

***Buck v. Davis* from the Left**

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I. INTRODUCTION

In Texas, imposition of the death penalty requires a jury determination that the defendant is likely to be dangerous in the future.¹ A six/two majority of the Supreme Court held, in *Buck v. Davis*,² that defense counsel was ineffective in presenting an expert witness who concluded that Duane Buck was unlikely to be a danger in the future but also reported that Buck was more likely to be dangerous because he is black. Prior to the Supreme Court's decision, a storm of public protest accompanied the case,³ and the oral argument made clear that the lower court's refusal to reverse Buck's conviction would be overturned.⁴

Because most of my scholarly work focuses on race in the criminal process, and because I am a capital defense attorney, the reader may be surprised that I agree with the dissenting opinion of Justice Thomas that “[h]aving settled on a desired outcome, the Court bulldozes procedural obstacles and misapplies settled law to justify it.”⁵ I also agree with Thomas that “[the] decision has few ramifications, if any, beyond the highly unusual facts presented here.”⁶ But unlike Justice Thomas, I do not view the sharply limited precedential value of the decision as its “one upside,”⁷ but rather as its deeply regrettable downside.

I have no doubt that the outcome of *Buck* is correct. Nor do I doubt that in one sense, as Buck's opening brief stated,⁸ and the majority opinion declares,⁹ the case is “extraordinary.” But in several important senses, the injustices embodied in Buck's trial are all too ordinary, and *Buck* leaves untouched those ordinary

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¹ See *Jurek v. Texas*, 428 U.S. 262 (1976); see also TEX. CODE CRIM. PROC. art. 37.071 (2017).

² *Buck v. Davis*, 137 S. Ct. 759 (2017).

³ Linda Geffin, *Sentenced to Death Because He Is Black: Grant Duane Buck a New Hearing!*, CHANGE.ORG, <https://www.change.org/p/sentenced-to-death-because-he-is-black-grant-duane-buck-a-new-hearing> [<https://perma.cc/SQX7-GEUQ>] (showing 94,121 supporters who signed the petition) (last visited Aug. 28, 2017).

⁴ Transcript of Oral Argument, *Buck*, 137 S. Ct. 759 (2017) (No. 15-8049).

⁵ *Buck*, 137 S. Ct. at 780–81 (Thomas, J., dissenting).

⁶ *Id.* at 781.

⁷ *Id.*

⁸ Brief for Petitioner at 3, *Buck*, 137 S. Ct. 759 (No. 15-8049).

⁹ *Buck*, 137 S. Ct. at 778 (majority opinion).

injustices. I write to protest those routine, unpublicized injustices, and to lament the Supreme Court's unwillingness to examine them.

Below, I first describe the case at trial and trace its history in the lower courts. Next, I summarize the Supreme Court opinions, perhaps giving shorter shrift to the procedural issues than is their due, and certainly shorter shrift than Justice Thomas would insist is appropriate. Then putting aside procedural issues, I focus on substantive doctrines in three areas that the opinion in *Buck* largely skips over: ineffective assistance of counsel, the future dangerousness determination, and the pervasive influence of racial bias in Texas death penalty cases.

II. *BUCK V. DAVIS*: THE CASE, THE BACKGROUND, AND THE DECISION

A. *The Case at Trial*

Duane Buck's crime was not a sympathetic one.¹⁰ After breaking into the home of Debra Gardner, his former girlfriend, Buck encountered an acquaintance, Harold Ebenezer, at whom he shot but missed; his own stepsister, Phyllis Taylor, whom he shot and wounded; and Gardner's friend, Kenneth Butler, whom he killed.¹¹ He then chased Gardner into the street, shooting and killing her in front of her children as they pleaded for her life.¹² In the aftermath of the crime, Buck displayed no remorse; he taunted Gardner as she lay dying,¹³ and smiled and laughed as police drove away.¹⁴

The State sought death. Buck's guilt was never disputed, so the only question was penalty. In Texas, unlike all other states but Virginia¹⁵ and Oregon,¹⁶ capital sentencing focuses on future dangerousness. To impose a death sentence, a unanimous jury must find, beyond a reasonable doubt, that the defendant is likely to commit future acts of criminal violence if sentenced to life imprisonment.¹⁷ Then the jury must consider any mitigating evidence proffered by the defendant.

