IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

KEITH THARPE, Petitioner, vs. WARDEN, Georgia Diagnostic and Classification Prison, Respondent.	:	CIVIL ACTION NO. 5:10-CV-433 (CAR)

ORDER

Petitioner Keith Tharpe moves this Court to reopen his 28 U.S.C. § 2254 action pursuant to Fed. R. Civ. P. 60(b)(6). ECF No. 77. For reasons discussed below, the Court denies his motion.[1]

I. BACKGROUND AND PROCEDURAL HISTORY

Tharpe's wife left him and moved in with her parents. *Tharpe v. State*, 262 Ga. 110, 110-11, 416 S.E.2d 78, 79 (1992). Following various threats of violence, Tharpe was ordered not to have any contact with her or her family. *Id*. Instead of obeying the order, he intercepted his wife and sister-in-law on the morning of September 25, 1990 when they were on their way to work. *Id*. He forced the women to stop their car and, armed with a shotgun, escorted his sister-in-law to the rear of the car where he shot her. *Id*. After rolling her into a ditch, he reloaded the shotgun, and shot her again. *Id*.

[1] Also pending is Tharpe's motion for leave to file excess pages. ECF No. 94. This motion is **GRANTED**.

Tharpe then drove away with his wife and raped her. *Id.* When he took his wife to a credit union to make her obtain money, she called the police. *Id.* Tharpe was arrested and charged with malice murder and two counts of kidnapping with bodily injury. *Id.* Following a nine-day trial, he was convicted on all counts and sentenced to death for the murder of his sister-in-law. *Id.*

After his motion for new trial was denied, the Georgia Supreme Court affirmed Tharpe's conviction and sentence on March 17, 1992. *Id.* at 110, 416 S.E.2d at 79. Tharpe did not raise any issue of juror bias in his motion for new trial or on direct appeal. The United States Supreme Court denied certiorari on October 19, 1992. ECF No. 13-1.

Tharpe filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia on March 17, 1993, amended the Petition on December 31, 1997, and amended it again on January 21, 1998. ECF Nos. 13-2; 13-8; 13-10. In claim ten of his December 31, 1997 amended Petition, Tharpe argued that "improper racial animus . . . infected the deliberations of the jury." ECF No. 13-8 at 16.

The state habeas court conducted evidentiary hearings on May 28, 1998, August 24, 1998, December 11, 1998, December 23, 1998, and July 30, 2007. ECF Nos. 14-1 to 14-7; 15-1 to 15-2; 15-13 to 15-17; 16-1 to 16-2; 17-1 to 18-11. At the May 28, 1998 hearing, Tharpe tendered affidavits from jurors Margaret Bonner, ECF No. 14-3 at 4; Barney Gattie, ECF No. 14-3 at 7; and James Stinson, ECF No. 14-3 at 36. Over two days in

October 1998, the state habeas court presided while the parties deposed eleven of the jurors who still resided in Georgia:[2] Barney Gattie, Lucille Long, Charles Morrison, Sr., James Stinson, Jr., Joe Woodard, Jack Simmons, Margaret Bonner, Mary Graham, Ernest Ammons, Martha Sandefur, and Polly Herndon. ECF Nos. 15-6; 15-7; 15-8. At the December 11, 1998 hearing, Tharpe tendered a juror affidavit from the twelfth juror, Tracy Simmons, as well as affidavits from Georgia Resource Center employees regarding their interactions with juror Barney Gattie. ECF No. 15-16 at 7, 10, 17. On that same date, Respondent tendered an affidavit from Barney Gattie. ECF No. 15-17 at 13.

The state habeas denied habeas relief in an order filed December 4, 2008. ECF No. 19-10. The court found that the jurors' testimony, including their affidavits and depositions, were inadmissible. ECF No. 19-10 at 99. "Further, even if [Tharpe] had admissible evidence to support his claim of juror misconduct," the juror misconduct claim was procedurally defaulted because Tharpe failed to raise it during his motion for new trial or direct appeal. ECF No. 19-10 at 5, 102. Tharpe alleged ineffective assistance of counsel as cause to overcome the default. ECF No. 13-8 at 17 n.10. The state habeas court determined that Tharpe "failed to establish the requisite deficiency or prejudice." ECF No. 19-10 at 102.

