NO. 19-7503

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 FLORIDA SUPREME COURT

BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

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Capital Case

Question Presented

Whether this Court should grant certiorari review where the Florida Supreme Court denied Petitioner's claim on independent and adequate state grounds when it determined that the claim was both untimely as a *Strickland* claim filed almost 20 years after the judgment became final and procedurally barred because the *Strickland* claim had previously been denied by the Court in 2007.

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Opinion Below

The decision of the Florida Supreme Court appears as *Bell v. State*, 284 So. 3d 400 (Fla. 2019).

Jurisdiction

This Court's jurisdiction to review the final judgment of the Florida Supreme Court is authorized by 28 U.S.C. § 1257. However, because the Florida Supreme Court's decision in this case is based on adequate and independent state grounds, this Court should decline to exercise jurisdiction. Sup. Ct. R. 14(g)(i). Additionally, the Florida Supreme Court's decision does not implicate an important or unsettled question of federal law, does not conflict with another state court of last resort or a

United States court of appeals, and does not conflict with relevant decisions of this Court. Sup. Ct. R. 10. No compelling reasons exist in this case and this Petition for a writ of certiorari should be denied. Sup. Ct. R. 10.

Statement of the Case and Facts

Petitioner, Michael Bell, was convicted of two counts of first-degree murder and the trial court imposed death sentences for both murders after the jury's unanimous recommendations. *Bell v. State*, 699 So. 2d 674, 676 (Fla. 1997), *cert. denied*, *Bell v. Florida*, 522 U.S. 1123 (1998).

> On December 9, 1993, appellant Michael Bell shot to death Jimmy West and Tamecka Smith as they entered a car outside a liquor lounge in Jacksonville. Three eyewitnesses testified regarding the murders, which the trial court described in the sentencing order as follows. In June 1993, Theodore Wright killed Lamar Bell in a shoot-out which was found to be justifiable homicide committed in self-defense. Michael Bell then swore to get revenge for the murder of his brother, Lamar Bell. During the five months following Lamar Bell's death, Michael Bell repeatedly told friends and relatives he planned to kill Wright. On December 8, 1993, Michael Bell, through a girlfriend, purchased an AK-47 assault rifle, a thirty-round magazine, and 160 bullets. The next night, Bell saw Theodore Wright's car, a yellow Plymouth. Bell left the area and shortly returned with two friends and his rifle loaded with thirty bullets. After a short search, he saw the yellow car in the parking lot of a liquor lounge. Bell did not know that Wright had sold the car to Wright's half-brother, Jimmy West, and that West had parked it and had gone into the lounge. Bell waited in the parking lot until West left the lounge with Tamecka Smith and another female. Bell picked up the loaded AK-47 and approached the car as West got into the driver's seat and Smith began to enter on the passenger's side. Bell approached the open door on the driver's side and at point-blank range fired twelve bullets into West and four into Smith. The other female ducked and escaped injury. After shooting West and Smith, Bell riddled with bullets the front of the lounge where about a dozen people were waiting to go inside. Bell then drove to his aunt's house and said to her, "Theodore got my brother and now I got his brother."

Id. at 675.

At trial, the prosecutor started his opening statement by describing that the victims "walked into a war zone." (Trial Record (TR) at 247). The prosecutor went on to describe his theory of the case as one "of a man who placed himself above the law. An individual who lived by his own law, the law of the jungle, the law in which innocent people were killed. And a law in which many others were exposed to death." (TR at 247). The prosecutor described that after seeing his brother killed, Petitioner "began plotting revenge." (TR at 248). "[T]he evidence is going to show in the defendant's lawless pursuit of revenge he murdered two innocent people. . . ." (TR at 248). There were no objections made regarding these comments. Petitioner waived opening statement. (TR at 281). At the end of the trial during the jury conference, trial counsel requested an instruction on self-defense, to which the prosecution had no objection. (TR at 558).