To establish Buck's future dangerousness, in addition to the evidence of the crime, the State offered testimony by a former girlfriend regarding his repeated physical abuse and threats,¹⁸ proof of his conviction of delivery of cocaine and

¹⁰ A longer version of the crime, which contains additional aggravating details, may be found in the State's Brief. See Brief for Respondent at 1–6, *Buck*, 137 S. Ct. 759 (No. 15-8049).

¹¹ *Id.*

¹² *Buck*, 137 S. Ct. at 767.

¹³ *Id.* at 783 (Thomas, J., dissenting).

¹⁴ *Id.* at 768 (majority opinion).

¹⁵ VA. CODE § 19.2-264.2 (2017).

¹⁶ OR. REV. STAT. § 163.150 (2015).

¹⁷ See *Jurek v. Texas*, 428 U.S. 262 (1976); see also TEX. CODE CRIM. PROC. art. 37.071 (2017).

¹⁸ Brief for Respondent, *supra* note 10, at 6–7.

unlawfully carrying a weapon,¹⁹ and testimony regarding Gardner’s dying moments surrounded by her children.²⁰ As Buck’s lawyers would later harp upon, and a majority of the Supreme Court would note, the State produced no evidence of violent behavior outside a romantic relationship.²¹

Defense counsel presented lay testimony from family and a pastor that Buck had not been violent in the past.²² The first expert the defense called was psychologist Patrick Lawrence, who, relying on the fact that Buck was unlikely to develop a romantic relationship with a woman in prison and also relying on records showing he “did not present any problems in the prison setting,” concluded that Buck was not likely to be dangerous in the future.²³ Lawrence’s testimony made no mention of race.

Defense counsel also presented psychologist, Dr. Walter Quijano, who, relying on the same two factors, agreed with Dr. Lawrence that Buck was unlikely to pose a danger in the future.²⁴ However, in determining whether Buck was likely to pose a danger in the future, Dr. Quijano considered seven “statistical factors.”²⁵ The relevant part of his report read as follows: “4. **Race.** Black: Increased probability. There is an over-representation of Blacks among the violent offenders.”²⁶ Defense counsel asked Quijano to discuss the “statistical factors” he had “looked at in regard to this case,” to which “Quijano responded that certain factors, including race, were ‘know[n] to predict future dangerousness.’”²⁷ He continued, “It’s a sad commentary . . . that minorities, Hispanics and black people, are over represented in the Criminal Justice System.”²⁸ In response to the prosecutor’s question on cross-examination, “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,” Quijano replied “Yes.”²⁹

The jury asked to see Quijano’s report during its deliberations and ultimately found that Buck was likely to be dangerous in the future and sentenced him to death.³⁰ His conviction and death sentence were affirmed on direct appeal.³¹

¹⁹ Brief for Petitioner, *supra* note 8, at 6.

²⁰ Brief for Respondent, *supra* note 10, at 7.

²¹ *Buck v. Davis*, 137 S. Ct. 759, 776 (2017). *But see id.* at 782–83 (Thomas, J., dissenting) (disputing this characterization of the killings based on the fact that Buck shot at three people with whom he was not romantically involved).

²² Brief for Petitioner, *supra* note 8, at 6.

²³ *Buck*, 137 S. Ct. at 768.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 769.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

B. *Post-Conviction Litigation*

Buck filed his first petition for a writ of habeas corpus in Texas state court in 1999, advancing four claims, all of which were “frivolous or noncognizable.”³² The petition did not address the adequacy of defense counsel’s representation.

