No. 18-6819

IN THE

Supreme Court of the United States

KEITH THARPE,

Petitioner,

v.

BENJAMIN FORD, WARDEN,

Respondent.

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

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights.

LDF has long been concerned about the persistent and pernicious influence of race on the administration of the criminal justice system. For example, LDF served as counsel of record in cases challenging racial bias in the criminal justice system, including the racial make-up of juries, *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972), and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination in *Carter v. Jury Commission*, 396 U.S. 320 (1970), and *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in cases involving the improper reliance on race in sentencing in *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), and the racially discriminatory use

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part and that no person other than amicus curiae, its members, or their counsel made a monetary contribution to the preparation or submission of this brief. Counsel for both parties consent to the filing of this brief. Undersigned counsel inadvertently neglected to notify all counsel of record of the intention to file this brief 10 days in advance and apologize for our oversight.

of peremptory challenges in *Johnson v. California*, 543 U.S. 499 (2005), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and *Batson v. Kentucky*, 476 U.S. 79 (1986) (overruling *Swain*). LDF also recently testified before the United States Congress, as well as the President's Task Force on 21st Century Policing, about the prevalence of racial bias throughout the criminal justice system and the need to eliminate such discrimination in order to foster confidence and trust in our public institutions. LDF was lead counsel in *Buck v. Davis*, 137 S. Ct. 759, 778 (2017), where this Court invalidated Duane Buck's death sentence because racially discriminatory testimony at Mr. Buck's capital sentencing proceeding meant Mr. Buck "may have been sentenced to death in part because of his race."

INTRODUCTION

Keith Tharpe has presented compelling evidence he was sentenced to death, at least in part, because he is Black. One of the jurors who sentenced Mr. Tharpe to death signed a "remarkable affidavit—which he never retracted—present[ing] a strong factual basis for the argument that Tharpe's race affected [the juror's] vote for a death verdict." *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (per curiam). In that affidavit, juror Barney Gattie stated that Black people can be divided into two types: "Black folks" and "Niggers." In Mr. Gattie's view, Mr. Tharpe fell into the second category. Choosing "between life or death for Tharpe wouldn't have mattered so much," if the victim had also been in the second category, but

because she was from a "nice Black family," Mr. Gattie thought that Mr. Tharpe "should get the electric chair for what he did." Mr. Gattie also reported that other jurors "wanted blacks to know they weren't going to get away with killing each other," and he stated: "After studying the Bible, I have wondered if black people even have souls."

This remarkable affidavit shows that Mr. Tharpe was "sentenced to death in part because of his race." *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). Such an unconstitutional death sentence represents "a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are." *Id*. Yet, for over twenty years, the state and federal courts have refused to consider the merits of Mr. Tharpe's claim, interposing a variety of changing procedural obstacles. Mr. Tharpe's certiorari petition demonstrates why the most recent procedural barriers erected by the Eleventh Circuit are inconsistent with this Court's precedent such that, at a minimum, a certificate of appealability (COA) was required. The petition also implicates an even more fundamental question: whether a judge-made procedural obstacle should ever prevent a court from considering the merits of a compelling claim that a defendant was sentenced to death because of his race. Amicus respectfully urges the Court to grant certiorari.

ARGUMENT

I. KEITH THARPE'S CERTIORARI PETITION DEMONSTRATES THAT THE ELEVENTH CIRCUIT SHOULD HAVE GRANTED A COA.

Under this Court's precedent, a COA is required so long as "'jurists of reason could disagree with the district court's resolution'" of Mr. Tharpe's Rule 60(b) motion or "'could conclude that the issues presented are adequate to deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). Here, the Eleventh Circuit denied a COA on two procedural grounds. The Eleventh Circuit first held Mr. Tharpe cannot rely on *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), to overcome Georgia's evidentiary rule against the consideration of juror affidavits to show bias, because that case is not retroactive under *Teague v. Lane*, 489 U.S. 288 (1989). It then ruled Mr. Tharpe failed to establish "cause" for the procedural default of his claim in state courts. But, as Mr. Tharpe explains, *see* Petition for Certiorari ("Pet.") at 20-26, 34-39, both of those rulings are incorrect and, at a minimum, debatable among jurists of reason. The Eleventh Circuit should have granted a COA.

