No. 15-8049

IN THE

Supreme Court of the United States

DUANE EDWARD BUCK,

Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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I. Introduction

This is the rare habeas case for which relief under Federal Rule of Civil Procedure 60(b)(6) is appropriate. Although the state ordinarily has a strong interest in the finality of criminal judgments, Texas acknowledged that when, as here, a death sentence is corrupted by "expert testimony" that the defendant is more likely to commit crimes of violence because of his race, its finality interest does not apply. For that reason, Texas conceded error in *Saldaño v. Texas* and then publicly declared it would not object to new sentencing hearings in six additional cases—including Mr. Buck's—that involved expert race-as-criminal-violence testimony. It kept its promise in five of those cases, but reneged on its promise to Mr. Buck.

Texas's arguments do not change the fact that this case is extraordinary, or that the lower courts' denial of relief was wrong, or at least debatable. Mr. Buck is entitled to a Certificate of Appealability (COA).

II. This Court Cannot Have Confidence in Duane Buck's Sentence of Death.

Texas now concedes that "the introduction of race into [Mr. Buck's] own capital-punishment proceedings by [Mr. Buck's] own trial counsel was at least debatably deficient performance." Red Br. 1. Yet, Texas continues to advance the untenable argument that Mr. Buck cannot meet *Strickland*'s prejudice prong, and indeed that no reasonable jurist could disagree. According to Texas, Dr. Quijano's repeated statements that Mr. Buck's race meant he was more likely to commit acts of criminal violence (a) played only a "very limited role" at sentencing, and (b) are

of no constitutional significance given the "overwhelming" aggravating evidence. Red Br. 23-33. Texas is wrong on both points.

A. Dr. Quijano's Testimony Was Uniquely Harmful.

Dr. Quijano's race-as-dangerousness opinion tainted Mr. Buck's sentencing proceeding with an "arbitrary, emotionally charged factor that has nothing to do with individual moral culpability." Red Br. 1 (citation omitted). The harm to Mr. Buck is clear: "Injection of a defendant's ethnicity into a trial as evidence of criminal behavior is self-evidently improper and prejudicial. . . ." *United States v. Cruz*, 981 F.2d 659, 664 (2d Cir. 1992). Indeed, courts have recognized for over a century that appeals to race bias create a *sui generis* risk that the jury will make its decision based on invidious considerations that have nothing to do with the competent evidence. *See* Blue Br. 36-38. Texas makes a number of arguments seeking to avoid this principle, but none are persuasive.

First, contrary to Texas's suggestion, Red Br. 29, the race-as-dangerousness opinion does not have to be repeated a certain number of times or occupy a specific percentage of transcript lines in order to be prejudicial. Given our nation's history, "one cannot unring the bell" or "destroy the virus that [is] spread" when jurors are urged to consider a criminal defendant's race as evidence in support of guilt or punishment. Blue Br. 33-34 (citations omitted). Indeed, in most of the cases cited by Mr. Buck on this issue, the court found prejudice based on just one or two racially-biased statements (some of which the jurors were instructed to disregard). *See id.* at 36-38.

Prejudice follows *a fortiori* here, where Dr. Quijano's assertions that Mr. Buck's race made him more likely to commit criminal acts of violence were presented to the jury on three separate occasions.

On direct examination, defense counsel elicited testimony by Dr. Quijano that Mr. Buck's "race" was one of the "the statistical factors we know to predict future dangerousness." JA 146a.

On cross-examination, the prosecutor had Dr. Quijano reaffirm that "the race factor, black, increases the future dangerousness for various complicated reasons." JA 170a.

And Dr. Quijano's report, which was submitted to the jury at defense counsel's request, stated that Mr. Buck's "**Race**. Black" meant there was an "Increased probability" he would "commit criminal acts of violence that would constitute a continuing threat to society." JA 18a, 19a (emphasis in original). During deliberations, the jury asked to review the "psychology reports," which included Dr. Quijano's. JA 209a.

Second, Texas stresses that it was the prosecution that made a direct racial appeal in the precedent cited in Mr. Buck's opening brief. Red Br. 31. But so did the prosecutor here. To be sure, the initial source of the constitutional error in this case was the failure of Mr. Buck's attorneys to "function[] as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). But one consequence of that error was that it opened the door for the prosecution to use Dr. Quijano's testimony to make a "direct plea[] . . . that the jury consider race or ethnicity as evidence of criminality." Red Br. 31.

