

## **APPENDIX A**



**SUPREME COURT OF GEORGIA**

Case No. S09E0780

Atlanta, April 19, 2010

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

**KEITH LEROY THARPE v. HILTON HALL, WARDEN**

**From the Superior Court of Butts County.**

**Upon consideration of the Application for Certificate of Probable Cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied. All the Justices concur, except Hunstein, C.J., who dissents, and Thompson, J., disqualified.**

Trial Court Case No. 93V144

**SUPREME COURT OF THE STATE OF GEORGIA**

Clerk's Office, Atlanta

I certify that the above is a true extract from minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

*Pamela M. Smith*, Deputy Clerk

## APPENDIX B

IN THE SUPERIOR COURT OF BUTTS COUNTY  
STATE OF GEORGIA

KEITH THARPE,

Petitioner,

v.

ERIC SELLERS, Warden,  
Georgia Diagnostic and  
Classification Center,

Respondent.

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CIVIL ACTION NO.  
2017-HC-13

HABEAS CORPUS

ORDER

This is Petitioner's second state habeas petition. Petitioner again argues the same juror racial bias claim previously raised and found to be procedurally defaulted by this Court and again claims he is intellectually disabled, which assertion has already been reviewed and rejected on the merits by this Court. This Court finds Petitioner's claim of juror racial bias is barred as res judicata, and, in the alternative, is still procedurally defaulted. Additionally, Petitioner's claims attendant to his allegation of intellectual disability are barred as res judicata. Accordingly, Petitioner's second state habeas petition is DISMISSED.

By Margaret Melville  
RICHONDA SMITH, CLERK

2017 SEP 26 AM 9:15

FILED BUTTS  
SUPERIOR COURT

### **Standard of Review for Res Judicata**

Bedrock principles of law establish that:

Res judicata thus “prevents the re-litigation of all claims which have already been adjudicated, or which could have been adjudicated, between identical parties or their privies in identical causes of action.”

*Odom v. Odom*, 291 Ga. 811, 812 (1) (2012); *see also Bruce v. State*, 274 Ga. 432, 434 (2) (2001) (“Without a change in the facts or the law, a habeas court will not review an issue decided on direct appeal.”); *Hall v. Lance*, 286 Ga. 365, 687 (2010).

### **Standard of Review for Procedural Default**

Under the procedural default doctrine set forth in *Black v. Hardin*, 255 Ga. 239 (1985) and *Valenzuela v. Newsome*, 253 Ga. 793 (1985) and codified at O.C.G.A. § 9-14-48(d), issues which were not raised at trial or on appeal may not be litigated in a habeas corpus proceeding absent a showing of cause and actual prejudice or of a miscarriage of justice. O.C.G.A. § 9-14-48(d); *Black v. Hardin*, *supra*; *Valenzuela v. Newsome*, *supra*; *Hance v. Kemp*, *supra*; *White v. Kelso*, 261 Ga. 32 (1991).

### **Juror Misconduct Claim**

Petitioner’s exact claim of juror racial bias was presented in Petitioner’s original state habeas petition. This Court previously found the claim to be procedurally defaulted. Petitioner has presented no new facts to overcome this

procedural bar. Instead, Petitioner alleges the United States Supreme Court's recent decision in *Peña-Rodriguez v. Colorado*, \_\_U.S.\_\_, 137 S. Ct. 855 (2017), is new law that requires the re-examination of his juror bias claim. At issue in *Peña-Rodriguez* was a Sixth Amendment challenge to the Colorado evidentiary rule that did not allow impeachment of jury verdicts based upon the internal deliberations of jurors. The Court rejected the continued constitutionality of this evidentiary rule by holding:

[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.

*Peña-Rodriguez*, 137 S. Ct. at 869.

First, the Court finds that Petitioner has failed to show that *Peña-Rodriguez* is retroactive to his collateral proceeding. Second, the Court notes that while the Court previously found Petitioner's juror testimony evidence was inadmissible under the no-impeachment rule of evidence, the Court also assumed that even if Petitioner's evidence were admissible he had still failed overcome the procedural default of his claim. Specifically, the Court found that Petitioner had failed to show that the juror in question, Barney Gattie, had relied upon any alleged racial bias in sentencing Petitioner to death. (Final Order, December 1, 2008, pp. 102-103). Therefore, even if *Peña-Rodriguez* were retroactive, it does not present new

law or facts to overcome the res judicata bar as this Court already reviewed Petitioner's evidence and found it did not show that racial animus was relied upon to sentence Petitioner.

Accordingly, the Court FINDS Petitioner's juror racial bias claim is barred from review under res judicata and is DISMISSED.

In the alternative, assuming *Peña-Rodriguez* is retroactive, Petitioner's claim is still procedurally defaulted. Petitioner has failed to show cause with any evidence or persuasive authority. Additionally, Petitioner has failed to show prejudice.

