No. 18- , 18A389

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

PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

"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)

"[R]acial bias [is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice. . . . An effort to address the most grave and serious statements of racial bias is not an effort to perfect the jury but to ensure that our legal system remains capable of coming ever closer to the promise of equal treatment under the law that is so central to a functioning democracy."

– *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017)

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QUESTIONS PRESENTED FOR REVIEW

Years after Petitioner's trial, juror Barney Gattie, a white man, signed a sworn affidavit "indicating [his] view 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 [Petitioner] 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.'" *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018). Although this "remarkable affidavit" presents "a strong factual basis for the argument that [Petitioner's] race affected Gattie's vote for a death verdict," *id.*, no court has ever addressed the merits of Petitioner's claim, first raised two decades ago, that Barney Gattie voted for death because Petitioner is black.

At the time Petitioner's counsel learned of Gattie's racist views, Georgia law prohibited juror testimony "to impeach their verdict." O.C.G.A. § 17-9-41. The state habeas court accordingly refused to consider Gattie's statements and, having excluded that evidence, found that Petitioner had not shown cause and prejudice to excuse the procedural default of this claim. On federal habeas review, the district court echoed the state habeas court's ruling. After this Court held, for the first time, in *Pena-Rodriguez v. Colorado*, 136 S. Ct. 1513 (2017), that no-impeachment rules may not bar consideration of juror testimony showing a verdict was likely motivated by racial bias, Petitioner sought to reopen this claim. In both state and federal proceedings brought in light of *Pena-Rodriguez*, the courts have continued to refuse to hear Petitioner's claim that he was sentenced to death because of his race, despite this Court's remand

to the Eleventh Circuit for further consideration in *Tharpe v. Sellers*. This Court is likely Petitioner's last resort to have this claim heard.

The Eleventh Circuit's latest rulings raise the following important questions:

1. Does *Pena-Rodriguez* apply retroactively to cases on collateral review?
2. The Eleventh Circuit first denied a certificate of appealability ("COA") on the theory that no reasonable jurist could find that Petitioner was prejudiced by Gattie's presence on the jury. After this Court found to the contrary and ordered further consideration, the Eleventh Circuit then denied a COA because it concluded that, while Petitioner did not learn of Gattie's racist views prior to state habeas proceedings and thus could not have challenged his death sentence on that ground at trial or on direct appeal, *Pena-Rodriguez* had created a new claim that first had to be exhausted in state court. After Petitioner moved for reconsideration on the grounds that the *Pena-Rodriguez* claim was not new and, in any event, had already been exhausted, the Eleventh Circuit then determined that a COA was unavailable both because Petitioner had failed to overcome the procedural default of the claim and because *Pena-Rodriguez* is not retroactive. Particularly given the Eleventh Circuit's constantly shifting rationale for denying a COA, did that court err in concluding that no reasonable jurist could debate whether Petitioner's colorable claim – that his death sentence is invalid because a juror voted to impose it based on Petitioner's race – together with this Court's intervening decision in *Pena-Rodriguez*, constitute extraordinary circumstances under Fed. R. Civ. P. 60(b) that would warrant reopening Petitioner's federal habeas proceeding to address the merits of that claim?

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PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

Petitioner, Keith Tharpe, respectfully petitions this Court to issue 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. *See* Appendices A and B.

OPINIONS BELOW

The published order of the Eleventh Circuit Court of Appeals, *Tharpe v. Warden*, 898 F.3d 1342 (11th Cir. 2018), which denied reconsideration of the Eleventh Circuit's denial of a Certificate of Appealability ("COA"), was entered August 10, 2018, and is attached as Appendix A. The unpublished order of the Eleventh Circuit Court of Appeals denying a Certificate of Appealability ("COA") following remand from this Court,[1] entered on April 3, 2018, is attached

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[1] *See Tharpe v. Sellers*, 138 S. Ct. 545 (2018).

hereto as Appendix B. The unpublished order of the Eleventh Circuit denying a COA on September 21, 2017, is attached hereto as Appendix C. The unpublished decision of the district court denying Petitioner's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b) (6), dated September 5, 2017, is appended as Appendix D. The Eleventh Circuit's published decision in *Tharpe v. Warden*, 834 F.3d 1323 (11th Cir. 2016), affirming the district court's denial of habeas relief is attached hereto as Appendix E. The district court's prior decision in *Tharpe v. Humphrey*, Case No. 5:10-CV-433 (M.D. Ga.), denying habeas relief, dated March 6, 2014, is attached hereto as Appendix F. The district court's order finding Petitioner's juror-bias claim procedurally defaulted is attached as Appendix G hereto. The underlying state habeas court order in *Tharpe v. Hall*, Butts Co. Superior Court Case No. 93-V-144, denying habeas relief is unreported and attached hereto as Appendix H. The Georgia Supreme Court's order denying review of the state habeas court's decision is unreported and attached hereto as Appendix I. This Court's grant of an extension of time, until November 22, 2018, to file this Petition is attached as Appendix J.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals denying Petitioner's application for a certificate of appealability was entered on April 3, 2018. *See* Appendix B. Reconsideration was denied on August 10, 2018. *See* Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254, 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:

"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 . . . ." U.S. Const. amend. XIV §1.

STATUTORY PROVISIONS INVOLVED

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

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . . .

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Federal Rule of Civil Procedure 60 provides in pertinent part:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason that justifies relief.

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, Petitioner'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] Dkt. No. 11-11 at 130-31. The trial court accepted the district attorney's race-neutral responses and the trial proceeded. Dkt. No. 11-11 at 145.

Prior to the *Batson* challenge, the State and defense questioned prospective juror Barney Gattie. Dkt. No. 11-3 at 85-99. 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 District Attorney Briley sometimes bought oysters at his seafood shop. Dkt. No. 11-3 at 95. Gattie was ultimately selected to serve on the jury. Dkt. No. 11-11 at 118-19. After convicting Petitioner, the jury heard evidence in aggravation and mitigation aimed at informing their sentencing decision. In aggravation, the State presented evidence that Petitioner had been convicted as a habitual traffic offender.[4] In mitigation, his attorneys presented brief testimony from a number of family

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[2] Petitioner 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 Petitioner'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 than *Batson*, specifically requiring a showing of the prosecuting attorney's history of discriminatory tactics. *See* Dkt. No. 12-6 at 57-61 (Brief of Appellant, *Tharpe v. State*); *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).

members, including his wife (and victim) Migrisus. The jury sentenced Petitioner 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.

Petitioner 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, Petitioner's state habeas counsel from the Georgia Resource Center conducted juror interviews. On May 16, 1998, attorneys Diana Holt and Laura-Hill Patton interviewed juror Barney Gattie at his home in Gray, Georgia. The visit lasted approximately one hour. Dkt. No. 15-16 at 23; Dkt. No. 77-6 at ¶ 2 (Affidavit of Laura Hill-Patton). During the interview, it became apparent that Gattie had strong, derogatory views about African Americans and that these views impacted his decision to sentence Petitioner to death. 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. Dkt. No. 15-16 at 19; Dkt. No. 77-7 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.'" Dkt. No. 15-16 at 20; Dkt. No. 77-7 at ¶ 11. The interview ended cordially with

Gattie's wife offering the attorneys fried green tomatoes and inviting them to stay for dinner.[5] Dkt. No. 15-16 at 20-21; Dkt. No. 77-7 at ¶ 13.

