No. _____

IN THE

Supreme Court of the United States

Duane Edward Buck,
Petitioner-Appellant

v.

William Stephens, Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent-Appellee

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Duane Buck's death penalty case raises a pressing issue of national importance: whether and to what extent the criminal justice system tolerates racial bias and discrimination. Specifically, did the United States Court of Appeals for the Fifth Circuit impose an improper and unduly burdensome Certificate of Appealability (COA) standard that contravenes this Court's precedent and deepens two circuit splits when it denied Mr. Buck a COA on his motion to reopen the judgment and obtain merits review of his claim that his trial counsel was constitutionally ineffective for knowingly presenting an "expert" who testified that Mr. Buck was more likely to be dangerous in the future because he is Black, where future dangerousness was both a prerequisite for a death sentence and the central issue at sentencing?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Duane Buck respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The November 6, 2015 opinion of the Court of Appeals denying rehearing *en banc* is available at 2015 WL 6874749 (5th Cir., Nov. 6, 2015) and attached as Appendix A. The August 20, 2015 panel opinion of the Court of Appeals denying Mr. Buck a COA is reported at 623 F. App'x 668 and attached as Appendix B. The March 11, 2015 Order of the United States District Court for the Southern District of Texas denying Mr. Buck's motion to alter or amend that Court's prior judgment is unreported and attached as Appendix C. The August 29, 2014 Memorandum and Order of the United States District Court for the Southern District of Texas denying Mr. Buck's motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) is unreported and attached as Appendix D. The July 24, 2006 Memorandum and Order of the United States District Court for the Southern District of Texas denying Mr. Buck's Petition for Writ of Habeas Corpus is unreported and attached as Appendix E.

JURISDICTION

The Court of Appeals entered its judgment on November 6, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a state criminal defendant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments. The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right 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 punishments inflicted.

The Fourteenth Amendment provides in relevant part:

> . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the application of 28 U.S.C. § 2253(c), which states:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
>
> . . .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. Introduction

By any measure, Duane Buck's death sentence is extraordinary. At sentencing, his trial attorney presented "bizarre and objectionable" testimony from a "defense expert" that Mr. Buck was more likely to be dangerous in the future because he is Black. *Buck v. Thaler*, 132 S. Ct. 32, 33 (2011) (statement of Alito, J., concerning the denial of certiorari). In Texas, future dangerousness is a prerequisite for a death sentence, and, in Mr. Buck's case, it was the central disputed issue at sentencing. Four years after Mr. Buck was sentenced to death, Texas acknowledged that such race-as-dangerousness testimony is unconstitutional and undermines not only the integrity of Mr. Buck's death sentence but also the integrity of the criminal justice system overall. Texas therefore promised to concede error and waive its procedural defenses in Mr. Buck's case, but it reneged on that promise. Then, in 2011, a majority of this Court left no doubt that the race-as-dangerousness evidence presented at Mr. Buck's sentencing hearing is deeply troubling. If these plainly extraordinary circumstances—when viewed in combination with intervening precedent from this Court which, for the first time, allows federal review of Mr. Buck's procedurally defaulted ineffective assistance of counsel (IAC) claim—do not justify relief under Rule 60(b)(6), then that Rule has no meaning.

Yet, when presented with these extraordinary facts and circumstances, the Fifth Circuit declared that Mr. Buck "ha[d] not made out even a minimal showing

that his case is exceptional," and that his ineffectiveness claim is "unremarkable as far as IAC claims go." App. B at 7, 9. As a result, the Fifth Circuit not only denied relief, it concluded that Mr. Buck had not made the threshold showing required to grant a COA. That conclusion, as Judge Dennis recognized in his dissent from the denial of rehearing *en banc*, is wrong under any standard of review; the circumstances identified by Mr. Buck "describe a situation that is at least debatably 'extraordinary.'" App. A at 6.

B. The Capital Trial Proceedings

In 1996, Duane Buck, an African-American man, was charged with capital murder in connection with the shooting deaths of Debra Gardner and Kenneth Butler in Houston, Texas. Mr. Buck was represented at trial by appointed counsel, Danny Easterling and Jerry Guerinot. Mr. Guerinot has a well-documented history of inadequate representation of his capitally charged clients: by 2010, "[t]wenty of Mr. Guerinot's clients ha[d] been sentenced to death."[1] That was then more than the number of prisoners sentenced to death "in about half of the 35 states that ha[d] the death penalty."[2]

In preparation for Mr. Buck's capital trial, counsel retained a psychologist, Dr. Walter Quijano, to assess, *inter alia*, whether Mr. Buck was likely to commit criminal acts of violence in the future—one of the "special issues" that a Texas jury must unanimously answer affirmatively before a defendant may be sentenced to

[1] Adam Liptak, *A Lawyer Known Best for Losing Capital Cases*, N.Y. Times, May 17, 2010, www.nytimes.com/2010/05/18/us/18bar.html?_r=0.

[2] *Id.*

death. *See* Tex. Code Crim. Proc. Ann. art. 37.071 § 2 (West 2013). Before trial, Dr. Quijano informed counsel that he viewed Mr. Buck as more likely to be dangerous in the future because he is Black. *Buck*, 132 S. Ct. at 33. Specifically, Dr. Quijano provided trial counsel with a report that identified the "Statistical Factors" he deemed relevant to future dangerousness, and the report stated, in no uncertain terms: "Race. Black. Increased probability." 3/8/97 Forensic Psychological Evaluation ("Rep.") at 7, *Buck v. Stephens*, No. 4:04-cv-03965 (S.D. Tex. June, 24 2005), ECF No. 5-118, p. 24; *Buck*, 132 S. Ct. at 33 (Statement of Alito, J.) (quoting report).

Even though this alleged link between race and future dangerousness had been proven false,[3] and notwithstanding the obvious harm that such testimony would cause Mr. Buck, trial counsel called Dr. Quijano to testify as an expert witness at Mr. Buck's sentencing. On direct examination, trial counsel specifically asked Dr. Quijano to recount the "statistical factors or environmental factors" that he used to assess the future dangerousness of a person "such as Mr. Buck." Sentencing Hr'g. Tr. ("Tr.") 110:2-7, May 6, 1997, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June, 24 2005), ECF No. 5-114, p.3. Dr. Quijano's answer tracked his report. He testified that race was among the "statistical factors in deciding whether a person will or will not constitute a continued danger," with Blacks and Hispanics more

[3] *See, e.g.*, J. W. Swanson et al., *Violence and Psychiatric Disorder in the Community: Evidence from the Epidemiologic Catchment Area Surveys*, 41 Hosp. & Comm. Psych., 761-770 (1990) (when controlling for socioeconomic status, correlations between race and violence disappear); J. Monahan et al., *Rethinking Risk Assessment: The MacArthur Study of Mental Disorder and Violence* (2001) (same).

likely to be dangerous because they are "over represented in the Criminal Justice System." *Id.* at 111:1-4, ECF No. 5-114, p.4). At trial counsel's request, and over the prosecution's objection, Dr. Quijano's report detailing that opinion was also admitted into evidence. *Id.* at 117:16-118:7, ECF No. 5-114, p. 10-11.

On cross-examination, the trial prosecutor exploited and compounded defense counsel's error by asking Dr. Quijano to reiterate his false and discriminatory "expert" opinion that Mr. Buck's race increased his likelihood of future dangerousness. Specifically, the prosecutor asked Dr. Quijano whether "the race factor, black, increases the future dangerousness for various complicated reasons." Dr. Quijano answered, "Yes." *Id.* at 160:8-15, ECF No. 5-115, p. 17. In closing argument, the prosecutor urged the jury to rely on Dr. Quijano to find that Mr. Buck was likely to commit criminal acts of violence in the future and that he was therefore eligible for a death sentence. *Id.* at 260:13-21 (ECF No. 5-117, p. 37).

During deliberations, the jury sent out three notes before deciding the appropriate sentence. In their third and final note, the jury requested the expert reports that had been submitted into evidence, including Dr. Quijano's report. See Jury Requests, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June, 24 2005), ECF No. 5-9, p. 4. After receiving these reports, the jury found that Mr. Buck was likely to be dangerous in the future, and he was sentenced to death.

C. Mr. Buck's State Habeas Proceedings

1. Mr. Buck's Initial Habeas Petition

In March of 1999, Mr. Buck filed his initial state habeas application, represented by newly-appointed counsel, Robin Norris. Like Mr. Buck's trial counsel, Mr. Buck's state habeas counsel had a history of deficient representation of death-sentenced prisoners. In another capital case, the CCA found that Mr. Norris threw his client "under the bus" by filing an initial state habeas application that was "only four pages long and merely state[d] factual and legal conclusions." *Ex parte Medina*, 361 S.W.3d 633, 635-36 (Tex. Crim. App. 2011). His representation of Mr. Buck was consistent with that troubling history.

State habeas counsel "filed only non-cognizable or frivolous claims in [Mr. Buck's] initial application." *Ex parte Buck*, 418 S.W.3d 98, 107 (Tex. Crim. App. 2013), *cert. denied*, 134 S. Ct. 2663 (2014). "[T]hree of the four claims . . . were raised and rejected on direct appeal and, therefore, under the longstanding precedent of [the CCA], those claims were not cognizable on a post-conviction writ of habeas corpus." *Id.* at 102. The fourth claim was "wholly frivolous" because it asserted that "applicant's trial counsel was ineffective for failing to request a jury instruction based on a non-existent provision of the penal code." *Id.* The application did not challenge any aspect of trial counsel's introduction of race as an aggravating factor into Mr. Buck's sentencing proceeding.

2. Texas Concedes Error.

In 2000, the Texas Attorney General conceded the unconstitutionality of Dr. Quijano's race-based future dangerousness testimony in the case of Victor Hugo Saldaño. *Saldaño v. State*, 70 S.W.3d 873, 875 (Tex. Crim. App. 2002) (quoting Pet. for Cert. at 3, *Saldaño v. Texas*, 530 U.S. 1212 (2000) (No. 99-8119)). Texas acknowledged that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice," and that the "infusion of race as a factor for the jury to weigh in making its determination violated [Mr. Saldaño's] constitutional right to be sentenced without regard to the color of his skin." Resp. to Pet. for Cert. at 7-8, *Saldaño v.* Texas, 530 U.S. 1212 (2000).

After its admission in *Saldaño*, then-Texas Attorney General, John Cornyn, announced that his office had conducted "a thorough audit" of capital cases—including a review of "case files for all executions since 1982"—and identified six cases, including Mr. Buck's, that also involved unconstitutional racially-biased testimony by Dr. Quijano.[4] The Attorney General's audit discovered equal protection violations in the cases of six death sentenced prisoners: Gustavo Garcia, Eugene Broxton, John Alba, Michael Gonzales, Carl Blue, and Duane Buck. In three of the cases (*Broxton*, *Gonzales*, and *Garcia*), the prosecution called Dr. Quijano as a witness; in the three others (*Alba*, *Blue*, and *Buck*), the defense

[4] Press Release, Office of the Tex. Att'y Gen., *U.S. Supreme Court Grants State's Motion in Capital Case* (June 5, 2000) (Rule 60(b) Mot. Ex. 3), *Buck*, No. 4:04-cv-03965 (S.D. Tex. Jan, 7 2014), ECF No. 49-1, p. 17; Press Release, Office of the Tex. Att'y Gen., *Statement from Attorney General John Cornyn Regarding Death Penalty Cases* (June 9, 2000) (Rule 60(b) Mot. Ex. 4), *Buck*, No. 4:04-cv-03965 (S.D. Tex. Jan, 7 2014), ECF No. 49-1, p. 19.

called Dr. Quijano. *See* Mem. Op. & Order at 15-16, *Blue v. Johnson*, No. 4:99-cv-00350 (S.D. Tex. Sep. 29, 2000) (hereinafter, "*Blue* Opinion and Order").

The Attorney General declared that for the six identified cases, Texas "will not object if they seek to overturn the death sentences based on Mr. Quijano's testimony,"[5] because "it is inappropriate to allow race to be considered as a factor in our criminal justice system . . . ." Tex. Att'y Gen. Press Release, (Rule 60(b) Mot. Ex. 4), *Buck*, No. 4:04-cv-03965 (S.D. Tex. Jan, 7 2014), ECF No. 49-1, p. 19 (internal quotation marks omitted)). The Attorney General acknowledged that some of the six cases might still be in state proceedings and promised, "if and when those cases reach this office they will be handled in a similar manner as the *Saldaño* case."[6] Mr. Buck's case was the only one still in state court at the time of the Attorney General's June 2000 announcement.

Prior to the Attorney General's admission of error, none of the identified defendants had challenged the constitutionality of Dr. Quijano's testimony. Nonetheless, in all of the cases, except Mr. Buck's, the State kept its promise, waived all procedural defenses and conceded that Dr. Quijano's testimony violated equal protection, thus requiring a new sentencing hearing.[7]

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[5] Jim Yardley, *Racial Bias Found in Six More Capital Cases*, N.Y. Times, June 11, 2000, http://www.nytimes.com/2000/06/11/us/racial-bias-found-in-six-more-capital-cases.

[6] James Kimberly, *Death Penalties of 6 in Jeopardy: Attorney General Gives Result of Probe into Race Testimony*, Hous. Chron., June 10, 2000, at A1. In Texas, the district attorney of the county of conviction typically represents the State during state post-conviction proceedings.

[7] *See Blue* Opinion and Order at 15-17, *Blue v. Johnson*, No. 4:99-cv-00350 (S.D. Tex. Sept. 29, 2000), ECF No. 29; *Alba v. Johnson*, No. 00-40194, 2000 WL 1272983 at *1 (5th Cir. Aug. 21, 2000); Order at 1, *Alba v. Johnson*, No. 4:98-cv-221 (E.D. Tex. Sept. 25, 2000), ECF No. 31; Order at 1, *Garcia v. Johnson*, No. 1:99-cv-00134 (E.D. Tex. Sept. 7, 2000), ECF No. 36; Resp. to Suppl. Pet. and Confession of Error by TDCJ-ID, *Garcia,* No. 1:99-cv-00134 (E.D. Tex. Aug. 18, 2000), ECF No. 35;

D. Mr. Buck's Post-*Saldaño* State and Federal Habeas Proceedings

1. State Habeas Proceedings

Two years after the Texas Attorney General conceded error in Mr. Buck's case—and five years after the filing of his initial application for state habeas relief—Mr. Norris finally filed a second application for state habeas relief which, for the first time, challenged trial counsel's introduction of race as an aggravating factor into Mr. Buck's sentencing proceeding. Subsequent Appl. for Writ of Habeas Corpus, *Ex parte Buck*, No. WR-57,004-02 (Tex. Crim. App. Oct. 15, 2003), ECF No. 5-152, pp. 6, 9. In October 2003, the CCA denied Mr. Buck's initial state habeas application and dismissed the subsequent post-conviction application as an abuse of the writ without considering its merits. Order, *Ex parte Buck*, No. WR-57,004-02 (Tex. Crim. App. Oct. 15, 2003).

2. Federal Habeas Proceedings

In October of 2004, Mr. Buck, represented by new counsel, filed a federal habeas corpus petition in the District Court asserting, *inter alia*, that Mr. Buck's federal constitutional rights to equal protection, due process and the effective assistance of counsel were violated by the introduction of "expert" testimony and an "expert" report linking Mr. Buck's race to an increased likelihood of future dangerousness. Pet. for Writ of Habeas Corpus at 55-62, *Buck v. Cockrell*, No. 04-03965 (S.D.Tex. Oct. 14, 2004), ECF No. 1. Although Texas had promised to concede constitutional error and waive its procedural defenses in Mr. Buck's case—

Broxton v. Johnson, No. H-00-CV-1034, 2001 U.S. Dist. LEXIS 25715, at *15 (S.D. Tex. Mar. 28, 2001); Final J. at 1, *Gonzales v. Cockrell*, No. 7:99-cv-00072 (W.D. Tex. Dec. 19, 2002), ECF No. 84.

as it had in all of the other *Saldaño*-like cases, including two in which Dr. Quijano was a defense witness[8]—Texas reversed course, argued that federal review of Mr. Buck's ineffectiveness claim was foreclosed by state habeas counsel's default of that claim, and asserted, for the first time, that Mr. Buck's case "present[ed] a strikingly different scenario than that presented in *Saldaño*—Buck himself, not the State offered Dr. Quijano's testimony into evidence." Resp't Dretke's Answer and Mot. for Summ. J. with Br. in Support at 17, 21-25, *Buck v. Dretke*, No. 04-03965 (S.D. Tex. Sept. 6, 2005), ECF No. 6 (hereinafter, "Respondent's Answer"). Even though Texas's description of Mr. Buck's case was "obviously not accurate"—because "[l]ike Buck, the defendants in both *Blue* and *Alba* called Quijano to the stand"—Texas "created the unmistakable impression that Buck's case differed from the others in that only Buck called Quijano as a witness." *Buck*, 132 S. Ct. at 37 (Sotomayor, J., dissenting).

The District Court agreed with Texas, finding that Mr. Buck's Quijano-related claims were procedurally defaulted and that Mr. Buck was unable to demonstrate cause and prejudice or a fundamental miscarriage of justice to excuse the default. App. E at 17-18.

Between 2006 and 2012, Mr. Buck repeatedly, and unsuccessfully, sought review of the District Court's decision through the federal appellate courts. *See Buck v. Thaler*, 345 F. App'x 923 (5th Cir. 2009) (affirming denial of habeas relief due to procedural default and denying request for certificate of appealability); *Buck*

[8] *See Blue* Opinion and Order at 15-17, *Blue,* No. 4:99-cv-00350 (S.D. Tex. Sep. 29, 2000), ECF No. 29; Order at 1, *Alba*, No. 4:98-cv-221 (E.D. Tex. Sept. 25, 2000), ECF No. 31.

v. Thaler, 559 U.S. 1072 (2010) (denying certiorari); *Buck v. Thaler*, 452 F. App'x 423 (5th Cir. 2011) (denying stay of execution and motion for relief from judgment); *In re Buck*, 132 S. Ct. 69 (2011) (granting stay of execution); *Buck*, 132 S. Ct. 32 (2011) (denying certiorari); *Buck v. Thaler*, 132 S. Ct. 1085 (2012) (denying rehearing). Because *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991), foreclosed federal review of Mr. Buck's IAC claims, Mr. Buck's appellate briefs did not challenge trial counsel's introduction of "expert" testimony and/or the "expert" report linking Mr. Buck's race to his likelihood of future dangerousness. For its part, Texas consistently asserted that Mr. Buck's trial counsel—rather than Texas—was responsible for placing Dr. Quijano's false and inflammatory opinion about race before the jury.[9] The Fifth Circuit agreed with Texas. *Buck,* 345 F. App'x at 930.

In 2011, three Justices of this Court reached the same conclusion. *Buck*, 132 S. Ct. 32. In response to a petition for certiorari that challenged the trial prosecutor's reliance on Dr. Quijano's testimony, Justice Alito, joined by Justices Scalia and Breyer, explained that responsibility for the introduction of "bizarre and objectionable" expert testimony linking Mr. Buck's race to an increased likelihood of future dangerousness "lay squarely with the defense." *Id*. at 33, 35. Justice Sotomayor, joined by Justice Kagan, dissented from the denial of certiorari, reasoning that "our criminal justice system should not tolerate" a "death sentence

[9] Respondent's Answer at 17-18, 20 *Buck v. Dretke*, No. 04-03965 (S.D. Tex. Sept. 6, 2005); Thaler's Reply to Buck's Mot. for Relief from J. and Mot. for Stay of Execution at 10, 16-17, 19-20, *Buck v. Thaler*, 04-03965 (S.D. Tex. Sept. 9, 2011), ECF No. 30; Resp. in Opp'n to Appl. for Cert. of Appealability at 22-25, 28-30, *Buck v. Thaler*, No. 11-70025 (5th Cir. Sept. 14, 2011); Br. in Opp'n at 12-13, 18-20, *Buck v. Thaler*, Nos. 11-6391 & 11A297 (U.S. Sept. 15, 2011).

marred by racial overtones and a record compromised by misleading remarks and omissions made by the State of Texas in the federal habeas proceedings below." *Id.* at 35.

3. Mr. Buck's 2013 State Habeas Application and the *Trevino* Decision

In March 2013, Mr. Buck filed a new state habeas application. Application for Post-Conviction Writ of Habeas Corpus, *Ex parte Buck,* No. WR-57,004-03 (Tex. Crim. App. Mar. 28, 2013). Eight months later, a divided CCA dismissed Mr. Buck's Application for "fail[ing] to satisfy the requirements of Article 11.071, § 5(a)." 418 S.W.3d at 98. In dissent, Judge Alcala (joined by Judges Price and Johnson) noted:

> [Mr. Buck's case] reveals a chronicle of inadequate representation at every stage of the proceedings, the integrity of which is further called into question by the admission of racist and inflammatory testimony from an expert witness at the punishment phase. . . . As a result of prior habeas counsel's errors and the combined force of state and federal procedural-default laws, no Court has ever considered the merits of [Mr. Buck's] legitimate claims for post-conviction relief.

Ex parte Buck, 418 S.W.3d at 107.

