No. _____

In the Supreme Court of the United States

DUANE EDWARD BUCK,

Petitioner,

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

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

I certify that on the 15th day of September, 2011, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*, PETITION FOR A WRIT OF PETITION FOR CERTIORARI, and MOTION FOR STAY OF EXECUTION on Georgette Oden, Assistant Attorney General of Texas, Office of the Texas Attorney General, Post Office Box 12548, Austin, Texas 78711, via email (georgette.oden@oag.state.tx.us) and through the United States Postal Service by 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/ Gregory W. Wiercioch

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PETITION FOR WRIT OF CERTIORARI

MR. BUCK IS SCHEDULED TO BE EXECUTED TODAY, SEPTEMBER 15, 2011, AFTER 6:00 P.M. CENTRAL TIME.

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CAPITAL CASE

QUESTIONS PRESENTED

In 2000, Texas identified Mr. Buck's case and five others as cases that were similar to the case of Victor Saldaño and promised to treat them all similarly. In *Saldaño*, the Attorney General of the State of Texas confessed constitutional error in this Court as a result of the government's reliance on the defendant's race as evidence supporting a finding of future dangerousness. *See Saldaño v. Texas*, No. 99–8119. That same year, the Attorney General subsequently waived procedural defenses—including exhaustion and the statute of limitations—in the cases of all five other individuals, whose cases were pending in federal court at the time. Mr. Buck's case did not make it to federal court until four years later. At that time, Texas, through its Attorney General, asserted procedural defenses against Mr. Buck and told several federal courts that Mr. Buck's case was "strikingly different" from Saldaño's case without ever informing those courts or Mr. Buck's counsel about its prior statements that the cases were similar and would be treated similarly.

1. Whether a defendant's race or ethnic background may ever be used as an aggravating circumstance in the punishment phase of a capital murder trial in which the State seeks the death penalty.

2. Whether the government may rely on the defendant's race during the sentencing phase of a capital murder trial as evidence that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

3. Whether a reasonable jurist could believe this case presents extraordinary circumstances justifying reopening federal habeas corpus proceedings under Fed. R. Civ. P. 60(b)(6).

4. Whether a reasonable jurist could believe the Attorney General's material misrepresentations to federal courts about the nature of the cases in which the Attorney General had previously conceded error and in which federal courts had already found equal protection violations constituted fraud on the court.

6. Whether Mr. Buck's death sentence is arbitrary and capricious.

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which Supreme Court Petitioner Duane Buck was the Petitioner before the United States District Court for the Southern District of Texas and the Appellant before the United States United States Court of Appeals for the Fifth Circuit. Mr. Buck is a prisoner sentenced to death and in the custody of Rick Thaler, the Director of the Texas Department of Criminal Justice, Correctional Institutions Division ("Director"). Mr. Buck has separately filed both a petition for writ of habeas corpus seeking review of equal protection, due process, and arbitrary-and-capricious claims.

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

PARTIES TO THE PROCEEDINGS BELOW iii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF *CERTIORARI* 1

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 19

I. THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S HOLDING THAT LITIGANTS ENGAGE IN "EXCESSIVE DELAY" BY FAILING TO UNCOVER GROSS MISREPRESENTATIONS BY AN OPPOSING PARTY. 19

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S HOLDING THAT THE ATTORNEY GENERAL'S ANNOUNCEMENT THAT IT WOULD WAIVE ANY PROCEDURAL BARS AND CONCEDE THAT THE ODIOUS RACE DISCRIMINATION IN MR. BUCK'S CASE AMOUNTED TO CONSTITUTIONAL ERROR, THE SUBSEQUENT RETRACTION OF THAT PLEDGE BASED ON MATERIAL MISREPRESENTATIONS, AND THE ARBITRARY RESULT THAT MR. BUCK WILL BE TREATED DIFFERENTLY FROM THE FIVE OTHER SALDAÑO DEFENDANTS ONLY BECAUSE HIS FEDERAL PROCEEDINGS FELL ON THE WRONG SIDE OF AN ELECTION DO NOT AMOUNT TO EXTRAORDINARY CIRCUMSTANCES UNDER RULE 60(B)(6). 23

III. THE COURT SHOULD GRANT CERTIORARI TO HOLD THAT THE ATTORNEY GENERAL'S ACTIONS ROSE TO FRAUD ON THE COURT 26

A. The Fifth Circuit's Opinion Conflicts with a Sixth Circuit Decision 26

B. The Fifth Circuit's "Independent" COA Determination on the Merits of Mr. Buck's Equal Protection and Due Process Claims 28

CONCLUSION..... 30

TABLE OF AUTHORITIES

Cases

Alba v. Johnson,
232 F.3d 208, 2000 WL 1272983, No. 00-40194 (5th Cir. Aug. 21, 2000) 29
Demjanjuk v. Petrovsky,
10 F. 3d 338 (6th Cir. 1993) 26
Every v. Blackburn,
781 F.2d 1138 (5th Cir. 1986) 29
Gonzalez v. Crosby,
545 U.S. 524 (2005) 26
Hazel-Atlas Glass v. Hartford-Empire Co.,
322 U.S. 238 (1944) 22
Holland v. Florida,
130 S. Ct. 2549 (2010) 20
Young v. United States,
315 U.S. 257 (1942) 29

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

PETITION FOR WRIT OF CERTIORARI

In June 2000, the Attorney General of the State of Texas announced that a handful of prosecutors in Texas had relied on the race of capital defendants to persuade jurors to impose the death penalty. To repair the integrity of the criminal justice system, Texas's then-Attorney General (now United States Senator) John Cornyn made solemn guarantees to the public that the Office of the Attorney General would take unprecedented steps to ensure that no death sentence obtained in such a constitutionally-offensive manner would ever be carried out. Texas upheld its promise in the cases of five of the six death-sentenced individuals in which the

Attorney General had concluded that the government used the defendant's race as evidence of future dangerousness. Refusing to rely on procedural defenses in federal court, the Attorney General confessed constitutional error in each of those cases. And, in each of those cases, the court found constitutional violations and overturned the death sentence.

In Petitioner Duane Edward Buck's case, however, Texas broke its promise to restore the integrity of the criminal justice system. With a new Attorney General in office, by the time Mr. Buck's case reached the federal courts Texas vigorously defended the constitutionality of Mr. Buck's death sentence. Ultimately relying on material misrepresentations and deliberate omissions, the Attorney General successfully persuaded the lower courts that the use of race-tainted future dangerousness evidence in Mr. Buck's case was distinguishable from the other cases singled out for correction by that office on federal habeas review. As a result, of the six individuals identified by Attorney General Cornyn, only Mr. Buck faces the prospect of having a death sentence carried out that was procured by the government's reliance on his race. Mr. Buck's treatment by Texas demands federal intervention in the interests of justice.

Mr. Buck accordingly requests that this Court grant certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The order of the court of appeals denying a certificate of appealability ("COA") to review the district court's orders denying relief on his motion for relief

from judgment is not reported, but is attached as Appendix 1. The order of the federal district court denying Mr. Buck's Rule 59(e) motion is not reported, but is attached as Appendix 2. The order of the federal district court denying Mr. Buck's Rule 60(b) motion is not reported, but is attached as Appendix 3. The opinion of the Fifth Circuit denying a COA to review the district court's judgment disposing of Mr. Buck's federal habeas corpus petition is not reported, but is attached as Appendix 4. The memorandum opinion of the district court denying Mr. Buck's federal habeas corpus petition is not reported, but it is attached as Appendix 5.

JURISDICTION

The Court has jurisdiction to entertain this petition for writ of habeas corpus under 28 U.S.C. §§ 2254(1). The court of appeals rendered its decision sought to be reviewed on September 14, 2011. See App. 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that:

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

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2253 provides in relevant part:

(c)

(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.

FED. R. CIV. P. 60 provides in relevant part:

(b) On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

... (6) any other reason that justifies relief. ...

(d) This rule does not limit a court's power to:

... (3) set aside a judgment for fraud on the court.

STATEMENT OF THE CASE

On June 5, 2000, this Court granted *certiorari* in *Saldaño v. Texas*, No. 99–8119, vacated the Texas Court of Criminal Appeals's judgment affirming Saldaño's death sentence, and remanded for further consideration in light of a concession by then-Attorney General of Texas John Cornyn that Saldaño's death sentence had been obtained in violation of equal protection. In *Saldaño*, the government called psychologist Walter Quijano as an expert in the sentencing phase of Mr. Saldaño's capital trial and elicited testimony about "identifying markers" that help psychologists determine whether there is a probability a defendant will present a threat of violence in the future. One of the factors that Dr. Quijano identified as increasing the likelihood of future dangerousness was the defendant's race or ethnicity. After the Texas Court of Criminal Appeals affirmed his conviction, Mr. Saldaño filed a petition for writ of *certiorari* in this Court asking the Court to decide the question of "[w]hether a defendant's race or ethnic background may ever be used as an aggravating circumstance in the punishment phase of a capital murder trial in which the State seeks the death penalty." *Saldano v. State*, No. 72,556 (Tex. Crim. App. 2002).

On behalf of the State of Texas, the Attorney General filed a response to the petition for writ of *certiorari* admitting constitutional error had occurred. Quoting *Rose v. Mitchell*, 443 US 545, 555 (1979), the Attorney General observed that "[d]iscrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice."[1] The Attorney General argued that the "infusion of race as a factor for the jury to weigh in making its determination violated [Saldaño's] constitutional right to be sentenced without regard to the color of his skin."[2]

Four days after this Court granted *certiorari* in *Saldaño*, the Attorney General issued a press release in which he identified Mr. Buck's case, and five other cases then pending in post-conviction proceedings, as cases in which the prosecution had unconstitutionally relied on the testimony of Dr. Quijano that a defendant's race increased the likelihood of future dangerousness:

> After a thorough audit of cases in our office, we have identified 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 about the sentence in a capital murder trial. ***Six of these eight cases are similar to that of Victor Hugo Saldano***.[3]

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[1] Response to Petition for Writ of *Certiorari* at 7, *Saldaño v. State*, No. 99-8119.

[2] *Id.* at 8.

[3] News Release, Office of the Attorney General, Statement from Attorney General John Cornyn regarding death penalty cases (June 9, 2000) (emphasis supplied).

One of those six cases was Mr. Buck's.[4]

The Attorney General said Texas would not contest equal protection claims in federal court in the six cases that it identified as similarly situated to Saldaño's: "[I]f the attorneys [for the six identified defendants] amend their appeals currently pending in federal court to include objections to Quijano's testimony, the attorney general will not object."[5] "As I explained in a filing before the United States Supreme Court...it is inappropriate to allow race to be considered as a factor in our criminal justice system," the Attorney General wrote.[6] "[T]he United States Supreme Court agreed. The people of Texas want and deserve a system that affords the same fairness to everyone."[7] Although Mr. Buck's case was not then pending in federal court, the Attorney General promised that Texas would "continue to vigilantly monitor all death-penalty cases."[8] "Our goal is to assure the people of Texas that our criminal justice system is fairly administered."[9] The Attorney

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[4] News Release, Office of the Attorney General, Texas Attorney General John Cornyn offers the following information on capital cases that involved Dr. Walter Quijano's testimony using race as a factor to determine future dangerousness (June 9, 2000).

[5] James Kimberly, *Death penalties of 6 in jeopardy: Attorney general gives result of probe into race testimony*, HOU. CHRON., June 10, 2000 at A1.

[6] News Release, Office of the Attorney General, Statement from Attorney General John Cornyn regarding death penalty cases (June 9, 2000).

[7] *Id.*

[8] *Id.*

[9] Steve Lash, *Texas death case set aside: U.S. Supreme Court sees possible racial bias*, HOU. CHRON., June 6, 2000 at A1.

General acknowledged that some cases might still be in state proceedings and guaranteed, "if and when those cases reach this office they will be handled in a similar manner as the Saldano case."[10]

Mr. Buck's case was still in state habeas proceedings at the time of the Attorney General's statement. It was the only case identified by the Attorney General as containing constitutional error not yet in federal court.