Moreover, contrary to Texas's assertion, the prosecutor did not "merely review[] the entirety of Quijano's testimony without expressing either agreement or disagreement with Quijano's views." Red Br. 30. The prosecutor not only reiterated Dr. Quijano's race-as-dangerousness opinion, she suggested it was grounded in empirical research: "You have determined that . . . the race factor, black, increases the future dangerousness ***for various complicated reasons***; is that correct?" JA 170a (emphasis added). By contrast, the prosecutor sought to undermine Dr. Quijano's opinions that were helpful to Mr. Buck. *See, e.g.*, JA 169 (questions designed to undermine Mr. Buck's age as a factor decreasing the probability of future dangerousness); JA 170a (similar with respect to Mr. Buck's work history).

In sum, the jury in Mr. Buck's case heard testimony that "condemn[ed] [Black people] as a class" as predisposed to criminal violence, just as in the Jim Crow era case law cited in Mr. Buck's opening brief. *Allison v. State*, 248 S.W.2d 147, 148 (Tex. Crim. App. 1952). That the testimony was elicited by both the defense and the prosecution—and was presented as the purportedly professional opinion of a defense expert "appointed by Judge Collins . . . to do an evaluation on the defendant"—only exacerbates the harm. Blue Br. 30-31; *see Walbey v. Quarterman*, 309 F. App'x 795, 804 (5th Cir. 2009) (testimony by a defense expert supporting the prosecution's future dangerousness case was "highly prejudicial, particularly coming from a defense witness").

Third, it does not matter that Dr. Quijano also presented testimony favorable to Mr. Buck. Because a jury expects a defense expert to reach a conclusion favorable to

the defense, any testimony from such an expert that favors the prosecution is likely to stand out in jurors' minds. *See id.* at 803-04 (finding *Strickland* prejudice because, *inter alia*, testimony by a defense expert "did severe damage to Walbey's case," even though the expert's ultimate conclusion was that Walbey was not likely to be a future danger); *Walbey v. Quarterman*, 2008 WL 6841900, at *8-10 (S.D. Tex. Feb. 20, 2008) (district court's decision describing expert's testimony).

Furthermore, Texas overstates the favorable aspects of Dr. Quijano's testimony. Red Br. 29-30. On cross-examination, Dr. Quijano—to the prosecutor's apparent surprise—testified that there ***was*** a probability Mr. Buck would commit future acts of violence:

> Q: . . . I believe you testified . . . that you believed that the defendant if incarcerated . . . there would not be the probability about him being a continuing threat to society. I believe that was your opinion.
>
> A. No.
>
> Q. That was not your opinion?
>
> A. A decreased probability but there is a probability.
>
> . . .
>
> Q. Then there is a probability that he would be a continuing threat to society?

A. Yes.

MS. HUFFMAN: No other questions, Doctor. . .

JA 176a.

The prosecutor was thus able to argue in closing: "You heard from Dr. Quijano, who had a lot of experience in the Texas Department of Corrections, who told you that there was a probability that the man would commit future acts of violence." JA 198a.[1]

By contrast, Dr. Lawrence, another defense expert who had previously evaluated roughly 900 prisoners convicted of homicide, consistently testified that Mr. Buck was not likely to be a future danger. *See* Tr. 177, 182-86, 188-204, 205-06, *Buck v. Thaler*, 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. As a result, all the prosecutor could say in closing about Dr. Lawrence was: "[t]he other gentleman, Dr. Lawrence, he told you that he couldn't make any guarantees." JA 199a.

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[1] Texas's argument that the prosecution's closing did not specifically refer to race, Red Br. 30, misses the point. In closing, the prosecutor expressly invoked Dr. Quijano's opinion that there was a probability Mr. Buck would be a future danger. That opinion was tainted by Dr. Quijano's race-as-dangerousness opinion. Although Texas suggests that Dr. Quijano's ultimate future dangerousness opinion was based solely on Mr. Buck's lack of remorse in the wake of the crimes, that suggestion is not supported by the Transcript. *Compare* Red Br. 30-31 *with* JA 175a-76a.

