No. _____

IN THE SUPREME COURT OF THE UNITED STATES

James Were,
Petitioner,

-v-

State of Ohio,
Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

James Were is African-American. He has been sentenced to death. He filed pretrial motions challenging his: 1) competency to stand trial and 2) level of intellectual functioning and resulting eligibility for the death penalty. Were presented school records documenting that he twice received IQ scores of 69 on the Stanford Binet while he was in elementary school. The trial judge at the competency hearing referred to the Stanford Binet as the "white man's test." The trial judge repeatedly in open court at both the competency and *Atkins* hearings stated that because Were is African American, he would not consider his two IQ scores of 69.

The prosecution in the penalty phase hearing followed the judge's cue and cross examined the experts on the notion that Were's IQ scores were unreliable because Were is African-American. The jury recommended that the trial judge impose the death penalty. The trial judge, who had previously refused to consider Were's IQ scores on the "white man's test," after conducting an independent evaluation of the evidence sentenced Were to death.

In *Buck v. Davis*, __ U.S. __, 137 S.Ct. 759, 776, 197 L.Ed. 1 (2017), this Court condemned the use of race as a defining factor in whether Buck received the death penalty. This Court cautioned courts to be especially vigilant against "particularly noxious strain[s] of racial prejudice" like those present in *Buck*. *Id*. at 776.

Subsequently after deciding *Buck*, this Court ruled that trial courts must consider in a motion for a new trial evidence that jurors relied on racial stereotypes or animus in convicting a defendant. *Peña-Rodriguez v. Colorado*, __ U.S. __,137 S.Ct.

855, 862, 197 L.Ed.2d 107 (2017). This Court again warned that racism "remains a familiar and recurring evil" *Id*. at 868.

Last year, this Court again flagged the use of race as an inappropriate criterion for determining whether a defendant receives the death penalty. *Tharpe v. Sellers*, __ U.S. ___, 138 S. Ct. 545, 199 L.Ed.2d 424 (2018). In that case a juror told Tharpe's lawyers that he believed Tharpe to be the bad kind of black person ("Nigger[]") and noted that "[a]fter studying the Bible, I have wondered if black people even have souls." *Id*. at *3.

In clear violation of *Buck*, *Peña-Rodriguez*, *Tharpe*, and the Eighth and Fourteenth Amendments, the Supreme Court of Ohio declined to address the trial court's introduction of Were's race into the death penalty eligibility determination and the prosecution's subsequent introduction of Were's race at the penalty hearing. The following questions are presented:

1. Did the Supreme Court of Ohio violate the Eighth and Fourteenth Amendments when it refused to reopen Petitioner's direct appeal to consider evidence that the judge and State unconstitutionally made race a factor in whether Petitioner was death-eligible and/or deserving of death? Should this Court grant certiorari, vacate, and remand to allow the Supreme Court of Ohio to reconsider and apply *Buck, Peña-Rodriguez*, and *Tharpe* to correct clear Eighth and Fourteenth Amendment violations?

2. Did the Supreme Court of Ohio violate the Eighth and Fourteenth Amendments when it refused to reopen Petitioner's direct appeal to consider evidence that the trial judge independently and the State unconstitutionally made race a factor in whether Were was eligible for a death sentence? Should this Court logically extend *Buck*, *Peña-Rodriguez*, and *Tharpe* to judges in that they like experts and jurors – cannot make race a factor in whether a defendant is death-eligible?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

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PETITION FOR WRIT OF CERTIORARI

Based on the rules announced in *Buck*, *Peña-Rodriguez*, and *Tharpe*, James Were respectfully requests this Court grant this petition for certiorari, reverse the decision below, and remand to the Supreme Court of Ohio for further proceedings. Alternatively, this Court should reverse the decision below, remand this case to the trial court for a new trial, and order that the trial court consider Were's IQ scores as evidence of his intellectual disability.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at *State v. Were*, 154 Ohio St.3d 1422, 2018-Ohio-4496, 111 N.E.3d 20 and is reproduced in the Appendix at **A-1**.

