No. 17-6075, 17-A330

In the
# Supreme Court of the United States

Keith Leroy Tharpe,
*Petitioner,*

v.

Warden, GDCP,
*Respondent.*

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

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Did the Eleventh Circuit utilize the appropriate standard for denying Petitioner's request for a certificate of appealability in accord with this Court's precedent?

2. Was the Eleventh Circuit's denial of Petitioner's certificate of appealablity correct?

## INTRODUCTION

Petitioner begins his brief by lamenting that no court has ever reviewed the merits of his juror racial bias claim. But the fault for that lies squarely at Petitioner's feet. During the state habeas proceeding, evidence from each of the jurors regarding Petitioner's juror bias claim was presented either live or in affidavit form. Following this presentation, briefing of both parties was ordered by the court. While Respondent briefed Petitioner's juror bias claim, Petitioner did not. He did not present any argument or evidence explaining to the court how he had shown cause and prejudice to overcome the default of his claim in order for the court to review his claim on the merits. Given this, the state habeas court reasonably concluded that Petitioner's claim was procedurally defaulted. Although the state court initially found Petitioner's juror bias evidence was not admissible, it alternatively assumed that even if Petitioner had admissible evidence, he had failed to show cause and prejudice to overcome the default of the claim. Petitioner did not raise a challenge to these findings in his application for certificate of probable cause to appeal in the Georgia Supreme Court.

Following his failure in state court, Petitioner gave his claim even less attention in his federal habeas proceeding. Despite being given more than one opportunity to do so, Petitioner did not specifically brief his claim to the federal habeas court. The court examined the issue and record and held Petitioner had failed to show cause and prejudice to overcome the default of his claim. Not once in any brief in federal court did Petitioner mention the facts of his claim. Additionally, Petitioner did not request a certificate of appealability for the district court's dismissal of his claim.

Then after this Court decided *Peña-Rodriguez v. Colorado*, __U.S.__, 137 S. Ct. 855 (2017), Petitioner requested that the federal habeas court reopen his 28 U.S.C. § 2254 proceeding under Federal Rule of Civil Procedure 60(b)(6). The district court once again looked at Petitioner's juror bias claim and found it was procedurally defaulted. In its examination of the default, the district court noted that the state habeas court had ultimately looked at Petitioner's evidence under the prejudice prong and found it did not prove that racial animus had been relied upon by the juror in sentencing Petitioner. The state habeas court was provided, by Petitioner, affidavit testimony from the juror Barney Gattie in which he provided racially discriminatory statements. However, Mr. Gattie then provided live and further affidavit testimony that race was not a motivating factor of the jury and answered many questions propounded by Petitioner in court that did not reveal Mr. Gattie harbored racial animosity toward black individuals. Additionally, the remaining eleven jurors, who all testified, did not state that race was considered during deliberations. The state habeas court, as found by the district court, made the credibility finding that racial animus had not been relied upon by the Mr. Gattie in sentencing Petitioner.

In denying the certificate of appealability (COA), the Eleventh Circuit Court of appeals heeded this Court's recent precedent, and did not go to the merits of Petitioner's claim. Instead the Court found, in summary fashion, that Petitioner's claim did not meet the COA standard. Petitioner has not shown that the court's decision was incorrect. Petitioner's claim is, without debate, still procedurally defaulted; and he has failed to show, in his case, *Peña-Rodriguez* lifted his default. Certiorari review is simply not warranted in this case.

## STATEMENT OF THE CASE

### A. Petitioner's Crimes

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

### B. The Trial

Petitioner was found guilty of malice murder and two counts of kidnapping with bodily injury. *Id.* During the sentencing phase of trial, counsel tried to show Petitioner was a good person that had been temporarily overcome with emotional distress after being left by his wife. *Tharpe v. Warden*, 834 F.3d 1323, 1325 (2016). The jury voted unanimously to impose the death penalty finding three statutory aggravating factors according to O.C.G.A. § 17-10-30(b)(2) and (b)(7): the murder was committed while Petitioner was engaged in the commission of another capital felony, kidnapping with bodily injury of Jacquelin Freeman; the murder was committed while Petitioner was engaged in the commission of another capital

felony, kidnapping with bodily injury of Migrisus Tharpe; and the murder was outrageously or wantonly vile, horrible or inhuman because it involved an aggravated battery to the victim. *Id.* at 1326.