On May 25, 1998, Ms. Holt returned to Gattie's house with another Resource Center attorney, Laura Berg, as well as a draft affidavit based on Gattie's statements during the initial interview. 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, 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 Company Plant in Forsyth until it closed."[6] Dkt. No. 15-16 at 21; Dkt. No. 77-7 at ¶ 14. Ms. Holt proceeded to ask 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.

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[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 Gattie.

[6] Tracy Simmons was one of the two African Americans who served on Petitioner's jury. *See* Dkt. No. 15-8 at 7.

Dkt. No. 15-16 at 21; Dkt. No. 77-7 at ¶ 15.[7] Ms. Holt's recollection corroborates 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. Dkt. No. 15-8 at 130; Dkt. No. 77-2 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:

> 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~~ Integration 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 Gattie's affidavit and faxed a copy to opposing counsel. Dkt. No. 77-9 (Petitioner's Notice to Rely on Affidavits, May 26, 1998). The very next day, Gattie signed a second affidavit, this time on behalf of the Respondent. It characterized his interaction with Petitioner's attorneys in a manner at odds with counsel's recollections of what occurred, suggesting that Gattie had not understood the purpose of their visit

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[7] Ms. Berg's recollection is consistent with Ms. Holt's. *See* Dkt. No. 15-16 at 1-11; Dkt. No. 77-8 at ¶ 3 (Affidavit of Laura M. Berg).

[8] Despite maintaining that he did not pay attention to counsel's reading of the affidavit before signing it, Gattie admitted during his deposition testimony that he made and initialed the correction shown in this image. Dkt. No. 15-6, at 44-45; Dkt. No. 77-4 at 16-17.

and had been intoxicated at the time he signed his prior affidavit. Dkt. No. 15-17 at 13-15; Dkt. No. 77-3 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 Petitioner's jury, he had not known Petitioner was on probation at the time of the crime and did not discuss an alleged prior shooting with other jurors, 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 Gattie's counter-affidavit, Respondent also moved to exclude Petitioner's juror affidavits in their entirety as improper impeachment of the jury's verdict inadmissible under O.C.G.A. §§ 17-9-41 and 9-10-9. *See* Dkt. No. 13-17 at 4. 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* Dkt. No. 19-10 (Appendix H) at 99-101.

In the months that followed, counsel for Petitioner 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. Dkt. No. 14-8 (June 2, 1998). Although the state habeas court initially granted the protective order (Dkt. No. 14-10), 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. *See* Dkt. No. 15-2 at 1-2.

The depositions were conducted on October 1-2, 1998. *See* Dkt. Nos. 15-6 – 15-8. Eleven of the twelve jurors testified, and all denied that any racial bias was involved in the deliberations. As for Gattie, he again specifically denied only one statement contained in his initial affidavit – namely that he had disclosed to other jurors that Petitioner was on probation for a prior shooting. Dkt. No. 15-6 at 54-55; Dt. 77-4 at 54-55. Although he maintained that Petitioner's counsel did

not properly identify themselves and that he was intoxicated at the time he signed his first affidavit, 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] Dkt. No.15-6 at 118-19; Dkt. No. 77-4 at 118-19.

At a subsequent evidentiary hearing held on December 11, 1998, Petitioner submitted affidavits from the attorneys who had interviewed Gattie initially (Laura-Hill Patton and Diana Holt) and who were present when his affidavit was executed (Diana Holt and Laura Berg). *See* Dkt. No. 15-16 at 10-13, 17-26; Dkt. Nos. 77-6, 77-7, and 77-8. These affidavits, which were admitted into evidence, reaffirmed 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 Gattie as attorneys who were working on Petitioner's behalf. Dkt. No. 15-16 at 23; Dtk. No. 77-6 at ¶ 3 (Affidavit of Laura-Hill Patton); Dkt. No. 15-16 at 17-18; Dkt. No. 77-7 at ¶ 4 (Affidavit of Diana Holt). Contrary to 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." Dkt. No. 15-16 at 12; Dkt. No. 77-8 at ¶ 8 (Affidavit of Laura M. Berg); *see also* Dkt. No. 15-16 at 21l Dkt. No. 77-7 at ¶ 15 (Affidavit of Diana Holt). The attorneys further testified that Gattie was well aware of the contents of the affidavit, which he had corrected and signed on May 25, 1998.

[9] Gattie nonetheless testified that some of the statements in the affidavits were "out of proportion." Dkt. No. 15-8 at 82; Dkt. No. 77-5 at 14.

> 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.

Dkt. No. 15-16 at 10; Dkt. No. 77-8 at ¶ 3 (Affidavit of Laura M. Berg); *see also* Dkt. No. 15-16 at 21; Dkt. No. 77-7 at ¶ 15.

After these proceedings, Petitioner'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 Petitioner'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. Dkt. No. 19-10 (Appendix H) (Final Order). With regard to the juror-bias 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." Dkt. No. 19-10 (Appendix H) 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 F.2d 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, "even if Petitioner had admissible evidence to support his claims of juror misconduct, this Court finds the claims are procedurally defaulted as Petitioner failed to raise them at the motion for new trial or on appeal" and that Petitioner had not shown cause and prejudice to overcome the default. *Id.* at 102-04. The court specifically observed that Petitioner 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.*" Dkt. No. 19-10 (Appendix H) 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 Gattie's and the attorneys' testimony.

C. Federal Habeas Proceedings.

1. Initial Federal Habeas Proceedings.

Petitioner filed his federal habeas petition on November 8, 2010, in which he raised a juror misconduct claim based, *inter alia*, on racial bias. Dkt. No. 1 at 16-17. He reasserted the claim in his amended petition. Dkt. No. 25 at 16-17. By Order dated August 18, 2011, the district court found the claim procedurally defaulted based on the state habeas court's analysis of default in its Final Order. Dkt. No. 37 at 8-9 (Appendix G). Petitioner continued to pursue his 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. Dkt. No. 65 (Appendix G). The Eleventh Circuit expanded the COA to include the question of Petitioner's

intellectual disability. *Tharpe v. Warden*, Eleventh Circuit Case No. 14-12464, Order of July 30, 2014. 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) (Appendix E).

On April 14, 2017, Petitioner 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).

2. Fed. R. Civ. P. 60(b) Proceedings.

While counsel were preparing to file Petitioner'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, Petitioner, on June 21, 2017, filed a Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6). Dkt. No. 77. Respondent filed a response in opposition on August 2, 2017, Dkt. No. 89, and Petitioner filed a reply brief in support of his motion on August 18, 2017, Dkt. No. 93. On September 5, 2017, the district court denied relief, concluding that Petitioner's claim was barred by *Teague v. Lane*, 489 U.S. 288 (1989), and alternatively was procedurally defaulted. Dkt. No. 95 (Appendix D). The court denied a certificate of appealability. *Id.* at 22-23.

