IN THE SUPREME COURT OF FLORIDA

MICHAEL BERNARD BELL
Appellant,

v.

CASE NO. SC18-1713
Lower ct. 161994CF009776AXXXMA

STATE OF FLORIDA
Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT, DUVAL COUNTY
STATE OF FLORIDA

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

Mr. Bell will respond to certain arguments made by the State in the Answer Brief. He will continue to rely on the arguments and citation of authority presented in the Initial Brief.

ARGUMENT

ISSUE I

THE CONVICTION AND SENTENCE IN THIS CASE ARE SUBJECT TO REVERSAL AFTER THE INFLAMMATORY INJECTIONS OF RACIAL BIAS AND ANIMUS INTO THE GUILT AND PENALTY PHASE OF THIS TRIAL BY MR. BELL'S OWN ATTORNEY

Mr. Bell argued in his Initial Brief that the trial court's denial of his successor motion for postconviction relief premised on *Buck v. Davis*, 137 S.Ct. 159 (2017] was error. Mr. Bell argued his own attorney's injection of racial animus into the trial and his adoption of the prosecutor's racial theme required reversal of his convictions under *Buck.* The State argues Mr. Bell is not entitled to relief because *Buck* is not retroactive because it is an application of *Strickland v. Washington*, 466 U.S. 688 (1994), rather than new law and that even if *Buck* were retroactive, Mr. Bell would not be entitled to relief because there was not identified unconstitutional arguments were not racially tinged at all. The State is incorrect in both these arguments.

In *Buck* the United States Supreme Court addressed again the odious injection of race, specifically when the defendant is African-American, into a criminal trial. Although courts have previously found error because of the improper use of race in criminal judicial proceedings, *Buck* makes it clear that the use of race is not to be tolerated at all. The United States Supreme Court has addressed racial overtures, animus, and discrimination for decades, as the State points out and Mr. Bell never contested. *See Rose v. Mitchell*, 443 U.S. 545 (1979)[finding the purposeful exclusion of blacks from serving on grand jury unconstitutional]; *Zant v. Stephens*, 462 U.S. 862 (1983)[rejecting race as an aggravating factor in capital sentencing proceedings]. This Court has also addressed the risk of racial prejudice infecting a criminal trial, even holding that it takes on greater significance in the context of a capital sentencing proceeding. *See Robinson v. State*, 520 So.2d 1, 7 (Fla. 1988). Despite decades of case law cautioning against and condemning the type of racial bias and prejudice that occurred in this case and in *Buck,* the problem did not cease. What changed in *Buck* was how the United States Supreme Court dealt with this continued abhorrent conduct in the face of judicial condemnation of it and how other Courts must address it. A means of eradicating the continuing problem is to change the response and that is what *Buck* did by creating new law.

Since 1984, under *Strickland*, in postconviction proceedings the courts have had vehicle to, in effect, overlook and excuse the inclusion of racial bias and prejudice into the criminal justice system by finding defense counsel was not deficient, either by finding the inclusion of racial bias was tactical or strategic under the first prong, and/or by finding it not sufficiently prejudicial under the second prong. Mr. Bell's case is a prime example of that. The prejudice prong of *Strickland* allowed a subjective analysis by the courts racial bias and prejudice to continue to occur as long as it was subjectively determined not too prejudicial.

It is undisputed the comments of the prosecutor in this case were racially motivated and improper. This Court found the prosecutor's arguments to be similar or indistinguishable from comments made in other cases by the same prosecutor in which this Court had reversed because of those improper statements on direct appeal as opposed to postconviction. *Bell v. State*, 965 So.2d 48, 60 (Fla. 2007). But, using *Strickland*, this Court denied Mr. Bell relief because he did not establish the requisite prejudice under *Strickland's* second prong, noting this was a different burden than he would have faced on direct appeal. *Ibid.,* at 61. Thus, *Strickland* was used to, in effect, permit the injection of racial animus and prejudice into a criminal trial. *Buck* has ended that. Instead of continuing to

permit racial prejudice to be interjected into a criminal trial by the State or the defense so long as on appeal it is determined to be either harmless error on direct appeal or not sufficiently prejudicial in a postconviction case, the United States Supreme Court has made it clear that "some toxins are deadly even in small doses." *Buck v. Davis*, at 777. *Buck* represents more than a significant change in the law- *Buck* created new law which prohibits the courts from in effect allowing racial bias, prejudice, and animus from playing any role in the criminal justice system by deciding what level of harm is created when the error occurs. *Buck* rejects the State's argument that racial prejudice and bias can continue to be allowed in criminal cases, whether under the harmless error standard of direct appeal or under the second prejudice prong of *Strickland*.