Fourth, Texas gets it backward when it asserts that Dr. Quijano's testimony was less harmful than the inflammatory racial rhetoric at issue in some of the case law cited by Mr. Buck. *See* Red Br. 31. Here, the prosecutor did not simply "draw the color line" by making a generalized appeal to racial prejudice, or use a coded phrase such as "burn, baby, burn" in the course of a question that the jury was instructed to disregard. *Id.* (citing cases). Instead, the prosecutor and the defense elicited testimony that "bore the imprimatur of an expert's opinion" and legitimized the uniquely pernicious stereotype that Black men are more likely to commit acts of criminal violence. *Vanderbilt v. Collins*, 994 F.2d 189, 199 (5th Cir. 1993).

This last point is especially significant because a jury finding of future dangerousness was a prerequisite for a death sentence here, and future dangerousness was the central disputed issue. Blue Br. 5-8. As this Court has recognized (in a case Texas does not even mention), a juror who "believes that blacks are violence prone . . . might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors" required for a death sentence; "[s]uch a juror might also be less favorably inclined toward petitioner's" mitigating evidence. *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion). Dr. Quijano repeatedly validated this false and uniquely prejudicial stereotype in Mr. Buck's case.

B. The Aggravation Does Not Alter the Prejudice Caused by Dr. Quijano's Testimony.

This Court has found *Strickland* prejudice even when the prosecution presented substantial evidence in aggravation. *See* Blue Br. 39-40 (discussing *Porter v.*

McCollum, 558 U.S. 30 (2009) (per curiam), and *Williams v. Taylor*, 529 U.S. 362 (2000)). Texas does not contend that this case is any more aggravated than *Porter* or *Williams*; and, indeed, Texas specifically "does not argue" that a brutal crime precludes a finding of prejudice. Red Br. 24.

Yet, at the same time, Texas insists that *Porter*, *Williams* and the other ineffective assistance of counsel cases cited in Mr. Buck's opening brief "have little bearing on this case" because they were premised on counsel's failure to investigate mitigation. Red Br. 24 & n. 6. That is a distinction without a difference. This Court's precedent is clear: errors by defense counsel that fundamentally skew the evidentiary picture presented to the capital sentencing jury can undermine confidence in a death sentence, even when a crime involves substantial aggravation. *See Porter*, 558 U.S. at 41-42; *Williams*, 529 U.S. at 398. That principle is applicable whether defense counsel fails to investigate and present mitigating evidence that would help their client (*i.e.*, the most common capital sentencing ineffectiveness claim), or defense counsel introduces uniquely harmful "evidence" that supports the state's case for death (*i.e.*, the extraordinary circumstances of Mr. Buck's ineffectiveness claim).

The case law cited by Texas, *see* Red Br. 25-26, does not hold otherwise. None of those cases involved an error by defense counsel that fundamentally skewed the evidentiary picture presented to the jury. *See, e.g., Wong v. Belmontes*, 558 U.S. 15, 22-27 (2009) (per curiam) (omitted mitigation was cumulative of trial evidence, or would have allowed the prosecution to introduce evidence of another murder in rebuttal); *Lenz v. Washington*, 444 F.3d 295, 303 (4th Cir. 2006) (petitioner, sentenced to death for a

prison killing, did not allege a "single fact that counsel or an expert failed to discover").

And, while Mr. Buck does not dispute that the "brutality of a crime" may be "probative of future dangerousness," Red Br. 24-25, context is critical. *Compare Martinez v. Quarterman*, 270 F. App'x 277, 286-87, 299 (5th Cir. 2008) (noting brutality of petitioner's double homicide as supportive of future dangerousness in a case where the defendant also engaged in repeated violent conduct in jail, including threatening an officer's family), *with Berry v. State*, 233 S.W.3d 847, 864 (Tex. Crim. App. 2007) (finding insufficient evidence of future dangerousness as a matter of law because—even though the defendant brutally murdered her infant child, left another infant child in a ditch, and lacked remorse—there was no evidence she was likely to be dangerous to anyone other than her own children, and a life sentence would ensure her incarceration throughout her remaining child-bearing years). In this case, Mr. Buck never demonstrated a propensity for violence outside of the context of a romantic relationship, and the undisputed record showed that he was nonviolent in prison.

