No. 17-8344

In the
Supreme Court of the United States

Keith Tharpe,
Petitioner,

v.

Eric Sellers,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did the Georgia Supreme Court correctly determine that the state-law ground of res judicata barred his juror-misconduct claim because *Pena-Rodriguez v. Colorado*, __ U.S. __, 137 S. Ct. 855 (2017), does not apply retroactively?

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The decision of the Georgia Supreme Court denying Tharpe's application for certificate of probable cause to appeal the denial of his first state habeas petition is not published, but is included in Respondent's Attachment A.

The decision of the state habeas court for Tharpe's second state habeas petition is not published, but is included in Petitioner's Attachment D.

The decision of the Georgia Supreme Court denying Tharpe's application for certificate of probable cause to appeal the denial of his second state habeas petition is not published, but is included in Petitioner's Attachment A.

The decision of the Georgia Supreme Court denying Tharpe's first motion for reconsideration of his application for certificate of probable cause to appeal the denial of his second state habeas petition is not published, but is included in Petitioner's Attachment B.

The decision of the Georgia Supreme Court denying Tharpe's second motion for reconsideration of his application for certificate of probable cause to appeal the denial of his second state habeas petition is not published, but is included in Petitioner's Attachment C.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime… nor be deprived of life, liberty, or property, without due process of law….

The Sixth Amendment of the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed….

The Eighth Amendment of the United States Constitution provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment, Section I, of the United States Constitution provides in relevant part:

> …No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

In his second state habeas petition, Tharpe asserted that he was entitled to relief on his barred juror-misconduct claim based on *Peña-Rodriguez v. Colorado*, __U.S.__, 137 S. Ct. 855 (2017). Relying on state law, the Georgia Supreme Court denied Tharpe relief because his claim was barred by res judicata and procedural default.

In his petition, Tharpe directly challenges only a basis for the res-judicata ruling: the state courts' conclusion that *Peña-Rodriguez* does not apply retroactively. This Court should deny review of that question. It is not the subject of any conflict of authority among lower courts. Answering it would not alter the denial of Tharpe's juror-misconduct claim because the Georgia Supreme Court denied that claim in the alternative based on procedural default. Notably, Tharpe does not challenge the alternative adequate and independent determination of procedural default in this petition. But even if the procedural default was not another bar to relief and the grant of certiorari review, the state courts correctly refused to retroactively apply *Peña-Rodriguez* to lift the first procedural bar. In *Peña-Rodriguez*, this Court explained that it was answering a question "left open" by its prior cases, thus acknowledging that the Court was announcing a new rule of constitutional law. Under *Teague v. Lane*'s well-settled retroactivity framework, new constitutional rules do not apply retroactively unless they meet two exceptions—it must either be a "substantive" or "watershed" rule of criminal procedure. The holding of *Peña-Rodriguez* is neither. As *Peña-Rodriguez* simply permits a court to consider certain evidence, it is not substantive as it does not "alter the range of conduct or the class of persons that the law punishes," and there is no serious argument that it is a "watershed" rule of criminal procedure.

This Court should deny the petition.

STATEMENT

A. Tharpe's Crimes

Petitioner Keith Tharpe's wife Migrisus left him. *Tharpe v. State*, 262 Ga. 110 (1992). A month later, armed with a shotgun, he drove to a location

he knew his estranged wife and sister-in-law, Jaquelin Freeman, would be passing on their way to work. *Id*. He blocked the road with his truck, forcing the two women to stop. *Id*. He then told his sister-in-law that he was going to "f---[her] up," took her behind his car, and shot her. *Id*. "He rolled her into a ditch, reloaded, and shot her again, killing her." *Id*. Tharpe then raped his wife and drove her to a bank, where he attempted to force her to withdraw money. *Id*. at 110-111. While at the bank, she was able to call the police and Tharpe was arrested. *Id*. at 111. While driving their children to school, Freeman's husband found her body in the ditch. (Trial Transcript (TT) Vol. VII , pp. 2024-29). The State charged Tharpe with murder and sought the death penalty. *Id*. at 110.

B. The Trial

A jury found Tharpe guilty of malice murder and two counts of kidnapping with bodily injury. The jury found three statutory aggravating circumstances: the murder of Jaqueline Freeman was committed while Tharpe was engaged in the capital felonies of kidnapping with bodily injury of Jaqueline Freeman and Migrisus Tharpe; and the murder of Jaqueline Freeman was outrageously or wantonly vile, horrible, or inhuman in that it involved an aggravated battery to Freeman. The jury sentenced Tharpe to death for murder.

Tharpe did not raise a juror-misconduct claim at the trial, in his motion for new trial, or on direct appeal.

The Georgia Supreme Court affirmed the convictions and sentences. *Tharpe v. State*, 262 Ga. 110 (1992), *cert. denied*, *Tharpe v. Georgia*, 506 U.S. 942, 113 S. Ct. 383 (1992).

C. First State Habeas Proceedings

In 1993, Tharpe filed his first state habeas petition and amended that petition twice. Tharpe's first amended petition, filed December 31, 1997, alleged under Claim X that his Fifth, Sixth, Eighth, and Fourteenth Amendment constitutional rights were violated by misconduct of the jury and included a general allegation of "improper racial animus which infected the deliberations of the jury." (ECF No. 13-8 at 16).[1] Two weeks later, the Warden asserted in his answer to this petition that the claim was procedurally defaulted. (ECF No. 13-9 at 6). A week later, on January 21, 1998, Tharpe amended his petition for the second time and incorporated Claim X, but no further details were added to the claim, and the amended petition did not acknowledge the procedural defense the Warden had previously raised. (ECF No. 13-10).