The Georgia Supreme Court affirmed the convictions and sentences on March 17, 1992. *Tharpe v. State*, 262 Ga. 110 (1992). Petitioner did not allege his juror misconduct claim at either the trial, the motion for new trial or on direct appeal. (ECF Nos. 10-2 at 118-19; ECF Nos. 12-5, 12-6, 12-7, 12-8). This Court denied certiorari review on October 19, 1992. *Tharpe v. Georgia*, 506 U.S. 942, 113 S. Ct. 383 (1992).

**C. State Habeas Proceedings**

On March 12, 1993, Petitioner filed his initial state habeas petition, (ECF No. 13-2), which he amended on December 31, 1997, (ECF No. 13-8), and on January 21, 1998 (ECF No. 13-10). In his first amended petition, Petitioner claimed that racial animus improperly infected the jury's deliberations. (ECF No. 13-8 at 16-17).

The state habeas court held multiple hearings where Petitioner's juror claim was addressed. Either through deposition or affidavit, sworn testimony was tendered before the state habeas court from each of the jurors. At the May 28, 1998, hearing, Petitioner tendered juror affidavits from Margaret Bonner, (ECF No. 14-3 at 4-6), Barney Gattie, (ECF No. 14-3 at 7-8), and James Stinson (ECF No. 14-3 at 36-38). The portion of Mr. Gattie's affidavit that is at issue in this case is the following:

In this affidavit, the relevant portion states:

> I . . . knew the girl who was killed, Mrs. Freeman. Her husband and his family have lived in Jones [C]ounty a long time. The

> Freemans are what I would call a nice Black family. In my experience I have observed that there are two types of black people. 1. Black folks and 2. Niggers. For example, some of them who hang around our little store act up and carry on. I tell them, "nigger, you better straighten up or get out of here fast." My wife tells me I am going to be shot by one of them one day if I don't quit saying that. I am an upfront, plainspoken man, though. Like I said, the Freemans were nice black folks. If they had been the type Tharpe is, then picking between life or death for Tharpe wouldn't have mattered so much. My feeling is, what would be the difference. As it was, because I knew the victim and her husband's family and knew them all to be good black folks, I felt Tharpe, who wasn't in the "good" black folks category in my book, should get the electric chair for what he did. Some of the jurors voted for death because they felt that Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason. The others wanted blacks to know they weren't going to get away with killing each other. After studying the Bible, I have wondered if black people even have souls. Integration started in Genesis. I think they were wrong. For example, look at O.J. Simpson. That white woman wouldn't have been killed if she hadn't have married that black man.

(ECF No. 14-3 at 7).

Subsequently, over two days, October 1-2, 1998, the state habeas court presided while the parties deposed eleven jurors: Barney Gattie, Lucille Long, Charles Morrison, James Stinson, Joe Thomas Woodard, Jason Simmons, Margaret Bonner, Mary Graham, Ernest Ammons, Martha Sandefur, and Polly Herndon. (ECF No. 15-6; ECF No. 15-7; ECF No. 15-8).

Mr. Gattie testified during the depositions that on the day he initially spoke to representatives from the Georgia Resource Center regarding Petitioner's case, which was the basis for the affidavit that was prepared, he had been drinking. (ECF No. 15-8 at 84-85). Mr. Gattie said when members of the Georgia Resource Center returned days later, he signed the affidavit that had been prepared by them, but he had been drinking that day because

it was a holiday. (ECF No. 15-6 at 42). Mr. Gattie specified that he had consumed a twelve pack of beer and a few drinks of whiskey before he signed the affidavit. (ECF No. 15-8 at 80).

Mr. Gattie also testified that he was not told by representatives of the Georgia Resource Center that it was an affidavit and what it was going to be used for. (ECF No. 15-6 at 42-43; ECF No. 15-8 at 83). Mr. Gattie testified that Ms. Holt from the Georgia Resource Center read him the affidavit because he did not have his glasses to read it himself. (ECF No. 15-8 at 81-83). Mr. Gattie testified that while the affidavit was being read to him, he was not really paying attention. (ECF No. 15-8 at 83). Mr. Gattie testified that he did not recall saying that he did not need to read the affidavit because it was all true. (ECF No. 15-6 at 42). Mr. Gattie testified that the affidavit acquired by the Georgia Resource Center had been "taken all out of proportion" and "was misconstrued." (ECF No. 15-6 at 56).

