No. 18-_____

IN THE SUPREME COURT OF THE UNITED STATES

KEITH THARPE,

Petitioner,

-v-

BENJAMIN FORD, Warden, Georgia Diagnostic Prison,
Respondent.

MOTION FOR TWO-WEEK EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

THIS IS A CAPITAL CASE

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COUNSEL FOR PETITIONER

No. 18-_____

IN THE SUPREME COURT OF THE UNITED STATES

KEITH THARPE,

Petitioner,

-v-

BENJAMIN FORD, Warden, Georgia Diagnostic Prison,
Respondent.

UNOPPOSED MOTION FOR TWO-WEEK EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TO THE HONORABLE CLARENCE THOMAS, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

COMES NOW the Petitioner, KEITH THARPE, by and through undersigned counsel, and pursuant to 28 U.S.C. §§ 1254 and 2101(c) and Supreme Court Rule 13.5, who respectfully requests an extension of time of two weeks within which to file his Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. He seeks review of a decision of the United States Court of Appeals for the Eleventh Circuit (Case No. 17-14027), which was entered on April 3, 2018, denying a Certificate of Appealability (COA) as to the District Court's

denial of Mr. Tharpe's Motion for Relief from Judgment Pursuant to Rule 60(b). *See* Attachment A. The Eleventh Circuit denied reconsideration on August 10, 2018. Attachment B. Mr. Tharpe's time to petition for a Writ of Certiorari in this Court expires November 8, 2018. This request is made more than ten (10) days before the petition would be due without an extension of time, and therefore Mr. Tharpe shows the following good cause in support of this request (*see* 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5 and 30.2):

1. After a jury trial in the Superior Court of Jones County, lasting from January 8-10, 1991, Mr. Tharpe was convicted of malice murder and sentenced to death. His convictions and death sentence were affirmed by the Supreme Court of Georgia on March 17, 1992. *See Tharpe v. State*, 262 Ga. 110 (1992). A timely filed Motion for Reconsideration was denied on May 14, 1992. This Court denied certiorari on October 19, 1992. *Tharpe v. Georgia*, 506 U.S. 942 (1992).

2. Mr. Tharpe filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia, on March 17, 1993. During state habeas proceedings, counsel raised a claim that his capital trial was rendered fundamentally unreliable on the basis of sworn testimony of a juror, Barnie Gattie, who admitted that his racially prejudiced beliefs infected his decision to vote in favor of the death sentence for Mr. Tharpe. The Superior Court denied relief in an order entered December 1, 2008. With respect to the juror-misconduct claim, the state habeas court ruled that juror Gattie's testimony and other proof was inadmissible under a Georgia law that precluded consideration of juror testimony to impeach a verdict. The court accordingly denied the claim for lack of proof. The court further found the claim procedurally defaulted, ruling that Petitioner had failed to establish prejudice from the default because he did not demonstrate "that any alleged racial bias of Mr. Gattie's was the basis for sentencing the Petitioner, as required by the ruling in *McCleskey [v.* Kemp, 481 U.S. 279 (1987)]."

3. Mr. Tharpe's Application to the Georgia Supreme Court for Certificate of Probable Cause to Appeal was denied on April 19, 2010. A Petition for Writ of Certiorari was denied by this Court on November 29, 2010. *Tharpe v. Upton*, 562 U.S. 1069 (2010).

4. On November 8, 2010, Mr. Tharpe filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Georgia, which denied his petition on March 6, 2014. With respect to the juror-misconduct claim, the District Court found the claim procedurally defaulted based on the state habeas court's analysis of the default in its Final Order. Doc. 37 at 8-9. On appeal, the Eleventh Circuit panel affirmed the District Court's denial of relief on August 25, 2016. *Tharpe v. Warden*, 834 F.3d 1323 (11th Cir. 2016). Mr. Tharpe petitioned for rehearing on September 15, 2016. Rehearing was denied on November 15, 2016.

5. Early in 2017, this Court decided *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), and *Buck v. Davis*, 137 S. Ct. 759 (2017). On the basis of these decisions, Mr. Tharpe filed in District Court on June 21, 2017, a Motion for Relief from Judgment under Federal Rule of Civil Procedure 60(b), setting out how this Court's intervening decisions authorized revisiting the claim that Petitioner's death sentence was invalid because one of Petitioner's jurors harbored egregious racially discriminatory views toward African-American people, and Mr. Tharpe in particular, and voted for the death sentence on the basis of his bigoted views.[1]

6. The District Court denied the motion and denied a COA in an order issued on September 5, 2017.

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[1] At the time he filed the 60(b) motion, a certiorari petition to review the Eleventh Circuit's federal habeas corpus decision was pending in this Court. *See Tharpe v. Sellers*, Sup. Ct. No. 16-8733. That petition was denied on June 26, 2017.

