No. 18-6819

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

KEITH THARPE,

Petitioner,

-v-

BENJAMIN FORD, WARDEN
Georgia Diagnostic Prison,

Respondent.

THIS IS A CAPITAL CASE

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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Petitioner, Keith Tharpe, respectfully submits this Reply Brief in support of his Petition for a Writ of Certiorari to review the judgments of the Eleventh Circuit Court of Appeals, entered in the above case on August 10, 2018, and April 3, 2018.

Respondent dismisses the first question presented, regarding the retroactivity of *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), as "mere error correction," Brief in Opposition ("BIO") at 18, 28, even though that issue is not, as Respondent contends, readily answered by *Teague v. Lane*, 489 U.S. 288 (1989), and despite the fact that the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") has expressly tasked this Court with determining the retroactivity of its own decisions. *See, e.g.*, *Tyler v. Cain*, 533 U.S. 656, 663 (2001) (in the context of successive litigation under 28 U.S.C. § 2244(b)(2)(A), "a new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive"). Respondent,

moreover, urges that Mr. Tharpe has failed to show cause for the procedural default of his claim, even though the record, as the Eleventh Circuit found in its April 3, 2018, order, demonstrates that the factual basis of the claim was not reasonably available prior to state habeas proceedings, a fact that establishes cause to excuse the default. The procedural barriers Respondent seeks to erect are illusory and this Court can, and must, grant certiorari in order to prevent the gross miscarriage of justice that would result from allowing the State of Georgia to carry out Mr. Tharpe's racism-tainted death sentence.

I. Whether *Teague*'s Analysis Determines The Retroactivity Of *Pena-Rodriguez* And Whether *Pena-Rodriguez* Has Retroactive Application To This Case Are Important Questions Of Federal Law Regarding Which Reasonable Jurists Could Debate And Which Merit Consideration By This Court.

Respondent's contention that the question of *Pena-Rodriguez*'s retroactive application is "mere error correction" arises from Respondent's simplistic view of the retroactivity issue and disregard of this Court's important role in determining the retroactivity of its own decisions, particularly under AEDPA.

A. Respondent's Assumption That *Teague*'s Analysis Governs The Retroactivity Question Here Ignores The Fact That *Teague*, By Definition, Applies To New Constitutional Rules Of Criminal Procedure – That Is Rules That "Are Designed To Enhance The Accuracy Of A Conviction Or Sentence By Regulating 'The Manner Of Determining The Defendant's Culpability'" – A Definition That Does Not Encompass The Rule Announced In *Pena-Rodriguez*.

Mr. Tharpe's first argument in his Petition regarding the retroactivity of *Pena-Rodriguez* is that *Teague* has no bearing on the retroactivity question because *Pena Rodriguez* did not set forth a constitutional rule of criminal procedure, new or otherwise. Petition at 20-24. Respondent has essentially ignored this argument, neither explaining how *Pena-Rodriguez* may be construed to be a rule of criminal procedure, given that it does not have any bearing on the conduct of a

criminal trial, or why *Teague* should apply irrespective of whether *Pena-Rodriguez* qualifies as a rule of criminal procedure.

Teague applies to "new constitutional rules of criminal procedure." *Teague*, 489 U.S. at 310. As this Court has explained, a constitutional rule of criminal procedure is "designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 730 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). *See* BIO at 18-28. But *Pena-Rodriguez* does not apply to trial proceedings, and it does not regulate the manner of determining a criminal defendant's guilt or innocence, or any issue bearing on punishment.[1] Rather, it establishes a narrow exception to an evidentiary rule that limits the *post-verdict* consideration of evidence used to impeach the verdict.

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[1] Respondent purports to address this argument, *see* BIO at 25-28, but does not. Instead, Respondent mischaracterizes Mr. Tharpe's reliance on Justice Kennedy's concurring statement in *Spencer v. Georgia*, 500 U.S. 960 (1991). According to Respondent, Mr. Tharpe cited Justice Kennedy's concurrence in the denial of certiorari as proof "that this Court has already determined that its holding in *Pena-Rodriguez* was retroactive." BIO at 25. Respondent further suggests that Mr. Tharpe has taken the position that Justice Kennedy's statement "bind[s] this Court on the question whether a rule announced 27 years later applies retroactively." BIO at 26. But Mr. Tharpe has made no such claims. Rather, he clearly identified Justice Kennedy's statement for what it is – a statement of a Supreme Court justice (and the justice who authored *Pena-Rodriguez*) that the propriety of evidence rules barring consideration of a juror's racism and its effect on a death sentence would not be barred by *Teague*. Petition at 36. As Mr. Tharpe suggested, Justice Kennedy's observations 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.'"'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations omitted). As such, the Eleventh Circuit erred in denying a COA.