During closing arguments, the prosecutor again referenced the "law of the jungle." The prosecutor stated that Theodore Wright's killing of Petitioner's younger brother was ruled to have been in self-defense, but that the "defendant didn't care that it was self-defense, he didn't care. He was above the law. He lived by his own law, the law of the jungle. The law where innocent people are killed." (TR at 584). Later, the prosecutor continued the argument: Petitioner "has lived his life by his own law. Not the civilized law, it's the law of the jungle. The law of the State of Florida, the law of the people of the State of Florida viewed the death of Lamar Bell found that it was self-defense." (TR at 591).

In response, defense counsel argued:

> there are neighborhoods in our community, some within a mile or two of this courthouse which are no safer than the jungle. Little safer than the front lines of some war zone. . . . It is a world that is so alienate [sic] to most of our experiences that although it's only a mile or two away it might as well be on another planet.

(TR at 595). Defense counsel continued with this theme explaining that while a defendant is entitled to a jury of his peers

> in truth and fact how can any of us who live in such a different world than Jimmy West and Theodore Wright and Michael Bell consider ourselves their peers? It is easy for us to sit here in this guarded, safe, quiet, protected environment and chairs elevated off of the floor and in the sense of kind righteous indignation want to strike out in revenge and condemn people who live in a world different than ours.

(TR at 597). Trial counsel further explained:

> just to give you more flavor of the kind of environment these people live in, Theodore Wright takes the stand and tells you that some months ago . . . they were looking for [Bell] and there was going to be some trouble. Did [Bell] hide? Did he try to get out a back door? . . . Did he call the police? Almost like a scene out of some Wild West sort of sleuth [sic] out, he borrows a gun, strolls out into the road and they have a shoot out. That's the kind of environment these people were living in.
>
> Theodore Wright was sworn to kill Michael Bell and Michael Bell knew that his brother Jimmy West was trying to kill him as well. You know, how can we think that we can understand this? I don't know that any of us has ever lived in the environment where there were people and several of them who were actively and sincerely attempting to kill us and that death could come at any point.

(TR at 600-01). Defense counsel then described that Petitioner's actions constitute self-defense. (TR at 602).

Petitioner was found "guilty of the first-degree murders of Smith and West." *Bell*, 699 So. 2d at 675. The trial court found three aggravating circumstances, "that

Bell had been convicted of a prior violent felony; that he had knowingly created a great risk of death to many persons; and that the killings were committed in cold, calculated, and premeditated manner" and one "marginal statutory mitigating circumstance of extreme mental or emotional disturbance because of the death of appellant's brother five months earlier." *Id.* at 676, 676 n.1, 676 n.2. The trial judge sentenced Petitioner to death for both murders after the jury's unanimous recommendations. *Id.* at 675. On direct appeal, the Florida Supreme Court affirmed the convictions and sentences. *Id.* at 679. This Court denied certiorari review on February 23, 1998. *Bell*, 522 U.S. at 1123.

In post-conviction, initially the circuit court summarily denied Petitioner's post-conviction motion without holding an evidentiary hearing. However, the Florida Supreme Court reversed the decision and remanded for an evidentiary hearing. *Bell v. State*, 790 So. 2d 1101 (Fla. 2001).

During post-conviction, Petitioner raised a claim of ineffective assistance of counsel for failing to object to the prosecutor's comments during closing argument that Petitioner lived "by the law of the jungle." *Bell v. State*, 965 So. 2d 48, 59 (Fla. 2007), *cert. denied, Bell v. Florida*, 552 U.S. 1011 (2007). The Florida Supreme Court found counsel was not ineffective because even if counsel was deficient in failing to object to these comments, Petitioner failed to meet the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), based on the "[c]onclusive evidence of Bell's guilt." *Id.* at 61.