Texas also suggests that case law "deal[ing] with improperly admitted expert testimony on future dangerousness" is more relevant here. Red Br. 24-25 n.6. But that precedent only confirms the error in Texas's "brutality trumps" argument. *Walbey*, 309 F. App'x at 804 (citing *Gardner v. Johnson*, 247 F.3d 551, 553 (5th Cir. 2001)). In *Satterwhite v. Texas*, 486 U.S. 249, 259 (1988), this Court found such improperly admitted testimony to be prejudicial notwithstanding at least as much evidence of future dangerousness as was present

here: Mr. Satterwhite had prior convictions for, *inter alia*, aggravated assault and armed robbery; he shot a relative in a separate incident; and another psychologist testified that Mr. Satterwhite was unable to feel guilt and "would be a continuing threat to society through acts of criminal violence." *Id*. Texas stresses the harmful nature of the expert's testimony in *Satterwhite*, *see* Red Br. 24 n.6, but, as discussed, Dr. Quijano's repeated assertions that Mr. Buck's race increased his probability of criminal violence were profoundly harmful.

Consistent with *Satterwhite*, the Fifth Circuit and Texas Court of Criminal Appeals have repeatedly found improperly admitted expert testimony, and other future dangerousness evidence, to be prejudicial even when the untainted evidence of future dangerousness was at least as strong as it was here. *See, e.g.*, *Gardner*, 247 F.3d at 554 (defendant picked up two fourteen-year-old hitchhikers, "stabbed the male numerous times and left him for dead, then took the female to a nearby lake where he stabbed her numerous times [and] hit her in the head with a rock . . . ."); *Vanderbilt*, 994 F.2d at 191-92 (defendant kidnapped and killed a sixteen-year-old, had previously abducted a woman at gunpoint and sexually assaulted her, and four police officers testified about his reputation for not being peaceful); *Thompson v. State*, 93 S.W.3d 16, 19-20, 28 & n.9 (Tex. Crim. App. 2001) (defendant shot and killed his ex-girlfriend and her male friend; threatened a deputy in a separate incident; and a cellmate reported to authorities that he was attempting to hire someone to kill a witness).

Texas also stresses that the combination of a brutal crime and evidence of a lack of remorse is "sufficient for a Texas jury to find that a capital defendant presents a

continuing threat to society." Red Br. 26. But *Strickland* is not a sufficiency-of-the-evidence test; the question here is not whether there "would not be enough left" to support the jury's death sentence absent Dr. Quijano's testimony. *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995) (discussing *Brady* materiality standard, and noting that standard is identical to *Strickland* prejudice). Instead, *Strickland* asks whether there is a "reasonable probability" at least one juror would have reached a different conclusion absent Dr. Quijano's repeated assertions that Mr. Buck's race increased his likelihood of committing future acts of criminal violence. 466 U.S. at 694; *see Wiggins v. Smith*, 539 U.S. 510, 537 (2003). And, while a "reasonable probability" requires a "substantial" likelihood of a different result, Red. Br. 33 (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)), it "do[es] not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding." *Porter*, 558 U.S. at 44 (quoting *Strickland*, 466 U.S. at 693-94). Instead, *Strickland*'s prejudice prong asks whether counsel's error "deprive[d] the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687.

A defendant can be deprived of a fair sentencing hearing even if his crime involves both aggravated facts and lack of remorse evidence. Indeed, Texas juries have repeatedly answered "no" to the future dangerousness special issue—and imposed life sentences—in such cases. For instance, in *Garcia v. State*, 2010 WL 4053640, at *3-4 (Tex. Ct. App. 2010), the jury answered "no" to the future dangerousness special issue when: the defendant killed two taxi drivers on separate days by shooting them in the back of the head; a witness testified that the defendant "seemed excited about" having killed the victims; and a

fellow inmate testified that the defendant said he should have killed a witness to a bank robbery he committed, and that the defendant, referring to a prison guard, said: "What you do with a motherfucker like that is put three in the back of his fucking head."

Similarly, in *Saenz v. State*, 421 S.W.3d 725, 733 (2014), the jury answered "no" to the future dangerousness special issue when, over a course of a month, the defendant killed five dialysis patients by injecting their intravenous dialysis lines with bleach and poisoned three additional patients in the same manner.[2] Texas juries also answered "no" to the future dangerousness question in cases where: the defendant killed his ex-girlfriend's sister and mother, caused the miscarriage of his own child, and jail officials testified that he was verbally abusive and smuggled a razor blade into his cell;[3] and the defendant killed two girls, ages 2 and 6, in a drive-by shooting.[4]

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[2] *See also* Crimesider Staff, *Kimberly Saenz, ex-nurse convicted of bleach killings, sentenced to life in prison*, CBS News, April 2, 2012, http://www.cbsnews.com/news/kimberly-saenz-ex-nurse-convicted-of-bleach-killings-sentenced-to-life-in-prison/.