Five months later, on May 26, 1998, and only two days before the scheduled state habeas evidentiary hearing, Tharpe served the Warden with affidavits recently obtained from jurors, to include Mr. Barney Gattie—the juror in question in the instant case. (Petitioner's Appendix 8).[2] The Warden filed a motion to exclude the juror affidavits on the basis that they amounted to improper impeachment evidence under the version of Ga. Stat. Ann. § 9-14-48 (c) in force at the time. (ECF No. 13-17).

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[1] The ECF No. refers to the document number in the record filed in Tharpe's federal habeas proceeding in *Tharpe v. Warden*, Middle District of Georgia, Case No. 5:10-cv-433.

[2] Tharpe filed an appendix in the record below in state court which will hereafter be referred to as Pet. App. followed by the corresponding number.

1. May 28, 1998 Hearing

At the May 28, 1998, hearing, Tharpe tendered a juror affidavit from Barney Gattie. (Pet. App. 1). The portion of Mr. Gattie's affidavit that is at issue in this case states in relevant part:

> I . . . knew the girl who was killed, Mrs. Freeman. Her husband and his family have lived in Jones [C]ounty a long time. The Freemans are what I would call a nice Black family. In my experience I have observed that there are two types of black people. 1. Black folks and 2. Niggers. For example, some of them who hang around our little store act up and carry on. I tell them, "nigger, you better straighten up or get out of here fast." My wife tells me I am going to be shot by one of them one day if I don't quit saying that. I am an upfront, plainspoken man, though. Like I said, the Freemans were nice black folks. If they had been the type Tharpe is, then picking between life or death for Tharpe wouldn't have mattered so much. My feeling is, what would be the difference. As it was, because I knew the victim and her husband's family and knew them all to be good black folks, I felt Tharpe, who wasn't in the "good" black folks category in my book, should get the electric chair for what he did. Some of the jurors voted for death because they felt that Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason. The others wanted blacks to know they weren't going to get away with killing each other. After studying the Bible, I have wondered if black people even have souls. Integration started in Genesis. I think they were wrong. For example, look at O.J. Simpson. That white woman wouldn't have been killed if she hadn't have married that black man.[3]

(Pet. App. 1, ¶ 3). No live witnesses were presented during this hearing. While Tharpe did not acknowledge the default of this claim, his counsel argued in one sentence that Mr. Gattie's affidavit was also being tendered on

[3] To be clear, the Warden in no way condones the use of this racial slur, but is merely reporting the testimony of Mr. Gattie.

"the issue of trial counsel's ineffectiveness and motion for new trial for failing to have interviewed Mr. Gattie." (ECF No. 14-1 at 42).

Four days after the hearing, Tharpe filed a notice of deposition for eleven jurors giving them only two days' notice to appear. (Pet. App. 9). The Warden filed a motion for protective order to prohibit Tharpe from taking the depositions on grounds which included juror harassment, failure to give reasonable notice, and the former no-impeachment statute of Ga. Stat. Ann. § 9-14-48(c). (ECF No. 14-8). The state habeas court granted the Warden's motion and precluded Tharpe from taking the depositions of the jurors until "further order" of the court. (ECF No. 14-9).

2. October 1-2, 1998 Live Depositions

Subsequently, Tharpe requested permission from the state court to depose all of the trial jurors, explaining that he needed to probe the racial attitudes of the jurors, including by asking them questions from "two tests developed by psychologists" to "measure social distancing." (ECF No. 14-15 at 7). Tharpe neither acknowledged the default of his claim in his motion nor provided any argument in support of cause to overcome it.

The state habeas court granted Tharpe's motion, and on October 1-2, 1998, the state habeas court presided while the parties deposed eleven jurors: Barney Gattie, Lucille Long, Charles Morrison, James Stinson, Joe Thomas Woodard, Jason Simmons, Margaret Bonner, Mary Graham, Ernest Ammons, Martha Sandefur, and Polly Herndon. (ECF No. 15-6; ECF No. 15-7; ECF No. 15-8).

Mr. Gattie testified during the depositions that on the day he initially spoke to representatives from the Georgia Resource Center regarding

Tharpe's case, which was the basis for the affidavit that was prepared, he had been drinking. (Pet. App. 3, p. 360-61[4]). Mr. Gattie said when members of the Georgia Resource Center returned days later, he signed the affidavit that had been prepared by them, but he had been drinking that day as well because it was a holiday. *Id.* at 355-57. Mr. Gattie specified that he had consumed a twelve pack of beer and a few drinks of whiskey before he signed the affidavit. *Id.* at 356. Mr. Gattie testified that the affidavit acquired by the Georgia Resource Center had been "taken all out of proportion" and "was misconstrued." *Id.* at 56. Mr. Gattie was not specifically questioned during the deposition as to which portions of the affidavit initially obtained by Tharpe's counsel was taken out of "proportion" or "misconstrued."

Tharpe's counsel asked Mr. Gattie many questions regarding his views on race, specifically black persons. Many of the questions were ruled irrelevant by the state habeas court—*e.g.*, whether Mr. Gattie had read *Uncle Tom's Cabin* or whether his granddaughter would "not want a black doll" or whether she has any "black dolls." *Id.* at 64, 108-109. However, Mr. Gattie was allowed to answer some questions. For example: Mr. Gattie agreed that racial discrimination was a serious problem in our country; felt that the Georgia State flag, which at that time held a Confederacy symbol, should be changed if it "offended people"; testified that he would love a mixed-race grandchild the same as a white grandchild; and later explained that he had black foster grandchildren that were "welcomed" in his home. *Id.* at 79, 88, 93, 102-103. He also testified, in response to specific questions, that he

[4] The page number denoted references the number provided on the bottom of the page of the deposition.

considered white and black people to be equal in intelligence and did not think blacks caused violence "[any] more than whites." *Id*. at 100, 106.

Tharpe did not present any evidence during this hearing regarding cause to overcome the default of his claim.