Petitioner also raised a claim of ineffective assistance of counsel "due to his

improper closing arguments at the guilt and penalty phases of trial." *Bell*, 965 So. 2d at 64. At the evidentiary hearing, trial counsel explained that in an attempt to invoke a self-defense argument before the jury, counsel argued that Petitioner's neighborhood was a dangerous place that is probably different from the jury's own experience, more like a "war zone" or the "Wild West." *Id.* at 64-65. Applying *Strickland*, the Florida Supreme Court found this argument was not an unreasonable strategy and that Petitioner failed to demonstrate prejudice based on the evidence of guilt presented at trial. *Id.* at 65-66. The Florida Supreme Court affirmed the denial of Petitioner's post-conviction motion and writ of habeas corpus. *Id.* at 79. On November 5, 2007, this Court denied certiorari review. *Bell*, 552 U.S. at 1011.

After the denial of his State post-conviction motion, on September 10, 2007, Petitioner filed a pro se federal habeas petition in the United States District Court for the Middle District of Florida. *Bell v. McDonough*, no:3:07-cv-860, 2009 WL 10698415, *10 (M.D.Fla. Jan. 15, 2009). The district court denied Petitioner's federal habeas petition on timeliness grounds as his post-conviction motion was filed in state court seventeen days after the Anti-Terrorism and Effective Death Penalty Act (AEDPA) one-year statute of limitations had expired. *Id.* Petitioner appealed the district court's dismissal of his habeas petition pro se, despite being represented by counsel. The Eleventh Circuit affirmed the decision of the district court, finding that Petitioner was not entitled to equitable tolling of the AEDPA one-year statute of limitations. *Bell v. Fla. Att'y Gen.*, 461 Fed. Appx. 843, *1 (11th Cir. 2012), *cert. denied*, *Bell v. Bondi*, 134 S. Ct. 2290 (2014). Petitioner filed a pro se petition for a

writ of certiorari to this Court, which was denied on May 19, 2014. *Bell*, 134 S. Ct. at 2290.

In 2010, Petitioner filed a successive post-conviction motion in the state circuit court pursuant to this Court's decision in *Porter v. McCollum*, 558 U.S. 30 (2009). The Florida Supreme Court affirmed the circuit court's denial of the successive post-conviction motion. *Bell v. State*, 91 So. 3d 782 (Fla. 2012).

In 2013, Petitioner filed a pro se petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida which was stricken as an unauthorized successive petition. Petitioner eventually requested a certificate of appealability from the Eleventh Circuit, which was denied in 2017. Petitioner filed a pro se petition for a writ of certiorari to this Court, which was denied May 14, 2018. *Bell v. Jones*, 138 S. Ct. 1994 (2018).

Petitioner filed another pro se successive post-conviction motion in the state circuit court which was stricken as an unauthorized pro se pleading. *Bell v. State*, no. SC16-369, 2016 WL 5888880 (Fla. Oct. 10, 2016).

Shortly after the *Hurst* decisions, Petitioner raised a claim asserting that he should be entitled to relief pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, *Florida v. Hurst*, 137 S. Ct. 2161 (2017). Since Petitioner's case became final in 1998, the Florida Supreme Court denied Petitioner's claim that *Hurst* should apply retroactively to him. *Bell v. State*, 235 So. 3d 287 (Fla. 2018), *cert. denied*, *Bell v. Florida*, 139 S. Ct. 159 (2018).

On February 20, 2018, Petitioner filed another successive post-conviction

motion raising a claim of violation of due process and ineffective assistance of counsel because trial counsel's comments during argument "improperly injected racial animus into his trial," which Petitioner claimed under this Court's 2017 case, *Buck v. Davis*, 137 S. Ct. 759 (2017), "would and could not be tolerated." The post-conviction court denied Petitioner's successive post-conviction motion finding that it was untimely under Florida law because *Buck* was not a new fundamental constitutional right held to be retroactive. *Bell*, 284 So. 3d at 401. This Court determined that *Buck* was not a new constitutional right and not retroactively applicable to Petitioner, but instead merely applied the long-standing *Strickland* test to determine that Buck's counsel rendered deficient performance which prejudiced Buck. *Id.* The Florida Supreme Court also agreed with the circuit court that the claim was procedurally barred under Florida law as the Court "previously addressed the arguments at issue in affirming the denial of his initial postconviction motion." *Id.* (citing *Bell*, 965 So. 2d at 59-61, 64-66, 68).