7. On September 6, 2017, the Superior Court of Jones County issued a warrant ordering Mr. Tharpe's execution to occur during the week of September 26-October 3, 2017.

8. Mr. Tharpe appealed to the Eleventh Circuit Court of Appeals on the same day and applied for a COA on September 8, 2017. Mr. Tharpe requested a stay of execution on September 13, 2017.

9. On September 21, 2017, the Eleventh Circuit panel denied a COA and stay of execution.

10. On September 23, 2017, Mr. Tharpe filed a Petition for Writ of Certiorari seeking review of the Eleventh Circuit panel's denial of COA and a Motion for Stay of Execution.

11. On September 26, 2017, this Court issued a stay of execution.

12. On January 8, 2018, this Court granted the certiorari petition, vacated the Eleventh Circuit panel's decision, and remanded to the panel for further consideration. *Tharpe v. Sellers*, 138 S. Ct. 545 (2018).

13. On April 3, 2018, the Eleventh Circuit panel issued another order denying COA. *See* Attachment A. Reconsideration was denied on August 10, 2018. *Tharpe v. Warden*, 898 F.3d 1342 (11th Cir. 2018) (slip opinion attached as Attachment B).

14. Mr. Tharpe now wishes to file a Petition for Writ of Certiorari requesting that this Court again review the Eleventh Circuit panel's denial of a COA as to his claim that a juror's racial bias infected his capital trial and sentencing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

15. Currently, a Petition for Writ of Certiorari to appeal the final judgment of the Eleventh Circuit panel is due November 8, 2018. However, an extension of time in which to file this Petition is sought because undersigned counsel has obligations in other capital cases which

have prevented counsel from devoting adequate time and resources toward completing Mr. Tharpe's Petition for a Writ of Certiorari.

16. Undersigned counsel are the executive director and Senior Litigator of the Georgia Appellate Practice & Educational Resource Center ('Georgia Resource Center") of Atlanta, Georgia: a small non-profit law office providing free post-conviction representation for Georgia's indigent death-sentenced prisoners. Undersigned counsel have been and continue to be involved in the following capital case matters that necessitate this request for an extension of time.

17. Since the panel's denial of reconsideration, undersigned counsel completed and filed a Petition for Rehearing in *Wilson v. Warden*, USCA No. 14-10681-P. On August 31, 2018; undersigned counsel completed and filed the Appellant's Brief in *Tollette v. Warden*, USCA No. 16-17149-P. On September 21, 2018, undersigned counsel completed and filed a reply in *Nance v. Warden*, USCA No. 17-15361-P. Undersigned are also currently endeavoring to complete a major brief due November 5, 2018, in federal district court proceedings in *King v. Warden*, Case No. 2:12-CV-119 (S.D.Ga.).

18. Further, undersigned counsel Kammer has been engaged in intensive preparation for a major evidentiary hearing in state habeas corpus proceedings in *Rice v. Sellers*, Superior Court of Butts County Case No. 2014-HC-10, scheduled for the week of October 22, 2018.

19. In addition, undersigned counsel Widder has recently had to spend considerable time in Maryland caring for an elderly parent who has become unable to live independently and getting her affairs in order.

The issues in this case have already garnered the attention of six members of this Court, at least five of whom likely voted to stay Petitioner's execution on the basis of his disturbing claim, and all of whom ultimately voted to remand this matter to the Eleventh Circuit for further

consideration. The Eleventh Circuit, in turn, has changed the grounds for its decision three times, in three different decisions denying a COA, a situation that underscores the importance of this Court's review of the claim. As this Court has recognized, the possibility that a capital defendant "may have been sentenced to death in part because of his race" is both "a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are," and an "extraordinary circumstance" warranting consideration through Rule 60(b) of the Federal Rules of Civil Procedure. *Buck*, 137 S. Ct. at 778. A Petition for Writ of Certiorari is likely the only remaining opportunity Mr. Tharpe has to seek to vindicate these rights in federal habeas proceedings. *See* 28 U.S.C. § 2244 (b). A two-week extension of time to accommodate counsel's conflicting obligations is a modest request intended to secure to Mr. Tharpe an adequate opportunity to seek such review.

20. Undersigned has consulted with opposing counsel, who does not oppose this request.

WHEREFORE, undersigned counsel respectfully requests an extension of time of two weeks within which to file the Petition for Writ of Certiorari, up to and including November 22, 2018.

This 9th day of October, 2018.

Respectfully submitted,

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COUNSEL FOR MR. THARPE

Attachment A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14027-P

KEITH THARPE,

Petitioner – Appellant,

versus

WARDEN,

Respondent – Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

ON REMAND FROM THE UNITED STATES SUPREME COURT

BEFORE: TJOFLAT, MARCUS, and WILSON, Circuit Judges.

