No. _____

IN THE

Supreme Court of the United States

MICHAEL BERNARD BELL

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI
CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does the decision in *Buck v. Davis*, 137 S.Ct. 759 (2017), which rejected the improper injection of racial animus, bias, or prejudice into a criminal trial by defense counsel as a reasonable tactical or strategic defense strategy as previously permitted under *Strickland v. Washington*, 466 U.S. 668 (1984), announce a substantive change in the law or establish a new constitutional right with retroactive application thereby entitling Petitioner to Relief?

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Petitioner, Michael Bernard Bell, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court.

Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

DECISION BELOW

The decision of the Florida Supreme Court is reported at *Bell v. State*, 284 So.3d 400, 2019 WL 5792866 (Fla. November 7, 2019) and is reprinted in the Appendix (App.) at A1.

JURISDICTION

The judgment of the Florida Supreme Court was entered on November 7, 2019 (App. A1). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, 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; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Introduction

Petitioner Michael Bernard Bell's death sentence was obtained in violation of the United States Constitution for the reasons described in *Buck v. Davis*, 137 S.Ct.

759 (2017). The Florida Supreme Court declined to grant relief because it concluded Mr. Bell was not entitled to bring his claim because *Buck* did not announce a substantive change in the law or establish a new constitutional right in a departure from *Strickland v. Washington*, 466 U.S. 668 (1984), by determining there is no reasonable strategic or tactical basis for defense counsel to use racially discriminatory tactics or inject racial animus, bias, or prejudice into a criminal trial when defending the accused. This determination is inconsistent with the framework of the Sixth Amendment guarantee of effective assistance of counsel and the Fourteenth Amendment's guarantee of equal protection, and the Eighth Amendment's ban on cruel and usual punishment.

The Florida Supreme Court's rejection of the retroactivity of *Buck* follows a pattern of jurisprudence from that court. This Court has overturned similar decisions by the Florida Supreme Court because they failed to give effect to this Court's death penalty jurisprudence. Nine years after this Court decided in *Lockett v. Ohio*, 438 U.S. 586 (1978), that mitigating evidence should not be confined to a statutory list, this Court overturned the Florida Supreme Court's bright-line rule barring relief in Florida cases where the jury was not instructed that it could consider non-statutory mitigating evidence. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987). Twelve years after this Court ruled in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment prohibits execution of the intellectually disabled, this Court ended the Florida Supreme Court's use of an unconstitutional bright-line IQ-cutoff test to deny *Atkins* claims. *See Hall v. Florida*, 134 S. Ct. 1986

(2014). Most recently, this Court ended the Florida Supreme Court's rejection of jury determinate sentencing in capital cases in *Hurst v. Florida*, 136 S.Ct. 616 (Fla. 2016).

This Court should consider the constitutionality of the Florida Supreme Court's determination that *Buck's* unequivocal bar to the improper use of racial stereotypes, racial animus, or racial discrimination in capital cases cannot be applied retroactively to those individuals such as Petitioner when his defense counsel adopted and utilized a strategy of racial animus and discrimination before the jury.

II. Factual and Procedural Background

A. Conviction, Death Sentence, and Direct Appeal

In 1995, Petitioner, an African-American man, was convicted of two counts of first-degree murder and related crimes in a Florida court. *See Bell v. State*, 699 So.2d 674 (Fla. 1997), *cert. denied*, 522 U.S. 1123 (1998). Petitioner was convicted of killing the brother of his own brother's killer, Jimmy West, and West's female companion. Petitioner's brother, Lavon Bell, had been killed five months earlier by Theodore Wright, Jimmy West's brother. The killing of Lavon Bell was the culmination of a long-standing feud between Wright, Jimmy West, and the Bell brothers. *Id., at* 675. Mr. Wright successfully asserted self-defense at his trial for Lavon Bell's murder. *Id.*, at 675-76. Wright and his brother, Jimmy West, continued to threaten Petitioner and his mother after Lavon Bell was killed. *Id.,* at

675-76. Tensions spilled over on December 3, 1993, when Petitioner shot and killed Jimmy West and his girlfriend as they left a liquor lounge in Jacksonville, FL.

The judge found that three aggravating circumstances had been proven beyond a reasonable doubt during Petitioner's penalty phase, and that those three aggravating circumstances were "sufficient" for the death penalty and not outweighed by the mitigation. [1] Based on his fact-finding, the judge sentenced Petitioner to death.