The six cases in which the Attorney General's thorough audit discovered equal protection violations were those of Carl Blue, John Alba, Gustavo Garcia, Eugene Broxton, Michael Gonzales, and Duane Buck. In all six cases, the State relied on testimony by Quijano about race in asking the jury to find the defendant a future danger, a pre-requisite to imposing a sentence of death. In three of the cases, the prosecution called Quijano as a witness; in three others, including Mr. Buck's, the defense called Quijano and race-based testimony was elicited on cross-examination and relied upon by the prosecution to carry its burden of proving future dangerousness.

The cases of Carl Blue and John Alba were like Mr. Buck's case in that the defense, rather than the prosecution, had called Quijano to the stand. Carl Blue's habeas corpus petition was already pending in federal district court at the time the Attorney General identified his case as containing constitutional error in 2000. Mr. Blue had not raised an equal protection or due process claim in state or federal

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[10] James Kimberly, *supra*.

court at that time. Despite this, the Attorney General waived the exhaustion requirement and all procedural defenses (including the statute of limitations) and conceded that the government's reliance on race violated equal protection.[11] On September 29, 2000, the district court granted Blue a new sentencing hearing because "Quijano's testimony...where he declares that race is a predictor of future dangerousness, was clearly unconstitutional" and "[n]either the trial court nor the prosecutor sought to correct this wrong."[12]

John Alba's federal habeas petition had already been denied by the federal district court at the time the Attorney General identified his sentence as having been obtained in violation of the Equal Protection Clause. The Attorney General therefore confessed error in that case to the United States Court of Appeals for the Fifth Circuit, which vacated the district court's denial, remanded the case to the district court, and instructed it to grant the petition on the basis of the constitutional violation.[13] District Court Judge Paul Brown thereafter granted Mr. Alba a resentencing free from consideration of his race on September 25, 2000.[14]

In the cases of Gustavo Garcia, Eugene Broxton, and Michael Gonzales, the government, rather than the defense, called Quijano to the stand. All three cases

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[11] Memorandum Opinion and Order at 17, *Blue v. Johnson*, No. 4:99-cv-00350, slip op. at 16 (S.D. Tex. Sep. 29, 2000).

[12] *Id*.

[13] *Alba v. Johnson*, No. 00-40194 (5th Cir. Aug. 21, 2000) (unpublished).

[14] Order, *Alba v. Johnson*, No. 4:98-cv-221 (E.D. Tex. Sept. 25, 2000).

were pending in federal district court when the Attorney General identified them as warranting new sentencing hearings. At the time, none had raised a claim alleging equal protection or due process violations in state or federal court related to the prosecution's reliance on race as a factor increasing the likelihood of future dangerousness. As in *Blue*, the Attorney General permitted all three to file "supplemental" habeas corpus petitions, waived all procedural defenses, and conceded constitutional error. All three were granted relief by the district court between 2000 and 2002.[15]

In 2002, while Mr. Buck's initial state habeas application was pending, his state habeas counsel, Robin Norris, filed a subsequent application raising equal protection and due process claims based on the government's reliance on Mr. Buck's race as an aggravating factor during the capital sentencing proceeding. On October 15, 2003, the Court of Criminal Appeals denied the initial application and dismissed the subsequent application raising Mr. Buck's equal protection and due process claims as an abuse of the writ. Order, *Ex parte Buck*, No. WR-57,004-02 (Tex. Crim. App. Oct. 15, 2003) (unpublished).

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[15] *See* Order, *Garcia v. Johnson*, No. 1:99-cv-00134 (E.D. Tex. Sep. 7, 2000); Order at 10-11, *Broxton v. Johnson*, No. 4:00-cv-01034 (S.D. Tex. Mar. 28, 2001); Order Granting Respondent's Partial Summary Judgment and Recognizing Respondent's Notice of Error Allowing Petitioner a New Sentencing Hearing to Determine if a Life or Death Sentence Should Be Imposed in This Case, *Gonzales v. Johnson*, No. 7:99-cv-00072 (W.D. Tex. Dec. 19, 2002).

Mr. Buck, represented by different counsel, filed his federal habeas corpus petition on October 14, 2004. When Mr. Buck raised his equal protection and due process claims in federal court, instead of waiving procedural defenses—as the Office of the Attorney General previously promised Mr. Buck it would—the Attorney General inexplicably raised them. Moreover, instead of formally conceding error to the tribunal as promised, the Attorney General not only failed to disclose the prior admissions about Mr. Buck's case, but also misled the Court about the nature of the cases in which his office had already confessed—and in which federal courts had already found—equal protection and due process violations:

> Buck claims that his constitutional rights to due process and equal protection were violated by the punishment phase testimony of his own expert. Specifically, he complains that defense expert, Dr. Quijano, testified that African-American offenders are statistically more likely to be a continuing threat to society than other racially distinct groups. ... However, Buck has procedurally defaulted these claims by failing to properly present them to the state courts….This Court is no doubt aware that the Director waived similar procedural bars and confessed error in other cases involving testimony by Dr. Quijano, most notably the case of Victor Hugo Saldano (collectively referred to as "the *Saldano* cases"). *See Saldano v. Cockrell*, 267 F. Supp. 2d 635, 639-40 (especially n. 3) (E.D. Tex. 2003). ***This case, however, presents a strikingly different scenario than that presented in Saldano–Buck himself, not the State offered Dr. Quijano's testimony into evidence. Based on this critical distinction***, the Director deems himself compelled to assert the valid procedural bar precluding merits review of Buck's constitutional claims. And on this basis, federal habeas relief should be denied.

Respondent Dretke's Answer and Motion for Summary Judgment with Brief in Support, at 17 (Docket Entry No. 7) (emphasis supplied). Thus, the Attorney

General conditioned his assertion of a procedural bar on the purported distinction that the defense, instead of the prosecution, had called Quijano.

The Attorney General expanded upon its purported reasons for asserting a procedural defense in the case:

> ***[T]he Director is obviously aware of the prior confessions of error in other federal habeas corpus cases involving similar testimony by Dr. Quijano***. *Saldano*, 267 F. Supp. 2d at 639, n. 3. However, this case is not *Saldano*. In Saldano's case Dr. Quijano testified for the State. *Id*. at 638. Thus, it was the State that introduced evidence that Hispanics were more likely to be a continuing threat to society and urged the jury to consider evidence of Saldano's race and ethnicity in making a determination of future dangerousness. *Id*. This obvious violation of Saldano's equal protection rights was repugnant to the administration of justice.…***[B]ecause it was Buck who called Dr. Quijano to testify*** and derived the benefit of Dr. Quijano's overall opinion that Buck was unlikely to be a future danger despite the existence of some negative factors, this case does not represent the odious error contained in the *Saldano* cases. As such, the former actions of the Director are not applicable and should not be considered in deciding this case.

Id. at 20 (emphases supplied).

Although the Attorney General, in his own words, was "obviously aware" of the prior confessions of error in the other federal habeas corpus cases involving Quijano's testimony, he did not discuss the circumstances of those cases. Specifically, the Attorney General did not disclose to the district court: (1) that his office had previously identified Mr. Buck's case after a "thorough audit" as one that was ***similar*** to Saldaño's case while simultaneously identifying other cases as ***dissimilar*** to Saldaño's, *i.e.*, that the Attorney General had made a prior admission highly material to his present litigation position before the Court; (2) that the

Attorney General had "waived similar procedural bars and confessed error" in cases in which the ***defense*** sponsored Quijano's testimony and in which federal courts had found constitutional violations and granted relief; and (3) that the Attorney General had previously promised his office would treat Mr. Buck's case the same as the other cases he had identified once Mr. Buck's case reached federal court.

On July 24, 2006, the district court applied a procedural default in reliance on the Attorney General's false representations that Mr. Buck's case was different from other cases in which the Attorney General had waived defenses and confessed error because Mr. Buck had called Quijano as a witness. Memorandum and Order at 15-17, *Buck v. Dretke*, No. 4:04-cv-03965 (S.D. Tex. July 24, 2006). The court also denied a certificate of appealability ("COA"). *Id*. at 25.

On November 22, 2006, Mr. Buck filed an application for COA in the court of appeals. In his response, the Attorney General argued that the "conclusion that Buck's claims were procedurally defaulted [was] not debatable among jurists of reason." Respondent-Appellee's Opposition to Application for Certificate of Appealability at 11, *Buck v. Thaler*, 345 Fed. App'x 923 (5th Cir. Dec. 18, 2006). The Attorney General again misleadingly distinguished Mr. Buck's case from the other cases in which the Attorney General had waived procedural defenses and confessed constitutional violations:

> This Court is no doubt aware that the Director waived similar procedural bars and confessed error in other cases involving testimony by Dr. Quijano, most notably the case of Victor Hugo Saldano (collectively referred to as "the *Saldano* cases"). *See Saldano v. Cockrell*, 267 F. Supp. 2d 635, 63 9-40 (especially n.3) (E.D. Tex. 2003).

> Based on these concessions, Buck argues that the court below erred in ignoring federal intra-court comity in finding his claims to be procedurally barred. Application, at 6-13....Buck's cited cases certainly do not stand for this proposition because the petitioners are not "similarly situated" as he asserts. Application, at 6. ***Rather, this case presents a strikingly different scenario than that presented in Saldano because Buck himself—not the State—offered Dr. Quijano's testimony into evidence.*** Based on this ***critical distinction***, the Director deemed himself compelled to assert the valid procedural bar precluding merits review of Buck's constitutional claims in the court below.
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> ****
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> First, the Director is obviously aware of the prior confessions of error in other federal habeas corpus cases involving similar testimony by Dr. Quijano. *Saldano*, 267 F. Supp . 2d at 639, n.3. This case, however, is not *Saldano* or *Broxton*. *Broxton v. Johnson*, H-00-CV-1034, 2001 LEXIS 25715 (March 28, 2001); Application, at 7. ***In both of those cases where the Director conceded error, Dr. Quijano testified for the State***, e.g. *Saldano*, 267 F. Supp. 2d at 638; Application at 7 (noting that in *Broxton*, Dr. Quijano testified for the State). Thus, it was the State that introduced evidence that Hispanics (or African-Americans) were more likely to be a continuing threat to society and urged the jury to consider evidence of race and ethnicity in making a determination of future dangerousness. *Id*. This obvious violation of a petitioner's equal protection rights was repugnant to the administration of justice.
>
> Yet ... ***because it was Buck who called Dr. Quijano to testify and derived the benefit of Dr. Quijano's overall opinion that Buck was unlikely to be a future danger despite the existence of some negative factors***, this case does not represent the odious error contained in the *Saldano* cases. As such, the former actions of the Director are not applicable and should not be considered in deciding this case.

Id. at 16-18 (emphases in original and supplied).

The Attorney General did not disclose to the appellate court: (1) that the Attorney General had made a previous admission that after a "thorough audit" he had identified Mr. Buck's case as being similar to *Saldaño*; (2) that the Attorney

General had promised that his office would waive procedural defenses in Mr. Buck's case once the case reached federal court; and (3) that in two previous cases in which the ***defense*** had sponsored Quijano's testimony and "derived the benefit of Dr. Quijano's overall opinion" (*Blue* and *Alba*), the Attorney General had waived procedural defenses and formally confessed constitutional error due to the State's use of the defendant's race to support a death sentence. The Attorney General's response failed to mention or cite to the cases of *Blue* or *Alba* at all.

Mr. Buck's COA application thereafter remained pending for three years until the court of appeals, on September 25, 2009, denied COA. In reliance on the Attorney General's representations that Mr. Buck's case was different from others in which the Attorney General had conceded error and in which federal courts had granted relief, the Fifth Circuit held that reasonable jurists could not disagree about the merits of Mr. Buck's constitutional claims and denied a COA. *Buck v. Thaler*, 345 Fed. App'x 923 (5th Cir. 2009). Mr. Buck thereafter sought *certiorari*, which was denied on April 19, 2010. *Buck v. Thaler*, No. 09-8589 (U.S. 2009).

On April 25, 2011, the trial court entered an order setting Mr. Buck's execution date for September 15, 2011. The following day, appointed federal habeas counsel indicated that he would like the assistance of the Texas Defender Service ("TDS") in preparing a clemency petition on behalf of Mr. Buck. Attorneys from TDS agreed to represent Mr. Buck *pro bono* in clemency proceedings.

