No. 17-8344

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

KEITH THARPE,

Petitioner,

-v-

ERIC SELLERS, WARDEN
Georgia Diagnostic Prison,

Respondent.

THIS IS A CAPITAL CASE

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

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Petitioner, Keith Tharpe, respectfully submits this reply brief in support of his petition for a writ of certiorari to review the judgment of the Georgia Supreme Court, entered in *Tharpe v. Sellers*, Case No. S18W0242, on September 26, 2017.

Respondent's brief in opposition to the grant of certiorari ("BIO") consists of three arguments: (1) Mr. Tharpe's claim is procedurally defaulted as a matter of state law and this Court accordingly lacks jurisdiction to hear the case; (2) a simple application of this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), readily determines that *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), may not be applied retroactively; and (3) this case raises an issue of mere "error-

correction" and accordingly does not deserve this Court's attention or time. As set forth below, each of these arguments is without merit.

I. The State Courts' Determinations That The Underlying Racist-Juror Claim Was Procedurally Defaulted And That *Res Judicata* Bars Further Consideration Of The Issue Are Not Independent And Adequate State-Law Grounds Precluding This Court's Review.

"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.'" *Foster v. Chatman*, 136 S. Ct. 1737, 1745 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)). But this jurisdictional bar only applies when the state court's procedural ruling "rests on an adequate and independent state law ground . . . ." *Id*. at 1746. "When application of a state law bar 'depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and [this Court's] jurisdiction is not precluded." *Id.* (quoting *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985)) (further citations omitted). Here (as in *Foster*[1]), the state procedural bars are intertwined with consideration of the merits of the federal constitutional claim and they accordingly do not constitute adequate and independent state law grounds precluding this Court's review.

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[1] In *Foster*, the petitioner had raised an unsuccessful challenge, at trial and on direct appeal, to the prosecutor's use of peremptory challenges to remove African-American jurors under *Batson v. Kentucky*, 476 U.S. 79 (1986). *See Foster*, 136 S. Ct., at 1743. He re-raised that claim in state habeas proceedings on the basis of newly discovered, previously unavailable evidence evincing the prosecutor's discriminatory intent. *Id.* at 1743-44. The state habeas court rejected the claim as *res judicata*, a decision left undisturbed by the Georgia Supreme Court's denial of a certificate of probable cause. This Court rejected Respondent's argument that the *res judicata* finding precluded this Court's review, concluding instead that the state habeas court's analysis of the underlying merits of the claim, in determining whether the *res judicata* bar applied, demonstrated that the *res judicata* finding was not an independent and adequate state law ground. *Id*. at 1746-47.

In the initial state habeas proceedings, the state habeas court determined that Mr. Tharpe's evidence of discrimination was inadmissible under Georgia's no-impeachment rule, Cert. Petition Attachment ("CPA") E, at 99-101, and that "even if Petitioner had admissible evidence to support his claims of juror misconduct, this Court finds the claims are procedurally defaulted" due to Mr. Tharpe's failure to raise them at the motion for new trial stage or on direct appeal, CPA E, at 102-03.[2] In the second state habeas proceedings, which argued that the intervening decision in *Pena-Rodriguez* warranted further consideration, the state habeas court concluded that *Pena-Rodriguez* was not retroactive and, regardless, the claim was *res judicata* because "it does not present new law or facts to overcome the res judicata bar as this Court already reviewed Petitioners' evidence and found it did not show that racial animus was relied upon to sentence Petitioner." CPA D, at 3-4. The court further ruled that, assuming *Pena-Rodriguez* did apply, Petitioner failed to establish prejudice because his proof of racial discrimination was insufficient and accordingly the claim was procedurally defaulted:

> While there was evidence that one of Petitioner's jurors, Mr. Gattie used a racially derogatory term associated with Petitioner's race, when read as a whole, the record

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[2] Curiously, Respondent contends that "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." BIO at p. 10. This argument has no actual record support. The state habeas court observed that "*even if* Petitioner had admissible evidence to support his claim of juror misconduct," the claim was procedurally defaulted, an observation that does not indicate that the court actually considered the evidence it had excluded. And the court did not mention the content of Petitioner's evidence of Mr. Gattie's racial bias at all. The only evidence it discussed was Mr. Gattie's *disclaimer* of racial intent, *see* CPA E, at 102-03, consideration of which was fully consistent with Georgia's no-impeachment rule providing that "affidavits of jurors may be taken to sustain but not to impeach their verdict.' O.C.G.A. § 17-9-41." CPA E, at 99 (quoting *Spencer v. State*, 260 Ga. 640 (1990)). Regardless, the state habeas court's lack-of-prejudice finding was based on a standard – proof that the juror's racism "was the basis for sentencing the Petitioner, as required by the ruling in . . . *McCleskey v. Kemp*, 481 U.S. 279 (1987)," CPA E, at 102 – that is inconsistent with this Court's decision in *Pena-Rodriguez*.

