases: *Quick v. State*, 256 Ga. 780, 353 S.E.2d 497 (1987) and *Turpin v. Todd*, 271 Ga. 386, 519 S.E.2d 678 (1999). However, the Eleventh Circuit disregarded well-substantiated Georgia law that it is not harmful error, or even a jury charge, if the bailiff

under instruction of the trial court merely informs the jury that they must proceed under the instructions previously given by the trial court. See *Turpin v. Todd*, 271 Ga. at 391, 519 S.E.2d at 683 (1999); *Potts v. State*, 261 Ga. 716, 725, 410 S.E.2d 89, 97 (1991); *Cohen v. State*, 257 Ga. 544, 546-547, 361 S.E.2d 373, 375 (1987); *Quick v. State*, 256 Ga. 780, 786-787, 353 S.E.2d 497, 502-503 (1987); *Childs v. State*, 257 Ga. 243, 256-257, 357 S.E.2d 48, 60-61 (1987); *Thacker v. State*, 226 Ga. 170, 180-181, 173 S.E.2d 186, 193-194 (1970); *Berryhill v. State*, 235 Ga. 549, 554, 221 S.E.2d 185, 189 (1975).

Instead, the Eleventh Circuit, again relying on the affidavits and testimony of the jurors that were not admitted, repeatedly found that the jury was informed that “life without parole was not an option.” *Ward v. Hall*, 592 F.3d at 1179, 1180. However, a review of the record shows that the record, again, is undeveloped on exactly what the jurors were told.

The record does support the state habeas court’s finding that Petitioner failed to establish actual prejudice; however, the Eleventh Circuit neglected to give the state court’s finding proper deference. Juror Craig testified by affidavit that the bailiff informed them that **they had to go on the instructions given by the trial court**. Another juror, Juror Dunsmore, initially stated in his affidavit drafted by state habeas counsel that the bailiff informed him that parole “was not an option”; however, at the state habeas hearing when testifying in his own words and upon examination by both parties, Juror Dunsmore

could not remember what was discussed or who was asked the question about parole, thereby undermining his prior affidavit testimony. Contrary to the Eleventh Circuit's holding, the only un rebutted testimony is that of Juror Craig who testified that the jury was informed that **they had to go on the instructions previously given by the trial court.**

Nevertheless, the Eleventh Circuit chose to rely on the internally contradictory testimony of Juror Craig that they were informed that parole was not an option, which is in contravention of § 2254(e)(1) as it does not give proper deference to the state habeas court's findings. This handpicking of specific facts to overcome the state habeas court's supported factual finding is clearly not a proper application of § 2254(e)(1).

Further, the Eleventh Circuit disregarded the fact that under Georgia law a trial court informing the jury, even through a bailiff, that the jury must rely on the instructions previously given by the trial court is not reversible error. In *Turpin v. Todd*, *supra*, which was relied on by the Eleventh Circuit as support for its finding of prejudice, the Georgia Supreme Court held, "a finding of harmless error is appropriate where the bailiff merely repeated what the trial court had instructed the bailiff to tell the jury. . . ." *Turpin v. Todd*, 271 Ga. at 391, 519 S.E.2d at 683. *See also Potts v. State*, 261 Ga. at 725, 410 S.E.2d at 97 (trial court did not commit reversible error by declining to answer the jury's questions about the possibility of parole); *Cohen v. State*, 257 Ga. at

546-547, 361 S.E.2d at 375 (trial court did not err by refusing to answer the jury's request for a definition of "life imprisonment in terms of years in prison," or by responding that the jury was "bound" by the charge that had been given and that such was "the law of this state.") *Citing Quick v. State*, 256 Ga. at 786-787, 353 S.E.2d at 502-503; *Childs v. State*, 257 Ga. at 256-257, 357 S.E.2d at 60-61; *Thacker v. State*, 226 Ga. at 180-181, 173 S.E.2d at 193-194 (no harm and not a charge when judge told the bailiff to tell the jury, "that he could tell them nothing about parole").