In June 2011, the *pro bono* TDS attorneys began collecting records and reviewing the record in order to prepare for clemency proceedings. As part of that

preparation, the defense team conducted extensive review of the media coverage of Mr. Buck's case. As a result, the June 2000 statements of then-Attorney General John Cornyn, identifying Mr. Buck's case as containing constitutional error were discovered. In July 2011, *pro bono* TDS counsel reviewed the records of the other five cases identified by then-Attorney General John Cornyn as containing similar constitutional error. The defense team reviewed the cases of *Blue* and *Alba* and discovered that the Attorney General had misrepresented, throughout the federal proceedings, that Mr. Buck's case differed from the others because he called Dr. Quijano to the stand. On August 31, 2011, counsel from TDS filed a clemency petition with the Texas Board of Pardons and Paroles, including a detailed description of the State's reliance on race as a factor increasing the likelihood of future dangerousness during Mr. Buck's capital sentencing hearing.

On September 7, 2011, now represented by *pro bono* TDS counsel in federal court, Mr. Buck filed a motion in the district court requesting that it grant him relief from the judgment due to the extraordinary circumstances that: (1) the Attorney General of Texas had already identified Mr. Buck's death sentence as one obtained in violation of equal protection based on the government's reliance on race as a factor at sentencing; (2) the Attorney General had promised that he would not assert procedural defenses against Mr. Buck's claims related to the government's violations of fundamental constitutional norms; and (3) the Attorney General's pleadings had failed to disclose these relevant facts and the circumstances of other

cases in which the Office of the Attorney General had previously waived procedural defenses and confessed error.

The Attorney General filed the Director's Response on September 9, 2011. The Response argued that a material distinction existed between Mr. Buck's case and the other cases in which the Attorney General remedied equal protection violations. However, the Director's Response contained factual and legal misrepresentations, and a material factual omission: The Attorney General affirmatively misrepresented the John Alba case, and it entirely omitted any mention of the Carl Blue case.

The Attorney General argued that: "This case ... presents a significantly different scenario than that presented in Saldano, where the prosecutor proffered the offending testimony.... Unlike Saldano, ***Alba***, Broxton, and Garcia, in Buck's case Quijano was called by the defense, not the State." Thaler's Reply to Buck's Motion for Relief from Judgment and Motion for Stay of Execution at 15, 17 (Docket Entry No. 30) (emphasis supplied). This assertion was materially false. Like Mr. Buck's case, the ***defense*** called and sponsored Quijano's testimony in *Alba*. Despite this supposedly distinguishing fact, the Attorney General acknowledged in Alba's case that Alba's sentence had been obtained in violation of equal protection because of the government's reliance on race.

Likewise, the defense called and sponsored the testimony of Quijano in *Blue* — ***a case left completely unmentioned by the Attorney General in the Director's Response and in every pleading he had filed in this case***.

Moreover, unlike in Mr. Buck's case, the government did ***not*** explicitly elicit any causal link between Blue's being an African-American and the likelihood of his committing violence in the future. Despite this, the Attorney General acknowledged that Blue's sentence was obtained in violation of equal protection because of the government's reliance on race as evidence of dangerousness.

The district court denied Mr. Buck's motion. In its order denying relief from judgment, the district court held that Mr. Buck was not entitled to prevail under Fed. R. Civ. P. 60(b)(6) because of the amount of time that had elapsed between the judgment and Mr. Buck's motion. *See* App. 3 at 7. It also declined to reopen the judgment based on fraud on the court. In reaching its conclusion, the court relied on the Fifth Circuit's previous denial of COA and the Attorney General's representation that "Quijano did not suggest to the jury that race or ethnicity should be a factor in the jury's decision." *Id*. The district court again denied a certificate of appealability to allow Mr. Buck to appeal the adverse decision. *Id*. at 9.

Mr. Buck sought an application for certificate of appealability in the court of appeals to review the district court's judgment that his habeas corpus proceeding should not be reopened. The Fifth Circuit denied COA. With respect to the denial of his motion to reopen,[16] the Fifth Circuit held that it had "no doubts" that reasonable

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[16] The Fifth Circuit also held that Mr. Buck's request for a COA on his underlying constitutional claim constituted a successive habeas petition. *See* Opinion at 5-7. However, Mr. Buck did not seek a COA on the district court's decision on his underlying equal protection and due process claims. To be entitled to a COA, even on a claim disposed on a procedural ground, Mr. Buck has to make a

jurists could not debate whether the district court's refusal to grant relief under Fed. R. Civ. P. 60(b)(6) was error. The Fifth Circuit held that jurists could not with reason debate whether the motion was brought in a reasonable time because it was not filed until five years after the district court's entry of final judgment and a year after this Court denied certiorari. App. 1 at 10-11. The court additionally held that it would be unreasonable for any jurist to believe that Mr. Buck's case presented extraordinary circumstances. App. 1 at 11-12. The court's analysis of whether extraordinary circumstances were presented was limited to whether Mr. Buck could have raised equal protection and due process claims during his initial state habeas application and wholly ignored the circumstances Mr. Buck actually presented as being extraordinary. In other words, it did not consider the actual issue presented: whether Texas's arbitrary and disparate treatment of Mr. Buck in relation to the seven other cases in which Texas confessed error and its misrepresentations and omissions to federal tribunals of highly material information were extraordinary circumstances.

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substantial showing of the denial of a constitutional right. "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." *Slack v. McDaniel*, 529 US 473,484 (2000). Hence, the Fifth Circuit merely confused Mr. Buck's attempt to make this showing in connection with the denial of his motion to reopen the judgment as a request for a COA on the underlying claim.

With respect to the district court's denial of the motion on fraud grounds, the Fifth Circuit held that jurists could not reasonably debate the district court's conclusion that the Attorney General's persistent and misleading material misrepresentations to multiple federal tribunals in multiple pleadings was not a fraud on the court. App. 1 at 12-14. This holding conflicts with at least one other court of appeals about what may constitute fraud on the court. *See Demjanjuk v. Petrovsky*, 10 F. 3d 338, 352 (6th Cir. 1993) (holding that when the party is a government acting through its duly authorized counsel, "[r]eckless disregard for the truth is sufficient" to constitute fraud on the court).

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S HOLDING THAT LITIGANTS ENGAGE IN "EXCESSIVE DELAY" BY FAILING TO UNCOVER GROSS MISREPRESENTATIONS BY AN OPPOSING PARTY.

The Fifth Circuit held that Mr. Buck

> . . . did not bring the motion for over five years[17] after the district court's entry of final judgment and more than a year after the Supreme Court denied certiorari. Such an excessive delay is not reasonable under the circumstances of this case. Buck has not presented ***any*** facts or even arguments that would constitute good cause for the delay.

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[17] The court failed to consider that, *for three of the five years* for which it held Mr. Buck accountable for delay, that court was sitting on his application for COA. Mr. Buck's application for COA was filed on November 22, 2006. The Fifth Circuit did not deny it until September 25, 2009. Mr. Buck thereafter sought *certiorari* from this Court, which was denied in April 19, 2010. It was not until new counsel were retained to aid in clemency that investigation revealed the Attorney General's conduct before the federal tribunals.

App. 1. at 10 (emphasis added).

Since the inception of Mr. Buck's first federal habeas corpus proceedings, the Attorney General's Office has repeatedly represented to the courts that the *Saldaño* cases in which they conceded error were materially different from Mr. Buck's because Quijano was called to the stand by the prosecution. This statement—intended to dispositively distinguish Mr. Buck's case from those in which a new sentencing hearing was constitutionally mandated—was false. As the court below held, it was false because publicly available court opinions revealed that, in two of the *Saldaño* cases, Quijano was called to the stand by the defense.

Mr. Buck's prior counsel apparently trusted that the Attorney General would comply with his duty of candor to the courts and did not investigate the possibility that public documents would reveal that the State was materially misleading the federal court. Likewise, the Fifth Circuit failed to detect the State's misrepresentations, even though it had granted habeas corpus relief in *Alba*—one of the *Saldaño* cases in which Quijano had been called by defense. The State's deception was discovered only when Mr. Buck recently secured new *pro bono* counsel shortly before his execution.

Rule 60(b)(6) affords equitable relief. The "exercise of a court's equity powers ... must be made on a case-by-case basis." *Holland v. Florida*, 130 S. Ct. 2549, 2563 (2010). The Fifth Circuit held that reasonable jurists could not debate whether Mr. Buck's motion to reopen judgment was filed within a reasonable time, but the court failed to consider the totality of the circumstances present in this case and factor

into its analysis the substantial equities that lie in Mr. Buck's favor. The court wholly failed to analyze what fault lay with the Attorney General for the delay due to its having made affirmative misrepresentations to federal tribunals.

The Attorney General was uniquely positioned to know about the circumstances of all the *Saldaño* cases. It was legal counsel for the Director in each of them, and it conceded error in each of them. Because of the concessions, none of the cases resulted in published opinions. The Attorney General used its unique position as counsel in all the cases to assure the federal court that Mr. Buck's case was different from all of them. See Respondent Dretke's Answer and Motion for Summary Judgment with Brief in Support, at 20 ("[T]he Director is obviously aware of the prior confessions of error in other federal habeas corpus cases involving similar testimony by Dr. Quijano."). But then he affirmatively made a materially false assertion: "[B]ecause it was Buck who called Dr. Quijano to testify and derived the benefit of Dr. Quijano's overall opinion that Buck was unlikely to be a future danger despite the existence of some negative factors, this case does not represent the odious error contained in the *Saldano* cases." *Id*. This statement refers implicitly to *Blue* and *Alba*, and the Attorney General knew it was false. The Attorney General ***expressly linked*** this purported distinction to its assertion of procedural default in the case, implying that if this distinction did not exist, then he would treat Mr. Buck similarly to how he treated the petitioners in the other *Saldaño* cases, *i.e.*, the Attorney General would waive procedural defenses. *Id*. at 17 ("***Based on this critical distinction***, the Director ***deems himself compelled*** to

assert the valid procedural bar precluding merits review of Buck's constitutional claims." (emphasis supplied)).

The court below failed to meaningfully consider the Attorney General's primary role in causing the delay by misrepresenting the facts of the unpublished cases about which he—and not Mr. Buck—was uniquely positioned to address. Had the Attorney General not misrepresented the circumstances of the *Saldaño* cases to the federal court, Mr. Buck would not have ever been in the position of needing to request relief from a judgment procured by such conduct. Likewise, the Attorney General's failure to reveal that his office's 2000 review of all the *Saldaño* cases included Mr. Buck on a list of five other cases deemed similar to *Saldaño* also could have averted Mr. Buck's need to seek relief from the judgment later.

This Court has recognized that "preservation of the integrity of the judicial process" need not "wait upon the diligence of litigants." *Hazel-Atlas Glass v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944). In hindsight, Mr. Buck's prior counsel erred by assuming the Attorney General's Office would not so overtly mischaracterize the circumstances of the *Saldaño* cases and the Attorney General's actions in them. Faulting Mr. Buck, however, because the Attorney General's misrepresentations escaped detection for several years turns equity on its head by rewarding the party guilty of a lack of candor with the federal courts and punishing the party whose cause of action was harmed by it. Because jurists of reason could disagree with the conclusion that Mr. Buck was at fault for the delay occasioned by the Attorney General's deception, this Court should vacate the lower court decision

with instructions to grant a certificate of appealability, and remand Mr. Buck's case so that he may fully brief his case on appeal.

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW THE FIFTH CIRCUIT'S HOLDING THAT THE ATTORNEY GENERAL'S ANNOUNCEMENT THAT IT WOULD WAIVE ANY PROCEDURAL BARS AND CONCEDE THAT THE ODIOUS RACE DISCRIMINATION IN MR. BUCK'S CASE AMOUNTED TO CONSTITUTIONAL ERROR, THE SUBSEQUENT RETRACTION OF THAT PLEDGE BASED ON MATERIAL MISREPRESENTATIONS, AND THE ARBITRARY RESULT THAT MR. BUCK WILL BE TREATED DIFFERENTLY FROM THE FIVE OTHER *SALDAÑO* DEFENDANTS ONLY BECAUSE HIS FEDERAL PROCEEDINGS FELL ON THE WRONG SIDE OF AN ELECTION DO NOT AMOUNT TO EXTRAORDINARY CIRCUMSTANCES UNDER RULE 60(B)(6).