There was no evidence in the juror affidavits or depositions that racial bias was discussed during deliberations. *See* affidavit of Margaret Bonner, (ECF No. 14-3 at 4-6); affidavit of James Stinson, (ECF No. 14-3 at 36-38); deposition of Lucille Long, (ECF No. 15-6 at 122-54; ECF No. 15-7 at 1-7); deposition of Charles Morrison, (ECF No. 15-7 at 8-34); deposition of James Stinson, (ECF No. 15-7 at 35-55); deposition of Joe Thomas Woodard, (ECF No. 15-7 at 56-90); deposition of Jason Simmons, (ECF No. 15-7 at 91-121); deposition of Margaret Bonner, (ECF No. 15-8 at 10-29); deposition of Mary Graham, (ECF No. 15-8 at 30-47); deposition of Ernest Ammons, (ECF No. 15-8 at 48-62); deposition of Martha Sandefur, (ECF No. 15-8 at 65-77); deposition of Polly Herndon, (ECF No. 15-8 at 108-27); and affidavit of Tracy Simmons, (ECF No. 15-16 at 7-8).

3. December 11 and 23, 1998 Hearing

At a December 11, 1998 evidentiary hearing on Tharpe's state habeas petition, the Warden called Charles Newberry and Shane Getter, Tharpe's trial and appellate counsel, as witnesses. During cross-examination by Tharpe's current habeas counsel, Mr. Newberry was questioned about Mr. Gattie. Mr. Newberry stated he was unaware Mr. Gattie had "espoused racist beliefs." (ECF No. 15-15 at 110). Mr. Newberry explained that he had come to know Mr. Gattie and his family since the trial and that the affidavit did not "reflect [Mr. Gattie's] true character at all" and to his "knowledge"

Mr. Gattie "doesn't feel that way really." *Id.* at 112-13. Mr. Newberry also testified to concern over how the affidavit was obtained. *Id.* at 110, 112. Specifically, Mr. Newberry stated that it "appear[ed]" to him that Tharpe's current representation had "spurred" Mr. Gattie on to obtain these statements and that "somebody got [Gattie] going on purpose." *Id.*

Regarding cause of the default of the juror-misconduct claim, other than generally asking Mr. Newberry and Mr. Geeter whether they had interviewed the jurors after trial, there was no other evidence presented on this topic. *Id.* at 104; ECF No. 16-1 at 111-12. There was also no argument presented regarding cause at either December hearing.

4. July 30, 2007 Hearing

Almost nine years later, the state habeas court held a final evidentiary hearing concerning Tharpe's alleged intellectual disability. Tharpe did not raise the juror-misconduct claim during the hearing or in post-hearing briefing; the Warden asserted again that the claim was procedurally defaulted. (ECF No. 18-17 at 124-25).

5. The State Habeas Court's Order on the First Petition

On December 4, 2008, the state habeas court entered an order denying habeas relief. (Pet. Att. E). The state habeas court initially found the juror affidavits and depositions were not admissible. *Id.* at 99-101. In the alternative, the state habeas court necessarily considered the juror affidavits and deposition testimony when it concluded that Tharpe's juror-misconduct claim was procedurally defaulted and he failed to establish cause and prejudice to overcome the default. *Id.* at102. Regarding cause, the state habeas court found: "Tharpe has failed to establish any state action as cause

preventing him from raising these claims" or that ineffective assistance of counsel had been shown as cause to overcome the default. *Id*. In concluding that Tharpe failed to establish prejudice, the state habeas court explained: "Tharpe has failed to show that any alleged racial bias of Mr. Gattie's was the basis for sentencing the Petitioner …. In fact, Mr. Gattie testified in his affidavit that he 'did not vote to impose the death penalty because [Tharpe] was a black man.'" *Id*. at 102-103.

Tharpe applied for a certificate of probable cause (CPC) with the Georgia Supreme Court. The application did not include a juror-misconduct claim. The Georgia Supreme Court summarily denied the application. Tharpe filed a petition for writ of certiorari with this Court, which did not include a juror-misconduct claim, and this Court denied the petition. *Tharpe v. Upton*, 562 U.S. 1069, 131 S. Ct. 655 (2010).

D. Federal Habeas Proceedings

In 2010, Tharpe filed a federal habeas corpus petition. Without specifying any particular juror, Tharpe generally alleged in Claim Three of his amended petition that "improper racial attitudes [] infected the deliberations of the jury." (ECF No. 25 at 19). After ordering separate briefing regarding procedurally defaulted and unexhausted claims (*See* ECF Nos. 24, 30), the district court determined that Tharpe's juror-misconduct claim (among others) was procedurally defaulted:

> Petitioner fails to specifically address any of the claims that the state habeas court found were procedurally defaulted. *He states, without further explanation, that his trial and appellate attorneys were ineffective and this should constitute cause to overcome the defaults. …Petitioner, unfortunately, fails to provide any details regarding this allegation.*

(ECF No.37 at 9-10) (emphasis added) (footnote omitted). The district court provided Tharpe another opportunity to demonstrate cause and prejudice to overcome the default of his claim in his final merits brief (ECF No. 37 at 10, n.1), but Tharpe failed to do so (ECF No. 53 at 1-158).

The district court denied habeas relief on March 3, 2014. Tharpe neither requested nor was granted a certificate of appealability (COA) on his juror-misconduct claim. The Eleventh Circuit Court of Appeals ultimately affirmed the district court's denial of relief. *Tharpe v. Warden*, 834 F.3d 1323 (11th Cir. 2016). This Court denied certiorari review. *Tharpe v. Sellers*, __U.S.__, 137 S. Ct. 2298 (2017).