While Mr. Buck's application was pending before the CCA, this Court announced, in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), that *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), was applicable to Texas. *Martinez* "'modif[ied] the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default.'" *Trevino*, 133 S. Ct. at 1917 (quoting *Martinez*, 132 S. Ct. at 1315). Together, *Martinez* and *Trevino* allow, for the first time, an opportunity for federal court

review of defaulted IAC claims where (1) the claim is "substantial"; (2) there was no counsel or ineffective counsel during the initial state post-conviction review; and (3) state law effectively requires ineffective assistance of trial counsel claims to be litigated on initial collateral review, as it does in Texas. *Id.* at 1918 (quoting *Martinez*, 132 S. Ct. at 1318-20). A "substantial" claim is one that "has some merit." *Martinez*, 132 S. Ct. at 1318 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for COA to issue)).

E. Mr. Buck's Post-*Trevino* Federal Habeas Proceedings

On January 7, 2014, Mr. Buck filed a motion for relief from the District Court's denial of the ineffective assistance of counsel claim that Mr. Buck raised in his initial federal habeas corpus petition. Rule 60(b)(6) Motion, *Buck v. Stephens*, No. 04-03965 (S.D.Tex. Jan. 7, 2014), ECF No. 49. Mr. Buck detailed eleven facts and circumstances demonstrating the "'extraordinary circumstances' justifying the reopening of a final judgment" under Rule 60(b)(6). *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). Specifically:

1. Mr. Buck's trial attorney knowingly presented expert testimony to the sentencing jury that Mr. Buck's race made him more likely to be a future danger;

2. Although required to act as gate-keeper to prevent unreliable expert opinions from reaching and influencing a jury, *see* Tex. R. Evid. 705(c); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), the trial court qualified Dr. Quijano as an expert on predictions of future dangerousness, allowed him to present race based opinion testimony to Mr. Buck's capital sentencing jury, and admitted Dr. Quijano's excludable hearsay report linking race to dangerousness;

3. The trial prosecutor intentionally elicited Dr. Quijano's testimony that Mr. Buck's race made him more likely to be a future danger on cross-examination, vouched for him as an "expert" in closing, and asked the jury to rely on Dr. Quijano's testimony to answer the future dangerousness special issue in the State's favor;

4. Mr. Buck's state habeas counsel did not challenge trial counsel's introduction of this false and offensive testimony—or Texas's reliance on it—in Mr. Buck's initial state habeas application;

5. The Texas Attorney General conceded constitutional error in Mr. Buck's case and promised to ensure that he received a new sentencing, but reneged on that promise after deciding that the introduction of the offensive testimony was trial counsel's fault;

6. [The District Court had previously] ruled that federal review of Mr. Buck's trial counsel ineffectiveness claim was foreclosed by state habeas counsel's failure to raise and litigate the issue in Mr. Buck's initial state habeas petition, relying on *Coleman*, which has subsequently been modified by *Martinez* and *Trevino*;

7. The Fifth Circuit held Mr. Buck's trial counsel responsible for the introduction of Dr. Quijano's testimony linking Mr. Buck's race to his likelihood of future dangerousness;

8. Three Supreme Court Justices concluded that trial counsel was at fault for the introduction of Dr. Quijano's testimony;

9. Three Judges of the CCA found that "because [Mr. Buck's] initial habeas counsel failed to include any claims related to Quijano's testimony in his original [state habeas] application, no court, state or federal, has ever considered the merits of those claims," *Ex parte Buck*, 418 S.W.3d at 104;

10. Mr. Buck's case is the only one in which Texas has broken its promise to waive procedural defenses and concede error, leaving Mr. Buck as the only individual in Texas facing execution without having been afforded a fair and unbiased sentencing hearing; and

11. *Martinez* and *Trevino* now allow for federal court review of "substantial" defaulted claims of trial counsel ineffectiveness.

Rule 60(b)(6) Motion at 15-17, *Buck*, No. 04-03965 (S.D.Tex. Jan. 7, 2014), ECF No. 49.

In adjudicating this Rule 60(b) motion, the District Court recognized that Mr. Buck's trial counsel's performance was constitutionally deficient. The court explained that, by calling Dr. Quijano as an expert witness, trial counsel "recklessly exposed his client to the risks of racial prejudice and introduced testimony that was contrary to his client's interests." App. D at 14. Remarkably, the court nonetheless concluded that trial counsel's introduction of this "expert" race-as-dangerousness evidence had only a "*de minimis*" effect on Mr. Buck's sentencing proceeding. App. D at 10. As a result, the court found that Mr. Buck was not prejudiced by his counsel's deficient performance, and that his case is not extraordinary within the meaning of Rule 60(b). App. D at 10.; *see also* App. C at 3. The District Court also denied a COA. App. D at 14-15.

Mr. Buck filed an application for a COA with the Fifth Circuit. With respect to *Strickland* prejudice, Mr. Buck showed that, far from being "*de minimis*," testimony from a purported "defense expert" that a defendant is more likely to be dangerous in the future because of his race is uniquely prejudicial—especially in the context of a capital sentencing proceeding, given "the range of discretion entrusted to a jury," and the fact that a "juror who believes that blacks are violence prone . . . might well be influenced by that belief in deciding" whether to impose the death penalty. *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion).

Mr. Buck's demonstration of prejudice in his case is especially clear because the State's evidence of future dangerousness was far from overwhelming. Indeed, another defense expert, Dr. Patrick Lawrence, testified that Mr. Buck's records showed that he "did not present any problems in the prison setting" and that he had been held in minimum custody. *See* Tr. 196, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June 24, 2005), ECF No. 5-116, pp. 13. Dr. Lawrence, who had previously evaluated roughly 900 prisoners convicted of homicide, and found that many were likely to be dangerous in the future, concluded and testified that Mr. Buck was not likely to commit criminal acts of violence in the future. *See* Tr. 177, 182-186, 188-204, 205-06, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June 24, 2005) ECF Nos. 5-115, pp. 34, 39-41; 5-116, pp. 2-3, 22-23; 5-116, pp. 5-21. Moreover, the jury reached a sentencing decision only after substantial deliberations, which included sending three notes to the court—the third of which requested the "expert" reports, including Dr. Quijano's. *See* Jury Requests, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June 24 2005), ECF No. 5-9, pp. 1-4. The Fifth Circuit neither disputed these points, nor approved of the District Court's analysis under *Strickland*'s prejudice prong.

Despite Mr. Buck's showing of prejudice in his case, the Fifth Circuit denied Mr. Buck's application because it concluded that Mr. "Buck has not made out even a minimal showing that his case is exceptional," within the meaning of Rule 60(b). App. B at 7. Mr. Buck sought *en banc* review of the panel's decision but, over the dissent of Judge Dennis, his application was denied. App. A. Judge Dennis, joined by Judge Graves, explained that a COA clearly should have issued, and that the

panel's contrary decision was consistent with the Fifth Circuit's "'troubling' habit of evaluating the merits of petitioners' [COA application] claims." *Id.* at 3 (quoting *Jordan v. Fisher*, 135 S. Ct. 2647, 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari)). Judge Dennis observed that "[r]ather than consider whether reasonable jurists could disagree with the district court and conclude that Buck's allegations 'set up an extraordinary situation,' the panel went through the factors one by one and determined that each was 'not extraordinary.'" *Id.* at 4 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). He further explained that the panel "'dismisse[d], miscast[], and minimize[d] [Mr. Buck's] evidence, diluting its full weight by disaggregating it and focusing the inquiry on determining whether each isolated piece of evidence, taken alone,' proves extraordinary circumstances." *Id.* (citation omitted). By contrast, "[a] proper threshold inquiry into Buck's claim would have revealed that reasonable jurists could disagree with the district court's conclusions," because the factors presented by Mr. Buck "describe a situation that is at least debatably 'extraordinary.'" *Id.* Judge Dennis noted that this conclusion is confirmed by the fact that—even before Mr. Buck was permitted to present his IAC claim—Justice Sotomayor, joined by Justice Kagan, found that Mr. Buck's case "'presented issues that 'deserve encouragement to proceed further.'" App. A at 6 (quoting *Buck*, 132 S. Ct. at 28 (internal citation omitted)).

REASONS FOR GRANTING THE WRIT

The panel's decision contravened this Court's precedent and deepened two circuit splits in a case raising an issue of national significance: whether the criminal justice system will tolerate a death sentence that is imposed after the introduction of "defense expert" testimony and a "defense expert" report unequivocally stating that the defendant is more likely to be dangerous in the future—the critical issue in determining his eligibility for death—because he is Black.

This Court has repeatedly stressed that racial discrimination in the administration of justice is exceptional, and that courts must be particularly vigilant about eliminating it in capital cases. Disregarding this settled precedent, the Fifth Circuit concluded that Mr. Buck "has not made out even a minimal showing that his case is exceptional," and that trial counsel's needless decision to inject "expert" evidence that Mr. Buck was more deserving of a death sentence because he is Black is "unremarkable as far as IAC claims go." App. B at 9. But the nature and consequence of trial counsel's presentation of this "expert" evidence is different in kind than the errors committed by counsel in almost any other ineffectiveness case. This is not a case where, for example, trial counsel failed to investigate mitigating evidence that might provide a basis for a sentence less than death. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510 (2003). Instead, this is a case where, as the District Court found, Mr. Buck's trial counsel "recklessly exposed his client to the risks of racial prejudice" and "len[t] credence to any potential latent

racial prejudice held by the jury." App. D at 14. Because the injection of racial discrimination into the judicial process "poisons public confidence in the evenhanded administration of justice," *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015), the patently deficient performance of Mr. Buck's trial counsel not only undermines confidence in Mr. Buck's death sentence, it undermines confidence in the criminal justice system as a whole.

It is precisely for this reason that Texas conceded error and promised six identified prisoners—including Mr. Buck—that it would not object or interpose procedural defenses if they sought to obtain new sentencing proceedings. Texas kept its promise to every single one of those prisoners, except Mr. Buck.

Then, in 2011, two opinions, reflecting the opinions of five Justices of this Court, underscored the exceptional nature of Mr. Buck's case. Justice Alito, joined by Justices Scalia and Breyer, explained that "[t]he petition in this case concerns bizarre and objectionable testimony given by a 'defense expert' at the penalty phase of Buck's capital trial." *Buck*, 132 S. Ct. at 33. Justice Alito concluded that Mr. Buck's certiorari petition—which then raised only a prosecutorial misconduct claim—should be denied because defense counsel, rather than the prosecution, was responsible for injecting race into the proceeding. *See id.* at 33, 35. Justice Sotomayor, joined by Justice Kagan, dissented from the denial of certiorari, stressing that Mr. Buck's death sentence is "marred by racial overtones," which "our criminal justice system should not tolerate . . . especially in a capital case." *Id.* at 35.

For all of these reasons, Mr. Buck's case is extraordinary under any conceivable understanding of the word and the panel's decision to the contrary is wrong under any standard of review. Further, in denying Mr. Buck a COA, the decision below continues the Fifth Circuit's "troubling" pattern of failing to follow this Court's COA precedent. *Jordan*, 135 S. Ct. at 2652 n.2 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari). Indeed, a review of capital § 2254 cases over the last five years shows that in 59% of cases arising out the Fifth Circuit, a COA was denied by both the district court and Court of Appeals on all claims. By contrast, during that same period, only 6.25% cases arising out of the Eleventh Circuit and 0% of cases arising out of the Fourth Circuit have had a COA denied on all claims.

For all these reasons, and those discussed more fully herein, certiorari should be granted.

I. Certiorari Should Be Granted Because Reasonable Jurists Could Unquestionably Debate The Extraordinariness of The Circumstances Identified by Mr. Buck.

This Court's precedent is clear: a COA involves only a threshold analysis and preserves full appellate review of potentially meritorious claims. Thus, "a prisoner seeking a COA need only demonstrate 'a substantial showing'" that the district court erred in denying relief. *Miller-El*, 537 U.S. at 327 (quoting *Slack v. McDaniel*, 529 U.S. at 473, 484 (2000) and 28 U.S.C. § 2253(c)(2)). This "threshold inquiry" is satisfied so long as reasonable jurists could either disagree with the district court's decision or "conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327, 336. A COA is not contingent upon proof "that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

In sum, the touchstone is "the debatability of the underlying constitutional claim [or procedural issue], not the resolution of that debate." *Id.* at 342; *see also id.* at 348 (Scalia, J., concurring) (recognizing that a COA is required when the district court's denial of relief is not "undebatable"). Applying this standard in *Miller-El*, this Court reversed the Fifth Circuit's denial of a COA in a jury discrimination case, and explained that "a COA can be supported by <u>any evidence</u> demonstrating that, despite the neutral explanation of the prosecution, the peremptory strikes in the final analysis were race based." *Id.* at 340 (emphasis added).

As explained in detail above, Mr. Buck's Rule 60(b) application pled numerous exceptional circumstances, which, as summarized by Judge Dennis's dissent from the denial of rehearing *en banc*, include the following:

- Mr. Buck "faces execution based on a capital sentencing proceeding whose reliability was fundamentally compromised by the race-based testimony of Dr. Walter Quijano";

- The "State of Texas identified his case as one of six that was 'similar' to that of Victor Hugo Saldaño, in which the State admitted that Dr. Quijano's testimony and the resulting 'infusion of race as a factor for the jury to weigh in making its determination violated [Mr. Saldaño's] constitutional right to be sentenced without regard to the color of his skin'";

- The "procedural default that barred [Mr. Buck's] present [ineffective assistance of counsel] claim should have been waived by the State pursuant to representations made by the Texas Attorney General";

- "[F]ollowing the Supreme Court's decisions in *Martinez* . . . and *Trevino* . . ., the same procedural default would not bar his claim if it were brought in federal court for the first time today";

- Three Judges on the Texas Court of Criminal Appeals dissented from that court's dismissal of Mr. Buck's successor state habeas petition, noting "'[t]he record in this case reveals a chronicle of inadequate representation at every stage of the proceedings, the integrity of which is further called into question by the admission of racist and inflammatory testimony from an expert witness at the punishment phase'"; and

- Even when considering solely Mr. Buck's prosecutorial misconduct claim, Justice Sotomayor concluded that, "[e]specially in light of the capital nature of this case and the express recognition by a Texas attorney general that the relevant testimony was inappropriately race-charged, Buck has presented issues that 'deserve encouragement to proceed further.'"

App. A at 5-6. (internal quotations and citations omitted).

As Judge Dennis recognized, these facts and circumstances, at a minimum, make the threshold showing that requires a COA. App. A at 6. The panel's

contrary conclusion—that Mr. "Buck has not made out even a minimal showing that his case is exceptional," within the meaning of Rule 60(b), App. B at 7—is a direct product of its failure to adhere to this Court's precedent. Instead of assessing the debatability of the District Court's opinion, the panel improperly rejected Mr. Buck's ineffectiveness claim on its merits; instead of engaging in the comprehensive, equitable analysis required by Rule 60(b), the panel isolated and disregarded critical aspects of Mr. Buck's case; and instead of acknowledging the unique harm caused by the injection of racial bias and discrimination into Mr. Buck's capital sentencing proceedings, the panel ignored it. Certiorari is warranted.

A. The Panel Improperly Sidestepped the COA Process by Denying Relief Based on its View of the Merits.

In reviewing the facts and circumstances of Mr. Buck's case, the Fifth Circuit panel "pa[id] lipservice to the principles guiding issuance of a COA," *Tennard v. Dretke*, 542 U.S. 274, 283 (2004), but actually held Mr. Buck to a far more onerous standard. Specifically, the panel "sidestep[ped the threshold COA] process by first deciding the merits of [Mr. Buck's] appeal, and then justifying its denial of a COA based on its adjudication of the actual merits," thereby "in essence deciding an appeal without jurisdiction." *Miller-El*, 537 U.S. at 336-37; *see* App. A at 2 (Dennis, J., dissenting).

As this Court stressed in *Miller-El*, the threshold nature of the COA inquiry "would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail."

Miller-El, 537 U.S. at 337. Yet that is precisely what the panel did here. In Judge Dennis's words:

> Rather than consider whether reasonable jurists could disagree with the district court and conclude that Buck's allegations "set up an extraordinary situation," *Ackermann v. United States*, 340 U.S. 193, 199 (1950), the panel went through the factors one by one and determined that each was "not extraordinary." *Buck*, Slip Op. at 9-10. At the end of this flawed analysis of the merits of Buck's claims, the panel conclusorily declared: "Jurists of reason would not debate that Buck has failed to show extraordinary circumstances justifying relief." *Id*. at 10.

App. A at 4; *cf. Harrington v. Richter*, 562 U.S. 86, 101 (2011) (noting the court of appeals failed to apply the proper AEDPA standard when it "conducted a de novo review" and then "declared, without further explanation," that the state court's contrary conclusion was unreasonable).

The panel impermissibly sidestepped the COA inquiry in this manner by denying relief because, in its view: (1) Mr. Buck's IAC claim is "unremarkable"; and (2) the "broken-promise element to this case makes it odd and factually unusual" but not extraordinary within the meaning of Rule 60(b). App. B at 9-10. These statements reflect the panel's (profoundly wrong) assessment of the merits of Mr. Buck's Rule 60(b) motion and complete departure from the proper COA analysis. The panel's sole inquiry should have been whether a reasonable jurist could conclude that Mr. Buck's IAC claim is remarkable, or that Texas's broken promise is not just "odd and factually unusual," but extraordinary.[10]

[10] The panel also stated that Mr. Buck has not "established that the AG's office promised not to raise procedural defenses in Buck's case," *Buck*, App. B at 3 n.1, but the Attorney General's own press releases—which specifically named Mr. Buck—and the AG's statements to the media make its commitment to Mr. Buck abundantly clear. *See* n.4, *supra*. Furthermore, any questions about

The Fifth Circuit's failure to apply the proper COA standard in this case is not an isolated error. This Court has twice corrected the Fifth Circuit's unduly restrictive approach to granting COAs. *See Tennard*, 542 U.S. at 283; *Miller-El*, 537 U.S. at 327. And just last Term, three Justices noted that the Fifth Circuit continues its "troubling" pattern of failing to apply the threshold COA standard required by this Court's precedent. *Jordan*, 135 S. Ct. at 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari).

The Fifth Circuit's troubling pattern has resulted in a demonstrable circuit split with respect to the application of the COA standard. As described in Appendix F, a review of electronically available capital § 2254 cases in the Fifth Circuit and two other nearby circuits (the Fourth and Eleventh) in the last five years, demonstrates a dramatic difference among the three circuits. In the Fifth Circuit, a COA was denied on all claims by both the district court and the court of appeals 59% of the time. By contrast, during that same period, a COA was denied on all claims by both the district court and court of appeals in only 6.25% of capital § 2254 cases in the Eleventh Circuit and 0% of such cases in the Fourth Circuit. *See* App. F. This stark disparity quantifiably demonstrates that the Fifth Circuit's application of the COA standard is significantly different from, and more burdensome than, that of the Fourth and Eleventh Circuits, which are more consistent with one another.

Mr. Buck's evidence are properly addressed at an evidentiary hearing. They certainly do not justify the denial of relief (much less a COA) without a hearing.

B. The Panel Failed to Undertake the Equitable Rule 60(b) Inquiry Mandated by this Court's Precedent.

The panel also disregarded this Court's precedent establishing that Rule 60(b) is an equitable remedy, which "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863-64 (1988) (quoting *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949)). As with any equitable standard where the touchstone is accomplishing justice, a court must "examine all of the circumstances" to determine whether "collectively [they establish] extraordinary circumstances for purposes of Rule 60(b)(6)." *Ramirez v. United States*, 799 F.3d 845, 851 (7th Cir. 2015)*; see Klapprott*, 335 U.S. at 615 (analyzing circumstances collectively in concluding that reopening the judgment was appropriate under Rule 60(b)).

Instead of following this equitable, holistic approach, the Fifth Circuit panel in this case "went through the factors one by one, and determined that each was 'not extraordinary'"; and, in so doing, it improperly "dilut[ed] [the] full weight" of the circumstances identified by Mr. Buck. App. A at 4 (Dennis, J., dissenting). For example, the panel deemed it irrelevant that Mr. Buck's habeas petition was denied without review of his IAC claim because "it is the nature of procedural defaults that many potentially viable claims will never advance to a merits determination." App. B at 9. Similarly, the panel concluded that this Court's intervening decisions in *Martinez* and *Trevino*, which would allow merits review of Mr. Buck's IAC claim,

were of no consequence because "'a change in decisional law' . . . is not an extraordinary circumstance under Rule 60(b)(6)." App. B at 9 (citation omitted).

By isolating, and then categorically discounting, these circumstances, the Fifth Circuit failed to undertake the equitable, case-specific analysis mandated by this Court's precedent. As a preliminary matter, a "prisoner's inability to present a claim of trial error [for merits review] is of particular concern when the claim is one of ineffective assistance of counsel," because the "right to the effective assistance of counsel at trial is a bedrock principle in our justice system." *Martinez*, 132 S. Ct. 1317. Moreover, this case does not involve an ordinary IAC claim. If it is a matter of "particular concern" whenever an IAC claim is defaulted, *id*., it is a matter of far graver concern where—as here—trial counsel's ineffectiveness caused the "the admission of racist and inflammatory testimony from an expert witness at the punishment phase," *Ex parte Buck*, 418 S.W.3d at 98 (Alcala, J., joined by Price and Johnson, JJ., dissenting), and undermined the integrity of both the petitioner's death sentence and the criminal justice system overall. Yet, the Fifth Circuit panel failed to consider the extraordinary circumstances identified by Mr. Buck and improperly treated Mr. Buck's case like any other involving a procedural default and change in decisional law.