The appeals court held jurists could not reasonably believe extraordinary circumstances existed. The court, however, never addressed the actual circumstances Mr. Buck set forth as being extraordinary. Mr. Buck argued that the following extraordinary circumstances warranted reopening his case:

(1) Texas's prior identification of his case as similar to Saldaño's by its highest legal officer;

(2) The Attorney General's promise, with regard to any of the six *Saldaño* cases pending in state court in 2000 that, "if and when those cases reach this office they will be handled in a similar manner as the Saldaño case"[1];

(3) Texas's subsequent disparate treatment of Mr. Buck in comparison to its actions in other, materially indistinguishable cases, leaving Mr. Buck as the only one of six identified death-sentenced individuals to be executed whose sentence was procured by the government's reliance on his race; and,

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[1] James Kimberly, *Death Penalties of 6 in Jeopardy: Attorney General Gives Result of Probe into Race Testimony*, HOU. CHRON., June 10, 2000 at A1. The Attorney General represents the State of Texas in federal habeas corpus proceedings, the State is represented by the local district attorney's office in state court proceedings.

(4) The Attorney General's misrepresentations and omissions about that information to the federal courts while simultaneously bolstering its authority by citing its involvement in and "obvious awareness" of "the *Saldaño* cases."

But, instead of analyzing those circumstances, the appeals court merely held that extraordinary circumstances did not exist because Mr. Buck could have raised his claims in his direct appeal or initial state habeas proceeding. *See* App. 1 at 11. The Fifth Circuit's *non sequitor* response wholly failed to resolve the case before it.

Moreover, while it is true that Mr. Buck could have raised his claims in state habeas corpus proceedings, ***it is not true that this makes his case any different from other cases in which the Attorney General conceded error and federal courts granted relief***. For example, the petitioner in *Blue*, a materially indistinguishable case from Mr. Buck's, also had not raised his equal protection and due process claims related to the government's reliance on race during his state habeas proceeding. The Attorney General waived the exhaustion requirement for Mr. Blue. In fact, the Attorney General waived exhaustion in *Blue*, *Broxton*, *Garcia*, *Gonzales*, and *Saldaño*.[2] In each of those cases the defendant procedurally defaulted his equal protection and due process claims.[3] In short, Mr. Buck behaved like every

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[2] Counsel has to date been unable to determine what happened in this regard in *Alba*.

[3] Thus, the appeals court seems to have premised its judgment in this regard on yet ***another*** error about the *Saldaño* cases. The court held that Mr. Buck "was free to raise equal protection arguments regarding the State's use of Quijano's testimony in his state court appeal and initial state court habeas application, ***just***

other petitioner whom the Attorney General had identified as having been sentenced in violation of equal protection, and for whom the Attorney General waived procedural defenses.

Had the Fifth Circuit engaged Mr. Buck's arguments it could not have escaped the conclusion that the circumstances of this case are extraordinary. Mr. Buck is in a class of one. He is the only *Saldaño* litigant who is still facing a death sentence based in part on the government's blatant and explicit reliance on an odious stereotype that African Americans and Hispanics are more dangerous than whites. In all the other *Saldaño* cases the punishment proceedings have been vacated; there are no other remaining *Saldaño* cases. It is rare that the Attorney General of Texas concedes that a death sentence was procured in violation of the Constitution. The Attorney General's subsequent revocation of his office's concession, based on a materially false description of the class of affected cases, is

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as another Texas defendant had raised the issue with success." App. 1 at 12 (emphasis added). The court is presumably, albeit cryptically and without citation, referring to Saldaño himself and this Court's vacating the state court's opinion. However, the court is wrong about what happened in *Saldaño*, which did not, in fact, result in relief from the state court. After this Court remanded his case to the state court, the Texas court re-imposed a procedural default. *Saldano v. State*, 70 S.W.3d 873, 891 (Tex. Crim. App. 2002) ("After our independent examination of the claim, we hold that no complaint about Dr. Quijano's testimony is presented for appellate review because the appellant did not make an objection to the testimony as our law has always required. Under that law a decision on the admissibility of evidence that there is a correlation between ethnicity and recidivism cannot be reached, and we express no view on that issue."). Thus, even Saldaño defaulted his claim in state court ***just like Mr. Buck***. It was not until Saldaño's case moved to federal court that he was granted relief when the Attorney General ***waived procedural defenses and conceded error***.

entirely unprecedented.[4] Jurists of reason could disagree with the Fifth Circuit's implicit conclusion that these circumstances are not extraordinary. Accordingly, this Court should vacate the lower court decision, grant a certificate of appealability, and remand Mr. Buck's case so that he may fully brief his case on appeal.

III. THE COURT SHOULD GRANT CERTIORARI TO HOLD THAT THE ATTORNEY GENERAL'S ACTIONS ROSE TO FRAUD ON THE COURT.

A. The Fifth Circuit's Opinion Conflicts with a Sixth Circuit Decision.

Mr. Buck's motion to reopen also argued that the court should reopen the federal proceedings because of a fraud on the court. The Fifth Circuit held, "The Attorney General's actions, even taking Buck's view of them as true, in no way resemble bribery of a judge or jurors, the fabrication of evidence, or rise to the level of egregiousness that constitutes fraud on the court." The lower court's opinion conflicts with *Demjanjuk v. Petrovsky*, 10 F. 3d 338 (6th Cir. 1993). *Demjanjuk* concerned a federal denaturalization and extradition proceeding in which government lawyers were "less than forthcoming" with certain information to which

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[4] The lower court's analogy to *Gonzalez v. Crosby*, 545 U.S. 524 (2005), was entirely misguided. In *Gonzalez*, the petitioner filed a motion for relief from judgment to take advantage of a subsequent change in law. *Id*. at 536. This Court held that a subsequent change in law did not amount to an extraordinary circumstance, and noted that Gonzalez's failure to pursue appeals on the particular legal issue in question made the change in the law "all the less extraordinary." Mr. Buck has not claimed something as ordinary as a change in law as the basis for reopening the district court's federal judgment against him.

they had "superior access." *Id.* at 342. As a result, the defendant and court "were deprived of information and materials that were critical to building the defense." *Id.* A special master appointed to review whether the government's conduct amounted to a fraud on the court determined that one had not occurred because the government had acted "in good faith." *Id.* at 340.

The Sixth Circuit disagreed. Observing that "[n]o court system can function without safeguards against actions that interfere with its administration of justice," the court held that, "[a]s an officer of the court, every attorney has a duty to be completely honest in conducting litigation." *Id.* at 352.

> [W]hile an attorney should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates fraud upon a court.

Id. (quoting 7 Moore's Federal Practice and Procedure ¶ 60.33). The court observed that when the party is a government, acting through its duly authorized counsel, "the distinction between client and attorney actions becomes meaningless." *Id.* In such cases, no scheme based on a subjective intent to commit fraud is required. Rather, "[r]eckless disregard for the truth is sufficient" to constitute fraud on the court. *Id.* at 353.

The Attorney General's conduct exhibited, at minimum, a reckless disregard for the truth. Accordingly, the Fifth Circuit's decision and the Sixth Circuit's

decision are in conflict, and this Court should grant certiorari to determine whether the Attorney General's conduct amounted to a fraud on the court in this case.

B. The Fifth Circuit's "Independent" COA Determination on the Merits of Mr. Buck's Equal Protection and Due Process Claims.

The Fifth Circuit also held that, notwithstanding the above, a fraud on the court did not occur because when Mr. Buck previously requested a COA to appeal the denial of his federal habeas petition, the Fifth Circuit "examined the record in Buck's case, applied applicable law, and concluded that were we to reach the merits of the issue of whether Buck's constitutional rights were violated by the State's questioning of Quijano and the State's closing argument, we would conclude that Buck could not make a substantial showing of the deprivation of a constitutional right." App. 1 at 15.

In other words, the appeals court held that a jurist who believed—or even might debate whether—the government's reliance on Mr. Buck's race as evidence of his future dangerousness during his capital trial was obtained in violation equal protection on the merits would be an unreasonable one. Thus, the court asserted an independent lack of merit in Mr. Buck's equal protection and due process claim as a basis for holding that no fraud on the court by the Attorney General occurred.

Preliminarily, and with respect to the Fifth Circuit's independent review, it bears noting that the Fifth Circuit's independent review was premised on an erroneous belief that no prior panel of that Court had determined an equal protection violation occurred. Mr. Buck had pointed out that a panel of the Fifth

Circuit in *Alba v. Johnson*, 232 F.3d 208, 2000 WL 1272983, No. 00-40194 (5th Cir. Aug. 21, 2000) (unpublished), had granted relief in circumstances materially indistinguishable from Mr. Buck's. The court believed that it did not have an independent duty to ascertain whether a constitutional violation occurred when the State confessed error. App. 1 at 14. Thus, when that court, citing this Court's order in *Saldaño v. Texas*, 530 U.S. 1212 (2000), remanded *Alba* to the district court "with instructions to grant habeas relief limited to sentencing," the court "did not hold that there was constitutional error." *Id*.

The court's premise was mistaken. First, the Fifth Circuit had already held that the state's concession of error is not binding on the court. *Every v. Blackburn*, 781 F.2d 1138, 1140 (5th Cir. 1986). Second, this Court has held likewise. *Young v. United States*, 315 U.S. 257, 258-59 (1942). Third, the court's belief that determining whether constitutional error existed when there has been a concession raised "[s]ignificant questions regarding the continued existence of a live case or controversy" is unavailing. If the government's concession of error in a federal habeas corpus case causes there not to be a case or controversy, the federal court would not have jurisdiction ***to grant relief*** to one of the parties. It would have to dismiss the case. Fourth, a federal court may entertain and grant a habeas corpus petition "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

On the merits of the initial COA application—which the lower court relied upon to uphold the district court's denial of Mr. Buck's motion to reopen, the Court's

holding that no reasonable jurist could debate whether the government's reliance on Mr. Buck's death sentence violated equal protection must be confronted by this Court. The Court may do that in this certiorari proceeding, or it may consider that in connection with Mr. Buck's petition for writ of habeas corpus contemporaneously filed with this Court, in which his claims are put forth more fully.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Buck's petition for writ of certiorari.

Respectfully submitted,

s/ Gregory W. Wiercioch

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Appendix 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
September 14, 2011
Lyle W. Cayce
Clerk

No. 11-70025

DUANE EDWARD BUCK,

Petitioner–Appellant,

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent–Appellee.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. H-04-3965

Before DAVIS, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:[*]

Duane Edward Buck was convicted in a Texas state court of capital murder and was sentenced to death. He is currently scheduled to be executed on September 15, 2011, and seeks a stay of that execution. He challenges two orders from the district court denying relief and seeks a certificate of appealability (COA) from this court, raising two issues. With regard to Buck's contention that reasonable jurists could debate the merits of his Equal

[*] 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.

Protection and Due Process claims, we treat his application for a COA as an application for permission to file a successive habeas petition, and we DENY that application. We DENY a COA with regard to Buck's contention that reasonable jurists could debate the district court's disposition of a motion under Rule 60 of the Federal Rules of Civil Procedure to reopen an earlier judgment entered by the district court denying a petition for habeas corpus relief. We DENY his request for a stay of execution.

I

The facts regarding Buck's conviction and sentencing are set forth in our previous opinion in this case,[1] and we recount them only briefly here. Buck was convicted by a jury in a Texas state court for murdering Kenneth Butler and Buck's former girlfriend, Debra Gardner, during the same criminal transaction. Buck entered Gardner's home, where his sister was visiting, inflicted serious gunshot wounds on his sister, fatally shot Butler, and then chased Gardner into the street as she and her children attempted to flee. He shot and killed Gardner in view of her two children. Buck has never contended that he was not the shooter.

