No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

KENNETH EARL FULTS,
Petitioner,

-v.-
BRUCE CHATMAN, Warden
Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS

THIS IS A CAPITAL CASE
EXECUTION SCHEDULED FOR APRIL 12, 2016

*Lindsay Bennett
(Georgia Bar No. 141641)
Office of the Federal Defender
Eastern District of California
801 I Street, 3rd Floor
Sacramento, California 95814
916-498-6666
(fax) 916-498-6656
Lindsay_Bennett@FD.Org

Jeffrey Lyn Ertel
(Georgia Bar No. 249966)
Federal Defender Program, Inc.
101 Marietta Street, NW, Suite 1500
Atlanta, Georgia 30303
404-688-7530
(fax) 404-688-0768
Jeff_Ertel@FD.Org

*Counsel of Record for Petitioner

Contents

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Kenneth Fults respectfully requests that this Court transfer for hearing and determination his application for habeas corpus to the district court in accordance with its authority under 28 U.S.C. § 2241(b).

OPINION BELOW

The opinion of the Unites States Court of Appeals for the Eleventh Circuit is published at *Fults v. GDCP Warden*, 764 F.3d 1311, 1317 (11th Cir. 2014) and attached at Appendix 1.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 2241, 2254(a), 1651(a) and Article III of the U.S. Constitution.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution which provide, in relevant part:

> 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, which district shall have been previously ascertained by law. . .
>
> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted [;]

> Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

The State of Georgia charged Petitioner with murder, burglary, kidnapping with bodily injury and possession of a firearm in the commission of a crime in Spalding County, Georgia. During jury selection, Petitioner, with no offer of leniency, changed his pleas in the Spalding County court to guilty. Following a three-day sentencing trial, the jury returned a death sentence. Petitioner was also sentenced to consecutive terms of life without parole (kidnapping), twenty years (burglary), and five years (possession of a firearm).

I. The Offense

In its direct review of Petitioner's case, the Georgia Supreme Court described the evidence as showing the following:

> [Fults] carried out a week-long crime spree which was centered, at least in part, upon his desire to murder a man who was engaged in a relationship with his former girlfriend. Fults first committed two burglaries, obtaining several handguns. After a failed attempt at murdering his former girlfriend's new boyfriend with one of the stolen handguns, Fults then burglarized the home of his next-door neighbors. After the male neighbor left for work, Fults forced his way through the front door wearing gloves and a hat pulled down over his face. Fults confronted the female occupant of the home, Cathy Bounds, brandishing a .22 caliber handgun he had stolen during one of the burglaries. Ms. Bounds begged for her life and offered Fults the rings on her fingers. Fults turned Ms. Bounds around toward the bedroom, either taped or forced her to tape her eyes closed by wrapping over six feet of electrical tape around her head, forced her into the bedroom,

> placed her face-down on her bed, placed a pillow over her head, and shot her five times in the back of the head.
>
> A search of Fults's trailer home revealed a boastful letter he had written in gang code in which he described the murder with some alterations of detail. Upon being confronted with this letter by a law enforcement officer, Fults confessed to killing Ms. Bounds but maintained that he had shot her by accident while in a dream-like state. The murder weapon was recovered from under Fults' trailer home, and .22 caliber shell casings shown to have been fired by the murder weapon as well as items from the earlier burglaries were found behind Fults's trailer home.

Fults v. State, 274 Ga. 82, 83, 548 S.E. 2d 315, 319 (2001).

II. Pretrial Proceedings

During jury selection, defense counsel, Johnny Mostiler, asked prospective jurors questions designed to reveal any racial bias that could impact their ability to sit impartially in Petitioner's case. One prospective juror stated she did not believe "blacks and whites" should marry. Defense counsel used a peremptory strike to eliminate her from the jury pool. When prospective juror Thomas Buffington was questioned, he explicitly denied harboring racial bias and thereby earned himself a place on Mr. Fults's jury.[1]

III. The Sentencing Trial

On March 19, 1997 with jury selection already underway, Mr. Fults accepted responsibility for the charges by changing his plea to guilty. The court informed

---

[1] Defense counsel asked Mr. Buffington, "Do you have any racial prejudice resting on your mind?" Buffington replied "No, sir." When further pressed by defense counsel as to whether it made any difference that the defendant in the case was black and the victim was white, Buffington again responded "No, sir." (Appendix 5, Selected portion of trial transcript: *voir dire* Thomas Buffington).

the jury of Petitioner's plea and told them that they would be proceeding directly to the "second trial" where the only issue before them was whether Petitioner would be sentenced to life or to death. The court administered initial charges to the jury, and the parties proceeded with opening statements. The jury returned its verdict with a sentence of death on May 22, 1997.

IV. Post-trial Proceedings

A. Motion for New Trial & Direct Appeal

Georgia law provides that:

> where matters complained of arise or are discovered subsequent to verdict or judgment which otherwise would not appear in the record, such as newly discovered evidence, and in other like instances, a motion for new trial or other available procedure shall be filed and together with all proceedings thereon shall become a part of the record on appeal.

O.C.G.A. § 5-6-36(a). The motion must "be made within 30 days of the entry of the judgment on the verdict," O.C.G.A. § 5-5-40(a), and it "may be amended any time on or before the ruling thereon, id. § 40(b). "The court also shall be empowered to grant a new trial on its own motion within 30 days from entry of the judgment, except in criminal cases where the defendant was acquitted." *Id.* at § 40(h).

Defense counsel Mostiler filed a motion for new trial but died while it was still pending. New counsel, Harold Sturdivant, was appointed to represent Mr. Fults for the remainder of his motion for new trial and direct appeal proceedings. Sturdivant amended the pending motion to include an ineffective assistance of trial counsel claim. Following the denial of the motion for new trial, Sturdivant raised

the following record-based claims on appeal: "(1) [Mr. Fults] was denied effective and adequate assistance of counsel; (2) the trial court erred in qualifying juror Marsha Huckaby over the objection of [Mr. Fults's] trial counsel; (3) the trial court erred in not allowing appellant's trial counsel question juror Elisa Freeman Warnder in order to clarify her answer to a question proposed by the court; (4) the trial court erred in denying [Mr. Fults's] motion for new trial thereby affirming the jury verdict which used one aggravating circumstance to establish another." As the state habeas court later determined, Mr. Sturdivant performed no investigation of extra-record facts in connection with the appeal. (Appendix 4, Butts County Superior Court: order denying petition for writ of habeas corpus at 30-31).

B. State Habeas Proceedings

On November 20, 2002, the state of Georgia issued a post-appeal execution warrant for Mr. Fults. Six days later, Mr. Fults filed in the state superior court a motion to stay his execution supported by an initial Petition for Writ of Habeas Corpus. On December 10, 2002, the Respondent-State filed a return and answer to the petition. A Superior Court judge was appointed by designation to preside over the proceedings.

On February 3, 2003, the court signed the first in a series of consent scheduling orders prepared by the parties, which detailed a period of discovery intended to provide the parties an opportunity to develop evidence in support of their respective claims and defenses and to identify and present additional claims for relief.