In an effort to make Justice Kennedy's observations in *Spencer* inconsequential, Respondent also attempts to distinguish the circumstances present in *Spencer* from Mr. Tharpe's case, *see* BIO at 26-27, but the distinctions Respondent asserts – that the racist comments arose during deliberations and that no procedural bars were presented because the claim was raised on direct appeal – have no bearing on whether the rule announced in *Pena-Rodriguez*, or the comparable rule that could have been announced in a future habeas proceeding in *Spencer*, have retroactive application to Mr. Tharpe's case.

See, e.g., *United States v. Birchette*, 908 F.3d 50, 57 (4th Cir. 2018) (noting that *Pena-Rodriguez* created a "narrow exception" to the no-impeachment rule and citing cases). *Teague*, accordingly, has nothing to say about the retroactivity of *Pena-Rodriguez*.

If, as Mr. Tharpe contends, *Teague* does not apply here, then it is appropriate to look to the Court's treatment of retroactivity in other contexts to determine the question of *Pena-Rodriguez*'s retroactivity.[2] Elsewhere, this Court has held that "a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 96 (1993) (discussing consensus among the Court in several opinions in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991)). And, in addressing Congress's authority to legislate retroactively, this Court

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[2] Other models of retroactivity analysis may provide a more fitting approach than *Teague* for analyzing the retroactivity of *Pena-Rodriguez*. Though federal habeas corpus is distinct in providing for the collateral review of otherwise final orders, *Pena-Rodriguez* itself is aimed at the consideration of new evidence available to upend a judgment, whether final or not. Moreover, the means by which Mr. Tharpe has attempted to litigate his claim, Fed. R. Civ. P. 60(b), "provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment," and "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863 (1988) (citation omitted).

In *Liljeberg*, the Court affirmed an appeals court ruling that new, post-judgment evidence that the trial judge had a conflict of interest and should have recused himself created an appearance of impropriety under 28 U.S.C. § 455 and established "extraordinary circumstances" warranting relief from judgment under Rule 60(b)(6). As the Court explained, "analysis of the merits of the underlying litigation suggests that there is a greater risk of unfairness in upholding the judgment in favor of Liljeberg than there is in allowing a new judge to take a fresh look at the issues," and that neither party had shown "special hardship by reason of their reliance on the original judgment." *Id.* at 868-69. Here, the merits illustrate that Mr. Tharpe faces an enormous and irrevocable risk – wrongful execution – based not on the "appearance of impropriety," but on a "remarkable affidavit" by one of his jurors "present[ing] a strong factual basis for the argument that Tharpe's race affected [the juror's] vote for a death verdict." *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (per curiam). Such a situation, as shown by *Buck v. Davis*, 137 S. Ct. 759 (2017), satisfies Rule 60(b)(6)'s requirement of "extraordinary circumstances" justifying the reopening of Mr. Tharpe's final judgment.

has recognized that "[t]he essential inquiry" in determining the retroactive application of new statutory laws "is 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Vartelas v. Holder*, 566 U.S. 257, 273 (2012) (quoting *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 269-70 (1994)).[3] *See also Judulang v. Holder*, 565 U.S. 42, 63 n.12 (2011) ("[R]etroactivity analysis focuses on 'considerations of fair notice, reasonable reliance, and settled expectations'") (quoting *Landgraf*, 511 U.S. at 270).

The retroactivity principles set forth in these cases support the conclusion that *Pena-Rodriguez* applies retroactively to cases on collateral review. *Pena-Rodriguez* does not disrupt "settled expectations" and its rule adds no "new legal consequences" to the events at Mr. Tharpe's trial. Rather, *Pena-Rodriguez* protects well-established rights – the Sixth Amendment guarantee of an impartial jury and the Fourteenth Amendment guarantee of equal protection under the law – which existed long before Mr. Tharpe's trial and indisputably governed his trial. *See, e.g., Turner v. Murray*, 476 U.S. 28 (1986) (holding that a capital defendant charged with an interracial crime has the right to voir dire on racial bias, given the "unique opportunity for racial prejudice to operate but remain undetected" and "the complete finality of the death sentence").[4] *See generally Pena-*

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[3] Determining whether a statute has retroactive effect "demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" A statute has retroactive effect when it '"takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . ."'" *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (citations omitted).