First, *Peña-Rodriguez* does not implicate *Teague*. *Teague* holds that, absent certain exceptions, new constitutional rules of criminal procedure governing the *trial* process do not apply retroactively, *i.e.*, to cases that had already completed direct review when the new rule was announced. *Teague*, 489 U.S. at 310. As the Court explained in *Montgomery v. Louisiana*,

Teague applies to rules "designed to enhance the accuracy of a conviction or sentence by regulating 'the manner of determining the defendant's culpability.'" 136 S. Ct. 718, 730 (2016) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)). *Teague* promotes finality and comity by having the habeas court ask whether the petitioner's "trial[] and [direct] appeal[] conformed to then-existing constitutional standards." *Teague*, 489 U.S. at 310.

At the time of Mr. Tharpe's trial, it was well-settled that the racial bias documented by Mr. Gattie's affidavit could play no role in determining Mr. Tharpe's sentence. *See Turner v. Murray*, 476 U.S. 28, 36 (1986) (plurality opinion) (". . . we find the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable . . ."); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (recognizing that any consideration of race in the capital sentencing process would be constitutionally impermissible); *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880) (Equal Protection Clause was meant, in part, to protect Black defendants from racially prejudiced juries because the jury is a criminal defendant's fundamental "protection of life and liberty against race or color prejudice . . ."). Mr. Gattie's affidavit leaves no doubt that Mr. Tharpe's trial did not "conform[] to then-existing constitutional standards." *Teague*, 489 U.S. at 310.

Peña-Rodriguez simply creates a constitutional exception to Georgia's rule against considering Mr. Gattie's affidavit on collateral review. Because *Peña-Rodriguez* has no effect on the constitutional standards that existed at the time of Mr. Tharpe's

trial, it does not implicate the principles of comity and finality underlying *Teague* and its anti-retroactivity rule. Yet the decision below assumed *Teague* applies to rules governing the evidence available in collateral proceedings, without citing a single case to support that proposition. At a minimum, this issue is debatable among jurists of reason.

Second, with respect to procedural default, as Mr. Tharpe explained in his Petition, he could not have reasonably discovered Barney Gattie's racial bias "until his attorneys conducted jury interviews in state habeas proceedings." Pet. at 18 n.13. The practical constraints of Georgia's post-conviction procedural framework prevent a petitioner from discovering evidence of juror misconduct or bias, such as the kind Mr. Tharpe encountered, until after trial. Such evidence is rarely available in the record and requires post-conviction habeas investigation to uncover it. *See Turpin v. Todd*, 493 S.E. 2d 900, 907 (Ga. 1997) (finding cause to overcome procedural default in state habeas where petitioner failed to raise jury-bailiff misconduct claim on direct appeal because no evidence in the record supported it). Although the Eleventh Circuit failed to find cause in its most recent order, *Tharpe v. Warden*, 898 F.3d 1342, 1347 (11th Cir. 2018), it concluded the opposite in its April 3, 2018, order, noting that Mr. Tharpe "could not have raised the pre-*Peña-Rodriguez* Claim at trial or on direct appeal" because he "discovered [the evidence in support] more than seven years after his trial . . . ." Pet. App'x A at 3 n.2.

In short, the Eleventh Circuit wrongly denied a COA on procedural grounds when this case warranted a grant of one.

II. WHEN A HABEAS PETITIONER PRESENTS COMPELLING EVIDENCE THAT HE WAS SENTENCED TO DEATH BECAUSE OF HIS RACE, NO JUDGE-MADE PROCEDURAL DOCTRINE SHOULD PREVENT MERITS REVIEW.