BY THE COURT:

The petitioner, Keith Tharpe, is a Georgia prison inmate awaiting execution for a murder he committed in 1990. After the Supreme Court of Georgia affirmed his conviction and death sentence, Tharpe, represented by counsel provided by the Georgia Resource Center, petitioned the Superior Court of Butts County for a writ

of habeas corpus. One of his claims, the facts of which he discovered more than seven years after his trial, was that a member of the jury that tried him, Barney Gattie (a white man), harbored a racial animus against him because he is black, and that such animus substantially influenced the jury's verdict and imposition of his death sentence, all in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. We refer to this Claim as Tharpe's "pre-*Pena-Rodriguez* Claim" to distinguish it from his present Claim, discussed *infra*.[1]

Tharpe supported his pre-*Pena-Rodriguez* Claim with the testimony of eleven of the twelve members of the jury, including Gattie's testimony. On December 1, 2008, after the habeas record was closed, the Superior Court denied the writ. It denied the pre-*Pena-Rodriguez* Claim on two grounds: (1) Tharpe procedurally defaulted the Claim because he had failed to raise it at trial or in his

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[1] Tharpe cited *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756 (1987), as the sole Supreme Court holding upon which he based the pre-*Pena-Rodriguez* Claim in both his state and federal habeas petitions. *McCleskey* in this context stands for the principle that a petitioner "must prove that the decisionmakers in his case acted with discriminatory purpose" in order to prevail. *Id.* at 292, 107 S. Ct. at 1767 (emphasis removed). Tharpe also cited Justice Kennedy's concurrence in the denial of certiorari in *Spencer v. Georgia*, 500 U.S. 960, 111 S. Ct. 2276 (1991), but this, of course, is not a holding of the Court. Tharpe provided the following additional citations in his petition to the Superior Court, but they have no bearing here as they relate to other claims:

> *Moore v. State*, 172 Ga. App. 844, 324 S.E.2d 760 (1984) (jury consideration of extraneous legal research); *Jones v. Kemp*, 706 F. Supp. 1534 (N.D. Ga. 1989) (jury consideration of extraneous religious information); *Turner v. Louisiana*, 379 U.S. 466[, 85 S. Ct. 546] (1965) (improper communications with bailiffs); *Rushen v. Spain*, 464 U.S. 114[, 104 S. Ct. 453] (1983) (improper communications with trial judge); *United States v. Scott*, 854 F.2d 697, 700 (5th Cir. 1988) (failure to respond truthfully on voir dire); *Radford v. State*, 263 Ga. 47, 426 S.E.2d 868 (1993) (improper communications with bailiffs).

direct appeal to the Supreme Court of Georgia,[2] and (2) Georgia's no-impeachment rule barred parties from impeaching a jury verdict with the post-trial testimony of jurors. *See Spencer v. State*, 398 S.E.2d 179, 184 (Ga. 1990), *cert. denied sub nom. Spencer v. Georgia*, 500 U.S. 960, 111 S. Ct. 2276 (1991) (explaining that the no-impeachment rule controls when a juror affidavit shows that racial prejudice played a role in jury deliberations).

The Supreme Court of Georgia thereafter summarily denied Tharpe's application for a certificate of probable cause to appeal the Superior Court's decision. *Tharpe v. Hall*, No. S09E0780 (Ga. Apr. 19, 2010). This denial constituted a ruling on the merits of Tharpe's habeas claims. *See Wilson v. Warden, Ga. Diagnostic Prison*, 834 F.3d 1227, 1232 (11th Cir. 2016) (*en banc*).

On November 8, 2010, Tharpe, again represented by counsel provided by the Georgia Resource Center, petitioned the United States District Court for the Middle District of Georgia for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. His petition asserted several claims, including the pre-*Pena-Rodriguez* Claim as presented to the Superior Court. On March 6, 2014, the District Court

[2] 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.

denied the writ.[3] It denied the pre-*Pena-Rodriguez* Claim on the ground that Tharpe failed to show cause for the procedural default the Superior Court had found and the resulting prejudice. That is, he had not shown that the default was caused by his attorney's constitutional ineffectiveness or that the attorney's performance caused him to suffer any actual prejudice.

Tharpe filed a notice of appeal, challenging the District Court's denial of the writ. The District Court issued a certificate of appealability ("COA") that did not include the pre-*Pena-Rodriguez* Claim. We expanded the COA, again without the pre-*Pena-Rodriguez* Claim, and ultimately affirmed. *Tharpe v. Warden*, 834 F.3d 1323 (11th Cir. 2016). Tharpe petitioned the Supreme Court of the United States for a writ of certiorari and was denied. *Tharpe v. Sellers*, ___ U.S. ___, 137 S. Ct. 2298 (2017).