The Florida Supreme Court affirmed Petitioner's conviction and death sentence on direct appeal. *Bell v. State*, 699 So.2d 674 (Fla. 1997), *cert. denied*, 522 U.S. 1123 (1998)

B. State and Federal Collateral Proceedings

In state post-conviction proceedings, Petitioner argued, among other things, that he was denied effective assistance of counsel when his attorney failed to object to the inappropriate remarks and arguments of the prosecutor during closing arguments. *See Bell v. State*, 965 So.2d 48, 54 (Fla. 2007), *cert. denied*, 552 U.S. 1011 (2007). It was noted in the opinion the State "included three separate remarks that Bell "lived by the law of the jungle."" *Id.* at 59. In 2006, the Florida Supreme

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[1] The aggravating circumstances found by the judge were: (1) a previous conviction for a violent felony; (2) the defendant knowingly created a great risk of death to many persons in committing the crime; and (3) the crime was cold, calculated and premeditated.

The mitigating circumstance found by the judge was: (1) the defendant was under the influence of an extreme mental or emotional disturbance at the time of the crime.

Court rejected all of Petitioner's claims and affirmed the denial of post-conviction relief. *Id.* at 79.

Petitioner filed a *pro se* 28 U.S.C.§2254 petition in the Middle District of Florida in September 2007. *Bell v. Att'y Gen.*, No.3:07-cv-00860-ODE (M.D. Fla. Sept. 10, 2007). The petition was dismissed as untimely and the dismissal was upheld by the 11th Circuit Court of Appeals. *See Bell v. Fla. Att'y Gen.*, No. 09-10782, 2012 WL 386253 (11th Cir. 2012), *cert. denied*, 134 S.Ct. 2290 (2014), *rehearing denied*, 139 S.Ct. 24 (2014).

Petitioner filed a successor post-conviction motion challenging Florida's death penalty sentencing scheme following *Hurst v. Florida*, 136 S.Ct. 616 (2016). The trial court denied relief and the Florida Supreme Court affirmed the denial. *See Bell v. State*, 235 So.3d 287 (Fla. 2018), *cert. denied*, 139 S.Ct. 159 (2018).

C. *Buck* Litigation

In February 2018, Petitioner filed a successive motion for state post-conviction relief under *Buck v. Davis*, 137 S.Ct. 759 (2017). Petitioner argued that his death sentence is unconstitutional under *Buck*, which should be applied to his case.

During Petitioner's trial, both the prosecutor and Petitioner's attorney depicted the Petitioner, an African-American man, with racially-tinged language. In the guilt phase of the trial both the State and defense counsel used racially charged language and depictions to separate Petitioner from the community of Caucasian jurors.

The prosecutor told the jury in opening statements that "This is a case of a man who placed himself above the law. An individual who lived by his own law, the law of the jungle..." [Trial Transcript R247] In his guilt phase closing argument the prosecutor continued this same theme of uncivilized barbarity to describe the Petitioner:

> "He lived by his own law, the law of the jungle." [Trial Transcript, R584]
>
> " This defendant, the evidence in this case has shown he has lived his life by his own law. Not the civilized law, it's the law of the jungle." [Trial Transcript R591]
>
> "He lived by the law of the jungle where innocent people get killed and others get exposed to death." [Trial Transcript R592]

Petitioner's own attorney adopted this theme of the Petitioner being a barbarian in a jungle in his own guilt phase closing argument, stating:

> "There are neighborhoods in our community, some within a mile or two of this courthouse which are no safer than a jungle." [Trial Transcript R596]

Defense counsel referenced Petitioner as someone different than the Caucasian jurors, the Petitioner was one of " …those that live in a different world than ours….". [Trial Transcript R597]

Defense counsel described Petitioner's actions as a "…senseless jungle-like barbaric killing." [Trial Transcript R597]

The racial enmity continued into the penalty phase of the trial. The prosecutor argued an additional four times that Mr. Bell was not from civilization, but instead operated under the "law of the jungle." [Trial Transcripts R682;R690;R691;R695] The State argued "[Mr. Bell] didn't care about the law of

Florida that had ruled his brother's death self-defense, he chose to live by the law of the jungle, he hunted those people down."[Trial Transcript, R695]

Defense counsel again did not object to the prosecutor's arguments. Defense counsel again adopted the prosecutor's theme and chose to separate Mr. Bell from the jurors by arguing Mr. Bell came from a "completely different world" and conducted acts that "do not belong in civilized society."