> does not show that racial animus was relied upon by the jury to convict or sentence Petitioner. . . . Consequently, Petitioner has failed to show prejudice as he has failed to show a reasonable probability of a different outcome at his motion for new trial or on appeal under the *Pena-Rodriguez* standard.

CPA D, at 3-4.[3] The Georgia Supreme Court's summary denial of a certificate of probable cause to appeal, as Respondent observes, should be presumed to have adopted the state habeas court's reasoning. *See* BIO at pp. 13-14 n. 5.

This Court's review is not barred by an independent and adequate state law ground for denying Petitioner relief below. As expressly found by the Eleventh Circuit Court of Appeals in the parallel federal proceedings, the record is clear that Petitioner has shown cause for failing to raise the juror-bias claim prior to initial state habeas proceedings: "Since Tharpe had not yet learned of Gattie's racial animus toward him and its possible effect on jury deliberations, and therefore on the jury's decision to impose the death penalty,' Tharpe's trial counsel could not have raised the pre-*Pena-Rodriguez* Claim at trial or on direct appeal."[4] *Tharpe v. Warden*, 11th Cir. No. 17-14027, Order dated Apr. 3, 2018.[5] Petitioner accordingly has shown cause for the

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[3] The state habeas court's conclusion that the record failed to show that "racial animus was relied upon by the jury to convict or sentence Petitioner," CPA D at 4, is inconsistent not only with the standard set forth in *Pena-Rodriguez*, but also with this Court's conclusion, in the parallel federal action, that "Gattie's remarkable affidavit—which he never retracted— presents a strong factual basis for the argument that Tharpe's race affected Gattie's vote for a death verdict." *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018).

[4] Respondent, indeed, cites to trial counsel's state habeas testimony indicating "he was unaware Mr. Gattie had 'espoused racist beliefs.'" BIO at p. 9.

[5] Respondent notes that the Eleventh Circuit "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. 17-014027-P (April 3, 2018)." BIO at p. 13. Respondent omitted advising this Court, however, that Petitioner filed a timely motion for reconsideration on April 20, 2018, pointing out *inter alia* that he had in fact exhausted this claim in state court, in both his initial state habeas action and his successive state habeas action, and that the reconsideration motion remains pending before the Eleventh Circuit.

procedural default. *See, e.g.*, *Turpin v. Todd*, 268 Ga. 820, 827 (1997). Moreover, the question of prejudice as grounds to excuse the procedural default is, in both the original and the successive petitions, dependent upon the merits of the federal question, namely whether Petitioner's death sentence was impermissibly tainted by racial bias. Accordingly, "it is apparent that the state habeas court's application of res judicata to [Petitioner's racist-juror] claim was not independent of the merits of his federal constitutional challenge." *Foster*, 136 S. Ct. at 1746-47. This Court accordingly has jurisdiction to review this case.

II. Whether *Pena-Rodriguez* Applies Retroactively Presents An Important Question Of Law This Court Should Decide.

Respondent takes the position that the retroactivity of *Pena-Rodriguez* is a simple application of the analysis set forth in *Teague*, for determining the retroactive application of "new rules of criminal procedure." But Respondent's strained arguments illustrate the difficulty of attempting to fit *Pena-Rodriguez*'s square peg into *Teague*'s round hole. As Respondent concedes, "[p]rocedural rules [governed by *Teague*] are designed to enhance the accuracy of a conviction or sentence by regulating '*the manner of determining* the defendant's culpability," while "substantive rule[s] "'place certain criminal laws and punishments altogether beyond the State's power to impose.'" BIO at p. 21 (quoting *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016) (emphasis in original)). Respondent infers that, because the rule in *Pena-Rodriguez* does not "place certain criminal laws and punishments altogether beyond the State's power to impose" and accordingly is not a rule of substantive criminal law (as defined in *Montgomery*), it must therefore be a rule of constitutional criminal procedure. Respondent relies on the dissenting opinion in Petitioner's companion federal case as support for this proposition. *See* BIO at p. 18 (quoting *Tharpe v. Sellers*, 138 S. Ct. at 551 (Thomas, J., dissenting)).