Amicus respectfully submits that the Court should also grant Keith Tharpe's petition to answer this more fundamental question "fairly subsumed in the questions presented in the petition for certiorari," *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 512 (1991) (quotation marks omitted): whether an exception to judge-made procedural barriers is necessary when, as here, a death row prisoner presents compelling evidence that he was sentenced to death because of his race.[2] The equitable nature of the habeas remedy

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[2] If this Court disagrees that the question is fairly subsumed by the questions presented by the Petition, then it should add the question for review given its fundamental importance and the fact that Mr. Tharpe's attorneys reasonably litigated this case in accordance with existing case law. *See, e.g.*, *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993) ("Rule 14.1(a), of course, is prudential; it does not limit our power to decide important questions not raised by the parties." (Quotation marks omitted)). Because amicus urges an expansion of this Court's prior case law to address a new type of miscarriage of justice, review is particularly appropriate even if an additional question presented is

supports such an exception, and it is necessary for the Court to protect against the unique harm that a death sentence tainted by racial discrimination would have on public confidence in the rule of law. At a minimum, jurists of reason could determine that the arguments for such an equitable exception to judge-made procedural barriers "'are adequate to deserve encouragement to proceed further,'" such that a COA is required. *Buck*, 137 S. Ct. at 773 (quotation marks omitted).

This case is like *Buck*. Both cases are "extraordinary" such that reopening the judgment is warranted under Rule 60(b) because, in both cases, the petitioner was sentenced to death in part because he is Black. In *Buck*, defense counsel presented an "expert" who testified before the jury that because Mr. Buck is Black, he posed a greater risk of committing future acts of criminal violence. *Id.* at 768-769. The introduction of this "powerful racial stereotype—that of black men as violence prone" was "odious in all aspects." *Id.* at 776 (quotation marks omitted); *id.* at 778. The real possibility that Mr. Buck was sentenced to death, at least in part, because he is Black injured not only Mr. Buck, but also public confidence in the criminal justice system. *See id.* at 778. As a result, Mr. Buck's case was "extraordinary" and "a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen the judgment." *Id.* at 777. It therefore "follow[ed] that the Fifth Circuit erred in denying Buck the COA

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required. *Cf. id.* ("We have made exceptions to Rule 14.1(a) in cases where we have overruled one of our prior decisions even though neither party requested it.").

required" to consider the merits of his appeal. *Id.* at 780.

The racism that taints Mr. Tharpe's death sentence is just as odious as that in *Buck*. Here, Barney Gattie—one of the people charged with deciding whether Mr. Tharpe should be sentenced to die—harbored deeply racist views, and his views influenced his decision. Mr. Gattie explained, unequivocally, that he chose "between life or death" because the victims "were nice black folks." *See* Pet. 7 (reproducing affidavit). Had they "been the type" of "black folks" Mr. Tharpe is—"Niggers"—it "wouldn't have mattered so much." *Id.* Mr. Gattie further stated that because Mr. Tharpe "wasn't in the 'good' black folks category," he felt Mr. Tharpe "should get the electric chair for what he did." *Id.* Mr. Gattie then asserted: "After studying the Bible, I have wondered if black people even have souls." *Id.*

Mr. Gattie thus gave sworn testimony that he chose to impose the death penalty on Mr. Tharpe because he considered him to be a "Nigger," and Mr. Gattie admitted to doubting the humanity of all Black people. Mr. Gattie's "remarkable" affidavit shows that he sentenced Mr. Tharpe to die, at least in part, because of Mr. Tharpe's race. *Tharpe*, 138 S. Ct. at 546. In that respect, the racial animus infecting Mr. Tharpe's sentence of death is even more unmistakable and egregious than it was in *Buck*. In *Buck*, the psychologist's testimony asserting that Mr. Buck was more likely to be a future danger because he is Black meant that Mr. Buck "may have been sentenced to death in part because of his race." 137 S. Ct. at 778. In this case, there is no "may" about it: Mr. Gattie's

affidavit is clear that he voted for a death sentence for Mr. Tharpe, in part, because Mr. Tharpe is Black.

Just as fundamental principles of equity required merits review of Mr. Buck's claim that he had been sentenced to death, in part, because he is Black, those principles require merits review of Mr. Tharpe's claim here.

