No. 18-6819

In the
Supreme Court of the United States

Keith Tharpe,
Petitioner,

v.

Benjamin Ford, Warden,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied *Teague* in determining that *Pena-Rodriguez* does not apply retroactively on collateral review.

2. Whether the court of appeals correctly applied the standard for reviewing a certificate of appealability in determining that reasonable jurists could not debate that *Pena-Rodriguez* does not apply retroactively, and that petitioner failed to prove cause to overcome the procedural default of his juror-bias claim.

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The decision of the Georgia Supreme Court in the criminal direct appeal is published at 262 Ga. 110, 416 S.E.2d 78 (1992).

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

The decision of the district court determining Tharpe's juror-bias claim was procedurally defaulted is unpublished, but is included in Petitioner's Appendix G. The decision of the district court denying federal habeas relief is not published, but is included in Petitioner's Appendix F. The decision of the Eleventh Circuit Court of Appeals affirming the district court's denial of relief is published at 834 F.3d 1323 (11th Cir. 2016) and is included in Petitioner's Appendix E.

The decision of the district court denying Tharpe's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b) motion as to his juror-bias claim is unpublished, but is included in Petitioner's Appendix D. The decision of the Eleventh Circuit Court of Appeals denying Tharpe's motion for a certificate of appealability (COA) is unpublished, but is included in Petitioner's Appendix C. The decision of the Eleventh Circuit Court of Appeals denying Tharpe's COA after remand from this Court is unpublished, but is included in Petitioner's Appendix B. The decision of the Eleventh Circuit Court of Appeals denying Tharpe's motion for reconsideration of its COA denial is published at 898 F.3d 1342 (11th Cir. 2018) and is included in Petitioner's Appendix A.

The decision of the state habeas court for Tharpe's second state habeas petition is not published, but is included in Respondent's Appendix B. The decision of the Georgia Supreme Court denying Tharpe's CPC application following the denial of his second state habeas petition is not published, but is included in Respondent's Appendix C. The decision of the Georgia Supreme Court denying Tharpe's first motion for reconsideration of his CPC application is not published, but is included in Respondent's Appendix D. The decision of the Georgia Supreme Court denying Tharpe's second motion for reconsideration of his CPC application is not published, but is included in Respondent's Appendix E.

JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment in this case on August 10, 2018. On October 11, 2018, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 22, 2018, and the petition was timely filed. On December 20, 2018, Justice Thomas extended the time within which to file the brief in opposition to and including January 25, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

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

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

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

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

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

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

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

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

28 U.S.C. § 2253 provides in relevant part:

> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> (B) the final order in a proceeding under section 2255 [28 USCS § 2255].
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Federal Rule of Civil Procedure 60 provides in relevant part:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or

> proceeding for the following reasons: …(6) any other reason that justifies relief.

INTRODUCTION

On remand from this Court, the court of appeals denied petitioner Keith Tharpe's request for a certificate of appealability (COA) to review his motion under Federal Rule of Civil Procedure 60(b)(6) to reopen his federal habeas case to reconsider his procedurally defaulted juror-bias claim. The court ultimately denied the COA for two independent reasons: (1) reasonable jurists could not debate that *Pena-Rodriguez v. Colorado*, __U.S.__, 137 S. Ct. 855 (2017) does not apply retroactively; and (2) reasonable jurists could not debate that Tharpe failed to prove cause to overcome the procedural default of his juror-bias claim.

This case does not warrant further review by this Court. First, the petition seeks error correction. Tharpe does not contend that either of the court of appeals' holdings conflicts with authority from any other lower court, but only that the court of appeals erred in applying this Court's well-settled precedents. Second, the decision below is correct.

The court of appeals correctly held that no reasonable jurist could debate that *Pena-Rodriguez* does not apply retroactively. This Court explained in *Pena-Rodriguez* that it was answering a question "left open" by its prior cases, thus acknowledging that the Court was announcing a new rule of constitutional law. Under *Teague's* well-settled retroactivity framework, new constitutional rules do not apply retroactively unless they meet two exceptions—it must be either a "substantive" or "watershed" rule of criminal procedure. The holding of *Pena-Rodriguez* is neither. *Pena-Rodriguez* is not substantive because it does not "alter the range of conduct or

the class of persons that the law punishes," but rather permits a court to consider certain evidence. And there is no serious argument that *Pena-Rodriguez* announced a "watershed" rule of criminal procedure.

The court of appeals also correctly held that no reasonable jurist could debate that Tharpe failed to prove cause to overcome the procedural default of his juror-bias claim. Tharpe grounds his *only* argument to the contrary in a purported determination by the court of appeals that he could not have discovered the juror's racial bias until seven years after his conviction and sentence became final. But the court did not make any such determination. And no evidence in the record either supports this argument or shows that Tharpe even made this argument to the state habeas court or fairly presented it to the federal district court.

This Court should deny the petition.

STATEMENT

A. Tharpe's Crimes

Petitioner Keith Tharpe's wife Migrisus left him. *Tharpe v. State*, 262 Ga. 110, 416 S.E.2d 78 (1992). A month later, armed with a shotgun, he drove to a location he knew his estranged wife and sister-in-law, Jaquelin Freeman, would be passing on their way to work. *Id.* He blocked the road with his truck, forcing the two women to stop. *Id.* He then told his sister-in-law that he was going to "f---[her] up," took her behind his car, and shot her. *Id.* "He rolled her into a ditch, reloaded, and shot her again, killing her." *Id.* Tharpe then raped his wife and drove her to a bank, where he attempted to force her to withdraw money. *Id.* at 110-111. While at the bank, she was able to call the police and Tharpe was arrested. *Id.* at 111. While driving their

children to school, Freeman's husband found her body in the ditch. ECF No. 11-12 at 58-63.[1] The State charged Tharpe with murder and sought the death penalty. *Id.* at 110.

