The Stench of Prejudice in Keith Tharpe's Death Sentence

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A juror in Mr. Tharpe's case signed an affidavit stating that he was a "nigger," wondering "if black people even have souls."

By Randall Kennedy

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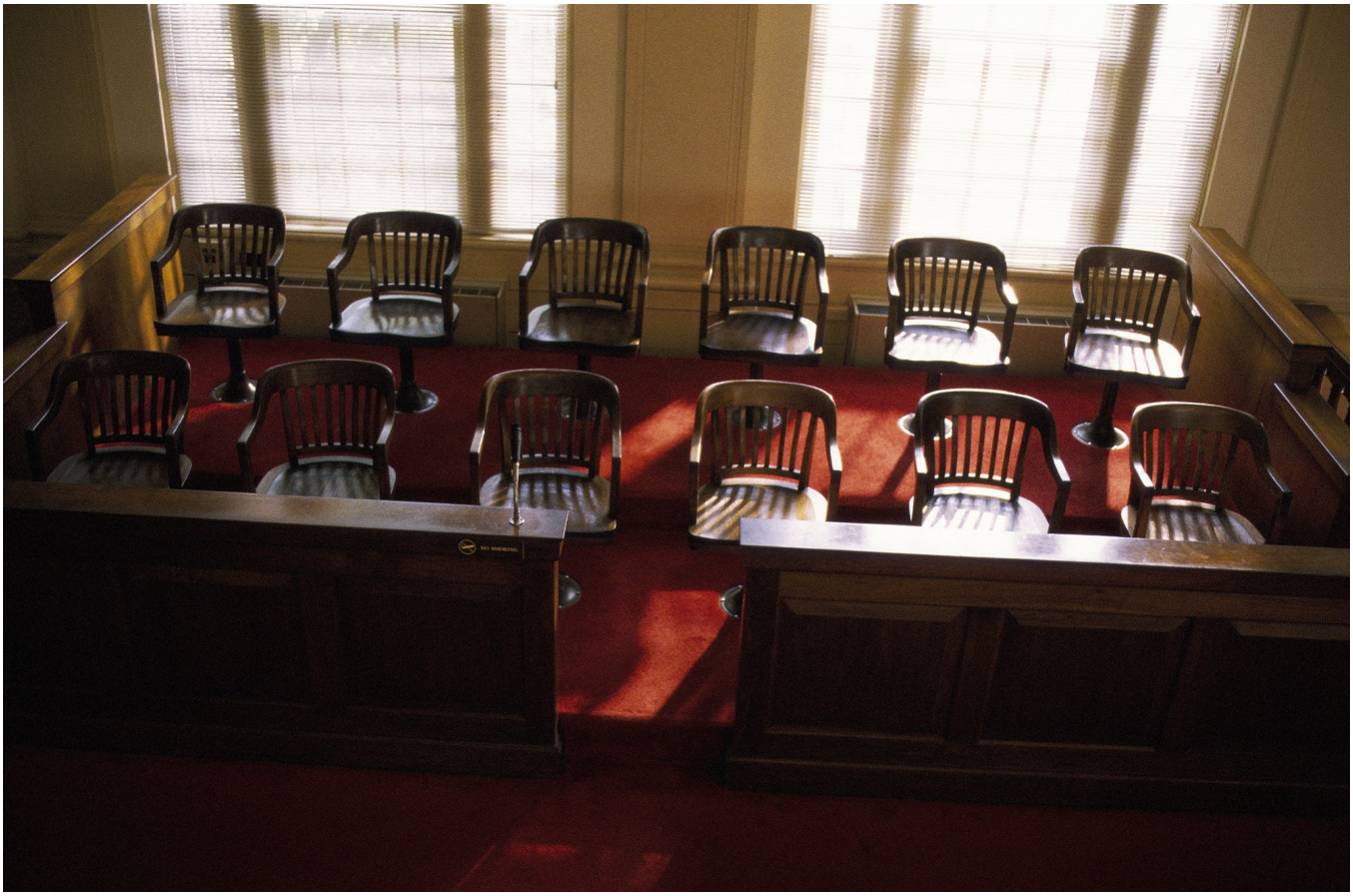
The Supreme Court issued a last-minute stay because a juror's affidavit, in the court's words, presented "a strong factual basis" that Keith Tharpe's race affected the juror's vote.Ron Chapple/The Image Bank, via Getty Images