E. Subsequent Appeal in the Federal Courts on Juror-Misconduct

On June 21, 2017, Tharpe asked the federal district court to reopen his 28 U.S.C. § 2254 proceeding under Federal Rule of Civil Procedure 60(b)(6).to reconsider his juror-misconduct claim based on this Court's recent decisions in *Peña-Rodriguez v. Colorado*, __U.S.__, 137 S. Ct. 855 (2017) and *Buck v. Davis*, __U.S.__, 137 S. Ct. 759 (2017). The district court denied Tharpe's motion, concluding that *Peña-Rodriguez* did not apply retroactively under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), and in the alternative, neither *Peña-Rodriguez* nor *Buck* provided an extraordinary circumstance under Rule 60(b)(6) to overcome the procedural default of his juror-misconduct claim.

On September 8, 2017, Tharpe applied for a COA in the Eleventh Circuit. Tharpe moved for a stay of execution in that court on September 13, 2017. On September 21, 2017, the Court of Appeals denied both Tharpe's COA application and the motion for stay of Tharpe's execution. *Tharpe v.*

Warden, Ga. Diagnostic & Classification Prison, No. 17-14027-P, 2017 U.S. App. LEXIS 18735 (11th Cir. Sep. 21, 2017).

On September 26, 2017, this Court granted Tharpe's motion for stay of execution. *Tharpe v. Sellers*, __ U.S. __, 138 S. Ct. 53 (2017). On January 8, 2018, this Court granted Tharpe's petition for writ of certiorari, vacated the judgment of the Court of Appeals, and remanded the case "for further consideration of the question whether Tharpe is entitled to a COA." *Tharpe v. Sellers*, __ U.S. __, 138 S. Ct. 545, 547 (2018). The court of appeals reconsidered its decision but ultimately denied the COA on the ground that Tharpe had not exhausted his claim in state court. *Keith Tharpe v. Warden*, Case No. 17-14027-P (April 3, 2018).

F. Second State Habeas Petition

Tharpe filed a second state habeas petition on September 6, 2017, and reasserted his juror-misconduct claim, along with two other claims. The state habeas court dismissed the petition on September 25, 2017 (Pet. Att. D), concluding that the juror-misconduct claim was: (1) barred by res judicata, and *Peña-Rodriguez* did not apply retroactively to lift the bar; and (2) in the alternative, procedurally defaulted. The state habeas court dismissed Tharpe's other two claims solely on res judicata grounds. *Id*. Tharpe raised this claim in his CPC application but the Georgia Supreme Court denied the application on September 26, 2017, explaining that the "application is hereby denied as lacking arguable merit because the claims presented in the petition are res judicata or otherwise procedurally defaulted."[5] (Pet. Att. A).

[5] As stated above, the state habeas court dismissed Tharpe's juror-misconduct claim on res judicata grounds and, alternatively, on procedural default grounds. While the Georgia Supreme Court's CPC denial states that

Tharpe filed a petition for writ of certiorari with this Court; however, following the grant of his motion for stay of execution, Tharpe requested that the petition be dismissed. On September 29, 2017, this Court granted the request. *Tharpe v. Sellers*, __ U.S. __, 138 S. Ct. 55 (2017). Tharpe later filed two motions for reconsideration in the Georgia Supreme Court regarding the denial of his application for certificate of probable cause to appeal. Both were summarily denied. (Pet. Att. B; Pet. Att. C). Tharpe then sought certiorari review in this Court.

REASONS FOR DENYING THE PETITION

I. Tharpe's first question presented does not warrant review.

A. This case is not a suitable vehicle for deciding whether *Peña-Rodriguez* applies retroactively.

This case is not a suitable vehicle for deciding whether *Peña-Rodriguez* applies retroactively to cases on state collateral review. While the Georgia Supreme Court denied Tharpe's CPC application on the ground that his juror-misconduct claim was barred under the doctrine of res judicata, which concerns the retroactivity of *Peña-Rodriguez*, it also denied the application on the alternative state-law bar of procedural default. The claim is procedurally defaulted because Tharpe did not raise it in his motion for new trial, and he does not even argue in his petition to this Court that he could demonstrate

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all claims were barred as res judicata "or" on other procedural grounds, it should be presumed that the court's decision rested on both procedural bars for the juror-misconduct claim as that was the determination of the lower court. *See generally, Wilson v. Sellers*, __ U.S. __, 138 S. Ct. 1188, 1193-97 (2018); *Foster v. Chatman*, __U.S.__, 136 S. Ct. 1737, *10 (2016). As there is nothing in the record rebutting the presumption that the Georgia Supreme Court's decision does not rest on the same procedural bars as the lower court, both bars stand.

cause and prejudice sufficient to overcome this state-law procedural bar. Because the Georgia Supreme Court relied in the alternative on this state-law bar to deny Tharpe's juror-misconduct claim, any decision on whether *Peña-Rodriguez* applies retroactively therefore would be advisory, which makes this petition an especially poor vehicle for deciding that question. *See Herb v. Pitcairn*, 324 U.S. 117, 125-26, 65 S. Ct. 459, 463 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

Additionally, this Court has held on numerous occasions that a state court judgment which rests on an independent and adequate state-law ground presents no federal question for adjudication by this Court in a petition for a writ of certiorari. *See, e.g., Foster v. Chatman*, __U.S.__, 136 S. Ct. 1737, *10 (2016) ("This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision.'") (quoting *Harris* v. *Reed*, 489 U.S. 255, 260, 109 S. Ct. 1038 (1989)). The state habeas court determined Tharpe's juror-misconduct claim was barred by not one, but two, adequate and independent state law grounds—the res judicata bar and the procedural default bar. The Georgia Supreme Court denied Tharpe's application holding the claim was barred on the same grounds. (Pet. Att. A). Tharpe's questions

presented do not overcome the adequate and independent state law grounds barring this Court's jurisdiction.

B. *Peña-Rodriguez* does not apply retroactively.

The first question presented also does not warrant further review because the state courts answered that question correctly: *Peña -Rodriguez* does not apply retroactively.