B. The Trial

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

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

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

C. First State Habeas Proceedings

In 1993, Tharpe filed his first state habeas petition and amended that petition twice. Tharpe's first amended petition, filed December 31, 1997, alleged under Claim X that his Fifth, Sixth, Eighth, and Fourteenth Amendment constitutional rights were violated by racial bias of the jury and

[1] "ECF No." refers to the Electronic Court Filing number associated with the document filed in Tharpe's federal habeas proceeding, followed by the appropriate ECF page number

included a general allegation of "improper racial animus which infected the deliberations of the jury." ECF No. 13-8 at 16. Two weeks later, the Warden asserted in his answer to this petition that the claim was procedurally defaulted. ECF No. 13-9 at 6. A week later, on January 21, 1998, Tharpe amended his petition for the second time and incorporated Claim X, but no further details were added to the claim, and the amended petition did not acknowledge the procedural defense the Warden had previously raised. ECF No. 13-10.

Five months later, on May 26, 1998, and only two days before the scheduled state habeas evidentiary hearing, Tharpe served the Warden with affidavits recently obtained from jurors, including Barney Gattie—the juror in question in the instant case. ECF No. 13-16. The Warden filed a motion to exclude the juror affidavits on the basis that they amounted to improper impeachment evidence under the version of Ga. Stat. Ann. § 9-14-48 (c) in force at the time. ECF No. 13-17.

1. May 28, 1998 Hearing

At the May 28, 1998, hearing, Tharpe tendered that juror affidavit from Barney Gattie. ECF No. 14-3 at 7-8. The portion of Mr. Gattie's affidavit that is at issue in this case states in relevant part:

> I . . . knew the girl who was killed, Mrs. Freeman. Her husband and his family have lived in Jones [C]ounty a long time. The Freemans are what I would call a nice Black family. In my experience I have observed that there are two types of black people. 1. Black folks and 2. Niggers. For example, some of them who hang around our little store act up and carry on. I tell them, "nigger, you better straighten up or get out of here fast." My wife tells me I am going to be shot by one of them one day if I don't quit saying that. I am an upfront, plainspoken man, though. Like I said, the Freemans were nice black folks. If they had been the type

> Tharpe is, then picking between life or death for Tharpe wouldn't have mattered so much. My feeling is, what would be the difference. As it was, because I knew the victim and her husband's family and knew them all to be good black folks, I felt Tharpe, who wasn't in the "good" black folks category in my book, should get the electric chair for what he did. Some of the jurors voted for death because they felt that Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason. The others wanted blacks to know they weren't going to get away with killing each other. After studying the Bible, I have wondered if black people even have souls. Integration started in Genesis. I think they were wrong. For example, look at O.J. Simpson. That white woman wouldn't have been killed if she hadn't have married that black man.

ECF No. 14-3 at 7. No live witnesses were presented during this hearing. While Tharpe did not acknowledge the default of this claim, his counsel argued in one sentence that Mr. Gattie's affidavit was also being tendered on "the issue of trial counsel's ineffectiveness and motion for new trial for failing to have interviewed Mr. Gattie." ECF No. 14-1 at 42. Tharpe did not present any evidence or argument that this information was previously unavailable at trial or on direct appeal.

Four days after the hearing, Tharpe filed a notice of deposition for eleven jurors, giving them only two days' notice to appear. *See* ECF No. 14-8 at 1. The Warden filed a motion for protective order to prohibit Tharpe from taking the depositions on grounds which included juror harassment, failure to give reasonable notice, and the former no-impeachment statute of Ga. Stat. Ann. § 9-14-48(c). *Id.* The state habeas court granted the Warden's motion and precluded Tharpe from taking the depositions of the jurors until "further order" of the court. ECF No. 14-9.

2. October 1-2, 1998 Live Depositions

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

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

Mr. Gattie testified during his deposition that on the day he initially spoke to representatives from the Georgia Resource Center regarding Tharpe's case, which was the basis for the affidavit that was prepared, he had been drinking. ECF No. 15-8 at 84-85. Mr. Gattie said when members of the Georgia Resource Center returned days later, he signed the affidavit that had been prepared by them, but he had been drinking that day as well because it was a holiday. *Id.* at 79-80. Mr. Gattie specified that he had consumed a twelve pack of beer and a few drinks of whiskey before he signed the affidavit. *Id.* at 80. Mr. Gattie testified that the affidavit acquired by the Georgia Resource Center had been "taken all out of proportion" and "was misconstrued." ECF No. 15-6 at 56. Mr. Gattie was not specifically questioned during the deposition as to which parts of the affidavit initially

obtained by Tharpe's counsel were taken out of "proportion" or "misconstrued."

Tharpe's counsel asked Mr. Gattie many questions regarding his views on race, specifically black persons. Mr. Gattie agreed that racial discrimination was a serious problem in our country; felt that the Georgia State flag, which at that time held a Confederacy symbol, should be changed if it "offended people"; testified that he would love a mixed-race grandchild the same as a white grandchild; and later explained that he had black foster grandchildren that were "welcomed" in his home. ECF No. 15-6 at 79, 88, 93, 102-103. He also testified, in response to specific questions, that he considered white and black people to be equal in intelligence and did not think blacks caused violence "[any] more than whites." *Id.* at 100, 106.

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

3. December 11 and 23, 1998 Hearing

At a December 11, 1998 evidentiary hearing on Tharpe's state habeas petition, the Warden called Charles Newberry and Shane Getter, Tharpe's trial and appellate counsel, as witnesses. Mr. Newberry and Mr. Geeter were questioned about whether they had interviewed the jurors after trial, however, there was no testimony or evidence presented that the views of Mr. Gattie only became discoverable seven years after trial. ECF No. 15-15 at 104; ECF No. 16-1 at 111-12. No argument regarding cause was presented at either December hearing.