The next day, the State of Georgia obtained a warrant for Petitioner's execution ordering Petitioner to be executed sometime between Tuesday, September 26, 2017, and Tuesday, October 3, 2017.

Eleventh Circuit Order No. 1: On September 8, 2017, Petitioner filed an Application for Certificate of Appealability ("COA") and filed a separate Motion for Stay of Execution on September 13, 2017. On September 21, 2017, a panel of the Eleventh Circuit denied the COA

application and stay motion. *See* Appendix C. 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." Appendix C at 7. It further held that a COA should not issue to review the ruling because Petitioner 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 unexhausted 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.[10]

[10] It was and remains Petitioner's position that his juror-bias claims before and since *Pena-Rodriguez* are one and the same and, accordingly, the claim was already exhausted at the time he filed his Rule 60(b) motion. Nonetheless, he in fact returned to state court, while under warrant, to raise the claim anew, on the basis of the change in the law occasioned by *Pena-Rodriguez*, filing a successive petition in state court on September 22, 2017. The state habeas court denied that petition on September 26, 2017. That same day, the Georgia Supreme Court denied review and Petitioner filed a petition for writ of certiorari. That petition remained pending after this Court granted a stay of execution in the federal case, *see Tharpe v. Sellers*, 138 S. Ct. 53 (2017), and the Court later dismissed it without prejudice per the parties' stipulation. *See* Sup. Ct. Dkt. No. 17-6130. After dismissal, Petitioner twice moved for reconsideration in the Georgia Supreme Court

On September 23, 2017, three days before the scheduled execution, Petitioner filed a petition for writ of certiorari to review the Eleventh Circuit's decision and a motion to stay the execution. *See* Sup. Ct. Dkt. No. 17-6075. On the night of Petitioner's scheduled execution, September 26, 2017, the Court stayed the execution pending disposition of the petition for writ of certiorari. *See Tharpe v. Sellers*, 138 S. Ct. 53 (2017). On January 8, 2018, the Court granted the petition, vacated the judgment, and remanded for further consideration. *Tharpe v. Sellers*, 138 S. Ct. 545 (2018). In the *per curiam* decision, a 6-member majority of the Court determined that the Eleventh Circuit's denial of COA "was based solely on its conclusion, rooted in the state court's factfinding, that Tharpe had failed to show prejudice in connection with his procedurally defaulted claim, i.e., that Tharpe had 'failed to demonstrate that Barney Gattie's behavior "had substantial and injurious effect or influence in determining the jury's verdict."'" *Id.* at 546. This Court found that the Eleventh Circuit had erred in concluding that Petitioner had failed to establish prejudice to excuse the default of the racist-juror claim or "[a]t the very least, [that] jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court's factual determination [as to prejudice] was wrong." *Id.* at 546. As the Court explained:

> The state court's prejudice determination rested on its finding that Gattie's vote to impose the death penalty was not based on Tharpe's race. . . . And that factual determination is binding on federal courts, including this Court, in the absence of clear and convincing evidence to the contrary. See 28 U.S.C. § 2254(e)(1). Here, however, Tharpe produced a sworn affidavit, signed by Gattie, indicating Gattie's view that "there are two types of black people: 1. Black folks and 2. Niggers"; that Tharpe, "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

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on the basis of this Court's stay of execution in the companion federal case and the Court's subsequent order granting the petition, vacating the judgment, and remanding to the Eleventh Circuit. The Georgia Supreme Court denied reconsideration both times. Petitioner's petition for writ of certiorari to review the state court proceedings, filed while this case remained pending in the Eleventh Circuit following remand, was denied on June 25, 2018. *Tharpe v. Sellers*, 138 S. Ct. 2681 (2018).

> 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." . . . . 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. At the very least, jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court's factual determination was wrong. The Eleventh Circuit erred when it concluded otherwise.

Tharpe, 138 S. Ct. at 546 (record citations omitted). The Eleventh Circuit's review, this Court held, "should not have rested on the ground that it was indisputable among reasonable jurists that Gattie's service on the jury did not prejudice Tharpe." *Id.* The Court vacated the judgment and remanded the case "for further consideration of the question whether Tharpe is entitled to a COA." *Id.* at 546-47.

Eleventh Circuit Order No. 2: Several months after the remand, on April 3, 2018, the Eleventh Circuit issued a second order denying COA. Appendix B. The court reiterated its belief that *Pena-Rodriguez* had created a new constitutional claim, even though this Court's *per curiam* opinion did not provide support for the Eleventh Circuit's previously expressed view that Petitioner's original habeas petition and his Rule 60(b) motion raised different claims. As the court explained, Petitioner had alleged in his habeas petition that one of his jurors "harbored a racial animus against him because he is black, and that such animus substantially influenced the jury's verdict and imposition of the death sentence, all in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments." *Id.* at 2. This claim, the court explained, would be designated "Tharpe's 'pre-*Pena-Rodriguez* Claim' to distinguish it from his present Claim, discussed *infra*." *Id.*

Significantly, the Eleventh Circuit, in its second COA denial, disagreed with the district court's conclusion that Petitioner's "pre-*Pena-Rodriguez* Claim" was procedurally defaulted because Petitioner had failed to raise it at trial or in his direct appeal. *Id.* at 2. Instead, the court

observed that Petitioner had "discovered more than seven years after his trial . . . that a member of the jury that tried him, Barney Gattie (a white man), harbored a racial animus against him because he is black . . . ." Appendix B at 2. And, after explaining that the state habeas court had found the "pre-*Pena-Rodriguez* claim" procedurally defaulted because it had not been raised at trial or on direct appeal, the Eleventh Circuit stated:

> 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*."

Id. at 2-3, 3 n. 2 (emphasis added).[11]

This conclusion, however, had no bearing on the court's ultimate ruling. Instead, the court noted that, in its first order, it had denied COA "for two reasons," first, that "Tharpe failed to make 'a substantial showing of the denial of a constitutional right'" because he did not demonstrate that "Barney Gattie's behavior 'had substantial and injurious effect or influence," and second, because, *Pena-Rodriguez* created a new claim that Petitioner had not yet exhausted. *See* Appendix B at 7-8; *see also id.* at 2 (distinguishing Petitioner's "pre-*Pena-Rodriguez* claim" from his "present [*Pena-Rodriguez*] claim"). The court accordingly denied COA again "on the alternative ground we gave for denying it originally: that Tharpe's *Pena-Rodriguez* Claim has not been exhausted in state court." *Id.* at 9.[12]

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[11] The court's implicit finding of cause to excuse default of the racist-juror claim is significant because the Eleventh Circuit simply ignored this finding in its third order when it rejected COA *inter alia* on the ground that the claim was defaulted.

