VALUING PROCEDURE OVER SUBSTANCE: RACIAL BIAS IN THE CAPITAL JURY ROOM

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INTRODUCTION

Keith Tharpe is an African American inmate on Georgia's death row.[1] Nearly thirty years ago, a jury found him guilty of capital murder and sentenced him to death.[2] Over seven years later, Tharpe's attorneys discovered that one of his jurors, who was white, harbored deeply racist views in connection with his vote for Tharpe's death.[3] Since then, Tharpe has attempted to challenge the "familiar and recurring evil" [4] that tainted his death sentence: racial bias. However, his claim has never been evaluated due to procedural bars.[5] Earlier this year, Tharpe made a final request for the Supreme Court to reverse the procedural rulings of the lower courts, but the Court denied certiorari.[6]

Death is a punishment that differs from all others not in degree, but in kind.[7] Accordingly, the Constitution requires that capital juries consider defendants as "individual human beings" rather than "members of a faceless, undifferentiated mass." [8] Tharpe's juror contravened this principle. In a signed affidavit, he stated that "there are two types of black people," using a racial slur to categorize one, and calling the other "good black folks."[9] In his view, Tharpe did not belong in the "good black folks" category and "should get the electric chair for what he did."[10] In contrast to the Constitution's mandate that capital juries contemplate the "compassionate or mitigating factors stemming from the diverse frailties of humankind," [11] Tharpe's juror explicitly wondered whether black people have souls.[12]

Justice Sotomayor concurred in the denial of certiorari, writing separately to caution that we "not look away from the magnitude of the

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[1] Tharpe v. Ford, 139 S. Ct. 911, 911 (2019) (Sotomayor, J., concurring) (mem.).
[2] Tharpe v. State, 416 S.E.2d 78, 79 (Ga. 1992).
[3] *Tharpe v. Ford*, 139 S. Ct. at 912.
[4] *Id.* at 911; Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017).
[5] *Tharpe v. Ford*, 139 S. Ct. at 912.
[6] *Id.*
[7] *E.g.*, Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).
[8] Woodson v. North Carolina, 428 U.S. 280, 304 (1976).
[9] *Tharpe v. Ford*, 139 S. Ct. at 911 (internal quotations omitted).
[10] *Id.*
[11] *Woodson v. North Carolina*, 428 U.S. at 304.
[12] *Tharpe v. Ford*, 139 S. Ct. at 913.

potential injustice that procedural barriers are shielding from judicial review."[13] In light of Tharpe's case, this contribution maintains that procedure must yield to substance where explicit racial bias in a capital jury may have contributed to a death sentence.

I. THE JURY'S BLACK BOX

The American jury is a black box. The centuries-old no-impeachment rule,[14] now codified in the Federal Rules of Evidence,[15] generally precludes juror testimony about statements, mental processes, and details from deliberations after a jury has returned a verdict or indictment. In *Tanner v. United States*, this rule barred a post-verdict evidentiary hearing where some jurors would have testified that others had ingested cocaine, marijuana, and alcohol during jury deliberations.[16] Despite its potential for undermining the Sixth Amendment right to a fair trial, the no-impeachment rule advances important goals. First, it ensures that verdicts are final, and that jurors will not be haled back into court to defend their choices.[17] Second, it promotes full and frank jury deliberations, avoiding the chilling effect that would come from transparency.[18] Third, it instills public trust in the jury system—which relies on the judgments of laypeople—and respect for the rule of law.[19]

In 2017, the Supreme Court in *Peña-Rodriguez v. Colorado* recognized that racial bias in the jury room violates the constitutional guarantee of equal protection of the law[20] and undercuts public confidence in the verdict.[21] Thus, the Court carved out an exception to the no-impeachment rule where there is clear evidence that a juror relied on racial animus to convict a defendant.[22] The trial court may then examine the evidence and any resulting denial of the Sixth Amendment jury trial right.[23] This fundamental right is most important in a capital sentencing,