[4] Indeed, Respondent's (mistaken) contention that Mr. Tharpe procedurally defaulted the racist-juror claim underscores that the legal basis for the claim presents nothing new; otherwise there would be yet another basis to excuse the default of the claim. *See, e.g., Bousley v. United States*, 523 U.S. 614, 622 (1998) ("[W]e have held that a claim that 'is so novel that its legal basis is not reasonably available to counsel' may constitute cause for a procedural default . . . .") (quoting *Reed v. Ross*, 468 U.S. 1, 16 (1984)).

Rodriguez, 137 S. Ct. at 867-68 (discussing this Court's commitment to rooting out racial discrimination in the justice system); *Buck*, 137 S. Ct. at 778 (same and noting that "[s]uch concerns are precisely among those we have identified as supporting relief under Rule 60(b)(6)") (citing *Liljeberg*, 486 U.S. at 864).

Moreover, even assuming *Teague* may be stretched out of shape to apply to the analysis of *Pena-Rodriguez*'s retroactivity, it should not be read to bar the application of *Pena-Rodriguez* to Mr. Tharpe's case. Relying on the dissenting opinion in *Pena-Rodriguez*, Respondent urges that the case "'established a new rule'" not "'dictated' by this Court's earlier precedent," because "'the opinion states that it is answering a question "left open" by this Court's earlier precedents.'" BIO at 21 (quoting *Tharpe*, 138 S. Ct. at 551 (Thomas, J., dissenting)). Respondent contends that this Court's "previous[] refus[al] to create a 'constitutional exception' to the 'no-impeachment rule' in two cases prior to *Pena-Rodriguez* – *Tanner* and *Warger*" demonstrates that *Pena-Rodriguez* announced a "new rule" within the meaning of *Teague*. BIO at 21. But the fact that prior to *Pena-Rodriguez* the Court had not recognized an exception to no-impeachment rules does not establish that the Court's decision to do so was not itself the logical and necessary result of the Court's prior decisions.[5]

"A holding constitutes a 'new rule' within the meaning of *Teague* if it 'breaks new ground,' 'imposes a new obligation on the States or the Federal Government,' or was not 'dictated by precedent existing at the time the defendant's conviction became final.'" *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (quoting *Graham v Collins*, 506 U.S. 461, 467 (1993) (quoting *Teague*,

[5] "[A]s our precedent interpreting *Teague* has demonstrated, rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." *Williams v. Taylor*, 529 U.S. 362, 382 (2000).

489 U.S. at 301)). "[A] holding is not so dictated . . . unless it would have been 'apparent to all reasonable jurists.'" *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (quoting *Lambrix* v. *Singletary*, 520 U.S. 518, 527-28 (1997)). As Mr. Tharpe has previously shown, *Pena-Rodriguez* imposes no new obligations on the States; its purpose and effect is to promote the right to a trial free from the pernicious effects of racial bias – rights that were recognized long before Mr. Tharpe's case went to trial. *See* Petition at 24-26. Although this Court, prior to *Pena-Rodriguez*, had not identified an exception to no-impeachment rules, that fact, on its own, does not show that the result in *Pena-Rodriguez* was not dictated by the Court's precedents. The Court had already recognized that there could be situations where justice and the Sixth Amendment right to a fair trial would override the evidentiary no-impeachment rule. *See Pena-Rodriguez*, 137 S. Ct. at 865-66 ("[T]he *Reid* and *McDonald* Courts noted the possibility of an exception to the [no-impeachment] rule in the 'gravest and most important cases.' . . . Yet since the enactment of Rule 606(b), the Court has addressed the precise question whether the Constitution mandates an exception to it in just two instances.") (quoting *United States v. Reid*, 53 U.S. 361, 366 (1851) and *McDonald v. Pless*, 238 U. S. 264, 269 (1915)). In those two cases, *Tanner v. United States*, 483 U.S. 107 (1987) and *Warger v. Shauers*, 135 S. Ct. 521 (2014), the Court concluded that the litigants' fair-trial rights were adequately protected by voir dire and other methods of detecting and redressing the partiality of jurors prior to verdict.