[12] The court also rejected Petitioner's reliance on *Buck v. Davis*, 137 S. Ct. 759 (2017), on which Petitioner had relied for the proposition that a change in the law that permitted review of a defaulted claim that racial bias may have influenced a death sentence constituted "extraordinary circumstances" that warranted reopening the judgment under Rule 60(b)(6). The Eleventh Circuit concluded that *Buck* was "inapposite" because Buck "sought relief for ineffective assistance of counsel after his own trial attorney presented evidence that his future dangerousness level . . . was

Eleventh Circuit Order No. 3: Petitioner moved for reconsideration of the Eleventh Circuit's April 3, 2018, order, arguing that he had raised the same fully exhausted claim – that his death sentence was invalid due to Barney Gattie's racism – in his initial habeas petition and in the Rule 60(b) motion and that, regardless, he had exhausted any "new" *Pena-Rodriguez* claim when he litigated the successive state habeas petition while under warrant. On August 10, 2018, the Eleventh Circuit denied reconsideration, but changed the grounds for its conclusion that Petitioner was not entitled to a COA: "First, his claim arises from the rule announced in *Pena-Rodriguez* . . . and that rule does not apply retroactively. Second, he has failed to show cause to overcome his procedural default." Appendix A at 2.

With respect to its retroactivity ruling, the Eleventh Circuit concluded that *Pena-Rodriguez* could not be applied retroactively under *Teague v. Lane*, 489 U.S. 288 (1989), inasmuch as Petitioner's conviction became final well before *Pena-Rodriguez* was decided, and *Pena-Rodriguez* was neither a new substantive rule of criminal law nor a watershed rule of criminal procedure. *See* Appendix A at 2-7.

The court also concluded that the claim was defaulted, noting that the state courts "have unambiguously held that Tharpe's juror racial bias claim was procedurally defaulted" both when first raised and following *Pena-Rodriguez*. *Id.* at 8. The court acknowledged that "the only question is whether Tharpe arguably proved cause," given that this Court had already "held that Barney Gattie's affidavit would permit jurists of reason to dispute whether Tharpe demonstrated prejudice, *see Tharpe*, 138 S. Ct. at 546 . . . ." *Id.* at 9. The court, however, did not acknowledge

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higher because he is black" and that this Court "reversed because the Fifth Circuit's COA inquiry did not comport with the standard laid out in *Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029 (2003)." Appendix B at 5. For this reason, the court concluded, "*Buck* does not affect Tharpe's *Pena-Rodriguez* claim." *Id.*

that it had previously found cause when it concluded that Petitioner "could not have raised the pre-*Pena-Rodriguez* Claim at trial or on direct appeal" because he "discovered [the claim's factual predicate] more than seven years after his trial . . . ." Apr. 3, 2018 Order (Appendix B) at 2, 3 n.2. Instead, the court claimed, incorrectly, that "[t]o prove cause, Tharpe alleged only, and at the highest order of abstraction, that 'trial counsel [was] ineffective in failing to raise meritorious claims on appeal[,] that trial counsel's ineffectiveness constitutes cause to excuse any procedural default," and that Petitioner had supplied no proof to support this.[13] Appendix A at 9. The court concluded that "[b]ecause Tharpe's attempt to show cause is wholly unsubstantiated, he has failed to make the requisite showing of cause to overcome his procedural default." *Id.*

HOW THE FEDERAL QUESTION WAS RAISED BELOW

Petitioner first raised the claim that racial bias motivated one of his jurors to vote in favor of the death penalty in his First Amended Petition for Writ of Habeas Corpus filed in the Superior Court of Butts County, Georgia. *See* Dkt. No. 13-8 at 16. The state habeas court held that the evidence submitted in support of the claim was inadmissible under Georgia's law precluding jurors

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[13] The Eleventh Circuit was clearly wrong to assert that Petitioner has only alleged ineffective assistance of counsel as cause for the default. Throughout these proceedings, Petitioner has shown cause by pointing out that Barney Gattie's racial bias was not discovered, and could not reasonably have been discovered, until his attorneys conducted jury interviews in state habeas proceedings – facts apparent from the state court record; he as well directed the courts to *Turpin v. Todd*, 268 Ga. 820, 827-28 (1997), in which the Georgia Supreme Court held that the petitioner had shown cause for not raising a jury misconduct claim prior to state habeas proceedings where, like here, "the record reveals no other evidence that would have alerted trial or appellate counsel to the fact that jury misconduct or improper jury deliberations occurred at trial." *See* Reply Brief in Support of Petitioner's Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6) (Doc. 93) at 13 n.7; Application for Certificate of Appealability ("COA Application"), CA11 No. 17-14027 at 38 n.15; Reply in Support of Application for Certificate of Appealability ("Reply in Support of COA Application"), CA 11 No. 17-14027 at 12. The Eleventh Circuit so found in its second order denying COA, Appendix B at 2, 3 n.2, but appears to have forgotten this finding when denying reconsideration.

from impeaching their verdict and that the claim was otherwise procedurally defaulted. Dkt. No. 19-10 at 98-104. In federal habeas corpus proceedings, the district court found the claim procedurally defaulted as well. Dkt. No. 37 (Appendix G) at 8-10. Following this Court's rulings in *Pena-Rodriguez* and *Buck*, Petitioner moved to reopen this claim pursuant to Fed. R. Civ. P. 60(b)(6) on the basis of the new decisional law rendering his previously defaulted juror-bias claim cognizable, but the district court denied the motion and the Eleventh Circuit denied a certificate of appealability. This Court stayed Petitioner's execution and, ultimately, granted certiorari, vacated the judgment and remanded for further proceedings. On remand, the Eleventh Circuit again denied a certificate of appealability and then denied reconsideration of its order, albeit on new grounds.

REASONS WHY THE PETITION SHOULD BE GRANTED

This Court has reaffirmed time and again that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.'" *Buck*, 137 S. Ct. at 778 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). The Court's decisions reflect its ongoing commitment to eradicating racial discrimination in the justice system. *See, e.g.*, *Pena-Rodriguez*, 137 S. Ct. at 867-68 (discussing cases). That commitment rings hollow if the State of Georgia is permitted to kill Petitioner without *any* judicial scrutiny of his long-standing and long-ignored claim that Juror Barney Gattie voted to impose the death penalty because Petitioner is black. That claim – supported by credible evidence, in the form of both sworn affidavits and live testimony, including Gattie's sworn statement that he voted for the death penalty because Petitioner is a "nigger" who killed a "'good' black" person and his flagrant, repeated and unabashed use of the word "nigger," a term that "is a universally recognized opprobrium, stigmatizing African-

Americans because of their race"[14] – must not be swept under the rug any longer. This Court's intervention is once again necessary to prevent a grotesque and shocking perversion of justice.

ARGUMENT

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

"[T]he jury . . . 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 racist views of even one juror negatively influence the verdict.