In *Berryhill v. State*, 235 Ga. at 554, 221 S.E.2d at 189, the Georgia Supreme Court held:

The communication in issue consisted of a question sent by the jurors to the trial judge and transmitted by the bailiff during the sentencing deliberations. They wondered "if they could sentence appellant to a life sentence without any possibility of parole?" The trial judge instructed the bailiff to inform the jurors that the court could not answer that question. Although all communications with the jury are to be discouraged except in open court with all persons present, the communication here did not amount to an instruction or charge to the jury and no reversible error is shown.

It is clear that the Eleventh Circuit failed to give the mandated presumption under § 2254(e)(1) to the state habeas court's factual findings that the trial court properly answered any question by the jury

concerning parole. Accordingly, this Court should grant certiorari review for a proper analysis, which would require reinstatement of Petitioner's sentence.

II. This Court Should Grant Certiorari Review As The Eleventh Circuit's Consideration Of The Thought Processes Of The Jurors To Find Prejudice Is In Direct Contravention Of This Court's Precedent And The Precedent Of Other Circuit Courts.

Pretermitted the fact that the state habeas court held that it was not admitting into evidence or considering the testimony of the jurors for its review, in finding prejudice and resulting harm, the Eleventh Circuit Court relied on those affidavits, the undeveloped testimony and the inadmissible thought processes of those jurors. *Ward v. Hall*, 592 F.3d 1173-1174, 1179.⁴ This analysis is in direct contravention of United States Supreme Court precedent, and the precedent of other circuit courts.

Federal Rules 606(b) states:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations **or to the effect of anything upon that or any other juror's mind or emotions as**

⁴ The Court also relied on pure speculative testimony to support its prejudice analysis. (*Ward v. Hall*, 592 F.3d 1173-1174).

influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror . . . A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

(Emphasis added).

Moreover, this Court has held, and the circuit courts agree, that a “‘juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although **not as to how far that influence operated upon his mind.**’” *Mattox v. United States*, 146 U.S. 140, 149, 13 S. Ct. 50, 53, 36 L. Ed. 917 (1892).” *Llewellyn v. Stynchcombe*, 609 F.2d 194, 196 (5th Cir. 1980) (emphasis added), citing *Remmer v. United States*, 347 U.S. 227 at 229 (1954); *United States v. Gipson*, 553 F.2d 453, 457 (5th Cir. 1977) (“Inquiries that seek to probe the mental processes of jurors, however, are impermissible.”). See also *United States v. Hornung*, 848 F.2d 1040, 1046 (10th Cir. 1988); *United States ex rel. Owen v. McMann*, 435 F.2d 813, 819-820 (2nd Cir. 1970); *Williams v. Price*, 343 F.3d 223, 232 (3rd Cir. 2003); *Robinson v. Polk*, 438 F.3d 350, 360 (4th Cir. 2006); *United States v. Gonzales*, 227 F.3d 520, 524 (6th Cir. 2000); *United States v. Williams*, 613 F.2d

573, 575-576 (5th Cir. 1980); *United States v. Siegelman*, 561 F.3d 1215, 1240 (11th Cir. 2009). Disregarding this precedent, the Eleventh Circuit based its finding of prejudice on the testimony of jurors about their thought processes during deliberations that was not admitted in the state court proceedings.

Further, the Eleventh Circuit improperly found harm based on its conclusion that the bailiff left the impression with the jury that Petitioner would be released on parole if the jury sentenced Petitioner to life. *Ward v. Hall*, 592 F.3d at 1179. Further, this improperly premised conclusion as to what the jurors' impression of the information given to them meant was extrapolated and speculated from the appellate court's non-deferential finding that the jury was told by the bailiff that "life without parole was not an option." *Ward v. Hall*, 592 F.3d at 1179, 1180. As set forth above, this conclusion is rebutted by the juror testimony that the jury was properly informed by the trial court, through the bailiff, that they had to go on the prior instructions of the trial court. This Court should grant certiorari, not attempt to discern what the jury's thought processes were, give the state court's factual findings proper presumption under § 2254(e)(1) and *Frady*, and reverse the Eleventh Circuit's grant of relief.

III. This Court Should Grant Certiorari Review As The Eleventh Circuit's Decision Rests On A Misapplication Of 28 U.S.C. § 2254(e)(1) In Finding Petitioner Had Established Prejudice Under *Frady*.