Petitioner then filed a petition for a writ of certiorari in this Court from the Florida Supreme Court's decision. This is the State's brief in opposition.

Reasons for Denying the Writ

There is no Basis for Certiorari Review of the Florida Supreme Court's Denial of Petitioner's Untimely and Procedurally Barred *Strickland* Claim

Petitioner seeks certiorari review of the Florida Supreme Court's decision applying a time-bar and procedural bar under state law to his claim of ineffective assistance of counsel. *Bell*, 284 So. 3d at 401. The Petition alleges that this Court's

opinion in *Buck* established "a *per se* finding of ineffective assistance of counsel when defense counsel interjects racial animus in his own client's trial" and that "*Buck* is a watershed decision which should be applied retroactively to collateral review proceedings." (Petition at 9, 13); *Buck*, 137 S. Ct. at 759. Because *Buck* instead applied *Strickland* to an ineffective assistance of counsel claim, the Florida Supreme Court determined that Petitioner's claim was time barred under Florida law because it was raised almost 20 years after finality and was not based on a newly established constitutional right which has been held to apply retroactively. Further, the Florida Supreme Court's decision upholding the time-bar is an adequate and independent state ground. The Florida Supreme Court's interpretation that *Buck* merely applied *Strickland* and did not establish a new right is not in conflict with any decision of another state court of last review, is not in conflict with any decision of a federal appellate court, and is not in conflict with this Court's jurisprudence. Thus, Petitioner's request for certiorari review should be denied.

Relevant Florida law provides that any post-conviction motion must be filed "within 1 year after the judgement and sentence become final" unless a "fundamental constitutional right" is asserted which "was not established" within the 1 year time limitation "and has been held to apply retroactively. . . ." Fla. R. Crim. P. 3.851(d)(1) and (d)(2)(B). This time-bar is an adequate and independent state ground that is often and uniformly applied in Florida. *See, e.g., Chandler v. Crosby*, 916 So. 2d 728, 733-40 (Fla. 2005). This Court does not review state court decisions that are based on adequate and independent state grounds. *See Michigan v. Long*, 463 U.S. 1032, 1040

(1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."). Because the Florida Supreme Court's rejection of Petitioner's claim as time barred is based on adequate and independent state grounds, certiorari review should be denied.

Petitioner's claim of ineffective assistance of counsel for "advancing a theme of racial bias and prejudice to the jury" in adopting the prosecutor's use of the phrase "law of the jungle" is also procedurally barred as it was raised and rejected in the original post-conviction proceedings. *Bell*, 965 So. 2d at 64-66. In post-conviction, trial defense counsel testified that up until just before the jury charge conference, Petitioner had been adamant to his counsel that he had no involvement in the crime. *Id.* at 64-65. As soon as Petitioner was amenable, defense counsel asked for the self-defense instruction. *Id.* at 65. Then, in closing, defense counsel "hoped to convince the jury that if they could understand the environment in which Bell lived and his feelings about Wright and West, they could possibly accept a self-defense argument." *Id.* The Florida Supreme Court noted that the "trial record supports counsel's claim that the remarks regarding Bell's neighborhood were to support his self-defense argument to the jury" and held that "counsel's strategy was reasonable" and Petitioner failed to meet the first prong of *Strickland*. *Id.* The Florida Supreme Court also found that Petitioner failed to demonstrate that he was prejudiced by counsel's performance, stating: "In the guilt phase, there were numerous eyewitnesses who testified that Bell planned, carried out, and admitted to having committed these

murders." *Id.* at 66. Since the Florida Supreme Court already rejected this claim of ineffective assistance of counsel, re-litigation of this claim is procedurally barred under the law of the case doctrine and/or collateral estoppel. Thus, the post-conviction court's summary denial of this claim as procedurally barred was proper.