But the holding in *Pena-Rodriguez* – that the constitutional rights to equal protection and an impartial jury trump an evidence rule that bars post-verdict consideration of juror testimony showing that racial bigotry influenced the vote of one or more jury members – is *not* a rule that "regulat[es] 'the manner of determining the defendant's culpability." *Pena-Rodriguez* does not impact how trials are conducted at all. Accordingly, it is far from obvious that *Teague* has any application to this case at all. *Cf. Coe v. Thurman*, 922 F.2d 528, 534 (9th Cir. 1991) (new rule regarding exhaustion of state court remedies "is not the kind of rule to which *Teague* applies" as it "has nothing to do with the procedures that the Constitution requires the states to follow").

Moreover, even assuming *Teague* and *Pena-Rodriguez* may be twisted into congruity, this does not answer the question of *Pena-Rodriguez*'s retroactivity. As Petitioner has argued, *Teague* presents no bar because, among other reasons, *Pena-Rodriguez*'s holding was "dictated by precedent" and accordingly was not "new" at all.[6] *See* Petition for Writ of Certiorari § I(B). *Pena-Rodriguez* does not "impose[] a new obligation on the States or Federal Government." *Teague*, 489 U.S., at 301.[7] Long before Petitioner was tried in a Jones County, Georgia, courtroom in 1991, his right to trial by an impartial jury, free from the influences of racial bias, had been established as a bedrock, constitutional principle secured by the Sixth and Fourteenth Amendments. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S.145 (1968) (Sixth and Fourteenth Amendments guarantee right to trial by impartial jury in serious criminal cases conducted in state court); *Ham v. South Carolina*,

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[6] "[T]he 'mere existence of a dissent [does not] suffice[] to show that the rule is new." *United States v. Morgan*, 845 F.3d 664, 668 (5th Cir. 2017) (quoting *Beard v. Banks*, 542 U.S. 406, 416 n.5 (2004)).

[7] *See, e.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 315 (1989) (challenge to Texas special issues did not seek a new rule because "at the time Penry's conviction became final, it was clear from *Lockett* and *Eddings* that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to [mitigating] evidence").

409 U.S. 524 (1973) (constitutional rights to fair trial and equal protection required trial judge, upon request, to voir dire on subject of racial prejudice); *see also, e.g.*, *McCleskey*, 753 F.2d at 904 (noting that "the accused can challenge for cause any venireman found to harbor a racial bias against the accused or his victim"); *cf. Brooks v. Dretke*, 518 F.3d 430, 435 (5th Cir 2005) (*Teague* not implicated where court was applying "a settled principle of law" to circumstances the Supreme Court had not directly addressed).

Given this pedigree, it is hardly surprising that when, in *Pena-Rodriguez*, these rights were for the first time directly pitted against the common law tradition of precluding jurors from impeaching their verdicts, the core constitutional rights prevailed. A state may promulgate its own rules of evidence "so long as their rules are not prohibited by any provision of the United States Constitution . . . ." *Spencer v. Texas*, 385 U.S. 554, 567 (1967). Here, application of this Court's non-discrimination and fair-trial precedents dictated this Court's conclusion in *Pena-Rodriguez* that a state's no-impeachment rule may not bar consideration of evidence that the vote of one or more jurors was influenced by racial bias.[8] That rule properly applies to Petitioner's case and, respectfully, this Court should grant certiorari to so hold.

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[8] Respondent's argument that "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.'" BIO at p. 18 (quoting *Tharpe v. Sellers*, 138 S. Ct. at 551 (Thomas, J., dissenting)), is beside the point. Simply because *Pena-Rodriguez* answered a question left open by earlier decisions, it does not follow that the Court's decision on the issue was not a clear-cut and simple application of prior decisions.

III. Petitioner's Disturbing Claim That He Faces Execution Because He Is African-American – A Claim Never Addressed On The Merits Despite Compelling Proof -- Deserves This Court's Consideration.

Respondent dismisses the petition for writ of certiorari as "a plea for error correction, which is an additional reason to deny review." BIO at p. 30. Respondent's efforts to belittle the significance of this case should be rejected. This case presents the important question of *Pena-Rodriguez*'s retroactive application, an issue ripe for this Court's determination. *Cf. Tyler v. Cain*, 533 U.S. 656, 663, 668 (2001) (observing, in the context of a successive habeas petition under 28 U.S. § 2244(b)(2)(A), that "a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive" and refraining from addressing the question "because [the retroactivity] decision would not help Tyler in this case").

