No. 17-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

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KEITH THARPE,

Petitioner,

-v-

ERIC SELLERS, WARDEN
Georgia Diagnostic Prison,

Respondent.

**THIS IS A CAPITAL CASE**

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**PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT**

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## QUESTIONS PRESENTED

THIS IS A CAPITAL CASE

Petitioner, who is African American, was sentenced to death by a Jones County, Georgia, jury. In state habeas proceedings, he introduced a sworn affidavit from a member of the jury, Barney Gattie, in which Mr. Gattie expressed opinions that provide "a strong factual basis for the argument that [Petitioner's] race affected Gattie's vote for a death verdict." *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018). Mr. Gattie stated in his affidavit that "there are two types of black people: 1. Black folks and 2. Niggers"; that Petitioner, "who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did"; that "[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason"; and that, "[a]fter studying the Bible, I have wondered if black people even have souls." *Id.* Based on a state evidentiary rule prohibiting jurors from impeaching their verdicts, the state habeas court refused to consider the affidavit and other proof evincing Mr. Gattie's racist beliefs. The court further held that Petitioner had procedurally defaulted the claim by not raising it in his motion for new trial and/or on appeal, and that the procedural default was not excused because "Petitioner has failed to show that any alleged racial bias of Mr. Gattie's was the basis for sentencing the Petitioner." The Georgia Supreme Court summarily denied a certificate of probable cause to appeal. In federal habeas corpus proceedings, the claim was rejected as procedurally defaulted under state law.

Several months after the Eleventh Circuit affirmed the denial of federal habeas corpus relief, this Court held in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), that state evidence rules precluding jurors from impeaching their verdict may not be applied to bar proof that a juror

voted to convict or sentence a criminal defendant on the basis of racial animus or stereotypes. In light of *Pena-Rodriguez*, Petitioner filed a second state habeas petition re-urging his claim that Mr. Gattie voted to impose the death penalty because Petitioner is black. The state habeas court refused to reconsider the claim, holding that *Pena-Rodriguez* did not apply retroactively and that, regardless, the claim remained procedurally defaulted because "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 Georgia Supreme Court denied a certificate of probable cause, with three justices dissenting, and later denied motions for reconsideration (again over dissent) based on this Court's stay of execution in parallel federal court proceedings, *see Tharpe v. Sellers*, 138 S. Ct. 53 (2017), and its decision granting certiorari, vacating the Eleventh Circuit's judgment and remanding for further proceedings, *see Tharpe*, 138 S. Ct. 545.

The state court rulings give rise to the following questions:

1. Does this Court's decision in *Pena-Rodriguez* apply retroactively?

2. Did the Georgia courts improperly ignore this Court's rulings and shirk their independent duty to enforce the United States Constitution when they refused to reconsider the racist-juror claim on the basis of this Court's intervening decision in *Pena-Rodriguez*, this Court's decision to stay Petitioner's execution for closer consideration of the racist-juror claim in the federal proceedings, and this Court's decision to grant certiorari, vacate the Eleventh Circuit's denial of a certificate of appealability, and remand the case for further consideration in light of this Court's determination that Petitioner's proof "presents a strong factual basis for the argument that [Petitioner's] race affected Gattie's vote for a death verdict," *Tharpe*, 138 S. Ct. at 546?

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**PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT**

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Petitioner, Keith Tharpe, respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the Georgia Supreme Court, entered in *Tharpe v. Sellers*, Case No. S18W0242, on September 26, 2017. *See* Attachment A.

## OPINIONS BELOW

The unpublished decision in *Tharpe v. Sellers*, Georgia Supreme Court Case No. S18W0242, entered on September 26, 2017, denying Mr. Tharpe's Application for a Certificate of Probable Cause to Appeal is attached hereto as Attachment A. The Georgia Supreme Court's order, from which three of the eight participating justices dissented, denied review of the lower state habeas court's decision. The unpublished decision of the Georgia Supreme Court denying

reconsideration on November 2, 2017, with three justices dissenting, is attached hereto as Attachment B. The unpublished order of the Georgia Supreme Court denying Mr. Tharpe's second motion for reconsideration on January 25, 2018, over the dissent of two justices, is attached hereto as Attachment C. The decision of the state habeas court in *Tharpe v. Sellers*, Butts Co. Superior Court Case No. 2017-HC-13, denying relief is unreported and attached hereto as Attachment D. The decision of the state habeas court in *Tharpe v. Hall*, Butts Co. Superior Court Case No. 93-V-144, denying habeas relief is unreported and attached hereto as Attachment E (Appendix 10 in proceeding below).[1]

## JURISDICTION

The judgment of the Georgia Supreme Court denying Petitioner's application for a certificate of probable cause to appeal the state habeas court's order was entered on September 26, 2017. *See* Attachment A. The Georgia Supreme Court denied reconsideration on November 2, 2017, and again on January 25, 2018. Attachments B and C. This Court granted Petitioner an extension of time in which to file the petition for writ of certiorari following the initial denial of reconsideration, extending the deadline to April 1, 2018. *See* Attachment F. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, Petitioner asserting a deprivation of his rights secured by the Constitution of the United States.

## CONSTITUTIONAL PROVISIONS INVOLVED

This petition invokes the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution:

[1] Documents filed in the record below shall hereinafter be cited as "App. [No.]."

"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...." U.S. Const. amend. V.

"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...." U.S. Const. amend. VI.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

"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." U.S. Const. amend. XIV §1.

## STATEMENT OF THE CASE

### A. The Trial.

Petitioner, Keith Tharpe, is currently under sentence of death in Georgia following a jury trial conducted in Jones County, Georgia, about three months after his arrest, in early January 1991.[2] The entirety of the guilt and penalty phases took place January 8-10, 1991. During voir dire, Mr. Tharpe's counsel raised a challenge pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), based on the district attorney's use of peremptory strikes against five of eight qualified black venire members available for challenge, as well as the prosecutor's notorious history of race discrimination.[3] Trial Transcript ("TT") Vol. VI, at 1960-61. The trial court accepted the district attorney's race-neutral responses and the trial proceeded. *Id.* at 1962.