In conducting its prejudice analysis, the Eleventh Circuit recognized this Court's holding in *United States v. Frady*, 456 U.S. 152 (1982), as follows:

Ward must still demonstrate actual prejudice. *See Jefferson*, 570 F.3d at 1309. . . . In *Frady*, the Court found no actual prejudice because there was “no substantial likelihood” that the jury would have found the defendant guilty of manslaughter instead of first degree murder “if only the malice instructions had been better framed[.]” *Id.* at 172, 102 S. Ct. at 1596. **Moreover, “even if the law presumes prejudice for certain errors when they are timely raised, a convicted defendant who is seeking to overcome a procedural bar does not have the benefit of that presumption of prejudice, and must instead meet the actual prejudice test set forth in *Frady*.”**

Ward v. Hall, 592 F.3d at 1178. (Emphasis added).

The Court then addressed the testimony of the jurors that was not admitted and the jurors' thought processes from that testimony and held that prejudice had been established because the jurors had considered that life without parole “was not an option.” *Id.* As set forth above, giving the proper presumption

under § 2254(e)(1), Petitioner did not show that the communication did not come from the trial court or that the communication was improper.⁵ Giving the proper presumption under § 2254, the court should have determined that Petitioner did not establish the *Frady* prejudice to overcome his default of this claim.

The Eleventh Circuit reasoned that Petitioner had established actual prejudice under *Frady* as the “jury was not supposed to be considering parole in the first place.” *Ward v. Hall*, 592 F.3d 1180. However, this reliance on the internal processes of the jury during deliberations and their thought processes during deliberations is an improper analysis and an improper basis for the grant of relief. In addition to the Eleventh Circuit relying on improper juror impeachment evidence, the Eleventh Circuit’s reasoning would require reversal in every case in which a juror asked a question about a fact or law not in record in the jury room or to the trial court, even if the juror was properly informed or instructed it could not consider that fact or law.

In light of the juror’s testimony that the bailiff informed them that they had to base their decision on the charge as previously given by the trial court, Petitioner did not establish that but for this communication he would not have been sentenced to death.

⁵ Respondent also asserts that as there was no “extraneous information,” Petitioner did not establish a colorable claim to shift the presumption of prejudice to Respondent.

This Court should grant certiorari review and reverse the Eleventh Circuit's grant of relief.

IV. This Court Should Grant Certiorari Review To Correct The Eleventh Circuit's "Merits" Review Of Evidence That Was Not Admitted In The State Court Proceedings.

The Eleventh Circuit erroneously reviewed Petitioner's claim of improper jury/bailiff communication on "the merits" and found, based on testimony that was not admitted in the state court proceedings and the undeveloped evidence, that the trial bailiff had improperly informed the jury that parole was not an option in Petitioner's case although the state habeas court found the claim procedurally defaulted on adequate state law grounds.

The Eleventh Circuit also infers that Respondent did not attempt to rebut the presumption of prejudice in the state habeas proceeding, ironically, while noting that the state habeas court found the affidavit evidence and testimony inadmissible. *Ward v. Hall*, 592 F.3d 1179. There was no evidence before the state or federal habeas court for Respondent to rebut as the state habeas court made it clear that it was not considering juror testimony on the issue. (*See Id.* at 1174-1175, 1178).

This Court has recently remanded several cases in which it found the record was undeveloped. (*Wellons v. Hall*, 130 S. Ct. 727 (2010); *In re Davis*,

130 S. Ct. 1 (2009)). This case is likewise undeveloped. Should this Court find that the granting of certiorari review is premature, this Court should grant the petition for certiorari, vacate the Eleventh Circuit's grant of relief and remand for further development of the facts. "A full hearing is appropriate to 'determine the circumstances, the impact thereof upon the juror[s], and whether or not it was prejudicial. . . .'" *Remmer v. United States*, 347 U.S. 227, 230 (1954).

CONCLUSION

WHEREFORE, for all of the above and foregoing reasons, Respondent prays that this Court grant certiorari and reverse the erroneous grant of sentencing relief.

Respectfully submitted,

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