During the punishment phase of his trial, Buck called Dr. Walter Quijano, a clinical psychologist, as an expert witness to testify on the likelihood of Buck's future dangerousness. On direct examination, Dr. Quijano testified that he had considered several statistical factors when evaluating Buck's potential for future dangerousness, including but not limited to age, sex, race, social economics, history of violence, and history of substance abuse. Regarding race, Dr. Quijano stated: "It's a sad commentary that minorities, Hispanics and black people, are over represented in the criminal justice system."

Dr. Quijano also testified that Buck suffered from dependent personality

[1] *Buck v. Thaler*, 345 F. App'x 923 (5th Cir. 2009).

disorder, which is characterized by an unhealthy reluctance to let go of past relationships, even to the point of violent or destructive behavior. According to Dr. Quijano, however, Buck was unlikely to commit future acts of violence because he would be unable to develop similar dependent relationships in jail. Basing his opinion on a combination of statistical, environmental, and clinical factors listed in his expert report, Dr. Quijano concluded that Buck would not likely pose any future danger to society if he were incarcerated.

On cross-examination, the prosecutor questioned Dr. Quijano regarding the several factors that he had mentioned during direct examination. At one point, the prosecutor — without objection from Buck's defense counsel — asked Dr. Quijano about his consideration of both race and sex as relevant factors in his future-dangerousness analysis, which led to the following exchange:

> Q: 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?
>
> A: Yes.

During closing arguments, Buck's defense counsel recalled for the jury Dr. Quijano's earlier testimony that there was "a very low probability that [Buck] would ever commit an act of violence." In rebuttal, the prosecution also referenced Dr. Quijano's testimony, stating — again without objection from defense counsel — that Dr. Quijano, "who had a lot of experience in the Texas Department of Corrections, . . . told you that there was a probability that [Buck] would commit future acts of violence." The prosecution made no reference whatsoever to Buck's race (African-American) or to Dr. Quijano's use of race as a statistical factor for determining future dangerousness.

Based on the jury's answers to the special issues submitted regarding punishment, Buck was sentenced to death in 1997. His conviction and sentence

were affirmed by the Texas Court of Criminal Appeals in 1998.[2] Buck filed two state habeas petitions, the first of which the Texas Court of Criminal Appeals denied, and the second of which that court dismissed as an abuse of the writ. Buck pursued habeas relief in federal district court. That court denied relief, and Buck sought a COA from this court. We denied that application in 2009.[3]

Buck initiated the present proceedings in September 2011. His most recent filings in the district court and our court recount that in June 2000, John Cornyn, who was then the Attorney General of the State of Texas, made a public statement, released to the press, that in six capital cases, including Buck's, questioning of an expert witness, Walter Quijano, at the sentencing stage in each of these cases had injected race into the proceedings. Buck asserts that in this same public statement, the Attorney General announced that the State of Texas would not contest equal protection claims in federal courts in those six cases and would not assert any procedural bars to the assertion of such equal protection claims in federal habeas proceedings. At that time, Buck's request for habeas relief in state court was pending. He did not file his first petition for habeas corpus relief in federal district court until October 14, 2004.

With the exception of Buck's case, the Attorney General of Texas did not raise procedural bars in federal habeas proceedings to the assertion of claims regarding the testimony of Quijano, and each of the other five individuals received a new trial. When Buck challenged the evidence that was elicited from Quijano, and the State's use of it, in his federal habeas proceeding, the State contended that this claim was procedurally barred. The State asserted that in Buck's case, unlike at least two of the other cases, Buck had called Quijano as a defense witness. This, the State argued, distinguished Buck's case from those

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[2] *Buck v. Thaler*, No. 72, 810 (Tex. Crim. App. Apr. 28, 1999).

[3] *Buck*, 345 F. App'x 923.

in which the State had called Quijano as a prosecution witness. The district court denied habeas relief. We denied his application for a COA.[4]

Buck now contends that the State made affirmative misrepresentations and failed to disclose that in at least two of the six cases identified by the Attorney General in 2000, those involving Carl Blue and John Alba, the defendants had called Quijano as a defense witness. Buck contends that the State has omitted any mention of the similarities between Buck's case and these two cases in which habeas relief was obtained, and that because of the State's misrepresentations and omissions, the district court and this court were misled.

In September of this year, 2011, Buck filed a motion in the district court seeking relief from the district court's July 24, 2006 order. After that motion was denied, Buck filed a motion to alter or amend the district court's September 9, 2011 order. The district court denied that motion on September 12, 2011. Buck now seeks relief in this court.

II

Although Buck asserted his challenges in the district court citing Federal Rule of Civil Procedure 60, the Supreme Court in *Gonzalez v. Crosby* made clear that a Rule 60(b) motion is to be treated as a successive habeas petition if it asserts or reasserts claims that there was error in a state court conviction.[5] Buck's first issue in his application for a COA in this court is that we should reconsider whether reasonable jurists could debate whether the State violated the equal protection clause in inserting race into his trial during the sentencing phase. He asserts that in the proceedings leading to our prior decision, we were misled by the Attorney General's briefing and omissions in that briefing regarding the other five cases in which Quijano testified. He asks us to revisit

[4] *Id.*

[5] 545 U.S. 524, 530-31 (2005).

our prior disposition of the issues he raised regarding Quijano and to rule in his favor.

Buck is "assert[ing] [a] federal basis for relief from a state court's judgment of conviction."[6] This constitutes a successive habeas petition even though he labeled the claim in district court as a Rule 60 motion. The district court therefore had no jurisdiction to resolve Buck's claim because this court had not given Buck permission to file a successive habeas petition.[7] However, treating the request for relief in this court as an application for permission to file a successive habeas petition, we deny that request.

A claim presented in a successive habeas that was not presented in a prior application "shall be dismissed unless the applicant shows that the claim relies on a new rule of constitutional law" or the that "factual predicate for the claim could not have been discovered previously through the exercise of due diligence . . . ."[8] Buck's claim is not based on a new rule of constitutional law or newly discovered facts. Buck makes no effort to show that the facts upon which he relied "could not have been discovered." Because Buck has failed to meet the standard required for this court to consider a successive habeas corpus application, we have no discretion in the matter.

The existence of the other five cases in which Quijano testified was known to Buck at the time he first sought habeas relief in federal district court in 2004. Similarly, at that time, the Attorney General's position that the procedural bar should not apply in the other five cases was a matter of public record, and new trials had been granted in at least four of the cases that had been identified, along with Buck's, in 2000.

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[6] *See id.* at 530.

[7] 28 U.S.C. § 2244(b)(3)(A).

[8] *Id.* § 2244(b)(2).

When the State asserted the procedural bar in Buck's federal habeas proceeding filed in 2004, Buck certainly knew that in his case, the State was not following the same path that it had taken in the other cases regarding Quijano's testimony and the assertion of procedural bars. Indeed, one of the grounds on which he sought relief in his 2004 filing in federal district court was that he should receive relief just as the other defendants had.

Even if Buck had been able to show that the factual predicate for his claim could not have been discovered through the exercise of due diligence,[9] he would still be required to show that "the facts underlying his claim, if viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[10] Buck has not pointed to anything that suggests he could meet this standard. He has not met the requirements for a successive habeas petition.

Under AEDPA, the role of the federal courts in reviewing state convictions, even for the death penalty, is very limited.[11] This role is even more narrow when the claims are raised for the first time in a successive federal habeas many years after the facts upon which the claims are based have occurred.[12] Buck has made no effort to meet the high hurdles AEDPA requires of such actions.

To the extent that Buck's contentions regarding the first issue identified in his application is not a successive habeas petition, but instead could be construed as cognizable under Rule 60, we would deny a COA for the reasons that we consider below with respect to Buck's second issue.

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[9] *Id.* § 2244(b)(2)(B)(i).

[10] *Id.* § 2244(b)(2)(B)(ii)

[11] 28 U.S.C. § 2244(a)-(b)(2).

[12] *Id.*

III

The second issue that Buck brings forth in his application to this court is his contention that reasonable jurists could debate the merits of his equal protection and due process claims because of the misleading record created by the Attorney General's alleged misrepresentations and omissions. We consider this to be a contention that there was "some defect in the integrity of the federal habeas proceedings."[13]

The Antiterrorism and Effective Death Penalty Act (AEDPA) requires a petitioner to obtain a COA to appeal a district court's denial of his habeas petition.[14] Despite this court's earlier holding in *Dunn v. Cockrell*,[15] a COA is generally required to appeal the denial of a Rule 60(b) motion in a habeas proceeding. We have read *Dunn*'s exception narrowly, holding that a COA is not required to appeal the denial of a Rule 60(b) motion "only when the purpose of the motion is to reinstate appellate jurisdiction over the original denial of habeas relief."[16] Buck's Rule 60(b) motion is not for the purpose of reinstating appellate jurisdiction over the original denial of habeas relief. Therefore, Buck is required to obtain a COA before appealing the district court's denial of his Rule 60(b) motion. Buck is also required to obtain a COA before appealing the district court's denial of his Rule 60(d) motion.[17]

We may only grant a COA if the petitioner makes "a substantial showing

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[13] *Gonzalez*, 545 U.S. at 532.

[14] 28 U.S.C. § 2253(c)(1).

[15] 302 F.3d 491, 492 (5th Cir. 2002).

[16] *Ochoa Canales v. Quarterman*, 507 F.3d 884, 888 (5th Cir. 2007); *see also Williams v. Quarterman*, 293 F. App'x 298, 315 (5th Cir. 2008).

[17] *Jackson v. Thaler*, 348 F. App'x 29, 31-32, 34-35 (5th Cir. 2009).

of the denial of a constitutional right."[18] "A petitioner satisfies this 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."[19] In making this determination, we conduct a "threshold inquiry" that involves "an overview of the claims in the habeas petition and a general assessment of their merits" but it "does not require full consideration of the factual or legal bases adduced in support of the claims."[20] In death-penalty cases, we resolve in favor of the petitioner any doubts whether a COA should issue.[21] In this case, however, we have no doubts. Buck has not demonstrated that jurists of reason could disagree with the district court's resolution of the issues presented in Buck's latest motions.

We first consider the district court's denial of Buck's motion for relief from judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure. Buck raised two grounds in that motion. The first was based on Rule 60(b)(6), which allows a district court to "relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief."[22] The district court denied the motion as untimely because it was not brought within a reasonable time as required by Rule 60(c)(1),[23] and Buck did not show

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[18] 28 U.S.C. § 2253(c)(2).

[19] *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

[20] *Id.* at 336.

[21] *Id.* at 460.

[22] FED. R. CIV. P. 60(b)(6).

[23] FED. R. CIV. P. 60(c)(1).

good cause for the delay.[24] Denial of a Rule 60(b) motion is reviewed for an abuse of discretion.[25] A court's determination of the timeliness of such a motion is also reviewed for abuse of discretion.[26]

We hold that the district court did not abuse its discretion in determining that Buck's Rule 60(b) motion was not brought within a reasonable time. He did not bring the motion for over five years after the district court's entry of final judgment and more than a year after the Supreme Court denied certiorari. Such an excessive delay is not reasonable under the circumstances of this case. Buck has not presented any facts or even arguments that would constitute good cause for the delay.

Buck was fully aware of the other five cases on which he now bases his request for relief. In his briefing in our court in 2006, Buck argued at some length that he should be accorded the same relief as the other five defendants. For example, he asserted:

> In Texas, in at least five other cases, individuals raise identical habeas claims as Appellant, and in no case did the federal courts find those claims procedurally default[ed]. The only difference is that in each of those cases, the Respondent conceded error. This case should not be any different.

At another juncture in his briefing to this court in 2006, Buck noted, "the Respondent, unlike the instant case, expressly waived exhaustion and procedural default regarding issues relating to Quijano."

The only additional argument that Buck now makes, five years later, is

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[24] *See In re Osborne*, 379 F.3d 277, 283 (5th Cir. 2004) ("Motions under Rule 60(b) must be made 'within a reasonable time,' unless good cause can be shown for the delay." (citing *Pryor v. U.S. Postal Serv.*, 769 F.2d 281, 287-88 (5th Cir.1985)).