Buck was not a substantive change in the law, did not announce a new constitutional right, and is not retroactively applicable. Instead, *Buck* applied the well-established *Strickland* test for ineffective assistance of counsel to the specific facts in Buck's case. Thus, *Buck* is not retroactively applicable to Petitioner's case, which became final almost 20 years ago.

In *Buck*, this Court applied *Strickland* and found that counsel was deficient because "[n]o competent defense attorney would introduce <u>such</u> evidence about his own client" and Buck was prejudiced because the expert testimony was "potent evidence" which went to a "key point at issue in Buck's sentencing" and the expert's opinion, that black men are violence prone, "coincided precisely with a particularly noxious strain of racial prejudice, which itself coincided precisely with the central question at sentencing. The effect of this <u>unusual confluence of factors</u> was to provide support for making a decision on life or death on the basis of race." *Buck*, 137 S. Ct. at 775-76 (emphases added). This Court's application of *Strickland*, which was decided in 1984, to the very specific facts in *Buck* did not create new law, constitutional or otherwise. Nor has this Court announced that *Buck* is retroactive under federal law. *See Chaidez v. United States*, 568 U.S. 342, 348 (2013) ("garden-variety applications of the test in *Strickland* [] for assessing claims of ineffective

assistance of counsel do not produce new rules" and thus are not retroactive pursuant to *Teague v. Lane*, 489 U.S. 288, 301 (1989)). Thus, the Florida Supreme Court's finding of Petitioner's claim as untimely because *Buck* did not announce a new fundamental constitutional right and is not retroactive is not contrary to any court's precedent.

Additional evidence that *Buck* did not raise a new fundamental constitutional right is the fact that injection of race into trial proceedings has long been impermissible. *See Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."); *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (identifying race as a factor that is "constitutionally impermissible or totally irrelevant to the sentencing process"). Nothing about *Buck* is new.

It does not appear that any other State has announced that *Buck* is to apply retroactively. *See Commonwealth v. Brown*, no. 445 WDA 2018, 2018 WL 4327528, *2 (Pa. Super. Sept. 11, 2018) (agreeing with the lower court's determination that "*Buck* does not establish a newly recognized constitutional right"). Both the application of *Strickland* and the prohibition of race related comments have existed for over 30 years. Since *Buck* is not retroactively applicable, it cannot be the basis for re-litigating Petitioner's claims.

Although Petitioner argues that *Buck* announced a rule that there is "a *per se* finding of ineffective assistance of counsel when defense counsel interjects racial animus in his own client's trial," this Court instead determined that under the facts

and circumstances specific to *Buck*, counsel was deficient. (Petition at 9); *Buck*, 137 S. Ct. at 775. In fact, this Court has specifically rejected *per se* rules for deficient performance stating that they are "inconsistent with *Strickland*'s holding that 'the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.'" *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000) (citing *Strickland*, 466 U.S. at 688) (rejecting the bright-line rule that failing to file a notice of appeal is *per se* deficient). There are only a few exceptions where prejudice is presumed, and *Buck* is not one of them. *See Strickland*, 466 U.S. at 692-93 (citing *United States v. Cronic*, 466 U.S. 648, 659 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980)(prejudice is presumed when counsel labors under an actual conflict of interest).

Even if *Buck* applied retroactively to Petitioner and did permit re-litigation of Petitioner's settled ineffective assistance of counsel claims, Petitioner's case is significantly distinguishable from *Buck*. In *Buck*, the claim raised was ineffective assistance of trial counsel for calling a psychologist as an expert witness to testify at sentencing. The expert testified that "one of the factors pertinent in assessing a person's propensity for violence was his race, and that Buck was statistically more likely to act violently because he is black." *Buck*, 137 S. Ct. at 767. This testimony was especially significant as the jury was charged with making findings related to future dangerousness during sentencing before they could impose the death penalty. *Id.* at 775. This Court determined that this expert testimony essentially told the jury "that the color of Buck's skin made him more deserving of execution." *Id.* This Court

held that the deficiency prong of *Strickland* had been met in *Buck* because "[n]o competent defense attorney would introduce such evidence about his own client." *Id.*