[3] Craig Kapitan, *Jury rejects death sentence*, My SanAntonio, Oct. 23, 2012, http://www.mysanantonio.com/news/local_news/article/Jury-rejects-death-sentence-3972452.php.

[4] *See* Associated Press, *Corpus Christi Man Gets Life in Prison for Killing 2 Girls*, NBC Dallas Fort Worth News, Feb. 28, 2015, http://www.nbcdfw.com/news/local/Corpus-Christi-Man-Gets-Life-in-Prison-for-Killing-2-Girls-294495691.html; http://www.txcourts.gov/media/905882/Nueces-02_26_15-Jury-Charge-Sentencing-Brendan-Gaytan.pdf (jury charge).

All of these cases were as aggravated as Mr. Buck's case, if not more so. Indeed, while Texas stresses Mr. Buck's lack of remorse during and immediately after the crime, *see* Red Br. 27 (citing JA 71a, 89a, 118a, 133-35a), in both *Garcia* and *Saenz*, the defendant showed a lack of remorse well after the crime, including by committing additional murders.

Here, by contrast, the jury could have reasonably concluded that Mr. Buck's crying at trial indicated that he was remorseful once given an opportunity to reflect on his actions. Texas asserts that Mr. Buck's crying "could be viewed as fear of the consequences." Red Br. 27. But the prosecutors who saw Mr. Buck cry never suggested such an interpretation, and never challenged Dr. Quijano's testimony that such crying indicated remorse. JA 182a-83a. Texas cannot deny that at least one juror may well have found that Mr. Buck's crying indicated that he is remorseful. Indeed, the Texas Court of Criminal Appeals has found it was not harmless to exclude much less powerful remorse evidence (*i.e.*, a letter in which the defendant expressed sympathy for the victim's family while seeking to blame others for the crime), in a case where the defendant, a registered sex offender, kidnapped and killed a five-year-old girl. *See Renteria v. State*, 206 S.W.3d 689, 694, 698 (2006).[5]

[5] Mr. Buck recognizes that Phyllis Taylor's statement that Mr. Buck sought and received her forgiveness is not technically part of the *Strickland* analysis. *See* Red Br. 27. Mr. Buck notes, however, that this is the kind of technical argument Texas said it would not raise in defending death sentences compromised by Dr. Quijano's race-as-dangerousness testimony.

Even assuming that the future dangerousness evidence here was sufficient, it was not overwhelming. Although Texas attempts to downplay the point, Red Br. 32, it cannot dispute that Mr. Buck functioned well in prison, and did not have the characteristics (*e.g.,* a gang affiliation) considered risk factors for prison violence. Blue Br. 42. Nor was there any evidence that Mr. Buck had ever been violent outside of the context of a romantic relationship with a woman.[6] And the undisputed evidence established that it was highly unlikely that he would develop such a relationship in prison. Blue Br. 41.

This Court need look no further than what actually happened at sentencing to reject Texas's assertion that "[o]n this record, it was manifest that [Mr. Buck] presented a future danger." Red Br. 24. The jury that heard all of the aggravating evidence now stressed by Texas was unable to make a quick decision. It deliberated for two days, and sent out four notes.

Although Texas insists that the length of the jury's deliberations does "not suggest a substantial likelihood" of a different result absent Dr. Quijano's race-as-dangerousness testimony, Red Br. 32, it never justifies that assertion. Nor could it. As this Court explained in *Parker v. Gladden*, 385 U.S. 363, 365 (1966), such lengthy jury deliberations "indicat[e] a difference among" the jurors and support a finding of prejudice. Moreover, while we cannot know why jurors requested the psychological

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[6] Contrary to Texas's suggestion, Red Br. 32, the circumstances of the instant crime, including Mr. Buck's shooting of his sister, were related to the breakdown of Mr. Buck's romantic relationship with Ms. Gardner. *See* Blue Br. 4.

reports, *see* Red Br. 33, we do know that, as the jury was struggling to determine whether Duane Buck was likely to be a future danger, they had before them Dr. Quijano's "expert" report stating that Mr. Buck's "**Race**. Black" meant an "[i]ncreased probability" he would "commit criminal acts of violence that would constitute a continuing threat to society." JA 18a, 19a.

It is difficult to imagine a death sentence less reliable than this one.