JURISDICTION

On November 7, 2018, the Supreme Court of Ohio declined to reopen Were's direct appeal. *State v. Were*, 154 Ohio St.3d 1422, 2018-Ohio-4496, 111 N.E.3d 20. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

Amendment 8 of the United States Constitution prohibits, in relevant part, the infliction of "cruel and unusual punishments."

Amendment 14 of the United States Constitution provides, in relevant part: "No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Supreme Court Rule 4.01(A)(1) provides "Unless otherwise addressed by these rules, an application for an order or other relief shall be made by filing a motion for the order or relief. The motion shall state with particularity the grounds on which it is based." The Rule is reproduced in the Appendix at A-2.

STATEMENT OF THE CASE

I. The trial judge and State used Were's race to ignore and/or undercut critical IQ evidence supporting the conclusion that Were was a person with an intellect disability.

James Were – aka Namir Mateen – lingers on Ohio's death row, despite being intellectually disabled, because he is Black. In the 1960s, when Were was 7 and 12 years old, his school referred him for IQ testing due to poor academic performance. At both ages, he scored a 69on IQ tests. Decades later, after the State indicted Were for capital crimes, the trial judge repeatedly and at various phases of trial refused to consider these two IQ scores as evidence of Were's intellectual disability specifically and only because of Were's race.

Were's limited intelligence was a significant factor in three separate phases of his trial: a) proceedings on his competency to stand trial; b) death penalty eligibility;

and c) mitigation. The judge refused to consider Were's IQ scores in his competency and *Atkins* determinations because Were is Black. Piggybacking off the judge's professed beliefs, the State argued in the *Atkins* phase to the judge and in the mitigation phase to the jury that Were's low IQ scores should not be considered because of his race.

A. Were's Race and his competency to stand trial

Were's murder trial began in 2003[1], after the State indicted him in relevant part for the 1994 murder of a corrections officer that occurred during an 11-day riot at Southern Correctional Facility in Lucasville, Ohio. Were raised the issue of his competency to stand trial. At the evidentiary hearing on his competency he presented as evidence of his incompetence the two IQ scores of 69 from the 1960s. Were also presented expert psychological testimony that Were was intellectually disabled and testimony from a Department of Corrections guidance counselor who said that despite Were's sincere efforts, his reading, comprehension, and math skills never reached a sixth-grade level. (Tr. 2555)

Neither the State nor Were raised the issue of race and IQ scores. The trial judge *sua sponte* raised his unsubstantiated beliefs about race and IQ testing. (Tr. 221–22.) He deemed Were's IQ scores invalid, because he believed they were

1 The State initially tried Were in 1995. The jury found Were guilty and the judge sentenced him to death. On direct appeal, the Ohio Supreme Court reversed Were's conviction in 2002 and remanded the case for a new trial, finding that the trial court violated Were's right to a competency hearing. *State v. Were*, 94 Ohio St.3d 173, 177 761 N.E.2d 591 (2002). This Petition concerns events that took place during Were's second trial.

produced by a "white man's test" and thus refused to consider this evidence of intellectual disability. (*Id*.; *Id*. at 244–45.) The judge unsurprisingly found Were competent to stand trial.

B. Were's Race and his Atkins' claim

Were also timely filed an *Atkins* motion, arguing that he was intellectually disabled and thus could not be sentenced to death. *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002). Once again, Were introduced as evidence of his intellectual disability his two IQ scores of 69 and presented the testimony of two expert psychologists who found Were had an intellectual disability. This time, the State initially raised the issue of race and IQ testing in its cross-examination of Were's experts. (Tr. 2357). The State then presented its own expert testimony from a doctor who claimed that the IQ tests from the 1960s were "culturally biased" such that they depressed the scores of minorities like Were. (Tr. 2440.)

The trial judge once again focused his questions of the defense and State experts on the relationship between race and IQ. (Tr. 2420–21; 2480–82.) The judge denied Were's *Atkins* motion after concluding that Were's IQ scores were not entitled to any weight because of his race. On the record, the trial judge stated:

> I do not find by the preponderance of the evidence that it is more likely so than not that his IQ is 69. ***There is no way to tell what this man's IQ was at that particular period of his life, because, one, the test was culturally biased; two, if it was not, it did not go into the area of a mental retardation, according to the Stanford-Binet or Wechsler*** . . .