Tharpe filed an Application for Certificate of Probable Cause to Appeal ("CPC

[2] One juror, Tracy Simmons, no longer lived in Georgia, and he was not deposed. ECF No. 15-8 at 7.

Application") in the Georgia Supreme Court, which was summarily denied. ECF Nos. 19-12; 19-15.

On November 8, 2010, Tharpe filed in this Court his Petition for Writ of Habeas Corpus by a Person in State Custody, which he later amended. ECF Nos. 1; 25. In claim three of his amended habeas petition, Tharpe alleged that improper racial attitudes infected the jury deliberations. ECF No. 25 at 19-20. In his answer to the amended petition, Respondent alleged this portion of claim three was procedurally defaulted.[3] ECF No. 27 at 13. After the parties briefed exhaustion and procedural default, ECF Nos. 29; 30; 34, the Court found that Tharpe's various claims of juror misconduct were procedurally defaulted, and that Tharpe failed to show cause and prejudice or a fundamental miscarriage of justice to overcome default. ECF No. 37 at 8-9.

After the parties briefed the merits of remaining claims, the Court denied

[3] In a footnote in his brief, Respondent for the first time argues that Tharpe "did not raise this issue in his CPC [A]pplication before the Georgia Supreme Court" and the claim is, therefore, unexhausted. ECF No. 89 at 7 n.2. In prior proceedings before this Court, Respondent never argued the claim was unexhausted. Instead, he argued that it was "properly found by the state habeas corpus court to be procedurally defaulted." ECF No. 27 at 13. Even now, beyond the mere mention of exhaustion in a footnote, Respondent does not argue that Tharpe's juror bias claim is unexhausted. Instead, he still clearly argues that the "claim remains procedurally defaulted." ECF No. 89 at 16. This Court has already ruled the claim is procedurally defaulted. ECF No. 37 at 8-9. Consistent with the previous litigation in this case and with the arguments Respondent makes in his current brief, ECF No. 89 at 16-29, this Court treats Tharpe's juror bias claim as procedurally defaulted. *See Hills v. Washington*, 441 F.3d 1374, 1376-77 (11th Cir. 2006)

Tharpe's habeas corpus petition and granted a certificate of appealability ("COA") on one claim—"Whether the state habeas court's determination that Tharpe's trial counsel was not ineffective in the investigation and presentation of mitigation evidence was based on an unreasonable determination of the facts, or was contrary to, or involved an unreasonable application of, clearly established federal law." ECF No. 65 at 57. Tharpe moved to have the COA expanded, but he did not request a COA regarding any of his juror misconduct claims. *Tharpe v. Warden*, No. 14-12464 (11th Cir. June 20, 2014). The Eleventh Circuit denied relief on August 25, 2016. ECF No. 75. Tharpe filed a petition for writ of certiorari in the United Stated Supreme Court, which was denied on June 26, 2017. ECF No. 82.

II. ANALYSIS

Tharpe argues the Court should exercise its discretion to reopen his federal habeas proceedings under Fed. R. Civ. P. 60(b)(6) to permit him to prove that his death sentence was fatally tainted by the racist views of juror Barney Gattie, a claim the state court and this Court previously found to be procedurally defaulted. ECF No. 77 at 15. Rule 60(b)(6) permits reopening a case for "any . . . reason justifying relief from the operation of the judgment." But, "relief under Rule 60(b)(6) is available only in 'extraordinary circumstances.'" *Buck v. Davis*, 137 S. Ct. 759, 777 (2017) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)). "Such circumstances . . . rarely occur in the habeas context." *Gonzalez*, 545 U.S. at 535.