On June 21, 2017, Tharpe moved the District Court pursuant to Federal Rule of Civil Procedure 60(b)(6) to reopen his § 2254 case based on the Supreme Court's intervening decision in *Pena-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855 (2017), which allows him now to prosecute his claim that a juror's racial bias impermissibly influenced the imposition of his death sentence (the "*Pena-*

[3] On August 18, 2011, the District Court issued an order that concluded the pre-*Pena-Rodriguez* Claim was procedurally defaulted and that "at this stage in the litigation, Petitioner has not established any applicable exception to excuse the defaults." *Tharpe v. Humphrey*, No. 5:10-CV-433, at *12 (M.D. Ga. Aug. 18, 2011) (order on procedural default and exhaustion).

Rodriguez Claim").[4] As the factual predicate for his Claim, Tharpe relied on the affidavits and testimony of Barney Gattie before the Superior Court in his habeas corpus proceeding.

Tharpe inexplicably pled the *Pena-Rodriguez* holding both as creating a *new* claim,[5] one that had not been exhausted in state court, *and* as an *old* claim, the pre-*Pena-Rodriguez* Claim that he had presented in his state habeas petition but that was erroneously rejected as defaulted given the *Pena-Rodriguez* holding. In other words, he argued that the Supreme Court of Georgia erred in affirming the Superior Court's denial of his pre-*Pena-Rodriguez* Claim on the alternative ground—that Georgia's no-impeachment rule precluded Tharpe from establishing the Claim—because the Supreme Court of Georgia should have anticipated the *Pena-Rodriguez* holding and acted accordingly.

[4] Tharpe also cited *Buck v. Davis*, 580 U.S. ___, 137 S. Ct. 759 (2017), as a basis for his claim. But *Buck* is inapposite. There, Buck, a Texas death row inmate, had moved to reopen his case under Rule 60(b)(6). In his motion, Buck sought relief for ineffective assistance of counsel after his own trial attorney presented evidence that his future dangerousness level—a key determination for capital sentencing under Texas law—was higher because he is black. 580 U.S. at ___, 137 S. Ct. at 768–69. The district court denied the motion, and the Fifth Circuit declined to issue a COA. The Supreme Court reversed because the Fifth Circuit's COA inquiry did not comport with the standard laid out in *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029 (2003). *Buck*, 580 U.S. at ___, 137 S. Ct. at 774. *Buck* does not affect Tharpe's *Pena-Rodriguez* Claim.

[5] *Pena-Rodriguez* was a holding that intervened between (1) the Supreme Court of Georgia's denial of Tharpe's application for a certificate of probable cause to appeal the Superior Court's denial of habeas corpus relief and our affirmance of the District Court's denial of his 28 U.S.C. § 2254 petition, and (2) the filing of his Rule 60(b)(6) motion to reopen his § 2254 case.

The State, responding, read Tharpe's motion only as reasserting the old pre-*Pena-Rodriguez* Claim. The State argued that this Claim had been defaulted and Tharpe's motion failed to show cause and resulting prejudice as an excuse for the default.

The District Court denied the Rule 60(b)(6) motion on three alternative grounds. First, reading Tharpe's motion as asserting a new claim based on the *Pena-Rodriguez* holding, the Court, applying *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), concluded that *Pena-Rodriguez* is not retroactive and therefore does not apply in the post-conviction context. Second, assuming that *Pena-Rodriguez* is retroactive, the Court presumed the correctness[6] of the Superior Court of Butts County's finding that Tharpe had procedurally defaulted the Claim and had failed to "establish cause and prejudice to overcome the default."[7] Third, assuming again that *Pena-Rodriguez* is retroactive, the Court found that the juror testimony presented to the Superior Court failed to establish that the jury's imposition of the death penalty was substantially influenced by racial animus. The District Court stated the following:

> The "circumstances" presented in Tharpe's case are dissimilar from those in *Pena-Rodriguez*. In *Pena-Rodriguez*, two jurors came forward immediately following the trial to report another juror's

[6] *See* 28 U.S.C. § 2254(e)(1).

[7] In order for the *Pena-Rodriguez* Claim to have been defaulted, the Superior Court would have to anticipate the *Pena-Rodriguez* holding as a logical extension of existing precedent of the Supreme Court of the United States.

> overtly racist remarks made during deliberations. The [Supreme] Court stated that "not only did the juror deploy a dangerous racial stereotype to conclude petitioner was guilty[,] he also encouraged other jurors to join him in convicting on that basis." No juror came forward following Tharpe's trial to complain about the deliberations. There is absolutely no indication that Gattie, or anyone else, brought up race during the jury deliberations. It was more than seven years later, and possibly when he was intoxicated, that Gattie made his racist statement. Appearing before the state habeas court for his deposition, Gattie testified that the statement had been misconstrued and he provided a second statement in which he stated his vote to impose the death penalty had nothing to do with race. After attending the depositions of eleven jurors, including Gattie, the state habeas court apparently credited this statement when it found Gattie had not relied on racial stereotypes or animus to sentence Tharpe. Given this analysis, the Court finds that Tharpe has not shown a reasonable probability of a different outcome under *Pena-Rodriguez*.