(*Id*. at 2502–04) (emphasis added). In his written "Opinion Finding Defendant Not Mentally Retarded," he found that "[t]he ***IQ tests taken by defendant, a black man***, at the ages of seven and twelve were culturally biased and ***more likely than not*** resulted in lower scoring." (Emphasis added.) The judge's own wording – "more likely than not" – reflected that there existed no actual evidence of racial bias in Were's IQ scores. And no evidence existed to support the judge's generalized beliefs about race and IQ. Quite literally, the only evidence the judge had that such cultural bias existed in IQ testing were his own questions.

C. Were's race and the appropriate sentence

Finally, during the mitigation hearing, Were again presented evidence of his IQ of 69 and expert psychological testimony, and ultimately argued to the jury that he should not be executed because he is "mentally retarded." (Tr. 2548, 2587, 2602.) On cross-examination, the State once more brought up the issue of race and IQ scores in an attempt to undercut this evidence. (Tr. 2614–15, 2631–34, 2640.) The State's efforts to undermine this argument of intellectual disability made Were's race a key factor for the jury to consider in whether to recommend a sentence of death. This effort was ultimately successful; the jury returned a death verdict.

II. Evidence presented during competency, *Atkins*, and mitigation proceedings established all three prongs of intellectual disability.

The medical community – and thus courts – "defines intellectual disability according to three criteria: significantly sub average intellectual functioning, deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances), and onset of these deficits during the developmental

period." *Hall v. Florida*, 572 U.S. 701, 710, 134 S. Ct. 1986, 188 L.Ed.2d 1007 (2014) (citing *Atkins*, 536 U.S. at 308). The expert testimony in conjunction with Were's IQ scores of 69 from when he was 7 and 12 years of age established that his ID manifested during his developmental period.

The evidence presented during Were's 2003 trial also establish that he has significantly sub average intellectual functioning. Although the judge repeatedly claimed and found that the IQ tests Were took from the 1960s were racially biased, no evidence or testimony was presented to support his belief. The judge claimed that all three psychologists who testified during the course of Were's competency, *Atkins*, and mitigation proceedings agreed that "those tests were culturally biased." (Tr. 2502–04.) But the only "evidence" of this "cultural bias" were the judge's own questions.

While the State's expert, Dr. Nelson, testified on direct examination that the tests were biased in a way that "depress[ed] the scores of minority testing," he admitted on cross examination that there was no actual proof that the tests were racially biased. (Tr. 2440, 2470–71.) In fact, Dr. Nelson could not point to any study or evidence that such racial bias existed in the tests Were took. (Tr. 2471.) In response to the judge's question, the most Dr. Nelson could offer was that there had been "concern about test bias." (Tr. 2482.).

Similarly, the only evidence of this bias the judge was able to pull from defense experts was an acknowledgement that there had been discussion or concern regarding test bias. Dr. Rheinscheld in response to one of the judge's questions,

testified that "[t]here was some discussion" about test bias, but again pointed to no evidence that such bias actually existed. (Tr. 2420–21.) Dr. Rheinscheld further explained that this discussion involved the "Larry P" case, which concerned educational placement in schools, and not determinations of intellectual disability. (Tr. 2420). The other defense expert, Dr. Hammer, also testified that there had been "concern" that the tests were racially biased, but unequivocally stated that "based on research" this test was "not a biased." (Tr. 2338.) Again, Dr. Hammer contextualized this concern – it stemmed from educational placement of African American students, and not test accuracy. (Tr. 222, 2338–39.)

The State argued that because Were's score was not equal to or less than 68 on the Standord Binet IQ test (two standard deviations below the mean, the "cut-off" for ID), the court was precluded from finding that Were has an intellectual disability. (Tr. 2491). That Were's two scores were one point above the standard deviation cutoff does not preclude a finding that he is ID. *Hall,* 572 U.S. at 724 ("Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test. . . . Florida's rule misconstrues the Court's statements in *Atkins* that intellectual disability is characterized by an IQ of 'approximately 70.'")