Tharpe contends his case should be reopened "due to extraordinary circumstances triggered by recent Supreme Court decisions, *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), and *Buck v. Davis*, 137 S. Ct. 759 (2017)." ECF No. 77 at 1. But, "'[s]omething more than a 'mere' change in the law is necessary . . . to provide the grounds for Rule 60(b)(6) relief.'" *Booker v. Singletary*, 90 F.3d 440, 442 (11th Cir. 1996) (quoting *Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987)); *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014) (citing *Gonzalez*, 545 U.S. at 535-38) (finding that "a change in decisional law is insufficient to create the 'extraordinary circumstance' necessary to invoke Rule 60(b)(6)"); *Howell v. Sec'y Fla. Dep't of Corr.*, 730 F.3d 1257, 1260-61 (11th Cir. 2013) (same). The movant bears the burden of showing not only a change in the law, but also "'that the circumstances are sufficiently extraordinary to warrant relief.'" *Booker*, 90 F.3d at 442 (quoting *Ritter*, 811 F.2d at 1401).

Tharpe fails for two reasons to establish the extraordinary circumstances necessary to reopen his case. First, Tharpe's request for the Court to review his juror bias claim in light of *Pena-Rodriguez* is barred by *Teague v. Lane*, 489 U.S. 288 (1989). Second, this claim is procedurally defaulted and the state habeas court already reviewed Gattie's statement when it concluded Tharpe failed to establish cause and prejudice to overcome the default.

A. The new rule announced in *Pena-Rodriguez* does not apply to cases on collateral review.

On March 6, 2017, the Supreme Court held:

> [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.

Pena-Rodriguez, 137 S. Ct. at 869. The issue is whether this recently-decided rule applies to cases on collateral review.

"Federal habeas corpus serves to ensure that state convictions comport with the federal law that was established at the time [a] petitioner's conviction became final." *Sawyer v. Smith*, 497 U.S. 227, 239 (1990) (emphasis omitted). In *Teague*, the Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310-11.

"To apply *Teague*, a federal court engages in a three-step process." *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997). The first step is to determine when the defendant's conviction became final. *Id.* Tharpe's conviction was final on October 19, 1992, the date on which the Supreme Court denied certiorari review. ECF No. 13-1; *Bond v. Moore*, 309 F.3d 770, 773 (11th Cir. 2002) (stating that a conviction is final on the date the Supreme Court denies certiorari).

Second, the Court "must surve[y] 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." *Lambrix*, 520 U.S. at 527

(internal quotation marks and citations omitted). In other words, was the rule announced in *Pena-Rodriguez* "*dictated* by then-existing precedent"? *Id*. (emphasis in original).

Tharpe argues it was. ECF No. 93 at 5. Although Tharpe cites two Supreme Court cases that existed at the time his conviction became final, neither addressed whether the Sixth Amendment allows impeachment of a jury verdict. *See Turner v. Murray*, 476 U.S. 28, 36-37 (1986) (holding that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issues of racial bias"); *Rose v. Mitchell*, 443 U.S. 545, 559 (1979) (reaffirming that "discrimination in the selection of the grand jury remains a valid ground for setting aside a criminal conviction," but holding that the defendant failed to "make out a prima facie case of discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment with regard to the selection of the grand jury foreman").

Tharpe also argues that "numerous lower courts have already considered claims under *Pena-Rodriguez* in habeas proceedings." ECF No. 93 at 6. But, none of these courts found *Pena-Rodriguez* applicable; none addressed retroactivity; and in only one case[4] did the respondent raise *Teague*. *See Berardi v. Paramo*, No. 15-55881, 2017 U.S. App. LEXIS 13638, at *2 (9th Cir. July 27, 2017) (no mention of retroactivity but

[4] This one case is *Sears v. Chatman*, No. 1:10-cv-1983-WSD, 2017 WL 2644478 (N.D. Ga. June 20, 2017), which is discussed below.