The Fifth Circuit's analysis is not only inconsistent with this Court's precedent, it also deepens a circuit split concerning the proper application of Rule 60(b) post-*Martinez*. The Fifth and Eleventh Circuits have categorically concluded that *Martinez*'s change in decisional law is not an extraordinary circumstance for

purposes of Rule 60(b). *See Adams v. Thaler*, 679 F.3d 312, 320 (5th Cir. 2012); *Hamilton v. Sec'y, Florida Dep't of Corrections*, 793 F.3d 1261, 1266 (11th Cir. 2015) (noting split with Third Circuit).[11] By contrast, the Third and Seventh Circuits have held that *Martinez* is relevant and must be considered along with all of the equitable factors identified by the petitioner to determine whether Rule 60(b) relief is warranted. The Court in *Cox v. Horn*, 757 F.3d 113, 122 (3d Cir. 2014), explained that the Fifth Circuit's categorical approach fails "to consider the full set of facts and circumstances attendant to the Rule 60(b)(6) motion under review," and is thereby inconsistent with the "flexible, multifactor approach . . . that takes into account all the particulars of a movant's case," as required by Rule 60(b).[12] *Accord Ramirez*, 799 F.3d at 850 (expressly agreeing with *Cox*). *Cox* further held that the district court abused its discretion by relying on the categorical approach, without "consider[ing] how, if at all, the capital aspect of this case or any other factor highlighted by the parties would figure into its 60(b)(6) analysis." *Cox*, 757 F.3d at 124.

[11] Although the panel below did not decide whether other equitable factors can be relevant in habeas cases under Rule 60(b), the panel expressly reiterated prior Fifth Circuit precedent holding that the change in decisional law caused by *Martinez* is not. App. B at 9.

[12] The Third Circuit further explained that the categorical approach is not authorized by this Court's decision in *Gonzalez*, 545 U.S. at 524. Instead, "*Gonzalez* merely highlights, in action, the position of both the Supreme Court and this Court that '[i]ntervening developments in the law by themselves *rarely* constitute the extraordinary circumstances required for relief under Rule 60(b)(6).' And, to be clear, the *Gonzalez* Court examined the individual circumstances of the petitioner's case to see whether relief was appropriate. . . ." *Cox*, at 757 F.3d at 123 (emphasis in *Cox*) (citations omitted).

C. The Fifth Circuit Disregarded the Special Harm Caused By Racial Discrimination Infecting the Administration of Justice.

In its decision denying Mr. Buck a COA, the panel repeated an error that this Court corrected in *Miller-El*, *viz*., denying a COA by failing to "give full consideration to the substantial evidence" presented by the habeas petitioner. *Miller-El*, 537 U.S. at 341. As Judge Dennis explained: "like the 'dismissive and strained interpretation' of a petitioner's evidence that was rejected by the Supreme Court" in *Miller-El*, the panel's opinion in Mr. Buck's case "'dismisses, miscasts, and minimizes Buck's evidence.'" App. A at 4 (citation omitted). As a result, the panel treated this exceptional case—which involves express racial bias at a capital sentencing hearing—as if it were an ordinary habeas petition.

As discussed, the panel declared that "Buck's IAC claim . . . is at least unremarkable as far as IAC claims go." App. B at 9. The only way that the panel could have reached such a patently incorrect conclusion is by disregarding the facts at the heart of Mr. Buck's case. To reiterate, Mr. Buck's claim is that his trial counsel unreasonably presented the sentencing jury with evidence from a psychologist, who was stamped with the trial court's imprimatur as an expert, that Mr. Buck was more likely to be dangerous in the future—the critical question that would determine whether Duane Buck would receive a death sentence—because he is Black. Yet, the panel did not even mention race in the portions of its opinion concluding (a) that Mr. Buck's IAC claim was "unremarkable," and (b) that the circumstances identified by Mr. Buck were "not extraordinary at all in the habeas context." App. B at 9.

The panel's error on this point is a fundamental one, which requires this Court's review. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Despite the constitutional prohibition on such discrimination, "'it is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors.'" *Miller-El v Dretke*, 545 U.S. 231, 237 (2005) (citation omitted). The risk that racial discrimination will taint criminal trials is especially pronounced in capital sentencing proceedings: "Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Turner*, 476 U.S. at 35 (plurality opinion). And the risk is greater still where, as here, future dangerousness is at issue: "a juror who believes that blacks are violence prone . . . might well be influenced by that belief" in deciding whether to impose death. *Id.* Moreover, when racial discrimination infects a criminal trial, the injury is not simply to the defendant, it is "to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Rose*, 443 U.S. at 556.

Mr. Buck's ineffective assistance of counsel claim—unlike an ordinary IAC claim—thus implicates "public confidence in the evenhanded administration of justice." *Davis*, 135 S. Ct. at 2208. It bears repeating that, despite this Court's "'unceasing efforts' to eradicate racial prejudice from our criminal justice system" (especially in capital cases), *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987), the jury

that decided whether Mr. Buck would live or die was presented with testimony from a "defense expert" that he was more likely to be dangerous in the future—the key issue concerning his eligibility for a death sentence—because he is Black.

The fact that Mr. Buck's trial counsel injected an explicit appeal to racial bias, fear and stereotype into the sentencing proceedings establishes that Mr. Buck's ineffectiveness claim, and, indeed, his case overall, is extraordinary. It is for that reason that Texas promised to concede error and waive its procedural defenses in Mr. Buck's case, and others like it. As Texas told this Court in *Saldaño*, "the use of race in [a capital] sentence seriously undermine[s] the fairness, integrity, or public reputation of the judicial process." Tex.'s Resp. to Pet. for Cert., *Saldaño v. Texas*, No. 99-8119 (U.S. May 3, 2000). That principle is as true for Mr. Buck's case as it was for *Saldaño*.

And the fact that Texas kept its promise in every case except Mr. Buck's makes his case even more extraordinary. The Fifth Circuit panel acknowledged that the "broken-promise element to this case makes it odd and factually unusual," but concluded that it was irrelevant because "extraordinary circumstances are not merely found on the spectrum of common circumstances to unique circumstances." App. B at 10. The panel cited no support for this *ipse dixit*, and failed to acknowledge that the difference, if any, between an "odd and factually unusual" circumstance and an "extraordinary" circumstance is precisely the kind of issue that could be debated by reasonable jurists.

Moreover, the panel's conclusion once again disregards the core of why this case is exceptional. Texas not only promised to concede error and waive procedural defenses and then reneged on its promise; Texas promised to concede error and waive procedural defenses because it recognized that doing so was necessary to protect the "integrity or public reputation" of the criminal justice system, and then reneged on its promise. Tex.'s Resp. to Pet. for Cert., *Saldaño*, No. 99-8119 (U.S. May 3, 2000). Thus, contrary to the panel's conclusion, *see* App. B at 10, whether or not Mr. Buck detrimentally relied on Texas's promise is irrelevant. Texas's broken promise is an extraordinary circumstance "'justifying relief from the judgment'" because Texas itself recognized that making such a promise was necessary to uphold the integrity of the courts.

CONCLUSION

For all of the foregoing reasons, Mr. Buck's case is extraordinary. At a minimum, reasonable jurists could so conclude, which means a COA must issue. This Court's review is warranted not only to resolve two circuit splits, but to maintain public confidence that courts will not permit an execution tainted by "expert" testimony explicitly linking race to dangerousness.

Respectfully submitted,

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Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-70030

United States Court of Appeals
Fifth Circuit
FILED
November 6, 2015
Lyle W. Cayce
Clerk

DUANE EDWARD BUCK,

Petitioner–Appellant,

versus

WILLIAM STEPHENS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent–Appellee.

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING EN BANC
(Opinion August 20, 2015, 2015 U.S. App. LEXIS 14755)

Before SMITH, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor

(FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

In the en banc poll, 2 judges voted in favor of rehearing (Judges Dennis and Graves), and 13 judges voted against rehearing (Chief Judge Stewart and Judges Jolly, Davis, Jones, Smith, Clement, Prado, Owen, Elrod, Southwick, Haynes, Higginson, and Costa).

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

* * * * * * *

JAMES L. DENNIS, Circuit Judge, with whom GRAVES, Circuit Judge, joins, dissenting:

In *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003), the Supreme Court held that the threshold inquiry required by 28 U.S.C. § 2253(c):

> does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

In my view, the panel in this case, perhaps unintentionally, followed that prohibited side-stepping process by justifying its denial of a COA based on its adjudication of the actual merits. This is not the first time that a panel of this

court has flouted *Miller-El*'s clear command when denying a COA: our court's "troubling" habit of evaluating the merits of petitioners' claims has been noted by three Supreme Court justices. *See Jordan v. Fisher*, 135 S. Ct. 2647, 2652 n.2 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari). Because I believe that Buck has made the requisite threshold showing of entitlement to relief, I respectfully dissent from the refusal to rehear his case en banc.

Duane Buck, a capital prisoner, seeks to raise ineffective assistance of counsel in federal habeas corpus proceedings. His habeas petition was denied by the district court as procedurally barred. Buck has now applied to this court for a COA to challenge the district court's denial of his second motion for relief from judgment under Rule 60 of the Federal Rules of Civil Procedure, in which he alleged that extraordinary circumstances warrant reopening the proceedings. Under *Slack v. McDaniel*, 429 U.S. 473, 484 (2000), a COA should issue in Buck's case if he shows (1) that jurists of reason would find debatable "whether the petition states a valid claim of the denial of a constitutional right" and (2) that those jurists "would find it debatable whether the district court was correct in its procedural ruling." Yet the panel denied Buck's application on the grounds that "he has not shown extraordinary circumstances that would permit relief under Federal Rule of Civil Procedure 60(b)(6)." *Buck v. Stephens*, Slip Op. at 1 (Aug. 20, 2015). By ruling on the merits, the panel contravened the Supreme Court's clear commands and improperly denied Buck his right to appeal.

In *Miller-El*, the Supreme Court reiterated that, when evaluating a COA application, "the court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." 537 U.S. at 326. A petitioner is not required to demonstrate that he is entitled to relief; in fact,

"[i]t is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief." *Id.* at 337. Rather, a petitioner satisfies the *Slack* standard "by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.* at 327 (emphasis added). Furthermore, under this court's established precedent, "any doubt as to whether a COA should issue in a death-penalty case must be resolved in favor of the petitioner." *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005) (citing *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004) (per curiam); *Newton v. Dretke*, 371 F.3d 250, 254 (5th Cir. 2004)).

In his application, Buck presented eleven factors that, when considered together, he believes demonstrate that his case involved extraordinary circumstances. Rather than consider whether reasonable jurists could disagree with the district court and conclude that Buck's allegations "set up an extraordinary situation," *Ackermann v. United States*, 340 U.S. 193, 199, (1950), the panel went through the factors one by one and determined that each was "not extraordinary." *Buck*, Slip Op. at 9-10. At the end of this flawed analysis of the merits of Buck's claims, the panel conclusorily declared: "Jurists of reason would not debate that Buck has failed to show extraordinary circumstances justifying relief." *Id.* at 10. This analysis would not be sufficient even if the court were properly considering the merits of Buck's claims: like the "dismissive and strained interpretation" of a petitioner's evidence that was rejected by the Supreme Court first in *Miller-El*, 537 U.S. at 344, and then again in *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005), the panel "dismisses, miscasts, and minimizes [Buck's] evidence, diluting its full weight by disaggregating it and focusing the inquiry on determining whether each

isolated piece of evidence, taken alone,"[1] proves extraordinary circumstances. This mischaracterization is still more deficient at this stage in the proceedings, where it is employed to aid the panel in "deciding [Buck's] appeal without jurisdiction." *Miller-El*, 537 U.S. at 326-27.

"[P]roving his claim was not [Buck's] burden." *Jordan*, 135 S. Ct. at 2652. A proper, threshold inquiry into Buck's claim would have revealed that reasonable jurists could disagree with the district court's conclusions. Buck asserts that he faces execution based on a capital sentencing proceeding whose reliability was fundamentally compromised by the race-based testimony of Dr. Walter Quijano. He asserts that the State of Texas identified his case as one of six that was "similar" to that of Victor Hugo Saldaño, in which the State admitted that Dr. Quijano's testimony and the resulting "infusion of race as a factor for the jury to weigh in making its determination violated [Mr. Saldaño's] constitutional right to be sentenced without regard to the color of his skin." State's Resp. to Pet. for Cert, at 8, *Saldano v. Texas*, U.S. Supreme Court, No. 99-8119. He asserts that his is the only death sentence identified by the State that has not been overturned because his is the only case in which Dr. Quijano's participation in the trial was the result of the deficient performance of his own defense attorney. He asserts that the procedural default that barred his present claim should have been waived by the State pursuant to representations made by the Texas Attorney General. He asserts that, following the Supreme Court's decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the same procedural default would not bar his claim if it were brought in federal court for the first time today. And he asserts that three judges on the Texas Court of Criminal

[1] Brief of the NAACP LDF, et al., as *Amici Curiae* at 3, *Miller-El v. Dretke*, 545 U.S. 231 (No. 03-9659) 2004 WL 1942171, at *3.

Appeals dissented from the dismissal of his state habeas petition as procedurally barred, concluding that "[t]he record in this case reveals a chronicle of inadequate representation at every stage of the proceedings, the integrity of which is further called into question by the admission of racist and inflammatory testimony from an expert witness at the punishment phase" and that the procedural barrier should therefore be abrogated. *Ex parte Buck*, 418 S.W.3d 98 (Tex. Crim. App. 2013) (Alcala, J., dissenting), *cert. denied sub nom. Buck v. Texas*, 134 S. Ct. 2663 (2014). While each of these factors might, on its own, be insufficient to warrant relief, together they describe a situation that is at least debatably "extraordinary."

That the issue is at least debatable is further illustrated by Justice Sotomayor's dissent from the denial of certiorari in *Buck v. Thaler*, 452 F. App'x 423 (5th Cir. 2011), a previous iteration of this case. Justice Sotomayor—joined by Justice Kagan—concluded that, "[e]specially in light of the capital nature of this case and the express recognition by a Texas attorney general that the relevant testimony was inappropriately race-charged, Buck has presented issues that 'deserve encouragement to proceed further'" and a COA should therefore have been granted. *Buck v. Thaler*, 132 S. Ct. 32, 38 (2011) (quoting *Miller-El*, 537 U.S. at 327).

"Any doubt regarding whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination." *Newton*, 371 F.3d at 254 (5th Cir. 2004). In a case involving the severest of penalties, the panel's summary conclusion that "[j]urists of reason would not debate that Buck has failed to show extraordinary circumstances justifying relief" was both inappropriate and incorrect.

I respectfully dissent.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

November 06, 2015

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 14-70030 Duane Buck v. William Stephens, Director
USDC No. 4:04-CV-3965

Enclosed is an order on Petitions for Rehearing and Rehearing En Banc entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Joseph M. Armato, Deputy Clerk

Ms. Katherine Cooper Black
Mr. David J. Bradley
Ms. Fredericka Searle Sargent
Mr. Samuel Spital
Ms. Christina A. Swarns

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
August 20, 2015
Lyle W. Cayce
Clerk

No. 14-70030

DUANE EDWARD BUCK,

Petitioner–Appellant,

versus

WILLIAM STEPHENS, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent–Appellee.

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:04-CV-3965

Before SMITH, OWEN, and HAYNES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

Duane Buck seeks a certificate of appealability ("COA") to challenge the denial of his motion for reconsideration, in which he sought to raise ineffective assistance of counsel ("IAC") in seeking federal habeas corpus relief. Because he has not shown extraordinary circumstances that would permit relief under

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Federal Rule of Civil Procedure 60(b)(6), we deny the application for a COA.

I.

This is Buck's third trip to the Fifth Circuit. More detailed explanations of the facts and procedural history can be found in *Buck v. Thaler*, 345 F. App'x 923 (5th Cir. 2009) (per curiam), and *Buck v. Thaler*, 452 F. App'x 423 (5th Cir. 2011) (per curiam). We recite only what is relevant to this request for a COA.

In July 1995, Buck murdered his ex-girlfriend Debra Gardner and her friend Kenneth Butler. Buck was arrested at the scene, and police found the murder weapons in the trunk of his car. Two witnesses identified him as the shooter. Buck laughed during and after the arrest and stated to one officer that "[t]he bitch got what she deserved."

Buck was convicted of capital murder for the deaths. During the penalty phase, the state presented evidence that Buck would likely remain dangerous. That evidence included his criminal history, his violent conduct, and his demeanor during and after the arrest.

Buck called Dr. Walter Quijano, a clinical psychologist, as an expert witness to testify regarding future dangerousness. Buck's lawyer asked Quijano what factors he would look at to determine whether an inmate would engage in future acts of violence. Quijano explained several, including age, sex, race, social economics, and substance abuse. For example, he testified that advanced age and increased wealth correlated with a decline in the likelihood of committing future violent acts. On race, he gave a one-sentence explanation: "It's a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System." That matched a statement included in Quijano's expert report, which was introduced as evidence.

During cross-examination, the prosecution elicited one more comment on

race from Quijano: Question: "You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?" Answer: "Yes." During closing arguments, the prosecution referenced Quijano's testimony generally and specifically noted that he had said that, although Buck was in the low range for a probability of committing future violent acts, the probability did exist. The prosecution did not reference Buck's race or Quijano's use of race.

The jury unanimously found beyond a reasonable doubt that there was a probability Buck would commit criminal acts of violence that would be a continuing threat to society. It further found that there were not sufficient mitigating circumstances to justify a life sentence. The court sentenced Buck to death, and the Texas Court of Criminal Appeals ("TCCA") affirmed.

Buck filed his first state habeas application in 1997; it contained no IAC claim or any other challenge based on Quijano's testimony. In 2000, however, the Texas Attorney General ("AG") admitted to the Supreme Court in *Saldano v. Texas*, 530 U.S. 1212 (2000), that the state had erred in calling Quijano as a witness and having him testify that the defendant's race increased the likelihood of future dangerousness. Shortly after the Court vacated and remanded *Saldano* on that confession of error, the AG publicly identified eight other cases involving racial testimony by Quijano, six of which the AG said were similar to Saldano's case; one of those was Buck's. Buck contends that Texas "promised to concede constitutional error and waive its procedural defenses" in his case so that he could get resentenced without the race-related testimony.[1]

[1] It has never been established that the AG's office promised not to raise procedural defenses in Buck's case. The record contains a news release by the AG's office stating that a post-*Saldano* audit had revealed "eight more cases in which testimony was offered by Dr. Quijano that race should be a factor for the jury to consider in making its determination

In 2002, while his first state habeas petition was pending, Buck filed a second petition that challenged Quijano's testimony on several grounds, including IAC. The TCCA ultimately denied the first habeas petition and dismissed the second as an abuse of the writ.

In 2004, Buck filed a federal habeas petition raising a litany of challenges to his sentence, including IAC. The court denied relief on that claim because Buck had not raised IAC on direct appeal or in his original state habeas petition. He had raised it in his second state habeas petition, but the TCCA dismissed it as an abuse of the writ, so it was procedurally defaulted. Buck sought a COA from this court on only one issue: "Was he deprived of due process or equal protection by the prosecution's reference to testimony from Buck's own penalty-phase expert witness . . . ?" *Buck*, 345 F. App'x at 924. We concluded that the claim was procedurally barred and meritless. *Id.* at 930.

After the state set an execution date of September 15, 2011, Buck moved for relief from the earlier district-court judgment under Federal Rule of Civil Procedure 60(b)(6), claiming that the state's failure to admit error and waive defenses was extraordinary and merited relief. The motion also asked for relief under Rule 60(d)(3), alleging that the AG had committed fraud on the court.

---

about the sentence in a capital murder trial," of which six were similar to *Saldano*. The same release stated that the AG's office "sent letters to opposing counsel and to the local prosecutors involved advising them of [the AG's] investigation." But we have found no statement by the AG in the record in which he confessed error relating to Buck's case and promised not to raise procedural defenses.

The record contains a *Houston Chronicle* article from 2000 that paraphrases the AG's spokesperson as saying, "If the attorneys amend their appeals currently pending in federal court to include objections to Quijano's testimony, the attorney general will not object." The spokesperson is quoted as representing that cases still with the district attorney's offices "will be handled in a similar manner as the Saldano case." A *New York Times* article went further, stating, "[The AG's] staff has notified defense lawyers representing the six inmates that his office will not object if they seek to overturn the death sentences based on Mr. Quijano's testimony." Because it does not change the outcome of this appeal, we need not explore whether such a promise was made or how explicit it was.

The district court denied the motion and, three days later, Buck filed a motion to amend the judgment under Rule 59(e), claiming that the AG had made material misrepresentations and omissions in opposing the earlier motion for relief. The court denied that motion as well. We declined to permit a successive habeas petition or issue a COA. *Buck*, 452 F. App'x at 433.

The Supreme Court stayed Buck's execution to consider his petition for writ of certiorari. It ultimately denied the petition, accompanied by a statement respecting that denial and a dissent. *Buck v. Thaler*, 132 S. Ct. 32, 32–35 (2011) (Alito, J., respecting the denial of certiorari); *id.* at 35–38 (Sotomayor, J., dissenting from the denial of certiorari).