During the deposition, Mr. Gattie stated that he had used the word "nigger." (ECF No. 15-6 at 113). Mr. Gattie said that there are "white niggers" and there are "black niggers" and both are "no good."[1] *Id.* Mr. Gattie explained that he did not mean the word "nigger" as a racial slur. (ECF No. 15-6 at 114). Regardless of whether you are white or a black, if you commit a crime; do wrong; or do not work, Mr. Gattie would consider that person a "nigger." *Id.*

Mr. Gattie was asked many questions by Petitioner's counsel regarding his views on race, specifically black persons. Many of the questions were ruled irrelevant by the state habeas court—e.g. questions such as whether

[1] To be clear, Respondent is not in any way condoning the use of this racial slur, but is merely reporting the testimony of Mr. Gattie.

Mr. Gattie had read *Uncle Tom's Cabin* or whether his granddaughter would "not want a black doll" or whether she has any "black dolls." (ECF No. 15-6 at 64, 108-109). However, the questions Mr. Gattie was allowed to answer do not show evidence of racial animus towards black individuals. For example, Mr. Gattie agreed that racial discrimination was a serious problem in our country, felt that the Georgia State flag, at that time it held a Confederacy symbol, should be changed if it "offended people," testified that he would love a mixed-race grandchild the same as a white grandchild, and later explained that he had black foster grandchildren that were "welcomed just like the whites was." (ECF No. 15-6 at 79, 88, 93, 102-103). He also testified, in answer to specific questions, that he considered white and black people to be equal in intelligence and did not think blacks "no more than whites" brought violence. *Id.* at 100, 106.

Mr. Gattie also testified live before the state habeas court that the word "nigger" was not discussed at trial and the only subjects that were discussed was the evidence presented at trial. (ECF No. 15-6 at 118).

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

Herndon, (ECF No. 15-8 at 108-27); and affidavit of Tracy Simmons, (ECF No. 15-16 at 7-8).

Following the live depositions, on December 11, 1998, Petitioner tendered a juror affidavit from Tracy Simmons. He also tendered affidavits from various people from the Georgia Resource Center regarding their recollection of the circumstances under which Mr. Gattie's affidavit was obtained. Also on that date, Respondent tendered an affidavit from Mr. Gattie. In this rebuttal affidavit, Mr. Gattie testified that he was unaware when he was approached by representatives of the Georgia Resource Center that they were representing Petitioner. (ECF No. 15-17 at 13). Mr. Gattie testified that he voted to sentence Petitioner to death because of the evidence presented at trial and Petitioner's lack of remorse. *Id.* at 14. Mr. Gattie testified that race was never an issue at deliberations and that the word "nigger" was never used by any juror during deliberations. *Id.*

On December 4, 2008, the state habeas court entered an order denying habeas relief. (ECF No. 19-10). Regarding Petitioner's juror misconduct claim, the court found the juror affidavits and depositions were not admissible. (ECF No. 19-10 at 99-101). **The court, however, in the alternative found that if Petitioner's evidence was admissible, Petitioner's juror misconduct claim was procedurally defaulted and he failed to establish prejudice to overcome the default. (ECF No. 19-10 at 102-03).** Regarding cause, the court found: "Petitioner has failed to establish any state action as cause preventing him from raising these claims" or that ineffective assistance of counsel had been shown as cause to overcome the default. *Id.* In concluding there was no prejudice the court opined:

"Petitioner has failed to show that any alleged racial bias of Mr. Gattie's was the basis for sentencing the Petitioner…" *Id.*

Petitioner filed an application for a certificate of probable cause with the Georgia Supreme Court. (ECF No. 19-12 at 1-48). In his application, Petitioner failed to allege that his death sentence was the result of juror misconduct. *Id.* The Georgia Supreme Court summarily denied the application. (ECF No. 19-15).

Petitioner filed a petition for writ of certiorari with this Court, which was denied. *Tharpe v. Upton*, 562 U.S. 1069, 131 S. Ct. 655 (2010).

**D. Federal Habeas Proceedings**

Petitioner filed his federal habeas corpus petition on November 8, 2010, and amended it on April 11, 2011. In both his original and amended habeas petitions, Petitioner claimed improper racial attitudes infected the jury's deliberations. (ECF No. 1 at 16-17; ECF No. 25 at 16-17). Issues of procedural default and exhaustion were briefed separately according to the district court's order. (ECF No. 24). The district court ultimately ruled that Petitioner's juror misconduct claim was procedurally defaulted and he failed to establish cause and prejudice to overcome the default. (ECF No. 37 at 8-10).