As related to the prejudice prong of *Strickland*, this Court found that the testimony "was potent evidence" from an expert witness related to "an otherwise speculative inquiry" of whether Buck would be dangerous in the future. *Buck*, 137 S. Ct. at 776. This "testimony appealed to a powerful racial stereotype—that of black men as 'violence prone.'" *Id.* (quoting *Turner v. Murray*, 476 U.S. 28, 35 (1986)). This Court found that Buck was prejudiced by this evidence because the jury heard "expert testimony that expressly [made] a defendant's race directly pertinent on the question of life or death." *Id.* at 777. This Court concluded that because the effect of the testimony could not "be dismissed as 'de minimis,' Buck has demonstrated prejudice." *Id.*

Unlike *Buck*, here, there was no expert testimony directly and expressly associating an aggravating factor to the defendant based on his race. Instead, the prosecutor made comments about Petitioner living "by the law of the jungle" in an attempt to allude to the concept that lawlessness cannot be tolerated in our society. Though such comments could contain a racial undercurrent in certain situations, that was not the case at Petitioner's trial. The prosecutor could have just as easily said that Petitioner ascribed to mob warfare, or believed he lived in the Wild West, or the feud was like that of the Hatfield's and McCoy's. The point was clearly about the conduct, Petitioner's revenge murders being unlawful, not about Petitioner's race.

Merriam-Webster defines "law of the jungle" as: "a code that dictates survival

by any means possible and that is presumed to be in effect among animals in their natural state or people unrestrained by any established law or civilized personal or civic control."[1] Wikipedia defines "law of the jungle" as "an expression that means 'every man for himself,' 'anything goes,' 'survival of the strongest,' 'survival of the fittest,'" etc., and references *The Jungle Book* by Rudyard Kipling as a possible origin, wherein wolves and other animals of the jungles of India use legal codes.[2] These are not racial stereotypes, but words to evoke lawlessness.

The phrase is also commonly used by statesmen and politicians. For example, in 1990, George H.W. Bush invoked the phrase at his New World Order speech to a joint session of congress:

> A hundred generations have searched for this elusive path to peace, while a thousand wars raged across the span of human endeavor, and today that new world is struggling to be born. A world quite different from the one we've known. A world where the rule of law supplants the rule of the jungle. A world in which nations recognize the shared responsibility for freedom and justice. A world where the strong respect the rights of the weak. [3]

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[1] *Law of the Jungle*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/law%20of%20the%20jungle?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Feb. 20, 2020)

[2] *Law of the Jungle*, Wikipedia.com, https://en.wikipedia.org/wiki/Law_of_the_jungle (last visited Feb. 20, 2020).

[3] *Bush 'Out of These Troubled Times. . . A New World Order'*, WashingtonPost.com, https://www.washingtonpost.com/archive/politics/1990/09/12/bush-out-of-these-troubled-times-a-new-world-order/b93b5cf1-e389-4e6a-84b0-85f71bf4c946/?utm_term=.adef947cf228 (last visited Feb. 20, 2020).

The turn of phrase was also used by former chairman of the federal reserve Alan Greenspan in 2004.[4] More recently, the comments have been used by France's finance minister, Bruno Le Marie, referring to "law of the fittest" in the context of trade relations,[5] and China's President, Xi Jinping, referring to trade policies of "winner take all,"[6] and most recently, the phrase was used in an interview with ambassador Bill Taylor in the New Yorker.[7] Certainly, Petitioner's desire to seek revenge falls properly into this category of lawlessness.

The facts of *Buck* are vastly and incomparably distinct from Bell's case. Not only was the prosecutor's statement not a direct statement about race as occurred in *Buck*, in this case, it was part of closing argument and not evidence presented by an expert. Trial defense counsel's response to the prosecutor's argument, was an attempt

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[4] *Remarks by Chairman Alan Greenspan*, FederalReserve.gov, https://www.federalreserve.gov/boarddocs/speeches/2004/20040113/default.htm (last visited Feb. 20, 2020).