This Court has "adhered to the principle that habeas corpus is, at its core, an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319 (1995). For this reason, "equitable principles have traditionally governed the substantive law of habeas corpus." *Holland v. Florida*, 560 U.S. 631, 646 (2010) (citation and internal quotation marks omitted). On one hand, the equitable principles governing habeas include federalism, comity, and finality. Comity restricts the use of the writ to afford "both respect and courtesy to the laws of the respective jurisdictions" in "our federal-state system." *Carbo v. United States*, 364 U.S. 611, 621 (1961). Finality similarly limits the scope of habeas relief "to ensure that state-court judgments are accorded the . . . respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Martinez v. Ryan*, 566 U.S. 1, 9 (2012); *see also* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452-53 (1963). *Teague*'s anti-retroactivity doctrine, and the procedural default doctrine established in *Wainwright v. Sykes*, 433 U.S. 72 (1977), promote these principles. These doctrines help maintain the balance of federalism and ensure the "state trial on the merits [is] the 'main event,'" *Wainwright*, 433 U.S. at 90, by limiting the

circumstances under which habeas courts may grant relief based on federal claims that were not properly presented to the state court or that did not exist at the time of the petitioner's trial or direct appeal.

But equally important is the bedrock principle that habeas must "be administered with the initiative and flexibility essential to insure that miscarriages of justices within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). "Habeas is not 'a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.'" *Boumediene v. Bush*, 553 U.S. 723, 780 (2008) (quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)). Consistent with its common-law roots, the Great Writ is "adaptable," providing a remedy as needed to correct fundamentally unjust convictions or sentences. *See id.* at 779.

As a result, neither comity nor finality can be absolute bars to habeas review, and courts must take other considerations into account in appropriate cases when deciding whether to review a habeas petitioner's claims on the merits. Thus, in the procedural default context, the Court has recognized two circumstances in which a federal habeas court must excuse noncompliance with a state procedural rule to consider the merits of a federal claim. The principles underlying those exceptions make clear that no procedural obstacle should prevent a habeas court from reaching the merits when a habeas petitioner presents compelling evidence that he was sentenced to death, in part, because he is Black.

First, a petitioner can overcome a procedural bar by establishing cause for the default and prejudice.

See, e.g., *Wainwright*, 433 U.S. at 87. For example, in *Martinez v. Ryan*, the Court held that a petitioner may establish cause to excuse a procedural default "when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding." 566 U.S. at 14. This Court said the rule announced in *Martinez* was necessary as "an equitable matter," *id.*, to protect the "bedrock principle" that any person haled into court is provided "effective assistance of counsel." *Id.* at 12. When a federal court finds cause and prejudice, it is not granting relief; rather, the court is allowing consideration of "the merits of a claim that otherwise would have been procedurally defaulted." *Id.* 17. In allowing petitioner an opportunity to be heard on the merits of the claim—effective assistance of counsel—the Court acknowledged the importance of the underlying claim in the equitable administration of justice.

Second, a petitioner can overcome a procedural bar when necessary to correct a "fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). As this Court explained in *Murray v. Carrier*, "'in appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" 477 U.S. 478, 495 (1986) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)) (alteration omitted). "In an effort to 'balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case,' the Court has recognized a miscarriage-of-justice

exception." *House v. Bell*, 547 U.S. 518, 536 (2006) (quoting *Schlup*, 513 U.S. at 524).

Thus far, the Court has tied the "miscarriage of justice" exception to cases where there is strong evidence that a prisoner is actually innocent of the underlying offense, *see House*, 547 U.S. at 536-37; *Schlup*, 513 U.S. at 315-16, 327, or compelling evidence that he is "actually innocent" of the death penalty—meaning that, in light of the new evidence, no reasonable juror would have found the petitioner eligible for the death penalty under state law. *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992).

But, while the incarceration or execution of an innocent person are prototypical examples of "fundamentally unjust" results, they are not the only examples. Indeed, one scholar recently noted that this "Court has repeatedly demonstrated a belief that concerns involving racial animus outweigh the concerns like finality and efficiency that underlie most procedural barriers." Carrie Leonetti, *Smoking Guns: The Supreme Court's Willingness to Lower Procedural Barriers to Merits Review in Cases Involving Egregious Racial Bias in the Criminal Justice System*, 101 Marq. L. Rev. 205, 212 (2017). Allowing an execution to proceed even though a defendant has been sentenced to death, at least in part, because of his race, would be a "miscarriage of justice." That is true from the perspectives of the defendant, the public, and the rule of law. As this Court explained two terms ago, the possibility that a defendant has been sentenced to death because of his race represents "a disturbing departure from a basic premise of our criminal justice system: Our law

punishes people for what they do, not who they are." *Buck*, 137 S. Ct. at 778. "Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Id*.