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[2] Mr. Tharpe was tried for offenses stemming from the September 25, 1990, murder of his sister-in-law Jackie Freeman and sexual assault of his estranged wife Migrisus Tharpe, while under the influence of drugs. *Tharpe v. State*, 262 Ga. 110, 110-11 (1992).

[3] By the time of Mr. Tharpe's trial, Ocmulgee Circuit District Attorney Joseph Briley had already been found to have used peremptory strikes in a discriminatory manner under the stringent standard of *Swain v. Alabama*, 380 U.S. 202 (1965), which imposed a higher burden

Prior to the *Batson* challenge, prospective juror Barney Gattie was questioned by the State and defense. TT Vol. III at 728-42. Mr. Gattie testified that he had no preconceived notions about the case, that he did not know the victims, and that his only connection to any party was that Mr. Briley sometimes bought oysters at his seafood shop. *Id.* at 738. Mr. Gattie was ultimately selected to serve on the jury. TT Vol. VI at 1935-36. After convicting Mr. Tharpe, the jury heard evidence in aggravation and mitigation to inform their decision whether to sentence Mr. Tharpe to death or a parole-eligible life sentence. In aggravation, the State presented evidence that Mr. Tharpe had been convicted as a habitual traffic offender.[4] In mitigation, his attorneys presented brief testimony from a number of family members, including his wife Migrisus. The jury ultimately sentenced Mr. Tharpe to death. His convictions and sentence were affirmed by the Georgia Supreme Court on March 17, 1992. *Tharpe v. State*, 262 Ga. 110, cert. denied, *Tharpe v. Georgia*, 506 U.S. 942 (1992).

**B. State Habeas Proceedings.**

Mr. Tharpe filed his state habeas corpus petition on March 17, 1993; it was subsequently amended on December 31, 1997, and January 22, 1998.

In May of 1998, Mr. Tharpe's state habeas counsel from the Georgia Resource Center conducted juror interviews. On May 16, 1998, attorneys Diana Holt and Laura-Hill Patton

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than *Batson*, specifically requiring a showing of the prosecuting attorney's history of discriminatory tactics. *See* Brief of Appellant, *Tharpe v. State*, Georgia Supreme Court No. S91P1642; *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991). Mr. Briley's history of discrimination included authoring a memo providing instruction to other attorneys about how to underrepresent African Americans and women on grand and traverse jury lists while still avoiding legal challenges. *See Amadeo v. Zant*, 486 U.S. 214, 217-18 (1988).

[4] *See Tharpe v. Head*, 272 Ga. 596 (2000).

interviewed juror Barney Gattie at his home in Gray, Georgia. The visit lasted approximately one hour. App. 5 at ¶ 2 (Affidavit of Laura Hill-Patton). Ms. Patton testified to her recollection of the interview:

> Mr. Gattie expressed his feelings about the case in general. He stated that there are two kinds of black people in the world – "regular black folks" and "niggers." Mr. Gattie noted that he understood that some people do not like the word "nigger" but that is just what they are, and he "tells it like he sees it." According to Mr. Gattie, if the victim in Mr. Tharpe's case had just been one of the niggers, he would not have cared about her death. But as it was, the victim was a woman from what Mr. Gattie considered to be one of the "good black families" in Gray. He explained that her husband was an EMT. Mr. Gattie stated that that sort of thing really made a difference to him when he was deciding whether to vote for a death sentence.

*Id.* This was consistent with attorney Diana Holt's recollection of the interview. App. 6 at ¶ 7 (Affidavit of Diana Holt). Ms. Holt further recalled: "Mr. Gattie said that he was congratulated for a good job as a juror on this case by some folks in the community. He said that one of the victim's family members had even told him, 'Thanks for sending that nigger to the chair.'" *Id.* at ¶ 11. The interview ended cordially with Mr. Gattie's wife offering the attorneys fried green tomatoes and inviting them to stay for dinner.[5] *Id.* at ¶ 13.

On May 25, 1998, Ms. Holt returned to Mr. Gattie's house with another Resource Center attorney, Laura Berg, as well as a draft affidavit based on Mr. Gattie's statements during the initial interview. Mr. Gattie asked the attorneys about other jurors they had sought to interview. When Ms. Holt mentioned they were having difficulty finding one juror, Tracy Simmons, who had moved out of state, Mr. Gattie stated: "you mean the nigger who used to live over by Juliette, Georgia. Yeah, I know who you are talking about, that nigger worked at the Bibb

[5] Both Ms. Holt and Ms. Patton are white women, as is Laura Berg, another lawyer from the Georgia Resource Center, who accompanied Ms. Holt on a later visit with Mr. Gattie.

Company Plant in Forsyth until it closed."[6] App. 6 at ¶ 14. Ms. Holt proceeded to ask Mr. Gattie to review the draft affidavit.

> I asked Mr. Gattie if I could read his statement to him, explaining that it was my practice to read witnesses their statements, and he agreed. He asked what I was going to do with it, and I told him I wouldn't do anything with it unless he approved it and confirmed the accuracy of it. He said, "well, go ahead. Let's here [sic] what you got there." I read the statement from beginning to end to him, including the preface declaring that Mr. Gattie was swearing to the following information. After each point, I looked at him and asked him if the statement was right. He nodded or said, "yes" after each point, except for one point related to the origin of integration. I corrected the statement on that point to reflect Mr. Gattie's actual words. He confirmed the accuracy of every word of the rest of the statement. He did not request any further changes to his statement. At the conclusion of my reading of Mr. Gattie's statement to him, I asked him if it was entirely accurate. He said it was. I also asked him if there were any changes he wanted to make to the statement. He said that there were not… I handed the statement to Mr. Gattie and asked if he wanted to read it. He said he didn't have his glasses and what I read was what he had said. After Ms. Berg swore Mr. Gattie, he signed the statement in Ms. Berg's presence, and she notarized it on the spot.