This is particularly true given the abundant evidence of Were's deficits in adaptive functioning. Were's prison records – discussed at trial – are consistent with the two IQ test scores of 69 he received in the 1960s. (Tr. 2397–98.) Moreover, Jacqueline McCullough, a guidance counselor for the Department of Rehabilitation and Corrections, worked with Were for approximately one and a half years at the

Ohio State Penitentiary. She testified that despite his sincere efforts, Were's reading, comprehension, and mathematics skills never reached a sixth-grade level. (Tr. 2555). Were's experts based their conclusions that he is intellectually disabled on Were's IQ scores ***and*** his consistent adaptive deficits. (Tr. 187, 194, 2344.)

III. The Supreme Court of Ohio's Rulings.

After this Court's 2017 and 2018 rulings in *Buck*, *Peña-Rodriguez*, and *Tharpe*, Were filed a motion with the Supreme Court of Ohio pursuant to that Court's Rule 4.01 to reopen his direct appeal because the trial judge and State unconstitutionally made Were's race the key factor in the competency and death penalty calculous.

The Ohio Supreme Court issued a pro-forma denial of Were's Motion without giving a reason why. *State v. Were*, 154 Ohio St.3d 1422, 2018-Ohio-4496, 111 N.E.3d 20.

REASON FOR GRANTING THE WRIT

I. The Ohio Supreme Court violated *Buck*, *Peña-Rodriguez*, and *Tharpe* by refusing to correct the State and trial court errors in making Were's race the key factor in the death penalty calculus.

A. *Buck*.

In *Buck v. Davis*, the central issue at sentencing during his 1995 capital trial was whether Buck would commit future acts of violence. Defense counsel presented testimony from an expert who told the jury during his mitigation phase that "the color of Buck's skin made him more deserving of execution." *Buck*, 137 S. Ct. at 775. Though this psychologist told the jury he did not

think Buck would reoffend and offered statistical reasons to support this opinion, he also identified Buck's race (African American) as a statistical factor that made Buck more likely to commit future acts of violence, a prerequisite to the jury returning a death verdict. *Id*. at 768. Regarding Buck's potential for future violence, this expert provided the jury with "hard statistical evidence – from an expert" that Buck would likely be violent in the future because of this immutable characteristic. *Id*. This evidence was all the more potent because it came from an expert – even a defense expert – "bearing the court's imprimatur." *Id*. at 777.

No court substantively acknowledged this expert's potentially deadly impact on Buck's 1995 case until over two decades later, when this Court reviewed his case on procedural grounds in 2017. This Court concluded that the expert testimony alone could have led the jury to making "a decision on life and death on the basis of race," which is intolerable to the criminal justice system. *Id*. at 776, 778 ("Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle."). The State claimed that any mentions of Buck's race were "*de minimis*" since there were only two express references to Buck's race during sentencing. *Id*. at 777. However, this Court recognized that:

> when a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. ***Some toxins can be deadly in small doses***.

Id. (Emphasis added.) This is true even when a defendant's own lawyer introduces race into the death penalty calculus. *Id*. Based on the expert's testimony that introduced Buck's race into his capital sentencing hearing, this Court concluded that Buck "demonstrated prejudice" and ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 768, 780, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

If Buck's own expert can impermissibly insert the issue of Buck's race into the death penalty equation, then certainly the trial judge's insertion of race into Were's competency and death penalty calculus violates the Constitution. The same concerns that underlie what happened in *Buck* exist here and are exacerbated. Here, Were's race was initially and repeatedly introduced by the trial judge and then applied by the court.

The use of Were's race to make him eligible for the death penalty and then to discount his strongest evidence of intellectual disability to the jury cannot be deemed "*de minimus*." Here, the racism was not given in small doses; rather, the ***judge himself*** served it up repeatedly. The trial judge's refusal to consider Were's IQ scores of 69 because of his race clearly violated the Constitution. And the Supreme Court of Ohio's refusal to consider Were's Motion clearly and obviously violated *Buck*. This Court should grant certiorari, vacate, and remand to require the Ohio courts to comply with *Buck*.