Unlike the situation in *Pena-Rodriguez*, where evidence presented post-verdict revealed that a juror's blatantly racist attitudes colored his view of the evidence and influenced his vote to convict, the issues in *Tanner* and *Warger* did not present the Court with circumstances that created a significant threat to the fairness and integrity of criminal trials. In *Tanner*, the issue was whether evidence from one juror that other jurors were drinking alcohol during the trial could be introduced.

The Court ruled that this situation was not sufficient to overcome Fed. R. Evid. 606(b), because "Petitioner's Sixth Amendment interests in an unimpaired jury . . . are protected by several aspects of the trial process," including voir dire, the opportunity of the court, the parties, and the jurors to observe juror behavior, and the potential use of "nonjuror evidence." *Tanner*, 483 U.S. at 127. In *Warger*, the Court similarly rejected the argument that evidence a juror may have lied during voir dire was sufficient to overcome Rule 606(b)'s restriction on evidence impeaching the verdict. As the Court observed, "[e]ven if jurors lie in voir dire in a way that conceals bias, juror impartiality is adequately assured by the parties' ability to bring to the court's attention any evidence of bias before the verdict is rendered, and to employ nonjuror evidence even after the verdict is rendered." 135 S. Ct. at 529. Even while upholding Rule 606(b), however, the *Warger* Court acknowledged:

> There may be cases of juror bias so extreme that, *almost by definition*, the jury trial right has been abridged. *If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process.* We need not consider the question, however, for those facts are not presented here.

Id. at 529 n.3 (emphasis added). *See also McDonald*, 238 U.S. at 269 (noting that an exception to the common-law no-impeachment rule "might occur in the gravest and most important cases"); *Reid*, 53 U.S. at 366 ("[C]ases might arise in which it would be impossible to refuse [juror testimony] without violating the plainest principles of justice.").

Neither of the cases Respondent cited – or any other case prior to this Court's decision in *Pena-Rodriguez* – addresses whether juror testimony proving that racial bias by one or more jurors impacted the verdict met the circumstances set forth in *McDonald, Reid*, and *Warger* for justifying an exception to the no-impeachment rule. That does not mean that the decision in *Pena-Rodriguez* was not dictated by this Court's precedents. Reasonable jurists would conclude that this Court's unwavering commitment to eradicating racial discrimination in the justice system (and its

recognition that the no-impeachment rule is not untouchable[6]) dictated the holding of *Pena-Rodriguez*. As this Court recognized, long before Mr. Tharpe's capital trial, given the pernicious, and often hidden, effects of race discrimination in the criminal justice system, extraordinary measures must be applied to ferret out and remedy racial bias: "Because of the risk that the factor of race may enter the criminal justice process, we have engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (quoting *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)). *See, e.g.*, *United States v. Mechanik*, 475 U.S. 66, 70 n.1 (1986) (noting "that racial discrimination in the selection of grand jurors is so pernicious, and other remedies so impractical, that the remedy of automatic reversal was necessary as a prophylactic means of deterring grand jury discrimination in the future . . . and that one could presume that a discriminatorily selected grand jury would treat defendants of excluded races unfairly") (citing *Vasquez v. Hillery*, 474 U.S. 254 (1986)); *Turner*, 476 U.S. at 35 (holding that a capital defendant accused of an interracial crime must be permitted to voir dire on the subject of racial bias, noting that "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. . . . [A] juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. . . . More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.").

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[6] Of course, under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, a state evidentiary rule may not conflict with the federal constitution. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383 (2015).