The state post-conviction court denied relief, finding Petitioner's claim was untimely because *Buck* was an extension of *Strickland v. Washington*, 466 U.S. 668 (1984). The trial court found trial counsel's prior failure to object to improper racially charged arguments by the State were strategic and tactical. The trial court further found since there was no explicit reference to Petitioner's race, there was nothing inherently racist about any of the comments of the prosecutor or defense counsel. The trial court further concluded that arguments and comments of counsel that are racially improper are not as bad as evidence that is racially improper, distinguishing *Buck*.

D. Decision Below

On November 7, 2019, the Florida Supreme Court issued an opinion summarily affirming the denial of *Buck* relief. App. A1-3; *Bell v. State*, 284 So.3d 400 (Fla. Nov. 7, 2019). The Florida Supreme Court's brief opinion held that *Buck* did not establish a new constitutional right by establishing a new per se rule when racial bias or animus has become part of a trial by the intentional acts of defense counsel, thus replacing the *Strickland* two-prong analysis of deficient performance

and prejudice in these instances. The Florida Supreme Court further opined that Petitioner was not entitled to relief because his previous post-conviction claim which raised a claim of ineffective assistance of counsel for failing to object to the prosecutor's improper comments did not warrant relief under *Strickland*.

The Florida Supreme Court did not address the trial court's finding that the statements of the prosecutor and defense counsel were not racial animus or that racial animus in the form of argument is less pernicious than racially tinged evidence.

REASONS FOR GRANTING THE WRIT

I. The Florida Supreme Court's determination that *Buck v. Davis* is not retroactive is erroneous because *Buck* announced a watershed change in the law by establishing *per se* ineffective assistance of counsel when counsel injects racial animus into a trial or otherwise suggests that race is the cause of the defendant's actions that cannot be deemed harmless rejecting *Strickland v. Washington.*

A. The Decision in *Buck v. Davis*, 137 S.Ct. 759 (2017).

In *Buck v. Davis*, 137 S.Ct. 759 (2017), Buck's attorney presented an expert in the penalty phase of the capital trial who testified that Buck, an African-American man, was more prone to violence because of his race. *Id.*, at 776. In finding defense counsels' action ineffective in a Rule 60(b) proceeding, the Court observed "When a defendant's own lawyer puts in the offending evidence, it is in the nature of an admission against interest, more likely to be taken at face value." *Id.,* at 777. "No competent defense attorney would introduce such evidence about his own client." *Id.*, at 775. With this pronouncement, *Buck* established a new

fundamental right- a *per se* finding of ineffective assistance of counsel when defense counsel interjects racial animus in his own client's trial.

Prior to *Buck*, a claim that defense counsel was ineffective for using race against his own client was evaluated under *Strickland v. Washington*, 466 U.S. 688 (1984). The first prong of *Strickland* required the court to determine whether or not defense counsels' action fell below an objection standard of reasonableness and were thus, deficient. Under *Strickland*, a defense attorney could avert a finding of deficient performance by claiming his decisions were tactical or strategic. A claim of ineffective assistance of counsel predicated on the insertion of racial enmity by defense counsel into their client's trial, pre-*Buck*, was subject to *Strickland*. Post-*Buck*, deficient performance occurs when defense counsel engages in such conduct, irrespective of any stated strategic or tactical basis for doing so.

In *Buck* this Court determined that prejudice results from the injection of racial animus into a criminal trial when evidence of race "appeals to a powerful racial stereotype." *Buck*, 137 S.Ct. at 776. This was satisfied in *Buck* because the expert's testimony played into the stereotype that black men are "violence prone". *Id.* The stereotype that black men are inherently violent is "a particularly noxious strain of racial prejudice" that "provided support for making a decision on life or death on the basis of race." *Id.*

The Court rejected the State's contention that the two limited references to race- one by the prosecutor and one by defense counsel- in *Buck* were de minimus, resulting in insufficient prejudice under *Strickland's* second prong. Rather than

engage in a *Strickland* analysis of whether or not confidence in the outcome was diminished, this Court explained that when racial animus is injected into a trial "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.*, at 777.

In *Buck* this Court was greatly influenced by the principle that "[D]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. *Id.*, at 778, *quoting, Rose v. Mitchell*, 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). Relying on race to impose criminal sanctions "poisons public confidence" in the judicial process. *Id.* Racial animus in a trial results in a process that is profoundly unreliable.

B. Traditional Non-Retroactivity Rules Can Serve Legitimate Purposes, but the Eighth and Fourteenth Amendments Impose Boundaries in Capital Cases That Warrant Relief In This Case.