[5] Jason Lemon, *Trump's Trade Policies are 'The Law of the Jungle,' France Says*, NewsWeek.com, Jul. 22, 2018, https://www.newsweek.com/trump-trade-policies-are-law-jungle-france-says-1036277 (last visited Feb. 20, 2020).

[6] Gerry Shih, *Xi tells the world China will boost imports, while swiping at Trump's 'law of the jungle,'* WashingtonPost.com, Nov. 5, 2018, https://www.washingtonpost.com/world/asia_pacific/xi-tells-the-world-china-will-boost-imports-while-swiping-at-trumpslaw-of-the-jungle/2018/11/05/c9b61f9c-e0bc-11e8-a1c9-6afe99dddd92_story.html?utm_term=.eafe98aceeeb (last visited Feb. 20, 2020).

[7] Wright, Robin, *Ambassador Bill Taylor on Impeachment, Russia, and the Law of the Jungle*, NewYorker.com, Feb. 8, 2020, https://www.newyorker.com/news/q-and-a/ambassador-bill-taylor-on-impeachment-russia-and-the-law-of-the-jungle (last visited Feb. 20, 2020).

to convince the jury that in Petitioner's neighborhood, what he did should be considered self-defense. This was a reasonable strategy given the evidence, as the Florida Supreme Court previously held. *Bell*, 965 So. 2d at 65. Petitioner also failed to demonstrate that these "jungle" comments alone undermined confidence in the outcome at his trial. Thus, trial counsel's response to the prosecutor's comments were not the product of deficient performance and did not prejudice Petitioner, as the Florida Supreme Court has already determined. *Id.* at 65-66. Petitioner's case is a far cry from the introduction of "race or ethnicity as evidence of criminality." *Buck*, 137 S. Ct. at 777. Petitioner's claim of ineffective assistance of counsel is meritless and should be denied.

In the proceedings below, Petitioner compared his case to an Idaho and Minnesota case where the defendant received a new trial based on improper injection of race into a case, but these cases, like *Buck* were much different than Petitioner's own. In *Kirk*, the Court of Appeals of Idaho found that the prosecutor "improperly injected race into his case by singing the first few lines of the song 'Dixie' during closing argument" and found this was harmful error. *State v. Kirk*, 157 Idaho 809, 810, 814-15 (Idaho Ct. App. 2014). In *Cabrera*, during closing argument, the prosecution accused defense counsel of "wild and, I submit, racist speculation on the part of counsel here, that because these men who happen to be black are in--have been in gangs in the past." *State v. Cabrera*, 700 N.W.2d 469, 474 (Minn. 2005). The Court reversed and remanded for a new trial "in the interests of justice and in the exercise of our supervisory powers." *Id.* at 475. Certainly, these two examples are

much different than Petitioner's own case. Even if "the law of the jungle" reference is subtlety racial in nature, neither of these cases constitute a subtle injection of race and are thus not persuasive, or even relevant, comparisons. Further, both of these cases were reviewing prosecutorial misconduct and whether it was harmless on direct appeal, not reviewing ineffective assistance of counsel during post-conviction proceedings. These cases provided no assistance to the lower court in analyzing Petitioner's claim.

Because *Buck* very clearly applied *Strickland*'s test for ineffective assistance of counsel, the Florida Supreme Court's denial of Petitioner's claim was correct. Petitioner's claim is time barred under Florida law because it was raised almost 20 years after finality and was not based on a newly established constitutional right which has been held to apply retroactively. This claim is also procedurally barred under Florida law because it was previously rejected. The Florida Supreme Court's decision is not contrary to any decision of another state court of last review, any decision of a federal appellate court, or any of this Court's jurisprudence. Nor does it implicate an important or unsettled question of federal law. Petitioner's request for certiorari review should be denied.

Conclusion

Respondent respectfully submits that the Petition for a writ of certiorari should be denied.

Respectfully submitted,
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