In 2013, Buck filed another state habeas petition. The trial court concluded that it was a subsequent petition and referred it to the TCCA. While that petition was pending, the Supreme Court decided *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), holding that Texas's procedural regime rendered it almost impossible to raise IAC claims on direct appeal, making the scheme similar to the one in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). The Court therefore held that the *Martinez* exception applied in Texas: The lack of effective counsel during initial state collateral-review proceedings could excuse a procedural default on an IAC claim. *Trevino*, 133 S. Ct. at 1921.

The TCCA dismissed the petition as an abuse of the writ. *Ex parte Buck*, 418 S.W.3d 98 (Tex. Crim. App. 2013). Three judges dissented, concluding that Buck had made out a potentially meritorious case of IAC relating to his attorney's alleged failure adequately to investigate and present mitigating evidence. *Id.* at 98–114 (Alcala, J., dissenting).

In January 2014, Buck again filed for Rule 60(b)(6) relief from judgment in his federal habeas case. He focused solely on his IAC claim, contending that counsel was ineffective for introducing Quijano and that his case was

sufficiently extraordinary to justify relief under Rule 60(b)(6). The district court denied the motion, holding that Buck's case did not have the extraordinary circumstances required for Rule 60(b)(6). It also held that Buck had failed to make out an IAC claim, establishing deficient performance but not prejudice. Within a month of that denial, Buck again moved for relief under Rule 60(b)(6), essentially disagreeing with the district court's disposition of the issues. On March 11, 2015, the district court denied that motion as well and declined to issue a COA.

II.

To obtain a COA, Buck must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). On application for a COA, we engage in "an overview of the claims in the habeas petition and a general assessment of their merits" but do not engage in "a full consideration of the factual or legal bases adduced in support of the claims," asking only whether the district court's resolution of the claim "was debatable among jurists of reason." *Miller-El*, 537 U.S. at 322.

The district court denied the motion for a procedural reason, namely, Buck's failure to show extraordinary circumstances justifying relief under Rule 60(b)(6). We therefore must deny a COA if Buck fails to establish both (1) that jurists of reason would find debatable "whether the petition states a valid claim of the denial of a constitutional right" and (2) that those jurists "would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 429 U.S. 473, 484 (2000).

III.

Regarding the procedural bar, for a Rule 60(b)(6) motion in this posture not to be itself a successive habeas petition, the litigant "must not be challenging a prior merits-based ruling." *Balentine v. Thaler*, 626 F.3d 842,

846 (5th Cir. 2010). Instead, he must be challenging a previous ruling—such as procedural default or a statute-of-limitations bar—that precluded a merits determination. *Id.* at 846–47. The district court initially denied Buck's IAC claim because the TCCA's abuse-of-the-writ dismissal was an adequate and independent state ground for denying relief, so Buck's motion satisfies that requirement.

To obtain relief under Rule 60(b)(6), Buck must show "extraordinary circumstances," *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005), which "will rarely occur in the habeas context," *id.* at 535. There is little guidance as to what constitutes "extraordinary circumstances," but we have recognized that a change in a decisional law does not qualify, and we have cited with approval district-court decisions holding other circumstances not extraordinary as well, including IAC. *See Williams v. Thaler*, 602 F.3d 291, 312 (5th Cir. 2010).

Buck contends that eight equitable factors from *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396 (5th Cir. Unit A Jan. 1981), are the proper means for evaluating a Rule 60(b) motion in a habeas case.[2] We have declined to answer whether *Seven Elves* sets the standard for a Rule 60(b)(6) motion in habeas proceedings. *See Diaz v. Stephens*, 731 F.3d 370, 376–77 (5th Cir. 2013). We need not answer it now because Buck has not made out even a minimal showing that his case is exceptional.

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[2] Those factors are "(1) [t]hat final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether if the judgment was a default or a dismissal in which there was no consideration of the merits the interest in deciding cases on the merits out-weighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack." *Seven Elves*, 635 F.2d at 402.

The January 2014 motion contains eleven facts, reurged in the COA application, that Buck says make the case extraordinary:

1. Mr. Buck's trial attorney knowingly presented expert testimony to the sentencing jury that Mr. Buck's race made him more likely to be a future danger;
2. Although required to act as gate-keeper to prevent unreliable expert opinions from reaching and influencing a jury, see Tex. R. Evid. 705(c); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992), the trial court qualified Dr. Quijano as an expert on predictions of future dangerousness, allowed him to present race based opinion testimony to Mr. Buck's capital sentencing jury, and admitted Dr. Quijano's excludable hearsay report linking race to dangerousness;
3. The trial prosecutor intentionally elicited Dr. Quijano's testimony that Mr. Buck's race made him more likely to be a future danger on cross-examination, vouched for him as an "expert" in closing, and asked the jury to rely on Dr. Quijano's testimony to answer the future dangerousness special issue in the State's favor;
4. Mr. Buck's state habeas counsel did not challenge trial counsel's introduction of this false and offensive testimony — or Texas's reliance on it — in Mr. Buck's initial state habeas application;
5. The Texas Attorney General conceded constitutional error in Mr. Buck's case and promised to ensure that he received a new sentencing, but reneged on that promise after deciding that the introduction of the offensive testimony was trial counsel's fault;
6. This Court ruled that federal review of Mr. Buck's trial counsel ineffectiveness claim was foreclosed by state habeas counsel's failure to raise and litigate the issue in Mr. Buck's initial state habeas petition, relying on *Coleman*, which has subsequently been modified by *Martinez* and *Trevino*;
7. The Fifth Circuit held Mr. Buck's trial counsel responsible for the introduction of Dr. Quijano's testimony linking Mr. Buck's race to his likelihood of future dangerousness;
8. Three Supreme Court Justices concluded that trial counsel was at fault for the introduction of Dr. Quijano's testimony;
9. Three Judges of the CCA found that "because [Mr. Buck's] initial habeas counsel failed to include any claims related to Quijano's testimony in his original [state habeas] application, no court, state or

federal, has ever considered the merits of those claims," *Buck*, 2013 WL 6081001, at *5;

10. Mr. Buck's case is the only one in which Texas has broken its promise to waive procedural defenses and concede error, leaving Mr. Buck as the only individual in Texas facing execution without having been afforded a fair and unbiased sentencing hearing; and

11. Martinez and Trevino now allow for federal court review of "substantial" defaulted claims of trial counsel ineffectiveness.

Initial examination of those facts reveals that they are not extraordinary at all in the habeas context. Numbers 1–3, 7, and 8 are just variations on the merits of Buck's IAC claim, which is at least unremarkable as far as IAC claims go. Buck's IAC claim is not so different in kind or degree from other disagreements over trial strategy between lawyer and client that it counts as an exceptional case. Nor are IAC claims as a class extraordinary under Rule 60(b)(6). The Court warned in *Gonzalez*, 545 U.S. at 536, that extraordinary circumstances will rarely be present in the habeas context.

The fourth and ninth extraordinary facts merely point out that Buck's IAC claim was procedurally defaulted and did not get a merits determination. That is not an extraordinary circumstance in the habeas context; it is the nature of procedural defaults that many potentially viable claims will never advance to a merits determination. No jurists of reason would expand the definition of "extraordinary" to reach all procedurally defaulted IAC claims.

The sixth and eleventh facts relate to Buck's notion that *Trevino* and *Martinez* changed the law regarding procedural defaults in IAC claims in a way that could have excused his procedural default. *Martinez*, however, "was simply a change in decisional law" that is not an extraordinary circumstance under Rule 60(b)(6), and "*Trevino*'s recent application of *Martinez* to Texas cases does not change that conclusion in any way." *Diaz*, 731 F.3d at 376 (internal quotation marks omitted).

Those facts plainly fail to make even a plausible argument that Buck's is the extraordinary case that satisfies Rule 60(b)(6). He has repeatedly asserted, however, that his case is special because of the *Saldano*-related statements by the AG. Buck contends the AG conceded that Quijano's testimony was unconstitutional but reneged on a promise to resentence Buck (fact five), despite Texas's following through in other cases involving Quijano (fact ten).

Even if the AG initially indicated to Buck that he would be resentenced—a fact that has never been adequately established, *see* note 1, *supra*—his decision not to follow through is not extraordinary. The broken-promise element to this case makes it odd and factually unusual, but extraordinary circumstances are not merely found on the spectrum of common circumstances to unique circumstances. And they must be extraordinary circumstances "justifying relief from the judgment." *Gonzalez*, 545 U.S. at 537. Buck has not shown why the alleged reneging would justify relief from the judgment. For example, he has not shown that he relied on the alleged promise to his detriment.

Nor is it extraordinary that the AG confessed error and waived procedural bars in other cases and not in Buck's. We have previously rejected the notion that some concept of "intra-court comity" requires the state to waive procedural defenses in similar cases. *See Buck*, 345 F. App'x at 929. Even assuming *arguendo* that the other cases at issue are materially similar to Buck's (which the state disputes), it can hardly be extraordinary that the state chose different litigation strategies between the two cases. Jurists of reason would not debate that Buck has failed to show extraordinary circumstances justifying relief.

Buck has not demonstrated that jurists of reason would debate whether his case is exceptional under Rule 60(b)(6). The request for a COA is DENIED.

Certified as a true copy and issued as the mandate on Aug 20, 2015

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

Appendix C

App. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DUANE EDWARD BUCK,	§	
	§	
Petitioner,	§	
	§	
v.	§	H-04-3965
	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice-Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER

Duane Edward Buck is a Texas death row inmate. On July 24, 2006, this Court denied his petition for a writ of habeas corpus. Among the claims denied were Buck's claims that he received ineffective assistance of counsel when his counsel called as an expert witness Dr. Walter Quijano, who mentioned an issue relating to race during the penalty phase of Buck's trial. Buck further contended that counsel was ineffective for failing to object when the prosecutor asked Dr. Quijano a question raising a racial issue on cross-examination. This Court found that those claims were procedurally defaulted, and the Fifth Circuit denied Buck's request for a certificate of appealability. *See Buck v. Thaler*, 345 Fed. App'x 923 (5th Cir., 2009).

In 2012, the Supreme Court issued its decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), holding that ineffective assistance of state habeas counsel could, in certain

circumstances, constitute cause to excuse a procedural default of an ineffective assistance of trial counsel claim. In *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), the Supreme Court held that *Martinez* is applicable to the Texas capital postconviction process. On January 7, 2014, Buck, relying on *Martinez* and *Trevino*, filed a motion for relief from the judgment of this Court under Rule 60(b)(6) of the Federal Rules of Civil Procedure (Inst. # 49). This Court denied that motion on August 29, 2014.

On September 26, 2014, Buck filed a motion to alter or amend judgment (Inst. # 67). For the reasons stated below, the motion is denied.

A motion to alter or amend under Fed.R.Civ.P. 59(e) "must clearly establish either a manifest error of law or must present newly discovered evidence." *Schiller v. Physicians Resource Grp., Inc.*, 342 F.3d 563, 567 (5th Cir. 2003)(internal quotation marks omitted). "Relief under Rule 59(e) is also appropriate where there has been an intervening change in controlling law." *Id.*

Buck contends that, in denying relief on his Rule 60 motion, this Court "improperly excluded from its consideration significant evidence . . . ." Motion to Alter or Amend (Inst. # 67) at 2. This assertion misrepresents the Court's opinion, which carefully considered all of Buck's argument and the entire record in this case.

This Court based the denial on the Court's extensive knowledge and re-review of the record in this case and independent review of relevant case law. Based on the record and controlling law, the Court concluded that Buck was not entitled to relief. The specific

reasons for the denial of Buck's Rule 60 motion are explained in detail in the 18 page order denying that motion.

Contrary to the assertions in Buck's motion, this Court specifically addressed Buck's arguments that his case presents "extraordinary circumstances" justifying relief, both in the text of the order denying his most recent Rule 60(b) motion, *See* August 29, 2014, Memorandum and Order (Inst. # 66) at 8-10, and by reference to other orders and opinions addressing these arguments, *see id.* at 8. Buck cites no new law in support of his argument and, aside from his wholly inaccurate assertion that this Court excluded evidence from its consideration, merely expresses his disagreement with the Court's analysis and conclusion. That disagreement does not demonstrate a manifest error of law, present newly discovered evidence, or rely on an intervening change in controlling law. It therefore does not provide grounds for relief.

This Court also found that, while Buck's counsel rendered deficient performance, Buck did not demonstrate that he was prejudiced by that deficient performance. Because of this, Buck failed to demonstrate that he presented a substantial underlying claim of ineffective assistance of counsel, and therefore could not overcome his procedural default under *Martinez*. Buck now argues that this Court's prejudice analysis was wrong.

Once again, Buck's argument boils down to mere disagreement with this Court's analysis. While Buck cites a few cases in which a court found that a defendant was prejudiced by counsel's deficient performance in a capital sentencing proceeding despite

evidence of a heinous crime, he cannot dispute that this analysis must be highly fact-specific. As discussed in detail in this Court's prior order, while counsel was deficient for calling Dr. Walter Quijano as an expert witness, any harm caused by his objectionable testimony was *de minimis* in light of, among other things: 1) the extremely limited scope of that testimony; 2) the fact that the prosecution did not refer to the objectionable testimony in closing argument; 3) the facts of Buck's crime, including the fact that he murdered one of his victims in front of her young children as the victim begged for her life; and 4) Buck's lack of remorse. Once again, Buck's argument comes down to the fact that he disagrees with this Court's conclusion that counsel's deficient performance did not, in light of the entire record, raise a reasonable probability that the outcome of the sentencing hearing would have been different had counsel not called Dr. Quijano to testify. *See Strickland v. Washington*, 466 U.S. 668, 694-95 (1984). As discussed above, Buck's disagreement with this Court's analysis does not provide a basis for relief under Rule 59.

Moreover, because this Court's finding that Buck is not entitled to relief is not debatable among jurists of reason, Buck is not entitled to a certificate of appealability from this Order. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). For the foregoing reasons,

IT IS ORDERED THAT Buck's Motion to Alter or Amend Judgment (Inst. # 67) is **Denied**; and

IT IS FURTHER ORDERED THAT no certificate of appealability shall issue.

SO ORDERED.

SIGNED at Houston, Texas, on this 11th day of March, 2015.

VANESSA GILMORE
United States District Judge

Appendix D

App. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DUANE EDWARD BUCK,	§	
	§	
Petitioner,	§	
	§	
v.	§	H-04-3965
	§	
WILLIAM STEPHENS, Director, Texas Department of Criminal Justice-Correctional Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM AND ORDER

Pending is petitioner's motion for relief from judgment (Inst. # 49). Petitioner seeks relief from the judgment of this Court entered on July 24, 2006 (Inst. # 16).

Duane Edward Buck is currently incarcerated on death row in Texas. On July 24, 2006, this Court denied his petition for a writ of habeas corpus. Among the claims denied were Buck's claims that he received ineffective assistance of counsel when his counsel called as an expert witness Dr. Walter Quijano, who mentioned an issue relating to race during the penalty phase of Buck's trial. Buck further contended that counsel was ineffective for failing to object when the prosecutor asked Dr. Quijano a question raising a racial issue on cross-examination. This Court found that those claims were procedurally defaulted, and the Fifth Circuit denied Buck's request for a certificate of appealability. *See Buck v. Thaler*, 345 Fed. App'x 923 (5th Cir., 2009).

In 2012, the Supreme Court issued its decision in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), holding that ineffective assistance of state habeas counsel could, in certain circumstances, constitute cause to excuse a procedural default of an ineffective assistance of trial counsel claim. In *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), the Supreme Court held that *Martinez* is applicable to the Texas capital postconviction process. On January 7, 2014, Buck, relying on *Martinez* and *Trevino*, filed the current motion for relief from the judgment of this Court under Rule 60(b)(6) of the Federal Rules of Civil Procedure (Inst. # 49).

I. Background

The facts are not in dispute. During the early morning hours of July 30, 1995, Harold Ebenezer, his brother Kenneth Butler, Buck's sister Phyllis Taylor, and Debra Gardner all gathered at Gardner's house after a night out playing pool. Buck lived in the house with Gardner on and off over the previous few years, but Gardner and Buck broke up two or three weeks earlier.

Buck banged loudly on Gardner's door and Gardner called "911." Buck then forced the door open and entered the house. He argued with Gardner and struck her. Buck then stated that he was there to pick up his clothes. He retrieved a few things and left.

At about 7:00 a.m., Buck returned with a rifle and shotgun. Upon entering the house, he shot at Ebenezer but missed. Ebenezer fled the house. Buck then walked up to his sister, Taylor, put the muzzle of one of the guns against her chest, and shot her. Taylor survived.

After she was shot, Taylor heard more shots coming from the vicinity of the bedrooms. As she made her way through the house, Taylor saw Butler's body in the hallway. After escaping, Ebenezer also heard two or three more shots fired inside the house. As he came around to the front of the house, Ebenezer saw Gardner walking toward the street with Buck following her.

Devon Green, Gardner's son, hid in the closet after hearing the first shot fired. Shortly thereafter, he heard Buck's voice accusing Butler of sleeping with "his wife,"followed by another gunshot. After a short while, Green looked out into the hall and saw Butler leaning against the wall bleeding. Green then ran outside and saw Buck shoot his mother and put two guns in the trunk of his car. Gardner's teenage daughter, Shennel Gardner, also saw Butler in the hallway after he was shot and then went outside and saw Buck shoot her mother. Both Butler and Gardner died from their wounds.

When police arrived, both Green and Ebenezer identified Buck as the shooter. Police subsequently retrieved a shotgun and a .22 caliber rifle from the trunk of Buck's car.

The case was tried to a jury. The jury found Buck guilty of capital murder at the conclusion of the guilt-innocence phase of the trial.

During the penalty phase, the State presented evidence of Buck's prior convictions for delivery of cocaine and unlawfully carrying a weapon. Vivian Jackson, Buck's ex-girlfriend and the mother of Buck's son, testified that Buck physically abused her and threatened her with a gun. One of the police officers who accompanied Buck after his arrest

testified that Buck was laughing. When the officer commented that he did not think the situation was very funny, Buck responded: "The bitch deserved what she got."

Buck presented evidence that he is a peaceful, nonviolent, person, that his mother died when he was 12 years old, that he worked as an auto mechanic, and that his father served several jail sentences for non-violent felonies. The defense also called Dr. Walter Quijano, a clinical psychologist, as an expert witness. Dr. Quijano opined, based on his evaluation of Buck, that Buck has a dependent personality disorder. People suffering from this disorder can become obsessive about relationships and have a very difficult time letting go after a relationship ends.

Dr. Quijano also testified that several factors can be predictive of future dangerousness. These include, according to Dr. Quijano, past violent behavior, the age and sex of the defendant (with older defendants less likely to be violent in the future, and male defendants more likely than female defendants to be violent), socio-economic status, and history of substance abuse. Dr. Quijano also testified that Latinos and African-Americans are over-represented in the penal system. Applying these factors to Buck, Quijano testified that Buck's lack of a violent past made it less likely that he would be violent in the future. Based on his selection of victims (a former girlfriend) and his prison disciplinary record, Quijano concluded that he is unlikely to be violent in prison.

Buck also called Dr. Patrick Gordon Lawrence, another clinical psychologist. Dr. Lawrence agreed that Buck has a dependent personality and that he poses a low probability

of future violence. The jury found that Buck posed a future danger to society, and that there was insufficient mitigating evidence to justify a sentence of life imprisonment. Accordingly, the trial court sentenced Buck to death.

The Texas Court of Criminal Appeals ("TCCA") affirmed Buck's conviction and sentence on April 28, 1999. *Buck v. State*, No. 72,810 (Tex. Crim. App. Apr. 28, 1999). On March 22, 1997, Buck filed a state habeas corpus petition. On December 13, 2002, he filed a successive state habeas application. On January 23, 2003, the trial court found that Buck's second petition was a subsequent habeas application and ordered the clerk to send it to the TCCA. The trial court recommended denying Buck's original petition on July 23, 2003. On October 15, 2003, the TCCA adopted the trial court's findings and recommendation and denied Buck's first application, and dismissed his second application as an abuse of the writ. *Ex Parte Buck* , Nos. 57,004-01, -02 (Tex. Crim. App. Oct. 15, 2003) (*per curiam*).

On October 14, 2004 , Buck filed his federal petition for a writ of habeas corpus. This Court denied his petition on July 24, 2006, the Fifth Circuit denied Buck's request for a certificate of appealability, *Buck v. Thaler*, No. 06-70035 (5th Cir. Sept. 25, 2009), and the Supreme Court denied his petition for a writ of *certiorari*, *Buck v. Thaler*, 130 S.Ct. 2096 (2010).

On September 7, 2011, Buck filed a motion for relief from this Court's judgment. This Court denied that motion on September 9, 2011 (Inst. # 31). On September 12, 2011, Buck filed a motion to alter or amend the judgment denying his motion for relief from the

judgment. This Court denied that motion on the same day (Inst. # 36). The Fifth Circuit denied Buck's request for a certificate of appealability on September 14, 2011. *Buck v. Thaler*, 452 Fed. App'x 423 (5th Cir. 2011). The Supreme Court denied Buck's petition for a writ of *certiorari* on November 7, 2011. *Buck v. Thaler*, 132 S.Ct. 32 (2011).