[25] *Balentine v. Thaler*, 626 F.3d 842, 846 (5th Cir. 2010), *cert. denied*, 131 S.Ct. 2992 (2011).

[26] *Lindy Investments III v. Shakertown 1992 Inc.*, 360 F. App'x. 510, 512 (5th Cir. 2010); *see also Matter of Al Copeland Enterprises, Inc.*, 153 F.3d 268, 271–72 (5th Cir. 1998).

that in two of the five cases, those involving Blue and Alba, the defendants rather than the State, called Quijano as a witness. These facts were ascertainable many years ago. Publicly available court opinions that Buck has attached to his filings in the district court and in this court reflect that both Blue and Alba received new sentencing hearings in 2000. We note that Buck's most recent claim in district court was not that Buck received disparate treatment as compared to Blue and Alba. He expressly disclaimed such an intention in his submission to the district court, saying, "Mr. Buck does not assert the second equal protection violation [that he was treated disparately from Blue and Alba] as a substantive claim for habeas corpus relief. He mentions it only to emphasize the extraordinary nature of the circumstances warranting relief from the judgment."

We conclude that Buck has not presented the extraordinary circumstances needed to justify the grant of a Rule 60(b)(6) motion.[27] The concept that asking a jury to find future dangerousness based on one's race violates the Equal Protection clause is certainly not a new or novel one. Yet, Buck did not raise any argument to this effect in his direct appeal to the Texas Court of Criminal Appeals or in his first state court application for habeas relief. It was only after the Attorney General confessed error in another case in which Quijano had appeared as an expert witness on future dangerousness that Buck, for the first time, raised the issue in a second application for habeas relief to the Texas Court of Criminal Appeals in 2002. That court denied the application as an abuse of the writ. These circumstances are to us indistinguishable from those before the Supreme Court in *Gonzalez*.[28] The defendant in that case had failed to raise a

[27] *See Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (explaining that "our cases have required a movant seeking relief under Rule 60(b)(6) to show 'extraordinary circumstances' justifying the re-opening of a final judgment").

[28] 545 U.S. 524, 537-38 (2005).

question regarding the statute of limitations under AEDPA. The Supreme Court's subsequent decision in *Artuz* was a change in the law for some circuits and made clear that the district court in Gonzalez's case had incorrectly applied limitations.[29] The Supreme Court held that "[t]he change in the law worked by *Artuz* is all the less extraordinary in petitioner's case, because of his lack of diligence in pursuing review of the statute-of-limitations issue."[30] The Court likened Gonzalez's circumstance to that of a defendant who freely and voluntarily decided not to appeal a particular issue, "although the favorable ruling in the companion case made it appear mistaken in hindsight."[31]

We have a similar situation before us. Buck was free to raise equal protection arguments regarding the State's use of Quijano's testimony in his state court appeal and initial state court habeas application, just as another Texas defendant had raised the issue with success. Buck did not raise the issue. It was only after the Attorney General confessed error in another case that Buck filed a second state court habeas petition that was denied, on independently adequate state procedural grounds. The Attorney General's confession of error is not a change in the law as was *Artuz*. It was a change in position as to whether well-settled law applied under particular circumstances. Buck now attempts to enforce statements made by the Attorney General, wholly outside of any judicial proceeding involving Buck, when after further review, the Attorney General changed his analysis of how well-settled law applied in Buck's case.

Buck also sought relief from the district court pursuant to Rule 60(d)(3), arguing that the Attorney General committed fraud on the court. Rule 60(d)

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[29] 531 U.S. 4 (2000).

[30] *Gonzalez* 545 U.S. at 537.

[31] *Id.* at 538.

provides that Rule 60 does not limit a court's power to set aside a judgment for fraud on the court.[32] Fraud on the court allows the district court to set aside a judgment without a strict time bar.[33] Whether relief should be granted based on fraud on the court under Rule 60(d) is committed to the sound discretion of the district court, and district courts are given wide discretion in denying such motions.[34]

Buck argues that the office of the Attorney General committed fraud on the court by initially representing that it would not assert any procedural defenses against Buck but then subsequently failing to honor this representation when it asserted a procedural bar in the federal habeas proceedings. Buck also contends that the State misrepresented in its briefing regarding Buck's original federal habeas petition that in each of the other five cases in which Quijano testified, Quijano had been called by the prosecutor as a prosecution witness when in fact, both Blue and Alba had called Quijano as a defense expert.

Our court has explained that "only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute fraud on the court."[35] Under this definition, the district court acted within its discretion in concluding that the Attorney General did not commit fraud on the court. The Attorney General's actions, even taking Buck's view of them as true, in no way resemble

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[32] FED. R. CIV. P. 60(d).

[33] *Jackson v. Thaler*, 348 F. App'x 29, 34 (5th Cir. 2009).

[34] *Apotex Corp. v. Merck & Co., Inc.*, 507 F.3d 1357, 1361 (Fed. Cir. 2007); s*ee also Jackson v. Thaler*, 348 F. App'x 29, 34 n.6 (5th Cir. 2009) ("Rule 60(d)(3) contains the "fraud on the court" provision that was part of the penultimate sentence of Rule 60(b) before its 2007 revision. The change was stylistic only, *see* Fed.R.Civ.P. 60, Advisory Committee Notes, 2007 Amendments, and thus interpretations of the prior "fraud upon the court" language apply equally to the new Rule 60(d)(3).").

[35] *Rozier v. Fort Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978).

bribery of a judge or jurors, the fabrication of evidence, or rise to the level of egregiousness that constitutes fraud on the court. Additionally, as the district court noted, Buck has not identified a legal basis for the claim that the Attorney General's statements created legally enforceable rights or later precluded him from distinguishing Buck's case from the other cases.

Buck contends that in granting relief to Blue and Alba, the courts in those cases had determined that there were constitutional violations in circumstances indistinguishable from his case. Buck appears to implicitly argue that if the district court and this court had known the similarities between Buck's case and these cases and had known that the other courts had found constitutional violations, the district court and this court would have been constrained to conclude that reasonable jurists could not only debate whether the circumstances of "Buck's case gave rise to a constitutional issue, several courts, including this Court, had already found that it did." However, this court was involved only in Alba's case, and we did not hold that there was constitutional error. We vacated based on the State's confession of error in that case. Buck argues that we had an independent duty to ascertain whether there was a constitutional violation notwithstanding the State's confession of error. We disagree. Significant questions regarding the continued existence of a live case or controversy would be presented if this court were to ignore the parties' withdrawal of matters in dispute. In Blue's case, the district court concluded that there had been a constitutional violation as a result of Quijano's testimony but then immediately noted the State's confession of error, observing "nothing more needs to be said on this point." The district court's reasoning in a particular case applying the law to the facts before it is not binding on another district court or this court. In any event, it is difficult to divorce the State's confession of error from the mix in Blue's case.

The important point is that the failure of the State to apprise the district court or this court that Blue and Alba had called Quijano as their own witness in their respective trials and that the State had subsequently confessed error in each of those cases did not amount to fraud on the court. This court examined the record in Buck's case, applied applicable law, and concluded that were we to reach the merits of the issue of whether Buck's constitutional rights were violated by the State's questioning of Quijano and the State's closing argument, we would conclude that Buck could not make a substantial showing of the deprivation of a constitutional right.[36] We said:

> [W]e are satisfied that Buck's claim would fail on the merits. It was Buck, not the prosecution, who introduced Dr. Quijano as an expert witness and then solicited testimony from him regarding the use of race as one of several statistical factors for predicting future dangerousness. Buck cannot now claim surprise at the opinions that Dr. Quijano expressed. Indeed, in the punishment phase of the trial, it was Buck's defense counsel who argued for the admission of Dr. Quijano's expert report into evidence, despite language in the report suggesting that Buck's race is one factor that might argue in favor of a finding of future dangerousness. Buck and his counsel presumably made this strategic determination because they believed that the potential benefit of Dr. Quijano's ultimate conclusion — that Buck was not likely to pose any future danger to society if he were incarcerated — outweighed any risk of exposing the jury to Dr. Quijano's less favorable opinions. Despite Buck's having opened the door to this testimony during his direct examination, the prosecution referenced the race factor only once during cross-examination, and never mentioned it at all during closing arguments. Even if we were to consider Buck's petition on the merits, we would conclude that it fails to demonstrate a substantial showing of the deprivation of a constitutional right.[37]

Buck has offered no basis on which we can disregard our prior holding on this

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[36] *Buck v. Thaler*, 345 F. App'x 923, 930 (5th Cir. 2009).

[37] *Id.*

matter.

IV

Finally, Buck requests a COA for the district court's denial of his motion to alter judgment under Rule 59(e) of the Federal Rules of Civil Procedure. Like a Rule 60 motion, Buck must obtain a COA to appeal the denial of a Rule 59(e) motion.[38] Buck asserts the district court relied on misrepresentations made by Respondent in denying his Rule 60 motion. We review the district court's denial of a Rule 59(e) motion for an abuse of discretion.[39] A motion to alter or amend under Rule 59(e) must clearly establish either a manifest error of law, present newly discovered evidence, or rely on an intervening change in controlling law.[40] In denying Buck's motion, the district court rejected any claims that it relied on Respondent's alleged misrepresentations in reaching a decision. Instead, the district court stated its denial was based on the record and controlling law. Buck's Rule 59(e) motion fails to cite a manifest error of law, present newly discovered evidence, nor does it rely on an intervening change in controlling law. Because we conclude that jurists of reason could not disagree with the district court's resolution of Buck's Rule 59(e) motion, we deny his COA.[41]

* * *

We treat Buck's request for a COA on the issue of whether his due process and equal protection claims should be reconsidered as an application for permission to file a successive habeas petition, and that application is DENIED.

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[38] *Williams v. Quarterman*, 293 F. App'x 298, 315 (5th Cir. 2008).

[39] *Schiller v. Physicians Resource Grp., Inc.*, 342 F.3d 563, 566 (5th Cir. 2003).

[40] *Id.* at 567.

[41] We are provided with no explanation for why the State declined to act consistently with its Attorney General's public announcement with respect to petitioner Buck. But given the procedural rules we must follow, even if we were inclined to do so we have no authority to grant Buck relief.

We DENY Buck's application for a COA as to his contention that reasonable jurists could debate the district court's disposition of his motion to reconsider judgment. We DENY the request for a stay of execution.

Appendix 2

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

DUANE EDWARD BUCK,	§	
	§	
Petitioner,	§	
	§	
v.	§	H-04-3965
	§	
RICK THALER, 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 was Buck's claim that his right to equal protection of the laws was violated when an expert witness, Dr. Walter Quijano, testified during the penalty phase of his trial that African-Americans "are over represented" in the prison population. That claim was dismissed on the grounds that it was procedurally defaulted.

On September 7, 2011, Buck filed a motion for relief from the judgment of this Court under Rule 60(b)(6) and 60(d) of the Federal Rules of Civil Procedure. He also filed a motion for a stay of execution. On September 9, 2011, this Court denied those motions.

On September 12, 2011, Buck filed a motion to alter judgment, and a motion for Rule 11 sanctions. For the reasons stated below, these motions are denied.

A. Motion To Alter Judgment

Buck contends that this Court based its decision to deny relief on his Rule 60 motion on material misrepresentations made by Respondent, particularly the Respondent's discussion of relevant case law. In fact, 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 order denying that motion.

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 fails to demonstrate grounds for relief.

B. Rule 11

Buck also filed a motion seeking sanctions against the Respondent under Rule 11 of the Federal Rules of Civil Procedure. It is unnecessary to address the substance of Buck's argument because Buck failed to follow the procedures set forth in Rule 11:

> A motion for sanctions . . . *must not be filed with the court* if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service [of the Rule 11 motion on the opposing party] or within another time the court sets.

Fed.R.Civ.P. 11(c)(2) (emphasis added). Buck did not give Respondent 21 days notice, and did not ask this Court to set a shorter time. Instead, he simply filed his motion for sanctions, completely disregarding the plain language of the rule that the motion "must not be filed with the court . . . ." Because Buck violated the procedures set forth in Rule 11, he is not entitled to relief.