*Id.* at ¶ 15.[7] Ms. Holt's recollection corroborates Mr. Gattie's affidavit, sworn to and signed that day, which included his amendment striking the term "interracial marriages" and replacing it with the handwritten word "integration," which he initialed. App. 1 at ¶ 3 (Affidavit of Barney Gattie). The affidavit further summarized his racial views as he had described them to Ms. Holt and Ms. Hill-Patton during their initial interview:

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[6] Tracy Simmons was one of the two African Americans who served on Mr. Tharpe's jury. *See* TT Vol. VI at 1931-32.

[7] Ms. Berg's recollection is consistent with Ms. Holt's. *See* App. 7 at ¶ 3 (Affidavit of Laura M. Berg).

3. I also knew the girl who was killed, Mrs. Freeman. Her husband and his family have lived in Jones county 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. ~~Interracial~~ marriages started in Genesis. I think they are 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.

*Id.*[8] The following day, on May 26, 1998, state habeas counsel filed Mr. Gattie's affidavit and faxed a copy to opposing counsel. App. 8 (Petitioner's Notice to Rely on Affidavits, May 26, 1998). The very next day, Mr. Gattie signed a second affidavit, this time on behalf of the Respondent. App. 2. This affidavit characterized Mr. Gattie's interaction with Mr. Tharpe's attorneys in a manner at odds with counsel's recollections of what occurred, suggesting that Mr. Gattie had not understood the purpose of their visit and had been intoxicated at the time he signed his prior affidavit. *Id.* at ¶ 1; 3 (Affidavit of Barney Gattie dated May 27, 1998). While he testified that the word "nigger" was not used during deliberations and that, at the time he served on Mr. Tharpe's jury, he had not known Mr. Tharpe was on probation at the time of the crime and did not discuss an alleged prior shooting with other jurors, Mr. Gattie did not deny using the term "nigger" generally, nor did he disavow his belief that black people could be divided into two categories of "good black folks" and "niggers." *See id.* In addition to filing Mr. Gattie's counter-affidavit, Respondent also moved to exclude Mr. Tharpe's juror affidavits in

[8] Despite maintaining that he did not read the affidavit before signing it, Mr. Gattie admitted during his deposition testimony that he made and initialed the correction shown in this image. App. 3 at 44-45.

their entirety as improper impeachment of the jury's verdict inadmissible under O.C.G.A. §§ 17-9-41 and 9-10-9. *See* Motion to Exclude Petitioner's "Juror" Affidavits, filed in *Tharpe v. Warden*, Butts County No. 93-V-144. Although the affidavits were admitted into the record at the May 28, 1998, evidentiary hearing, the state habeas court later held that they, along with other testimony, were inadmissible under Georgia's no-impeachment rule. *See* Attachment E at 99-101.

In the months that followed, counsel for Mr. Tharpe sought to depose all the jurors to determine the extent to which racial bias had infected his trial. In turn, Respondent sought a protective order to prevent depositions. Although the state habeas court initially granted the protective order, after a motions hearing on August 24, 1998, it agreed to allow the depositions in the court's presence so that it could rule on what questions about the jurors' racial views would be permitted.

The depositions were conducted on October 1-2, 1998. *See* Apps. 3, 4. Eleven of the twelve jurors testified, and all denied that any racial bias was involved in the deliberations. As for Mr. Gattie, he again specifically denied only one statement contained in his initial affidavit – namely that he had disclosed to other jurors that Mr. Tharpe was on probation for a prior shooting. App. 3 at 54-55. Although he maintained that Mr. Tharpe's counsel did not properly identify themselves and that he was intoxicated at the time he signed his first affidavit, Mr. Gattie did not deny the accuracy of any other statements in his initial affidavit and, indeed, testified that the only inaccurate statement in it concerned jury-room discussions of the alleged prior shooting.[9] App. 3 at 118-19.

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[9] Mr. Gattie nonetheless testified that some of the statements in the affidavits were "out of proportion." App 4 at 358.

At a subsequent evidentiary hearing held on December 11, 1998, Mr. Tharpe submitted affidavits from the attorneys who had interviewed Mr. Gattie initially (Laura-Hill Patton and Diana Holt) and who were present when his affidavit was executed (Diana Holt and Laura Berg). *See* Apps. 5, 6, 7. These affidavits, which were admitted into evidence, reaffirmed Mr. Gattie's racial attitudes and contradicted his testimony regarding the circumstances under which the affidavit was obtained. The attorneys also testified that they had introduced themselves to Mr. Gattie as attorneys who were working on Mr. Tharpe's behalf. App. 5 at ¶ 3 (Affidavit of Laura-Hill Patton); App. 6 at ¶ 4 (Affidavit of Diana Holt). Contrary to Mr. Gattie's suggestion in his second affidavit and his deposition testimony that he was significantly intoxicated at the time he signed his first affidavit, "Mr. Gattie did not appear to be tired or alcohol-impaired at any time throughout our visit. He was alert and animated as Ms. Holt read him the affidavit and afterwards, as we chatted with him." App. 7 at ¶ 8 (Affidavit of Laura M. Berg); *see also* App. 6 at ¶ 15 (Affidavit of Diana Holt). The attorneys further testified that Mr. Gattie was well aware of the contents of the affidavit, which he had corrected and signed on May 25, 1998.

> Ms. Holt read the entire affidavit to Mr. Gattie in a clear, slow voice, stopping every couple of lines to ask Mr. Gattie to verify that what she had read was accurate. Every time Ms. Holt would stop for verification Mr. Gattie would tell her "that's right" or "I'm sticking to my story" or would reiterate the statement that Ms. Holt had just read.

App. 7 at ¶ 3 (Affidavit of Laura M. Berg); *see also* App. 6 at ¶ 15 (Affidavit of Diana Holt).