The outcome in *Pena-Rodriguez* is the only result consistent with this Court's "unceasing efforts" to stamp out the effects of racial bias in the criminal justice system. It can be no surprise, then, that in *Pena-Rodriguez* this Court concluded that proof that race discrimination tainted a jury's verdict constituted "juror bias so extreme," *Warger*, 135 S. Ct. at 529 n.3, or presented "the gravest and most important [of] cases," *McDonald*, 238 U.S. at 269, or "violated the plainest principles of justice," *Reid*, 53 U.S. at 366, as to warrant an exception to the no-impeachment rule. *See, e.g.*, *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 258-59 (2007) (noting with respect to whether a rule was "dictated by precedent" that "[t]he relevance of those cases lies not in their results – in several instances, we concluded, after applying the relevant law, that the special issues provided for adequate consideration of the defendant's mitigating evidence – but in their failure to disturb the basic legal principle that continues to govern such cases: The jury must have a 'meaningful basis to consider the relevant mitigating qualities' of the defendant's proffered evidence"). Because the result in *Pena-Rodriguez* imposed no new obligations on the State and was "dictated by precedent," it did not constitute a "new rule" under *Teague*, and *Teague* does not bar its retroactive application to this case.

B. Respondent's Dismissal Of Question One As Mere "Error Correction" Ignores The Important Role AEDPA Has Assigned To This Court To Determine the Retroactivity of Its Rulings.

Respondent contends that this case does not warrant this Court's attention because Mr. Tharpe seeks mere "error correction" of the courts below. According to Respondent, this case is not worthy of certiorari review because "Tharpe does not identify any conflict of authority" and simply "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." BIO at 24. This characterization of the retroactivity issue is incorrect. As detailed above, the issue of

Teague's applicability and/or its application is not a simple matter and seeking review of the Eleventh Circuit's rulings is hardly "mere error correction."[7]

Nor is it accurate that this Court's jurisdiction or interests are limited to only those issues where there is a split of authority. Supreme Court Rule 10 states that certiorari review is warranted where "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c).[8] The questions presented in Mr. Tharpe's case are "important" and have implications beyond this matter. Moreover, the ultimate issue at stake – whether the State should be permitted to carry out an execution so tainted by racial bias – is a question of grave magnitude.

Respondent's argument also ignores the important role assigned to this Court by AEDPA to determine the retroactivity of its own decisions. As this Court has explained, AEDPA – specifically 28 U.S.C. § 2244(b)(2)(A) – permits a habeas petitioner to seek permission to file a successive petition based on intervening Supreme Court law "only if this Court has held that the new rule is retroactively applicable to cases on collateral review." *Tyler*, 533 U.S. at 662. *See also Dodd v. United States*, 545 U.S. 353, 359 (2005) (28 U.S.C. § 2255(h)(2) authorizes the filing

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[7] The dissent in *Buck* had similarly dismissive words regarding the majority opinion: "Today's decision has few ramifications, if any, beyond the highly unusual facts presented here. The majority leaves entirely undisturbed the black-letter principles of collateral review, ineffective assistance of counsel, and Rule 60(b)(6) law that govern day-to-day operations in federal courts." *Buck*, 137 S. Ct. at 781. Taken at face value, such criticism simply indicates that this Court, on occasion and perhaps particularly in capital cases, has recognized the need to step in to correct egregious errors by the lower courts. *See, e.g.*, *Wearry v. Cain*, 136 S. Ct. 1002 (2016) (*per curiam*); *Foster v. Chatman*, 136 S. Ct. 1737 (2016); *Miller-El v. Dretke*, 545 U.S. 231 (2005).

[8] The criteria set forth in Rule 10, moreover, "neither control[] nor fully measur[e] the Court's discretion." Sup. Ct. Rule 10.

of a second or successive motion "only in limited circumstances, such as where [the applicant] seeks to take advantage of 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"). Although this case is not in a successive posture, it is only through cases that are not in a successive posture that this Court can make the necessary retroactivity finding, given that AEDPA precludes appellate review of a circuit court's decision not to permit the filing of a successive petition. *See* 28 U.S.C. § 2244(b)(3)(E) (grant or denial of leave to file a successive petition "shall not be the subject of a petition for rehearing or for a writ of certiorari"); 28 U.S.C. § 2255 (h) (incorporating § 2244 standards).

Whether *Pena-Rodriguez* applies retroactively is an important question whose answer lies particularly within this Court's responsibility. Certiorari should be granted to decide this issue.

II. Mr. Tharpe's Racist-Juror Claim Is Not Procedurally Defaulted.

In addition to arguing that "reasonable jurists" could not debate that *Pena-Rodriguez* is not retroactive, Respondent's other main point is that Mr. Tharpe's claim is procedurally defaulted and thus may not be addressed. Respondent's argument relies on distorting the record. As detailed below (and as the Eleventh Circuit found in its April 3, 2018, order), Mr. Tharpe could not have known of the factual basis for the racist-juror claim at the time of trial and direct appeal, and he has accordingly shown "cause" to overcome the procedural default of the claim.