4. July 30, 2007 Hearing

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

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

On December 4, 2008, the state habeas court entered an order denying habeas relief. Pet. App. E. The state habeas court initially ruled that the juror affidavits and depositions were not admissible. *Id.* at 99-101. In the alternative, the state habeas court necessarily considered the juror affidavits and deposition testimony when it concluded that Tharpe's juror-bias claim was procedurally defaulted and that he failed to establish cause and prejudice to overcome the default. *Id.* at 102. Regarding cause, the state habeas court concluded: "Tharpe has failed to establish any state action as

cause preventing him from raising these claims" or that ineffective assistance of counsel had been shown as cause to overcome the default. *Id.*

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

D. Federal Habeas Proceedings

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

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

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

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

E. Federal Rule of Civil Procedure 60(b) Proceedings on Juror-Bias Claim

On June 21, 2017, Tharpe asked the federal district court to reopen his 28 U.S.C. § 2254 proceeding under Federal Rule of Civil Procedure 60(b)(6) to reconsider his juror-bias claim based on this Court's recent decisions in *Pena-Rodriguez v. Colorado*, __ U.S. __, 137 S. Ct. 855 (2017) and *Buck v. Davis*, __ U.S. __, 137 S. Ct. 759 (2017). The district court denied Tharpe's motion, concluding that *Pena-Rodriguez* did not apply retroactively under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), and in the alternative, his juror-bias claim was procedurally defaulted. ECF No. 95.

1. Court of Appeals' First Denial of COA

On September 8, 2017, Tharpe applied for a COA in the Eleventh Circuit Court of Appeals. Tharpe moved for a stay of execution in that court on September 13, 2017. On September 21, 2017, the court of appeals denied both Tharpe's motion for COA and the motion for stay of Tharpe's execution. Pet. App. C. Notably the court pointed out that, in Tharpe's original federal habeas proceeding, he "failed" to meet his "burden of overcoming the default [of his juror-bias claim] by establishing cause and prejudice." Pet. App. C at 3. The court of appeals "assume[d] for purposes of this case that *Pena-*

Rodriguez [was] retroactive," and provided three reasons for denying the request for COA: (1) "Tharpe failed to demonstrate that Barney Gattie's behavior 'had substantial and injurious effect or influence in determining the jury's verdict'"; (2) Tharpe had not "shown that 'jurists of reason would find it debatable whether the district court was correct in its procedural [default] ruling'"; and (3) and "Tharpe's *Pena-Rodriguez* claim has not been exhausted in the Georgia courts." Pet App. C at 7 (quoting *Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S. Ct. 1710, 1722 (1993); *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000)).

On September 26, 2017, this Court granted Tharpe's motion for stay of execution. *Tharpe v. Sellers*, __U.S.__, 138 S. Ct. 53 (2017). On January 8, 2018, this Court granted Tharpe's petition for writ of certiorari, vacated the judgment of the court of appeals, and remanded the case "for further consideration of the question whether Tharpe is entitled to a COA." *Tharpe v. Sellers*, __ U.S. __, 138 S. Ct. 545, 547 (2018). This Court reasoned that:

> The Eleventh Circuit's decision, as we read it, *was based solely on its 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.'"

Id. at 546 (emphasis added) (quoting Pet. App. C at 7). This Court disagreed that reasonable jurists could not debate whether Tharpe had shown prejudice and remanded the case. *Id.* However, in doing so, this Court pointed out that "Tharpe faces a high bar in showing that jurists of reason could disagree whether the District Court abused its discretion in denying his motion. It may be that, at the end of the day, Tharpe should not receive a COA." *Id.*

2. Court of Appeals' Second Denial of COA

The court of appeals issued a decision on remand on April 2, 2108, and denied the COA on the ground that Tharpe had not exhausted his claim in state court. Pet. App. B.

Tharpe misrepresents a portion of the court of appeals' remand decision. Tharpe alleges that the court of appeals "disagreed with the district court's conclusion that Petitioner's 'pre-*Pena-Rodriguez* Claim' was procedurally defaulted because Petitioner had failed to raise it at trial or in his direct appeal." Pet. at 15 (quoting Pet. App. B at 2). The portion of the order Tharpe relies upon is the court of appeals' summary of the procedural history of Tharpe's juror-bias claim in the state and federal courts. Pet. App. B at 1-3. The court did not make any factual or legal determinations in this portion of its order. Although the court pointed out that Gattie's racial views were not known at the time of trial, nothing in the opinion indicates that the court found that this information was not *discoverable* until state habeas. Nor did the court hold in any other part of its order that Tharpe had shown cause to overcome the default of his claim.

3. Court of Appeals' Third Denial of COA

On August 10, 2018, the court of appeals denied Tharpe's request for reconsideration of the court's second denial of his COA. Pet. App. A. The court first noted that Tharpe had "exhausted his racial juror bias claim in Georgia State courts." *Id.* at 2. In denying Tharpe's request for reconsideration, the court provided two reasons: 1) *Pena-Rodriguez* did not apply retroactively; and 2) Tharpe "failed to show cause to overcome his procedural default" of his juror-bias claim. *Id.*

In determining the retroactivity of *Pena-Rodriguez*, the court conducted the three-step *Teague* analysis: it 1) compared the date of finality of conviction with the date *Pena-Rodriguez* was decided; 2) determined whether *Pena-Rodriguez* announced a new rule of criminal procedure not dictated by precedent "'existing at the time the defendant's conviction became final'"; and 3) determined whether an exception applied. *Id.* at 2-7 (quoting *Whorton v. Bockting*, 549 U.S. 406, 416, 127 S. Ct. 1173, 1181 (2007)).

After noting that *Pena-Rodriguez* was decided after Tharpe's conviction became final, the court of appeals examined whether *Pena-Rodriguez* announced new law. Pet. App. A at 3. The court determined it did "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" and "[i]f anything, clearly-established precedent held just the opposite." *Id.* at 4. In support, the court pointed out that this Court had twice "addressed whether the no-impeachment rule contained a constitutional exception" and twice "concluded it did not." *Id.* at 5 (citing *Tanner v. United States*, 483 U.S. 107, 125, 107 S. Ct. 2739, 2750 (1987); *Warger v. Shauers*, __U.S.__, 135 S. Ct. 521, 529 (2014)).