After these proceedings, Mr. Tharpe's state habeas case languished and several changes in attorneys on both sides occurred. On July 30, 2007, the court conducted an evidentiary hearing addressing Mr. Tharpe's intellectual disability claim pursuant to *Turpin v. Hill*, 269 Ga. 302 (1998). After submission of post-hearing briefing and proposed orders, the state habeas court issued a final order denying relief on all claims. Attachment E (Final Order). With regard

to the racist-juror claim, the state court ruled that all juror testimony in both affidavits and depositions was inadmissible under Georgia law: "[T]he fact that some jurors exhibited certain prejudices, biases, misunderstandings as to the law, or other characteristics that are not conducive to neutral and competent fact-finding is not a basis for impeaching the jury's verdict." Attachment E at 99. The court explained:

> The Georgia Supreme Court has made clear that the affidavits, such as those submitted by Petitioner to this Court, are not admissible. In *Spencer v. State*, 260 Ga. 640 (1990), the Georgia Supreme Court held: "The general rule is that affidavits of jurors may be taken to sustain but not to impeach their verdict." O.C.G.A § 17-9-41. **Exceptions are made to the rule in cases where extrajudicial and prejudicial information has been brought to the jury's attention improperly, or where non-jurors have interfered with the jury's deliberations.** *See, e.g.*, *Hall v. State*, 259 Ga. 412 (383 S.E. 2d 128) (1989) and cases cited therein. Compare FRE 606 (b). (Footnote omitted.) The affidavit here does not fit within these exceptions to the rule. Compare *Shillcutt v. Gagnon*, 827 F2d 1155 (II) (7th Cir. 1987). *See also Wright* & *Gold, Federal Practice and Procedure*, Ch. 7, § 6074 at pp. 431-32. ("Most authorities agree that **the rule precludes a juror from testifying that issues in the case were prejudged,** a juror was motivated by irrelevant or improper personal considerations, **or racial or ethnic prejudice** played a role in jury deliberations." (Footnotes omitted.)) . . . *Spencer*, 260 Ga. at 643.

*Id.* at 99-100 (emphasis in original). Based on this analysis, the court concluded: "[A]s the juror depositions and Petitioner's affidavits with regard to these claims are inadmissible, Petitioner has failed to prove, with any competent evidence, that there was any juror misconduct…." *Id.* at 101. The state habeas court further ruled that, regardless, the juror misconduct claims, including the claim that Juror Gattie's racial prejudice invalidated the death sentence, were defaulted for failure to raise them at motion for new trial or on direct appeal, and that Mr. Tharpe had not shown cause and prejudice to overcome the default. *Id.* at 102-04. The court specifically observed that Mr. Tharpe had suffered no prejudice as he "has failed to show that any alleged racial bias of Mr. Gattie's was the basis for sentencing the Petitioner, as required by the ruling in *McCleskey.*" Attachment E at 102 (citing *McCleskey v. Kemp*, 481 U.S. 279 (1987)). Based on

these rulings, the court made no fact or credibility findings regarding the disputed facts in Mr. Gattie's and the attorneys' testimony.

### C. Federal Habeas Proceedings

In Mr. Tharpe's federal habeas petition, filed on November 8, 2010, he raised a juror misconduct claim based, *inter alia*, on racial bias. He reasserted the claim in his amended petition. By Order dated August 18, 2011, the district court found the claim procedurally defaulted based on the state habeas court's analysis of the default in its Final Order. Mr. Tharpe continued to pursue other claims for relief that were not procedurally barred. The district court denied his petition on March 6, 2014, but issued a certificate of appealability ("COA") to address the claim that trial counsel provided ineffective representation in investigating and presenting mitigation evidence. The Eleventh Circuit expanded the COA to include the question of Mr. Tharpe's intellectual disability, but not the claim challenging Georgia's requirement that intellectual disability be established by proof beyond a reasonable doubt. The Eleventh Circuit affirmed the district court's denial of habeas relief on August 25, 2016. *Tharpe v. Warden*, 834 F.3d 1323 (11th Cir. 2016).

On April 14, 2017, Mr. Tharpe filed a petition for writ of certiorari based on issues addressed in the Eleventh Circuit's opinion. That petition was denied on June 26, 2017. *Tharpe v. Warden*, 137 S. Ct. 2298 (2017).

While counsel were preparing to file Mr. Tharpe's petition for a writ of certiorari, this Court issued decisions in *Buck v. Davis*, 137 S. Ct. 759 (2017), and *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). Based on these two decisions and while the certiorari petition remained pending before this Court, Mr. Tharpe, on June 21, 2017, filed a Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6). On September 5, 2017, the

district court denied relief, concluding that Mr. Tharpe's claim was barred by *Teague v. Lane*, 489 U.S. 288 (1989), and alternatively was procedurally defaulted. The court denied a certificate of appealability.

The next day, September 6, 2017, the State of Georgia obtained a warrant ordering Mr. Tharpe's execution to be conducted sometime between Tuesday, September 26, 2017, and Tuesday, October 3, 2017.

On September 8, 2017, Mr. Tharpe filed an Application for Certificate of Appealability ("COA") in the Eleventh Circuit. He filed a separate Motion for Stay of Execution was filed on September 13, 2017. On September 21, 2017, a panel of the Eleventh Circuit denied the COA application and stay motion. The panel ruled that the district court had not abused its discretion in denying the 60(b) motion because it "applied the correct legal standard and based its decision on findings of fact not clearly erroneous." Case No. 17-14027-P, Order of September 21, 2017. It further held that a COA should not issue to review the ruling because Mr. Tharpe had not "made a substantial showing of the denial of a constitutional right" because, "[a]s the Butts County Superior Court and the District Court found, Tharpe failed to demonstrate that Barney Gattie's behavior 'had substantial and injurious effect or influence in determining the jury's verdict'" or that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal citation omitted) and *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Finally, the panel opined that "[i]f Tharpe is correct that *Pena-Rodriguez* applies retroactively in post-conviction proceedings and thus gives rise to a constitutional claim he could not have brought to the Butts County Superior Court, he is now free to pursue the claim in state court." *Id.* at 7-8. Judge Wilson concurred in the COA denial, noting that he would have granted COA in the case had he

not concluded that the *Pena-Rodriguez* claim was not properly exhausted and accordingly that a stay should be granted and "the denial should be without prejudice so as to allow Tharpe a chance to re-file after it is properly litigated in Georgia state court." *Id.* at 9.