upholding the state court's denial of relief for Petitioner's juror bias claim); *Young v. Davis*, 860 F.3d 318, 333-34 (5th Cir. 2017) (no mention of retroactively but declining to extend *Pena-Rodriguez* and consider juror affidavits not presented to the state courts); *Sanders v. Davis*, No. 1:92-cv-05471-LJO-SAB, 2017 U.S. Dist. LEXIS 92501, at *215 (E.D. Cal. June 15, 2017) (no mention of retroactivity but finding that juror statements on the prejudicial effects of jury instructions were not admissible); *Montes v. Macomber*, No. 15-cv-2377-H-BGS, 2017 U.S. Dist. LEXIS 54713, at *25 n.3 (S.D. Cal. Apr. 10, 2017) (no mention of retroactivity but explaining that "intrinsic jury processes will not be examined on appeal and cannot support reversal"); *Anderson v. Kelley*, No. 5:12-cv-279 (DPM), 2017 U.S. Dist. LEXIS 48268, at *77 (E.D. Ark. Mar. 28, 2017) (no mention of retroactivity but finding that evidence of the jurors' thought processes could not be considered); *Cutro v. Stirling*, No. 1:16-cv-2048-JFA, 2017 U.S. Dist. LEXIS 42903, at *56 n.26 (D.S.C. Mar. 23, 2017) (no mention of retroactivity but finding that juror affidavits should not be considered); *Richardson v. Kornegay*, No. 5:16-hc-02115-FL, 2017 U.S. Dist. LEXIS 43080, at *25-29 (E.D.N.C. Mar. 24, 2017) (no mention of retroactivity but finding juror statements inadmissible).[5] Thus, these cases do not support Tharpe's argument

[5] In *Richardson*, a review of the docket located on the Federal Judiciary's Public Access to Court Electronic Records ("PACER") shows that neither the petitioner nor the respondent cited *Pena-Rodriguez* prior to the court's March 24, 2017 order. *Richardson v. Kornegay*, 5:16-hc-02115-FL, ECF Nos. 7, 12, 20, 21, 22, 23, 24, 28, 29, 31 (E.D.N.C.). In its order, the court distinguished *Pena-Rodriguez*, finding that the juror statements offered in *Richardson* did not indicate any juror relied on racial animus to convict the defendant and, therefore, the statements could not be used to impeach the verdict. *Richardson v.*

that *Pena-Rodriguez* applies to cases on collateral review. These courts simply did not address the issue of retroactivity.

Tharpe argues that "[n]otably, in a capital case in the Northern District of Georgia, the district court declined to accept the state's retroactivity argument and denied the claim on the merits." ECF No. 93 at 7 (citing *Sears v. Chatman*, No. 1:10-cv-1983-WSD, 2017 U.S. Dist. LEXIS 94475, at *10 (N.D. Ga. June 20, 2017)).[6] A review of the docket in that case, however, reveals that the district court specifically declined to reach the respondent's *Teague* argument. *Sears v. Chatman*, 1:10-cv-1983, ECF No. 49 at 15 n.8 (N.D. Ga. May 9, 2016). The court ultimately determined that the petitioner did not show the Georgia Supreme Court's denial of his juror coercion claim was based on unreasonable facts or "was contrary to, or involved an unreasonable application of **clearly established Federal law.**" *Sears v. Chatman*, No. 1:10-cv-1983-WSD, 2017 WL 2644478, at *17 (N.D. Ga. June 20, 2017) (emphasis added).

Kornegay, No. 5:16-hc-02115-FL, 2017 U.S. Dist. LEXIS 43080, at *29 (E.D.N.C. Mar. 24, 2017). Relying on *Pena-Rodriguez*, the petitioner recently filed a motion to alter or amend judgment. *Richardson v. Kornegay*, 5:16-hc-02115-FL, ECF No. 35 (E.D.N.C. Apr. 4, 2017). In response, the respondent argued that "*Pena-Rodriguez* prescribed a new constitutional rule of criminal procedure" and, therefore, cannot "apply retroactively to [p]etitioner's case under *Teague* . . . ." *Richardson v. Kornegay*, 5:16-hc-02115-FL, ECF No. 36 (E.D.N.C. Apr. 4, 2017). The court has not yet ruled on the petitioner's motion to alter or amend judgment.

[6] Tharpe provided the LEXIS citation for this order. For reasons unknown, LEXIS shows "[t]he requested document is not available at this time . . . ." Therefore, the Court has located the order on Westlaw and uses the following citation: *Sears v. Chatman*, No. 1:10-cv-1983-WSD, 2017 WL 2644478 (N.D. Ga. June 20, 2017). For background, the Court has reviewed the docket located on PACER and cites to that when necessary.