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

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[14] *Brown v. East Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993).

that this right preempts the widespread practice of shielding jury verdicts from scrutiny through "no impeachment"[15] rules that prohibit the use of juror testimony to challenge the validity of a jury verdict. That decision imposes no new obligations on the states and should be recognized as having retroactive effect in this and other proceedings. The Eleventh Circuit decided *Pena-Rodriguez* has no retroactive effect, however, applying the standard governing the retroactivity of new constitutional rules of criminal procedure set forth in *Teague v. Lane*, 489 U.S. 288 (1989).

As set forth below, *Pena-Rodriguez* does not create a new constitutional rule of criminal procedure and thus its application is not barred by *Teague*'s non-retroactivity rule. Moreover, even assuming that *Teague* applies, *Pena-Rodriguez*'s rule qualifies for retroactive application under that decision. Given the compelling nature of Petitioner'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.[16]

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)

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

[16] The retroactivity determination, moreover, is the particular responsibility of this Court in certain contexts. *See, e.g.*, 28 U.S.C. § 2254(e)(2)(A)(i) (barring factual development in federal habeas proceedings except under narrow circumstances, including that "the claim relies on . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable").

(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 confidence that petitioner's equal protection claim will not be barred in federal habeas corpus proceedings by *Teague* and its progeny").[17]

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 v. Louisiana*, 136 S. Ct. 718, 730 (2016) (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. No-impeachment rules are not limited to criminal proceedings. And neither regulate the "manner of determining" a defendant's culpability (or sentence). 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 a trial is conducted.

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[17] 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 Petitioner's case to find the evidence of Juror Gattie's racism inadmissible under Georgia's no-impeachment rule. *See* Appendix H at 99-100; *Spencer v. State*, 260 Ga. 640 (1990).

Moreover, *Pena-Rodriguez* modified a substantive rule of evidence designed to protect the sanctity of jury deliberations (in both civil and criminal trials)[18] and did so on the basis of clearly established Supreme Court law securing bedrock constitutional rights to trial by an impartial jury[19] 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 Petitioner's claim.[20] *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 principle*, enumerated as long ago as *Smith v. O'Grady*, [312 U.S. 329 (1941)]. And, because *Teague* by its terms applies only to

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[18] "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.

[19] "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).

[20] The Eleventh Circuit's reasoning illustrates the futility of attempting to fit *Teague*'s square peg into *Pena-Rodriguez*'s round hole. The court rejected the argument that no-impeachment rules are substantive, rather than procedural in nature, because, according to the court, "whether a rule is substantive under *Teague* is utterly distinct from whether it is substantive under *Erie* [*R.R. Co. v. Tompkins*, 304 U.S. 64, 58 (1938)]," and asserted, without explanation' that "the rule in *Pena-Rodriguez* is plainly procedural in nature; it regulates only the manner of determining the defendant's culpability and concerns a procedural mechanism by which to challenge a jury verdict." Appendix A at 6. But the conclusion that *Pena-Rodriguez* does not constitute a rule of substantive criminal law (which Petitioner did not argue), does not establish that it constitutes a criminal procedural rule. Such a rule, this Court has explained, 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 effects of invidious racism – are bedrock procedural protections.

procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.") (emphasis added).

B. Even If Considered 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 Petitioner'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 Petitioner's conviction and sentence became final, applying the Sixth Amendment right to an impartial jury and the Fourteenth Amendment right to equal protection under the law as means to secure 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).

The Eleventh Circuit concluded that "no precedent established that proof of a juror's racial animus created a Sixth Amendment exception to the no-impeachment rule" and cited *Tanner v. United States*, 483 U.S. 107 (1987) and *McDonald v. Pless*, 238 U.S. 264, 268 (1910), for the proposition that "clearly established precedent held just the opposite." Appendix A at 4. But, the cited precedent, *Tanner* and *McDonald*, do not hold the opposite. Neither case addressed the question posed by *Pena-Rodriguez* – whether the harm to litigants and the judicial system as a

whole posed by a racist juror outweighs the interest in protecting the sanctity of jury deliberations. In *Tanner*, the Court held that proof that jurors were impaired from consuming alcohol and drugs did not override this interest. *See Tanner*, 483 U.S. 120-27. In *McDonald*, the Court upheld the secrecy of jury deliberations against evidence that jurors "used an arbitrary and unjust method in arriving at their [monetary] verdict." *McDonald*, 238 U.S. at 267. And, as this Court noted in *Pena-Rodriguez*, earlier cases, including *McDonald*, expressly recognized that "'cases might arise in which it would be impossible to refuse' juror testimony 'without violating the plainest principle of justice,'" and "cautioning that the no-impeachment rule might recognize exceptions '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 863-64 (quoting *United States v. Reid*, 53 U.S. 361, 366 (1852), and *McDonald*, 238 U.S. at 269).

And the exception this Court acknowledged in *Reid* and *McDonald* was, unsurprisingly, satisfied by the facts of *Pena-Rodriguez*, a "case [lying] at the intersection of the Court's decisions endorsing the no-impeachment rule and its decisions seeking to eliminate racial bias in the jury system." *Pena-Rodriguez*, 137 S. Ct. at 868. The Court's holding in *Pena-Rodriguez* – that a defendant's right to an impartial jury and equal protection under the law trumped a state rule enshrining the secrecy of jury deliberations – was the predictable result of its application of prior decisions securing a criminal defendant's right not to be convicted and sentenced on the basis of race.

"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 decisions recognizing that racial bigotry is anathema to the right to trial by a fair and impartial jury and equal protection under the law, and that any such bigotry should be brought to light, long predate *Pena-Rodriguez*. *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."). As such, *Pena-Rodriguez* did not break "new ground" and imposed no "new obligation" on any court.

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 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 Eleventh Circuit, In Offering Multiple, Conflicting Grounds For Denying A COA, Ignored The Low Threshold For Granting A COA And Revealed The Court's Efforts To Avoid Review Of The Disturbing Issues This Case Presents.

Title 28 U.S.C. § 2253 (c) requires a certificate of appealability to be granted before a habeas petitioner may appeal from a final district court judgment denying relief.[21] A COA should issue where the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). When, as here, a COA seeks to address a district court's procedural ruling, the petitioner must show "that [the] procedural ruling barring relief is itself debatable among jurists of reason . . . ." *Buck*, 137 S. Ct. at 777. *See Slack*, *supra*. As this Court recently explained in *Buck*, the COA inquiry "is not coextensive with a merits analysis" and, "[a]t the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336).

Here, Petitioner clearly met that standard in showing that reasonable jurists could disagree with the district court's denial of his Rule 60(b) motion on the ground that *Pena-Rodriguez* did not apply and that, regardless, the state habeas court's failure to consider the evidence presented of Juror Gattie's racist views and their impact on the death sentence, nonetheless complied with *Pena-*

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[21] The Eleventh Circuit requires issuance of a COA "before a habeas petition may appeal the denial of a Rule 60(b) motion." *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1265 (11th Cir. 2015). *See also Buck*, 137 S. Ct. at 780 (Fifth Circuit erred in denying a COA to address procedurally defaulted claim of racial bias in capital sentence raised in Rule 60(b) motion).