B. *Peña-Rodriguez.*

In *Peña-Rodriguez*, this Court addressed racism in the context of the Sixth Amendment's right to a jury trial. There, two jurors told defense attorneys in post-

conviction that a third juror, H.C., made racist comments about the defendant and his alibi witness during the course of deliberations. 137 U.S. 855, 862. This juror stated his belief that the defendant was guilty of sexual assault "because he's Mexican…[and] nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id*. In addition, this juror expressed his doubts about the defendant's alibi witness because this witness was "an illegal," even though the witness testified that he was a legal resident at trial. *Id*.

The Colorado courts refused to look at this evidence that the defendant's race impacted the jury's verdict, finding that these deliberations could not be examined under the state's aliunde rule. *Id.* at 862.

This Court reversed and found that when racial animus is a "significant motivating factor" in a juror's guilt determination, the no-impeachment rule must give way to the Constitution's guarantee of an impartial jury. *Id*. at 869. This Court concluded that courts have a special duty to "purge racial prejudice from the administration of justice." *Id*. Criminal defendants are guaranteed "'protection of life and liberty against race or color prejudice.'" *Id at* 868 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 310, 107 S. Ct. 1756, 95 L.Ed.2d 262 (1987)). Courts **must** address this bias in order to come "ever closer to the promise of equal treatment under the law that is so central to a functioning democracy." *Id*. at 868.

The Supreme Court of Ohio refused to do what this Court said it must do in *Peña-Rodriguez*: address discrete instances of extreme racial bias that continue to plague the criminal justice system. This failure risks precisely the "systemic injury

to the administration of justice" warned of in *Peña-Rodriguez*. *Id*. at 867. Ohio's failure is all the more egregious because Were's is a capital case. The Supreme Court of Ohio's refusal to even consider whether Were's rights were violated when the judge and State made his race central to the question of whether he could or would receive the death penalty clearly violated *Peña-Rodriguez*. This Court should grant certiorari, vacate, and remand to require Ohio courts to comply with *Peña-Rodriguez*.

C. *Tharpe*.

This Court addressed the Eleventh Circuit's denial of Tharpe's request for a certificate of appealability because it concluded that Tharpe failed to prove prejudice, *ie,* that a racist juror's beliefs impacted his vote for the death penalty. *Tharpe*, 138 S. Ct. 545, 546. This Court's per curium opinion reversed the Eleventh Circuit and remanded the case for consideration of whether Tharpe was entitled to a certificate of appealability.

In *Tharpe,* after trial a juror signed an affidavit admitting that he believed:

> [T]here are two types of black people: 1. Black folks and 2. Niggers"; that Tharpe, "who wasn't in the 'good' black folks category in my book, should get the electric chair for what he did"; that "[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason"; [***3] and that, "[a]fter studying the Bible, I have wondered if black people even have souls."

Id. This Court concluded that this affidavit provided a "strong factual basis" that racism impacted this juror's vote for the death penalty. This case presented "unusual facts" that required the Eleventh Circuit to take a closer look. *Id*.

The trial judge and State's actions in Were's case are likewise constitutionally repugnant. Ohio's failure to even consider Were's Motion given the remarkable underlying facts is a clear, obvious violation of *Tharpe*.

This Court should grant certiorari, vacate the decision below, and remand for further proceedings. Remand is appropriate and necessary to enforce the Eighth Amendment's prohibition against executing "anyone in 'the entire category of intellectually disabled offenders." *Moore*, 581 U.S. __,137 S. Ct. 1039, 1051, 197 L.Ed.2d 416 (internal citations omitted).

II. This Court should logically expand *Buck*, *Peña-Rodriguez*, and *Tharpe* to establish that the protections laid out in those cases clearly apply to cases like Were's.

This case sits at the intersection of Eighth and Fourteenth Amendment protections. The Eighth Amendment prohibits the State from executing a person with an intellectual disability. *Atkins*, 536 U.S. 304. While this Court left "to the States the task of developing appropriate ways to enforce the constitutional restriction" announced in *Atkins*. *Id*. at 317, this discretion is not unlimited, and this Court has intervened since *Atkins* to ensure that States are correctly enforcing this restriction. See *Hall*, 572 U.S. at 719; *Moore v. Texas*, 137 S.Ct. at 1042 (2017).