"'[C]learly established Federal law'" means only the holdings of the Supreme Court's cases in existence at the time the Georgia Supreme Court decided the claim. *Id*. at *8 (quoting 28 U.S.C. § 2254(d)(1)). *Pena-Rodriguez* was not in existence at the time the Georgia Supreme Court denied Sears's juror coercion claim and the district court did not apply *Pena-Rodriguez* to the claim. Therefore, neither *Sears*, nor any of the other cases cited by Tharpe, supports his argument that the rule announced in *Pena-Rodriguez* was dictated by existing precedent and, therefore, applies retroactively.

Contrary to Tharpe's arguments, this Court finds that the rule announced in *Pena-Rodriguez* was not dictated by clearly established Supreme Court law. Instead, *Pena-Rodriguez* was a clear break with long-standing precedent. See *Tanner v. United States*, 483 U.S. 107, 117 (1987) (citations omitted) (stating that "[b]y the beginning of this 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"). As the Court pointed out 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)). This broad no-impeachment rule was endorsed by the Supreme Court in *McDonald v. Pless*, 238 U.S. 264, 268 (1915) and by Congress in 1975 when it adopted the Federal Rules of Evidence, specifically Rule 606(b). *Pena-Rodriguez*, 137 S. Ct. at 864. Also, "[i]n the great majority of jurisdictions, strong no-impeachment rules continue to be 'viewed as both promoting

the finality of verdicts and insulating the jury from outside influences.'" *Id*. at 878 (Alito, J., dissenting) (citations omitted).

Prior to *Pena-Rodriguez*, the Supreme Court addressed whether the Constitution mandates an exception to the no-impeachment rule only twice. *Id*. at 866. In both cases, the Court endorsed the rule and refused to find exceptions. *Id*. at 866-67 (citing *Tanner*, 483 U.S. at 125; *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014)). Thus, *Pena-Rodriguez* was a "startling development" in that "for the first time, the Court create[d] a constitutional exception to no-impeachment rules." *Id*. at 875 (Alito, J., dissenting).

Because *Pena-Rodriguez* announced a new rule, the Court must take the third step and determine "whether that new rule nonetheless falls within one of the two exceptions to [the] nonretroactivity doctrine." *Lambrix*, 520 U.S. at 539. Under the first exception, the inquiry is whether the new rule is substantive or procedural. *Schiro v. Summerlin*, 542 U.S. 348, 352 (2004). Substantive rules apply retroactively, while procedural rules do not. *Id*. at 351. Tharpe argues that the rule announced in *Pena-Rodriguez* is a substantive rule of law. ECF No. 93 at 4-5. To support this position, Tharpe cites cases that hold some state evidentiary rules are substantive versus procedural and, therefore, apply in diversity actions. *Bradford v. Bruno, Inc*., 94 F.3d 621, 622 (11th Cir. 1996) (only state law of substantive, as opposed to procedural, nature is applicable in diversity cases); *Ungerleider v. Gordon*, 214 F.3d 1279, 1282 (11th Cir. 2000) (finding that the parole

evidence "rule is one of substantive law, not evidence, so it is applied by federal courts sitting in diversity"). But, for retroactivity purposes, a rule is considered substantive only if it "narrow[s] the scope of a criminal statute by interpreting its terms" or "place[s] particular conduct or persons covered by the statute beyond the State's power to punish." *Summerlin*, 542 U.S. at 351-52; *Lambrix*, 520 U.S. at 539 (internal quotation marks and citations omitted). "In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural." *Summerlin*, 542 U.S. at 353 (emphasis in original). *Pena-Rodriguez* "'neither decriminalize[d] a class of conduct nor prohibit[ed] the imposition of capital punishment on a particular class of persons.'" *Lambrix*, 520 U.S. at 539 (citations omitted). Instead, it altered the application of no-impeachment rules. The ruling in *Pena-Rodriguez*, therefore, is properly classified as procedural because it dictates when courts must consider juror testimony to impeach a verdict.