Next the court examined whether the new rule announced in *Pena-Rodriguez* "fits with one of *Teague*'s two retroactivity exceptions," which are: 1) "new substantive rules that place 'certain kinds of primary, private individual conduct beyond the power' of criminal law"; and (2) "new 'watershed rules of criminal procedure.'" Pet. App. A at 3, 5 (quoting *Teague*, 489 U.S. at 311). The court rejected Tharpe's argument that *Pena-Rodriguez* announced a "substantive rule" and pointed out that given the "exceedingly high bar" set for "watershed rules," "even Tharpe himself does not argue

that *Pena-Rodriguez*'s rule is such a watershed." *Id.* at 6-7. As no exception applied, the court held that *Pena-Rodriguez* was not retroactive and that determination "alone was enough reason to deny Tharpe's motion for a COA." *Id.* at 7.

The court also denied the COA for a "second, independent reason: Tharpe failed to show cause for his procedural default" of his claim. *Id.* In making this determination, the court explained that Tharpe had in state habeas "only, and at the highest order of abstraction" alleged trial counsel was ineffective for failing to raise the claim as cause to overcome the procedural bar. *Id.* at 9. Because Tharpe provided no evidence in support, the state court "rejected the argument as a bare, conclusory assertion." *Id.* Given his failure to "[]substantiate[]" his ineffective-assistance claim in state court, the court of appeals concluded Tharpe "failed to make the requisite showing of cause." *Id.*

F. Second State Habeas Petition

A little over a month after filing his Rule 60(b)(6) motion in the federal district court, Tharpe filed a second state habeas petition on September 6, 2017, and reasserted his juror-bias claim, along with two other claims. The state habeas court dismissed the petition on September 25, 2017 (Res. App. B), concluding that the juror-bias claim was: (1) barred by res judicata, and *Pena-Rodriguez* did not apply retroactively to lift the bar; and (2) in the alternative, procedurally defaulted. The state habeas court dismissed Tharpe's other two claims solely on res judicata grounds. *Id.* Tharpe filed a CPC application but the Georgia Supreme Court denied the application on September 26, 2017, explaining that the "application is hereby denied as

lacking arguable merit because the claims presented in the petition are res judicata or otherwise procedurally defaulted." Res. App. C.

Tharpe filed a petition for writ of certiorari with this Court; however, following the grant of his motion for stay of execution, Tharpe requested that the petition be dismissed. On September 29, 2017, this Court granted the request. *Tharpe v. Sellers*, __U.S.__, 138 S. Ct. 55 (2017). Tharpe later filed two motions for reconsideration in the Georgia Supreme Court regarding the denial of his CPC application. Both were summarily denied. Res. App. D; Res. App. E.

Tharpe then sought certiorari review in this Court, which was denied on June 25, 2018. *Tharpe v. Sellers*, __U.S.__, 138 S. Ct. 2681 (2018). Tharpe's arguments in support of certiorari review of the state court decision regarding *Pena-Rodriguez*'s retroactivity largely mirror the arguments in his current petition before this Court.

REASONS FOR DENYING THE PETITION

I. The first question presented does not warrant review.

A. The question seeks error correction on an issue that will not affect the outcome of this case.

Tharpe's first question presented asks this Court to review the court of appeals' determination that he is not entitled to a COA because no reasonable jurist could debate that *Pena-Rodriguez* does not apply retroactively on collateral review. This question does not warrant review as an initial matter because it seeks mere error correction. Tharpe does not identify any conflict of authority. Instead, he asks this Court to review the court of appeals' application of *Teague v. Lane*, this Court's well-settled precedent for assessing retroactivity, under the COA standard of review.

This Court does not ordinarily grant certiorari to review a court of appeals' application of settled precedent.

Nor is there reason to do so here, because deciding the *Pena-Rodriguez* question would not affect the outcome of this case. The court of appeals denied a COA for two independent reasons: because *Pena-Rodriguez* does not apply retroactively, and also because Tharpe failed to prove cause sufficient to overcome his procedural default of his juror-bias claim. Even if the Court thought the court of appeals erred with respect to the first issue, it would still have to affirm the decision below on the second basis because reasonable jurists could not debate that Tharpe "alleged" cause in the courts below "only" "at the highest order of abstraction" and thus failed to prove cause to overcome the default of his claim. Pet. App. A at 9.

B. Reasonable jurists could not debate that *Pena-Rodriguez* does not apply retroactively.

When this Court announces a new rule of constitutional law that applies in criminal proceedings, as done by the court of appeals, it is analyzed under *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), to determine if the rule applies retroactively to federal collateral review. Under *Teague*, *Pena-Rodriguez* does not apply retroactively. There is no question that Tharpe's conviction and sentence became final before *Pena-Rodriguez* was decided. Further, *Pena-Rodriguez* announced a new rule because it created a new constitutional exception to state-law no-impeachment rules, answering a question the Court acknowledged it had "left open" in earlier cases. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 859. And neither of *Teague*'s exceptions to non-retroactivity apply because the new rule announced in *Pena-Rodriguez* neither "placed primary, private individual conduct beyond

the power of the criminal law-making authority to proscribe" nor rose to the level of a "watershed rule[] of criminal procedure." *Teague*, 489 U.S. at 307. As Justice Thomas concluded in his dissent to this Court's previous grant of certiorari review and remand: "no reasonable jurist could argue that *Pena-Rodriguez* applies retroactively on collateral review." *Tharpe v. Sellers*, 138 S. Ct. 545, 551.

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

"[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.'" *Teague*, 489 at 301; *see also Bockting*, 549 U.S. at 416. "And a holding is not so dictated … unless it would have been 'apparent to all reasonable jurists.'" *Chaidez*, 568 U.S. at 347 (quoting *Lambrix v. Singletary*, 520 U.S. 518, 527-28, 117 S. Ct. 1517, 1525 (1997)).

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

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

Pena-Rodriguez, 137 S. Ct. at 869.