The state habeas court addressed this question as part of its determination that res judicata barred Tharpe's juror-bias claim, which relies on *Peña -Rodriguez*. Under Georgia law, the doctrine of res judicata "prevents the re-litigation of all claims which have already been adjudicated" between the same parties on "identical causes of action." *Odom v. Odom*, 291 Ga. 811, 812 (2012) (quoting *Waldroup v. Greene County Hosp. Auth.*, 265 Ga. 864, 865 (1995). This bar stands unless the petitioner can demonstrate the existence of new facts or new law. *Bruce v. State*, 274 Ga. 432, 434 (2001). Lifting the res judicata bar in a state collateral proceeding based on new law requires showing that the new law applies retroactively. *See Head v. Hill*, 277 Ga. 255, 257-58 (2003).

When this Court announces a new rule of constitutional law that applies in criminal proceedings, this Court and the Georgia state courts analyze whether the rule applies retroactively in a state collateral proceeding under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). *See State v. Sosa*, 291 Ga. 734, 736-37 (2012) ("To determine whether a constitutional rule of criminal procedure applies retroactively to judgments in criminal cases that are final before the new rule is announced, we apply the analysis set out in *Teague v. Lane*"). Applying *Teague* involves a three-step process: 1)

determine the date on which the petitioner's conviction and sentence became final; 2) determine whether the case in question announced a "new rule" and; 3) if so, determine whether it falls within one of two "narrow exceptions" to the general rule that new rules do not apply retroactively. *Caspari v. Bohlen*, 510 U.S. 383, 390, 114 S. Ct. 948, 953 (1994)

Under *Teague*, *Peña-Rodriguez* does not apply retroactively. There is no question that Tharpe's conviction and sentence became final before *Peña-Rodriguez* was decided. That case announced a new rule because it created a new constitutional exception to state-law no-impeachment rules, answering a question the Court acknowledged it had "left open" in earlier cases. And neither of *Teague*'s exceptions to nonretroactivity apply because the new rule announced in *Peña-Rodriguez* neither "placed primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" nor rises to the level of a "watershed rule[] of criminal procedure." *Teague v. Lane*, 489 U.S. at 307. As Justice Thomas concluded in his dissent in Tharpe's federal habeas case, "no reasonable jurist could argue that *Peña-Rodriguez* applies retroactively on collateral review." *Tharpe v. Sellers*, __U.S. __, 138 S. Ct. 545, 551 (2018).

1. *Peña-Rodriguez* announced a new rule of constitutional law.

"[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.'" *Teague*, 489 at 301; *see also Whorton v. Bockting*, 549 U.S. 406, 416, 127 S. Ct. 1173, 1181 (2007) 416. "And a holding is not so dictated … unless it would have been 'apparent to all reasonable jurists.'" *Chaidez*, 568 U.S. at

347 (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527-28, 117 S. Ct. 1517, 1525 (1997)).

Peña-Rodriguez concerned a Sixth Amendment challenge to Colorado's evidentiary rule that prohibited the admission of testimony concerning internal jury deliberations for the purpose of impeaching the jury's verdict. This Court determined that Colorado's rule, as applied to *Peña-Rodriguez*, was unconstitutional. The Court explained:

> [W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Peña-Rodriguez, 137 S. Ct. at 869.

As Justice Thomas correctly determined, "*Pena-Rodriguez* established a new rule." *Tharpe v. Sellers*, 138 S. Ct. at 551 (Thomas, J., dissenting). Indeed, far from being dictated by this Court's earlier precedent, "the opinion states that it is answering a question 'left open' by this Court's earlier precedents." *Id.* (quoting *Peña-Rodriguez*, 137 S. Ct. at 859). Justice Alito agreed in his dissent in *Peña-Rodriguez* itself, noting that the majority's decision was a "startling development" because "for the first time, the Court create[d] a constitutional exception to no-impeachment rules." *Peña-Rodriguez*, 137 S. Ct. at 875 (Alito, J., dissenting)); *see also id.* at 874 ("In the absence of a definitive common-law tradition permitting impeachment by juror testimony, we have no basis to invoke a constitutional provision that merely 'follow[s] out the established course of the common law in all trials for

crimes,' [] to overturn Colorado's decision to preserve the no-impeachment rule") (Thomas, J., dissenting) (citation omitted).

Tharpe's arguments fail to show otherwise. Tharpe cites a list of this Court's precedents that stand for the general proposition that a defendant may not be convicted and sentenced on the basis of race. But the question before the Court in *Peña-Rodriguez* was whether there was "an exception to the no-impeachment rule when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict." *Peña-Rodriguez*, 137 S. Ct. at 861. As this Court explained in *Beard v. Banks*, 542 U.S. 406, 410, 124 S. Ct. 2504, 2509-10 (2004), while a line of cases may *support* the Court's newest ruling, that does not mean they "compel[led]" the decision. Tharpe fails to cite to any precedent of this Court that existed prior to the finality of his conviction and sentence which "compelled" *Peña-Rodriguez*'s holding that "racial animus" evidence was an exception to the long-standing rule that a jury's verdict may not be impeached by evidence from the internal deliberations process.

Peña-Rodriguez did not create a new rule of constitutional law.[6]

[6] Notably, a determination that *Peña-Rodriguez* did *not* create a new rule of constitutional law would not permit Tharpe to obtain review of his juror-misconduct claim in state court, because he seeks to overcome res judicata on the basis that *Peña-Rodriguez* is new law. *See Bruce*, 274 Ga. at 434. If *Peña-Rodriguez* is not a new rule, it is not new law on which he could rely to overcome that independent and adequate state law ground barring his juror-misconduct claim.