On April 14, 2005, Petitioner filed his amended petition in state court, along with his witness list and the affidavits he had obtained during the court-authorized discovery period. Included in that submission was an affidavit in support of a juror bias claim from Juror Thomas Buffington stating: "I don't know if [Fults] ever killed anybody, but that nigger got just what should have happened. Once he pled guilty, I knew I would vote for the death penalty because that's what that nigger deserved." (Appendix 06, State habeas affidavit of Juror Thomas Buffington). The State filed its return and answer to the amended petition on October 3, 2005.

By subsequent order, an evidentiary hearing was held on March 20-23, 2007, at which evidence was taken on a number of claims. Following the state habeas hearing, the parties briefed their arguments to the court. Petitioner presented argument supporting admission of Juror Buffington's affidavit and supporting his claim of denial of a fair trial due to Buffington's racial bias.

The State opposed the admission of Buffington's affidavit under the no impeachment rule, and argued that several claims, including the juror misconduct, were procedurally defaulted under § O.C.G.A. 9-14-48(d), which provides that absent a showing of cause and prejudice issues not raised on appeal may not be considered in habeas. Citing *Turpin v. Todd*, 268 Ga. 820, 493 S.E.2d 900 (1997), Mr. Fults noted that a procedurally defaulted claim will not be barred from consideration "if the petitioner shows, first, an adequate cause for failing to raise the issue earlier and, second, actual prejudice resulting from the alleged error or errors." *Turpin*, 268 Ga.at 824, 493 S.E.2d at 905. Under *Turpin*, a petitioner has

shown adequate cause for overcoming a procedural default when "some objective factor external to the defense impeded counsel's efforts to raise the claim that has been procedurally defaulted." *Id.* (*quoting Murray v. Carrier*, 477 U.S. 478, 488 (1986). These factors "may include interference by government officials 'that makes compliance with the State's procedural rule impracticable,'" or "'a showing that the factual or legal basis for a claim was not reasonably available to counsel.'" *Id.* (*quoting McCleskey v. Zant*, 499 U.S. 467 (1991). Petitioner noted that the evidence of Buffington's bias was not available to trial or appellate counsel.

Following the evidentiary hearing, the state court formally admitted Buffington's affidavit over the Respondent's objection. Without addressing *Todd* - - and thus without address the merits of the claim - - the state habeas court denied the juror bias claim along with 94 other claims or sub-claims, stating:

> Petitioner raises contentions which he failed to raise on direct appeal. As Petitioner has failed to establish cause and actual prejudice sufficient to excuse his procedural default of these claims, this Court may not consider the merits of any such claims in this collateral proceeding. *Black v. Hardin*, 255 Ga 239 (1985); *Valenzuela v. Newsome*, 253 Ga. 793 (l985); O.C.GA. § 9-14-48(d); *Hance v. Kemp*, 258 Ga. 649(4) (1988); *White v. Kelso*, 261 Ga. 32 (1991)."

See Appendix 04, Butts County Superior Court: order denying petition for writ of habeas corpus at 5-16.

C. Federal Proceedings

On July 31, 2009, Mr. Fults filed a petition for writ of habeas corpus under 28 U.S.C. §2254 in the U.S. District Court for the Northern District of Georgia. The

District Court dismissed Mr. Fults's juror misconduct claim as procedurally defaulted. Thereafter, Petitioner argued the claim in his merits brief to the district court. In response, the state argued that the state court never said it was considering the evidence, and that, in fact, it could not be considered because, inter alia, the evidence in support of the claim was inadmissible. The court denied Mr. Fults's petition. *See* Appendix 2, United States District Court Order Denying Petition for Writ of Habeas Corpus.

On appeal, the Eleventh Circuit held as to the juror misconduct claim that despite Mr. Fults's reliance on *Todd*, that he had failed properly to present the claim in state court. The Eleventh Circuit concluded that in the showing made by state habeas counsel itself constituted a state procedural default. The Eleventh Circuit held that, in addition to showing that Mr. Fults had been without actual knowledge of the Juror Buffington's bias until he had engaged in the court-ordered discovery proceedings, state law also required state habeas counsel could not have discovered the claim at the of the original trial proceedings or appeal. Thus, according to the Eleventh Circuit the procedural problem involved state habeas counsel as much as it did state trial and appellate counsel, if not more. The Eleventh Circuit noted: "[Mr. Buffington's] affidavit was silent as to when Mr. Buffington first disclosed this information to Mr. Fults or his counsel, and Mr. Fults did not explain in his state habeas corpus petition how or when he and his counsel came to learn of Mr. Buffington's alleged prejudice." 764 F.3d at 1315. The Court returned to the theme of state habeas counsel's alleged default when it later stated:

> [I]n his post-hearing brief in the state habeas proceeding Mr. Fults made only a general allegation that the basis for this claim was not reasonably available to his counsel. Because Mr. Fults did not provide any facts with respect to how he and his counsel exercised diligence -- remember that his trial and appellate counsel did not testify at the evidentiary hearing -- or how and when they came to learn of Mr. Buffington's alleged racial prejudice, it was insufficient to generally allege that the evidence was not reasonably available.

764 F.3d at 1317.

On April 13, 2015 Mr. Fults sought certiorari review of the Eleventh Circuit's decision. (No. 14-9740). The State opposed the petition, arguing inter alia, that Juror Buffington's affidavit was inadmissible. On October 5, 2016, this Court denied the Petition for a Writ of Certiorari.

D. Recent Developments

On March 23, 2016, the state of Georgia issued an execution warrant for Mr. Fults. In accordance with the warrant, Mr. Fults is currently scheduled to be executed on April 12, 2016. In the course of preparing for clemency proceedings in Mr. Fults's case, Mr. Fults's counsel met with some of the jurors from the trial. Among the topics discussed was the previously obtained affidavit of fellow juror, Thomas Buffington. As detailed below, two jurors confirmed that Buffington concealed his racist views from the remainder of the jury during the trial and deliberations. The revelation of those jurors that one of their fellow members' verdict was fueled by racial animus has prompted them to come forward and express their grave concerns over the possible execution of Mr. Fults notwithstanding the unacceptable role that race played in his death sentence.

Upon learning about the racial animus of one of his fellow jurors, jury foreman, Ryan K. Archer, declared:

> In Mr. Buffington's affidavit, he made it very clear how he felt about Mr. Fults's race. He swore under oath in his statement he would sentence that "nigger" to death as soon as he pled guilty. Mr. Buffington hid his feelings about Mr. Fults's race during our deliberations. As the foreperson, I would have alerted the judge if I had known about Mr. Buffington's true feelings.
>
> There are two very troubling things in his statement to me as a juror and as the foreperson of the jury. One is Mr. Buffington indicated he could not be a fair and impartial juror and actually listen to the evidence for Mr. Fults. The second is the racial slur used by Mr. Buffington in such a casual manner. It is my personal opinion, a person with this mentality cannot sit in judgment of others. Their biases outweigh their ability to be fair and impartial.