Buck created new law by unequivocally rejecting the infusion of racial animus, bias or prejudice into a criminal trial as part of a defense strategy by defense counsel. Prior to *Buck*, under *Strickland* in postconviction proceedings, a defendant had to establish deficient performance by counsel to prevail on a claim that counsel improperly interjected race into his trial. Trial counsel, as happened in Mr. Bell's case, could evade a claim under *Strickland*, by claiming the failure to object or the intentional adoption or injection of race by the

defense was strategic or tactical. Strategic or tactical decisions are immune from scrutiny under *Strickland* as a general rule, but not as to racial issues under *Buck*. *Buck* departs from *Strickland's* strategic and tactical general rule.

Trial counsel's failure to object to the prosecutor's comments in this case were, in effect, excused. This is especially problematic because this trial counsel had a history of failing to make appropriate objections to improper closing arguments- he allowed the same prosecutor to make completely inappropriate arguments in *Brooks v. State*, 762 So.2d 879, 898-99 (Fla. 2000).

In this case, trial counsel did not object to the prosecutor's improper comments and then adopted them to his own arguments. Thus, the prosecutor's objectionable comments and defense counsel's own comments were not preserved for direct appeal, unless raised as fundamental error. *Ibid*. Appellate counsel did not raise any issues on direct appeal related to the prosecutor's or trial counsel's improper injection of race, prejudice, and in order to do so would have had to raise it as a fundamental error claim.

In postconviction, Mr. Bell argued his attorney was deficient for failing to object to the prosecutor's comments. However, this Court found the failure to object ground was waived in postconviction because the un-objected to comments by

the prosecutor and unpreserved issue should have been raised on direct appeal, seemingly ignoring the general rule that unpreserved issues are not cognizant on direct appeal. *Bell v. State*, 965 So.2d 48, 60 (Fla. 2007). Thus, the prosecutor's injection of racial animus and prejudice into this trial was not addressed on the merits.

There is no doubt trial counsel in this case did not object to the prosecutor's racially prejudiced and biased arguments- he adopted that theme as his own as he admitted during the postconviction evidentiary hearing. This Court's quotes from defense counsel Nichols postconviction testimony made that very clear, as trial counsel testified he made the strategic and tactical choice to do so. *Bell v. State*, 965 So.2d at 59-60. *Buck*, however, rejects prior law which permitted defense counsel's use of race as a tactical or strategic tool. *Buck* created new law by rejecting the application of the first prong of *Strickland*, that of deficient performance, when challenges are made to a defense attorney's failure to object to instances of racial bias, prejudice, and animus by the State or when the defense affirmatively use racial bias, prejudice, or animus. *Buck* did not just apply *Strickland* as the State argues. *Buck* rejected a *Strickland* analysis on questions of racial bias, prejudice, and animus by defense counsel on the first prong and created new law. Under *Buck* there is no longer strategic or

tactical immunity from a claim of deficient performance for what trial counsel did in this case. Claims of deficient performance based on racial bias, prejudice, and animus will no longer cite *Strickland* as the basis for review, but instead will cite *Buck* as the controlling law.

The State's continued argument that defense counsel's comments and his adoption of the State's improper arguments were not offensive and racially motivated is without merit. This Court, even when denying relief on prejudice, seemed to find the arguments at issue here to be improper, and stated "We agree, even assuming that Nichols was deficient in not objecting to the prosecutor's closing argument, Bell has not demonstrated prejudice…". *Bell v. State*, 965 So.2d at 60-61. Despite this Court's rejection of similar comments by the same prosecutor in *Brooks* and *Urbin v. State*, 714 So.2d 411 (Fla. 1998), the State still refuses to acknowledge that the arguments made by the State and adopted by defense counsel clearly had racial implications in this case. Mr. Bell is African-American. The arguments of defense counsel were intended to highlight his differences with the white jury based on race and to portray him as a violent, barbaric man based on race.

The State's reliance on George H.W. Bush's use of the phrase "the law of the jungle" to describe a new political world order, the reference to the term by the current Chinese

president to refer to current trade policies of Trump, or by Alan Greenspan in a discussion of economics to argue the use of the "rule of the jungle" in this trial was not racist are misplaced and out of context. In none of those instances were the comments directed at a specific black man in a capital prosecution before a white jury in the South. Context is everything and cannot be ignored. The comparisons the State suggests are apples to oranges in Mr. Bell's situation.

The State takes issue with undersigned counsel citing cases from other jurisdictions to illustrate that references to race are harmful instead of solely relying on Florida cases. The cases cited in the Initial Brief are illustrative and relevant to the point that improper racial bias, prejudice, and animus can be subtle, but that does not erase the harm caused. Florida courts have also reversed for racial contagion in a trial. For example, in *State v. Davis*, 872 So.2d 250 (Fla. 2004), this Court reversed the black defendant's conviction for murdering a white woman after defense counsel informed the jury of his own racial prejudice in an attempt to ferret out the jurors' latent racial prejudices on voir dire. *Davis* certainly defeats the State's argument that reversals based on racial animus should only occur when the racial animus is admitted as actual evidence as opposed to occurring in voir dire or argument.[Answer Brief at 18] There is no difference between calling someone a "n---"

in voir dire, opening statement, or closing argument as opposed to calling a witness who testifies the defendant is a "n---", as the State's argument suggests. Racial animus is abhorrent no matter where in a judicial proceeding it occurs. *Evans v. State*, 838 So.2d 1235 (Fla. 2d DCA 2003).