The Supreme Court decided *Martinez* in 2012, and *Trevino* in 2013. On January 7, 2014, Buck filed this Rule 60(b) motion.

II. Analysis

In this renewed motion for relief from the judgment, Buck argues that his trial counsel rendered ineffective assistance by calling Dr. Quijano to testify. Buck's counsel asked Dr. Quijano to discuss certain statistical factors relevant to determining whether a defendant poses a future threat to commit criminal acts of violence. Among the factors Dr. Quijano discussed on direct examination was race. Dr. Quijano testified that "minorities, Hispanics and black people are over represented in our Criminal Justice System." The prosecutor asked an additional race related question on cross-examination. Buck is African-American.

In his habeas petition, Buck argued that Dr. Quijano's reliance on race as a statistical predictor of future dangerousness, and the prosecutor's reference to this testimony on cross-examination, invited the jury to consider his race as a predictor of future dangerousness. He also argues that his counsel rendered ineffective assistance by eliciting this race related testimony from Dr. Quijano, and that counsel was ineffective for failing to object when the prosecutor asked a question about this testimony during Quijano's cross examination.

Buck notes that the Texas Attorney General conceded error in several other cases involving similar testimony by the same witness. He contends that the Attorney General also stated that he would not assert procedural defenses to such claims in federal court, but asserted such a defense in this case.

Buck conceded that he did not raise these claims either in his direct appeal or in his original state habeas corpus application, though he did raise them in his successive state habeas application. The TCCA dismissed the successive petition as an abuse of the writ. This Court therefore had no choice but to find the claims procedurally defaulted. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

This Court also discussed whether Buck could avoid the procedural default by showing that he is "actually innocent of the death penalty," *i.e.*, but for a constitutional error, he would not have been legally eligible for a sentence of death, *see Sawyer v. Whitley*, 505 U.S. 333, 335 (1992). The penalty phase evidence showed that Buck had a history of domestic violence, including threatening his ex-girlfriend with a gun, shot his own sister during the rampage that resulted in the murders of Gardner and Butler, murdered Gardner in front of her children, showed no remorse for the murders, and laughed when asked about the murders. The Court found that the evidence presented was sufficient for the jury to conclude that Buck posed a future danger and was therefore eligible for a sentence of death.

A. Rule 60(b)

Rule 60(b)(6) provides for relief from a judgment for "any . . . reason that justifies relief." This Court can consider the motion if it "attacks, not the substance of the federal court's resolution [of Buck's habeas corpus petition] on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005). Relief under Rule 60(b) is available only if the case presents "extraordinary circumstances." *Id.* at 536.

Generally speaking, a "change in decisional law after entry of judgment does not constitute extraordinary circumstances" and is not alone a ground for relief from a final judgment under Rule 60(b)(6). *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012) (internal quotation marks and citation omitted). *Adams* specifically rejected the argument that *Martinez*, standing alone, constitutes "extraordinary circumstances" justifying relief under Rule 60(b)(6). *Id.* at 320. Buck argues that his case does present extraordinary circumstances because of the nature of Quijano's testimony, the fact that the claims have never been addressed on the merits by a reviewing court due to procedural bars, and the Texas Attorney General's decision not to raise procedural defenses in cases that Buck claims are similar.

As previously addressed in this Court's memorandum and order denying Buck's petition, Quijano's testimony on direct examination in this case noted the fact that African-Americans and Latinos are over-represented in the penal system. On cross examination,

Quijano answered "yes" when asked: "You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?" 28 Tr. at 160. Buck challenged this testimony solicited on cross examination, but the Fifth Circuit has previously rejected his claim that his case is similarly situated to the other cases in which Quijano testified.

> Citing a line of cases in which Texas has conceded error and waived procedural default after the *prosecution* had introduced Dr. Quijano as an expert witness during the penalty phase, Buck contends that notions of "intra-court comity" compel us to conclude that the State must also waive procedural default in the instant case. Buck's case, however, differs markedly from, e.g., *Saldano v. Roach*, [363 F.3d 545 (5th Cir. 2004),] in which the prosecution introduced Dr. Quijano as an expert witness and then proceeded to question him as to how the defendant's race might serve as a predictor of future dangerousness. In *Saldano*, the State conceded its error and waived any procedural bar that otherwise might have precluded our review of the defendant's claim on the merits. Here, in contrast, the State has not conceded any error or waived its procedural bar. Rather, the State has consistently maintained that it did not violate Buck's constitutional rights merely by questioning Buck's own witness – without objection from Buck – on the very same issues first discussed by that witness during direct examination by the defense, a classic example of the defense "opening the door" for the prosecutor to pursue the subject. Because Buck's characterization of "intra-court comity" finds no support in our precedent, we decline to apply here concessions made by the State in a different case with different facts. Such a broad expansion of a party's case-specific concession would not only contravene our precedent, but would also discourage the State from conceding error when it seeks to correct its own mistakes – both of which are clearly undesirable results.

Buck v. Thaler, 345 Fed. App'x 923, 929 (5th Cir. 2009) (footnotes omitted). The Fifth Circuit has found that Buck's case is different in critical respects from the cases in which Texas confessed error.

Finally, Buck's argument that this Court should grant relief because no court has yet reviewed the merits of his ineffective assistance of counsel claims is circular. Procedural bars prevent courts from reviewing claims on the merits. Buck's claim is procedurally defaulted. Therefore, the claim has not been reviewed on the merits. Buck suggests that the fact that the claims are defaulted should constitute extraordinary circumstances excusing the default. Other than citing *Martinez*, however, Buck has failed to demonstrate that this case presents extraordinary circumstances. While the introduction of any mention of race was ill-advised at best and repugnant at worst, it was, in this case, *de minimis*. As respondent points out, there were two references to race in Dr. Quijano's testimony. On direct examination, Quijano stated the indisputable fact that African-Americans and Latinos are over-represented in the criminal justice system. On cross examination, Dr. Quijano answered affirmatively when questioned about earlier findings he had made that being black is one statistical factor he considered in reaching his conclusion. The prosecutor did not make any race-based argument in closing. Moreover, the State's confession of error in other cases does not create any legally enforceable rights, nor does equity demand that the confession of error be extended to Buck's case for the reasons stated by the Fifth Circuit and quoted above. Finally, the fact that his claims have not been reviewed on the merits is a result of the fact that they

were procedurally defaulted. If that constituted "extraordinary circumstances," then the change in decisional law represented by *Martinez*, would, by itself, provide grounds for relief under Rule 60(b). As noted above, both the Supreme Court and the Fifth Circuit have held otherwise. *See Gonzalez*, 545 U.S. at 531-32; *Adams*, 679 F.3d at319.

B. Ineffective Assistance of Counsel

Assuming without finding that Buck has demonstrated that his case presented "extraordinary circumstances," he would not be entitled to relief on the merits of his claim. In *Martinez*, the Supreme Court carved out a narrow equitable exception to the rule that a federal habeas court cannot consider a procedurally defaulted claim of ineffective assistance of counsel.

> [W]hen a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim . . . where appointed counsel in the initial-review collateral proceeding . . . was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 . . . (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.

Martinez v. Ryan, 132 S.Ct. 1309, 1318-19 (2012).

To prevail on a claim for ineffective assistance of counsel, Petitioner

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires

> showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prevail on the first prong of the *Strickland* test, Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. *Id.* at 688. Review of counsel's performance is deferential. *Id.* at 689.

In the context of a capital sentencing proceeding, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 465 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

During the penalty phase, the State presented evidence of Buck's prior convictions for delivery of cocaine, possession of a controlled substance, and unlawfully carrying a weapon. 28 Tr. at 5-28, 239-43. The State also presented testimony from Buck's former girlfriend recounting acts of domestic violence, including one instance in which Buck threatened her with a gun. *Id.* at 31-40.

In addition to Buck's past history, the jury was aware of the horrific facts of Buck's murder of Gardner and Butler. These included Buck's attempt to murder his own sister, and his murder of Gardner in front of her two children. The jury also heard that Buck was

laughing about the murders when he was arrested, and that he said about Gardner that "the bitch deserved what she got." *Id.* at 50-51.

Buck called several witnesses who knew him and testified that he was not violent. *See* 28 tr. at 77, 84-85, 96. He also called two expert witnesses: Dr. Quijano and Dr. Patrick Lawrence. Quijano was the former chief psychologist for TDCJ, *id.* at 101-02, and Lawrence was a psychologist specializing in prediction of future criminal behavior, *id.* at 177, 182-85.

Buck's counsel offered testimony that Quijano was neutral, emphasizing his experience working for TDCJ, *id.* at 101-04, and eliciting the fact that Quijano had testified for both defendants and the State in the past. *Id.* at 104-05. Quijano offered his opinion that Buck was not a future danger. *Id.* at 115. He based his conclusion, in part, on "several statistical factors . . . including, but not limited to age, sex, race, social economics, history of violence, and history of substance abuse." *Buck v. Thaler*, 345 Fed. App'x at 925. Included in Quijano's testimony was his observation that African-Americans and Latinos are over-represented in the criminal justice system. 28 Tr. at 111.

Nevertheless, the Court finds that counsel's representation fell below an objective standard of reasonableness under the first prong of *Strickland*. *See Strickland*, 466 U.S. at 687-88. Buck's trial counsel called Dr. Quijano as a witness even though he knew that Dr. Quijano had previously testified on the direct correlation between race and future dangerousness. Additionally, Buck's counsel had received Dr. Quijano's expert report before trial clearly stating that Buck's race made him statistically more likely to be a future danger.

Buck v. Thaler, __ U.S. __ 132 S. Ct. 32, 33 (2011). Despite the longstanding "'unceasing efforts' to eradicate racial prejudice from our criminal justice system," *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987), Buck's counsel called Dr. Quijano as a witness and relied on his expert report, although counsel was fully aware of Dr. Quijano's inflammatory opinions about race. There was no strategic reason to do so because Buck's counsel offered a second expert at trial, Dr. Lawrence, who had no history of this kind of troubling race-based testimony. Testimony like that of Dr. Quijano lends credence to any potential latent racial prejudice held by the jury. *Cf. Guerra v. Collins*, 916 F. Supp. 620, 636 (S.D. Tex. 1995), *aff'd sub nom. Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996) (holding that a defendant is "entitled to have his punishment assessed by the jury based on consideration of the mitigating and aggravating circumstances concerning his personal actions and intentions, not those of a group of people with whom he shared a characteristic."). Buck's counsel recklessly exposed his client to the risks of racial prejudice and introduced testimony that was contrary to his client's interests. His performance fell below an objective standard of reasonableness, and the Court therefore finds that trial counsel's performance was constitutionally deficient.

However, the Court finds that under the facts of this case, Buck cannot show that he was prejudiced by his counsel's constitutionally deficient action. In light of the aggravating evidence, particularly the facts of the crime and Buck's actions following the murders, it cannot be said that there is a reasonable probability that the outcome would have been different if Quijano had made no reference to race. Although counsel rendered deficient

performance by calling Quijano as a witness, Buck suffered no *Strickland* prejudice as a result. Therefore, the Court finds that Petitioner has not established a claim of ineffective assistance of trial counsel on this issue.

Buck also contends that his counsel was ineffective for failing to object when the State asked Quijano a question about the issue of Buck's race. As the Fifth Circuit noted, Buck opened the door to this question. *See Buck v. Thaler*, 345 Fed. App'x at 930. Because Buck opened the door, any objection to the prosecutor's question would have been futile. "This Court has made clear that counsel is not required to make futile motions or objections." *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) . Counsel was not ineffective for failing to make a futile objection.

Assuming without deciding, however, that the prosecutor's question amounted to constitutional error, Buck cannot prove prejudice. As previously discussed, the evidence showed that Buck had a prior criminal history and was violent toward his ex-girlfriend. He committed a brutal double murder, killing one of the victims in front of her two young children, and shot his own sister in the chest. Under these facts, there is no reasonable probability that the outcome of the sentencing phase would have been different if counsel objected to the prosecutor's question.

C. Certificate of Appealability

Although Buck has not requested a certificate of appealability ("COA"), the court may nevertheless determine whether he is entitled to this relief in light of the court's rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued."). A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). "A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997). A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*, 213

F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253© is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "[T]he determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001).

This Court concludes that Buck has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and that jurists of reason would not find it debatable whether this court is correct in its procedural determinations. Therefore, Buck is not entitled to a COA.

D. Conclusion

For the foregoing reasons, Buck's renewed motion for relief from the judgment (Inst. # 49) is denied.

III. Order

For the foregoing reasons, IT IS ORDERED THAT Buck's Motion For Relief From Judgment (Docket Entry 49) is **Denied**; and

IT IS FURTHER ORDERED THAT no certificate of appealability shall issue.

SO ORDERED.

SIGNED at Houston, Texas, on this 29th day of August, 2014.

VANESSA GILMORE
United States District Judge

Appendix E

App. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DUANE EDWARD BUCK, Petitioner, v. DOUG DRETKE, Director, Texas Department of Criminal Justice-Correctional Institutions Division, Respondent.	§ § § § § § § § § § § § §	H-04-3965

Memorandum and Order

This case is before the Court on Petitioner Duane Edward Buck's Petition for Writ of Habeas Corpus and Respondent Doug Dretke's Motion for Summary Judgment. Having carefully considered the Petition, the Summary Judgment Motion, the evidence, and the arguments and authorities submitted by counsel, the Court is of the opinion that Respondent's Motion for Summary Judgment should be GRANTED, and Buck's Petition for Writ of Habeas Corpus should be DENIED.

I. Background[1]

During the early morning hours of July 30, 1995, Harold Ebenezer, his brother Kenneth Butler, Buck's sister Phyllis Taylor, and Debra Gardner all gathered at Gardner's house after a night out playing pool. Buck lived in the house with Gardner on and off over the previous few years, but Gardner and Buck broke up two or three weeks earlier.

Buck banged loudly on Gardner's door and Gardner called "911." Buck then forced the door open and entered the house. He argued with Gardner and struck her. Buck then stated that he was there to pick up his clothes. He retrieved a few things and left.

At about 7:00 a.m., Buck returned with a rifle and shotgun. Upon entering the house, he shot at Ebenezer but missed; Ebenezer fled the house. Buck then walked up to his sister, Taylor, put the muzzle of one of the guns against her chest, and shot her. Taylor survived.

After she was shot, Taylor heard more shots coming from the vicinity of the bedrooms. As she made her way through the house, Taylor saw Butler's body in the hallway. After escaping, Ebenezer also heard two or three more shots fired inside the house. As he came around to the front of the house, Ebenezer saw Gardner walking toward the street with Buck following her.

Devon Green, Gardner's son, hid in the closet after hearing the first shot fired. Shortly thereafter, he heard Buck's voice accusing Butler of sleeping with "his wife,"

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[1] The facts are adapted from the opinion of the Texas Court of Criminal Appeals ("TCCA") on Buck's direct appeal. *See Buck v. State*, No. 72,810 at 2-3 (Tex. Crim. App. Apr. 28, 1999). Any significant divergence from the TCCA statement of facts is noted with a specific citation to the record.

followed by another gunshot. After a short while, Green looked out into the hall and saw Butler leaning against the wall bleeding. Green then ran outside and saw Buck shoot his mother and put two guns in the trunk of his car. Gardner's teenage daughter, Shennel Gardner, also saw Butler in the hallway after he was shot and then went outside and saw Buck shoot her mother. Both Butler and Gardner died from their wounds.

When police arrived, both Green and Ebenezer identified Buck as the shooter. Police subsequently retrieved a shotgun and a .22 caliber rifle from the trunk of Buck's car.

During the penalty phase, the State presented evidence of Buck's prior convictions for delivery of cocaine and unlawfully carrying a weapon. 28 Tr. at 5-28.[2] Vivian Jackson, Buck's ex-girlfriend and the mother of Buck's son, testified that Buck physically abused her and threatened her with a gun. *Id.* at 30-36. One of the police officers who accompanied Buck after his arrest testified that Buck was laughing. When the officer commented that he did not think the situation was very funny, Buck responded: "The bitch deserved what she got." *Id.* at 62-70.

Buck presented evidence that he is a peaceful, nonviolent, person, that his mother died when he was 12 years old, that he worked as an auto mechanic, and that his father served several jail sentences for non-violent felonies. *Id.* at 76-100. The defense also called Dr. Walter Quijano, a clinical psychologist, as an expert witness. Dr. Quijano opined, based on his evaluation of Buck, that Buck has a dependent personality disorder. People suffering

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[2] "Tr." refers to the transcript of Buck's trial.

from this disorder can become obsessive about relationships and have a very difficult time letting go after a relationship ends.

Dr. Quijano also testified that several factors can be predictive of future dangerousness. These include, according to Dr. Quijano, past violent behavior, the age and sex of the defendant (with older defendants less likely to be violent in the future, and male defendants more likely than female defendants to be violent), socio-economic status, and history of substance abuse. Dr. Quijano also testified that race is a statistical predictor of future dangerousness based on the fact that Latinos and African-Americans are over-represented in the penal system. Applying these factors to Buck, Quijano testified that Buck's lack of a violent past made it less likely that he would be violent in the future. Based on his selection of victims (a former girlfriend) and his prison disciplinary record, Quijano concluded that he is unlikely to be violent in prison. *Id.* at 101-20.

Buck also called Dr. Patrick Gordon Lawrence, another clinical psychologist. Dr. Lawrence agreed that Buck has a dependent personality and that he poses a low probability of future violence. *Id.* at 177-206. The jury found that Buck posed a future danger to society, and that there was insufficient mitigating evidence to justify a sentence of life imprisonment. Accordingly, the trial court sentenced Buck to death. 29 Tr. at 278.

The TCCA affirmed Buck's conviction and sentence on April 28, 1999. *Buck v. State*, No. 72,810 (Tex. Crim. App. Apr. 28, 1999). On March 22, 1997, Buck filed a state habeas corpus petition. On December 13, 2002, he filed a successive state habeas application. SH.

at 2.[3] On January 23, 2003, the trial court found that Buck's second petition was a subsequent habeas application and ordered the clerk to send it to the TCCA. *Id.* at 18-19. The trial court recommended denying Buck's original petition on July 23, 2003. SH. at 119-27. On October 15, 2003, the TCCA adopted the trial court's findings and recommendation and denied Buck's first application, and dismissed his second application as an abuse of the writ. *Ex Parte Buck* , Nos. 57,004-01, -02 (Tex. Crim. App. Oct. 15, 2003) (*per curiam*). On October 14, 2004 , Buck filed this timely federal petition for a writ of habeas corpus.

II. The Applicable Legal Standards

A. The Anti-Terrorism and Effective Death Penalty Act

This federal petition for habeas relief is governed by the applicable provisions of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which became effective April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA, federal habeas relief based upon claims that were adjudicated on the merits by the state courts cannot be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Kitchens v. Johnson*,190 F.3d 698, 700 (5th Cir. 1999).

For questions of law or mixed questions of law and fact adjudicated on the merits in

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[3] "SH." refers to the transcript of Buck's state habeas corpus proceeding.

state court, this Court may grant federal habeas relief under 28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." *See Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 534 U.S. 885 (2001). Under the "contrary to" clause, this Court may afford habeas relief only if "'the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court] on a question of law or if the state court decides a case differently than . . . [the Supreme Court] has on a set of materially indistinguishable facts.'" *Dowthitt v. Johnson*, 230 F.3d 733, 740-41 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001) (quoting *Terry Williams v. Taylor*, 529 U.S. 362, 406 (2000)).[4]

The "unreasonable application" standard permits federal habeas relief only if a state court decision "identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Terry Williams*, 529 U.S. at 406. "In applying this standard, we must decide (1) what was the decision of the state courts with regard to the questions before us and (2) whether there is any established federal law, as explicated by the Supreme

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[4] On April 18, 2000, the Supreme Court issued two separate opinions, both originating in Virginia, involving the AEDPA, and in which the petitioners had the same surname. *Terry Williams v. Taylor*, 529 U.S. 362 (2000), involves § 2254(d)(1), and *Michael Williams v. Taylor*, 529 U.S. 420 (2000), involves § 2254(e)(2). To avoid confusion, this Court will include the full name of the petitioner when citing to these two cases.

Court, with which the state court decision conflicts." *Hoover v. Johnson*, 193 F.3d 366, 368 (5th Cir. 1999). A federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 239 F.3d 683, 696 (5th Cir. 2001), *aff'd*, 286 F.3d 230 (5th Cir. 2002) (en banc), *cert. denied sub nom. Neal v. Epps*, 537 U.S. 1104 (2003). The solitary inquiry for a federal court under the 'unreasonable application' prong becomes "whether the state court's determination is 'at least minimally consistent with the facts and circumstances of the case.'" *Id.* (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997)); *see also Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'").

The AEDPA precludes federal habeas relief on factual issues unless the state court's adjudication of the merits was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254 (d)(2); *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000), *cert. denied*, 532 U.S. 1039 (2001). The State court's factual determinations are presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Jackson v. Anderson*, 112 F.3d 823, 824-25 (5th Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998).