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Several years after Keith Tharpe was sentenced to death for murder in 1991, a juror in his case signed an affidavit stating that there are two types of black people: good ones and "niggers." The juror, who was white, put the defendant in the latter category and said that he wondered "if black people even have souls."

Mr. Tharpe sits on death row in Georgia. Although his lawyers assert that his punishment was tainted by juror racism, a state court ruled against Mr. Tharpe on that issue two decades ago.

Since then, state and federal courts have put procedural obstacles in front of his efforts to appeal that ruling. Mr. Tharpe seemed to be doomed when the Court of Appeals for the 11th Circuit rebuffed him. He was set to be executed in September 2017.

But the Supreme Court issued a last-minute stay, shaken by the juror's disturbing affidavit which, in the court's words, presented "a strong factual basis that Tharpe's race affected [the juror's] vote for a death verdict."

When the Supreme Court returned the case to the 11th Circuit, it again refused to examine the racial bias claim, offering new procedural impediments. As soon as March 1, the Supreme Court may decide whether it will review Mr. Tharpe's case.

What is going on here?

The struggle over Mr. Tharpe's fate has to do, in part, with a continuing dispute over whether the legal system should allow jury verdicts to be impeached by the post-verdict testimony of jurors.

For a long time, federal and state courts almost always prohibited jurors from testifying about deliberations. In 2015, for example, after a sex crime

conviction, the Colorado Supreme Court refused to consider testimony from two jurors who came forward to report that a fellow juror had expressed anti-Latino bias against the defendant and his alibi witnesses.

In an opinion by Justice Anthony Kennedy, the Supreme Court reversed the Colorado court, ruling that, amid serious allegations of racial juror bias, a reviewing court must be able to consider evidence from jurors, even if doing so opens jury deliberations to more scrutiny than otherwise allowed.

The court acknowledged the importance of supporting the finality of verdicts, protecting candor and confidentiality within the jury room and discouraging efforts to flip jurors beset by regrets. But it rightly concluded that even more imperative is eradicating racial discrimination from the criminal justice system. Racial bias, the court declared, "implicates unique historical, constitutional and institutional concerns" — a sentiment suggesting that even among some conservative jurists there exists a newly energized desire to rectify the racism that remains all too evident in our administration of criminal justice.

More generally, the struggle over Mr. Tharpe's case has to do with the circumstances, if any, under which a government ought to be allowed to execute someone.

One camp is relatively tolerant of contaminations, like racism, that might have affected sentencing. In an unpublished memorandum to his colleagues, Justice Antonin Scalia rebuffed a challenge to capital punishment, despite acknowledging that "the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real ... and ineradicable." The other camp is more demanding, recognizing the need for exacting scrutiny when it comes to assessing the validity of the most extreme form of governmental power: imposition of capital punishment.

Some people in this camp oppose capital punishment altogether. They

believe that we cannot trust the criminal justice system to impose a penalty as irrevocable as death. The Supreme Court of Washington State recently invalidated capital punishment because the death penalty there "is imposed in an arbitrary and racially biased manner." Others in this camp tolerate the death penalty, but only if there is no substantial whiff of prejudice.

The impending execution of Keith Tharpe cannot pass that test. There is the stench of prejudice, not just a whiff. In this case, remember, one of the 12 people who voted for death voluntarily admitted that he thought of Mr. Tharpe as a "nigger" and "wondered if black people have souls." Under these circumstances an execution would certainly be a miscarriage of justice. The Supreme Court must intervene out of an elemental embrace of due process.

Randall Kennedy is a law professor at Harvard and the author of "Nigger: The Strange Career of a Troublesome Word."

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