Mr. Tharpe filed a petition for writ of certiorari to review of the Eleventh Circuit's ruling ("federal certiorari petition") and a motion to stay the execution in this Court on September 23, 2017. On September 26, 2017, this Court stayed Mr. Tharpe's execution. *Tharpe v. Sellers*, 138 S. Ct. 53 (2017). On January 8, 2018, this Court granted certiorari, vacated the Eleventh Circuit judgment, and remanded for further proceedings. *Tharpe v. Sellers*, 138 S. Ct. 545 (2018). In remanding, the Court observed that "Gattie's remarkable affidavit – which he never retracted – presents a strong factual basis for the argument that Tharpe's race affected Gattie's vote for a death verdict." *Id.* at 546. The case remains pending before the Eleventh Circuit.[10]

**D. New State Court Proceedings.**

While the issue was being litigated in federal court, Mr. Tharpe also sought additional review of the racist-juror claim in state court. On September 22, 2017, he filed a second petition for writ of habeas corpus in Butts County Superior Court, arguing that new law from this Court required reconsideration of his racist-juror claim. Respondent urged in opposition that the claims were *res judicata* and barred by this Court's opinion in *Teague v. Lane*, 489 U.S. 288 (1989). On September 26, 2017, the state habeas court dismissed the habeas petition. Attachment D. The court concluded that *Pena-Rodriguez* does not apply retroactively and hence the claim was res judicata, and that the claim, regardless, was procedurally barred. Attachment D at 3-5. Later, on September 26, 2017, the Georgia Supreme Court denied a certificate of probable cause

[10] Mr. Tharpe respectfully requests that the Court hold this petition pending the outcome of the federal habeas proceedings.

("CPC") to appeal the state habeas court's ruling.[11] Attachment A. Three of the eight participating justices dissented.

That same day, Mr. Tharpe filed a petition for writ of certiorari to review the Georgia Supreme Court's CPC denial. *See* Sup. Ct. Dkt. No. 17-6130. After this Court granted a stay of execution in the parallel federal proceedings, *Tharpe*, 138 S. Ct. 53, Mr. Tharpe, on September 29, 2017, moved to dismiss the petition pursuant to Sup. Ct. Rule 46

to allow him to seek reconsideration of the state supreme court's denial of CPC. This Court dismissed the petition on September 29, 2017.

On October 6, 2017, Mr. Tharpe file a motion in the Georgia Supreme Court seeking reconsideration and asking that the case be held pending resolution of the parallel federal proceedings, which the Georgia Supreme Court denied on November 1, 2017, with three justices dissenting. *See* Attachment B. After this Court granted the federal certiorari petition, vacated the Eleventh Circuit judgment and remanded for further proceedings, Mr. Tharpe again moved for reconsideration in light of this Court's *per curiam* decision, *Tharpe v. Sellers*, 138 S. Ct. 545 (2018). The Georgia Supreme Court again denied reconsideration, over the dissent of two justices. Attachment C.[12]

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[11] "A certificate of probable cause to appeal a final judgment in a habeas corpus case involving a criminal conviction will be issued where there is arguable merit, provided that there has been compliance with O.C.G.A. § 9-14-52(b)." Ga. Sup. Ct. Rule 36.

[12] Following the denial of Mr. Tharpe's first motion for reconsideration, this Court granted his motion for an extension of time in which to file the certiorari petition in this matter, until April 1, 2018. *See* Attachment F.

## HOW THE FEDERAL QUESTION WAS RAISED BELOW

Mr. Tharpe's claim that one of his jurors was motivated to vote in favor of the death penalty on the basis of racial bias was raised in his First Amended Petition for Writ of Habeas Corpus filed in the Superior Court of Butts County, Georgia. The state habeas court held that the evidence submitted in support of the claim was inadmissible under Georgia's law precluding jurors from impeaching their verdict and was otherwise procedurally defaulted. Attachment E. In Mr. Tharpe's second habeas petition, the state habeas court ruled that this Court's recent decision in *Pena-Rodriguez* did not apply retroactively and that the claim was *res judicata* and procedurally barred. Attachment D. The Georgia Supreme Court, with three Justices dissenting, denied a CPC. Attachment A. The Georgia Supreme Court denied reconsideration of its CPC denial after this Court had stayed Mr. Tharpe's execution, Attachment B, and, again, after this Court issued its decision granting the federal certiorari petition, vacating the Eleventh Circuit judgment and remanding the case for further proceedings, Attachment C.

## REASONS WHY THE PETITION SHOULD BE GRANTED

### I. This Court Should Grant Certiorari To Determine Whether *Pena-Rodriguez* Applies Retroactively.

"[I]t is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880)). That fundamental protection is eviscerated, however, when the jury is composed of one or more individuals who harbor racist views that impact their role as decisionmakers.

This Court's jurisprudence accordingly reflects an abiding commitment to eradicating racial discrimination and its pernicious effects in the justice system. As this Court recently observed:

> "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose* v. *Mitchell*, 443 U. S. 545, 555, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979). Relying on race to impose a criminal sanction "poisons public confidence" in the judicial process. *Davis* v. *Ayala*, 576 U. S. ___, ___, 135 S. Ct. 2187, 192 L. Ed. 2d 323, 344 (2015). It thus injures not just the defendant, but "the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts." *Rose*, 443 U. S., at 556, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (internal quotation marks omitted).

*Buck v. Davis*, 137 S. Ct. 759, 778 (2017). This Court's decision in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), is firmly set within this tradition. *See, e.g., id.* at 867-68 (discussing this Court's continuing commitment to eliminating racism in legal proceedings).