B. The Standard for Summary Judgment in Habeas Corpus Cases

"As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000). Insofar as they are consistent with established habeas practice and procedure, the Federal Rules of Civil Procedure apply to habeas cases. *See* Rule 11 of the Rules Governing Section 2254 Cases. In ordinary civil cases, a district court considering a motion for summary judgment is required to construe the facts in the case in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). Where a state prisoner's factual allegations have been adversely resolved by express or implicit findings of the state courts, however, and the prisoner fails to demonstrate by clear and convincing evidence that the presumption of correctness established by 28 U.S.C. § 2254(e)(1) should not apply, it is inappropriate for the facts of a case to be resolved in the petitioner's favor. *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Foster v. Johnson*, 293 F.3d 766, 777 (5th Cir.), *cert. denied sub nom Foster v. Epps*, 537 U.S. 1054 (2002); *Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000), *cert. denied*, 532 U.S. 915 (2001); *Emery v. Johnson*, 940 F.Supp. 1046, 1051 (S.D. Tex. 1996), *aff'd*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 525 U.S. 969 (1998). Consequently, where facts have been determined by the Texas state courts, this Court is bound by such findings unless an exception to 28 U.S.C. § 2254 is shown.

III. Analysis

Buck's petition raises eight claims for relief. These are addressed in turn.

A. Informing The Jury About Parole Eligibility

In his first claim for relief, Buck argues that the trial court violated his Fourteenth Amendment right to due process of law by refusing to inform, or allow Buck to inform, the jury of the law concerning Buck's parole eligibility if sentenced to life imprisonment. Buck contends that this unfairly impeded his ability to rebut the State's argument that he posed a future danger to society. In his second claim, Buck argues that this lack of information renders his sentence violative of the Eighth Amendment because it impeded his ability to offer mitigating evidence. In his third claim, Buck argues that the trial court's refusal to permit testimony concerning parole eligibility violated Buck's rights under the compulsory process clause of the Sixth Amendment.

The crux these three claims is whether the fact that a life sentence would make Buck ineligible for parole until he served 40 years in prison was relevant to the issue of his future dangerousness. He argues that his expert witnesses were not permitted to testify that this was a factor in their conclusions that he was not a future danger, and that his lawyers were also not permitted to inform the jury of this part of his experts' analysis.

Petitioner argues that his position is supported by the United States Supreme Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). At the time of Simmons' conviction, South Carolina allowed for a sentence of life in prison without the possibility of parole upon conviction of a capital offense. In *Simmons*, the defense sought an instruction

informing the jury that life imprisonment would carry no possibility of parole, but the trial court refused. The Supreme Court held that when "the alternative sentence to death is life without parole . . . due process plainly requires that [the defendant] be allowed to bring [parole ineligibility] to the jury's attention by way of arguments by defense counsel or an instruction from the court." *Simmons*, 512 U.S. at 169 (citing *Gardner v. Florida*, 430 U.S. 349, 362 (1977)).

The *Simmons* court reasoned that when a state imposes the death penalty on the premise that the convicted individual poses a danger to society, the fact that the defendant may receive life without possibility of parole "will necessarily undercut the State's argument regarding the threat the defendant poses to society." *Simmons*, 512 U.S. at 169. To hold otherwise would create a "false dilemma by advancing generalized argument regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." *Id.* at 171.

Simmons addresses very specific circumstances: (1) When the state seeks the death penalty at least in part on the grounds that the defendant will be a future danger to society; and (2) when the alternative to a sentence of death is a sentence of life imprisonment without the possibility of parole.

> [I]f the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole ineligibility allows the defendant to deny or explain the showing of future dangerousness, due

> process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.

Simmons, 512 U.S. at 168-69 (internal quotation marks and citation omitted); *see also*, *Wheat v. Johnson*, 238 F.3d 357, 361-62 (5th Cir.), *cert. denied*, 532 U.S. 1070 (2001). While the State did seek a death sentence in this case partially on the basis that Petitioner would pose a continuing threat, the jury's alternative was a parole-eligible life sentence, not, as in *Simmons*, life without parole. *Id.* at 168 n.8.

The Fifth Circuit has repeatedly rejected Buck's claim.

> [T]he Supreme Court took great pains in its opinion in *Simmons* to distinguish states such as Texas, which does not provide capital sentencing juries with an option of life without parole, from the scheme in South Carolina which required an instruction on parole ineligibility . . . [T]he Fifth Circuit has repeatedly refused to extend the rule in *Simmons* beyond those situations in which a capital murder defendant is statutorily ineligible for parole.

Green v. Johnson, 160 F.3d 1029, 1045 (5th Cir. 1998), *cert. denied*, 525 U.S. 1174 (1999); *see also*, *Wheat*, 238 F.3d at 361-62 (5th Cir.), *cert. denied*, 532 U.S. 1070 (2001)(finding *Simmons* inapplicable to the Texas sentencing scheme); *Soria v. Johnson*, 207 F.3d 232 (5th Cir.), *cert. denied*, 530 U.S. 1286 (2000)(finding that "reliance on *Simmons* to demonstrate that the Texas capital sentencing scheme denied [petitioner] a fair trial is unavailing"); *Miller v. Johnson*, 200 F.3d 274, 290 (5th Cir.), *cert. denied*, 531 U.S. 849 (2000) ("because Miller would have been eligible for parole under Texas law if sentenced to life, we find his reliance on *Simmons* unavailing")(internal quotation marks and citation omitted); *Hughes v. Johnson*,

191 F.3d 607, 617 (5th Cir. 1999), *cert. denied*, 528 U.S. 1145 (2000); *Muniz v. Johnson*, 132 F.3d 214, 224 (5th Cir.), *cert. denied*, 523 U.S. 1113 (1998)(stating that a claim based on *Simmons* "has no merit under the law in our circuit"); *Montoya v. Scott*, 65 F.3d 405, 416 (5th Cir. 1995), *cert. denied sub nom. Montoya v. Johnson*, 517 U.S. 1133 (1996) (holding that *Simmons* claims are foreclosed by recent circuit authority rejecting an extension of *Simmons* beyond situations in which a defendant is statutorily ineligible for parole"); *Allridge v. Scott*, 41 F.3d 213, 222(5th Cir. 1994), *cert. denied*, 514 U.S. 1108 (1995)(stating that "*Simmons* is inapplicable to this case"); *Kinnamon v. Scott*, 40 F.3d 731, 733 (5th Cir.), *cert. denied*, 513 U.S. 1054 (1994) (refusing to "extend *Simmons* beyond cases in which the sentencing alternative to death is life without parole").

If these decisions left any doubt that *Simmons* provides no basis for the relief Petitioner seeks, the Supreme Court removed all such doubt in *Ramdass v. Angelone*, 530 U.S. 156 (2000). "*Simmons* applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." *Id.* at 169.

In this case, life without parole was not a possibility. Petitioner faced one of two sentences: Death, or life imprisonment with the possibility of parole at a future date. Therefore, as *Ramdass* and Fifth Circuit precedent make unmistakably clear, Petitioner's claims do not fall within the scope of *Simmons*.

Insofar as Petitioner seeks an extension of *Simmons* to the Texas scheme, this Court is barred from granting habeas relief on that basis by the non-retroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989). *See Wheat*, 238 F.3d at 361 (finding any extension

of *Simmons* to violate *Teague*); *Clark v. Johnson*, 227 F.3d 273, 282 (5th Cir. 2000), *cert. denied*, 531 U.S. 1167 (2001)(same); *Boyd v. Johnson*, 167 F.3d 907, 912 (5th Cir.), *cert. denied*, 527 U.S. 1055 (1999) ("Relief based on *Simmons* is foreclosed by *Teague*."). In *Teague*, the Supreme Court held that a federal court may not create new constitutional rules of criminal procedure on habeas review. *Id.* at 301. Thus, even if controlling precedent did not expressly hold that the *Simmons* rule does not cover Petitioner's case, relief would be barred by *Teague*.

Buck also argues, citing *Skipper v. South Carolina*, 476 U.S. 1 (1986), that information about parole eligibility is relevant mitigating evidence because it "might serve as a basis for a sentence less than death." *Id.* at 4. He therefore contends that the trial court's refusal to allow Buck to inform the jury about parole eligibility violates his Eighth Amendment right to present mitigating evidence. The Fifth Circuit, however, has consistently found that the Eighth Amendment does not require that a jury be informed of parole eligibility. *See Tigner v. Cockrell*, 264 F.3d 521, 525 (5th Cir. 2001). Therefore, Petitioner's motion for relief on his first through third claims is DENIED.

B. Ineffective Assistance Of Counsel

Buck argues that the evidence supported a finding that he acted under the immediate influence of sudden passion arising from an adequate cause when he committed the murders. In his fourth claim for relief, Buck argues that his trial counsel rendered ineffective assistance by failing to request a lesser included offense instruction based on this theory.

To prevail on a claim for ineffective assistance of counsel, Petitioner

> must show that . . . counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). In order to prevail on the first prong of the *Strickland* test, Petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances. *Id.* at 688. Review of counsel's performance is deferential. *Id.* at 689.

Buck committed the murders on July 30, 1995. The Texas statute defining a homicide committed under the influence of sudden passion as the lesser included offense of voluntary manslaughter was repealed on September 1, 1994. *See* Acts 1993, 73rd Leg., ch. 900, § 1.01. Where the prior version of the statute defined manslaughter as a homicide committed under the influence of sudden passion, the amended version, which was in effect at the time of Buck's crime, defines manslaughter as "recklessly caus[ing] the death of the individual." Tex. Penal § 19.04. Therefore, Texas law did not provide for the lesser included offense on which Buck now claims he was entitled to a jury instruction. Indeed, petitioner admits that this statutory definition of voluntary manslaughter existed only "[p]rior to September of 1994 . . . ." Pet. at 47.

Counsel's failure to request a jury instruction unsupported by the law did not constitute deficient performance. "Counsel cannot be deficient for failing to press a frivolous

point." *Sones v. Hargett*, 61 F.3d 410, 415 n.5 (5th Cir. 1995); *see also Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) ("This Court has made clear that counsel is not required to make futile motions or objections."). Therefore, petitioner fails to meet the first prong of the *Strickland* test and his petition for relief on this claim is DENIED.

C. Evidence Of Future Dangerousness Based On Race

Petitioner's fifth and sixth claims for relief relate to testimony offered during the penalty phase by Dr. Walter Quijano, who testified as an expert witness. Buck's counsel asked Dr. Quijano to discuss certain statistical factors relevant to determining whether a defendant poses a future threat to commit criminal acts of violence. Among the factors Dr. Quijano discussed was race. Dr. Quijano testified that "minorities, Hispanics and black people are over represented in our Criminal Justice System." 28 Tr. at 111. The prosecutor revisited this topic on cross-examination. Buck is African-American.

In his Fifth claim for relief, Buck argues that Dr. Quijano's reliance on race as a statistical predictor of future dangerousness, and the prosecutor's references to this testimony on cross-examination and in closing argument, violated Buck's Sixth and Fourteenth Amendment rights to an impartial jury, due process, and equal protection of the law. In his Sixth claim for relief, Buck contends his counsel rendered ineffective assistance by eliciting this testimony from Dr. Quijano.

Buck concedes that he did not raise these claims either in his direct appeal or on his original state habeas corpus application, though he did raise them in his successive state habeas application. As noted above, the TCCA dismissed the successive petition as an abuse

of the writ.

"When a state court declines to hear a prisoner's federal claims because the prisoner failed to fulfill a state procedural requirement, federal habeas is generally barred if the state procedural rule is independent and adequate to support the judgment." *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001). The Supreme Court has noted that

> [i]n all cases in which a state prisoner had defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). "This doctrine ensures that federal courts give proper respect to state procedural rules." *Glover v. Cain*, 128 F.3d 900, 902 (5th Cir. 1997) (citing *Coleman*, 501 U.S. at 750-51), *cert. denied*, 523 U.S. 1125 (1998); *see also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (finding the cause and prejudice standard to be "grounded in concerns of comity and federalism").

To be "adequate" to support the judgment, the state law ground must be both "firmly established and regularly followed." *Ford v. Georgia*, 498 U.S. 411, 424 (1991). The Texas Court of Criminal Appeals applies its abuse of the writ doctrine regularly and strictly. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir.) (per curiam), *cert. denied*, 515 U.S. 1153 (1995). Therefore, this claim is procedurally defaulted and this Court may not review the claim unless Buck demonstrates cause and prejudice, or that this Court's refusal to review the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

"Cause" for a procedural default requires a showing that some objective factor external to the defense impeded counsel's efforts to comply with the state procedural rule, or a showing of a prior determination of ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Amadeo v. Zant*, 486 U.S. 214, 222 (1988). Buck does not argue that cause exists for his default.

A "miscarriage of justice" means actual innocence, either of the crime for which he was convicted or of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 335 (1992). "Actual innocence of the death penalty" means that, but for a constitutional error, Buck would not have been legally eligible for a sentence of death. *Id.*

To show actual innocence,

> [T]he prisoner must 'show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial, the trier of the facts would have entertained a reasonable doubt of his guilt.

Kuhlmann v. Wilson, 477 U.S. 436, 455 n.17 (1986).

The penalty phase evidence showed that Buck had a history of domestic violence, including threatening his ex-girlfriend with a gun, shot his own sister during the rampage that resulted in the murders of Gardner and Butler, showed no remorse for the murders, and laughed when asked about the murders. This evidence was sufficient for the jury to conclude that Buck posed a future danger. Therefore, petitioner has not established that, but-for the allegedly improper testimony, he could not, as a matter of law, be sentenced to death.

Because Buck fails to establish either cause for his procedural default nor actual innocence of the death penalty, this Court may not review his Fifth and Sixth claims for relief.

D. Burden Of Proof On Future Dangerousness

In his Seventh claim for relief, Buck argues that the future dangerousness special issue violates the rules of *Ring v. Arizona*, 536 U.S. 584 (2002) and *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004). Specifically, Buck argues that the language of the statutory special issue, requiring the jury to determine whether there is a "probability" of future dangerousness, has the practical effect of reducing the burden of proof from "beyond a reasonable doubt" to a mere preponderance of the evidence, notwithstanding a specific statutory requirement of proof beyond a reasonable doubt.

Buck never presented these claims in state court. The AEDPA requires that a prisoner exhaust his available State remedies before raising a claim in a federal habeas petition.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). As the Fifth Circuit explained in a pre -AEDPA case, "federal courts must respect the autonomy of state courts by requiring that petitioners advance in state court all grounds for relief, as well as factual allegations supporting those grounds. "[A]bsent special circumstances, a federal habeas petitioner must exhaust his state remedies by pressing his claims in state court before he may seek federal habeas relief." *Orman v.*

Cain, 228 F.3d 616, 619-20 (5th Cir. 2000); *see* 28 U.S.C. § 2254(b)(1) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State. . . .").

Ordinarily, a federal habeas petition that contains unexhausted claims is dismissed without prejudice, allowing the petitioner to return to the state forum to present his unexhausted claims. *Rose v. Lundy*, 455 U.S. 509 (1982). Such a result in this case, however, would be futile because Petitioner's unexhausted claims would be procedurally barred as an abuse of the writ under Texas law. A procedural bar for federal habeas review occurs if the court to which a petitioner must present his claims to satisfy the exhaustion requirement would now find the unexhausted claims procedurally barred. *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

Texas prohibits successive writs challenging the same conviction except in narrow circumstances. Tex.CodeCrim.Proc.Ann. art. 11.071 § 5(a) (Vernon Supp. 2002). The Texas Court of Criminal Appeals will not consider the merits or grant relief on a subsequent habeas application unless the application contains sufficient specific facts establishing the following:

> (1) the current claims have not been and could not have been presented previously in an original application or in a previously considered application because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or
>
> (2) by a preponderance of the evidence, but for a violation of the

> United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt.

Id.

Petitioner does not claim that he could not have presented the claim in one of his previous state habeas petitions because the factual basis for the claim did not exist, or that he is actually innocent. *Ring* was decided on June 22, 2002, and Buck did not file his successive state habeas petition until December 13, 2002. Therefore, Petitioner could have raised this claim in his prior successive state petition, and the unexhausted claim does not fit within the exceptions to the successive writ statute and would be procedurally defaulted in the Texas courts. *Coleman*, 501 U.S. at 735 n.1.[5] That bar precludes this Court from reviewing Petitioner's claim absent a showing of cause for the default and actual prejudice attributable to the default, or that this Court's refusal to review the claim will result in a fundamental miscarriage of justice. *Id.* at 750. Buck offers no argument that cause exists to excuse his default, or that he is actually innocent. Therefore, this Court cannot review his seventh claim.

E. Burden Of Proof On Lack Of Mitigation

The Texas capital sentencing statute requires the jury, after deciding that the defendant poses a future danger, to determine whether the defendant's mitigating evidence

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[5] Buck also cites *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531 (2004). While *Blakely* was not decided until after the TCCA dismissed both of Buck's state petitions, Buck does not argue that *Blakely* recognized any new substantive right concerning the burden of proof on aggravating factors. Rather, Buck merely argues that "*Blakely* confirms the foregoing *Ring* analysis." Pet. at 64.

is sufficient to justify imposing a sentence of life imprisonment rather than death. Tex. Code Crim. Pro. art. 37.071(2)(e)(1). In his Eighth and final claim for relief, Buck argues that the Texas capital sentencing statute violates the rules of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely* because it does not place the burden on the prosecution to prove that the mitigating evidence is insufficient to justify a life sentence.

Apprendi itself rejects Buck's position.

> Finally, the principal dissent ignores the distinction the Court has often recognized, *see, e.g.*, *Martin v. Ohio*, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987), between facts in aggravation of punishment and facts in mitigation. . . . If facts found by a jury support a guilty verdict of murder, the judge is authorized by that jury verdict to sentence the defendant to the maximum sentence provided by the murder statute. If the defendant can escape the statutory maximum by showing, for example, that he is a war veteran, then a judge that finds the fact of veteran status is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone. Core concerns animating the jury and burden-of-proof requirements are thus absent from such a scheme.

Apprendi, 530 U.S. at 491 n.16. The Supreme Court has thus drawn a critical distinction between aggravating and mitigating circumstances in sentencing proceedings. To the extent that some aggravating circumstance is required before the court may exceed an otherwise-prescribed sentencing range, the state must prove those aggravating circumstances beyond a reasonable doubt. Under the Texas capital sentencing statute, the statutory maximum sentence in the absence of proof of aggravating circumstances is life imprisonment. A court

cannot sentence a defendant to death unless the State proves beyond a reasonable doubt that there is a probability that the defendant will commit future acts of violence constituting a continuing threat to society. Tex.Crim.Pro. art. 37.071(2)(b)(1). Once the State has proven this factor, the defendant may be sentenced to death.

The sentencing scheme, however, gives a defendant another opportunity to show that death should not be imposed, even though the State has met its burden of proof. The mitigation special issue is, in this sense, analogous to an affirmative defense. *Apprendi* does not prohibit placing the burden of proof on this special issue on the defendant. The mitigation special issue does not address a factor necessary to increase the maximum sentence; rather, it addresses factors that allow the jury to impose a sentence *less than* the statutory maximum. Therefore, the mitigation special issue does not fall within the scope of *Apprendi*, and Buck is not entitled to relief on this claim.

IV. Evidentiary Hearing

Buck requests an evidentiary hearing. An evidentiary hearing is not required if there are "no relevant factual disputes that would require development in order to assess the claims." *Michael Williams v. Taylor*, 529 U.S. 420, 436 (2000) (stating that it was "Congress' to avoid unneeded hearings in federal habeas corpus"); *Robison v. Johnson*, 151 F.3d 256, 268 (5th Cir. 1998), *cert. denied*, 526 U.S. 1100 (1999). "If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require." Rule 8 of the Rules Governing Section 2254 Cases.

Each of Petitioner's claims can be resolved by reference to the state court record, the

submissions of the parties, and relevant legal authority. There is, therefore, no basis upon which to hold an evidentiary hearing on these claims.

V. Certificate of Appealability

Buck has not requested a certificate of appealability ("COA"), but this Court may determine whether he is entitled to this relief in light of the foregoing rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898(5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued.") A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). "A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997).

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve

encouragement to proceed further." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "The nature of the penalty in a capital case is a 'proper consideration in determining whether to issue a [COA], but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.'" *Washington v. Johnson*, 90 F.3d 945, 949 (5th Cir. 1996), *cert. denied*, 520 U.S. 1122 (1997) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)). However, "the determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001).

This Court has carefully and exhaustively considered each of Buck's claims. While the issues Buck raises are clearly important and deserving of the closest scrutiny, the Court finds that each of the claims is foreclosed by clear, binding precedent. This Court concludes

that under such precedents, Buck has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court concludes that Buck is not entitled to a certificate of appealability on his claims.

VI. Order

For the foregoing reasons, it is ORDERED as follows:

1. Respondent Doug Dretke's Motion for Summary Judgment (Docket Entry 7) is GRANTED;

2. Petitioner Duane Edward Buck's Petition For Writ Of Habeas Corpus (Docket Entry 1) is DENIED; and

3. No Certificate of Appealability shall issue in this case.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 24th day of July, 2006.

Vanessa Gilmore
United States District Judge

Appendix F

CERTIFICATE OF APPEALABILITY REVIEW

Undersigned counsel, with research assistance from two students at Columbia Law School, Rachel M. Wagner and Andrew J. Simpson, reviewed electronically available opinions and orders from the United States Courts of Appeals for the Fourth, Fifth and Eleventh Circuits, published and unpublished, on or after January 1, 2011, in which a petitioner sought relief from his or her death sentence under 28 U.S.C. § 2254 and a motion for a Certificate of Appealability ("COA") was decided within the circuit.