2. Neither of *Teague's* exceptions apply.

Teague set out two exceptions that allow a new rule to be applied retroactively on collateral review: (1) new "substantive" rules of criminal procedure, *i.e.*, those which "place 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'"; and (2) new "watershed rules of criminal procedure," *i.e.*, those which are necessary to the fundamental fairness of the criminal proceeding. *Teague*, 489 U.S. at 311-13. *Peña-Rodriguez* did not announce a "substantive" rule as it neither places a group of persons nor a crime beyond proscription. And the new rule could never rise to the level of being a "watershed" rule.

a. *Peña-Rodriguez* does not announce a "substantive" rule.

Under *Teague*, a new rule is "substantive" only if it "'narrow[s] the scope of a criminal statute'" or "'place[s] particular conduct or persons ... beyond the State's power to punish.'" *Schriro v. Summerlin*, 542 U.S. 348, 351-52, 124 S. Ct. 2519, 2522 (2004). "Since *Pena-Rodriguez* permits a trial court 'to consider [certain] evidence,' 580 U. S., at ___, 137 S. Ct. 855[] and does not 'alte[r] the range of conduct or the class of persons that the law punishes,' *Schriro v. Summerlin*, 542 U. S. 348, 353, [] it cannot be a substantive rule." *See Tharpe*, 138 S. Ct. at 551 (Thomas, J., dissenting) (citations omitted).

Tharpe argues that the rule announced in *Peña-Rodriguez* is substantive because it concerns the "'stability and finality of verdicts'" and is therefore "a rule addressed to substance and not procedure." (Pet. , p. 19, n. 16) (quoting *Peña-Rodriguez* 137 S. Ct. at 835). Tharpe's interpretation of "substantive" under the first *Teague* exception is incorrect. Whether a rule is

"substantive" under *Teague* "turns on the function of the rule at issue, not the constitutional guarantee from which the rule derives." *Welch v. United States*, __U.S. __, 136 S. Ct. 1257, 1266 (2016). And the "function" of a substantive rule must be to "place certain criminal laws and punishments altogether beyond the State's power to impose." *Montgomery v. Louisiana*, __ U.S. __, 136 S. Ct. 718, 729 (2016. The *Peña-Rodriguez* rule does not do this. "Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating '*the manner of determining* the defendant's culpability.' Those rules 'merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.'" *Montgomery, supra*, at 730 (emphasis in original) (quoting *Schriro*, 542 U.S. at 353). *Peña-Rodriguez* announced a new rule allowing the admission of evidence of racial bias by a juror to determine whether a jury's verdict violated the Sixth Amendment. This new rule is procedural in function because it does not "affect … the conduct or persons to be punished." *Welch*, 136 S. Ct. at 1268; *see also, id.* ("A decision that strikes down a procedural statute—for example, a statute regulating the types of evidence that can be presented at trial—would itself be a procedural decision."); *Bockting*, 549 U.S. at 417 (noting that it was "clear and undisputed" that the *Crawford* rule determining the use of a hearsay exception that violated a defendant's rights under the Confrontation Clause was not substantive).

Determining what evidence is admissible in deciding a Sixth Amendment challenge to the impartiality of the jury in a criminal proceeding is procedural, not "substantive" as *Teague* has defined it. This exception therefore does not permit retroactive application of *Peña-Rodriguez*.

b. *Peña-Rodriguez* does not create a "watershed" rule.

For a procedural rule to be a watershed rule, it must be exceptional:

> Because of this more speculative connection to innocence, we give retroactive effect to only a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *That a new procedural rule is fundamental in some abstract sense is not enough*; the rule must be one without which the likelihood of an accurate conviction is seriously diminished. This class of rules is extremely narrow, and it is unlikely that any … ha[s] yet to emerge.

Schriro, 542 U.S. at 352 (citations and quotations omitted; emphasis added). *Peña-Rodriguez* does not meet this standard. As Justice Thomas already explained, "[n]ot even the right to have a jury decide a defendant's eligibility for death counts as a watershed rule of criminal procedure." *Tharpe*, 138 S. Ct. at 552. (Thomas, J., dissenting).

"[A] new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Bockting*, 549 U.S. at 421. Contrary to Tharpe's assertions, *Peña-Rodriguez* does not meet that standard. (*See* Pet. brief, p. 19, n. 18). This Court explained in *Bockting* that anything less than *Gideon v. Wainright*'s rule guaranteeing that "counsel must be appointed for any indigent defendant charged with a felony" probably would not qualify as a watershed rule. *Bockting, supra*, at 419. Indeed, as stated above, to date this Court has not determined that any new rule of criminal procedure has created a "watershed" rule—e.g. not in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), not in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), and not in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004). *See Schriro*, 542 U.S. at 352.

Given that *Peña-Rodriguez* is limited to the admissibility of possible evidence, this confirms it is not a "watershed" rule. While *Peña-Rodriguez* determined that certain juror impeachment evidence related to racial bias was admissible, the Court did not hold that a defendant was *entitled* to this evidence. The Court acknowledged that certain "professional ethics and local court rules" may "often limit counsel's post-trial contact with jurors." *Peña-Rodriguez*, 137 S. Ct. at 860. *See, e.g.*, S.D. Ga. R. Civ. Cas. R. 83.8 ("No party, attorney, or other person shall, without Court approval, make or attempt any communication relating to any feature of the trial of any case with any regular or alternate juror who has served in such case, whether or not the case was concluded by verdict."). Thus, if a petitioner may not even be entitled to an opportunity to attempt to acquire the evidence *Peña-Rodriguez* relied upon, it is hard to see how its rule is "essential to the fairness" or "accuracy" of a proceeding."