Tharpe v. Warden, No. 5:10-CV-433, at *20–21 (M.D. Ga. Sept. 5, 2017) (order denying Rule 60(b)(6) motion) (citations omitted) (alterations accepted).

Tharpe filed a notice of appeal to challenge the District Court's denial of his Rule 60(b)(6) motion. The District Court declined to issue a COA. We did likewise, and we concluded that the District Court's decision was not an abuse of discretion for two reasons.

First, assuming that *Pena-Rodriguez* is retroactive and applies in this post-conviction proceeding, we concluded that Tharpe failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). We based our conclusion on the Superior Court's and the District Court's finding that Tharpe failed to demonstrate Barney Gattie's behavior "had substantial and injurious

effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 1722 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253 (1946)). We concluded, in addition, that Tharpe failed to "show[] that 'jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Tharpe v. Warden*, No. 17-14027-P, 2017 WL 4250413, at *3 (11th Cir. Sept. 21, 2017) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000)).

Our second reason for denying a COA was that Tharpe's *Pena-Rodriguez* Claim had not been exhausted in the Georgia courts. Assuming the retroactivity of the *Pena-Rodriguez* holding, because Tharpe could not have brought this Claim to the Superior Court of Butts County in his state habeas proceeding, he was free to initiate it there in the first instance.

Tharpe petitioned the Supreme Court of the United States for a writ of certiorari to review our denial of a COA. The Court granted the petition. The Court read our reason for denying the COA as

> based solely on [our] conclusion, rooted in the state court's factfinding, that Tharpe had failed to show prejudice in connection with his procedurally defaulted claim, *i.e.*, that Tharpe had "failed to demonstrate that Barney Gattie's behavior 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Ibid.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L.Ed.2d 353 (1993)).

Tharpe v. Sellers, 583 U.S. ___, 138 S. Ct. 545, 546 (2018). The Supreme Court's review of the state court habeas record, however, differed markedly from our reading.

> The state court's prejudice determination rested on its finding that Gattie's vote to impose the death penalty was not based on Tharpe's race. And that factual determination is binding on federal courts, including this Court, in the absence of clear and convincing evidence to the contrary. Here, however, Tharpe produced a sworn affidavit, signed by Gattie, indicating Gattie's view that "there are two types of black people: 1. Black folks and 2. Niggers"; that Tharpe, "who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did"; that "[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason"; and that, "[a]fter studying the Bible, I have wondered if black people even have souls." 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. At the very least, jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court's factual determination was wrong. The Eleventh Circuit erred when it concluded otherwise.

Id. (citations omitted). The Court went on to say that our "review should not have rested on the ground that it was indisputable among reasonable jurists that Gattie's service on the jury did not prejudice Tharpe." *Id.* The Court therefore vacated our decision and remanded the case "for further consideration of the question whether Tharpe is entitled to a COA." *Id.* at 546–47.

We have given the matter further consideration and deny Tharpe's application for a COA on the alternative ground we gave for denying it originally: that Tharpe's *Pena-Rodriguez* Claim has not been exhausted in state court. When

the Supreme Court of Georgia affirmed the Superior Court's alternative ground for denying Tharpe's pre-*Pena-Rodriguez* Claim, *i.e.*, its application of the no-impeachment rule pursuant to *Spencer*, the affirmance did not "result[] in a decision that was contrary to, or involved an unreasonable application of," a holding of the Supreme Court of the United States. *See* 28 U.S.C. § 2254(d)(1). To the contrary, the relevant Supreme Court holding at the time, *Tanner v. United States*, 483 U.S. 107, 107 S. Ct. 2739 (1987), found no constitutional violation in the common law no-impeachment rule. *See id.* at 117, 107 S. Ct. at 2745 (upholding "the near-universal and firmly established common-law rule in the United States [that] flatly prohibited the admission of juror testimony to impeach a jury verdict"). Thus, had the District Court, in its March 6, 2014 decision denying the writ, reviewed Tharpe's pre-*Pena-Rodriguez* Claim on the merits, it would have found no constitutional violation in the Supreme Court of Georgia's decision.

The Georgia courts have yet to examine Tharpe's *Pena-Rodriguez* Claim. Our denial of the COA will enable Tharpe to pursue the Claim in a successive petition in the Superior Court of Butts County. Policy considerations implemented by the exhaustion doctrine, grounded in "principles of comity and federalism," counsel this disposition. *Thompson v. Wainwright*, 714 F.2d 1495, 1499 (11th Cir. 1983). Tharpe's application for a COA is therefore denied without prejudice.

APPLICATION DENIED.

Attachment B

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14027-P

KEITH THARPE,

Petitioner – Appellant,

versus

WARDEN,

Respondent – Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

Before: TJOFLAT, MARCUS, and WILSON, Circuit Judges.