Rodriguez. Moreover, the reasons for denying a COA finally adopted by the Eleventh Circuit fail to withstand scrutiny and, given the extraordinary issues at stake in this case, warrant review by this Court.

A. Petitioner Appropriately Sought to Reopen the Judgment Under Rule 60(b)(6).

On the basis of this Court's intervening decisions in *Pena-Rodriguez* and *Buck*, Petitioner moved to reopen the district court judgment in his case under Fed. R. Civ. P. 60(b) (6). That rule "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances, including fraud, mistake, and newly discovered evidence." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Rule 60(b)(6) "permits reopening when the movant shows 'any . . . reason justifying relief from the operation of the judgment' other than the more specific circumstances set out in Rules 60(b)(1)-(5)."[22] *Id*.[23] While the Antiterrorism and Effective Death Penalty Act of 1996 has placed limits on Rule 60(b)'s application in federal habeas proceedings, it appropriately applies to cases like Petitioner's, which "attack[], not the substance of the federal

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[22] Grounds 1-5 permit judgment to be opened due to:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or misconduct by an opposing party; (4) the judgment is void; [and] (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable . . . .

Fed. R. Civ. P. 60(b).

[23] "This clause is a broadly drafted umbrella provision which has been described as 'a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses.'" *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984) (quoting 7 J. Lucas & J. Moore, Moore's Federal Practice para. 60.27[2] at 375 (2d ed. 1982)).

court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," *id.* at 532, in this case the preclusion of proof to support Petitioner's juror misconduct claim and the court's application of an overly burdensome prejudice standard to find the claim procedurally defaulted.

"Rule 60(b) vests wide discretion in the courts, but . . . relief under 60(b)(6) is available only in 'extraordinary circumstances.'" *Buck*, 137 S. Ct. at 777 (quoting *Gonzalez*, 545 U.S. at 535). Such circumstances must be determined on the basis of "a wide range of factors [that] may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Buck*, 137 S. Ct. at 778 (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-64 (1988)).

This Court's recent decision in *Buck* is instructive. There, the Court held that the district court had abused its discretion in denying a habeas petitioner's Rule 60(b)(6) motion, given proof that "Buck may have been sentenced to death in part because of his race." *Buck*, 137 S. Ct. at 778. This type of error represented a "disturbing departure from a basic premise of our criminal justice system," which "punishes people for what they do, not who they are," a departure "exacerbated because it concerned race." *Id.* Buck's trial counsel had knowingly presented expert testimony at Buck's penalty phase that Buck was more likely to be a future danger because he was black. *Id.* at 768-69. Trial counsel's ineffectiveness in this regard, however, was not raised on direct appeal or in his initial state postconviction proceedings; when later raised in federal habeas proceedings, it was deemed procedurally defaulted and the merits of the claim were not reached. *Id.* at 770-71.

This Court's decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), established a previously unavailable basis to excuse the procedural default of Buck's ineffective assistance claim; he accordingly sought relief under Fed. R. Civ. P. 60(b) to

reopen his claim that his death sentence was tainted by his trial counsel's ineffectiveness in presenting racially discriminatory expert testimony. The district court denied relief, concluding that Buck had not shown "extraordinary circumstances" and that he had failed to demonstrate the merits of the underlying claim, as the expert's introduction of race was "*de minimis*" because the expert had only linked race and future dangerousness twice. *Buck*, 137 S. Ct. at 772. The Fifth Circuit denied a certificate of appealability to address the claim. *Id.* at 773.

This Court disagreed with the rulings from both lower federal courts. With respect to the district court's refusal to reopen the case under Rule 60(b)(6), the Court initially concluded that Buck succeeded on the merits of his claim that trial counsel were ineffective in presenting expert testimony linking Buck's race to his future dangerousness, given the centrality of the future dangerousness finding, the stark impropriety of presenting such testimony, and the likelihood that expert testimony on the subject influenced the sentencing jury. *Buck*, 137 S. Ct. at 776-77. The Court further repudiated the district court's conclusion that the criteria for granting the Rule 60(b)(6) motion was not met because the case did not present "extraordinary circumstances." Rather, the Court observed:

> Buck may have been sentenced to death in part because of his race. As an initial matter, this 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. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle. As petitioner correctly puts it, "[i]t stretches credulity to characterize Mr. Buck's [ineffective assistance of counsel] claim as run-of-the-mill." . . . This departure from basic principle was exacerbated because it concerned race.

Id. at 778. That such circumstances were "extraordinary" was "confirmed by what the State itself did in response to [the expert's testimony] in other cases," namely confessing error in five of the six cases the State had identified in which the expert had given such testimony. *Id.* at 778-79. Only Buck's capital sentence had been left untouched. *Id.* Given these circumstances, the Court

found, its recent decisions in *Martinez* and *Trevino* provided the mechanism for having Buck's ineffective-assistance claim finally determined on the merits.

B. Reasonable Jurists Could Debate Whether The District Court Properly Refused To Reopen The Case Under Rule 60(b)(6).

Given this Court's strong condemnation of *the possibility* that Mr. Buck had been sentenced to death in part on the basis of his race, Petitioner's positive proof that his death sentence is so tainted, together with this Court's intervening decision in *Pena-Rodriguez*, which removes the impediment to judicial review of the claim's merits, establish "extraordinary circumstances" that warrant reopening Petitioner's habeas proceedings under Rule 60(b)(6). Although "something more than a 'mere' change in the law is necessary to provide the grounds for Rule 60(b)(6) relief," *Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987), *Buck* clearly shows that that "something more" is presented here. First, as in *Buck*, the new law on which Petitioner relied not only provided a path for considering the merits of Petitioner's previously defaulted claim, but it also informs the merits review of that claim. More significantly, *Buck* shows that the subject matter of the claim – the likelihood that Petitioner was "sentenced to death in part because of his race" – is of exceptional importance, representing a "disturbing departure from a basic premise of our criminal justice system" heightened by the "odious" and "pernicious" taint of racial discrimination. *Buck*, 137 S.Ct. at 778. *See also Pena-Rodriguez*, 137 S. Ct. at 868; *cf. Liljeberg*, 486 U.S. at 864 (holding that relief under Rule 60(b) was appropriate to correct district court's failure to recuse itself based on circumstances creating the appearance of impropriety and noting that "it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process").

Together, *Buck* and *Pena-Rodriguez* establish that reasonable jurists could disagree with the district court's decision to deny the Rule 60(b) motion on grounds that Petitioner's claim was not "extraordinary."