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

### E. Rule 60(b)(6) Motion

On June 21, 2017, Petitioner filed a Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6). (ECF No. 77). In this motion, Petitioner asked the district court to reopen his 28 U.S.C. § 2254 to reconsider his juror bias claim under this Court's recent decisions in *Peña-Rodriguez v. Colorado*, __U.S.__, 137 S. Ct. 855 (2017) and *Buck v. Davis*, __U.S.__, 137 S. Ct. 759 (2017). The district court entered an order denying Petitioner's motion on September 5, 2017. In its order, the district court found Petitioner's reliance on Peña-Rodriguez was barred by the nonretroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), and in the alternative, found neither *Peña-Rodriguez* nor *Buck* provided an extraordinary circumstance under Rule 60(b)(6) to overcome the procedural default of his juror misconduct claim. (ECF No. 95). The Court also denied Petitioner a Certificate of Appealability. (ECF No. 95).

On September 8, 2017, Petitioner filed an Application for COA in the Eleventh Circuit and a subsequent Motion for Stay of Execution was filed on September 13, 2017. On September 21, 2017, the Eleventh Circuit entered an order denying Petitioner's Application for COA and Motion for Stay of Execution. *Keith Tharpe v. Warden*, Case No. 17-14027-P (September 21, 2017).

## REASONS FOR DENYING THE PETITION

### I. The Eleventh Circuit's denial of COA was in accord with this Court's precedent as it answered the threshold question for granting a COA and did not perform a merits review.

Petitioner alleges the Eleventh Circuit did not answer the threshold question of whether it should grant his request for a COA, but instead, in violation of this Court's precedent, went directly to the merits of his juror bias claim. (Petitioner's brief, p. 15). It can hardly be said that the Eleventh Circuit's two paragraphs addressing whether a COA should be granted consists of a merits review of his juror bias claim. (Appendix A, pp. 7-8). Although the Eleventh Circuit does spend the first six of the nine page order setting out the procedural history, it does not undertake a merits review. In the two paragraphs, the Court acknowledged the standard and summarily found Petitioner had failed to meet it. *Id.* Consequently, Petitioner has failed to show the Eleventh Circuit's decision is not in accord with this Court's order.

As correctly stated by Petitioner, this Court recently reiterated in *Buck v. Davis*, that a "COA inquiry" "is not coextensive with a merits analysis." 137 S. Ct. at 773. This Court went on to state, "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.'" *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). And this question should be answered "without 'full consideration of the factual or legal bases adduced in support of the

claims.'" *Id.* (quoting *Miller-El*, 537 U.S. at 336). The Eleventh Circuit did not stray from this directive.

In the first six pages, the Eleventh Circuit set out the relevant procedural history, including specific findings by the district court. (Petitioner's Appendix A, pp. 1-6). The Eleventh did not comment in the first six pages on the merits of Petitioner's juror misconduct claim nor did the court recite any facts from the record. Immediately following its brief notation of the district court's decision, the Court correctly identified the correct standards for granting a Rule 60(b)(6) motion[2] and a COA. *Id.* at 6-7. As an initial matter the Court assumed *Peña-Rodriguez* was retroactive for collateral review.[3] *Id.* at 7. Then, the court provided its first reason for denying the COA, which is limited to three sentences. It determined that Petitioner had failed to make a "substantial showing of the denial of a constitutional right" as both the state habeas and federal habeas court had found Petitioner had not shown juror "Gattie's behavior 'had a substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 7 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). The court then

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[2] The Eleventh Circuit summarily concluded that in denying Petitioner's Rule 60(b)(6) motion, the district court had "applied the correct legal standard and based its decision on findings of fact not clearly erroneous." (Petitioner's Attachment A, p. 7).

[3] Petitioner complains that reasonable jurists could debate whether *Peña-Rodriguez* is retroactive which "present[ed] yet another reason that a COA was appropriate in this case." (Petitioner's brief, p. 20, n. 14). Respondent asserts, as he did below, that *Peña-Rodriguez* is not retroactive for collateral review purposes and reasonable jurists could not debate this issue. However, as the Eleventh Circuit essentially resolved this issue in Petitioner's favor, he fails to explain how the court's decision in not in accord with this Court's precedent to warrant review of his petition.

summarily found that reasonable jurists could not debate that the district court correctly found Petitioner's claim was procedurally defaulted. *Id.*

As an alternative reason for denying the COA, the court also found that if *Peña-Rodriguez* is retroactive, Petitioner's claim had not been properly exhausted in state court. *Id.* at 7-8.