BY THE COURT:

This facts and procedural history of this case have been exhaustively described in numerous opinions and orders. *See, e.g.*, *Tharpe v. Sellers*, 583 U.S. ___, 138 S. Ct. 545 (2018); *Tharpe v. Warden*, 834 F.3d 1323 (11th Cir. 2016); *Tharpe v. State*, 416 S.E.2d 78 (Ga. 1992). We write only to decide whether our

April 3, 2018 Order denying a certificate of appealability ("COA") should be reconsidered. We conclude that it should not.

We have been made aware that Keith Tharpe exhausted his juror racial bias claim in Georgia state courts. *See Tharpe v. Sellers*, No. S18W0242 (Ga. Nov. 2, 2017); *Tharpe v. Sellers*, No. S18W0242 (Ga. Sept. 26, 2017). But he is not entitled to a COA for two distinct reasons. First, his claim arises from the rule announced in *Pena-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855 (2017), and that rule does not apply retroactively. Second, he has failed to show cause to overcome his procedural default. For these two independent reasons—either of which, standing alone, would suffice to deny a COA—our decision denying his motion for COA is not due for reconsideration.

I.

Federal habeas corpus review "serves to ensure that state convictions comport with the federal law that was established at the time petitioner's conviction became final." *Sawyer v. Smith*, 497 U.S. 227, 239, 110 S. Ct. 2822, 2830 (1990). "[N]ew constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague v. Lane*, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075 (1989). "To apply *Teague*, a federal court engages in a three-step process." *Lambrix v. Singletary*, 520 U.S. 518, 527, 117 S. Ct. 1517, 1524 (1997).

Teague's three steps, as instructed by the Supreme Court, are as follows. First, the court must determine the date on which the defendant's conviction became final. *Id.* Second, the court "must survey the legal landscape as it then existed and determine whether a state court considering the defendant's claim at the time his conviction became final would have felt compelled by *existing precedent* to conclude that the rule he seeks was required by the Constitution." *Id.* (quotations and citations omitted) (emphasis added). If the legal rule forming the basis of the claim "was not *dictated by precedent* existing at the time the defendant's conviction became final," *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S. Ct. 1173, 1181 (2007) (quotation omitted) (emphasis added), or if it would not have been "apparent to all reasonable jurists" at that time, *Chaidez v. United States*, 568 U.S. 342, 347, 133 S. Ct. 1103, 1107 (2013) (quotation omitted), then *Teague* precludes application of that rule on collateral review, absent an exception.

The third step of *Teague*'s analysis, though, is to determine if such an exception applies. Only two possible exceptions exist: (1) for new substantive rules that place "certain kinds of primary, private individual conduct beyond the power" of criminal law, or (2) for new "watershed rules of criminal procedure." *Teague*, 489 U.S. at 311, 109 S. Ct. at 1075–76 (quotation omitted).

Working our way through *Teague*, Tharpe's conviction became final on October 19, 1992, the date on which the Supreme Court denied certiorari. *See*

Bond v. Moore, 309 F.3d 770, 773 (11th Cir. 2002). It is immediately apparent that a claim grounded in *Pena-Rodriguez v. Colorado*, a decision handed down nearly twenty-five years later on March 6, 2017, will likely fail to clear *Teague*'s hurdles. Indeed, *Pena-Rodriguez* cannot apply to Tharpe's habeas claim because, before *Pena-Rodriguez*, no precedent established that proof of a juror's racial animus created a Sixth Amendment exception to the no-impeachment rule.

If anything, clearly-established precedent held just the opposite. In *Tanner v. United States*, the Supreme Court explained that "[b]y the beginning of [the twentieth] century, if not earlier, the near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict." 483 U.S. 107, 117, 107 S. Ct. 2739, 2745 (1987). And, as the Supreme Court noted in *Pena-Rodriguez*, "[a]t common law[,] jurors were forbidden to impeach their verdict, either by affidavit or live testimony." 137 S. Ct. at 863 (citing *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785)).

The Supreme Court endorsed the no-impeachment rule's breadth in *McDonald v. Pless*, when it noted that "a change in the [no-impeachment] rule would open the door to the most pernicious arts and tampering with jurors[,] . . . would be replete with dangerous consequences[,] . . . and no verdict would be safe." 238 U.S. 264, 268, 35 S. Ct. 783, 784–85 (1915) (quotations omitted).

Congress likewise embraced the no-impeachment rule by incorporating it into Federal Rule of Evidence 606(b)(1), which reads this way:

> During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

See Pena-Rodriguez, 137 S. Ct. at 864.