When this case first was brought to the Eleventh Circuit (while Petitioner faced imminent execution), that court initially fell into the same error made by the Fifth Circuit in *Buck*, "sidestep[ping] [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits," a practice that "in essence decid[es] an appeal without jurisdiction." *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336-37). In its first COA denial (Appendix C), the Eleventh Circuit essentially interposed a merits-based rationale for denying COA, accepting the notion that the district court could reasonably have dismissed Gattie's racist remarks and testimony that he voted to impose the death penalty because Petitioner was a "nigger" who had killed someone Gattie considered "'good' black folk," as an "offhand comment" that did not "justify setting aside the no-impeachment bar to allow further judicial inquiry." Appendix C at 5 (quoting *Pena-Rodriquez*, 137 S. Ct. at 869). *See also id*. at 7 (approving district court's analysis as "appl[ying] the correct legal standard and bas[ing] its decision on findings of fact not clearly erroneous"). This Court forcefully rejected the Eleventh Circuit's rationale for denying COA; it stayed Petitioner's execution, granted certiorari, vacated the Eleventh Circuit's judgment, and remanded for further consideration, finding that Petitioner's proof "presents a strong factual basis for the argument that Tharpe's race affected Gattie's vote for a death verdict" and, "[a]t the very least, jurists of reason could debate whether Tharpe has shown by clear and convincing evidence that the state court's factual determination was wrong." *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (*per curiam*).

On remand, the Eleventh Circuit changed course, interposing procedural barriers to granting leave to appeal the district court's order. In the April 3, 2018, order, the court found, significantly, that Petitioner could not have raised the claim that his death sentence was constitutionally infirm as a result of Barney Gattie's racist views at the trial or direct appeal stage, because Petitioner did not learn of this claim until his postconviction lawyers interviewed Gattie many years later – a determination tantamount to a finding of "cause" to excuse the procedural default of the claim. Appendix B at 2, 3 n.2. Nonetheless, the court held, *Pena-Rodriguez* had created a *new* claim that first had to be exhausted in the state courts. *Id.* at 8, 9-10. It denied COA noting that its ruling "will enable Tharpe to pursue the Claim in a successive petition in the Superior Court of Butts County. . . . Tharpe's application for a COA is therefore denied without prejudice." *Id.* at 10.

Petitioner then moved for reconsideration on the grounds that his racist-juror claim was fully exhausted both because it was the same claim before and after *Pena-Rodriguez*, and because, regardless, the "new" *Pena-Rodriguez* claim had already been exhausted in successive state habeas proceedings conducted under warrant. In response, the Eleventh Circuit came up with new reasons to avoid granting a COA, opining that *Pena-Rodriguez* was a new constitutional rule of criminal procedure that did not apply retroactively and concluding the claim was procedurally defaulted because Petitioner had not shown cause for the default[24] – even though just a few months before, in the April 3, 2018, order, the court had determined that Petitioner could not have raised the claim

[24] The court acknowledged that this Court's remand order removed prejudice as an issue. Appendix A at 9 ("Since Tharpe's juror racial bias claim was procedurally defaulted, and since the Supreme Court of the United States held that Barney Gattie's affidavit would permit jurists of reason to dispute whether Tharpe demonstrated prejudice, *see Tharpe*, 138 S. Ct. at 546, the only question is whether Tharpe arguably proved cause.").

before interviewing Gattie in state habeas proceedings, an implicit finding of cause to excuse the default.[25]

The Eleventh Circuit's shifting and contradictory reasons for denying review strongly suggest a court that is shirking its "duty . . . to decide cases and controversies properly before [it]." *United States v. Raines*, 362 U.S. 17, 20 (1960) (quoting *Marbury v. Madison*, 1 Cranch 137, 177-80 (1803)). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 327. Surely that minimal standard has been met here.

1. Reasonable Jurists Could Debate Whether The District Court Correctly Held That Petitioner's Claim Is Procedurally Defaulted.

In denying the Rule 60(b) motion, the district court found that Petitioner had procedurally defaulted the claim that Juror Gattie's vote for the death penalty was influenced by Petitioner's race, and had not shown prejudice to excuse the default. *See* Doc. 95 at 14-22. This Court repudiated that finding – and the Eleventh Circuit's reliance on it – when it vacated the Eleventh Circuit's first COA denial and remanded the case. *See Tharpe*, 139 S. Ct. at 546-47. The same panel of Eleventh Circuit judges, on remand, initially found "cause" for Petitioner's failure to raise

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[25] "The bar to federal review may be lifted . . . if 'the prisoner can demonstrate cause for the [procedural] default [in state court] and actual prejudice as a result of the alleged violation of federal law.'" *Maples v. Thomas*, 565 U.S. 266, 280 (2012) (quoting *Coleman v. Thompson*, 501 U.S. 722, 751 (1991)). A petitioner's "showing that the factual or legal 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)).

the racist-juror claim at trial or on direct appeal because "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 . . . ." Appendix B at 3 n.2. Yet, just a few months later, when the court's stated rationale for denying COA was shown to be factually insupportable, the same panel of judges found the opposite: "Because Tharpe's attempt to show cause is wholly unsubstantiated, he has failed to overcome his procedural default. *See Tharpe*, 138 S. Ct. at 552 (Thomas, J., dissenting ('[N]o reasonable jurists could argue that Tharpe demonstrated cause for his procedural default.')." Appendix A at 9.

But, as the Eleventh Circuit had previously found, Petitioner could not have raised the claim at the time of trial and direct appeal because he did not discover the factual basis for his claim until "more than seven years after his trial . . . ." Appendix B at 2. *See also Tharpe*, 138 S. Ct. at 547, 548 (Thomas, J., dissenting) ("More than seven years after his trial, Tharpe's lawyers interviewed one of his jurors, Barnie Gattie [whose] resulting affidavit" expressed "racist opinions about blacks . . . that are certainly odious"). Indeed, it is undisputed that Petitioner could not have known of the predicate facts of his claim prior to the time that his postconviction lawyers interviewed jurors. In light of the undisputed facts regarding Petitioner's discovery of the claim, and the Eleventh Circuit's earlier, implicit finding of cause, reasonable jurists could disagree that the claim is in fact procedurally defaulted. Indeed, the weight of the evidence establishes cause to excuse the default because Petitioner could not have known of the factual basis of the claim at the time of trial or direct appeal. The Eleventh Circuit accordingly should not have denied COA on the ground that Petitioner defaulted the claim that he was sentenced to death on the basis of race.

2. Reasonable jurists could debate the district court's conclusion that *Pena-Rodriguez* does not apply retroactively.

Former-Justice Anthony Kennedy, the author of *Pena-Rodriguez*, believed that the rule ultimately announced in that case would not be barred by *Teague*. *See Spencer v. Georgia*, 500 U.S. 960, 960 (1991) (Kennedy, J., concurring) ("[I]f I thought our decision in *Teague* . . . would prevent us from reaching [petitioner's issues] on federal habeas review, I would have voted to grant certiorari."). That fact alone should establish that reasonable minds could disagree with the district court's retroactivity ruling. Nonetheless, Eleventh Circuit, following the district court's lead, applied the retroactivity analysis set forth in *Teague v. Lane*, 489 U.S. 288 (1989), a case that, by its terms, applies only to "new constitutional rules of criminal procedure." *Bousley*, 523 U.S. at 619. *Pena-Rodriguez*, however, established an exception to a rule of evidence governing the admissibility of proof used to impeach a verdict. As such, it by definition did not create a "new constitutional rule of criminal procedure." The evidentiary no-impeachment rule is not "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 *Summerlin*, 542 U.S. at 353) (emphasis in *Summerlin*). Reasonable minds accordingly could disagree with the district court's determination that Petitioner's claim is *Teague*-barred.