3. Tharpe's further arguments that *Peña-Rodriguez* is retroactive are unavailing.

Tharpe makes two further arguments in support of his assertion that *Peña-Rodriguez* is retroactive. First, Tharpe alleges this Court has already determined that its holding in *Peña-Rodriguez* was retroactive in a 1990 concurrence to a denial of certiorari review. *See Spencer v. Georgia*, 500 U.S. 960, 111 S. Ct. 2276 (1991). Second, he asserts that *Peña-Rodriguez* did not announce a rule of "criminal procedure" and therefore, does not fall under the *Teague* retroactivity doctrine. Both arguments are unavailing.

First, Tharpe points out an "observation" by Justice Kennedy in a 1990 concurrence to a denial of certiorari review of a racial discrimination claim rejected by the state court. *See Spencer v. Georgia*, 500 U.S. 960, 111 S. Ct.

2276 (1991); *Spencer v. State*, 260 Ga. 640, 643 (1990). In the underlying case of *Spencer v. State*, "Spencer relied upon a post-trial affidavit from one of the jurors stating she overheard two white jurors making racially derogatory comments about the defendant during the jury's deliberations." The Georgia Supreme Court held that Georgia's no-impeachment rule barred admission of the affidavit. *Spencer*, 260 Ga. at 643. In the alternative, the state court held the affidavit failed to show a denial of due process because it did not "establish that racial prejudice caused those two jurors to vote to convict Spencer and sentence him to die." *Id.* at 644.

Later, in a concurrence to the denial of certiorari review of this claim, Justice Kennedy stated, "This case appears to present important questions of federal law, and if I thought our decision in *Teague v. Lane* [] would prevent us from reaching those issues on federal habeas review, I would have voted to grant certiorari." *Spencer v. Georgia*, 500 U.S. at 960 (citation omitted). Tharpe alleges this statement expresses an opinion regarding the retroactivity of a hypothetical rule akin to the one this Court announced in *Peña-Rodriguez*, but it does not plainly do that. First, this brief statement of a single justice in a concurral plainly does not bind this Court on the question whether a rule announced 27 years later applies retroactively. Second, the facts in *Spencer* are different than those in the case at bar; in *Spencer*, unlike here, the alleged racial comments arose during deliberations. Third, there was no procedural bar to Spencer's claim because it was raised on direct review.

Tharpe's second argument in support of applying *Peña-Rodriguez* retroactively is mistaken. He contends that because *Peña-Rodriguez* concerned an evidentiary rule that was applicable in both civil and criminal

proceedings, it was not a rule of "*criminal* procedure" falling under *Teague*'s retroactivity doctrine. Thus, according to Tharpe, it is automatically retroactive. Tharpe cites to no precedent that supports this novel argument. In the many cases decided by this Court applying *Teague*, the emphasis has been on whether this Court announced a new rule of constitutional law that applies in a criminal proceeding, without regard for whether it could also have an effect on civil proceedings. *See, e.g.*, *Montgomery*, 136 S. Ct. at 729; *Chaidez v. United States*, 568 U.S. 342, 133 S. Ct. 1103 (2013); *Schriro v. Summerlin*, 542 U.S. 348, 351-52, 124 S. Ct. 2519, 2522 (2004). In *Peña-Rodriguez*, this Court determined whether an evidentiary rule ran afoul of the Sixth Amendment, which only applies in a criminal proceeding.

This Court's decision in *Bockting* illustrates the error of Tharpe's contention. In *Bockting*, this Court held that its decision in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004), was not retroactive on collateral review. The *Crawford* Court held that a hearsay exception under the Washington state evidentiary code was used in a manner that violated a defendant's rights under the Confrontation Clause of the Sixth Amendment. *Crawford*, 541 U.S. 36-69. The evidentiary code in question—Wash. Rule Evid. 804(b)(3) (2003)—was applicable in both a civil and criminal proceeding. *See Crawford*, 541 U.S. at 40. The *Bockting* Court, using the *Teague* framework, nonetheless determined that *Crawford* was not retroactive.

Likewise, *Peña-Rodriguez* concerned the constitutionality of a rule of evidence regarding the admissibility of testimony to be used to impeach a criminal conviction and sentence. And, as in *Crawford*, the underlying claim alleged a violation of a Sixth Amendment criminal "procedural guarantee."

See Crawford, 541 U.S. at 42. Thus, because the *Peña-Rodriguez* Court's new holding of constitutional law concerned a rule of evidence, utilized in application to a criminal proceeding, regarding a constitutional "procedural guarantee," the retroactive effect of the new rule must be judged under *Teague*. This is so regardless of whether the evidentiary rule was also applicable in a civil proceeding.

Because the state courts correctly determined that the new constitutional rule announced in *Peña-Rodriguez* is not retroactive on collateral review, this Court should not grant certiorari to answer that question.

II. Tharpe's second question presented does not warrant review.

A. Tharpe's second question does not present a cognizable federal question.

Tharpe's second question presented asks whether "the Georgia courts improperly ignore[d] this Court's rulings and shirk[ed] their independent duty to enforce the United States Constitution when they refused to reconsider" his racial-bias claim on the merits. (Pet. brief, p. ii). Tharpe's question and arguments in support fail to present a clear federal question for this Court to answer. Although he argues, without legal support or elaboration, that the state courts erred by "repeatedly" declining to adjudicate his claim on the merits despite the existence of state-law procedural bars, he does not argue with any specificity that federal law requires that conclusion with respect to the state court's res judicata or procedural default grounds for denying his claim. Thus, Tharpe has not presented a cognizable federal question and certiorari review should be denied.

However, to the extent Tharpe's question is cognizable it still fails to invoke this Court's jurisdiction. Even if a merits review of Tharpe's claim would entitle him to habeas relief, the adequate and independent state law bars still stand to divest this Court of jurisdiction. *See, e.g., Engle v. Isaac*, 456 U.S. 107, 129, 102 S. Ct. 1558, 1572-73 (1982) (noting that even when there is a viable constitutional claim it does not preclude the finding of procedural default). Therefore, even assuming Tharpe has presented a cognizable federal question, this Court would still be precluded from examining the merits of the claim because it lacks jurisdiction. Certiorari review should be denied.