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[13] *Id.*
[14] *E.g.*, Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017).
[15] FED. R. EVID. 606(b).
[16] Tanner v. United States, 483 U.S. 107, 115–16, 127 (1987).
[17] *E.g.*, Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861, 865 (2017).
[18] *E.g.*, *id.* at 878 (quoting *Tanner*, 483 U.S. at 120–21).
[19] *E.g.*, *id.*
[20] *Peña-Rodriguez*, 137 S. Ct. at 868 ("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.").
[21] *Id.* at 869 ("A constitutional rule that racial bias in the justice system must be addressed–including, in some instances, after the verdict has been entered–is necessary to prevent a systemic loss of confidence in jury verdicts . . . .").
[22] *Id.*
[23] *Id.*

which "is unique in its total irrevocability"[24] and "should reflect a reasoned *moral* response to the defendant's background, character, and crime."[25]

II. RETROACTIVITY

Invoking *Peña-Rodriguez*, Tharpe, a state prisoner, sought postconviction relief from the federal courts.[26] The Eleventh Circuit denied relief, holding that *Peña-Rodriguez* did not apply retroactively to Tharpe's case.[27] Under *Teague v. Lane*, a new constitutional rule of criminal procedure is generally inapplicable to cases that became final before the new rule was announced.[28] However, federal courts engage in a three-step test to be sure.[29] First, they determine when the defendant's conviction became final.[30] Second, they decide whether the rule is new, or whether a state court, at that time, would have felt compelled by existing precedent to conclude that the rule was required by the Constitution.[31] Third, if the rule is new, they consider whether it falls within one of two narrow exceptions to nonretroactivity—it is either a substantive rule or a watershed rule of criminal procedure.[32]

Here, the Eleventh Circuit found that the rule from *Peña-Rodriguez* was announced after Tharpe's conviction became final.[33] Second, it held that at that time, a state court considering Tharpe's claim would not have felt compelled by existing precedent to conclude that the rule was required by the Constitution.[34] In the Eleventh Circuit's view, then-existing precedents like *McDonald v. Pless* embraced the breadth of the no-impeachment rule.[35] Third, the Eleventh Circuit determined that neither exception to nonretroactivity applied.[36] *Peña-Rodriguez* did not create a new substantive rule; rather, it created a new procedural mechanism for challenging a jury verdict.[37] However, the Eleventh Circuit reasoned, this

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[24] Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).
[25] Penry v. Lynaugh, 492 U.S. 302, 319 (quoting California v. Brown, 479 U.S. 538, 545 (O'Connor, J., concurring) (emphasis in original)).
[26] *E.g.*, Tharpe v. Warden, 898 F.3d 1342, 1344 (11th Cir. 2018).
[27] *Id.*
[28] Teague v. Lane, 489 U.S. 288, 310 (1989).
[29] *E.g.*, Lambrix v. Singletary, 520 U.S. 518, 527 (1997).
[30] *E.g.*, *id.*
[31] *E.g.*, *id.*
[32] *E.g.*, *id.* at 539.
[33] Tharpe v. Warden, 898 F.3d 1342, 1345 (11th Cir. 2018).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 1345–46.

new procedural rule did not rise to the level of a watershed, like *Gideon*'s right to counsel.[38]

One might argue that the Eleventh Circuit overstated its conclusion regarding the second prong of *Teague*. Although *McDonald* and other precedents endorsed the no-impeachment rule, they also warned that juror testimony cannot be excluded if that would "[violate] the plainest principles of justice."[39] The court in *McDonald* envisioned such injustice in "the gravest and most important cases."[40] Then-existing precedent thus cautioned against "[laying] down any inflexible rule" regarding post-verdict juror testimony.[41] The "appalling risk that racial bias swayed Tharpe's sentencing"[42] did not comport with the Constitution when his conviction became final. This is exactly the grave and important case that *McDonald* contemplated.