See Appendix 7, affidavit of Ryan K. Archer.

In addition, another of the jurors, Mary Bunn, has come forward after learning about Mr. Buffington's racism. In a sworn affidavit, Ms. Bunn states:

> Mr. Buffington called Mr. Fults a "nigger." I am deeply troubled that Mr. Buffington was allowed to sit in judgment of Mr. Fults since he considered Mr. Fults to be less of a human being. His use of the word "nigger" in describing Mr. Fults is extremely offensive and it seems very unfair to me that Mr. Buffington was allowed to be a juror at Mr. Fults's trial.

See Appendix 8, affidavit of Mary Bunn.

REASONS FOR GRANTING THE WRIT

This Court's power to grant an extraordinary writ is very broad but reserved for exceptional cases in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.2. 258, 260 (1947). Title 28 U.S.C. § 2244(b)(1) prevents Mr. Fults

from renewing his claims for relief in light of this Court's recent grant of certiorari review in *Pena-Rodriguez v. Colorado*, No. 15-606. The provision, however, does not preclude this Court for exercising its authority to entertain original habeas petitions, *Felker v. Turpin*, 518 U.S. 651, 660 (1996), nor has it disallowed this Court from "transferring the application for hearing and determination" to the district court pursuant to 28 U.S.C. § 2241(b).

Rule 20 of this Court requires a petitioner seeking a writ of habeas corpus demonstrate that (1) "adequate relief cannot be obtained in any other form or in any other court;" (2) "exceptional circumstances warrant the exercise of this power;" and (3) "the writ will be in aid of the Court's appellate jurisdiction." Further, this Court's authority to grant relief is limited by 28 U.S.C. § 2254, and any considerations of a second petition must be "inform[ed]" by 28 U.S.C. § 2244(b). *See Felker*, 518 U.S. at 662-63.

Mr. Fults's last hope for consideration of the undisputed evidence that his death judgment is the product of race discrimination lies with this Court. His case presents exceptional circumstances that warrant exercise of this Court's discretionary powers.

I. STATEMENT OF REASONS FOR NOT FILING IN THE DISTRICT COURT

Mr. Fults states he has not applied to the district court because he was previously denied relief on the claim presented herein. State remedies were exhausted as described in the statement of the case.

Pursuant to 28 U.S.C. § 2244(b)(1) Mr. Fults is precluded from seeking relief in the district court. As a result, Mr. Fults is unable to obtain relief in any other form or any other court. His application for clemency is pending before the Georgia Board of Pardons and Paroles.

II. THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE WARRANT THE EXERCISE OF THIS COURT'S JURISDICTION

On April 4, 2016, this Court granted the Petition for Writ of Certiorari in *Pena-Rodriguez v. Colorado*, No. 15-606, a case strikingly similar to this one. In *Pena-Rodriguez*, one of the jurors voted to convict the defendant of sexually assaulting a teenage girl "because he's Mexican and Mexican men take whatever they want." During *voir dire* all of the prospective jurors had been asked whether they could be "fair" or would "have a feeling for or against" the defendant. None of the impaneled jurors gave any indication that he or she harbored any racial bias.

Here, one of the jurors who sentenced Mr. Fults to death was motivated by similarly egregious racial animus. During *voir dire* prospective juror Thomas Buffington was asked, "Do you have any racial prejudice resting on your mind?" Buffington replied "No, sir." When specifically asked whether it made any difference that the defendant in the case was black and the victim was white, Buffington again responded "No, sir." Only later did Buffington reveal that, prior to commencement of the sentencing trial he had already decided to "vote for the death penalty because that's what that nigger deserved." As noted in Mr. Archer's recent affidavit, had Buffington made his views known to the rest of the jury, "[a]s the

foreperson, [he] would have alerted the judge if he had known about Mr. Buffington's true feelings." Appendix 7, affidavit of Ryan K. Archer.

Mr. Fults raised claims of juror misconduct and bias in state and federal courts, but no court has ever reviewed those claims on the merits. He previously sought and was denied a Writ of Certiorari to review the Eleventh Circuit's procedural denial of relief. *Fults v. GDCP Warden*, 764 F.3d 1311 (11th Cir. 2014), *cert. denied sub nom. Fults v. Chatman*, No. 14-9740, 136 S. Ct. 56, 193 L. Ed. 2d 59 (2015). Mr. Fults respects this Court's determination that the Eleventh Circuit's treatment of his alleged procedural default did not "so far depart[] from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10. That determination, however, represents neither agreement with the Eleventh Circuit's analysis of the alleged procedural infirmities of Mr. Fults's case nor disagreement that Mr. Fults was condemned on the basis of his race.

Because no court has ever addressed the merits of Mr. Fults's juror claim, by this application for an original writ he is petitioning this Court to give his claim the consideration they deserve. It is only by pure accidents of timing that Mr. Fults now faces imminent execution without any consideration of the pernicious effects of racism on his sentence. The jurors in *Pena-Rodriguez* came forward immediately and Mr. Pena-Rodriguez's claims were deemed timely filed. In contrast, the juror in Mr. Fults's case did not speak up until several years after Mr. Fults's trial, and accordingly Mr. Fults was deemed to have filed his claims too late. Nonetheless,

Mr. Pena-Rodriguez's appeal, *Pena-Rodriguez v. People*, 350 P.3d 287 (Colo. 2015) was decided after the conclusion of Mr. Fults's federal habeas proceedings. As a result, Mr. Fults was denied certiorari review before this Court was presented with a more suitable case in which to decide issues of juror bias, Mr. Pena-Rodriguez's.

That Mr. Fults's case was deemed an unsuitable vehicle for clarifying the law concerning concealed juror bigotry, combined with mere accidents of timing – including the timing of his scheduled execution - should not mean that he should be permanently and irrevocably denied the potential benefit of a favorable ruling in *Pena-Rodriguez.* This Court and only this Court can correct for the vagaries of time by issuing a stay of Mr. Fults's execution and either considering his claim now on the merits – consideration that no court has ever given him – or alternatively withholding consideration pending resolution of the merits of Mr. Pena-Rodriquez's claim.

One of the reasons offered by Mr. Pena-Rodriguez in support of certiorari review was that his case arose on direct review, meaning that it "possesses none of the complications that often accompany habeas cases." *Pena-Rodriguez v. Colorado*, No. 15-606, Pet. Writ of Cert. at 17. To be sure, the issue in Mr. Fults's case is nowhere near as tidy. Nonetheless, the issue upon which this Court has granted certiorari--"whether a no-impeachment rule constitutionally may bar evidence of racial bias offered to prove a violation of the Sixth Amendment right to an impartial jury—thoroughly pervades Mr. Fults's case.

In state post-conviction proceedings the State of Georgia argued that its corollary to Fed. R. Evid 606(b), which bars juror testimony which impeaches the verdict, prohibited consideration of Juror Buffington's statements. *Fults v. Hall*, 2002-V-905, Respondent's Objections to Petitioner's Evidence at 2-4. In post hearing briefing the State argued Mr. Fults should be denied relief for lack of admissible evidencethat Juror Buffington's verdict was based on improper racial considerations. A subsidiary argument was a two-sentence assertion that merits review had been forfeited because the claim was defaulted. *Fults v. Hall*, 2002-V-905, Respondent's Response to Petitioner's Post-Hearing Brief at 24-28.