Whether cause exists for a procedural default "ordinarily turn[s] 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. . . . [A] showing that the factual . . . basis for a claim was not reasonably available to counsel . . . would constitute cause under this standard." *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (citing *Reed v. Ross*, 468 U.S. 1, 16 (1984)). As Mr. Tharpe has argued throughout the Rule 60(b) proceedings, the factual basis for his claim that Barney Gattie's death-

penalty vote was tainted by racial bias could not have been known at the time of trial and direct appeal and, accordingly, it was properly raised in state habeas proceedings. *See* Dkt. No. 93 at 13 n.7; COA Application, *Tharpe v. Warden*, CA 11 No. 17-14027, dated September 8, 2017, at 28 n.15; Reply Brief in Support of COA Application, CA 11 No. 17-14027, dated September 19, 2017, at 5-8; Reply Brief in Support of Petition for Writ of Certiorari in *Tharpe v. Sellers*, Sup. Ct. No. 17-6075, at 7-8; *see also* Dkt. No. 77 at 5 (discussing Barney Gattie's voir dire testimony).[9]

The record reflects that Barney Gattie's voir dire examination raised no alarms and he did not express any biased views. During general voir dire, Mr. Gattie stated his address and his and his wife's employment, Dkt. No. 11-1 at 52; indicated he knew the prosecutor and some State witnesses, but said this would not influence him, Dkt. No. 11-1 at 62-68; and stated that someone had broken into his restaurant and stolen the cash register, Dkt. No. 11-1 at 71-72. During

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[9] Respondent insinuates that Mr. Tharpe waived unavailability as a basis to find "cause" because Mr. Tharpe, prior to the Rule 60(b) proceedings, did not argue that the factual basis of the claim was unavailable at the time of trial and direct review. *See* BIO at 8, 36-38. But there is no exhaustion requirement for a non-constitutional, record-based ground for finding cause. Although this Court has held that a habeas petitioner must exhaust a claim that counsel's ineffective representation constituted cause for failing to raise a defaulted claim, *see Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000), the rationale supporting that holding is that "effective assistance adequate to establish cause of the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim" and, as such, "*that* constitutional claim, like others, [must] first be raised in state court." *Id.* at 451-42 (citing *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986)). That non-constitutional grounds for showing cause to excuse a procedural default do *not* have to be exhausted is demonstrated by the fact that the Court, in *Carpenter*, invited the lower court to explore other grounds to excuse the default upon remand. *Id.* at 453. *See, e.g., Ward v. Hall*, 592 F.3d 1144, 1157 (11th Cir. 2010) (observing that "[a] showing that the legal basis for a claim was not 'reasonably available to counsel' could constitute cause," and that "an ineffective-assistance-of-counsel claim, *if both exhausted and not procedurally defaulted*, may constitute cause") (emphasis added). Because Mr. Tharpe had no basis to suspect that Juror Gattie held racially biased views, trial and appellate counsel had no reason to investigate whether he did. *See Turpin v. Todd*, 268 Ga. 820, 827 (1997) (counsel had no duty to search for evidence of jury-bailiff misconduct where there was "no evidence in th[e] case that would have alerted trial or appellate counsel to the presence of any misconduct by the jury or the bailiff").

individual voir dire, Mr. Gattie advised that he had read about the case in the paper and heard people talk about it, but knew nothing about it; he said he could set aside what he had heard and it would not influence him. Dkt. No. 11-3 at 86. He testified that he could consider both the death penalty and life imprisonment, and stated that he would keep an open mind. Dkt. No. 11-3 at 86-90. He advised that he would have to hear all the evidence, including mitigation, before deciding the sentence, and understood the State had the burden of proof. Dkt. No. 11-3 at 91-93. When defense counsel asked him about his earlier statement that he was familiar with the prosecutor, Mr. Gattie said he saw the prosecutor occasionally at his seafood store. Dkt. No. 11-3 at 95-96. He reiterated that he would have to hear the evidence before making a judgment and said he would follow the law. Dkt. No. 11-3 at 96-97.