One might also argue the opposite, to the same end: *Peña-Rodriguez* announced a new watershed rule of criminal procedure. A defendant's ability to challenge express racial animus in the jury room—which has been protected from encroachment since Lord Mansfield's refusal to impeach a jury verdict in eighteenth century England[43]—is a watershed indeed. This exception is reserved for that narrow class of procedural rules that "[implicate] the fundamental fairness and accuracy of the criminal proceeding."[44] Tharpe's juror's racist sentiments compromised such fundamental fairness and accuracy; his affidavit "[presented] a strong factual basis for the argument that Tharpe's race affected [the juror's] vote for a death verdict."[45]

In cases like Tharpe's, *Peña-Rodriguez* should apply retroactively. Generally, the rule's equal justice values have been embedded in our Constitution since ratification of the Civil War Amendments.[46] Specifically, it is a new departure from the age-old no-impeachment rule that is crucial to reaching a just outcome.

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[38] *Id.* at 1346.
[39] *E.g.*, United States v. Reid, 53 U.S. 361, 366 (1851).
[40] McDonald v. Pless, 238 U.S. 264, 269 (1915).
[41] *Id.* at 268.
[42] Tharpe v. Ford, 139 S. Ct. 911, 913 (2019) (Sotomayor, J., concurring) (mem.).
[43] Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 872 (2017) (citing Vaise v. Delaval, 1 T.R. 11, 99 Eng. Rep. 944 (K.B.)).
[44] Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)) (internal quotations omitted).
[45] Tharpe v. Sellers, 138 S. Ct. 545, 546 (2018) (per curiam).
[46] *Peña-Rodriguez v. Colorado*, 137 S. Ct. at 867 (The "imperative to purge racial prejudice from the administration of justice was given new force and direction by the ratification of the Civil War Amendments.").

III. PROCEDURAL DEFAULT

In denying postconviction relief, the Eleventh Circuit also held that Tharpe's racial bias claim was procedurally defaulted.[47] Because Tharpe did not raise his claim sooner in state court, a federal court could not review it unless Tharpe showed cause for his delay and prejudice resulting from the juror bias.[48] In 2018, the Supreme Court held that the Eleventh Circuit erred when it concluded that Tharpe failed to demonstrate the possibility that his juror's views were prejudicial.[49] On remand, the Eleventh Circuit maintained that, despite the potential for prejudice, Tharpe still failed to show cause for his delay.[50] The question of cause "must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[51] The court was dissatisfied with Tharpe's vague allegation of ineffective assistance of trial counsel as cause, noting that he provided no specific facts.[52]

However, Tharpe's delay was likely caused by a late discovery of his juror's racist attitudes, over seven years after trial.[53] Of course, *voir dire*—which purports to guard against racial bias in the jury[54]—did not reveal the juror's racial prejudice. This is unsurprising, as there is a "stigma that attaches to reporting racism,"[55] assuming that potential jurors are even aware of their racism.[56] Hence, *voir dire* cannot always eradicate capital jury bias, and delayed discovery of such bias should be recognized as a legitimate cause for a prisoner's failure to raise that claim sooner.

Finally, Tharpe's case presented extraordinary circumstances that required review of the merits. In *Buck v. Davis*, Duane Buck, like Tharpe, was convicted of capital murder.[57] During sentencing, Buck's attorney called a psychologist who testified that Buck probably would not engage in future violent conduct, but was statistically more likely to do so because

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[47] Tharpe v. Warden, 898 F.3d 1342, 1347 (11th Cir. 2018).
[48] *Id.*; *e.g.*, Wainright v. Skyes, 433 U.S. 72, 87 (1977).
[49] *Tharpe v. Sellers*, 138 S. Ct. at 546.
[50] *Tharpe v. Warden*, 898 F.3d at 1347.
[51] Murray v. Carrier, 477 U.S. 478, 488 (1986).
[52] *Tharpe v. Warden*, 898 F.3d at 1347.
[53] Tharpe v. Ford, 139 S. Ct. 911, 912 (2019) (Sotomayor, J., concurring) (mem.).
[54] *See, e.g.*, Tanner v. United States, 483 U.S. 107, 127 (1987) ("The suitability of an individual for the responsibility of jury service, of course, is examined during *voir dire*.").
[55] Christian B. Sundquist, *Uncovering Juror Racial Bias*, 96 DENV. L. REV. 309, 320 (2019).
[56] *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (noting that "a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation").
[57] Buck v. Davis, 137 S. Ct. 759, 767 (2017).