Before *Pena-Rodriguez*, the Supreme Court twice addressed whether the no-impeachment rule contained a constitutional exception. *Id.* at 866–67 (citing *Tanner*, 483 U.S. at 125, 107 S. Ct. at 2750; *Warger v. Shauers*, 574 U.S. ___, 135 S. Ct. 521, 529 (2014)). Each time, the Supreme Court concluded it did not. *Id.* For that reason, *Pena-Rodriguez* was a "startling development" because "for the first time, the Court create[d] a constitutional exception to no-impeachment rules." *Id.* at 875, 879 (Alito, J., dissenting).

Since *Pena-Rodriguez* established a new rule that was neither "dictated" nor "apparent to all reasonable jurists" at the time of Tharpe's conviction, we must determine whether it fits within one of *Teague*'s two retroactivity exceptions. We conclude it does not. First, the rule announced in *Pena-Rodriguez* is not a substantive one because it neither "decriminalizes a class of conduct nor prohibits the imposition of capital punishment on a particular class of persons." *Lambrix*, 520 U.S. at 539, 117 S. Ct. at 1531 (quotation omitted). Tharpe nonetheless cited

Bradford v. Bruno's, Inc., 94 F.3d 621, 622 (11th Cir. 1996), and *Ungerleider v. Gordon*, 214 F.3d 1279, 1282 (11th Cir. 2000), for the proposition that *Pena-Rodriguez* decreed a substantive rule. Yet those cases had nothing to do with either the no-impeachment rule or *Teague* retroactivity. Rather, they addressed whether wholly different state rules of evidence were substantive for purposes of the *Erie* doctrine.[1] *Bradford*, 94 F.3d at 622; *Ungerleider*, 214 F.3d at 1282.

Because the inquiry into whether a rule is substantive under *Teague* is utterly distinct from whether it is substantive under *Erie*, no reasonable jurist could accept Tharpe's argument. Rather, the rule in *Pena-Rodriguez* is plainly procedural in nature; it regulates only the manner of determining the defendant's culpability and concerns a procedural mechanism by which to challenge a jury verdict. It does not satisfy *Teague*'s first exception for retroactivity.

Additionally, the *Pena-Rodriguez* rule is not a watershed rule of criminal procedure that would satisfy *Teague*'s second exception. This exception "is extremely narrow, and it is unlikely" that any class of rules satisfying it has "yet to emerge" since *Teague*. *Schriro v. Summerlin*, 542 U.S. 348, 352, 124 S. Ct. 2519, 2523 (2004) (quotation omitted). "[T]he paradigmatic example of a watershed rule of criminal procedure is the requirement that counsel be provided in all criminal trials for serious offenses." *Gray v. Netherland*, 518 U.S. 152, 170, 116 S. Ct.

[1] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

2074, 2085 (1996) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963)). "[R]ules that regulate only the *manner of determining* the defendant's culpability are procedural," and thus apply retroactively to collateral proceedings only if they are exceedingly rare "watershed[s]" akin to *Gideon*. *Schriro*, 542 U.S. at 353, 124 S. Ct. at 2523. In light of this exceedingly high bar, even Tharpe himself does not argue that *Pena-Rodriguez*'s rule is such a watershed.

Because a state court in October 1992 would not have felt that the rule announced in *Pena-Rodriguez* was required by then-existing precedent, and because the *Pena-Rodriguez* rule is neither a new substantive rule that places primary conduct beyond the power of criminal law nor a watershed rule of criminal procedure, *Teague* bars Tharpe's claim. *See Tharpe*, 138 S. Ct. at 551 (Thomas, J., dissenting) ("[N]o reasonable jurist could argue that *Pena-Rodriguez* applies retroactively on collateral review."). This alone would be enough reason to deny Tharpe's motion for a COA and accordingly his motion for reconsideration. However, there exists a second, independent reason: Tharpe failed to show cause for his procedural default.

II.

The procedural default rule is clear. It provides that "[f]ederal courts may not review a claim procedurally defaulted under state law if the last state court to review the claim states clearly and expressly that its judgment rests on a procedural

bar, and the bar presents an independent and adequate state ground for denying relief." *Hill v. Jones*, 81 F.3d 1015, 1022 (11th Cir. 1996). A federal court cannot review a procedurally defaulted claim unless the petitioner can show cause for the failure to properly present the claim and actual prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 2506–07 (1977). "To establish 'cause' for a procedural default, a petitioner must demonstrate that some objective factor external to the defense impeded the effort to raise the claim properly in the state court." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). "[A]llegations [supporting cause and prejudice] must be factual and specific, not conclusory." *Harris v. Comm'r, Ala. Dep't of Corr.*, 874 F.3d 682, 691 (11th Cir. 2017) (quoting *Chavez v. Sec'y, Fla. Dep't of Corr.*, 647 F.3d 1057, 1061 (11th Cir. 2011)).