In *Pena-Rodriguez*, this Court reaffirmed the fundamental importance of protecting a criminal defendant's right not to be convicted or condemned on the basis of racial bias. It held that this right preempts the wide-spread practice of shielding jury verdicts from scrutiny through "no impeachment"[13] rules that prohibit the use of juror testimony to challenge the validity of a jury verdict. That decision, which imposes no new obligations on the states, should be recognized as having retroactive effect in this and other proceedings. The state habeas court, however, concluded without any apparent analysis that *Pena-Rodriguez* is not retroactive, and the Georgia Supreme Court's decision to deny CPC left that determination untouched.

As set forth below, *Pena-Rodriguez* does not create a new constitutional rule of criminal procedure and thus its application is not barred by the non-retroactivity rule set forth in *Teague v.*

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[13] *See Pena-Rodriguez*, 138 S. Ct. at 549.

*Lane*, 489 U.S. 288 (1989).[14] Moreover, even assuming that *Teague* applies, *Pena-Rodriguez*'s rule qualifies for retroactive application under that decision. Because *Pena-Rodriguez* applies retroactively, the Georgia courts were required to apply it. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 727 (2016) ("If . . . the Constitution establishes a rule and requires that the rule have retroactive application, then a state court's refusal to give the rule retroactive effect is reviewable by this Court. . . . States may not disregard a controlling, constitutional command in their own courts."). Given the compelling nature of Mr. Tharpe's claim that he was sentenced to death because he is black, he respectfully submits that certiorari should be granted to address the retroactivity question.

### A. *Pena-Rodriguez* Is Not A Rule Of Criminal Procedure And Thus It Does Not Implicate *Teague*'s Retroactivity Limitations.

Years before *Pena-Rodriguez* was decided, its author, Justice Kennedy, opined that *Teague* would impose no bar to a federal court's determination that Georgia's no-impeachment rule could not preclude consideration of evidence that a jury's verdict was impacted by racial bias. *See Spencer v. Georgia*, 500 U.S. 960, 960 (1991) (Kennedy, J., concurring in the denial of certiorari) (observing that "if I thought our decision in *Teague* . . . would prevent us from reaching those issues on federal habeas review, I would have voted to grant certiorari. I have

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[14] The state habeas court's determination that *Pena-Rodriguez* does not apply retroactively is implicitly based on *Teague*, given both Respondent's argument that the application of *Pena-Rodriguez* is *Teague*-barred and the fact that Georgia has adopted *Teague* as its method for determining the retroactivity of new rules. *See, e.g.*, *State v. Sosa*, 291 Ga. 734, 737 (2012). And, regardless of the basis of the state court ruling, *Teague* sets the minimum standard for a state's retroactivity law. *See, e.g.*, *Montgomery*, 136 S. Ct. at 727.

confidence that petitioner's equal protection claim will not be barred in federal habeas corpus proceedings by *Teague* and its progeny . . . .").[15]

Justice Kennedy's observation is not surprising, given the particular focus of *Teague*'s retroactivity rule. In *Teague*, this Court limited the retroactive application of "new constitutional rules of criminal procedure," holding that such rules may only be applied retroactively, on collateral review, if they "place[] 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'" or constitute "watershed rules of criminal procedure." *Teague*, 489 U.S. at 310, 311. *Teague* governs rules of *criminal procedure, i.e.*, rules "designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability.'" *Montgomery*, 136 S. Ct. at 730 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). Neither Georgia's evidentiary rule barring jurors from impeaching their verdict, nor *Pena-Rodriguez*'s holding that such a rule cannot preclude a court's consideration of evidence that racism impacted the jury's verdict, however, are rules of criminal procedure. Those rules are not limited to criminal proceedings, nor do they regulate the manner in which a defendant's culpability (or sentence) is established. Indeed, the no-impeachment rule and *Pena-Rodriguez*'s curtailment of it apply only after a conviction and/or sentence has been returned; they play no role whatsoever in "regulat[ing] the manner of determining the defendant's culpability" or even the manner in which trial is conducted.

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[15] The Georgia Supreme Court decision in *Spencer*, from which certiorari was sought, was in fact the very case on which the state habeas court relied in Mr. Tharpe's case to find the evidence of Juror Gattie's racism inadmissible under Georgia's no-impeachment rule. *See* Attachment E at 99-100; *Spencer v. State*, 260 Ga. 640 (1990), *supra*.

Moreover, *Pena-Rodriguez* modified a substantive rule of evidence designed to protect the sanctity of jury deliberations (in both civil and criminal trials),[16] based on the Court's application of clearly established Supreme Court law regarding the bedrock constitutional rights to trial by an impartial jury[17] and to equal protection under the law. *Pena-Rodriguez* accordingly did not create a new constitutional rule of criminal procedure, and *Teague* should not apply to bar Mr. Tharpe's claim.[18] *See, e.g. Bousley v. United States*, 523 U.S. 614, 620 (1998) ("[W]e do not believe that *Teague* governs this case. The only constitutional claim made here is that petitioner's guilty plea was not knowing and intelligent. *There is surely nothing new about this*

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[16] "Some state evidentiary rules are substantive in nature, and transcend the substance-procedure boundary . . . . *Bradford v. Bruno's Inc.*, 41 F.3d 625 (11th Cir. 1995) (finding that Alabama's collateral source rule is substantive in nature); *Ungerleider v. Gordon*, 214 F.3d 1279, 1282 (11th Cir. 2000)." *McDowell v. Brown*, 392 F.3d 1283, 1295 (11th Cir. 2004). The no-impeachment rule, which is designed "to promote full and vigorous discussion" among jurors and to "give[] stability and finality to verdicts," *Pena-Rodriguez*, 137 S. Ct. at 865, in addition to not being a rule addressed to *criminal* procedure, is also, essentially, a rule addressed to substance and not procedure. As a "substantive" rule, *Pena-Rodriguez* is also not subject to *Teague*'s retroactivity constraints.

[17] "Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors . . . ." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991).