And as the Court elaborated in *Buck*, this "departure from basic principle" that our law does not punish people for immutable characteristics is even more profound when that immutable characteristic is race. *Id*. "'Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.'" *Id*. (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)). "Relying on race to impose a criminal sanction 'poisons public confidence' in the judicial process. It thus injures not just the defendant, but 'the law as an institution, the community at large, and the democratic ideal reflected in the processes of our courts.'" *Id.* (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015), and *Rose*, 443 U.S. at 556).

These principles apply with special force when racial discrimination in the jury room taints a defendant's conviction or sentence. Racial bias in the jury room is "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Peña-Rodriguez*, 137 S. Ct. at 868. "Permitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the wrongful exercise of power by the State.'" *Id*. (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). In light of these special concerns, the Court in *Peña-Rodriguez* held: "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, a confidence that is a central premise of the Sixth Amendment trial right." *Id*. at 869.

The concerns motivating *Peña-Rodriguez* are even more significant in capital cases. The sentencing phase of a capital case requires jurors to make a "moral judgment whether to impose the death penalty." *Shafer v. South Carolina*, 532 U.S. 36, 51 (2001). That decision is unlike any other a jury must make, and it requires the exercise of reasoned discretion. In exercising that discretion, jurors are constitutionally required to consider a defendant's humanity, and "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind" warranting a sentence less than death. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); *see Lockett v. Ohio*, 438 U.S. 586, 601, 604 (1978) (plurality opinion). Mr. Gattie's affidavit leaves no doubt that he did not, indeed could not, consider Mr. Tharpe's humanity before voting to sentence him to death. Mr. Gattie, "[a]fter studying the Bible," openly "wondered if black people even have souls." *See* Pet. at 7.

In sum, strong evidence that a sentencer imposed death at least in part because of the defendant's race creates precisely the kind of "fundamentally unjust" result that warrants an equitable exception to the procedural default doctrine. Under these circumstances, "the State's interest in finality deserves little weight," because the people of that State "lack an interest in enforcing a capital sentence

obtained on so flawed a basis." *Buck*, 137 S. Ct. at 779 (discussing the significance of Texas's prior confession of error).

And just as the Court should recognize that the "miscarriage of justice" exception to procedural default applies when there is compelling evidence that a defendant was sentenced to death in part because of his race, the Court should recognize a similar exception to any anti-retroactivity doctrine. The "watershed rules of criminal procedure" exception to *Teague* is intended for new procedural rules "'without which the likelihood of an accurate conviction is seriously diminished.'" *Schriro*, 542 U.S. at 352 (quoting *Teague*, 489 U.S. at 313) (emphasis omitted). An "accurate" outcome is not only one in which the court is confident of the defendant's guilt, it is one in which the defendant was not sentenced to death because of his race. When, as here, there is compelling evidence that the defendant was sentenced to death in part because of his race, his death sentence is not "accurate" in any meaningful sense of the term. Again, under these circumstances, the State's ordinary "interest in finality carries little weight," *Buck*, 137 S. Ct. at 779, and federal habeas courts must be permitted to reach the merits of a petitioner's claims.

Procedural rules must not be "so inflexible that [they] may not yield to exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Bowen v. Johnston*, 306 U.S. 19, 27 (1939). No conviction or sentence is more "'fundamentally unjust,'" *Murray*, 477 U.S. at 495, than a death sentence imposed, at least in part,

because the defendant is Black. This Court should therefore hold that an exception must exist with respect to any procedural doctrine that would bar merits review in the face of compelling evidence that a petitioner's sentence of death is tainted with such overt racism. At a minimum, the Court should hold that this issue is "'adequate to deserve encouragement to proceed further,'" such that a COA must be issued. *Buck*, 137 S. Ct. at 773 (citation omitted).

CONCLUSION

This case is "extraordinary." *Buck*, 137 S. Ct. at 778. The taint of racial discrimination in Mr. Tharpe's death sentence is undeniable. The Court should grant certiorari and reverse the Eleventh Circuit's decision denying Mr. Tharpe a certificate of appealability.

Respectfully submitted,

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