In district court, questions of admissibility of impeaching evidence also plagued the case. In an order regarding the alleged procedural default of Mr. Fults's juror claims, the district court wrote that "the evidence of racial bias is based entirely upon inadmissible juror impeaching evidence." *Fults v. Warden*, 3:09-CV-8-TWT, 2/4/11 Order at 7. In its briefing in the Eleventh Circuit, the State argued at length that Juror Buffington's affidavit could not be considered by the federal courts and likely was not considered by the state habeas court. Appendix C, *Fults v. GDCP Warden*, No. 12-13565, Brief on Behalf of the Respondent/Appellee at 7-16 and 8 n. 2. Prior to oral argument the State filed a letter of supplemental authorities under Fed.R.App.P. 28(j) arguing that Juror Buffington's affidavit was inadmissible impeachment evidence, citing inter alia *Warger v. Shauers*, 721 F.3d 606,611-612 (8th Cir. 2013), and *United States v. Benally*, 546 F.3d 1230, 1232-1242 (10th Cir. 2008). Appendix D, Respondent's Supplemental Authority. More than

one-quarter of the State's Brief in Opposition to Mr. Fults's Petition for Writ of Certiorari in this Court was devoted to arguing that Mr. Buffington's affidavit was "improper impeachment evidence." Appendix G, *Fults v. GDCP Warden*, No. 14-9740, Respondent's Brief in Opposition at 22-30.

Questions of admissibility of juror impeachment evidence underlie all of the rulings in Mr. Fults's case. Only this Court can prevent the miscarriage of justice that would result from Mr. Fults's execution while the pivotal issue in his case is under this Court's consideration.

III. MR. FULTS'S DEATH SENTENCE WAS OBTAINED IN VIOLATION OF HIS CONSTITUIONAL RIGHTS

Racial or ethnic bias is an "especially pernicious" form of prejudice in the criminal justice process to which this Court applies special scrutiny. *Rose v. Mitchell*, 443 U.S. 545, 555 (1979); see also *Georgia v. McCollum*, 505 U.S. 42, 58 (1992) (a defendant has "a right to an impartial jury that can view him without racial animus, which so long has distorted our system of criminal justice"); *Holland v. Illinois*, 493 U.S. 474, 511 (1990) (Stevens, J., dissenting) (noting the Court's "unceasing efforts to eradicate racial prejudice from our criminal justice system").

The Court has been vigilant, for example, about state-sponsored prejudice when prosecutors exercise peremptory challenges of jurors for racially discriminatory reasons. See *Batson v. Kentucky*, 476 U.S. 79, 88 (1986); see also *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005) ("When the government's choice of jurors is tainted with racial bias," then "the very integrity of the courts is

jeopardized."); *Powers v. Ohio*, 499 U.S. 400, 411 (1991) ("The jury acts as a vital check against wrongful exercise of power by the State and its prosecutors. The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee.") (internal citation omitted).

The Court should be no less vigilant when allegations arise that overt racial or ethnic prejudice has tainted a jury's guilty verdict. *Cf. McCollum*, 505 U.S. at 62 (Thomas, J., concurring) (cautioning against "exalting the rights of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death"). Indeed, "the constitutional interests of the affected party are at their strongest when a jury employs racial bias in reaching its verdict." 27 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6074, at 513 (2d ed. 2007).

The guarantee of an impartial jury "goes to the very integrity of the legal system." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987). Fundamental fairness depends on fact-finders who are free from any "predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873 (1989). Jurors are not "impartial" in the "constitutional sense of that term" if they have "strong and deep impressions" that "close the mind against the testimony that may be offered in opposition to them." *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807); see also *Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam) ("[P]etitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors"); *Aldridge v. United States*, 283 U.S. 308, 313 (1931) (A "gross injustice" is

perpetrated if a juror "entertain[s] a prejudice which would preclude his rendering a fair verdict."); *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879) (Prejudices against "particular classes" that "sway the judgment of jurors" "deny to persons of those classes the full enjoyment of that protection which others enjoy.").

Racial bias in jury deliberations continues to be a serious problem today, notwithstanding the progress that we, as a nation, have made towards greater equality and inclusion. In recent years, a number of courts across the country have faced incidents of racial animus in jury deliberations that are as offensive as those at issue here. *See, e.g.*, *Kittle v. United States*, 65 A.3d 1144, 1147-48 (D.C. 2013) (jurors allegedly asserted that "all 'blacks' are guilty regardless"); *State v. Brown*, 62 A.3d 1099, 1106, 1110 (R.I. 2013) (juror allegedly referred to Native American defendants as "those people" and mockingly beat water bottles "like tom-tom drums"); *United States v. Villar*, 586 F.3d 76, 81, 85-87 (1st Cir. 2009) (in case involving Hispanic defendant, one juror allegedly said "I guess we're profiling but they cause all the trouble"); *United States v. Benally*, 546 F.3d 1230, 1231 (10th Cir. 2008) (juror allegedly said, in case with Native American defendant, that "[w]hen Indians get alcohol, they all get drunk, and . . . when they get drunk, they get violent").[2] Many of those courts have rightly concluded that such expressions of

---

[2] *See also, e.g., Commonwealth v. Laguer*, 571 N.E.2d 371, 375 (Mass. 1991) (during deliberations in aggravated rape trial, juror allegedly asserted that "spics screw all day and night" and alluded to defendant's guilt); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1156 (7th Cir. 1987) (in prostitution case, white male juror commented about the defendant, "Let's be logical. He's black and he sees a seventeen year old white girl – I know the type."); *United States v. Heller*, 785 F.2d 1524, 1526 (11th Cir. 1986) (juror allegedly made ethnic slurs and jokes during trial of Jewish defendant).

race-based impartiality cannot go unaddressed.[3] Notwithstanding Mr. Fults's supposed procedural default, consisting of his failure to expose Juror Buffington's racism at a time while it was still under active concealment (discussed infra), the Georgia State courts' refusal to consider Mr. Fults's claim on the merits is nothing short of appalling.