This Court has recognized that traditional non-retroactivity rules, which deny the benefit of new constitutional decisions to prisoners whose cases have already become final on direct review, can serve legitimate purposes, including protecting states' interests in the finality of criminal convictions. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 309 (1989). These rules are a pragmatic necessity of the judicial process and are accepted as constitutional despite some features of unequal treatment. This Petition does not ask the Court to revisit that settled feature of American law.

But the gravity of the issue presented in this case, a conviction secured by the use of a defense strategy of racial animus designed to isolate and separate the Petitioner from the jurors and civilized society, cannot be tolerated under the Eighth Amendment's prohibition on the arbitrary and capricious infliction of the death penalty. *See Furman v. Georgia*, 408 U.S. 238 (1972); *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). The use of racial animus in capital proceedings is intolerable and a conviction obtained as a result of racial animus is an exception to the innate arbitrariness under traditional non-retroactivity rules. It would be fundamentally unfair to allow the taint of racial animus in this case to go uncorrected.

Buck sought relief under a provision of Rule 60(b)(6), a catchall category, that permits a court to reopen a judgment "for any reason that justifies relief", but which this Court has interpreted to mean only in extraordinary circumstances, such as the risk of injustice to the parties or the risk of undermining the public's confidence in the judicial process. *Buck v. Davis*, 137 S.Ct. at 777. This Court found such extraordinary circumstances were met, reasoning:

> But our holding on prejudice makes it clear that Buck may have been sentenced to death in part because of his race. As an initial matter this is a disturbing departure from a basic premise of our criminal justice system. Our law punishes people for what they do, not who they are. Dispensing punishment on the basis for an immutable characteristic flatly contravenes this guiding principle…[citation omitted] This departure from basic principles was exacerbated because it concerned race. *Id.,* at 778.

Due to the previous effect of permitting race to become a factor in the death sentence Buck received, the Court determined "such concerns are precisely among those we have identified as supported relief under Rule 60(b)(6)." *Id.*

The Court rejected concerns about the finality of judgment, holding the State's interest in finality deserved little weight when stacked against the damage to the administration of justice caused the injection of race into the capital sentencing proceedings. *Id.* at 779. *See also Tharpe v. Sellers*, 138 S.Ct.545 (2018).

C.

D. The Decision in *Buck v. Davis* Falls Within the *Teague* Exceptions and Should Be Applied Retroactively.

The Florida Supreme Court rejected Petitioner's claim as time barred. The Florida Supreme Court held that *Buck* did not establish a new fundamental constitutional right of *per se* ineffective assistance of counsel under *Strickland v. Washington*, but instead "applied *Strickland's* long-established standard for evaluating claims of ineffective assistance of trial counsel to the specific facts of the case before it. *See Buck*, 137 S.Ct. at 775-77. Nothing in the Supreme Court's decision purports to replace *Strickland* with a new per se rule. Therefore, Bell's motion is untimely. *See* Fla. R. Crim. P. 3.851(d)." The Florida Supreme Court's conclusions regarding *Buck's* retroactivity are incorrect.

The general rule of non- retroactivity to collateral cases announced in *Teague* has two exceptions. The first exception is for substantive rules- rules that place certain classes of persons and types of conduct outside a state's power to punish. The second is for watershed rules that implicate the fundamental fairness of the trial. *Teague*, 489 U.S. at 311-13, 109 S.Ct. 1060. To qualify for as an exception, the new rule must meet two conditions: (1) it must relate to the accuracy of the conviction and (2) it must "alter our understanding of the 'bedrock procedural

elements' essential to the [fundamental] fairness of a proceeding." *Sawyer v. Smith*, 497 U.S. 227, 242, 110 S.Ct. 2822, 111 L.Ed. 2d 193 (1990).

The precise contours of this exception are difficult to define, however *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1962) is referenced as quintessential watershed rule. If a claim is subject to a harmless error or plain error review, it does not likely meet the watershed exception. *Buck* is a watershed decision which should be applied retroactively to collateral review proceedings.