As Justice Thomas correctly determined, "*Pena-Rodriguez* established a new rule." *Tharpe v. Sellers*, 138 S. Ct. at 551 (Thomas, J., dissenting). Indeed, far from being "dictated" by this Court's earlier precedent, "the opinion states that it is answering a question 'left open' by this Court's earlier precedents." *Id.* (quoting *Pena-Rodriguez*, 137 S. Ct. at 859). Justice Alito agreed in his dissent in *Pena-Rodriguez* itself, noting that the majority's decision was a "startling development" because "for the first time, the Court create[d] a constitutional exception to no-impeachment rules." *Pena-Rodriguez*, 137 S. Ct. at 875 (Alito, J., dissenting).

The court of appeals agreed and held "*Pena-Rodriguez* established a new rule that was neither 'dictated' nor 'apparent to all reasonable jurists' at the time of Tharpe's conviction." Pet. App. At 5. The court correctly explained that this Court had previously refused to create a "constitutional exception" to the "no-impeachment rule" in two cases prior to *Pena-Rodriguez* —*Tanner* and *Warger*. *Id.* Tharpe fails to dispute this point, which Justice Alito's *Pena-Rodriguez* dissent makes too. *Pena-Rodriguez,* 137 S. Ct. at 878 ("Recognizing the importance of Rule 606(b), this Court has twice rebuffed efforts to create a Sixth Amendment exception—first in *Tanner* and then, just two Terms ago, in *Warger*.").

Instead, Tharpe argues that neither *Tanner* nor *McDonald v. Pless*, 238 U.S. 264, 35 S. Ct. 783 (1915), concerned impeachment through *juror racial bias*. Pet. at 24.[2] This argument misses the point, which is that the Court

[2] Notably, this complaint topples all of Tharpe's arguments that *Pena-Rodriguez* did not announce new law as none of the cases he relies upon to argue otherwise discuss the specific issue of whether a jury's verdict may be impeached with racial bias.

had never before created a constitutional exception to the no-impeachment rule *at all*, much less one focused on racial bias. Both opinions lamented the many dangers of invading the jury's deliberations and rejected an exception to the no-impeachment rule that allowed the "internal" conduct of jurors to be used to attack a verdict. *See, e.g.*, *Tanner*, 483 U.S. at 127 ("long-recognized and very substantial concerns support the protection of jury deliberations from intrusive inquiry"); *McDonald*, 238 U.S. at 268 (explaining that lawmakers had rejected no-impeachment exceptions because "while it may often exclude the only possible evidence of misconduct, a change in the rule 'would open the door to the most pernicious arts and tampering with jurors'" and "'no verdict would be safe'") (quoting *Lessee of Cluggage v. Swan*, 4 Binn. 150, 155 (Pa. 1811)). Those decision thus show quite clearly that by recognizing such an exception, *Pena-Rodriguez* amounted to a new rule.

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

evidence was an exception to the long-standing rule that a jury's verdict may not be impeached by evidence from the internal deliberations process.

In short, *Pena-Rodriguez* announced a new rule of constitutional law.

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

Teague explained that only two kinds of new rules may be applied retroactively on collateral review: (1) new "substantive" rules of criminal procedure, *i.e.*, those which "place 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'"; and (2) new "watershed rules of criminal procedure," *i.e.*, those which are necessary to the fundamental fairness of the criminal proceeding. *Teague*, 489 U.S. at 311-13. *Pena-Rodriguez* did not announce a "substantive" rule as it neither places a group of persons nor a crime beyond proscription. And the new rule is not a "watershed" rule.

a. *Pena-Rodriguez* did not announce a "substantive" rule.

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

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

Determining what evidence is admissible in deciding a Sixth Amendment challenge to the impartiality of the jury in a criminal proceeding is procedural, not "substantive," as *Teague* has defined it. The court of appeals thus correctly decided that the *Pena-Rodriguez* rule 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." Pet. App. A at 6. This exception therefore does not permit retroactive application of *Pena-Rodriguez*.

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

The court of appeals also correctly determined that *Pena-Rodriguez* "is not a watershed rule of criminal procedure." Pet. App. A at 6. For a procedural rule to be a watershed rule, it must be exceptional:

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

Schriro, 542 U.S. at 352 (citations and quotations omitted; emphasis added). *Pena-Rodriguez* does not meet this standard. As Justice Thomas already explained, "[n]ot even the right to have a jury decide a defendant's eligibility for death counts as a watershed rule of criminal procedure." *Tharpe*, 138 S. Ct. at 552. (Thomas, J., dissenting). As below, Tharpe does not argue that *Pena-Rodriguez* announced a watershed rule. *See* Pet. App. A at 7 ("even Tharpe himself does not argue that Pena-Rodriguez's rule is such a watershed").

3. *Teague*'s retroactivity doctrine applies to this case.

Tharpe argues that *Teague*'s "retroactivity limitations" do not apply to *Pena-Rodriguez*. Pet. at 21. First, Tharpe argues that this Court has already determined that its holding in *Pena-Rodriguez* was retroactive in a 1990 concurrence to a denial of certiorari review. *See Spencer v. Georgia*, 500 U.S. 960, 111 S. Ct. 2276 (1991). Second, he asserts that *Pena-Rodriguez* did not announce a rule of "criminal procedure" and therefore, does not fall under the *Teague* retroactivity doctrine. Both arguments are unavailing.

In support of his first argument, Tharpe points to an "observation" by Justice Kennedy in a 1990 concurrence to a denial of certiorari review of a racial discrimination claim rejected by the state court. *See Spencer v. Georgia*, 500 U.S. 960, 111 S. Ct. 2276 (1991); *Spencer v. State*, 260 Ga. 640, 643, 398 S.E.2d 179, 184 (1990). In the underlying case of *Spencer v. State*, "Spencer relied upon a post-trial affidavit from one of the jurors stating she overheard two white jurors making racially derogatory comments about the defendant during the jury's deliberations." The Georgia Supreme Court held that Georgia's no-impeachment rule barred admission of the affidavit. *Spencer*, 260 Ga. at 643. In the alternative, the state court held that the affidavit failed to show a denial of due process because it did not "establish that racial prejudice caused those two jurors to vote to convict Spencer and sentence him to die." *Id.* at 644. Later, in a concurrence to the denial of certiorari review of this claim, Justice Kennedy stated, "This case appears to present important questions of federal law, and if I thought our decision in *Teague v. Lane* [] would prevent us from reaching those issues on federal habeas review, I would have voted to grant certiorari." *Spencer v. Georgia*, 500 U.S. at 960 (citation omitted).