The decision to vote for death by one of the seated jurors in Petitioner's capital sentencing trial was fueled by racial animus. Mr. Fults, an African-American man, was facing the death penalty for the murder of a young, white woman in a small Southern town, which was itself marred by a history of racism and segregationist tactics. Defense counsel questioned prospective jurors about race in order to ensure that racial bias play no role in the jury's verdict. One of the prospective jurors, Thomas Buffington, was seated on Mr. Fults's jury after expressly denying any racial bias. During Mr. Fults's state post-conviction proceedings, jurors were interviewed. When Juror Buffington was interviewed he made the following statement: "***I don't know if [Fults] ever killed anybody, but that***

---

[3] *See, e.g., Brown*, 62 A.3d at 1110 ("no-impeachment" rule cannot preclude admission of testimony concerning jurors' racial bias in deliberations where necessary to protect defendant's constitutional right to fair trial by impartial jury); *Villar*, 586 F.3d at 85-87 (trial court has discretion to conduct inquiry into jurors' expressions of racial animus during deliberations under the Sixth Amendment and the Due Process Clause); *Laguer*, 571 N.E.2d at 376 (Sixth Amendment requires consideration of juror testimony alleging racially biased statements during deliberations because "the possibility . . . that the defendant did not receive a trial by an impartial jury, which was his fundamental right, cannot be ignored"); *Heller*, 785 F.2d at 1527-28 (reversing conviction of Jewish defendant in light of allegations that juror engaged in ethnic slurs and jokes during trial because it "displayed the sort of bigotry that clearly denied the defendant . . . the fair and impartial jury that the Constitution mandates").

nigger got just what should have happened. Once he pled guilty, I knew I would vote for the death penalty because that's what that nigger deserved."

Mr. Fults submitted Buffington's affidavit to the state habeas court in order to prove that he had been deprived of an impartial jury and his trial had been infected by racial bias, thereby depriving him of a fair trial. *See Turner v. Murray,* 476 U.S. 28, 36 (1986) and *see McClesky v. Kemp*, 481 U.S. 279, 308-09 (1987). The state habeas court admitted Mr. Buffington's affidavit, but thereafter refused to consider it, ruling instead that this claim was procedurally defaulted.

A. The Use of the Word "Nigger" Constitutes an Extreme Expression of Racial Bias

Racial hatred and subjugation are embodied in the word "nigger," an epithet that holds a singular position in our society. Its use in this era, especially by a white man responsible for adjudicating a capital sentence for a black man, cannot be shrugged off as benign, and cannot be squared with the commands of the Sixth, Eighth, and Fourteenth Amendments.

"No word in the English language is as odious or loaded with as terrible a history [as nigger]." *Daso* v. *The Grafton School, Inc.,* 181 F. Supp.2d 485 (D. Md. 2002). Not only is the use of the term "highly offensive and demeaning," it "evok[es] a history of racial violence, brutality and subordination." *McGinest* v. *GTE Servo Corp.,* 360 F.3d 1103, 1116 (9th Cir. 2004) (quoting *Swinton* v. *Potomac Corp.,* 270 F.3d 794,817 (9th Cir.2001) (quotation marks omitted). That history in Georgia includes slavery, de jure discrimination in its antebellum penal code, *see* Ga. Penal

Code of 1816, No. 508 §1, Lamar, Compilation of the Laws of Georgia, 571, 804 (1821), post-reconstruction lynchings, extraordinary disparities in the imposition of the death penalty for rape, *McCleskey v. Kemp,* 481 U.S. 279,332 (Brennan, J., dissenting) (1987) and numerous horrible events. Given the realities of race relations in this and this country, the use of the term is "perhaps the most offensive and inflammatory racial slur in English, ... a word expressive of racial hatred and bigotry." *McGinest,* 360 F.3d at 1116.

Courts have recognized the unique nature of this slur even in civil settings. *See e.g., In the Matter of Larry M Hutchings,* 661 S.E.2d 343, 348 (S.C. 2008) (concluding that a magistrate's use of the word "evinced a bigoted animus in the performance of his judicial duties"); *In re Ferrara,* 582 N.W.2d 817 (Mich. 1998) (ordering removal of trial court judge based on, inter alia, repeated use of "nigger" in surreptitiously recorded conversations off the bench which did not concern legal matters before the judge); *In re Spivey,* 480 S.E.2d 693 (N.C. 1997) (affirming removal of district attorney from office because the attorney, while at a bar, "loudly and repeatedly" called a fellow patron a "nigger").

B. A Juror's Use of the Word "Nigger" to refer to the African American Defendant Establishes the Juror's Racial Bias and Compels Reversal of the Conviction under the Sixth and Fourteenth Amendments.

While offensive in any context, the use of this racial slur is especially odious coming from the mouth of a white juror when referring to an African-American defendant. The Sixth Amendment, of course, "requires that a defendant have 'a

panel of impartial, "indifferent" jurors. "' *Murphy* v. *Florida,* 421 U.S. 794, 799 (1975) (quoting *Irvin* v. *Dowd,* 366 U.S. 717,722 (1961)). Given the history of the discriminatory treatment against black defendants in the criminal justice system, it cannot be seriously disputed that "racial prejudice can violently affect a juror's impartiality [in a criminal case]," *United States ex reI. Haynes* v. *McKendrick,* 481 F.2d 152, 157 (2d Cir. 1973).

In this century, courts in three states have held that, even in a noncapital case, a juror's use of the word "nigger" in reference to the defendant requires reversal of the conviction. *Marshall* v. *State,* 854 So. 2d 1235, 1237 (Fla. 2003) (per curiam); *State* v. *Jones,* 29 So.3d 533 (La. 2009); *People* v. *Rivera, 759* N.Y.S.2d 136, 137 (N.Y. App. Div. 2003). The Louisiana court explained that it had "considerable difficulty accepting the government's assumption that, at this time in our history, people who use the word 'nigger' are not racially biased." *Jones*, 29 So. 3d at 539. Moreover, Juror Buffington's reference to Mr. Fults as a "nigger" contrasts with his *voir dire* statements that he was not racially biased. Two Courts of Appeal have held that a juror's use of the epithet, when coupled with denials of racial bias during *voir dire*, entitle the defendant to a hearing on whether or not the juror lied on *voir dire*. *United States* v. *Henley,* 238 F.3d 1111, 1112 (9th Cir. 2001); *Williams* v. *Price,* 343 F.3d 223, 225 (3d Cir. 2003). As the *Henley* court explained, under such circumstances, the question of whether Rule 606(b) applies to proof that racial bias infected jury deliberations need not be reached. This is because "[w]here ... a juror has been asked direct questions about racial bias during *voir dire*, and has sworn

that racial bias would play no part in his deliberations, evidence of that juror's alleged racial bias is indisputably admissible for the purpose of determining whether the juror's responses were truthful." *Henley*, 238 F. 3d at 1121.

C. A Juror's Use of the Word "Nigger" to Refer to an African American Defendant in a Capital Case Requires Reversal Under the Eighth and Fourteenth Amendments.

When a defendant can show that his jury acted with a discriminatory purpose, a violation of the Equal Protection Clause is established. *McCleskey v.Kemp,* 481 U.S 279, 292-93 (1987). And when a death sentence is at stake, the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits even an unacceptable *risk* that the sentence was influenced by racial prejudice. *Id.* at 308-9. There can be no doubt that Mr. Fults has established an unacceptable risk.