Nothing in the Eleventh Circuit's analysis shows that it conducted a merits analysis. After reviewing Petitioner's brief, the only specific allegation that Respondent could find that supports Petitioner's argument is the following:

> Here, the Eleventh Circuit essentially interposed a merits-based rationale for denying COA, accepting the notion that the district court could reasonably have dismissed Mr. Gattie's racist remarks and testimony that he voted to impose the death penalty because Mr. Tharpe was a "nigger" who had killed someone Mr. Gattie considered "'good' black folk," as an "offhand comment" that did not "justify setting aside the no-impeachment bar to allow further judicial inquiry."

(Petitioner's brief, p. 20).

Petitioner's allegation has no merit. Petitioner's allegation inserts findings not made by the court as the portion of the Eleventh Circuit's opinion that Petitioner cites to is part of the court's recitation of the district court's opinion. This portion does not contain any merits analysis, but merely reports what the district court found and cites to the portion of this Court's decision in *Peña-Rodriguez* that the district court was referring to:

> The District Court rejected Tharpe's argument that the Superior Court's default analysis failed to comply with that required by *Pena-Rodriguez*, by noting that in *Pena-Rodriguez,* the Supreme Court **"left discretion to the state trial court to determine if a juror's statement indicated he relied on racial animus to convict or sentence a defendant."** As the Supreme Court described in *Pena-Rodriguez*,

> [n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. **Whether the threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances,** including the content and timing of the alleged statements and the reliability of the proffered evidence.
>
> 137 S. Ct. at 869.

(Petitioner's Attachment A, pp. 5-6) (emphasis added).

Consequently, Petitioner has failed to show the Eleventh Circuit improperly conducted a merits review in denying his request for a COA. As the Eleventh Circuit's decision was in accord with this Court's precedent, certiorari review should be denied.

## II. The Eleventh Circuit's denial of Petitioner's request for a COA was correct.

Petitioner alleges his verdict was the product of improper racial bias on the part of juror Gattie in violation of his Sixth Amendment right to an impartial jury. As stated above, in denying Petitioner's request for a COA, the Eleventh Circuit determined that: 1) reasonable jurists could not debate the correctness of the district court's finding of procedural default; 2) and Petitioner had failed to show the denial of constitutional right as the state and federal court's had found Petitioner had failed to show juror "Gattie's behavior" influenced the jury's verdict. In making these determinations, the

Eleventh Circuit assumed this Court's recent decision in *Peña-Rodriguez* is retroactive for collateral review purposes. Petitioner has failed to show the Eleventh Circuit's decision is incorrect. Nothing in *Peña-Rodriguez* suggests that the holding automatically removes a procedural default of a claim. And Petitioner failed to show his Sixth Amendment rights were violated under the standard announced in *Peña-Rodriguez*.

### A. *Peña-Rodriguez* does not lift the procedural default bar of Petitioner's claim.

As stated above, the state habeas court initially found Petitioner's evidence of juror bias to be inadmissible. But then the court assumed the evidence was admissible, and found the claim was procedurally defaulted and Petitioner had not shown cause and prejudice to overcome the default.[4] During Petitioner's original federal habeas proceeding, Petitioner did not specifically brief this claim, despite being given more than one opportunity to do so, and the district court found the claim to be procedurally defaulted.[5] (CITE). In denying Petitioner's request to reopen his § 2254 proceeding under Rule 60(b)(6), the district court again found Petitioner's claim was procedurally defaulted. The Eleventh Circuit found that reasonable jurists could not debate the correctness of the district court's determination that Petitioner's claim was procedurally defaulted.

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[4] Of note, despite hearings before the state habeas court on this claim, Petitioner did not brief his juror bias claim in his post-hearing brief. Nor did he raise it in his CPC application to the Georgia Supreme Court.

[5] Given Petitioner's failure to ever brief his juror misconduct claim in either his original state or federal habeas proceeding, Petitioner's lament that no court has ever reviewed his claim on the merits rings particularly hollow. (*See* Petitioner's brief, p. 1).