Notwithstanding the procedural flaws of Buck's motion, it is particularly ironic that Buck seeks sanctions against Respondent for allegedly misrepresenting case law on the same day that Buck's own Rule 59(e) motion grossly misrepresents this Court's order denying Buck's Rule 60 motion. Buck's Rule 59(e) motion states: "In its order denying relief from judgment, this Court held that . . . Texas's interest in expediently executing [Buck] outweighed [Buck's] interest in a race-neutral sentencing trial and freedom from arbitrary treatment by Texas." Rule 59(e) Motion at 6. The order held nothing of the kind.

The order denying Buck's Rule 60 motion noted that Buck waited *more than five years* after this Court denied relief on his habeas corpus petition. The motion came almost two years after the Fifth Circuit concluded, in denying a certificate of appealability, that no reasonable jurist could disagree with this Court's conclusion that Buck was not entitled to relief. This five year wait is not consistent with the dictates of Rule 60 that motions be filed within a reasonable time, especially when there was no new evidence or intervening change of law relevant to this case.

It is also worth noting that Buck filed the Rule 60 motion only eight days before his scheduled execution (though, again, more than five years after the judgment). Under these

circumstances, the certification by Buck's counsel that his motion was "not being presented for any improper purpose, such as to . . . cause unnecessary delay . . . .," Fed.R.Civ.P. 11(b)(1) seems dubious, at best. 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 Judgment (Docket Entry 33) is **Denied**;

IT IS FURTHER ORDERED THAT Buck's Motion For Sanctions (Docket Entry 34) is **Denied**;

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

SO ORDERED.

SIGNED at Houston, Texas, on this 12th day of September, 2011.

VANESSA GILMORE
United States District Judge

Appendix 3

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

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

ORDER

Pending before the Court is Petitioner's Motion for Relief from Judgment **(Instrument No. 27)** and Petitioner's Motion to Stay Execution **(Instrument No. 28)**. On July 24, 2006 this Court denied Plaintiff's denied Petitioner's claim for habeas relief as procedurally defaulted. Petitioner seeks relief from the judgment of this Court under Rule 60(b)(6) and 60(d) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The facts of this case are summarized as follows:

I. Background

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.

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 for the defense 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. On cross-examination, the government elicited the following testimony from Dr. Quijano:

> Q: 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?
>
> A: Yes

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). No claim was made that his death sentence was predicated on Mr. Buck's race being a factor increasing his future dangerousness. On March 22, 1997, Buck filed a state habeas corpus petition, but again no claim for relief was presented in this application related to Mr. Buck's race being used as a predictor of future danger. 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).

II. Analysis

Buck seeks relief under two separate provisions of Federal Rule of Civil Procedure 60. Buck's arguments relate to Dr. Quijano's testimony. 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." The prosecutor revisited this topic 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 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, and that his counsel rendered ineffective assistance by eliciting this testimony from Dr. Quijano.

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, 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.

A. Rule 60(b)

Rule 60(b)(6) provides for relief from a judgment for "any . . . reason that justifies relief." Rule 60(c)(1), however, requires that any motion under Rule 60(b) "be made within a reasonable time . . . ." This motion comes more than five years after this Court denied Buck's petition, and almost two years after the Fifth Circuit denied him a certificate of appealability on the same issue. The Fifth Circuit held that this Court was correct in its procedural default analysis, and that Buck failed to make a substantial showing of the denial of a constitutional right. *See Buck v. Thaler*, No. 06-70035 (5th Cir., Sept. 25, 2009).

Therefore, Buck has not brought his motion "within a reasonable time," and Buck does not show good cause for the delay. *See, e.g., In re Osborne*, 379 F.3d 277, 283 (5th Cir. 2004) ("Motions under Rule 60(b) must be made 'within a reasonable time,' unless good cause can be shown for the delay). Moreover, Buck cites no new facts or intervening changes in the law in the five years since this Court denied his petition that would justify relief without regard to his failure to file the motion within a reasonable time.

B. Rule 60(d)

Alternatively, Buck seeks relief from the judgment alleging that the State committed fraud on the court. Buck contends that the Attorney General's press release had initially identified his case as one that was similar to Saldano for which he would not assert procedural defenses to claims based on Dr. Quijano's testimony. Buck now argues that any later distinction between Saldano and his own case that was relied upon by the Attorney General in asserting their procedural defenses results in a fraud on the court. "Fraud upon the court requires that there was a material subversion of the legal process . . . it requires rigorous proof . . . lest the finality established by Rule 60(b) be overwhelmed by continuing attacks on the judgment." *Apotex Corp. v. Merck & Co., Inc.*, 507 F.3d 1357, 1360-61 (Fed. Cir. 2007), *cert. denied*, 553 U.S. 1090 (2008).

Buck identifies as a material misstatement of fact, the assertion by the Attorney General that this case was dissimilar to the other cases in which the Attorney General agreed to the procedural bar because the offending witness was called by the defense. Although Petitioner has characterized the Attorney General's efforts to distinguish Buck's case from the others as a fraud on the court, the Fifth Circuit discussed the distinction as follows:

> It was Buck, not the prosecution, who introduced Dr. Quijano as an expert witness and then solicited testimony from him regarding the use of race as one of several statistical factors for predicting future dangerousness. ...Buck and his counsel presumably made this strategic determination because they believed that the potential benefit of Dr. Quijano's ultimate conclusion that Buck was not likely to pose any future danger to society if he were incarcerated outweighed any risk of exposing the jury to Dr. Quijano's less favorable opinions.

Buck v. Thaler, 345 Fed. App x - 923, 930 (5th Cir. 2009).

Additionally, as the Respondent correctly points out, Quijano did not suggest to the jury that race or ethnicity should be a factor in the jury's decision.

Finally, although the Attorney General's initial press release indicated that they would not assert any procedural defenses to Quijano's testimony in cases that they had then identified as similar to Saldano's, Buck has identified no legal basis for a claim that the Attorney General's statement created legally enforceable rights or that it precluded the Attorney General from later identifying distinguishing facts that made their initial assessment inapplicable to this case. Accordingly, he fails to identify any fraud on the court.

C. Stay Of Execution

Buck has also filed a motion for a stay of execution to allow this Court time to adjudicate his motion for relief from judgment. He is scheduled for execution on September 15, 2011. Because the Court has found that Buck is not entitled to relief on his Rule 60 motion, and no stay is necessary to allow time to adjudicate that motion, Buck's motion for a stay of execution is denied. Moreover, because this Court's finding that Buck is not entitled to relief from the judgment 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).

D. Conclusion

Buck's claim was denied by this Court more than five years ago, and by the Fifth Circuit almost two years ago. Buck has cited no new facts or intervening changes in the law and the Court finds that his motion is untimely. Additionally, he fails to demonstrate any fraud on the court, and he thus fails to demonstrate that he is entitled to relief. Accordingly,

IT IS ORDERED THAT Buck's Motion For Relief From Judgment **(Docket Entry 27)** is **Denied**;

IT IS FURTHER ORDERED THAT Buck's Motion For Stay Of Execution **(Docket Entry 28)** is **Denied**; and

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

SO ORDERED.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED at Houston, Texas, on this 9th day of September, 2011.

VANESSA GILMORE
United States District Judge

Appendix 4

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

F I L E D
September 25, 2009

Charles R. Fulbruge III
Clerk

No. 06-70035

DUANE EDWARD BUCK

Petitioner-Appellant

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

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

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:[*]

Petitioner-Appellant Duane Edward Buck was convicted of capital murder in Texas and sentenced to death. The district court denied Buck's petition for federal habeas corpus relief and declined to issue a Certificate of Appealability ("COA"). Buck now seeks a COA from us on a single issue: Was he deprived of due process or equal protection by the prosecution's reference to testimony from

[*] 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.

Buck's own penalty-phase expert witness, who stated that, after considering several factors — including race — he had determined that Buck would not likely pose any future danger to society if he were incarcerated. Agreeing with Respondent-Appellee Rick Thaler ("the Director") that Buck's claim is procedurally barred and that, even if it were not, it lacks merit, we decline to issue a COA.

I. FACTS AND PROCEEDINGS

A. Background

Early one morning in July 1995, Buck's ex-girlfriend, Debra Gardner, and several of her friends, including Kenneth Butler, his brother, Harold Ebnezer, and Buck's sister, Phyllis Taylor, gathered at Gardner's house after having spent the previous night out playing pool. Buck and Gardner had ended their relationship about one week earlier. At some point that morning, Buck arrived at the residence, banged on the front door, and kicked it open, after which he argued loudly with Gardner and struck her before retrieving some of his possessions and leaving.

Several hours later, Buck returned with a rifle and a shotgun. After forcing the front door open, Buck fired at — but missed — Ebnezer, who immediately fled the house through the back door. Buck then approached Taylor, pressed the muzzle of the rifle directly against her chest, and fired. Taylor fell to the ground but survived her injuries. As she lay on the ground, Taylor heard several more gunshots coming from the area of the bedrooms. When Taylor was able to stand and make her way through the house, she discovered Butler's body slumped over and bleeding in the hallway.

After hearing the first gunshots, Devon Green, Gardner's then-11-year-old son who had been sleeping in the back bedroom, hid in the hallway closet. From his hiding place, Green listened as Buck confronted Butler in the hallway and accused him of sleeping with Buck's "wife." Gunshots followed. Both Green and

his teenage sister, Shennel Gardner, then ran outside, where they witnessed Buck shoot their mother as she attempted to flee in the street.

Buck placed both guns into the trunk of his car, which was parked outside Gardner's residence, and attempted to start the vehicle. When his car did not start, Buck began walking away from the residence. Police arrived just as he was leaving, and both Green and Ebnezer identified him as the shooter. Police then took Buck into custody and recovered a shotgun and a .22 caliber rifle from the trunk of his car. Both Gardner and Butler died from their gunshot wounds.

B. Trial

A Harris County jury convicted Buck on charges of capital murder for the shooting deaths of Gardner and Butler. During the penalty phase of Buck's trial, the prosecution presented evidence of his prior convictions for delivery of cocaine and unlawful possession of a weapon. The prosecution also called several witnesses who portrayed Buck as a violent and remorseless criminal. For example, Vivian Jackson, another of Buck's ex-girlfriends, testified that Buck had physically abused her on several occasions and had once threatened her with a gun. In addition, one of the police officers who had been present during Buck's instant arrest testified that Buck had laughed both during and after the arrest. The officer recalled telling Buck that he did not find the situation funny, to which Buck, still laughing, responded, "[t]he bitch deserved what she got."

In mitigation, Buck presented evidence that he is a peaceful, non-violent person; that his mother died when he was 12 years old; that he worked as an auto mechanic; and that, while he was growing up, his father had served several jail sentences for non-violent felonies. Buck called Dr. Walter Quijano, a clinical psychologist, as an expert witness to testify on the likelihood of Buck's future dangerousness.[1] On direct examination, Dr. Quijano testified that he had

[1] Buck also called Dr. Patrick Lawrence, another psychologist, as an expert witness to testify on future dangerousness. Both Dr. Quijano and Dr. Lawrence testified that various

considered several statistical factors when evaluating Buck's potential for future dangerousness, including but not limited to age, sex, race, social economics, history of violence, and history of substance abuse. Regarding race, Dr. Quijano stated: "It's a sad commentary that minorities, Hispanics and black people, are over represented in the criminal justice system."

Dr. Quijano also testified that Buck suffered from dependent personality disorder, which is characterized by an unhealthy reluctance to let go of past relationships, even to the point of violent or destructive behavior. According to Dr. Quijano, however, Buck was unlikely to commit future acts of violence because would be unable to develop similar dependent relationships in jail. Basing his opinion on a combination of statistical, environmental, and clinical factors listed in his expert report, Dr. Quijano concluded that Buck would not likely pose any future danger to society if he were incarcerated.

On cross-examination, the prosecutor questioned Dr. Quijano regarding the several factors that he had mentioned during direct examination. At one point, the prosecutor — without objection from Buck's defense counsel — asked Dr. Quijano about his consideration of both race and sex as relevant factors in his future-dangerousness analysis, which led to the following exchange:

> Q: 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?
>
> A: Yes.