In part this is because "the broad range of discretion entrusted to a jury in a capital sentencing hearing" creates "a unique opportunity for racial prejudice to operate but remain undetected ... " *Turner* v. *Murray,* 476 U.S. 28, 35 (1986). Empirical evidence suggests that many whites harbor automatic, often unconscious, racial associations and stereotypes. On tests of implicit attitudes, the vast majority of white Americans express a strong preference for whites.[4] The past has created those racial associations, and consequently, those who subconsciously "… hold them

---

[4] See e.g., Brian Nosek, et aI., Harvesting Implicit Group Attitudes from a Demonstration Web Site, 6 GROUP DYNAMICS 101, 105 (202) (reporting data). Most white adults also more likely to shoot a black target than a white target in a video simulation - regardless of whether the object the target pulls out of his pocket is a tool or a gun. Results on this task correlate with measures of implicit attitudes. Jack Glaser & Eric D. Knowles, Implicit Motivation to Control Prejudice, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164 (2008).

may bear no moral responsibility for them. Moreover, persons with those automatic associations sometimes can, if motivated, suppress those biases, and make unbiased decisions.[5] This case, however, does not pose the problem of a well-meaning but subconsciously biased juror. Juror Buffington was not someone with mild or subconscious associations, but an extremist,[6] someone who actively embraced racial animosity and directed it at a capital defendant. Our Constitution does, and must, exclude such jurors, both for the sake of the defendant, and for the sake of the community that rests its trust in the judicial system.

IV. THIS COURT SHOULD ENTERTAIN THIS PETITION NOTWITHSTANDING THE PURPORTED STATE PROCEDURAL DEFAULT

Mr. Fults recognizes that this Court's discretion to grant extraordinary habeas relief is subject to the general constraints on the availability of habeas corpus relief. *See Felker,* 518 U.S. at 662-63. Mr. Fults acknowledges that this Court previously determined that questions presented by the Eleventh Circuit's analysis of the alleged procedural default of his juror bias claims did not rise above the error-correction threshold governing certiorari review. That does not mean, however, that the Eleventh Circuit's ruling was not erroneous. Mr. Fults asserts that it was and moreover that the lower court's analysis was likely impacted by the

---

[5] Jeffrey Rachlinski, Sheri Johnson, Andrew Wistrich & Chris Guthrie, 84 NOTRE DAME L. REV. 1195, 1202-1204, 1221 (2009) (reviewing the literature and reporting new data).

[6] Since at least the 1975, the number of "dominative racists" - those who embrace white superiority racial stereotypes and animosity - has been steadily falling. *See e.g.*, Howard Schuman et. al, RACIAL A TIITUDES IN AMERICA (1985); Howard Schuman, Changing Racial Norms in America, 30 MICH. Q. REV. 460 (1991).

State's vigorous, detailed, and now questionable assertion that Juror Buffington's affidavit was inadmissible and immaterial.

The problems with the default rulings in this case were discussed extensively in Mr. Fults's Petition for a Writ of Certiorari and will not be repeated in their entirety here. The alleged default has a long, complicated and confusing history in state and federal court, but to put the matter simply, Mr. Fults was deemed to have defaulted his claim of undisclosed juror bias by failing to present it at the time of trial, when he had no way of knowing that the claim existed. Under federal habeas law, however, a state procedural ruling is not adequate to bar federal review unless the rule's "application in [the] particular case [satisfies] constitutional requirements of due process of law ..." *Spencer* v. *Kemp,* 781 F. 2d 1458, 1470 (11th Cir. 1986). A state procedural rule does not comport with due process when the petitioner was not afforded a meaningful opportunity to comply with the rule. *Ford* v. *Georgia,* 498 U.S. 411, 423-34(1991); *Spencer,* 781 F. 2d at 1470.

Here, Mr. Fults had no opportunity to comply with the rule because prior to state habeas investigation he had no notice of Juror Buffington's bias, and indeed, had reassurance from *voir dire* that he was not biased. *See Williams* v. *Taylor,* 529 U.S. 420 (2000) (finding petitioner not at fault for failing to discover juror had lied during voir dire where nothing put counsel on notice that she was lying).

A. The *Pena-Rodrigues* Arguments Call Into Question Not Only the State's Oft-Repeated Reliance on the "No Impeachment" Rule In Mr. Fults's Case But Also the State Procedural Default Ruling Itself

The overall thrust of the many of the arguments in support of certiorari review in Pena-Rodriguez is that mechanistic rules, even rules intended to promote the interests of finality and comity, must yield to the interests of defendants and the community to ridding verdicts of the pernicious effects of racism. For instance, petitioner Pena-Rodriguez argued:

> This Court has consistently made clear that rules of evidence – even rules with deep common-law pedigree – must yield when necessary to effectuate a criminal defendant's Sixth Amendment or due process rights. In *Chambers v. Mississippi*, 410 U.S. 284 (1973), for example, the Court held that the Sixth Amendment and Due Process Clause trump the hearsay rule and the common-law rule categorically prohibiting a party from impeaching his own witness insofar as those rules bar reliable testimony vital to ascertaining guilt. *Id.* at 302. Even though "perhaps no rule of evidence has been more respected or more frequently applied" over the centuries than the hearsay rule, this Court explained, the rule "may not be applied mechanistically to defeat" the constitutional right to present a defense. *Id.*; *see also Holmes v. South Carolina*, 547 U.S. 319, 324-26 (2006) (reaffirming Chambers).
>
> Similarly, in *Rock v. Arkansas*, 483 U.S. 44 (1987), this Court held that the categorical rule shared by many states "excluding a criminal defendant's hypnotically refreshed testimony" must yield to the "constitutional right to testify in [one's] own defense" when the rule would "disable a defendant from presenting her version of the events for which she is on trial." *Id.* at 49, 61. Finally, in *Washington v. Texas*, 388 U.S. 14 (1967), this Court held that the Sixth Amendment trumps the commonlaw rule precluding defendants from calling alleged accomplices to testify on their behalf. *Id.* at 20-23. Despite the rule's venerable origins predating the founding era, this Court explained that the rule must give way when necessary to vindicate the right enshrined in the Compulsory Process Clause allowing defendants to secure testimony "relevant and material to the defense." *Id.* at 23.

> The same basic analysis applies here: when a no-impeachment rule precludes a court from considering evidence that racial bias infected jury deliberations, the rule infringes on the right to an impartial jury without sufficient justification.

Pena-Rodriguez v. Colorado, No. 15-606, Petition for Writ of Certiorari at 19-20.

Amicus Curiae Professors of Law similarly argued:

> Permitting verdicts tainted by racial or ethnic bias to remain in place in the interest of "finality" does profound harm to the criminal justice system. Moreover, public confidence in the "integrity" of adjudication declines when racial or ethnic prejudice comes to light but evidentiary rules bar its consideration.

Pena-Rodriguez v. Colorado, No. 15-606, Brief for Amici Curiae Professors of Law in Support of Petitioner at 5. Much the same could be said for the mechanistic application of Georgia's procedural default rule in Mr. Fults's case. To be sure, there are instances where even the right to a jury free of overt racism must yield to certain claim preclusive procedural rules, but this is not one of them. As discussed below, Mr. Fults brought his claims at the first reasonable opportunity. Even assuming that a default was properly found, which Mr. Fults does not concede, the unusual circumstance of his case require that it is the default rule, not his Sixth Amendment rights that must yield.