### 1. No Cause

Petitioner fails to address how *Peña-Rodriguez* can be used as cause to overcome the procedural default of his claim. As such, Petitioner fails to show that *Peña-Rodriguez* is an extraordinary circumstance warranting the reopening of his case. The juror misconduct claim in *Peña-Rodriguez* was addressed on the merits as it came to this Court on direct appeal. As shown above, Petitioner has never specifically pled or proven cause to overcome the default of his claim. There is no language in *Peña-Rodriguez* suggesting that juror misconduct claims, even those alleging racial bias, are exempt from the procedural default bar. Reasonable jurists could not debate that *Peña-Rodriguez* does not create an extraordinary circumstance to show cause to overcome the default of Petitioner's claim.

The only cause argument Petitioner ever raised in any court was the general allegation that trial and appellate counsel were ineffective for not pursing his procedurally defaulted claims. Petitioner never offered specific argument and evidence explaining why his juror misconduct claim could not have been raised at trial or on direct appeal. As such, he has waived any opportunity to do so. *See generally Princeton Homes, Inc. v. Virone*, 612 F.3d 1324, 1329, n. 2 (11th Cir. 2010) ("It is well-settled that 'appellate courts generally will not consider an issue or theory that was not raised in the district court.'" (quoting *FDIC v. Verex Assurance, Inc.*, 3 F.3d 391, 395 (11th Cir. 1993) (citation omitted)).

Petitioner has had nearly two decades to explain to the state and federal courts why he waited until seven years after his trial to raise his juror misconduct claim, and has never done so. Peña-Rodriguez does not provide

the extraordinary circumstance for Petitioner to do so now and reasonable jurists could not debate this issue.

**2. No Prejudice**

Contrary to Petitioner's assertion, and assuming *Peña-Rodriguez* is retroactive, reasonable jurists could not debate that Petitioner has failed to show prejudice under the rule announced in *Peña-Rodriguez*. As correctly found by the district court, the state habeas court's prejudice analysis "comports with the analysis required by *Pena-Rodriguez*." (ECF No. at 19). Given the extremely narrow holding in *Peña-Rodriguez*, and the facts of Petitioner's case, Petitioner has failed to show that reasonable jurists could debate this determination.

*Peña-Rodriguez* is a threshold inquiry asking whether a juror has made "a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant." *Peña-Rodriguez*, 137 S. Ct. at 869. When this is satisfied, "the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id.* Based on this, if a court looks at the evidence and determines that no juror relied on racial stereotypes or animus to convict a criminal defendant, then the no-impeachment rule still applies. If the no-impeachment rule no longer applies, then Petitioner must "show that racial animus was a significant motivating factor in the juror's vote to convict" and this determination is "committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence." *Id.*

By-passing whether Petitioner had shown enough evidence to overcome the no-impeachment rule by assuming Petitioner did have admissible evidence, the state habeas court concluded that Petitioner's juror misconduct claim was procedurally defaulted. (ECF No. 19-10 at 102-03). In analyzing the prejudice prong, the state habeas court found Mr. Gattie testified "that he 'did not vote to impose the death penalty because [the Petitioner] was a black man' and that 'at no time was there any discussion about imposing the death sentence because [Petitioner] was a black man.'" *Id*. Thus, the state habeas court properly concluded: "Petitioner has failed to show that any alleged racial bias of Mr. Gattie's was the basis for sentencing the Petitioner… ." (ECF No. 19-10 at 102). Petitioner fails to show how this determination did not comply with this Court's decision in *Peña-Rodriguez*.

As correctly pointed out by the district court and Eleventh Circuit, the determination of whether the evidence shows improper racial animus is left to the "discretion of the trial court" who must evaluate all of the circumstances surrounding the evidence. Petitioner faults all of the courts for not relying solely on the affidavit testimony he obtained from Mr. Gattie in determining his claim. But neither the state nor federal courts were under such a mandate. And contrary to Petitioner's implication, there is no proof that the state or federal court did not consider his evidence.

As correctly found by the district court, "The 'circumstances' presented in Tharpe's case are dissimilar from those in *Peña-Rodriguez*." (ECF No. 95 at 20-21). In *Peña-Rodriguez*, the juror was so overtly racist during deliberations that two jurors spoke to Peña-Rodriguez's attorneys about the racist comments immediately after trial. Here, every juror that was questioned, all remaining eleven, regarding the possibility of racial animus

during deliberations denied that any racial animus tainted the process. (ECF No. 15-7 at 4-5, 31, 53-54, 86, 118; ECF No. 15-8 at 26, 45-46, 60, 74-75, 125). Although Mr. Gattie made comments seven years after trial that could indicate racial bias, he denied that any bias affected his deliberations. (ECF No. 15-17 at 14).