[18] Respondent's efforts to apply *Teague* to *Pena-Rodriguez* illustrate the futility of attempting to fit a square peg into a round hole. For instance, Respondent urged in the Georgia Supreme Court that *Pena-Rodriguez* must be a rule of criminal procedure under *Teague*, because "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."'" Response in Opposition to Application for Certificate of Probable Cause to Appeal and in Opposition to Motion for Stay 19-20 (citations omitted). Yet, Respondent relies on a flawed syllogism in arguing that this proves *Pena-Rodriguez* must therefore constitute a rule of criminal procedure, governed by the limitations of *Teague*. Though the rule *Pena-Rodriguez* adopts – that no-impeachment rules may not preclude the presentation of proof showing that the decisions of one or more jurors were motivated by racially discriminatory views – does not constitute a rule of substantive criminal law, that does not establish that it constitutes a criminal procedural rule, which this Court has explained in this context is one that "regulate[s] only the *manner of determining* the defendant's culpability." *Summerlin*, 542 U.S. at 353. The rule of *Pena-Rodriguez* does not govern the conduct of a trial at all, though the interests it protects – protecting verdicts, whether criminal or civil, from the effect of invidious racism – are bedrock procedural protections.

*principle*, enumerated as long ago as *Smith v. O'Grady*, [312 U.S. 329 (1941)]. And, because *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.").

### B. Even If Construed To Be A Rule Of Criminal Procedure, The Holding In *Pena-Rodriguez* Is Not A "New" Rule As It Was Dictated By Supreme Court Precedent Existing At The Time Mr. Tharpe's Conviction Became Final.

Even were *Pena-Rodriguez*'s narrow exception to the no-impeachment rule deemed a rule of criminal procedure, it is not a "new" rule because its outcome was dictated by clearly established Supreme Court law, existing at the time Mr. Tharpe's conviction and sentence became final, securing the Sixth Amendment right to an impartial jury and the Fourteenth Amendment right to equal protection under the law as a means to safeguard a criminal defendant's right not to be convicted and condemned on the basis of race. *See, e.g.*, *Turner v. Murray*, 476 U.S. 28, 35 (1986) ("The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence. . . . By refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury."); *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."). *See generally Pena-Rodriguez*, 137 S. Ct. at 867-79 (discussing equal protection and Sixth Amendment case law); *Buck*, 137 S. Ct. at 778 (same).[19]

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[19] In *Pena-Rodriguez*, this Court noted that prior decisions had recognized that the no-impeachment rule may give way in the "'gravest and most important cases' where exclusion of juror affidavits might well violate 'the plainest principles of justice.'" *Pena-Rodriguez*, 137 S. Ct. at 864 (quoting *United States v. Reid*, 53 U.S. 361, 366 (1852), and *McDonald v. Pless*, 238 U.S. 264, 269 (1915)). There was nothing new in the Court's recognition that evidence that racial bias motivated a verdict satisfies those narrow exceptions.

Although *Pena-Rodriguez* overrules Georgia's prohibition on the use of juror affidavits indicating that racial bias impacted a defendant's verdict,[20] and hence warranted state court review of Mr. Tharpe's racial bias claim,[21] that does not mean that the Court's decision was not dictated by its precedents. Rather, the decision was the predictable result of the Court's application of its prior decisions securing a criminal defendant's right not to be convicted and sentenced on the basis of race. And, because "state evidence rules do not trump a defendant's constitutional right[s]," *Williams v. Illinois*, 567 U.S. 50, 53 (2012), such clearly established constitutional rules readily preempt the application of Georgia's no-impeachment rule and overrules Georgia law to the contrary.

"In general, a case announces a 'new rule' when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . Put differently, and, indeed, more meaningfully for the majority of cases, a decision announces a new rule '"if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."' *Butler v. McKellar*, 494 U.S. 407, 412 (1990) (citations omitted) (emphasis in original). This Court's

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[20] *See, e.g., Spencer, supra.*

[21] In Georgia, intervening developments, including new facts, or changes or clarification of the law, even those not of constitutional dimension, enable Georgia habeas corpus courts to consider, on the merits, legal challenges that were previously unavailable to petitioners, even where petitioners previously raised the same error. *See, e.g., Luke v. Battle*, 275 Ga. 370, 374 (2002) (intervening changes in law, including those which clarify existing law, render claim cognizable in habeas); *Johnson v. Zant*, 249 Ga. 812, 818 (1982) (previously unavailable facts warrant revisitation of claim); *Bruce v. Smith*, 274 Ga. 432, 435 (2001) (where petitioner previously raised jury instruction challenge, new subsequent case law permitted relitigation of claim, even though new legal developments were only jurisprudential in nature and not of constitutional magnitude); *Jarrell v. Zant*, 248 Ga. 492, 492 n.1 (1981) (intervening developments in state law since earlier habeas petition allowed habeas court to consider new challenge to jury instructions on the merits in second habeas petition); *Tucker v. Kemp*, 256 Ga. 571, 573 (1987) (recognizing exception to rule of *res judicata* "'in that habeas would likely be allowed if the law changed which might render a later challenge successful'") (quoting *Hammock v. Zant*, 243 Ga. 259, 260 n.1 (1979), *citing Stevens v. Kemp*, 254 Ga. 228 (1985)).

decisions recognizing that racial bigotry is anathema to the right to trial by a fair and impartial jury and equal protection under the law long predate *Pena-Rodriguez,* which accordingly imposed no "new obligation" on any court. *See, e.g.*, *Ham v. South Carolina*, 409 U.S. 524, 526-27 (1973) ("Since one of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure these 'essential demands of fairness,' . . . and since a principal purpose of the adoption of the Fourteen Amendment was to prohibit the States from invidiously discriminating on the basis of race, . . . we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice."); *Aldridge v. United States*, 283 U.S. 308, 314 (1931) ("The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.").

The constitutional rule that *Pena-Rodriguez* protects – that jury verdicts may not be tainted by racial bias – has not been changed one iota by the Supreme Court's decision in *Pena-Rodriguez*. The decision simply has recognized that the constitutional violation may be proven post trial with evidence that would otherwise be excluded under a state's no-impeachment rule. As a rule clearly dictated by longstanding Supreme Court decisional law intended to root out racial discrimination in the criminal justice system, it should be applied in this case.