In 2004 this Court stated:

> Initially, we strongly affirm the principle that racial Prejudice has no acceptable place in our justice system. As we stated in *Powell v. Allstate Insurance Co.*, 652 So. 2d 354,358 (Fla. 1995):
>
> > [t]he founding principle upon which this nation was established is that all persons were initially created equal and are entitled to have their individual human dignity respected. This guarantee of equal treatment has been carried forward in explicit provisions of our federal and state constitutions. It is not by chance that the words "Equal Justice Under Law" have been placed for all to see above the entrance to this nation's highest court. If we are to expect our citizens to treat one another with equal dignity and respect, the justice system must serve as the great example of maintaining that standard. And while we have been far from perfect in implementing this founding principle, our initial declaration and our imperfect struggle and efforts have served as a beacon for people around the world.
>
> In *Powell*, we considered whether to authorize an inquiry to ascertain whether racist jokes and statements were made by jurors in a trial involving a suit by the plaintiffs, who were black citizens of Jamaica, against an insurance company for claims arising from an automobile accident. *See id.* at 355. We authorized the inquiry, and ruled that if the trial court determined that the statements were, in fact made, the comments warranted a new trial. *See id.*,at 358. Rejecting any notion that this was not a proper concern within the purview of the justice system, we stated:

> The issue of racial, ethnic, and religious bias in the courts is not simply a matter of "political correctness" to be brushed aside by a thick-skinned judiciary…
>
> Despite longstanding and continual efforts, both legislative enactments and by judicial decisions to purge our society of the scourge of racial and religious prejudice, both racism and anti-Semitism remain ugly malignancies sapping the strength of our body politic. The judiciary, as an institution given a constitutional mandate to ensure equality and fairness in the affairs of our country when called on to act in litigated cases, must remain ever vigilant in its responsibility. The obvious difficulty with prejudice in a judicial context is that it prevents the impartial decision-making that both the Sixth Amendment and fundamental fair play require. A racially or religiously biased individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and law that our jury system requires.

Id., (quoting, *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986). The United States Supreme Court has observed that it has been compelled to " Engage[] n 'unceasing efforts' to eradicate racial Prejudice from our criminal justice system." *McCloskey v. Kemp*, 481 U.S. 279,309, 107 S.Ct.1756, 95 L.Ed.2d 262 (1987)(quoting, *Batson v. Kentucky*, 476 U.S. 79, 85, 108 S.Ct. 1712, 90 L.Ed. 2d 69 (1986)).

The necessity of vigilance against the influence of racial prejudice is particularly acute when the justice system serves as the mechanism by which a litigant is required to forfeit his or her life. As the United States Supreme Court first stated more than twenty-five years Ago, "death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg v. Georgia*, 428 U.S. 153,188, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976); *see also*, *State v. Dixon*, 283 So.2d 1,7 (Fla. 1973)(stating that because "[d]eath is a unique punishment in its finality and in its

> total rejection of the possibility of rehabilitation…, The Legislature has chosen to reserve its application to only the most aggravated and unmitigated of crimes"). we have acknowledged that "death is different" in recognizing the need for effective counsel in capital proceedings "from the perspective of both the sovereign state and the defending citizen." *Sheppard & White, P.A. v. City of Jacksonville*, 827 So.2d 925, 932 (Fla. 2002).

State v. Davis, 872 So.2d 250, 253-255 (Fla. 2010).

Buck v. Davis requires these statements actually be put into effect by eliminating any justification for the continued acceptance of racial prejudice, bias, or animus to be part of a capital criminal trial, whether that justification is a perceived lack of prejudice, harmless error, or claimed tactical or strategic reasons for doing so. The new law created by *Buck* attempts to ensure the stated desire to eliminate racial bias from the criminal justice system may actually occur.

The trial court's denial of relief in this case was error. Under *Buck*, Mr. Bell is entitled to a new trial free of racial discrimination and animus.

CONCLUSION

Based on the forgoing arguments and citations of law, Mr. Bell respectfully requests the denial of his successor motion for postconviction relief be reversed.

Respectfully submitted,

/s/Robert A. Norgard

ROBERT A. NORGARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of this Reply Brief has been filed using the Florida Courts E-Portal system, which will automatically send notice of electronic filing to the Office of the Attorney General at capapp@myfloridalegal.com this **31st** day of January, 2019.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and style font used in the preparation of this Reply Brief is Courier New 12-point in compliance with Fla. R. App. P. 9.210(a)(2).

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