The Georgia courts have unambiguously held that Tharpe's juror racial bias claim was procedurally defaulted. The Superior Court of Butts County ruled that "even if [Tharpe] had admissible evidence to support his claim of juror misconduct, this Court finds that the claims are procedurally defaulted as [Tharpe] failed to raise them at the motion for new trial or on appeal." *Tharpe v. Hall*, No. 93-V-144, at 102 (Ga. Super. Ct. Dec. 1, 2008). After Tharpe returned to state court following *Pena-Rodriguez*, the Superior Court again held that Tharpe's claim "is still procedurally defaulted." Pet'r's Mot. for Recons. Ex. A at 4. Again, the

Supreme Court of Georgia refused to review the claim. *Id.* Ex. B. Since Tharpe's juror racial bias claim was procedurally defaulted, and since the Supreme Court of the United States held that Barney Gattie's affidavit would permit jurists of reason to dispute whether Tharpe demonstrated prejudice, *see Tharpe*, 138 S. Ct. at 546, the only question is whether Tharpe arguably proved cause.

To prove cause, Tharpe alleged only, and at the highest order of abstraction, that "trial counsel [was] ineffective in failing to raise meritorious claims on appeal, and that trial counsel's ineffectiveness constitutes cause to excuse any procedural default." He alleged no specific facts. Indeed, he alleged nothing at all. The state court rejected the argument as a bare, conclusory assertion. The District Court agreed, noting "[p]etitioner, unfortunately, fails to provide any details regarding [the] allegation . . . that his trial and appellate attorneys were ineffective[, thereby establishing] cause to overcome [his] defaults." *Tharpe v. Humphrey*, No. 5:10-CV-433, at 9 (M.D. Ga. Aug. 18, 2011). Because Tharpe's attempt to show cause is wholly unsubstantiated, he has failed to make the requisite showing of cause to overcome his procedural default. *See Tharpe*, 138 S. Ct. at 552 (Thomas, J., dissenting) ("[N]o reasonable jurist could argue that Tharpe demonstrated cause for his procedural default.").

* * *

For the foregoing reasons, we deny Keith Tharpe's motion for reconsideration of the April 3, 2018 Order denying a COA.

MOTION FOR RECONSIDERATION DENIED.

WILSON, Circuit Judge, specially concurring:

I am persuaded that Mr. Tharpe's application for a COA should be denied because *Peña-Rodriguez*[1] does not apply retroactively under the *Teague*[2] analysis.

After working through the first two steps of *Teague*'s framework, it is clear that Tharpe cannot show that existing precedent dictated Peña-Rodriguez. Thus, Tharpe's only other available option is to claim that *Peña-Rodriguez* meets one of the two exceptions to Teague's bar—the second exception, declaring that it is a new watershed rule of criminal procedure, being the most plausible. This exception, though, is extremely narrow and has not been used to this day. *See Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (The exception is reserved for "only a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. . . . [A] new procedural rule [being] fundamental in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is *seriously* diminished. . . . [However] [t]his class of rules is extremely narrow, and it is unlikely that any has yet to emerge." (internal citations and quotation marks omitted)). Again, this avenue is so rare that, as the Order points out, even Tharpe himself has not made this argument.

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[1] *Peña-Rodriguez v. Colorado*, 580 U.S. ___, 137 S. Ct. 855 (2017).

[2] *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989).

In addition, I disapprove of the lackadaisical treatment of Mr. Gattie's original affidavit. The statements and beliefs contained in the affidavit were not "offhand comments" by any means. *See Tharpe v. Warden*, No. 17-14027-P, slip op. at 5–7 (11th Cir. Sep. 21, 2017) (laying out the district court's reasoning regarding Mr. Gattie's affidavit which was easily disavowed by the Supreme Court in *Tharpe v. Sellers*, 583 U.S. ___, ___, 138 S. Ct. 545, 545–46 (2018)). To the contrary, Gattie's repugnant comments were rife with racial slurs; deeply seeded views regarding integration, interracial marriage, and the like; a comment inquiring whether black people even had souls; and even an explicit statement that the juror's decision to sentence Tharpe to death was at least, in part, based on race.[3]

[3] The juror in question, Juror Gattie, said the following in his affidavit:

> 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

Over the long course of this procedurally complex case, it is easy to gloss over our improper treatment of Mr. Gattie's original affidavit, but it is something that I want to acknowledge. Absent intervention from the Supreme Court, it seems that we would have approved of the idea that Mr. Gattie's affidavit would not have amounted to prejudice. I do not stand by that idea, or our court's treatment of the affidavit. As a factual matter, the statements contained therein clearly indicate a reliance on racial animus to convict or sentence a defendant.

> 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.

No. 18-_____

IN THE SUPREME COURT OF THE UNITED STATES

KEITH THARPE,

Petitioner,

-v-

BENJAMIN FORD, Warden, Georgia Diagnostic Prison,
Respondent.

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 at the following address:

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This 9th day of October, 2018.

Attorney