## II. The Georgia Courts, by Continuing to Refuse to Address the Merits of Mr. Tharpe's Racist-Juror Claim, Have Repeatedly Ignored Their Fundamental Obligation to Enforce the Federal Constitution.

"States may not disregard a controlling, constitutional command in their own courts." *Montgomery*, 136 S. Ct. at 728 (citing *Martin v. Hunter's Lessee*, 14 U.S. 304, 1 Wheat 304, 340-41 (1816)). Here, *Pena-Rodriguez* constitutes precisely the type of intervening decision that warrants further consideration in state court, particularly given this Court's subsequent rulings in Mr. Tharpe's federal certiorari petition. Yet, the Georgia courts have repeatedly ignored the mandate of *Pena-Rodriguez* since Mr. Tharpe first brought the decision to their attention.

After this Court issued *Pena-Rodriguez*, Mr. Tharpe filed a successive habeas corpus action in state court arguing that *Pena-Rodriguez* was an intervening decision that warranted further consideration of Mr. Tharpe's claim that Barney Gattie's racist views influenced his decision to sentence Mr. Tharpe to death. The state habeas court dismissed the claim as res judicata, even though Georgia law clearly provides that res judicata does not bar a second or successive petition when "there has been an intervening change in the law since [the court] decided the issue" previously. *Bruce*, 274 Ga. at 434. *Pena-Rodriguez* overruled the holding in *Spencer*, 260 Ga. at 643-44 – the holding on which the state habeas court had originally relied in refusing to consider Mr. Tharpe's evidence – that juror affidavits showing that racism influenced the verdict could not be considered under Georgia's no-impeachment rule. That change in the law warranted reconsideration of the claim in a second habeas petition. *See Bruce*, 274 Ga. at 435 (the "overruling of contrary authority . . . is an intervening change in the law sufficient to permit review of [petitioner's] substantive claim in this habeas petition"); *see also Luke*, 275 Ga. at 374 ("We also note that [petitioner's] claim is not barred by res judicata, as, after the Court of

Appeals decided his direct appeal, there was an intervening change in the law due to our *Brewer* decision.").

Despite the undeniable change in the law occasioned by *Pena-Rodriguez*, the state habeas court refused to address the merits of the racist-juror claim, holding, without explication, that *Pena-Rodriguez* did not apply retroactively and that, regardless, Mr. Tharpe "still failed [to] overcome the procedural default of his claim" because he "failed to show that the juror in question, Barney Gattie had relied upon any alleged racial bias in sentencing Petitioner to death." Attachment D, at 3. The Georgia Supreme Court, with three justices dissenting, denied Mr. Tharpe's CPC application "as lacking arguable merit because the claims presented in the petition are res judicata or otherwise procedurally barred." Attachment A.

The Georgia Supreme Court again had an opportunity to address the claim after this Court stayed Mr. Tharpe's execution, *Tharpe v. Sellers*, 138 S. Ct. 53 (2017), but it summarily denied Mr. Tharpe's motion for reconsideration and refused to hold the case in abeyance pending this Court's resolution of the federal certiorari petition. Attachment B.

Finally, Mr. Tharpe again moved for reconsideration in the Georgia Supreme Court after this Court granted the federal certiorari petition on the ground that Barney Gattie's "remarkable affidavit – which he never retracted – presents a strong factual basis for the argument that Tharpe's race affected Gattie's vote for a death verdict." *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018). The Georgia Supreme Court once again summarily denied the request. Attachment C.

That Mr. Tharpe "may have been sentenced to death in part because of his race . . . is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are." *Buck*, 137 S. Ct. at 778. Such a "departure from basic principal [is] exacerbated because it concern[s] race," as racial discrimination, "odious in

all aspects,' is especially pernicious in the administration of justice.'" *Id.* (quoting *Rose*, 443 U.S. at 555. This claim – and the evidence that supports it – makes this case "extraordinary"[22] and "remarkable."[23] Yet, despite the highly disturbing nature of this claim – and this Court's recognition that Mr. Gattie's "remarkable" and unrefuted affidavit "presents a strong factual basis for the argument that Tharpe's race affected Gattie's vote for a death verdict" – the Georgia courts have continued to refuse to address it on its merits, instead ducking behind a row of procedural bars that, in fairness, do not apply. The lack of concern displayed by the Georgia courts in this matter reflects an alarming complacency in the face of compelling proof that Mr. Tharpe's race played an impermissible role in his death sentence, a disturbing disregard for this Court's directives, and an essential apathy towards the courts' role in enforcing the commands of the federal constitution.

The state courts have been given multiple opportunities to address the merits of Mr. Tharpe's compelling claim that his death sentence is irremediably tainted by racial prejudice, but have failed to do so each time. Mr. Tharpe respectfully submits that this Court should grant certiorari to review the case.

## CONCLUSION

"The jury is to be 'a criminal defendant's fundamental "protection of life and liberty against race or color prejudice."'" *Pena-Rodriguez*, 137 S. Ct. at 868 (quoting *McCleskey*, 481 U.S. at 310 (internal citation omitted)). This Court must grant the Petition for Writ of Certiorari in order to ensure that the fundamental protection the jury is intended to confer on the accused is

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[22] *Buck*, 137 S. Ct. at 778.

[23] *Tharpe*, 138 S. Ct. at 546 (describing Mr. Gattie's affidavit as "remarkable").

not grotesquely perverted by allowing the State to execute Mr. Tharpe without ever affording him merits review of his disturbing claim, supported by credible and "strong" evidence, that he was sentenced to death because in one juror's eyes he is a "nigger" who should be executed because of his race.

This 2nd day of April, 2018.

Respectfully submitted,

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COUNSEL FOR PETITIONER

No. 17-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2017

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KEITH THARPE,

Petitioner,

-v-

ERIC SELLERS, Warden
Georgia Diagnostic Prison,

Respondent.

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**CERTIFICATE OF SERVICE**

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

Sabrina Graham
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132 State Judicial Building
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This 2nd day of April, 2018.

Attorney