During closing arguments, Buck's defense counsel recalled for the jury Dr. Quijano's earlier testimony that there was "a very low probability that [Buck] would ever commit an act of violence." In rebuttal, the prosecution also

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statistical factors indicated that Buck was a good candidate for a life sentence, as he would not pose a continuing threat to society if he were incarcerated.

referenced Dr. Quijano's testimony, stating — again without objection from defense counsel — that Dr. Quijano, "who had a lot of experience in the Texas Department of Corrections, . . . told you that there was a probability that [Buck] would commit future acts of violence." The prosecution made no reference whatsoever to Buck's race (African-American) or to Dr. Quijano's use of race as a statistical factor for determining future dangerousness.

The jury concluded that Buck is a future danger to society and that there was insufficient mitigating evidence to justify a sentence of life imprisonment. After the trial court sentenced Buck to death by lethal injection, the Texas Court of Criminal Appeals ("TCCA") affirmed Buck's conviction and death sentence.

C. Habeas Proceedings

Buck sequentially filed two state habeas petitions with the trial court. After reviewing both petitions, the trial court recommended that Buck's first petition be denied on the merits and that his second petition be directed to the TCCA as a successive writ application. Adopting the trial court's findings and recommendations, the TCCA denied Buck's earlier habeas petition on the merits and dismissed the later petition as an abuse of the writ.

Following the TCCA's ruling, Buck timely filed a petition for a writ of habeas corpus with the federal district court. In his federal habeas petition, Buck alleged several bases for relief, including (1) the trial court's refusal to inform the jury of the law concerning Buck's parole eligibility if he were sentenced to life imprisonment; (2) ineffective assistance of counsel; (3) the prosecution's references to Dr. Quijano's testimony citing race as a factor for determining future dangerousness; and (4) the constitutionality of the Texas death penalty statute. Concluding that Buck had failed to show that reasonable jurists could debate the correctness of the trial court's rulings, the district court granted the Director's motion for summary judgment and *sua sponte* declined to issue a COA.

Pursuant to 28 U.S.C. § 2253(c)(1), Buck timely filed an application for a COA with us. In his application, Buck seeks a COA on only a single issue, *viz.*, whether he was deprived of due process or equal protection by the prosecution's reference to Dr. Quijano's testimony citing race as a future-dangerousness factor.[2]

II. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act ("AEDPA") requires a petitioner to obtain a COA to appeal the district court's denial of his habeas petition.[3] We may only grant a COA if the petitioner makes "a substantial showing of the denial of a constitutional right."[4] "A petitioner satisfies this 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."[5] In making this determination, we conduct a "threshold inquiry" that involves "an overview of the claims in the habeas petition and a general assessment of their merits" but "does not require full consideration of the factual or legal bases

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[2] Buck framed the sole basis for his application seeking a COA as follows:

> Whether Appellant's rights protected by the due process and equal protection clauses of the Fifth Amendment and the Eighth Amendment of the United States Constitution were abrogated by the presentation of expert testimony during the penalty phase of his trial which was embraced by [the state's] jury argument that allowed for consideration of his race as an aggravating factor in the jury's life or death decision.

[3] 28 U.S.C. § 2253(c)(1).

[4] *Id.* § 2253(c)(2).

[5] *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

adduced in support of the claims."[6] In death-penalty cases, we resolve in favor of the petitioner any doubts whether a COA should issue.[7]

III. ANALYSIS

A. Procedural Bar

The Director contends that Buck is procedurally barred from seeking a COA on the prosecution's reference to Dr. Quijano's testimony because Buck failed to exhaust the issue in the state court proceedings. Buck concedes that he did not raise the issue of Dr. Quijano's testimony until he filed his second habeas petition, which the TCCA dismissed as an abuse of the writ. After determining that Buck had failed to show either sufficient cause for delay or manifest injustice resulting from it, the district court concluded that Buck was procedurally barred from raising the issue in his federal habeas petition.

When a district court's denial of habeas relief is premised on procedural grounds, we will issue a COA only if the petitioner can show "*not only* that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, *but also* that they would find it debatable whether the district court was correct in its procedural ruling."[8] The petitioner "must make a substantial showing that the district court's procedural ruling was incorrect before we can consider the merits" of the underlying claim.[9]

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[6] *Id.* at 336.

[7] *Id.* at 460.

[8] *See Beazley v. Johnson*, 242 F.3d 248, 263 (5th Cir. 2001) (internal quotation marks and citation omitted) (emphasis in original).

[9] *See Turner v. Quarterman*, 481 F.3d 292, 301 (5th Cir. 2007).

Under 28 U.S.C. § 2254(b)(1)(A), a federal court may not grant habeas relief unless "the applicant has exhausted the remedies available in the courts of the State."[10] As we have previously explained,

> [t]he requirements of the exhaustion concept are simple: An applicant must fairly apprise the highest court of his state of the federal rights which were allegedly violated. Further, the applicant must present his claims in a procedurally correct manner. If, for whatever reason, an applicant bypasses the appellate processes of his state — whether through procedural default or otherwise — he will *not* be deemed to have met the exhaustion requirement absent a showing of one of two particulars. He must either demonstrate cause and prejudice *or* show that the failure to consider his claims will result in a fundamental miscarriage of justice.[11]

To demonstrate "good cause" for a procedural default, the petitioner must show either that his counsel was ineffective or that some objective, external factor impeded his counsel's efforts to comply with the procedural rule.[12] Alternatively, the petitioner may show "a fundamental miscarriage of justice" by establishing his actual innocence, either of the crime of which he was convicted or of the death penalty.[13] "Actual innocence of the death penalty" requires a showing "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[14]

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[10] 28 U.S.C. § 2254(b)(1)(A).

[11] *Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993) (emphasis added) (internal quotation marks and citation omitted).

[12] *See Murray v. Carrier*, 477 U.S. 478, 488 (1986).

[13] *See Schlup v. Delo*, 513 U.S. 298, 324 (1995) (noting that "the fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case"); *Sawyer v. Whitley*, 505 U.S. 333, 350 (1992)

[14] *Sawyer*, 505 U.S. at 336.

Except in specific, narrowly defined circumstances that are not applicable in the instant case, Texas prohibits petitioners from filing successive petitions for writs of habeas corpus.[15] The TCCA has previously explained that, "if an applicant for a subsequent writ of habeas corpus raises issues that existed at the time of his first writ," then, absent a showing of good cause, the successive petition should be dismissed as an abuse of the writ, both "as a general rule, and as a matter of policy."[16] Noting that the TCCA has strictly and regularly applied Texas's abuse-of-the-writ doctrine, we have previously instructed that the TCCA's dismissal of a successive habeas petition as an abuse of the writ generally creates a procedural bar, precluding our review of issues first raised

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[15] *See* TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5 (Vernon 2009). For example, the Texas Code of Criminal Procedure provides that:

> If a subsequent application for a writ of habeas corpus is filed after filing an initial application a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in a timely initial 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;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no reasonable juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury . . . .

Id. If a trial court receives a subsequent habeas petition, the Texas Code of Criminal Procedure directs the court to send a copy of the petition to the TCCA, which, on receiving such a petition,"shall issue an order dismissing the application as an abuse of the writ . . . ." *Id.* § 5(c).

[16] *See Ex Parte Barber*, 879 S.W.2d 889, 892, n. 1 (Tex. Cr. App. 1994).

in the dismissed petition.[17] Given Texas's clear jurisprudence on this point, we conclude that reasonable jurists could not debate the correctness of the district court's ruling that Buck is procedurally barred from raising his claim regarding the prosecutor's comments on Dr. Quijano's testimony in a federal habeas petition.[18]

Further, Buck has not asserted anything which even suggests that his claim falls within one of the exceptions to the exhaustion requirement. Although Buck was unquestionably aware of Dr. Quijano's testimony when he filed his first application for a writ, he has not proffered any good cause for his failure to raise the issue at that time. Further, he has not demonstrated that failure to consider the merits of his claim now would result in a fundamental miscarriage of justice. Thus, Buck cannot establish actual innocence of his crime and has failed to show that he would not have been eligible for the death penalty absent the prosecution's reference to Dr. Quijano's testimony.

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.[19] Buck's case, however, differs markedly from, e.g., *Saldano v. Roach*, 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

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[17] *See Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995).

[18] *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (recognizing the "important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them").

[19] *See Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004); *Alba v. Johnson*, No. 00-40194, 232 F.3d 208, 2000 WL 1272983 (5th Cir. Aug. 21, 2000) (per curiam) (unpublished opinion); *Broxton v. Johnson*, No. H-00-CV-1034 (S.D. Tex. Mar. 28, 2001) (unpublished opinion); *Blue v. Johnson*, No. H-99-0350 (S.D. Tex. Oct. 2, 2000) (unpublished opinion); *Garcia v. Johnson*, No. 99-CV-00134 (E.D. Tex. Sept. 7, 2000) (unpublished opinion).

as a predictor of future dangerousness.[20] 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 any procedural bar.[21] Rather, the State has consistently maintained that it did not violate Buck's constitutional rights merely by questioning Buck's own expert 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 different cases 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.[22]

We are confident of the correctness of the district court's procedural ruling, and we conclude that Buck is procedurally barred from seeking a COA on the issue of the prosecution's exploring of Dr. Quijano's testimony on race as a factor in the future-dangerousness calculus.[23]

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[20] *Saldano*, 363 F.3d at 549.

[21] Of course, in *Saldano*, we did not have occasion to review the petitioner's claim on the merits, because, after confessing error, the State did not appeal the district court's ruling in favor of the petitioner; rather, our jurisdiction was invoked because the Collin County district attorney had appealed the district court's denial of his motion to intervene. *Id.* at 556.

[22] *See Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993) (noting that the exhaustion requirement "is excused only in those rare cases where exceptional circumstances of peculiar urgency mandate federal court interference" (internal quotation marks and citation omitted)).

[23] We also note, without deciding, that Buck's claim would likely be procedurally barred even if he *had* included it in his first application for a writ of habeas corpus. As stated above, defense counsel never objected to the prosecution's terse reference to race — in fact, it was

B. Merits

Even assuming *arguendo* that the correctness of the district court's procedural ruling were subject to debate among reasonable jurists, we are satisfied that Buck's claim would fail on the merits. It was Buck, not the prosecution, who introduced Dr. Quijano as an expert witness and then solicited testimony from him regarding the use of race as one of several statistical factors for predicting future dangerousness. Buck cannot now claim surprise at the opinions that Dr. Quijano expressed. Indeed, in the punishment phase of the trial, it was Buck's defense counsel who argued for the admission of Dr. Quijano's expert report into evidence, despite language in the report suggesting that Buck's race is one factor that might argue in favor of a finding of future dangerousness. Buck and his counsel presumably made this strategic determination because they believed that the potential benefit of Dr. Quijano's ultimate conclusion — that Buck was not likely to pose any future danger to society if he were incarcerated — outweighed any risk of exposing the jury to Dr. Quijano's less favorable opinions. Despite Buck's having opened the door to this testimony during his direct examination, the prosecution referenced the race factor only once during cross-examination, and never mentioned it at all during closing arguments. Even if we were to consider Buck's petition on the merits, we would conclude that it fails to demonstrate a substantial showing of the deprivation of a constitutional right.

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defense counsel who introduced Dr. Quijano as an expert witness and then proceeded to solicit the testimony at issue. As we have previously explained, Texas's contemporaneous objection rule — which requires that errors be properly preserved by an objection — serves as "an adequate procedural bar," preventing our review of issues that were deemed defaulted for lack of any contemporaneous objection by defense counsel. *See Dowthitt v. Johnson*, 230 F.3d 733, 752 (5th Cir. 2000).

IV. CONCLUSION

We decline to issue a COA on Buck's claim because he is procedurally barred from seeking federal habeas relief for issues that he first raised in his second state petition, which the TCCA dismissed as an abuse of the writ. Alternatively, even if we were to consider the merits of Buck's claim, we would conclude that it fails to make a substantial showing of the denial of a constitutional right.

PETITION FOR A CERTIFICATE OF APPEALABILITY DENIED.

Appendix 5

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

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

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
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> (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