In addition to the Eighth Amendment identified in *Atkins* and its progeny, the Fourteenth Amendment prohibits the use of race as a factor in criminal justice proceedings. For over a century, this Court has condemned the consideration of race in the criminal justice process. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 309–10, 25 L.Ed. 664 (1880) ("[H]ow can it be maintained that compelling a colored man to submit to a trial for his life drawn from a panel from which the State has expressly

excluded every man of his race, because of color alone . . . is not a denial to him of equal legal protection?"); *Batson v. Kentucky*, 476 U.S. 79, 87-88, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986) "[d]iscrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to black citizens that equal justice which the law aims to secure to all others,'" *Batson*, 476 U.S. at 87–88 (1986) (quoting *Strauder*, 100 U.S. at 308) (alterations omitted). The perniciousness of racism is such that it damages our system of criminal justice when it plays any role:

> For we also cannot deny that years after the close of the War Between the States and [over] 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.

Rose v. Mitchell, 443 U.S. 545, 558–59, 99 S. Ct. 2993, 61 L.Ed.2d 739 (1979).

A defendant's race is "constitutionally impermissible or totally irrelevant to the sentencing process." *Zant v. Stephens*, 462 U.S. 862, 885, 102 S. Ct. 1856, 72 L.Ed.2d 222 (1983). Any reliance on race in "impos[ing] a criminal sanction 'poisons public confidence' in the judicial process." *Buck*, 137 S. Ct. at 778 (quoting *Davis* v. *Ayala*, 135 S. Ct. 2187, 192 L.Ed.2d 323 (2015)). When racism infects criminal sentencing in any way, it "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 *Rose*, 443 U.S. at 556 (internal quotation marks omitted)).

Nowhere is this infection more potentially damaging to individual defendants and to the integrity of the criminal justice system as a whole than in the context of capital sentencing. The State has a responsibility to ensure that should it elect to wield its power to kill its own citizens that it does so without prejudice. When prejudice – especially racism – finds its way into these decisions regarding life and death, the sentence and process by which a verdict was reached are tainted and inherently untrustworthy.

In *Buck*, the offending racism came from a defense expert, who introduced Buck's race as a factor for the jury to consider in the death penalty calculus. In *Tharpe*, as in *Peña-Rodriguez*, a juror expressed extreme racist views about African Americans, which this Court believed may very well have influenced his decision to vote for death.

Similarly – and more egregiously – in this case, the source of the racism initially came from a different source. It came from the judge, who introduced his beliefs during various phases of trial that African American IQ test scores were always "more likely than not" invalid simply because of the race of the test taker. This Court has condemned the injection of racism into capital cases when jurors (*Tharpe, Peña-Rodriguez*) and experts (*Buck*) are the source of this racism. This condemnation must also – and especially – extend to the scenario presented here, when a judge himself makes a defendant's race a key factor in whether he is eligible for death. The State compounded the issue here, when it took the judge's beliefs regarding race and IQ and presented them to the jury in the form of their own expert,

who testified that Were was not intellectually disabled (and thus not deserving of a life sentence) because of his race.

Atkins guarantees that defendants like Were will not be executed, due to limited intellectual functioning. It is wholly inconsistent with the constitutional guarantee of equal protection to allow courts and the State to ignore evidence of intellectual disability solely because of a defendant's race. This Court should reverse the Supreme Court of Ohio's denial, vacate Were's death sentence, remand this case back to the trial court for a new trial, and order the trial court to consider Were's IQ scores as evidence of his intellectual disability.

CONCLUSION

For the foregoing reasons, Petitioner James Were respectfully requests this Court grant this petition for certiorari, reverse the decision below, and remand to the Ohio Supreme Court for further proceedings in conformance with *Buck*, *Peña-Rodriguez*, and *Tharpe*. Alternatively, this Court should reverse the decision below, remand this case to the trial court for a new trial, and order that the trial court consider Were's IQ scores as evidence of his intellectual disability.

Respectfully submitted,

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