Undersigned counsel used the Westlaw database, an online legal research service, to input search terms and retrieve the relevant cases. The first set of search terms were as follows: (1) (capital /s habeas) & 2254 & "certificate #of appealability"; (2) capital /25 2254 & "certificate #of appealability"; (3) (death /2 penalty) & 2254 & "certificate #of appealability"; (4) (capital /s habeas) & 2254 /50 "COA"; (5) (capital /25 2254) /50 "COA"; and (6) (death /2 penalty) & 2254 /50 "COA". These searches were narrowed to the Fourth, Fifth and Eleventh Circuits and by the relevant time period.

To ensure an exhaustive search, undersigned counsel also ran a search within a collection of cases tagged by Westlaw as concerning Certificates of Appealability (Westlaw assigns these cases with an internal number - 197k818). Within this section, a broad search for the terms "capital & 2254" and "death & 2254" was run in the Fourth, Fifth and Eleventh Circuit Courts, during the relevant time period. This uncovered a small number of additional cases.

After the cases were retrieved, undersigned counsel reviewed the cases to ensure they fit the criteria identified above (i.e., a capital case under 28 U.S.C. § 2254 in which the petitioner was under a death sentence and a motion for a COA was decided). Cases that were false hits were removed from consideration.

In the below chart, any case in which either the district court or the Court of Appeals granted a COA on any claim is listed as "Granted." If no court granted a COA on any claim, the case is listed as "Denied." If the Court of Appeals either granted a COA when the district court had denied a COA on all claims, or if the Court of Appeals expanded a COA granted by the district court, the case is described as "Granted, Circuit." If the district court is the only court that granted a COA, the case is described as "Granted, District." When a petitioner sought a COA on more than one occasion during the course of his federal appeals and two separate opinions were issued by the Court of Appeals during the relevant time period, those cases are listed separately.

Our review was limited to the electronically available opinions issued by the Court of Appeals during the last five years; the district court rulings were determined based on the procedural history in the Court of Appeals' opinion. With respect to the time frame, the only consideration was whether the Court of Appeals issued its decision within the last five years, regardless of whether or not the district court had also issued its decision within the last five years.

Based on the this review, a COA was denied on all claims in 58.9% (76 out of 129) of the cases arising out of the Fifth Circuit, while a COA was only denied in 6.3% (7 out of 111) and 0% of the cases arising out of the Eleventh and Fourth Circuits respectively.

Fourth Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Atkins, Randy	4th	Atkins v. Lassiter, 502 F.App'x. 244, 245 (4th Cir. 2012)	Granted, Circuit
Barnes, William	4th	Barnes v. Joyner, 751 F.3d 229, 232 (4th Cir. 2014)	Granted, District
Elmore, Edward	4th	Elmore v. Ozmint, 661 F.3d 783, 788 (4th Cir. 2011), as amended (Dec. 12, 2012)	Granted, District
Fowler, Elrico	4th	Fowler v. Joyner, 753 F.3d 446, 453 (4th Cir. 2014)	Granted, Circuit
Gray, Ricky	4th	Gray v. Zook, 806 F.3d 783, 790 (4th Cir. 2015)	Granted, District
Gray, Ricky	4th	Gray v. Pearson, 526 F.App'x 331, 332 (4th Cir. 2013)	Granted, District
Hurst, Jason	4th	Hurst v. Joyner, 757 F.3d 389, 394 (4th Cir. 2014)	Granted, District
Johnson, Shermaine	4th	Johnson v. Ponton, 780 F.3d 219, 222 (4th Cir. 2015)	Granted, District
Porter, Thomas	4th	Porter v. Zook, 803 F.3d 694, 696 (4th Cir. 2015)	Granted, District
Prieto, Alfredo	4th	Prieto v. Zook, 791 F.3d 465, 467 (4th Cir. 2015	Granted, Circuit
Richardson, Timothy	4th	Richardson v. Branker, 668 F.3d 128, 137 (4th Cir. 2012)	Granted, District
Teleguz, Ivan	4th	Teleguz v. Pearson, 689 F.3d 322, 325 (4th Cir. 2012)	Granted, Circuit
		Total Granted:	**12 (100%)**
		Total Denied:	**0 (0%)**

Fifth Circuit[1]

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Adams, Beunka	5th	Adams v. Thaler 421 F.App'x 322, 324 (5th Cir. 2011)	Granted, District
Allen, Guy Len	5th	Allen v. Stephens, 619 F.App'x 280, 281 (5th Cir. 2015)	Denied
Allen, Kerry Dimart	5th	Allen v. Stephens, 805 F.3d 617, 622 (5th Cir. 2015)	Denied
Ayestas, Carlos Manuel	5th	Ayestas v. Thaler, 462 F.App'x 474, 476 (5th Cir. 2012)	Denied
Basso, Suzanne Margaret	5th	Basso v. Stephens, 555 F.App'x 335, 337 (5th Cir. 2014)	Denied
Battaglia, John David	5th	Battaglia v. Stephens, 621 F.App'x 781, 787 (5th Cir. 2015)	Denied
Beatty, Tracy Lane	5th	Beatty v. Stephens, 759 F.3d 455, 458 (5th Cir. 2014)	Denied
Bigby, James Eugene	5th	Bigby v. Stephens, 595 F.App'x 350, 351 (5th Cir. 2014)	Denied
Blue, Carl Henry	5th	Blue v. Thaler, 665 F.3d 647, 670 (5th Cir. 2011)	Denied
Bower, Lester Leroy	5th	In re Bower, 612 F.App'x 748, 750 (5th Cir. 2015)	Denied
Brawner, Jan Michael	5th	Brawner v. Epps, 439 F.App'x 396, 398 (5th Cir. 2011)	Denied
Braziel, Alvin Avon Jr.	5th	Braziel v. Stephens, No. 15-70018, 2015 WL 7729400, at *1 (5th Cir. Nov. 30, 2015)	Denied
Brown, Arthur	5th	Brown v. Thaler, 684 F.3d 482, 486 (5th Cir. 2012)	Denied
Burton, Arthur Lee	5th	Burton v. Stephens, 543 F.App'x 451, 453 (5th Cir. 2013)	Denied
Butler, Steven Anthony	5th	Butler v. Stephens, No. 09-70003, 2015 WL 5235206, at *4 (5th Cir. Sept. 9, 2015)	Granted, Circuit
Byrom, Michelle	5th	Byrom v. Epps, 518 F.App'x 243, 244 (5th Cir. 2013)	Granted, District
Canales, Anibal	5th	Canales v. Stephens, 765 F.3d 551, 559 (5th Cir. 2014)	Granted, District

[1] In Charles v. Stephens, the Fifth Circuit held that it had jurisdiction over petitioner's motion, although the district court denied his request for a COA, because a denial of a motion under 18 U.S.C. § 3599(f) is an appealable order and not subject to the COA requirement. 612 F.App'x 214, 217 (5th Cir. 2015). Therefore, even though the district court "denied" petitioner's COA, we have not listed this case in the chart or counted it in the tally of cases.

Cantu, Ivan Abner	5th	Cantu v. Thaler, 632 F.3d 157, 162 (5th Cir. 2011)	Granted, District
Carter, Tilon Lashon	5th	Carter v. Stephens, 805 F.3d 552, 553 (5th Cir. 2015)	Denied
Charles, Derrick Dewayne	5th	Charles v. Stephens, 736 F.3d 380, 383 (5th Cir. 2013)	Granted, District
Chester, Elroy	5th	Chester v. Thaler, 666 F.3d 340, 356 fn. 7 (5th Cir. 2011)	Granted, District
Clark, Troy	5th	Clark v. Stephens, No. 14-70034, 2015 WL 5730638, at *4 (5th Cir. Oct. 1, 2015)	Granted, Circuit
Clark, Troy	5th	Clark v. Thaler, 673 F.3d 410, 413 (5th Cir. 2012)	Granted, District
Cobb, Richard Aaron	5th	Cobb v. Thaler, 682 F.3d 364, 367 (5th Cir. 2012)	Granted, District
Coleman, Lisa Ann	5th	In re Coleman, 768 F.3d 367, 369 (5th Cir. 2014)	Denied
Coleman, Lisa Ann	5th	Coleman v. Thaler, 716 F.3d 895, 898 (5th Cir. 2013)	Denied
Craig, Dale Dwayne	5th	Craig v. Cain, No. 12-30035, 2013 WL 69128, at *1 (5th Cir. Jan. 4, 2013)	Denied
Crawford, Charles Ray	5th	Crawford v. Epps, 531 F.App'x 511, 516 (5th Cir. 2013)	Granted, District
Crutsinger, Billy Jack	5th	Crutsinger v. Stephens, 576 F.App'x 422, 424 (5th Cir. 2014)	Denied
Doyle, Anthony Dewayne	5th	Doyle v. Stephens, 535 F.App'x 391, 392 (5th Cir. 2013)	Denied
Druery, Marcus Ray Tyrone	5th	Druery v. Thaler, 647 F.3d 535, 537 (5th Cir. 2011)	Denied
Eldridge, Gerald Cornelius	5th	Eldridge v. Stephens, 608 F.App'x 289, 289 (5th Cir. 2015)	Granted, Circuit
Escamilla, Licho	5th	Escamilla v. Stephens, 602 F.App'x 939, 940 (5th Cir. 2015)	Granted, Circuit
Escamilla, Licho	5th	Escamilla v. Stephens, 749 F.3d 380, 383 (5th Cir. 2014)	Granted, Circuit
Feldman, Douglas Alan	5th	Feldman v. Thaler, 695 F.3d 372, 377 (5th Cir. 2012)	Denied
Freeman, James Garrett	5th	Freeman v. Stephens, 614 F.App'x 180, 181 (5th Cir. 2015)	Denied
Garcia, Humberto	5th	Garcia v. Thaler, 440 F.App'x 232, 233 (5th Cir. 2011)	Denied

Leal			
Garcia, Gustavo Julian	5th	Garcia v. Stephens, 793 F.3d 513, 515 (5th Cir. 2015)	Denied
Garcia, Juan Martin	5th	Garcia v. Stephens, 757 F.3d 220, 221 (5th Cir. 2014)	Denied
Garza, Joe Franco	5th	Garza v. Stephens, 575 F.App'x 404, 406 (5th Cir. 2014)	Denied
Garza, Manuel	5th	Garza v. Stephens, 738 F.3d 669, 672 (5th Cir. 2013)	Denied
Garza, Robert Gene	5th	Garza v. Thaler, 487 F.App'x 907, 908 (5th Cir. 2012)	Denied
Gates, Bill Douglas	5th	Gates v. Thaler, 476 F.App'x 336, 337 (5th Cir. 2012)	Denied
Gonzales, Ramiro	5th	Gonzales v. Stephens, 606 F.App'x 767, 768 (5th Cir. 2015)	Denied
Guevara, Gilmar Alexander	5th	Guevara v. Stephens, 577 F.App'x 364, 366 (5th Cir. 2014)	Denied
Gutierrez, Ruben	5th	Gutierrez v. Stephens, 590 F.App'x 371, 373 (5th Cir. 2014)	Denied
Hall, Justen	5th	Hall v. Thaler, 504 F.App'x 269, 270 (5th Cir. 2012)	Denied
Harris, Robert Wayne	5th	Harris v. Thaler, 464 F.App'x 301, 303 (5th Cir. 2012)	Denied
Haynes, Anthony Cardell	5th	Haynes v. Thaler, 438 F.App'x 324, 326 (5th Cir. 2011)	Granted, Circuit
Hearn, Yokamon Laneal	5th	Hearn v. Thaler, 669 F.3d 265, 267 (5th Cir. 2012)	Denied
Henderson, James Lee	5th	Henderson v. Stephens, 791 F.3d 567, 577 (5th Cir. 2015)	Granted, District
Hernandez, Ramiro	5th	Hernandez v. Stephens, 537 F.App'x 531, 533 (5th Cir. 2013)	Granted, District
Hines, Bobby Lee	5th	Hines v. Thaler, 456 F.App'x 357, 358 (5th Cir. 2011)	Denied
Hoffman, Jessie	5th	Hoffman v. Cain, 752 F.3d 430, 434 (5th Cir. 2014)	Granted, District
Holiday, Raphael Deon	5th	Holiday v. Stephens, 587 F.App'x 767, 790 (5th Cir. 2014)	Denied
Ibarra, Ramiro Rubi	5th	Ibarra v. Thaler, 691 F.3d 677, 679 (5th Cir. 2012)	Denied
Ibarra,	5th	Ibarra v. Stephens, 723 F.3d 599, 600 (5th	Granted, Circuit

Ramiro Rubi		Cir. 2013)	
Jackson, Henry Curtis	5th	Jackson v. Epps, 447 F.App'x 535, 537 (5th Cir. 2011)	Granted, District
Jasper, Ray	5th	In re Jasper, 559 F.App'x 366, 368 (5th Cir. 2014)	Granted, Circuit
Jasper, Ray	5th	Jasper v. Thaler, 466 F.App'x 429, 430 (5th Cir. 2012)	Granted, District
Jennings, Robert Mitchell	5th	Jennings v. Stephens, 537 F.App'x 326, 339 (5th Cir. 2013)	Denied
Johnson, Dexter	5th	Johnson v. Stephens, 617 F.App'x 293, 295 (5th Cir. 2015)	Granted, District
Jones, Shelton Denoria	5th	Jones v. Stephens, 612 F.App'x 723, 724 (5th Cir. 2015)	Granted, District
Jones, Shelton Denoria	5th	Jones v. Stephens, 541 F.App'x 399, 400 (5th Cir. 2013)	Denied
Jordan, Richard	5th	Jordan v. Epps, 756 F.3d 395, 398 (5th Cir. 2014)	Denied
Ladd, Robert Charles	5th	Ladd v. Stephens, 748 F.3d 637, 639 (5th Cir. 2014)	Granted, District
Lewis, Rickey Lynn	5th	Lewis v. Thaler, 701 F.3d 783, 785 (5th Cir. 2012)	Granted, District
Loden, Thomas Edwin	5th	Loden v. McCarty, 778 F.3d 484, 493 (5th Cir. 2015)	Granted, District
Manning, Willie Jerome	5th	Manning v. Epps, 688 F.3d 177, 180 (5th Cir. 2012)	Granted, District
Masterson, Richard Allen	5th	Masterson v. Stephens, 596 F.App'x 282, 284 (5th Cir. 2015)	Denied
Matamoros, John Reyes	5th	Matamoros v. Stephens, 783 F.3d 212, 213 (5th Cir. 2015)	Granted, Circuit
Matamoros, John Reyes	5th	Matamoros v. Stephens, 539 F.App'x 487, 489 (5th Cir. 2013)	Granted, Circuit
Mays, Randall Wayne	5th	Mays v. Stephens, 757 F.3d 211, 212 (5th Cir. 2014)	Denied
McCarthy, Kimberly Lagayle	5th	McCarthy v. Thaler, 482 F.App'x 898, 899 (5th Cir. 2012)	Denied
McCoskey, Jamie Bruce	5th	McCoskey v. Thaler, 478 F.App'x 143, 145 (5th Cir. 2012)	Granted, District
McGowan,	5th	McGowen v. Thaler, 675 F.3d 482, 503 (5th	Denied

Roger Wayne		Cir. 2012)	
Mendoza, Moises Sandoval	5th	Mendoza v. Stephens, 783 F.3d 203, 209 (5th Cir. 2015)	Granted, District
Mitchell, William Gerald	5th	Mitchell v. Epps, 641 F.3d 134, 139 (5th Cir. 2011)	Denied
Newbury, Donald Keith	5th	Newbury v. Stephens, 756 F.3d 850, 853 (5th Cir. 2014)	Denied
Newbury, Donald Keith	5th	Newbury v. Thaler, 437 F.App'x 290, 292 (5th Cir. 2011)	Denied
Osborne, Emerson	5th	Osborne v. King, 617 F.App'x 308, 309 (5th Cir.)	Granted, District
Parr, Carroll	5th	Parr v. Thaler, 481 F.App'x 872, 874 (5th Cir. 2012)	Denied
Panetti, Scott Louis	5th	Panetti v. Stephens, 727 F.3d 398, 400 (5th Cir. 2013)	Granted, District
Paredes, Miguel	5th	In re Paredes, 587 F.App'x 805, 807 (5th Cir. 2014)	Denied
Perez, Louis Castro	5th	Perez v. Stephens, 784 F.3d 276, 278 (5th Cir. 2015)	Denied
Perez, Louis Castro	5th	Perez v. Stephens, 745 F.3d 174, 176 (5th Cir. 2014)	Denied
Pruett, Robert Lynn	5th	Pruett v. Thaler, 455 F.App'x 478, 479 (5th Cir. 2011)	Granted, District
Puckett, Larry Matthew	5th	Puckett v. Epps, 641 F.3d 657, 658-59 (5th Cir. 2011)	Granted, Circuit
Quintanilla, John Manuel	5th	Quintanilla v. Thaler, 443 F.App'x 919, 920 (5th Cir. 2011)	Denied
Rayford, William Earl	5th	Rayford v. Stephens, 622 F.App'x 315, 316 (5th Cir. 2015)	Denied
Reed, Rodney	5th	Reed v. Stephens, 739 F.3d 753, 760 (5th Cir. 2014)	Denied
Ripkowski, Britt Allen	5th	Ripkowski v. Thaler, 438 F.App'x 296, 300 (5th Cir. 2011)	Granted, District
Rivas, George	5th	Rivas v. Thaler, 432 F.App'x 395, 396 (5th Cir. 2011)	Denied
Roberson, Robert Leslie	5th	Roberson v. Stephens, 614 F.App'x 124, 125 (5th Cir. 2015)	Granted, Circuit
Roberts, Donnie Lee	5th	Roberts v. Thaler, 681 F.3d 597, 602 (5th Cir. 2012)	Granted, District
Ross, Vaughn	5th	Ross v. Thaler, 511 F.App'x 293, 294 (5th Cir. 2013)	Denied

Ruiz, Rolando	5th	Ruiz v. Stephens, 728 F.3d 416, 418 (5th Cir. 2013)	Denied
Russeau, Gregory	5th	Russeau v. Stephens, 559 F.App'x 342, 348 (5th Cir. 2014)	Granted, District
Sells, Tommy Lynn	5th	Sells v. Stephens, 536 F.App'x 483, 484 (5th Cir. 2013)	Denied
Simmons, Donald Ray	5th	Simmons v. Thaler, 440 F.App'x 237, 238 (5th Cir. 2011)	Granted, Circuit
Simmons, Gary Carl	5th	Simmons v. Epps, 654 F.3d 526, 533 (5th Cir. 2011)	Granted, Circuit
Simon, Robert	5th	Simon v. Epps, 463 F.App'x 339, 340 (5th Cir. 2012)	Granted, District
Sprouse, Kent William	5th	Sprouse v. Stephens, 748 F.3d 609, 615 (5th Cir. 2014)	Granted, District
Storey, William	5th	Storey v. Stephens, 606 F.App'x 192, 193 (5th Cir. 2015)	Denied
Swain, Mario	5th	Swain v. Thaler, 466 F.App'x 393, 394 (5th Cir. 2012)	Granted, District
Tabler, Richard Lee	5th	Tabler v. Stephens, 588 F.App'x 297, 298 (5th Cir. 2014)	Denied
Tamayo, Edgar Arias	5th	Tamayo v. Stephens, 740 F.3d 991, 992 (5th Cir. 2014)	Denied
Tamayo, Edgar Arias	5th	Tamayo v. Stephens, 740 F.3d 986, 987 (5th Cir. 2014)	Granted, District
Tercero, Bernardo Aban	5th	Tercero v. Stephens, 738 F.3d 141, 143 (5th Cir. 2013)	Denied
Threadgill, Ronnie Paul	5th	In re Threadgill, 522 F.App'x 236, 238 (5th Cir. 2013)	Denied
Threadgill, Ronnie Paul	5th	Threadgill v. Thaler, 425 F.App'x 298, 299 (5th Cir. 2011)	Granted, District
Trevino, Carlos	5th	Trevino v. Thaler, 449 F.App'x 415, 416 (5th Cir. 2011)	Granted, District
Trottie, Willie Tyrone	5th	Trottie v. Stephens, 720 F.3d 231, 237 (5th Cir. 2013)	Denied
Trottie, Willie Tyrone	5th	Trottie v. Stephens, 581 F.App'x 436, 437 (5th Cir. 2014)	Denied
Turner, Edwin Hart	5th	Turner v. Epps, 12 F.App'x 696, 698 (5th Cir. 2011)	Denied
Vasquez, Manuel	5th	Vasquez v. Thaler, 505 F.App'x 319, 323 (5th Cir. 2013)	Denied
Villanueva, Jorge	5th	Villanueva v. Stephens, 555 F.App'x 300, 309 (5th Cir. 2014)	Granted, Circuit
Ward, Adam	5th	Ward v. Stephens, 777 F.3d 250, 253 (5th	Denied