Tharpe contends that this statement of now-retired Justice Kennedy expresses an opinion regarding the retroactivity of a hypothetical rule akin to the one this Court announced in *Pena-Rodriguez*, but it does not do that. First, this brief statement of a single justice in a concurrence plainly does not bind this Court on the question whether a rule announced 27 years later applies retroactively. Second, the facts in *Spencer* are different than those in the case at bar; in *Spencer*, unlike here, the alleged racial comments arose

during deliberations. Third, there was no procedural bar to Spencer's claim because it was raised on direct review.

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

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

applied the *Teague* framework and determined that *Crawford* was not retroactive. There is no reason for a different approach here.

Because the court of appeals correctly determined that the new constitutional rule announced in *Pena-Rodriguez* is not retroactive on collateral review and does not fit within either of the *Teague* exceptions, this Court should not grant certiorari to answer that question.

II. The court of appeals' denial of Tharpe's motion for a certificate of appealability of his Rule 60(b)(6) motion was in accord with this Court's precedent.

Tharpe argues that reasonable jurists could debate whether he proved "extraordinary circumstances" to reopen his § 2254 case under Rule 60(b)(6). Relying upon *Buck v. Davis*, Tharpe argues that evidence of racial discrimination serves as an "extraordinary circumstance" that can overcome any procedural barrier to the claim which a petitioner seeks review. *See* Pet. at 29-30. But *Buck* does not support that conclusion because the Court specifically held that it could not have considered the "Rule 60(b)(6) contentions" if the law that removed the default of the underlying claim was not retroactive. *Buck*, 137 S. Ct. at 780. Underpinning Tharpe's argument are his erroneous allegations that the court of appeals "capricious[ly]" denied his motions for COA with differing "justifications" in its three opinions. Pet. at 37. The court of appeals issued consistent opinions for denying Tharpe's COA and correctly applied this Court's precedent in denying Tharpe's motion for COA, and Tharpe's arguments are nothing more than a request for certiorari review for mere error correction. His request should be denied.

A. The court of appeals did not issue inconsistent orders.

Tharpe accuses the court of appeals of "shifting" its "justifications" for denying his motion for COA across its three orders denying his motion for a COA. Pet. at 37; *see* Pet. Apps. A, B, C. In denying Tharpe's motion however, the court was consistent in its analysis and holdings.

In the first denial, the court "assume[d]" *Pena-Rodriguez* was retroactive," and provided three reasons for denying the motion: (1) "Tharpe failed to demonstrate that Barney Gattie's behavior 'had substantial and injurious effect or influence in determining the jury's verdict'"; (2) Tharpe had not "shown that 'jurists of reason would find it debatable whether the district court was correct in its procedural [default] ruling'"; and (3) and "Tharpe's *Pena-Rodriguez* claim has not been exhausted in the Georgia courts." Pet App. C at 7. This Court held that the court of appeals had not considered cause but only prejudice in its ruling on procedural default and remanded the case, because the Court disagreed that reasonable jurists could not debate whether Tharpe had shown prejudice. *Tharpe*, 138 S. Ct. at 546.

On remand, the court of appeals denied the COA a second time on the ground that Tharpe had not exhausted his claim in state court. Pet. App. B. Tharpe asked for reconsideration and showed the court that he sought state habeas review for a second time relying upon *Pena-Rodriguez* and the state courts had denied relief. Pet. App. A at 2. The court of appeals determined the claim was properly exhausted, so it went on to examine the other issues it had not decided—could reasonable jurists' debate: whether *Pena-Rodriguez* was retroactive; and whether Tharpe had shown cause to overcome the default—and denied the COA on those alternative bases.

Tharpe first complains about the court of appeals' exhaustion rulings, but there was nothing contradictory in the court's holdings on this issue. The court simply concluded that Tharpe needed to seek review of his claim under *Pena-Rodriguez* in state court before it could be properly considered by the federal court. Tharpe may disagree with the court's opinion on exhaustion, but that is not enough to show the court's rulings on this issue were contradictory.

Similarly, Tharpe's second criticism of the court of appeals' retroactivity determination fails. In the court of appeals' first order, it only "*assume[d]* for purposes of this case that *Pena-Rodriguez* [was] retroactive." Thus the Court's later *determination* that *Pena-Rodriguez* is not retroactive is not contradictory. Pet App. C at 7.

Tharpe's third argument that the court of appeals made dueling determinations regarding cause to overcome the default of his claim misrepresents the court of appeals' opinions. Tharpe contends that the court's second order found cause to overcome the default of his claim. However, the portion of the order Tharpe relies upon is the court of appeals' summary of the procedural history of Tharpe's juror-bias claim in the state and federal courts—which contains no factual or legal determinations. Pet. App. B at 1-3. Instead, it pointed out that Tharpe raised his juror-bias claim in his first state habeas proceeding based on "facts of which he discovered more than seven years after trial." *Id.* at 2. The court did not state or imply that the "facts" were *not discoverable until seven years after trial*—merely that seven years later was when they were discovered. *Id.* The court, in the next paragraph, recited that the state habeas court found the claim was procedurally defaulted. *Id.* at 2-3. In a footnote to this portion of the order,

the court of appeals' pointed out that because trial counsel "had not yet learned of Gattie's racial animus" counsel "could not have raised" the claim "at trial or on appeal." *Id.* at 3, n.2. While the court of appeals stated that trial counsel did not raise the claim because they were not aware of facts in support, the court did not state, or find, that trial counsel *could not have discovered* the facts in support of the claim earlier. Tharpe's attempt to create a finding where there is none is unavailing.