III. Mr. Buck's Case is Extraordinary Within the Meaning of Federal Rule of Civil Procedure 60(b)(6).

This is the rare habeas case for which relief under Rule 60(b)(6) is warranted. Blue Br. 47-54. Mr. Buck's trial counsel knowingly injected an explicit appeal to racial bias into Mr. Buck's capital sentencing hearing; this error undermined confidence in Mr. Buck's death sentence and in the criminal justice system overall; after conceding error in *Saldaño*, Texas publicly acknowledged that it had no finality interest in six additional death sentences, including Mr. Buck's, which were compromised by Dr. Quijano's race-as-criminal-violence opinion; Texas conceded constitutional error and waived procedural defenses in five of the cases, but reneged on its commitment to Mr. Buck; and this Court's intervening decisions in *Martinez* and *Trevino* allow for merits review of Mr. Buck's ineffectiveness claim, which was defaulted because of state habeas counsel's failure to raise it for three years. Blue Br. 18-20. These facts are patently extraordinary and amply demonstrate Mr. Buck's entitlement to a COA.

A. Trial Counsel's Knowing Introduction of Dr. Quijano's Explicit Appeal to Racial Bias Is Extraordinary.

As Texas acknowledges, "[r]ace is an arbitrary, emotionally charged factor that has nothing to do with individual moral culpability." Red Br. 1. Yet, Texas insists that trial counsel's introduction of an expert opinion that Mr. Buck's race ***supported a death sentence*** is not extraordinary within the meaning of Rule 60(b)(6) because counsel's error was not prejudicial. Red Br. 41. As detailed above, Texas is wrong: Dr. Quijano's opinion was uniquely harmful, and it is reasonably probable that at least one juror would have reached a different conclusion without it.

Moreover, trial counsel's introduction of Dr. Quijano's race-as-criminal-violence opinion not only prejudiced Mr. Buck's case, it also undermines "public confidence in the evenhanded administration of justice." *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015); *see also JEB v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) (race discrimination in the court system "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law"); Blue Br. 47-49.

Texas cannot dispute the extraordinariness of this harm because it was the very reason that Texas took the extraordinary step of publicly declaring that it had no finality interest in six death sentences, including Mr. Buck's, that were corrupted by Dr. Quijano's opinion. Texas explained: "it is inappropriate to allow race to be considered as a factor in our criminal justice system," and"[t]he people of Texas want and deserve a system that affords the same fairness to everyone." JA 213a.

B. It Is Extraordinary that Texas Recognized Its Ordinary Interest in Finality Does Not Apply to Mr. Buck's Death Sentence, But Arbitrarily Reversed Course and Pursued Mr. Buck's Execution.

Three years after Mr. Buck's trial, Texas publicly declared that its interest in the fairness of the criminal justice system outweighed its ordinary interest in the finality of six death sentences, including Mr. Buck's. Texas did so after a "thorough audit" revealed those cases to be "similar to that of Victor Hugo Saldano," a case where Texas conceded error in this Court because "testimony was offered by Dr. Quijano that race should be a factor for the jury to consider in making its determination about the sentence in a capital murder trial." JA 213a. Texas announced that it would waive its procedural defenses and allow new sentencing hearings in each of the six identified cases. *See* Blue Br. 11 & n.2. Texas sent letters to the relevant prosecutors and defense counsel advising them of its findings (JA 214a), and filed federal court pleadings fulfilling its promise in five of those cases. *See* Blue Br. 12 nn. 3-4. In other words, Texas itself recognized that this is the "rare instance[]" when the state's ordinary interest in the "finality of judgments" must yield. *O'Neal v. McAninch*, 513 U.S. 432, 447 (1995) (Thomas, J., dissenting). That is extraordinary.

Because Texas broke its promise to Mr. Buck, he is the only prisoner to face execution pursuant to a death sentence that Texas itself has declared to be illegitimate. This is more extraordinary still: it undermines confidence in the justice system; causes the public to lose confidence in the impartiality of prosecutors; and encourages a public

perception that the justice system is arbitrary. *See* Br. of Former Prosecutors as Amici Curiae in Supp. of Pet. 17-23.

The foregoing circumstances are not only extraordinary on their face, they "*justify[] relief from the judgment*," under Rule 60(b). Red Br. 44 (citations omitted). In analyzing whether extraordinary circumstances justify relief from judgment, key factors under this Court's precedent are "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988). All of those factors favor Mr. Buck.