B. Tharpe has not asked this Court to review the state court's conclusion that his claim was procedurally defaulted, which bars review of his juror-bias claim.

The state courts rejected Tharpe's juror-misconduct claim based not just on res judicata, but also on the adequate and independent state-law ground of procedural default. The presence of state-law procedural bar means both that resolving the question whether *Peña-Rodriguez* is retroactive would not affect the state court's ultimate denial of Tharpe's claim, *see* Section IA., and that this Court lacks jurisdiction to entertain the merits of that claim itself. *See Foster*, 136 S. Ct. 1737, 1745 (2016).

Tharpe's petition ignores the alternative procedural bar to the merits of his claim. His argument in support of his second, highly generalized attack on the state courts' failure to reach the merits of his claim focuses on the res judicata bar. Any potential questions about the Georgia Supreme Court's determination that his claim is procedurally defaulted, including whether he

has demonstrated cause and prejudice to excuse that default, are therefore not properly before this Court.

Under the procedural default doctrine set forth in *Black v. Hardin*, 255 Ga. 239 (1985) and *Valenzuela v. Newsome*, 253 Ga. 793 (1985), and codified at Ga. Stat. Ann. § 9-14-48(d), issues which were not raised at trial or on appeal may not be litigated in a habeas corpus proceeding absent a showing of cause and prejudice. Even if Tharpe had presented that procedural-default ruling to this Court for review, he would not be able to demonstrate error.

For instance, he asserted below in support of cause that the legal basis for his claim—*Peña-Rodriguez*—was not available at the time of his trial and served as cause to overcome the default.[7] However, this "new legal basis" argument for cause is narrow; it requires a petitioner to show that his claim was "'so novel that its legal basis is not reasonably available to counsel.'" *Bousley v. United States*, 523 U.S. 614, 622, 118 S. Ct. 1604, 1611 (1998) (quoting *Reed v. Ross*, 468 U.S. 1, 16, 104 S. Ct. 2901, 2910 (1984)); *see also id.* at 623 ("[F]utility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" (quoting *Engle*, 456 U.S. at 130, n.35). Tharpe cannot make that showing because petitioners have long challenged their verdicts based upon jurors' racial bias. *See, e.g., Spencer v. Georgia*, 500 U.S. 960, 111 S. Ct. 2276 (1991).

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[7] As detailed above in the procedural history, despite spending fifteen years in state habeas proceedings, Tharpe never provided evidence or argument to the court in support of cause; he only offered a "conclusory" statement of ineffective assistance of counsel, to overcome the default of his claim in the prior proceedings. *See Tharpe*, 138 S. Ct. at 552 (Thomas, J., dissenting) ("The only cause that Tharpe raised in state court was ineffective assistance of counsel. The state court rejected this claim because Tharpe presented only a conclusory allegation to support it.").

Nor could Tharpe assert as cause that counsel had no reason to believe his jurors might have harbored racial bias at the time of trial or on appeal amounted to cause that excused the failure to excuse his procedural default. "[W]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as a cause for a procedural default." *Murray v. Carrier*, 477 U.S. 478, 486, 106 S. Ct. 2639, 2644 (1986) (quoting *Engle*, 456 U.S. at 133-134). And that basis for cause seems particularly insufficient here, given that state habeas counsel also had no indication that any of the jurors were biased, yet were able to investigate and bring the claim anyway.[8] Without a showing of cause, the default still stands.

Consequently, certiorari review should be denied.

III. Both questions presented seek only error correction.

This Court "rarely" grants a petition for certiorari to correct a lower court's application of settled law. S. Ct. R. 10; *see also*. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction ... is outside the mainstream of the Court's functions and ... not among the 'compelling reasons' ... that govern the

[8] The Warden reiterates that the petition does not properly present any issue with respect to the Georgia Supreme Court's alternative ruling that procedural default barred Tharpe's juror-misconduct claim, including whether Tharpe could demonstrate cause and prejudice to overcome that bar. The Warden addresses these arguments only briefly and out of an abundance of caution. If this Court were to reach any issues related to the state court's procedural-default ruling despite Tharpe's failure to raise them, the Warden would respectfully request an opportunity to brief those issues fully.

grant of certiorari"). This petition is a plea for error correction, which is an additional reason to deny review.

The first question presented is whether this Court's recent decision in *Peña-Rodriguez* applies retroactively. In reaching its conclusion that res judicata barred Tharpe's juror-misconduct claim, the state habeas court concluded that *Peña-Rodriguez* does not apply retroactively, and the Georgia Supreme Court's order cited res judicata as a ground for denial. Tharpe has not identified any decision of a state court of last resort or federal court of appeals in conflict with the conclusion that *Peña-Rodriguez* applies retroactively. And indeed, the Warden is not aware of any other appellate decision, state or federal, that has passed upon the question. Absent a contrary decision from a state court of last resort or federal court of appeals, this question reduces to whether the state court correctly applied the well-settled retroactivity analysis set out in *Teague v. Lane*—which Georgia courts use to determine whether a constitutional rule of criminal procedure applies retroactively to judgments in criminal cases that are final before the new rule is announced, *see State v. Sosa*, 291 Ga. 734, 736-37 (2012). That plea for error correction does not warrant certiorari review.

The same goes for Tharpe's second question presented. In his argument in support of that question, he does not identify any state or federal decision that conflicts with the state courts' application of res judicata and state-law procedural default to his claim in this case, or any other basis for review outside of a vague and highly generalized request for error correction. Review of this question is not warranted for that reason as well.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2018, served the within and foregoing pleading, prior to filing the same, post-prepaid and properly addressed upon:

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