Kelly		Cir. 2015)	
Washington, Willie Terion	5th	Washington v. Stephens, 551 F.App'x 122, 123 (5th Cir. 2014)	Granted, Circuit
White, Garcia Glenn	5th	In re White, 602 F.App'x 954, 957 (5th Cir. 2015)	Denied
White, Garcia Glenn	5th	White v. Thaler, 522 F.App'x 236, 238 (5th Cir. 2013)	Denied
Wilkins, Christopher Chubasco	5th	Wilkins v. Stephens, 560 F.App'x 299, 301 (5th Cir. 2014)	Denied
Williams, Clifton Lamar	5th	Williams v. Stephens, 761 F.3d 561, 565 (5th Cir. 2014)	Denied
Williams, Perry Eugene	5th	Williams v. Stephens, 575 F.App'x 380, 382 (5th Cir. 2014)	Granted, District
Wilson, Marvin Lee	5th	Wilson v. Thaler, 450 F.App'x 369, 371 (5th Cir. 2011)	Granted, District
Wood, Jeffrey Lee	5th	Wood v. Stephens, 619 F.App'x 304, 305 (5th Cir. 2015)	Granted, Circuit
Woodard, Robert Lee	5th	Woodard v. Thaler, 414 F.App'x 675, 676 (5th Cir. 2011)	Denied
Young, Clinton Lee	5th	Young v. Stephens, 795 F.3d 484, 490 (5th Cir. 2015), as revised (July 30, 2015)	Denied
Yowell, Michael John	5th	Yowell v. Thaler, 545 F.App'x 311, 313 (5th Cir. 2013)	Denied
		Total Granted:	**53 (41.1%)**
		Total Denied:	**76 (58.9%)**

Eleventh Circuit

Name of Movant	Circuit	Case Citation	Granted, and if so by which court?
Adkins, Ricky D.	11th	Adkins v. Warden, Holman CF, 710 F.3d 1241, 1243-44 (11th Cir. 2013)	Granted, Circuit
Anderson, Fred	11th	Anderson v. Sec'y, Fla. Dep't of Corr., 752 F.3d 881, 902 (11th Cir. 2014)	Granted, Circuit
Arthur, Thomas D.	11th	Arthur v. Thomas, 739 F.3d 611, 627 (11th Cir.)	Granted, Circuit
Banks, Chadwick	11th	Banks v. Sec'y, Fla. Dep't of Corr., 491 F.App'x 966, 969 (11th Cir. 2012)	Granted, District
Barwick, Darryl Brian	11th	Barwick v. Sec'y, Fla. Dep't of Corr., 794 F.3d 1239, 1243 (11th Cir. 2015)	Granted, Circuit
Bates, Kayle Barrington	11th	Bates v. Sec'y, Fla. Dep't of Corr., 768 F.3d 1278, 1283 (11th Cir. 2014)	Granted, Circuit
Belcher, James	11th	Belcher v. Sec'y, Dep't of Corr., 427 F.App'x 692, 692 (11th Cir. 2011)	Granted, Circuit
Bell, Michael	11th	Bell v. Fla. Atty. Gen., 461 F.App'x 843, 845 (11th Cir. 2012)	Granted, District
Bishop, Joshua Daniel	11th	Bishop v. Warden, GDCP, 726 F.3d 1243, 1253 (11th Cir. 2013)	Granted, Circuit
Blanco, Omar	11th	Blanco v. Sec'y, Fla. Dep't of Corr., 688 F.3d 1211, 1226 (11th Cir. 2012)	Granted, District
Bolin, Oscar Ray	11th	In re Bolin, No. 15-15710-P, 2016 WL 51227, at *7 fn. 4 (11th Cir. Jan. 4, 2016)	Granted, District
Booker, Stephen	11th	Booker v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1121, 1122 (11th Cir. 2012)	Granted, Circuit
Borden, Jeffrey Lynn	11th	Borden v. Allen, 646 F.3d 785, 807 (11th Cir. 2011)	Granted, District
Boyd, Anthony	11th	Boyd v. Comm'r, Ala. Dep't of Corr., 697 F.3d 1320, 1330 (11th Cir. 2012)	Granted, Circuit
Brannan, Andrew H.	11th	Brannan v. GDCP Warden, 541 F.App'x 901, 902 (11th Cir. 2013)	Granted, Circuit
Brooks, Christopher Eugene	11th	Brooks v. Comm'r, Ala. Dep't of Corr., 719 F.3d 1292, 1299 (11th Cir. 2013)	Granted, Circuit
Burgess, Raymond	11th	Burgess v. Terry, 478 F.App'x 597, 601 (11th Cir. 2012)	Granted, Circuit
Burns, Daniel	11th	Burns v. Sec'y, Fla. Dep't of Corr., 720 F.3d 1296, 1302 (11th Cir. 2013)	Granted, Circuit
Carrillo, Raul	11th	Carrillo v. Sec'y, Fla. Dep't of Corr., 477 F.App'x 546, 548 (11th Cir. 2012)	Granted, District
Chavez, Juan Carlos	11th	Chavez v. Sec'y Fla. Dep't of Corr., 647 F.3d 1057, 1060 (11th Cir. 2011)	Granted, District

Conner, John Wayne	11th	Conner v. GDCP Warden, 784 F.3d 752, 756 (11th Cir. 2015)	Granted, Circuit
Conner, John Wayne	11th	Conner v. Hall, 645 F.3d 1277, 1286 (11th Cir. 2011)	Granted, Circuit
Connor, Seburt Nelson	11th	Connor v. Sec'y, Fla. Dep't of Corr., 713 F.3d 609, 611 (11th Cir. 2013)	Granted, Circuit
Consalvo, Robert	11th	Consalvo v. Sec'y for Dep't of Corr., 664 F.3d 842, 843 (11th Cir. 2011)	Granted, District
Cook, Andrew Allen	11th	Cook v. Warden, Ga. Diagnostic Prison, 677 F.3d 1133, 1136 (11th Cir. 2012)	Granted, District
Cooper, Richard	11th	Cooper v. Sec'y, Dep't of Corr., 646 F.3d 1328, 1330-31 (11th Cir. 2011)	Granted, District
Cox, Allen W.	11th	Cox v. McNeil, 638 F.3d 1356, 1360 (11th Cir. 2011)	Granted, Circuit
Damren, Floyd	11th	Damren v. Florida, 776 F.3d 816, 820 (11th Cir. 2015)	Granted, District
Downs, Ernest Charles	11th	Downs v. Sec'y, Fla. Dep't of Corr., 738 F.3d 240, 256 (11th Cir. 2013)	Granted, Circuit
Evans, Paul H.	11th	Evans v. Sec'y, Fla. Dep't of Corr., 699 F.3d 1249, 1255 (11th Cir. 2012)	Granted, Circuit[2]
Evans, Wydell	11th	Evans v. Sec'y, Fla. Dep't of Corr., 681 F.3d 1241, 1251 (11th Cir.)	Granted, District
Everett, Paul Glen	11th	Everett v. Sec'y, Fla. Dep't of Corr., 779 F.3d 1212, 1218 (11th Cir. 2015)	Granted, Circuit
Farina, Anthony Joseph	11th	Farina v. Sec'y, Fla. Dep't of Corr., 536 F.App'x 966, 970 (11th Cir. 2013)	Granted, Circuit
Ferguson, John	11th	Ferguson v. Sec'y, Fla. Dep't of Corr., 716 F.3d 1315, 1330 (11th Cir. 2013)	Granted, District
Ferrell, Eric Lynn	11th	Ferrell v. Hall, 640 F.3d 1199, 1222-23 (11th Cir. 2011)	Granted, Circuit
Floyd, Maurice Lamar	11th	Floyd v. Sec'y, Fla. Dep't of Corr., No. 13-13566, 2016 WL 231484, at *1 (11th Cir. Jan. 20, 2016)	Granted, Circuit
Fults, Kenneth Earl	11th	Fults v. GDCP Warden, 764 F.3d 1311, 1312 (11th Cir. 2014)	Granted, Circuit
Gissendaner, Kelly Renee	11th	Gissendaner v. Seaboldt, 735 F.3d 1311, 1316 (11th Cir. 2013)	Granted, District
Gore, Marshall Lee	11th	Gore v. Crews, 720 F.3d 811, 814 (11th Cir. 2013)	Granted, District
Gonzalez,	11th	Gonzalez v. Sec'y, Fla. Dep't of Corr.,	Granted, District

[2] The district court granted Mr. Evans habeas relief from his death sentence. The State appealed this ruling and the district court granted Mr. Evans a COA on two of his claims. The Court of Appeals expanded Mr. Evan's COA. Because petitioner's sentencing relief was not final when his COA was granted, we counted Mr. Evans as being under a death sentence and thus meeting the criteria for inclusion.

Ricardo		629 F.3d 1219, 1220 (11th Cir. 2011)	
Greene, Daniel	11th	Greene v. Upton, 644 F.3d 1145, 1153 (11th Cir. 2011)	Granted, Circuit
Griffin, Michael Allen	11th	Griffin v. Sec'y, Fla. Dep't of Corr., 787 F.3d 1086, 1087 (11th Cir. 2015)	Denied
Grim, Norman Mearle	11th	Grim v. Sec'y, Fla. Dep't of Corr., 705 F.3d 1284, 1286 (11th Cir. 2013)	Denied
Gudinas, Thomas Lee	11th	Gudinas v. Sec'y, Dep't of Corr., 436 F.App'x 895, 896 (11th Cir. 2011)	Granted, Circuit
Hardy, John Milton	11th	Hardy v. Comm'r, Ala. Dep't of Corr., 684 F.3d 1066, 1073 (11th Cir. 2012)	Granted, District
Harvey, Harold Lee	11th	Harvey v. Warden, Union Corr. Inst., 629 F.3d 1228, 1237 (11th Cir. 2011)	Granted, District
Heath, Ronald Palmer	11th	Heath v. Sec'y, Fla. Dep't of Corr., 717 F.3d 1202, 1204 (11th Cir. 2013)	Granted, District
Henry, George Russell	11th	Henry v. Warden, Ga. Diagnostic Prison, 750 F.3d 1226, 1230 (11th Cir. 2014)	Granted, District
Hitchcock, James	11th	Hitchcock v. Sec'y, Fla. Dep't of Corr., 745 F.3d 476, 480 (11th Cir. 2014)	Granted, Circuit
Hittson, Travis Clinton	11th	Hittson v. GDCP Warden, 759 F.3d 1210, 1217 (11th Cir. 2014)	Granted, Circuit
Holland, Albert Jr.	11th	Holland v. Florida, 775 F.3d 1294, 1305 (11th Cir. 2014)	Granted, Circuit
Holsey, Robert Wayne	11th	Holsey v. Warden, Ga. Diagnostic Prison, 694 F.3d 1230, 1231 (11th Cir. 2012)	Granted, District
Howell, Paul A.	11th	Howell v. Sec'y, Fla. Dep't of Corr., 730 F.3d 1257, 1260 (11th Cir. 2013)	Granted, District
Hunt, Gregory	11th	Hunt v. Comm'r, Ala. Dep't of Corr., 666 F.3d 708, 720 (11th Cir. 2012)	Granted, District
Israel, Connie Ray	11th	Israel v. Sec'y, Fla. Dep't of Corr., 517 F.App'x 694, 695 (11th Cir. 2013)	Granted, District
Johnson, Marcus Ray	11th	Johnson v. Warden, Ga. Diagnostic & Classification Prison, 805 F.3d 1317, 1323 (11th Cir. 2015)	Denied
Johnson, Marcus Ray	11th	Johnson v. Warden, 808 F.3d 1275, 1283 (11th Cir. 2015)	Denied
Johnson, Terrell M.	11th	Johnson v. Sec'y, Dep't of Corr., 643 F.3d 907, 911 (11th Cir. 2011)	Granted, Circuit
Jones, Brandon Astor	11th	Jones v. GDCP Warden, 753 F.3d 1171, 1181 (11th Cir. 2014)	Granted, District
Jones, Randall Scott	11th	Jones v. Sec'y, Dep't of Corr., 644 F.3d 1206, 1208 (11th Cir. 2011)	Granted, Circuit
Kilgore, Dean	11th	Kilgore v. Sec'y, Fla. Dep't of Corr., 805 F.3d 1301, 1308-09 (11th Cir. 2015)	Granted, Circuit
Kuenzel,	11th	Kuenzel v. Comm'r, Ala. Dep't of Corr.,	Granted, District

William Earnest		690 F.3d 1311, 1314 (11th Cir. 2012)	
Lambrix, Cary Michael	11th	Lambrix v. Sec'y, Fla. Dep't of Corr., 756 F.3d 1246, 1258 (11th Cir.)	Denied
Lawrence, Jonathan Huey	11th	Lawrence v. Sec'y, Fla. Dep't of Corr., 700 F.3d 464, 476 (11th Cir. 2012)	Granted, Circuit
Lee, Jeffrey	11th	Lee v. Comm'r, Ala. Dep't of Corr., 726 F.3d 1172, 1191 (11th Cir. 2013)	Granted, District
Lucas, Harold Gene	11th	Lucas v. Sec'y, Dep't of Corr., 682 F.3d 1342, 1351 (11th Cir. 2012)	Granted, District
Lucas, Daniel Anthony	11th	Lucas v. Warden, Ga. Diagnostic & Classification Prison, 771 F.3d 785, 790 (11th Cir. 2014)	Granted, Circuit
Lugo, Daniel	11th	Lugo v. Sec'y, Fla. Dep't of Corr., 750 F.3d 1198, 1201 (11th Cir. 2014)	Granted, Circuit
Lynch, Richard E.	11th	Lynch v. Sec'y, Fla. Dep't of Corr., 776 F.3d 1209, 1217 (11th Cir. 2015)	Granted, Circuit
Madison, Vernon	11th	Madison v. Comm'r, Ala. Dep't of Corr., 677 F.3d 1333, 1335 (11th Cir. 2012)	Granted, Circuit
Madison, Vernon	11th	Madison v. Comm'r, Ala. Dep't of Corr., 761 F.3d 1240, 1241 (11th Cir. 2014)	Granted, Circuit
McNabb, Torrey Twane	11th	McNabb v. Comm'r Ala. Dep't of Corr., 727 F.3d 1334, 1335 (11th Cir. 2013)	Granted, District
McWilliams, James E.	11th	McWilliams v. Comm'r, Ala. Dep't of Corr., No. 13-13906, 2015 WL 8950641, at *1 (11th Cir. Dec. 16, 2015)	Granted, Circuit
Melton, Antonio Lebaron	11th	Melton v. Sec'y, Fla. Dep't of Corr., 778 F.3d 1234, 1235 (11th Cir.)	Denied
Mendoza, Marbel	11th	Mendoza v. Sec'y, Fla. Dep't of Corr., 761 F.3d 1213, 1215 (11th Cir. 2014)	Granted, Circuit
Morris, Robert	11th	Morris v. Sec'y, Dep't of Corr., 677 F.3d 1117, 1125 (11th Cir. 2012)	Granted, Circuit
Morton, Alvin Leroy	11th	Morton v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1157, 1165 (11th Cir. 2012)	Granted, Circuit
Myers, Robin D.	11th	Myers v. Allen, 420 F.App'x 924, 927 (11th Cir. 2011)	Granted, District
Owen, Donald Eugene	11th	Owen v. Fla. Dep't of Corr., 686 F.3d 1181, 1191-92 (11th Cir. 2012)	Granted, District
Pietri, Norberto	11th	Pietri v. Fla. Dep't of Corr., 641 F.3d 1276, 1279 (11th Cir. 2011)	Granted, District
Ponticelli, Anthony John	11th	Ponticelli v. Sec'y, Fla. Dep't of Corr., 690 F.3d 1271, 1291 (11th Cir. 2012)	Granted, District
Pooler, Leroy	11th	Pooler v. Sec'y, Fla. Dep't of Corr., 702 F.3d 1252, 1268 (11th Cir. 2012)	Granted, District
Preston,	11th	Preston v. Sec'y, Fla. Dep't of Corr., 785	Granted, Circuit

Robert Anthony		F.3d 449, 451 (11th Cir. 2015)	
Price, Christopher Lee	11th	Price v. Allen, 679 F.3d 1315, 1319 (11th Cir. 2012)	Granted, Circuit
Puiatti, Carl	11th	Puiatti v. Sec'y, Fla. Dep't of Corr., 732 F.3d 1255, 1259 (11th Cir. 2013)	Granted, Circuit
Ray, Domenique	11th	Ray v. Ala. Dep't of Corr., No. 13-15673, 2016 WL 66534, at *3 (11th Cir. Jan. 6, 2016)	Granted, Circuit
Reese, John Loveman	11th	Reese v. Sec'y, Fla. Dep't of Corr., 675 F.3d 1277, 1286 (11th Cir. 2012)	Granted, District
Roberts, David Lee	11th	Roberts v. Comm'r, Ala. Dep't of Corr., 677 F.3d 1086, 1088 (11th Cir. 2012)	Granted, Circuit
Rodriguez, Manuel Antonio	11th	Rodriguez v. Sec'y, Fla. Dep't of Corr., 756 F.3d 1277, 1280 fn. 5 (11th Cir. 2014)	Granted, District
Rose, Milo A.	11th	Rose v. McNeil, 634 F.3d 1224, 1240 (11th Cir. 2011)	Granted, Circuit
Rozzelle, Roger Allen	11th	Rozzelle v. Sec'y, Fla. Dep't of Corr., 672 F.3d 1000, 1009 (11th Cir. 2012)	Granted, District
Samra, Michael Brandon	11th	Samra v. Warden, Donaldson Corr. Facility, No. 14-14869, 2015 WL 5204387, at *11 (11th Cir. Sept. 8, 2015)	Granted, Circuit
San Martin, Pablo	11th	San Martin v. McNeil, 633 F.3d 1257, 1265 (11th Cir. 2011)	Granted, District
Smith, Joseph Clifton	11th	Smith v. Campbell, 620 F.App'x 734, 745 (11th Cir. 2015)	Granted, Circuit
Smith, Ronald Bert	11th	Smith v. Comm'r, Ala. Dep't of Corr., 703 F.3d 1266, 1268 fn. 1 (11th Cir. 2012)	Granted, Circuit
Smithers, Samuel	11th	Smithers v. Sec'y, Fla. Dep't of Corr., 501 F.App'x 906, 907 (11th Cir. 2012)	Granted, Circuit
Stewart, Kenneth A.	11th	Stewart v. Sec'y, Fla. Dep't of Corr., No. 14-11238, 2015 WL 9301490, at *3 (11th Cir. Dec. 22, 2015)	Granted, Circuit
Tanzi, Michael Anthony	11th	Tanzi v. Sec'y, Fla. Dep't of Corr., 772 F.3d 644, 650 (11th Cir. 2014)	Granted, Circuit
Taylor, Michael Shannon	11th	Taylor v. Culliver, No. 13-11179, 2015 WL 4645228, at *1 (11th Cir. Aug. 6, 2015)	Granted, Circuit
Taylor, Perry Alexander	11th	Taylor v. Sec'y, Fla. Dep't of Corr., 760 F.3d 1284, 1293 (11th Cir. 2014)	Granted, Circuit
Terrell, Brian Keith	11th	Terrell v. GDCP Warden, 744 F.3d 1255, 1258 (11th Cir.)	Granted, Circuit
Trepal, George	11th	Trepal v. Sec'y, Fla. Dep't of Corr., 684	Granted, District

James		F.3d 1088, 1107 (11th Cir. 2012)	
Troy, John	11th	Troy v. Sec'y, Fla. Dep't of Corr., 763 F.3d 1305, 1312 (11th Cir. 2014)	Granted, Circuit
Waldrip, Tommy Lee	11th	Waldrip v. Humphrey, 532 F.App'x 878, 879 (11th Cir. 2013)	Granted, Circuit
Walls, Frank A.	11th	Walls v. Buss, 658 F.3d 1274, 1277 (11th Cir. 2011)	Granted, District
Wellons, Marcus A.	11th	Wellons v. Warden, Ga. Diagnostic & Classification Prison, 695 F.3d 1202, 1206 (11th Cir. 2012)	Granted, Circuit
White, Leroy	11th	White v. Jones, 408 F.App'x 292, 293 (11th Cir. 2011)	Denied
Williamson, Dana	11th	Williamson v. Fla. Dep't of Corr., 805 F.3d 1009, 1015 (11th Cir. 2015)	Granted, District
Wilson, Marion Jr.	11th	Wilson v. Warden, Ga. Diagnostic Prison, 774 F.3d 671, 677 (11th Cir. 2014)	Granted, District
Wright, Joel Dale	11th	Wright v. Sec'y, Fla. Dep't of Corr., 761 F.3d 1256, 1260 (11th Cir. 2014)	Granted, District
Zack, Michael Duane	11th	Zack v. Tucker, 666 F.3d 1265, 1267 (11th Cir. 2012)	Granted, District
		Total Granted:	**104 (93.7%)**
		Total Denied:	**7 (6.3%)**

No. _____

IN THE

Supreme Court of the United States

DUANE EDWARD BUCK,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I certify that on the 4th day of February, 2016, I served the enclosed MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on Edward L. Marshall, and Fredericka Sargent Assistant Attorneys General, Post-Conviction Unit, Office of the Texas Attorney General, 300 West 15th Street, 8th Floor, Austin, Texas 78701, (512) 463-2191 via email (Edward.Marshall@texasattorneygeneral.gov and fredericka.sargent@texasattorneygeneral.gov) and through the United States Postal Service via email and first-class mail in accordance with Sup. Ct. R. 29(3). All parties required to be served have been served. I am a member of the Bar of this Court.

/s/ *Christina A Swarns*
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