And these circumstances are extraordinary regardless of whether or not Texas's commitment "'created legally enforceable rights,'" Red Br. 44 (quoting JA 260a), constituted an independent basis for relief, *id.* at 43, or involved detrimental reliance by Mr. Buck, *id.* at 44. The extraordinariness of Texas's conduct is simply not contingent upon the application of judicial estoppel principles. *Cf.* Red Br. 43-44. It is extraordinary because it shows that Texas recognized Mr. Buck's death sentence undermines public confidence in the rule of law, such that Texas's ordinary interest in finality does not apply.

Similarly, because Mr. Buck is now able to challenge his trial counsel's knowing introduction of Dr. Quijano's race-as-dangerousness opinion, Texas's conduct is extraordinary even though "[o]nly in Buck's case did defense counsel elicit the race-related testimony on direct examination." Red Br. 45 (quoting *Buck v. Thaler*,

132 S. Ct. 32, 34-35 (2011) (Alito J.)). As noted, Texas acknowledged that it has no interest in the finality of death sentences where "testimony was offered by Dr. Quijano that race should be a factor for the jury to consider in making its determination about the sentence in a capital murder trial." JA 213a. Thus, by its express terms, Texas's promise focused on the fact that improper race-as-dangerousness evidence was admitted in a death penalty trial, not on the identity of the party introducing it. Indeed, Dr. Quijano's opinion was even more harmful in Mr. Buck's case because it was first elicited by defense counsel and then capitalized on by the prosecutor. *See* p. 4, *supra*.

C. *Martinez* and *Trevino* Support a Finding that Mr. Buck's Case is Extraordinary.

When *Martinez* and *Trevino* are considered in combination with the other extraordinary facts and circumstances in Mr. Buck's case, they confirm Mr. Buck's entitlement to Rule 60(b)(6) relief. As this Court recognized in *Martinez*, a state's interest in finality is lessened when, as here, unreasonable errors by state habeas counsel prevent review of whether trial counsel fulfilled their "foundation[al]" role of "test[ing] the prosecution's case . . . while protecting the rights of the person charged." *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012); *see* Blue Br. 52, 56.

Texas contends that *Martinez* and *Trevino* do not support 60(b) relief because "the overwhelming aggravating evidence in this case foreclosed petitioner's ability to establish the prejudice element of his ineffective-assistance [of counsel] claim." Red Br. 41. As detailed above, this is false.

Texas also contends that "*Martinez* and *Trevino* do not apply retroactively to cases on collateral review." Red Br. 38 (citing, *inter alia*, *Teague v. Lane*, 489 U.S. 288, 299-316 (1989)). *Teague*, however, applies only to "new constitutional rules of criminal procedure," *id.* at 310, that apply to the trial – not collateral review – process. *Montgomery v. Louisiana*, 136 S. Ct. 718, 730 (2016) (*Teague* governs rules "designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'") (citation omitted) (emphasis in original)). Because *Martinez* and *Trevino* are not constitutional rules governing criminal trials, *see, e.g.*, *Martinez*, 132 S. Ct. at 1319, *Teague*'s general rule against retroactivity does not apply. And, indeed, *Martinez* and *Trevino* were themselves habeas cases where the petitioner's conviction was already final.[7] *See also Neathery v. Stephens*, 134 S. Ct. 898 (2014) (vacating denial of a COA on a defaulted claim of trial counsel ineffectiveness, and remanding for further proceedings in light of *Trevino*); *Haynes v. Thaler*, 133 S. Ct. 2764 (2013) (same).

Texas has, in any event, waived its *Teague* argument by failing to raise it in the district court, the court of appeals, or, indeed, in its brief in opposition to certiorari. *See Schiro v. Farley*, 510 U.S. 222, 228-29 (1994).

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[7] *In re Paredes*, 587 F. App'x 805 (5th Cir. 2014) (per curiam), does not support Texas's position. *Paredes* explained that *Martinez* and *Trevino* did not announce a new retroactive, constitutional rule that would support a successive petition under 28 U.S.C. § 2244. *See id.* at 812. But that was only after the Court of Appeals recognized that *Martinez* and *Trevino* were properly (if, in that case, unsuccessfully) raised in a Rule 60(b) motion seeking to reopen an earlier habeas proceeding. *See id.* at 818-19; *see generally Coe v. Thurman*, 922 F.2d 528, 534 (9th Cir. 1991).