"The second exception is for watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Lambrix*, 520 U.S. at 539 (internal quotation marks and citations omitted). "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." *Summerlin*, 542 U.S. at 352 (emphasis in original) (internal quotation marks and citations omitted). The

Supreme Court has "observed . . . that the 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. Netherlands*, 518 U.S. 152, 170 (1996) (citations omitted). Tharpe does not argue, and the Court cannot find, that the rule announced in *Pena-Rodriguez* is a watershed rule akin to *Gideon's* rule establishing the right to counsel in all felony cases.

Consequently, the Court finds that *Pena-Rodriguez* "announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Summerlin*, 542 U.S. at 358. Because consideration of *Pena Rodriguez* in Tharpe's habeas action is precluded under *Teague*, the Court must decline to grant his Rule 60(b)(6) motion to reopen. *See Buck*, 137 S. Ct. at 780 (noting that 60(b)(6) relief is inappropriate if movant is not entitled to benefit of the new rule he seeks to invoke).[7]

B. Pretermitting *Teague*, Tharpe's juror misconduct claim is procedurally barred.

As explained above, in *Pena-Rodriguez* the Court held that the Sixth Amendment requires the no-impeachment rule to "give way" if a juror makes a clear statement that he relied on racial bias to convict a defendant. 137 S. Ct. at 869. Tharpe states that

[7] While Tharpe relies on *Buck* in his Rule 60(b)(6) motion, nothing in *Buck* alters the application of *Teague* in this case. The Court agrees with Tharpe that in *Buck*, the Supreme Court did not decide whether *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013) apply retroactively. *Buck*, 137 S. Ct. at 780. This is because the Respondent waived the argument by failing to raise it in a timely manner. *Id*. In this case, Respondent has raised *Teague* in a timely manner and the Court finds that *Teague* bars application of *Pena-Rodriguez*.

"*Pena-Rodriguez* . . . establishes that this Court erred in failing to reach the merits of Mr. Tharpe's claim." ECF No. 77 at 15. It does not. This Court did not fail to reach the merits of Tharpe's juror misconduct claim because Georgia's no-impeachment rule prohibits the admission of juror testimony to impeach a verdict. Instead, the Court did not address the merits of the claim because Tharpe failed to raise the claim on direct appeal and, therefore, the claim was procedurally defaulted. *See Black v. Hardin*, 255 Ga. 239, 239, 336 S.E.2d 754, 755 (1985).

In *Pena-Rodriguez*, trial counsel, during the motion for new trial and on direct appeal, presented two juror affidavits that showed a third juror expressed numerous racist comments during jury deliberations. 137 S. Ct. at 862. The trial court, Colorado Court of Appeals, and Colorado Supreme Court all held that the courts could not consider the affidavits because deliberations that occur among the jurors are protected from inquiry under Colorado's no-impeachment rule. *Id*. Here, Tharpe failed to raise the juror bias claim during his motion for new trial or on direct appeal. Tharpe did not raise the issue until his state habeas proceedings.

At the May 28, 1998 state habeas evidentiary hearing, Tharpe tendered affidavits from several jurors, including Barney Gattie. ECF No. 14-3 at 4-6, 7-8, and 36-38. In his affidavit, Gattie stated:

> 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.

ECF No. 14-3 at 7.

Subsequently, the state habeas court allowed the parties to depose eleven of the juror who stilled lived in Georgia. (ECF Nos. 15-6 at 30). The depositions were taken over a two-day period (October 1 and 2, 1998) in the presence of the court. ECF Nos. 15-6; 15-7; 15-8. At his deposition, Gattie testified that he consumed alcohol every weekend. ECF No. 15-8 at 84. He stated that he had been drinking alcohol on the Saturday he first spoke with representatives from the Georgia Resource Center. ECF No. 15-8 at 84-85. When they returned on Memorial Day with the affidavit for him to sign, he had again been drinking. ECF No. 15-6 at 41-42. He testified that he had consumed a twelve-pack of beer and a few drinks of whiskey before signing the affidavit. ECF No. 15-8 at 80. Gattie stated he was not told what the affidavit was

going to be used for, he did not read the affidavit, and when the affidavit was read to him, he did not pay attention.[8] ECF Nos. 15-6 at 42-43; 15-8 at 83. He complained that the affidavit was "taken all out of proportion," or taken "[o]ut of context" and "was misconstrued." ECF No. 15-6 at 56, 118.