Finally, Tharpe alleges the court of appeals "erect[ed] a variety of procedural barriers of dubious substance" to deny his motion for COA. The court did not "erect" "procedural barriers." The Warden asserted his affirmative defenses of *Teague* and procedural default in the district court in response to Tharpe's motion to reopen his case under Rule 60(b)(6). ECF No. 89. The district court held that *Pena-Rodriguez* was not retroactive and Tharpe had not shown cause and prejudice to overcome the procedural default of his juror-bias claim. ECF No. 95. In remanding this case to the court of appeals, this Court pointed out that the "District Court denied Tharpe's Rule 60(b) motion on several grounds not addressed by the Eleventh Circuit" on which this Court "express[ed] no view[s]" and acknowledged that given the "standard for relief from judgment under Rule 60(b)(6), which is available only in 'extraordinary circumstances,' [], Tharpe faces a high bar in showing that jurists of reason could disagree whether the District Court abused its discretion in denying his motion." *Tharpe*, 138 S. Ct. at 546 (citation omitted) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 536, 125 S. Ct. 2641, 2650 (2005)). Given that this Court specifically acknowledged there were other grounds to be decided by the court of appeals—which included

Pena-Rodriguez's retroactivity and cause to overcome the default—and the "high bar" to overcome to reopen his case, Tharpe's complaint fails.

Tharpe has failed to show that court of appeals' decisions were "contradictory" or that it determined grounds not decided by the district court or contemplated by this Court in remanding the case. His argument is not worthy of this Court's certiorari review.

B. The court of appeals correctly applied the COA standard.

To obtain a COA under 28 U.S.C. § 2253(c), a habeas prisoner must make a "substantial showing of the denial of a constitutional right." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039 (2003). Under the controlling standard, a petitioner must "show [] 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.'" *Id.* (quoting *Slack v. McDaniel*, 529 U.S. at 484).

This Court has explained that "where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Where a claim has been dismissed on procedural grounds, then a petitioner must make two showings—"one directed at the underlying constitutional claims and one directed at the district court's procedural holding." *Id.* at 485. As *Slack* pointed out, each "component of the § 2253(c) showing is part of a threshold

inquiry," which promotes deciding *first* the component that provides "an answer … more apparent from the record"—typically "procedural issues." *Id.*

"Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 528, 125 S. Ct. 2641, 2645 (2005). However, the "Rule concludes with a catchall category—subdivision (b)(6)—providing that a court may lift a judgment for 'any other reason that justifies relief.'" *Buck v. Davis*, ___, U.S. ___, 137 S. Ct. 759, 772 (2017). But, as this Court has held, the "any other reason" that can justify relief under 60(b)(6) must be an "extraordinary circumstance," and "'[s]uch circumstances will rarely occur in the habeas context.'" *Buck*, 137 S. Ct. at 772 (quoting *Gonzalez*, 545 U. S. at 535). Further, "[i]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)." *Agostini v. Felton*, 521 U.S. 203, 239, 117 S. Ct. 1997, 2018 (1997).

The court of appeals correctly applied the COA standard when it determined reasonable jurists could not debate that *Pena-Rodriguez* does not apply retroactively and Tharpe failed to prove cause to overcome the procedural default of his juror-bias claim. Tharpe's arguments in support of certiorari review are for mere error correction—an insufficient vehicle for this Court to grant review.

1. *Buck* does not support granting a COA as to Tharpe's Rule 60(b)(6) motion because reasonable jurists could not debate that *Pena-Rodriguez* is not retroactive.

Buck sought to reopen his § 2254 case under Rule 60(b)(6) for consideration of his procedurally defaulted trial counsel ineffective-assistance claim, which concerned the presentation of racially discriminatory evidence

by the petitioner's own trial counsel. *Buck*, 137 S. Ct. at 771-72. In support, Buck argued that "the change in law affected by *Martinez* and *Trevino*, which, if they had been decided earlier, would have permitted federal review of [his] defaulted [ineffective-assistance] claim." *Id.* at 772. This Court held, based on several factors, that Buck proved reasonable jurists could debate whether he had shown "extraordinary circumstances" to reopen his case, that *Martinez* and *Trevino* excused the default of his ineffective-assistance claim, and trial counsel were ineffective for presenting evidence that made Buck's race a sentencing phase consideration. *Id.* at 773-79.

However, the Court's holdings came with a large caveat. At the conclusion of *Buck*, the Court held that the State's *Teague* defense to the retroactivity of *Martinez* and *Trevino* in Buck's Rule 60(b)(6) proceedings was "waived." *Id.* at 780. The Court then explained that if it "were to entertain the State's eleventh-hour *Teague* argument and find it persuasive, Buck's *Strickland* and Rule 60(b)(6) contentions—the issues we thought worthy of review—would be insulated from our consideration." *Id.* Thus, if the State had made a successful *Teague* argument in the district court, reasonable jurists could not debate that Buck would not have been entitled to Rule 60(b)(6) relief.

Likewise, in Tharpe's case, unless *Pena-Rodriguez* is retroactive, Tharpe is precluded from using Mr. Gattie's verdict impeaching testimony as an "extraordinary circumstance" to reopen his § 2254 case. As argued extensively above, reasonable jurists could not debate that *Pena-Rodriguez* is not retroactive. *See also Tharpe*, 138 S. Ct. at 551 (Thomas, J., dissenting) ("no reasonable jurist could argue that *Pena-Rodriguez* applies retroactively on collateral review"). Therefore, *Buck* does not support Tharpe's argument

that the court of appeals wrongly decided that reasonable jurists could not debate that the district court properly denied his Rule 60(b)(6) motion.

