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.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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April 03, 2018

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 17-14027-P
Case Style: Keith Tharpe v. Warden
District Court Docket No: 5:10-cv-00433-CAR

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

Enclosure(s)

DIS-4 Multi-purpose dismissal letter