Gattie testified that he is not "against integration" or "against blacks." ECF No. 15-6 at 66. He claimed to think African Americans "are hardworking people" and no more violent than other groups of individuals. ECF No. 15-6 at 99-100. Gattie stated that he used the term "nigger," but not as a racial slur. ECF No. 15-6 at 113-14. Instead, he used it describe both white and black people who are "no good," who do not work, or who commit crimes. ECF Nos. 15-6 at 113-14; 15-8 at 92, 94. Gattie also testified that race was not an issue at deliberations and he never used the term "nigger" during deliberations. ECF Nos. 15-6 at 118; 15-17 at 14.

In addition to Gattie, the other ten jurors who were deposed testified that Tharpe's race was not discussed during deliberations, race played no part in their deliberations, no one used racial slurs during deliberations, and racial animus or bias was not a part of the deliberations. ECF Nos. 15-7 at 5, 31, 53-54, 60, 85-86, 94, 117-19; 15-8 at 26, 46, 59, 74-75, 117, 125. Tharpe tendered an affidavit from Tracy Simmons, the only juror who was not deposed, and he did not allege that race played any part in their

[8] According to the Georgia Resource Center representatives who interviewed him, they informed Gattie who they were and the reason for their visit, and Gattie did not appear alcohol-impaired. ECF No. 15-16 at 10-26.

deliberations or that anyone expressed racial animus or bias during deliberations. ECF No. 15-16 at 7-8.

Respondent also submitted an affidavit from Gattie in which he stated he did not vote to impose the death penalty because of Tharpe's race. ECF No. 15-17 at 14. Instead, he stated he voted for a death sentence because of "the evidence presented" and Tharpe's lack of "remorse." *Id*. In this affidavit, Gattie again distanced himself from the statements shown in the affidavit he signed for Tharpe's state habeas counsel. He claimed "parts of what he said [were] left out of the statement and other parts were written out of context." ECF No. 15-17 at 16.

In its December 4, 2008 Order, the state habeas court found that the jurors' affidavit and deposition testimony was not admissible to impeach the verdict. ECF No. 19-10 at 98-101. But, "**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.**" ECF No. 19-10 at 102 (emphasis added).

To determine if Tharpe could establish cause and prejudice to overcome procedural default, the state habeas court considered the jurors' depositions and affidavits. ECF No. 19-10 at 102-04. Regarding the allegation of juror racism and bias, the state habeas court found:

> Petitioner has tendered the affidavit of juror Barn[ey] Gattie to attempt to establish that a member of his jury was allegedly racially biased and

> prejudiced against Petitioner and thus, impeach the jury's verdict. However, this Court concludes that Petitioner has failed to show that any alleged racial bias of Mr. Gattie[] was the basis for sentencing the Petitioner, as required by the ruling in *McClesky*. In fact, Mr. Gattie testified in his affidavit that he "did not vote to impose the death penalty because [the Petitioner] was a black man" and that "at no time was there any discussion about imposing the death sentence because [Petitioner] was a black man." This Court finds that Petitioner has failed to establish any prejudice with regard to this claim.

ECF No. 19-10 at 103-04 (citations omitted). The court ultimately concluded:

> as to each of these juror misconduct claims, this Court finds that Petitioner has failed to carry his burden of establishing deficiency of counsel or prejudice resulting from counsel's representation. Thus, Petitioner has failed to establish cause or prejudice to overcome his default of these claims, and habeas relief is denied.

ECF No. 19-10 at 104.

When, as in Tharpe's case, "[a] state court finds insufficient evidence to establish cause and prejudice to overcome a procedural bar, 'we must presume the state court's factual findings to be correct unless the petitioner rebuts that presumption with clear and convincing evidence.'" *Greene v. Upton*, 644 F.3d 1145, 1154 (11th Cir. 2011) (citations omitted). During his federal proceedings, Tharpe presented no evidence to overcome the procedural bar and, therefore, this Court found his juror misconduct claims, including his claim improper racial animus, were procedurally defaulted. ECF No. 25 at 19-20.