At the conclusion of this portion of Tharpe's brief, citing *Buck*, he argues in a footnote that the court of appeals lacked "jurisdiction" to decide *Pena-Rodriguez*'s retroactivity under the COA standard because, ostensibly, doing so placed the court in the erroneous position of deciding the "merits of the appeal."[3] Pet. at 37, n.27. But nothing in *Buck* suggests that the court of appeals lacked jurisdiction to determine if reasonable jurists could debate the retroactivity of *Pena-Rodriguez*. Moreover, as Tharpe admitted in the next sentence of his brief, retroactivity was a "purely legal question" that did not address the merits of his juror-bias claim. *Id.* Tharpe fails to explain how the court of appeals could have addressed the issue in any different manner that would have complied with the COA standard.

2. *Buck* does not support granting a COA as to Tharpe's Rule 60(b)(6) motion because reasonable jurists could not debate that he failed to prove cause.

"The existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986). Relying on his erroneous interpretation of the court of appeals' second opinion denying COA, Tharpe argues he has proven cause to overcome the default

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[3] Tharpe also alleges the court of appeals "interposed a merits-based rationale" in its first denial of COA, which led to this Court's remand. Pet. at 32. However, this Court's remand opinion does not imply or hold that was the error with the court of appeals' first denial. Instead, the Court's remand was based solely on its disagreement with the court of appeals' prejudice determination. *Tharpe*, 138 S. Ct. at 546,

because he could not have discovered Mr. Gattie's racial views until his state habeas proceeding. Pet. at 34-35. However, the court of appeals did not make that finding, Tharpe did not plead that reason as cause in his original state or federal habeas proceedings, and there is no evidence in the record to support that assertion.

During Tharpe's original state habeas proceeding, his only possible offering of cause was a statement by habeas counsel that Mr. Gattie's affidavit was also being tendered on "the issue of trial counsel's ineffectiveness and motion for new trial for failing to have interviewed Mr. Gattie." ECF No. 14-1 at 42. However, as correctly found by the state habeas court, and not disputed by Tharpe, he presented no evidence or argument in support of that claim.[4] Pet. App. H at 102.

Nor did Tharpe offer a basis for cause in the district court. Despite being given two opportunities to plead and prove cause, Tharpe only generally alleged ineffective assistance of counsel as cause to overcome the default—which the district court found insufficient. *See* ECF No. 37 at 9-10. The court of appeals detailed this history and correctly determined that Tharpe's "attempt to show cause [was] wholly unsubstantiated" and he "failed to make the requisite showing of cause to overcome his procedural default." Pet. App. A at 9.

Given this record, Tharpe's interpretation of the court of appeals' second opinion is even more unfounded. As shown above, the court of appeals did not hold that Tharpe had shown cause. Although the court commented that Tharpe did not learn about Mr. Gattie's racial views until seven years after

[4] Tharpe's CPC application to the Georgia Supreme Court did not include a juror-bias claim. ECF No. 19-12 thru 19-13.

trial, *the court did not find this evidence was not discoverable until that time.* And there is absolutely no evidence in the record that supports Tharpe's contention that he could not have discovered this information until seven years later.[5] Indeed, this basis for cause seems particularly insufficient given that state habeas counsel, with no alleged indication that any of the jurors were biased, were able to investigate and bring the claim immediately thereafter.

Tharpe also argues in a footnote that the court of appeals was "wrong to assert that Petitioner has only alleged ineffective assistance of counsel as cause for the default." Pet. at 18, n.13. Citing to a footnote in his reply brief in support of his Rule 60(b)(6) motion to the district court, Tharpe alleges he proved cause "by pointing out that Barney Gattie's racial bias was not discovered, and could not reasonably have been discovered, until his attorneys conducted jury interviews in state habeas proceedings – facts apparent from the state court record" and "direct[ing]" the district court to *Turpin v. Todd*, 268 Ga. 820, 493 S.E.2d 900 (1997), in support. *Id.* However, as Justice Thomas correctly stated in his dissent to the grant of certiorari review in this case, "Tharpe never raised this argument in state court, so the state court did

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[5] Tharpe contends that "it is undisputed that Petitioner could not have known of the predicate facts of his claim prior to the time that his postconviction lawyers interviewed jurors." Pet. at 35. In Tharpe's state and federal habeas proceedings, the Warden had no reason to "dispute" a claim not made. However, despite Tharpe's failure to raise the issue below, the Warden did dispute in the court of appeals in response to Tharpe's motion for COA any implied argument in support of this allegation with the following: "Petitioner has had nearly two decades to explain to the state and federal courts *why he waited until seven years after his trial to raise his juror misconduct claim, and has never done so*." Response in Opposition to Motion for Certificate of Appealability and Motion for Stay of Execution, CA11 No. 17-14027 at 27.

not err in failing to accept it. Nor did the District Court abuse its discretion in failing to address it, since Tharpe merely mentioned it in a footnote in his reply brief where he was explaining the state court's decision."[6] *Tharpe*, 138 S. Ct. at 552.

In sum, Tharpe's new argument in support of cause is just another "conclusory allegation" with no evidence in support, as was his original cause argument of ineffective-assistance. *Tharpe*, 138 S. Ct. at 552. More importantly, Tharpe has failed to prove that the court of appeals' decision misapplies this Court's precedent or stands in conflict with the other circuit courts, thus reducing Tharpe's argument for certiorari review to a request for mere error correction.

[6] Likewise, this assertion was represented in a footnote in Tharpe's original application for COA (CA11 No. 17-14027 at 38 n.15) and did not make it to the body of his briefing until his reply in support of his COA application (CA 11 No. 17-14027 at 12). Moreover, the court of appeals does not generally entertain arguments either not presented or not fairly presented in the district court. *See Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1352 (11th Cir. 2009) (where "[t]he district court did not consider that argument because it was not fairly presented . . . . we will not decide it"); *Skinner v. City of Miami*, 62 F.3d 344, 348 (11th Cir. 1995) ("[A]s a general rule, an appellate court will not consider a legal issue or theory raised for the first time on appeal.").

CONCLUSION

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

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2019, I served this brief on all parties required to be served by mailing a copy of the brief to be delivered via email and post-prepaid and addressed as follows:

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