This view is reinforced by an examination of how much of the Pena-Rodrigues briefing cuts across an issue at the heart of his case: ferretting out racism in the jury room is a difficult and elusive endeavor. As argued in the Petition for a Writ of Certiorari:

> [T]here are inherent limitations on the capacity of *voir dire* to prevent racial bias from entering the jury room in the first place. Criminal

> defendants are not always allowed at *voir dire* to inquire into racial bias. *Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981) (plurality opinion). And when defendants are permitted to inquire specifically into racial biases… defense counsel is often well advised not to pose such direct questions. ….
>
> [A]sking direct questions about racial bias is usually ineffective anyway. Unlike with other forms of partiality, jurors are unlikely to self-identify as racially prejudiced or to make racially biased statements during *voir dire*. A juror "may have an interest in concealing his own bias [or he] may be unaware of it." *Smith*, 455 U.S. at 221-22 (O'Connor, J., concurring). Either way, "it will rarely be productive to ask jurors directly if they will be prejudiced because of the party's race, as a negative answer will virtually always be forthcoming." James J. Gobert et al., Jury Selection: The Law, Art and Science of Selecting a Jury § 7:41 (3d ed. 2014).
>
> Defense counsel are therefore typically left at *voir dire* to pose only general questions about potential bias. But as petitioner's trial demonstrates, such indirect inquiries seldom uncover racial animus. Pet. App. 3a; see also Gobert et al., supra, § 7:44 ("Whether such general questioning is sufficient for the purpose of exposing racial prejudice is debatable."). Few are prone, in the face of open-ended questions, to volunteer that they harbor socially repugnant views.

Pena-Rodriguez v. Colorado, No. 15-606, Petition for Writ of Certiorari at 19-20; see also *Pena-Rodriguez v. Colorado*, No. 15-606, Brief for Amici Curiae Professors of Law in Support of Petitioner at 10-11 ("Visual observation by the judge, counsel, or court personnel, however, can do little to bring racial or ethnic bias to light. ….[E]vidence outside of the jury deliberations is unlikely to reveal a juror's racially discriminatory reaction to the evidence at trial.").

Mr. Pena-Rodriguez had at least one stroke of good fortune that by-passed Mr. Fults: his jurors in his case were aware of, offended by, and immediately revealed the racism of their fellow juror. Mr. Fults in contrast was condemned to

death on the basis of his race by a juror whose race-based decision was not discovered until after the time for making a motion for new trial. Whether due to the no-impeachment rule or to the extraordinarily harsh application of Georgia's procedural default rule, "[w]hen a decision is based on bigotry, removing the deliberations from the court's purview does nothing to preserve the integrity of the jury. Both defendants and society may become aware of express juror prejudice through post-trial disclosures, and then look to the court to determine the constitutional significance of that bias." *Pena-Rodriguez v. Colorado*, No. 15-606, Brief for Amici Curiae Professors of Law in Support of Petitioner at 21. There is "[n]o surer way . . . to bring the processes of justice into disrepute" than to allow courts to turn a blind eye when deliberations have been infected with racial bias. *Aldridge v. United States*, 283 U.S. 308, 315 (1931).

This Court has already recognized that "[t]here may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Warger v. Shauers*, 135 S. Ct. 521, 529 n.3 (2014). In other contexts, members of this Court have recognized the desirability of having a postconviction hearing "to determine whether a juror is biased." *Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring); *see also id.* (noting that there "are some extreme situations that would justify a finding of implied bias"). This case, in which a juror voted for death based on Mr. Fults's race presents exactly the sort of "extreme" situation that the Court noted in

Warger. The egregiousness of Juror Buffington's conduct should justify not merely an otherwise prohibited inquiry into the deliberative process, but also an adjudication of the merits of Mr. Fults's claim notwithstanding the state court's procedural default imposed with utter disregard for the real life difficulties of ferreting out hidden racism in the courtroom.

B. The Procedural Rejection of Mr. Fults's Claim Notwithstanding, Mr. Fults Presented His Claim to the Georgia State Courts in a Reasonable Manner

In Georgia, "a failure to make timely objection to any alleged error or deficiency or to pursue the same on appeal ordinarily will preclude review by writ of habeas corpus." *Black v. Hardin*, 255 Ga. 239, 240 (1985); *see also* O.C.G.A. § 9-14-48(d); and *Ward v. Hall*, 592 F.3d 1144, 1176 (11th Cir. 2010). However, Georgia law specifically provides that procedural default may be overcome where there is cause to excuse the default and where failing to review the claim would result in prejudice to the Petitioner.

In *Turpin v. Todd*, 268 Ga. 820, 825 (1997), a juror misconduct case, the Georgia Supreme Court held that where "the [appellate] record reveals no . . . evidence that would have alerted trial or appellate counsel to the fact that jury misconduct or improper deliberations occurred at trial," a petitioner who later discovers evidence of impropriety "has established cause for failing to raise the claim of . . . juror[] misconduct on appeal." *Id.* at 827. The Georgia Supreme Court based this rule on ethical standards for criminal defense lawyers, which caution

attorneys from conducting post-conviction interviews with jurors where "there simply was no evidence . . . that would have alerted trial or appellate counsel to the presence of any misconduct by the jury . . . ." *Ibid.* (*citing* American Bar Association, Standards for Criminal Justice, Defense Function, Std. 4-7.3 (2d ed. 1980) and commentary at 4.85).

In Georgia, as elsewhere, jurors are strongly presumed to have followed the law and to have rendered their service fairly and impartially. *United States v. Robbins*, 500 F.2d 650, 653 (5th Cir. 1974); *see also Ward v. Hall*, 592 F.3d 1144, 1175 (11th Cir.2010) (citing *United States v. Siegelman*, 561 F.3d 1215, 1237 (11th Cir. 2009) (jury assumed to act impartially). In accord with ABA Standards, Georgia recognizes that inquiries into juror misconduct is appropriate "*where there is evidence of juror* misconduct that might undermine the verdict," provided that lawyers making such inquiry "carefully avoid[] harassment." *Turpin v. Todd*, 268 Ga. at 907 (quoting ABA Standards for Criminal Justice, Standard 4-7-.3 (2d ed. 1980) (emphasis Todd's). Thus, there is no "freestanding" obligation on trial or appellate counsel to investigate jurors absent information that would sufficient to alert them "to the fact that jury misconduct or improper jury deliberations occurred at trial. *Id.* Consequently, if such evidence subsequently comes to light, such claims are properly presented in state habeas; the petitioner has shown "cause" under § O.C.G.A. 9-14-48(d) for his failure to raise the claim on appeal.

The absence of any evidence on the trial record suggesting the presence of a racist on the jury means that Mr. Fults was entitled to rely on the presumption of

impartiality. Further, as detailed, *supra*, Juror Buffington was questioned on the issue of race during *voir dire* and he expressly denied having any bias. Consequently, "there simply was no evidence . . . that would have alerted trial or appellate counsel to the presence of any misconduct by the jury . . . ." *Turpin,* 268 at 827. In fact, there was active concealment of bias by the juror himself. Thus, under the rule of *Turpin*, Petitioner was not required to raise the claim on direct appeal or on motion for new trial. Or stated differently, there is cause to overcome procedural default with respect to this claim. *Id.* ; *see also Strickler v. Greene*, 527 U.S. 263, 283, n. 24 (1999) (a showing that the factual or legal basis for a claim was not reasonably available to counsel satisfies the cause standard); and *Amadeo v. Zant*, 486 U.S. 214, 222 (1988) (same).