Nothing Juror Gattie said during voir dire gave any hint of his racist views. Moreover, safeguards to protect the right to an impartial jury – "voir dire, observation of juror demeanor and conduct during trial, juror reports before the verdict, and nonjuror evidence after trial" – "may be compromised, or they may prove insufficient" to safeguard against racial bias. *Pena-Rodriguez*, 137 S. Ct. at 868-69. Because Mr. Tharpe had no reason to second-guess Barney Gattie's attitudes towards African Americans based on his voir dire examination and trial conduct, and the fact of his racial bigotry was therefore unknown, the claim that Mr. Tharpe's death sentence was tainted by Barney Gattie's racism was unavailable at the time of trial and direct appeal. And the Eleventh Circuit so found, in its April 3, 2018, order:

> [The district court] denied the pre-*Pena-Rodriguez* Claim on two grounds: (1) Tharpe procedurally defaulted the Claim because he had failed to raise it at trial or in his direct appeal to the Supreme Court of Georgia,[2] and (2) Georgia's no-impeachment rule barred parties from impeaching a jury verdict with the post-trial testimony of jurors.
>
> [2] Since Tharpe had not yet learned of Gattie's racial animus toward him and its possible effect on jury deliberations, and therefore on the jury's decision to impose

> the death penalty, Tharpe's trial counsel *could not have raised the pre-Pena-Rodriguez Claim at trial or on direct appeal*.

Order dated April 3, 2018, at 2-3 (Appendix B) (emphasis added).[10] The reasonable unavailability of the racist-juror claim at the time of Mr. Tharpe's trial and direct appeal provides cause to excuse any procedural default of the claim. *See, e.g., Ward*, 592 F.3d at 1176-77 (finding cause for default of bailiff-juror misconduct claim given "the failure of the bailiff and/or the trial judge to inform Ward or his counsel about the jury's question concerning parole"); *Todd*, 268 Ga. at 827 (cause shown where "there was simply no evidence in this case that would have alerted trial or appellate counsel to the presence of any misconduct by the jury or the bailiff"); *cf. Williams*, 529 U.S. at 442 (under 28 U.S.C. § 2254(e)(2), which incorporates the cause-and-prejudice test, counsel did not show a lack of diligence as "[t]he record contains no evidence which would have put a reasonable attorney on notice that Stinnett's non-response was a deliberate omission of material information"). Mr. Tharpe's proof of "cause" shows, at the very least, that jurists of reason could disagree with the district court's default determination.[11] The Eleventh Circuit accordingly erred in denying a COA on the ground that Mr. Tharpe had not shown cause to the excuse the default.

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[10] Respondent claims Mr. Tharpe has distorted the Eleventh Circuit's meaning, BIO at 30-31, but Mr. Tharpe relies on the plain meaning of the words and their syntax. Since the court explained that Mr. Tharpe "could not have raised the pre-*Pena-Rodriguez* Claim at trial or on direct appeal" in a footnote qualifying a clause explaining the district court's procedurally default finding, it is hard to imagine what other meaning the Eleventh Circuit could have had.

[11] Were this Court to find that Mr. Tharpe did not establish cause to excuse the default, relief is nonetheless appropriate because "[a]llowing an execution to proceed even though a defendant has been sentenced to death, at least in part, because of his race, would be a 'miscarriage of justice' sufficient to overcome the default." *Tharpe v. Ford*, No. 18-6819, Brief of *Amicus Curiae* NAACP Legal Defense & Educational Fund, Inc., In Support of Petitioner, p. 13.

CONCLUSION

To permit Mr. Tharpe to be executed on this record, without requiring any judicial inquiry into the merits of his claim that his death sentence was tainted by racial bigotry, would be a "disturbing departure from a basic premise of our criminal justice system," that people are punished "for what they do, not who they are," *Buck*, 137 S. Ct. at 778, and an outcome wholly at odds with this Court's ongoing commitment to eradicating the taint of racism from the justice system. For the reasons set forth above and in Mr. Tharpe's petition for writ of certiorari, this Court must grant certiorari.

This 8th day of February, 2019.

Respectfully submitted,

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No. 18-6819

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2018

KEITH THARPE,

Petitioner,

-v-

BENJAMIN FORD, Warden
Georgia Diagnostic Prison,

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by electronic mail on counsel for Respondent and Amicus Curiae, as follows:

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This 8th day of February, 2019.

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