While there was evidence that one of Petitioner's jurors, Mr. Gattie, used a racially derogatory term associated with Petitioner's race, when read as a whole, the record does not show that racial animus was relied upon by the jury to convict or sentence Petitioner. The Court specifically credits Mr. Gattie's live deposition testimony, Mr. Gattie's second affidavit presented by Respondent, which Mr. Gattie swore was the truth, and the testimony from the remaining jurors. The Court finds the affidavit from Mr. Gattie presented by Petitioner's counsel to be less than credible given the circumstances under which Mr. Gattie testified it was obtained, specifically his testimony that he did not swear to the truth of the information in the affidavit. Consequently, Petitioner has failed to show prejudice

as he has failed to show a reasonable probability of a different outcome at his motion for new trial or on appeal under the *Peña-Rodriguez* standard.

Consequently, the Court FINDS Petitioner has failed to show cause and prejudice, or a miscarriage of justice to overcome the procedural default of his juror bias claim. Petitioner's juror bias claim is, in the alternative, DISMISSED as procedurally defaulted.

#### **Petitioner's Challenge to Georgia's Burden of Proof for Intellectual Disability Claims.**

Petitioner's allegation that Georgia's burden of proof for claims of intellectual disability is unconstitutional is barred from this Court's review as res judicata. This claim was raised and rejected in Petitioner's first state habeas corpus petition before this Court. He has presented no new law or facts to overcome this bar. Petitioner argues that *Moore v. Texas*, 137 S. Ct. 1039 (2017), is new law that allows this Court to review this claim a second time. In *Moore*, the Supreme Court held that diagnostic standards should be consulted in assessing claims of intellectual disability. *Moore* does not dictate burdens of proof and is not new law that overcomes the procedural bar. Accordingly, this Court FINDS this claim is barred by res judicata and the claim is DISMISSED.

#### **Petitioner's Claim that He is Intellectually Disabled**

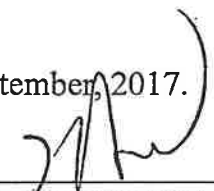
Petitioner's claim that he is intellectually disabled is also barred from this Court's review as res judicata. Petitioner presented extensive evidence on this



claim in his first state habeas proceedings. This Court previously reviewed those claims using the current clinical diagnostic standards. *Moore* does not provide new law and Petitioner has asserted no new facts to overcome that bar. Therefore, this Court FINDS this claim is barred by res judicata and is DISMISSED.

As the Court is able to determine from the face of the pleadings that the claims are barred under res judicata, the DISMISSES the petition without a hearing. *See Collier v. State*, 290 Ga. 456 (2012). Petitioner's request for a stay of execution is DENIED.

SO ORDERED, this the 25 day of September, 2017.



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THOMAS H. WILSON  
Chief Judge of the Superior Courts  
Towaliga Judicial Circuit

Prepared by:  
Sabrina D. Graham  
Senior Assistant Attorney General

## APPENDIX C



**SUPREME COURT OF GEORGIA**  
Case No. S18W0242

Atlanta September 26, 2017

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

**KEITH THARPE v. ERIC SELLERS, WARDEN**

After a careful review of Tharpe's application for a certificate of probable cause to appeal the dismissal of his second state habeas petition, the Warden's response, Tharpe's reply to the response, and the record in this case, the application is hereby denied as lacking arguable merit because the claims presented in the petition are res judicata or otherwise procedurally barred. See Supreme Court Rule 36.

Tharpe's motion for a stay of execution is also denied.

Hines, C. J., Blackwell, Boggs, Peterson, Grant, JJ., and Judge Charles J. Bethel concur. Melton, P. J., Benham, and Hunstein, JJ., dissent. Nahmias, J., not participating.

**SUPREME COURT OF THE STATE OF GEORGIA**

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

*Theresa A. Barnes*, Clerk

## APPENDIX D



**SUPREME COURT OF GEORGIA**

Case No. S18W0242

Atlanta November 2, 2017

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

**KEITH THARPE v. ERIC SELLERS, WARDEN**

Upon consideration of Tharpe's motion for reconsideration and the included motion to hold this case in abeyance, they are both denied.

Hines, C. J., Blackwell, Boggs, Peterson, Grant, JJ., and Judge Charles J. Bethel concur. Melton, P. J., Benham, and Hunstein, JJ., dissent. Nahmias, J., not participating.

**SUPREME COURT OF THE STATE OF GEORGIA**

Clerk 's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

*Thirise A. Baume* Clerk

## APPENDIX E



**SUPREME COURT OF GEORGIA**

Case No. S18W0242

Atlanta January 25, 2018

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

**KEITH THARPE v. ERIC SELLERS, WARDEN**

Upon consideration of Tharpe's request for leave to file a second motion for reconsideration, it is denied.

Hines, C. J., Melton, P. J., Blackwell, Boggs, Peterson, Grant, JJ., and Judge Charles J. Bethel concur. Benham and Hunstein, JJ., dissent. Nahmias, J., not participating.

**SUPREME COURT OF THE STATE OF GEORGIA**

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

*Thiase A. Benham* Clerk