he is black.[58] The jury sentenced Buck to death.[59] The Court held that Buck's case presented extraordinary circumstances warranting reopening his judgment on postconviction review.[60] It reasoned that "[d]ispensing punishment on the basis of an immutable characteristic flatly contravenes [the] guiding principle[s]" of our criminal justice system.[61] The psychologist in *Buck* indoctrinated odious beliefs in the jury. The juror in *Tharpe* already harbored those beliefs, creating injustice for Tharpe and "'[poisoning] public confidence' in the judicial process."[62] To avoid this result in the future, there must be an exception to procedural defaults where there is compelling evidence of racial bias in the capital jury room.

CONCLUSION

Tharpe's case, and others this year,[63] illustrate that the Supreme Court will likely continue its trend of placing high value on procedural concerns in capital cases. In 1981, Wilbert Evans was convicted of capital murder and sentenced to death based on one aggravating factor: the jury's determination that if allowed to live, Evans would pose a serious threat to society.[64] This finding was tested a few years later when Evans protected guards and nurses during a prison riot.[65] However, the State's "interest in procedural finality" trumped the guards' affidavits describing how Evans saved their lives.[66] Nearly forty years later, in 2019, the Court held that the Eighth Amendment does not guarantee an inmate a painless death.[67] In that case, Justice Gorsuch found that the important interest in timely executions had been frustrated.[68] In dissent, Justice Sotomayor responded: "There are higher values than ensuring that executions run on time;" if a death sentence "violates the Constitution, that stain can never come out."[69]

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[58] *Id.*
[59] *Id.*
[60] *Id.* at 777–78 (holding that "the District Court abused its discretion in denying Buck's Rule 60(b)(6) motion").
[61] *Id.* at 778.
[62] *Id.*
[63] *E.g.*, Dunn v. Ray, 139 S. Ct. 661 (2019) (Kagan, J., dissenting) (mem.) (Supreme Court vacated stay of execution because Muslim inmate waited too late to seek relief after his "request to have an imam attend him in the last moments of his life" was denied).
[64] Evans v. Muncy, 498 U.S. 927, 927 (1990) (Marshall, J., dissenting) (mem.); Evans v. Muncy, 916 F.2d 163, 164 (4th Cir. 1990) (per curiam).
[65] *Evans v. Muncy*, 498 U.S. at 928.
[66] *Id.* (one officer "heard Evans imploring to the escaping inmates, 'Don't hurt anybody and everything will be allright.'" He continued: "It is my belief that had it not been for Evans, I might not be here today") (internal quotations omitted).
[67] Bucklew v. Precythe, 139 S. Ct. 1112, 1124 (2019).
[68] *Id.* at 1133–34.
[69] *Id.* at 1148 (Sotomayor, J., dissenting).

Capital murder is a heinous crime, and Tharpe's murder of his sister-in-law is no exception.[70] However, "our law punishes people for what they do, not who they are."[71] Where racial prejudice improperly influences a death verdict, procedure must yield to review of the merits. The death sentence that has the potential to be "*dead wrong* is no less so simply because its deficiency is not uncovered until the eleventh hour."[72]

[70] Tharpe v. Sellers, 138 S. Ct. 545, 547–48 (2018) (Thomas, J., dissenting) (per curiam) (describing the jury's finding "that the murder was outrageously or wantonly vile, horrible, or inhuman").
[71] Buck v. Davis, 137 S. Ct. 759, 778 (2017).
[72] Evans v. Muncy, 498 U.S. 927, 931 (1990) (Marshall, J., dissenting) (mem.) (emphasis in original).