Given the district court's decision to apply a retroactivity analysis that was designed to apply in a completely different context, as well as the *res nova* nature of the issue it decided,[26]

[26] *See, e.g., United States v. Espinoza-Saenz*, 235 F.3d 501, 502 (10th Cir. 2000) ("Because this presents a question of first impression in this circuit, we conclude that the issue merits further judicial consideration, and we grant a certificate of appealability."); *Nowakowski v. New York*, 835 F.3d 210, 213 (2d Cir. 2016) ("We granted a certificate of appealability with instructions to brief two questions of first impression we now answer.").

reasonable jurists could disagree about the district court's application of that standard here and its determination that *Pena-Rodriguez* is not retroactive.[27]

3. The capricious nature of the Eleventh Circuit's shifting justifications for avoiding review of Petitioner's case suggest the court is erecting excuses simply to avoid its duty to hear all cases properly before it.

"The responsibility of courts is to decide cases, both usual and unusual, by neutrally applying the law." *Tharpe*, 138 S. Ct. at 547 (Thomas, J., dissenting). Here, the Eleventh Circuit's parade of post-remand excuses not to hear Petitioner's case "reek[] of afterthought" and provide no good reason to doubt that [its justifications are] anything but makeweight." *Miller-El v. Dretke*, 545 U.S. 231, 246 (2005).

Petitioner has raised the disturbing claim, supported by compelling evidence, that one of his jurors was motivated to vote in favor of the death penalty because Petitioner is black. For close to twenty years, both state and federal courts avoided addressing the merits of that claim in reliance on an evidentiary rule precluding the very proof needed to substantiate it. Now that this Court has made clear that, together, the constitutional rights to equal protection of the law and to a fair trial by an impartial jury override the interests protected by no-impeachment rules, the state and federal courts have continued to avoid Petitioner's evidence by erecting a variety of procedural barriers of dubious substance to stand in its way. This Court must step in to avoid the travesty of justice that

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[27] The Eleventh Circuit issued a ruling to that effect, despite its lack of jurisdiction to do so. *See, e.g.*, *Buck*, 137 S. Ct. at 773 ("'When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.'") (quoting *Miller-El*, 537 U.S. at 336-37). Nonetheless, because the Eleventh Circuit order determined a purely legal question and because statutory law, in other contexts, relegates to this Court the responsibility for determining retroactivity, *see, e.g.*, 28 U.S.C. § 2254(e)(2)(1)(A)(i), Petitioner has separately raised this question as a separate basis for certiorari.

would result from permitting Petitioner's execution to go forward without any court ever confronting this claim. If given meaningful consideration, Petitioner's evidence yields a deeply unsettling view of his death sentence.

Gattie's affidavit statements regarding African Americans in general and Petitioner in particular, separately and together with the affidavits of the three lawyers who met with him, cannot be dismissed as mere "offhand comment[s] indicating racial bias or hostility." *Pena-Rodriguez*, 137 S. Ct. at 869. To the contrary, Gattie's statements, which must be taken as accurate assessments of his actual thoughts, go to the very heart of the issue of whether he voted to sentence Petitioner to death because of his race. Gattie's free use of the word "nigger" was "by its very nature an expression of prejudice on the part of the maker" which, due to social condemnation, may have been "cloaked" once he was appearing in court.[28] *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986).[29] To whitewash Gattie's language ignores the historical significance

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[28] In *Pena-Rodriguez*, this Court noted "The stigma that attends racial bias may make it difficult for a juror to report inappropriate statements during the course of juror deliberations. It is one thing to accuse a fellow juror of having a personal experience that improperly influences her consideration of the case . . . . It is quite another to call her a bigot." 137 S. Ct. at 869. That same stigma, of course, could have an equally chilling effect on a juror's willingness to implicate himself as a racist in open court.

[29] In *Heller*, the Eleventh Circuit vacated a conviction where the trial court had engaged in only a superficial inquiry into allegations that several jurors had made anti-Semitic remarks in the jury room. The court rejected the government's efforts to minimize the racial and religious slurs as made "purely in a spirit of jest" having "no bearing on the jury's deliberations." *Heller*, 785 F.2d at 1527. As the Eleventh Circuit forcefully stated:

> *[A]nti-Semitic "humor" is by its very nature an expression of prejudice on the part of the maker.* Indeed, in a society in which anti-Semitism is condemned, those harboring such thoughts often attempt to mask them by cloaking them in a "teasing" garb. A wolf in sheep's clothing is, despite clever disguise, still a wolf. Those who made the anti-Semitic "jokes" at trial and those who reacted to them with "gales of

of his words. "Over the years, *nigger* has become the best known of the American language's many racial insults, evolving into the paradigmatic slur." Randall Kennedy, *Nigger: The Strange Career of a Troublesome Word* 22 (Vintage Books ed. 2003). Juror Gattie's free use of the word, particularly coupled with his expressly racist views about integration, intermarriage, and souls, accordingly provided clear evidence of his entrenched racial bias, irrespective of his later claim that he used the word "nigger" to describe lazy, no-good white people as well as black people. This Court recognized as much in concluding 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." *Tharpe*, 138 S. Ct. at 546.

The underlying merits of Petitioner's case are deeply disturbing and set forth a more than colorable claim that Petitioner's death sentence was the impermissible product of racial bias. This claim deserved encouragement to proceed further and the Eleventh Circuit accordingly should have issued a COA. Petitioner respectfully submits that this Court should grant certiorari, vacate the Eleventh Circuit's judgment, and either take this case up for full consideration or remand with instructions to the Eleventh Circuit to grant a certificate of appealability to address the Petitioner's claim that he should be granted relief from judgment.

> laughter" displayed the sort of bigotry that clearly denied the defendant Heller the fair and impartial jury that the Constitution mandates.

Id. (emphasis added). The same holds true here.

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). Gattie's presence on Petitioner's jury, however, denied to Petitioner this essential safeguard against the pernicious effects of racial bigotry. This Court must grant the Petition for Writ of Certiorari in order to ensure that the fundamental protection the jury is intended to confer is not grotesquely perverted by allowing the State of Georgia to proceed with Petitioner's execution without any court ever having afforded him merits review of his disturbing claim, supported by credible evidence, that he was sentenced to death because in one juror's eyes he is a "nigger" who "should get the electric chair for what he did."

This 21st day of November, 2018.

Respectfully submitted,

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No. 18- , 18A389

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 as follows:

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This 21st day of November, 2018.

Attorney