Texas also claims that "in this second Rule 60(b) motion, petitioner seeks to relitigate an ineffective assistance claim that he did not even raise in his first Rule 60(b)(6) motion," which "makes *Martinez* and *Trevino* even less relevant." Red Br. 36, 41-42. But, as Texas acknowledges, *see id.* at 38 n.8, when Mr. Buck litigated his first 60(b) motion, *Coleman v. Thompson*, 501 U.S. 722 (1991), stood as an "unqualified" bar to relief on Mr. Buck's defaulted claim of trial counsel ineffectiveness. *Trevino v. Thaler*, 133 S. Ct. 1911, 1917 (2013). Mr. Buck therefore pursued the viable, albeit ultimately unsuccessful, argument that Texas's "misleading remarks and omissions," *Buck*, 132 S. Ct. at 35 (Sotomayor, J. dissenting), constituted a fraud on the court. *See Buck v. Stephens,* 623 F. App'x 668, 670 (5th Cir. 2015), *cert. granted,* 136 S. Ct. 2409 (2016). When *Martinez* and *Trevino* modified *Coleman* and, for the first time, afforded Mr. Buck an opportunity for federal review of his ineffectiveness claim, Mr. Buck filed the instant Rule 60(b)(6) motion. That Mr. Buck did not previously seek relief on a defaulted claim of trial counsel ineffectiveness reflects the state of the law in 2011, not a failure of diligence.

Martinez and *Trevino* support Rule 60(b) relief.

D. The District Court's Decision to Deny Rule 60(b) Relief Constitutes an Abuse of Discretion.

The District Court abused its discretion in denying Mr. Buck's motion for 60(b) relief because that court: (a) relied on an error of law; (b) failed to take into account key circumstances supporting relief; and (c) failed to adhere to the purpose of Rule 60(b).

First, although the Rule 60(b) standard is fact-intensive, *see* Red Br. 35, a court necessarily abuses its discretion when its application of that fact-intensive standard is premised on an error of law. *Highmark Inc. v. Allcare Health Mgmt. Sys. Inc.*, 134 S. Ct. 1744, 1748 n.2 (2014). That is precisely what happened here. The District Court recognized that Mr. Buck's trial counsel "recklessly exposed his client to the risks of racial prejudice and introduced testimony that was contrary to his client's interests," JA 364a, but concluded that this error did not support Rule 60(b) relief because Dr. Quijano's opinion had a "*de minimis*" impact on Mr. Buck's capital sentencing, JA 259a, 272a. The District Court's conclusion—which was premised on its review of the state court record and did not involve any findings of discrete, historical fact—was a legal error subject to *de novo* review. *See, e.g., Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (conducting *de novo* review of *Strickland* prejudice because state court had not reached the issue, without according any deference to decisions of lower federal courts) (citing *Wiggins*, 539 U.S. at 534). For the reasons stated above and in Mr. Buck's opening brief, Dr. Quijano's testimony undermines confidence in Mr. Buck's death sentence.

Second, the District Court failed to acknowledge that trial counsel's conduct in this case not only affected Mr. Buck, but also put "the very integrity of the courts [in] jeopard[y]." *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005). The integrity of the judicial system is a key factor in evaluating the propriety of relief under Rule 60(b)(6), *see Liljeberg*, 486 U.S. at 866, and the District Court's failure to consider it was likewise an abuse of discretion. *See, e.g., United States v. Taylor*, 487 U.S. 326, 342 (1988).

And, third, the District Court's failure to adhere to Rule 60(b)'s fundamental objective of providing a vehicle for vacating judgments where justice so requires constitutes an abuse of discretion. *See Liljeberg*, 486 U.S. at 864.

Mr. Buck respectfully submits that this Court should find the District Court abused its discretion in denying relief under Rule 60(b)(6). At a minimum, reasonable jurists would conclude that the District Court's decision is debatable, and a COA is required.

CONCLUSION

No constitutional principle is more fundamental than the rule that a defendant's race must play no role in a criminal trial. This Court has therefore been united in its "unceasing efforts to eradicate racial prejudice from our criminal justice system," when confronted with direct evidence of race bias in an individual case. *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (internal citation omitted). Allowing Mr. Buck to be executed pursuant to a capital sentencing proceeding where an expert repeatedly stated that he is more likely to commit future acts of criminal violence because he is Black would make a mockery of that commitment. A COA should issue.

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