The Petitioner submits that *Buck* created a new watershed rule akin to *Gideon*. Despite decades of case law cautioning against and condemning the type of racial bias, animus, and prejudice that occurred in decades of cases, in *Buck*, and in this case, the problem did not cease. As in this case, *Strickland* was routinely used to excuse the conduct of defense counsel by concluding the use of such abhorrent practices could be strategic or tactical under *Strickland's* first prong or harmless error under *Strickland's* second prong. *Buck* affirmatively rejected *Strickland* by eradicating the judicial system's ability to accept and institutionalize racism in criminal trials. Petitioner's case is a prime example of that tactic- his prior post-conviction claim that defense counsel was deficient for failing to object to the prosecutor's pernicious use of race in his opening and closing arguments was found to be a tactical or strategic decision under *Strickland* and the use of racial prejudice to have caused insufficient harm to undermine confidence in the outcome of the guilt and penalty phases of the trial. *Buck* unequivocally rejected the application of harmless error, and by extension the application of *Strickland's* prejudice analysis,

when race has been introduced into a criminal trial and used as a means to sentence a defendant to death. This is a clear rejection of *Strickland* and militates in favor of a finding that *Buck* meets the criteria for a watershed rule.

The new rule announced in *Buck* was also necessary to prevent an impermissibly large risk of inaccurate convictions and sentences, in this case and others, and is essential to the fairness of criminal proceedings. *See Whorton v. Bockting*, 127 S.Ct. 1173, 167 L.Ed. 2d 1 (2007). (Holding that *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), was not a watershed rule because it was not necessary to prevent an impermissibly large risk of an inaccurate conviction and did not alter the bedrock procedural elements essential to the fairness of a proceeding.) *Buck* is a watershed rule under these criteria. It is entirely likely that Petitioner's death sentence is the result of racial discrimination and animus. Vigilance is required to combat the influence or racial prejudice in the judicial system, particularly when the justice system is being used as the mechanism to forfeit the litigant's life. *State v. Davis*, 872 So.2d 250, 253-255 (Fla. 2010). The Eighth and Fourteenth Amendments demand no less.

The eradication of racial considerations from criminal proceedings is one of the abiding purposes of the Fourteenth Amendment. *Miller v. North Carolina*, 583 F.2d 701, 707 (4th Cir. 1978). The interjection of race in Petitioner's case caused profound unreliability, a denial of equal protection and due process inconsistent with the Constitution. Interjections of race, by argument or evidence, risks denying a defendant equal protection and due process- such evidence or argument is an

"affront to the Constitution's guarantee of equal protection of the laws. And by threatening to cultivate bias in the jury, it equally offends the defendant's right to an impartial jury." *Calhoun v. United States*, 588 U.S. 1206, 133 S.Ct. 1136, 185 L.Ed.2d 385 (2013),(Sotomayor, J., respecting denial of certiorari). It cannot be overlooked that defense counsel in this case had a history of failing to make objections, he failed to object to similar statements by the same prosecutor in *Brooks v. State*, 762 So.2d 879, 898-899 (Fla. 2000). The Florida Supreme Court has further found very similar comments by this same prosecutor to warrant reversal in *Brooks* and *Urbin v. State*, 714 So.2d 411 (Fla. 1998).

It is an open question of whether states are required to apply new constitutional rules that fall within the watershed exception on collateral review. *See Montgomery v. Louisiana*, 136 S.Ct. 718, 729 (2016)("The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case the Constitution requires state collateral review courts to give retroactive effect to that rule. *Teague's* conclusion establishing the retroactivity of new constitutional rules is best understood as resting upon constitutional premises. That constitutional command is, like all federal law, binding on state courts." 136 S.Ct. at 718)("This holding is limited to *Teague's* first exception for substantive rules; the constitutional status of *Teague's* exception for watershed rules of procedure need not be addressed here." 136 S.Ct. at 229.)

Buck should be applied retroactively by the states due to the "special precaution" that racial bias and discrimination must be treated with. *Pena-*

Rodriguez v. Colorado, 580 U.S. __, 137 S.Ct. 855, 869, 197 L.Ed.2d 107 (2017). Racial bias implicates unique historical, constitutional concerns. *Id.* at __, 137 S.Ct. at 868. It is the responsibility of the courts "to purge racial prejudice from the administration of justice." *Id.*, at __, 137 S.Ct. 867. It can confidently be said that a conviction and sentence based on racial animus and discrimination not only diminishes the reliability of the individual proceeding, it is "deadly in small doses" to the administration of justice. *Buck v. Davis*, 137 U.S. at 777.

The Court in *Buck* was greatly influenced by the principle that "[D]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. *Buck v. Davis*, 137 U.S. at 778, *quoting, Rose v. Mitchell*, 443 U.S. 545, 555, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979). Relying on race to impose criminal sanctions "poisons public confidence in the judicial process." *Id.* The judicial system cannot give even the imprimatur of approval to racial bias and discrimination. Retroactive application of *Buck* ensures this will not occur.

CONCLUSION

This Court should grant a writ of certiorari to review the decision below.

Respectfully submitted,
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