Because the state habeas court's procedural default analysis comports with the analysis required by *Pena-Rodriguez*, the Court fails to see how *Pena-Rodriguez* changes

the outcome. In *Pena-Rodriguez*, the Court held that "where a juror makes a clear statement that indicates he . . . relied on racial stereotypes or animus to convict a criminal defendant," the trial court should "consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." 137 S. Ct. at 869. To determine if Tharpe could overcome procedural default of his juror misconduct claim, the state habeas court specifically found that Gattie had not relied on racial stereotypes or animus to sentence Tharpe. ECF No. 19-10 at 103-04.

Tharpe complains that the state habeas court's procedural default analysis was "superficial" and failed to comply with the that required by *Pena-Rodriguez*. ECF No. 93 at 14. But, in *Pena-Rodriguez*, the Court specifically left discretion to the state trial court to determine if a juror's statement indicted he relied on racial animus to convict or sentence a defendant:

> Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether the threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

137 S. Ct. at 869.

The "circumstances" presented in Tharpe's case are dissimilar from those in

Pena-Rodriguez. *Id*. In *Pena-Rodriguez*, two jurors came forward immediately following the trial to report another juror's overtly racist remarks made during deliberations. *Id.* at 861. The 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." *Id*. at 870. 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. ECF No. 15-17 at 14. 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. *See Consalvo v. Sec'y for the Dep't of Corr*., 664 F.3d 842, 845 (11th Cir. 2011) ("Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review."). Given this analysis, the Court finds that Tharpe has not shown a reasonable probability of a different outcome under *Pena-Rodriguez*.[9]

[9] Again, nothing in *Buck* alters this outcome. Tharpe states that *Buck* stands for the proposition that "the possibility that racial bias impacted a death sentence constituted an extraordinary circumstance for the purposes of filing a 60(b)(6) motion." ECF No. 93 at

III. CONCLUSION

For these reasons, Tharpe's motion to reopen his 28 U.S.C. § 2254 action pursuant to Fed. R. Civ. P. 60(b)(6) is **DENIED**.

CERTIFICATE OF APPEALABILITY

"[A] COA is required before a habeas petitioner may appeal the denial of a Rule 60(b) motion." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1265 (11th Cir. 2015). The Court can issue a COA only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To merit a COA, the Court must determine "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations omitted). If a procedural ruling is involved,

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9. In *Buck*, there were several "extraordinary circumstances." 137 S. Ct. at 767, 776-79. A defense psychologist, who was "a medical expert bearing the court's imprimatur," 137 S. Ct. at 777, testified that "Buck was statistically more likely to act violently because he is black" *Id*. at 767. In five other cases in which this same expert provided similar testimony, the State had already consented to the defendants being resentenced. *Id*. at 778-79. It refused to do so in Buck's case because the defense, not the State, presented the expert at trial. *Id*. at 779. The Court stated that "[r]egardless of which party first broached the subject, race was in all these cases put to the jury 'as a factor . . . to weigh in making its determination.'" *Id*. (citations omitted). The Court granted Buck's 60(b)(6) motion to reopen and found ineffective assistance of counsel. *Id*. at 780. As the dissent explained, *Buck* "has few ramifications, if any, beyond the highly unusual facts presented. . . . The majority leave entirely undisturbed the black-letter principles of collateral review . . . and Rule 60(b)(6) law that govern day-to-day operations in federal court." *Id*. at 781 (Thomas, J., dissenting). The extraordinary circumstances present in *Buck* are not present here. Moreover, *Buck* did not alter the application of *Teague*, which ultimately bars the application of *Pena-Rodriguez* in Tharpe's case.

the petitioner must "demonstrate that a procedural ruling barring relief is itself debatable among jurists of reason; otherwise, the appeal would not 'deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 777 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

Under this standard, the Court cannot find that "a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen judgment." *Id*. The Court, therefore, declines to issue a COA.

SO ORDERED, this 5th day of September, 2017.

S/ C. Ashley Royal
C. ASHLEY ROYAL, SENIOR JUDGE
UNITED STATES DISTRICT COURT