During live testimony before the state habeas court, Mr. Gattie was subjected to rigorous examination by Petitioner's counsel regarding how his initial affidavit was obtained and what constituted his racial views. Mr. Gattie disputed that he had sworn to the accuracy of his affidavit, provided testimony that suggested the circumstances under which Petitioner's counsel had obtained the affidavit were questionable, and felt his statements to Petitioner's counsel had not been accurately reflected in his affidavit. Moreover, when allowed to answer Petitioner's counsel's myriad of questions designed to reveal racism, Mr. Gattie's answers did not show that he harbored racist views of black persons. Again, Respondent is not defending Mr. Gattie's use of the word "nigger" but is instead merely pointing out that Mr. Gattie's answers to counsel's question did not expose him as an individual who possessed racial animosity toward black persons. Nor did his answers reveal that Mr. Gattie had sentenced Petitioner based upon his race.

It was not unreasonable under the facts presented to the state habeas court to conclude that racial bias was not relied upon to sentence Petitioner. Mr. Gattie's racially insensitive remarks seven years after trial do not establish the racial animus necessary to meet the standard announced by this Court in *Peña-Rodriguez*. Moreover, the jurors denied that racial animus was a part of their deliberations. As correctly found by the district court, the state habeas court, after hearing the jurors testify live, made the

credibility determination that Mr. Gattie had not relied upon "racial stereotypes or animus to sentence Tharpe." (ECF. No. 95 at 21). *See Consalvo v. Sec'y for the Dep't of Corr.*, 664 F.3d 842, 845 (11th Cir. 2011) ("Determining the credibility of witnesses is the province and function of the state courts, not a federal court engaging in habeas review."). Petitioner has not shown that the district court's finding that he had failed to show prejudice was incorrect.

As Petitioner has failed to show that under the *Peña-Rodriguez* standard the outcome of a motion for new trial or appeal on this claim would have been different, he has also failed to show a denial of Sixth Amendment rights. Although Petitioner's complains that the courts improperly channeled review of his claim under the prejudice standard, he does not explain how such a review did not result in proper consideration of his Sixth Amendment claim under *Peña-Rodriguez*. A prejudice analysis and a substantive review of his claim are essentially one in the same.

Petitioner alleges the Eleventh Circuit was in error in determining that he had failed to show a denial of his Sixth Amendment rights by finding that the state court and the district had determined "Gattie's behavior 'had a substantial and injurious effect or influence in determining the jury's verdict.'" (Petitioner's Appendix A at 7) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). Although Petitioner takes issue with the Eleventh Circuit's use of the *Brecht* standard, that is in essence what the lower courts found—that Mr. Gattie's racial views, which did evidence some bias, did not unconstitutionally infect the jury's deliberations of Petitioner's sentence. And Petitioner has not shown that the courts' determination were incorrect.

Consequently, as the Eleventh Circuit correctly determined Petitioner had not made the necessary showing for a COA, Petitioner has failed to present an issue worthy of this Court's review.

## III. The Eleventh Circuit's alternate denial of Petitioner's request for a COA because Petitioner had not exhausted his juror misconduct claim is irrelevant.

Petitioner complains that the Eleventh Circuit erroneously determined that if *Peña-Rodriguez* was retroactive, then he had not exhausted his claim in state court. Petitioner argues that *Peña-Rodriguez* did not create a new claim but merely altered the evidence that could be considered in reviewing the claim. Regardless of whether Petitioner's claim is exhausted the Eleventh Circuit's first reason for denying the COA is correct and in accord with this Court's precedent. Accordingly, this issue presents nothing warranting this Court's certiorari review.

## CONCLUSION

For the reasons above, this Court should deny the petition for certiorari and Petitioner's request to stay his execution.

Respectfully submitted.

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*September 26, 2017*

## CERTIFICATE OF SERVICE

I do hereby certify that I have this day, September 26, 2017, served the within and foregoing Pleading, prior to filing the same, by emailing, properly addressed upon:

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/s/ Sabrina D. Graham
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