As the State conceded below, the record before trial and appellate counsel contained only Buffington's denials under oath that he had any racial prejudice resting on his mind. Indeed, after arguing that Mr. Fults's juror misconduct claim was defaulted, the State urged the state habeas court to reject Mr. Fults's claim on the merits on grounds that "during *voir dire*, Mr. Buffington . . . stated that he did not have any racial prejudice resting on his mind, and it did not make any difference that the Petitioner is black and the victim was white." Appendix A, Respondent's Objections to Petitioner's Evidence.

Why then was the claim defaulted? At the risk of obscuring the forest for the trees, Mr. Fults will attempt to answer. The state habeas court, citing *Valenzuela v. Newsome*, 253 Ga. 793 (1985); *Black v. Hardin*, 255 Ga. 239 (1985); O.C.G.A. § 9-

14-48(d); *Hance v. Kemp*, 258 Ga. 649(4) (1988); and *White v. Kelso*, 261 Ga. 32 (1991), denied relief on the ground that Mr. Fults had not raised his claim at trial and/or on direct appeal and, further, that Mr. Fults failed to overcome the default. Yet, as Mr. Fults will explain, absent the judicial gloss of *Turpin v. Todd*, these cases cannot form the basis of an adequate state bar.

In *Valenzuela v. Newsome*, 253 Ga. 793; 325 S.E.2d 370 (1985), the Georgia Supreme Court held that claims regarding whether there was sufficient evidence to uphold a conviction must be presented on direct appeal and cannot be raised for the first time in a habeas corpus proceeding. The same year the Georgia Supreme Court decided *Valenzuela*, it announced in *Black v. Hardin,* 255 Ga. 239; 336 S.E.2d 754 (1985), that: "a failure to make timely objection to *any* alleged error or deficiency or to pursue the same appeal ordinarily will preclude review by writ of habeas corpus." 255 Ga. at 240 (emphasis in original). However, the Georgia Supreme Court went on to note that, "an otherwise valid procedural bar will not preclude a habeas corpus court from considering alleged constitutional errors or deficiencies if there shall be a showing of actual prejudice to the accused." *Id.*

In *White v. Kelso*, 261 Ga. 32; 401 S.E.2d 733 (1991), the Georgia Supreme Court held that ineffective assistance of counsel claims must be raised at the first possible stage of post-conviction review. In *White*, the court observed that, while counsel cannot be expected to raise his own ineffectiveness in a motion for new trial motion, under circumstances where new counsel is appointed at the motion for new

trial stage; an ineffectiveness claim will be deemed waived if now raised by new counsel at the first possible opportunity.[7]

O.C.G.A. § 9-14-48(d), the Georgia statute governing habeas corpus proceedings, states that:

> the [state habeas] court shall review the trial record and transcript of proceedings and consider whether the petitioner made timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal and whether, in the event the petitioner had new counsel subsequent to trial, the petitioner raised any claim of ineffective assistance of trial counsel on appeal; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas corpus relief shall not be granted. In all cases habeas corpus relief shall be granted to avoid a miscarriage of justice. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper.

Although *Black v. Hardin, Valenzuela v. Newsome, and White v. Kelso*, and the statute have some relevance to the alleged default, none of them explain how "cause" and "prejudice" may be established. It was not until the state supreme court's 1997 decision in *Turpin* that Georgia defined "cause" and "prejudice" in the context of evaluating a claim that was determined to have been defaulted. Thus, in order to adequately apply the Georgia rule governing the assessment of whether a claim is defaulted and, if so, whether a petitioner can overcome the default, Georgia state courts must look through the lens provided by *Turpin*. Under *Turpin*, a claim

---

[7] The state habeas court also cited *Hance v. Kemp*, 258 Ga. 649; 373 S.E.2d 184 (1988), which has little, if any relevance to the instant claim. There the Georgia Supreme Court upheld the state habeas court's procedural bar of certain claims that had been previously raised and rejected in the trial court.

which is otherwise defaulted is reviewable where, inter alia, "the [appellate] record reveals no . . . evidence that would have alerted trial or appellate counsel to the fact that jury misconduct or improper deliberations occurred at trial." 268 Ga. at 827.

The record before the state court showed Mr. Fults had complied with the requirements of *Black* as interpreted and applied in *Turpin* in the specific context of juror misconduct. Because the state habeas court never addressed, much less applied the rule in *Turpin* to Mr. Fults's claim, the court's application of state law was not adequate.

A state procedural rule is not adequate to bar federal review unless the rule's "applications in [the] particular case [satisfies] constitutional requirements of due process of law. . ." *Spencer v. Kemp*, 781 F.2d 1458, 1470 (11th Cir. 1986). A state procedural rule violates due process where a petitioner is deprived of a meaningful opportunity to comply with the rule. *Ford v. Georgia*, 498 U.S. 411, 423-34 (1991); *Spencer* 781 F.2d at 1479. Mr. Fults had no opportunity to comply with a rule requiring that he bring his juror misconduct claim at motion for new trial or on direct appeal because, prior to the discovery of Juror Buffington's bias during state habeas proceedings, Petitioner had no notice of Juror Buffington's bias, and indeed, had Buffington's assurances during *voir dire* that he was not biased. *See Williams v. Taylor*, 529 U.S. 420 (2000).

Mr. Fults complied with the state procedure under *Todd*, which if applied as intended would have served as a gateway for merits review of his juror misconduct claim. Instead, the state court cabined its procedural analysis to *Turpin's*

predecessors; *Black v. Hardin, Valenzuela v. Newsome, and White v. Kelso*. The bar imposed by the state habeas court deprived Petitioner of review of his claim. Indeed, based upon the rule as applied in his case *and* under the specific circumstances of his case - - namely where there was nothing apparent from the record that would have alerted prior counsel to the existence of the issue - - Mr. Fults he could not possibly have complied with the state's rule and obtained review of his claim.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner respectfully requests this Court to grant his Petition for Writ of Habeas Corpus or, in the alternative, grant his motion to stay his execution until such time as the Court decides *Pena-Rodriguez v. Colorado*.

Respectfully submitted this 8th day of April, 2016.

Lindsay Bennett
GA Bar No. 141641
Office of the Federal Defender
Eastern District of California
801 I Street, 3rd floor
Sacramento, California 95814
916-498-6666/(fax) 916-498-6656
Lindsay_Bennett@FD.Org

Jeffrey L. Ertel
GA Bar No. 249966
Federal Defender Program, Inc.
101 Marietta Street, Suite 1500
Atlanta, Georgia 30303
404-688-7530/ (fax) 404-688-0768