Moreover, this case raises a question of fundamental, indeed, "extraordinary" import – whether Petitioner was sentenced to death because he is black. This is no garden-variety error. As this Court observed just last term, the possibility that a capital defendant "may have been sentenced to death in part because of his race" presents "extraordinary circumstances" that justify this Court's intervention. *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). As this Court explained:

> "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979). Relying on race to impose a criminal sanction "poisons public confidence" in the judicial process. *Davis v. Ayala*, 576 U. S. ___, ___, 135 S. Ct. 2187, 192 L. Ed. 2d 323, 344 (2015). It thus injures not just the defendant, but "the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts." *Rose*, 443 U. S., at 556, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (internal quotation marks omitted).

Buck, 137 S. Ct. at 778.

No court has ever addressed the merits of Petitioner's disturbing claim, a claim supported by evidence this Court has found to "present a strong factual basis for the argument that Tharpe's

race affected Gattie's vote for a death verdict."[9] The troubling nature of this claim, moreover, is heightened when it is considered in light of the broader context of racial disparities endemic to the State of Georgia at the time of Petitioner's trial and the established discriminatory practices of Petitioner's prosecutor, Joseph Briley.

At the time of Petitioner's trial, the justice system in Georgia was almost exclusively run by white people. Every Georgia district attorney at the time was white, only six of Georgia's 134 Superior Court judges were black, and those six African-American jurists served in three of the state's primary population centers – Fulton County (*i.e.* Atlanta), Augusta and Savannah. Mark Curriden, *Racism Mars Justice in U.S. Panel Reports*, Atlanta J. & Const., Aug. 11, 1991, at D1, D3. This, even though 27 percent of the population at the time was black. Official Net Undercount and Undercount Rate for Counties (1990), available at https://www.census.gov/dmd/www/pdf/underga.pdf (last viewed May 29, 2018) (reflecting that the adjusted African-American population was 1,815,556 out of 6,620,641 individuals).

Petitioner's prosecutor, moreover, was found by this Court to have authored a memorandum "intentionally designed to underrepresent black people and women on grand and traverse juries without giving rise to a prima facie case of racial discrimination . . . ." *Amadeo v. Zant*, 486 U.S. 214, 218 (1988).[10] And, in *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991), the

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[9] *Tharpe*, 138 S. Ct. at 146.

[10] Although Joseph Briley was not mentioned by name in *Amadeo*, he "admitted in his deposition [in a separate capital habeas case] that he was the author of a now infamous memo designed to underrepresent blacks, women and all individuals 18-24 years old on Putman County's grand and traverse juries." *Horton v. Zant*, 941 F.2d 1449, 1455 (11th Cir. 1991); *see also Hightower v. Terry*, 459 F.3d 1067, 1075 n.5 (11th Cir. 2006) (Wilson, J., dissenting) (noting that Briley "essentially admitted" his authorship of the discriminatory memorandum at issue in *Amadeo*).

Eleventh Circuit found that the capital habeas petitioner had established a pattern of discriminatory peremptory challenges by Joseph Briley against qualified African-American jurors and other racially discriminatory acts sufficient to establish a violation of the petitioner's equal protection rights under the "crippling burden of proof"[11] set forth in *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled in part by Batson*, 476 U.S. at 92-93.

These considerations underscore the importance of granting certiorari in this case to review the Georgia Supreme Court's repeated refusal even to address Petitioner's claim that a racist juror sentenced him to death because of his skin color.[12]

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[11] *Batson*, 476 U.S. at 92.

[12] In the Petition for Writ of Certiorari, Petitioner asked that this Court hold the petition pending the Eleventh Circuit's adjudication of the parallel federal proceedings following remand from this Court. *See* Cert. Petition at p. 13 n. 10. As noted above, Petitioner's motion for reconsideration of the Eleventh Circuit's post-remand decision again denying a certificate of appealability has been pending before the panel since April 20, 2018.

CONCLUSION

Wherefore, for the reasons set forth above and in the Petition for Writ of Certiorari, Petitioner respectfully requests that the Court grant certiorari to review the Georgia Supreme Court's judgment.

This 29th day of May, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by electronic mail on counsel for Respondent as follows:

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This 29th day of May, 2018.

Attorney