That same year, while Buck’s first petition was pending, another case involving Quijano’s testimony, that of Victor Saldano, reached the Supreme Court.³³ Saldano argued that his death sentence was tainted by Quijano’s testimony that Saldano’s Latino ethnicity weighed in favor of future dangerousness.³⁴ The *Buck* majority states without elaboration that Texas confessed error, and requested that the Court to grant Saldano’s petition, vacate the state court judgment, and remand the case—and that the Court did so.³⁵ The reader who wonders why Texas confessed error only when the case reached the Supreme Court finds no answer in *Buck* but might consider whether the fact that George W. Bush, then the governor of Texas, was running for President at that time affected Texas’s decision to confess error.

Whatever the reason for the concession, it was followed only days later by then-Texas Attorney General John Cornyn’s announcement that six other capital cases—including Buck’s—were possibly tainted by race-related testimony from Quijano.³⁶ Eventually, Cornyn “confessed error, waiv[ing] any available procedural defenses, and consented to resentencing in the cases of five of those six defendants.”³⁷ Buck’s was the exception.³⁸

“[T]he Texas Attorney General represents state respondents in federal habeas cases, but not state habeas cases,” consequently, when Buck filed a successive petition in state court alleging ineffective assistance of counsel based upon the introduction of Quijano’s testimony, the decision to concede was not in Cornyn’s hands.³⁹ In that proceeding, the State neither waived procedural defenses nor confessed error, and because Buck’s petition was successive, in 2003 the Texas Court of Criminal Appeals dismissed it as an abuse of the writ.⁴⁰ By the time Buck

³¹ *Id.*

³² *Id.*

³³ *Id.* (referencing *Saldano v. Texas*, 50 U.S. 1212 (2000)).

³⁴ *Id.*

³⁵ *Id.*

³⁶ OFFICE OF THE TEXAS ATTORNEY GENERAL, STATEMENT FROM ATTORNEY GENERAL JOHN CORNYN REGARDING DEATH PENALTY CASES, (June 9, 2000), <https://texasattorneygeneral.gov/newspubs/newsarchive/2000/20000609death.htm> [<https://perma.cc/5WUF-FWQV>].

³⁷ *Buck*, 137 S. Ct. at 770.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*; see *Ex parte Buck*, Nos. WR-57,004-01, WR-57,004-02 (Tex. Crim. App., Oct. 15, 2003) (per curiam).

filed his petition for habeas corpus in federal district court, Cornyn was no longer Attorney General, and the new Attorney General asserted procedural default as a barrier to reaching the merits of Buck's ineffective assistance of counsel claim.⁴¹ In 2006, a federal district court agreed that the ineffective assistance of counsel claim was procedurally defaulted and therefore unreviewable.⁴²

Then in 2014, "Buck sought to reopen that 2006 judgment by filing a motion under Federal Rule of Civil Procedure 60(b)(6)."⁴³ He argued that the Supreme Court's subsequent decisions in *Martinez v. Ryan* and *Trevino v. Thaler* created the "extraordinary circumstances" required to justify reopening a judgment under the rule.⁴⁴ Broadly speaking, *Martinez* and *Trevino*, taken together, permit federal habeas petitioners in Texas to litigate the merits of an otherwise defaulted ineffective assistance of trial counsel when they can show that state post-conviction counsel were ineffective in failing to raise that claim.⁴⁵ Buck's motion identified ten additional factors that, he said, contributed to the "extraordinary circumstances" required to justify reopening a judgment under Rule 60(b)(6).⁴⁶

"The District Court . . . denied the motion, and the Fifth Circuit declined to issue the certificate of appealability (COA)"—Buck needed to appeal that decision; Buck petitioned for, and was granted, certiorari.⁴⁷ Seven amicus briefs, including one from former prosecutors, were filed in support of the petitioner;⁴⁸ none were filed in support of the respondent. Numerous editorials⁴⁹ and public figures,⁵⁰ including former Texas Governor Mark White,⁵¹ and Linda Geffin,⁵² one of the

⁴¹ *Buck*, 137 S. Ct. at 770.

⁴² *Id.* at 767.

⁴³ *Id.*

⁴⁴ *Id.*; see *Martinez v. Ryan*, 566 U.S. 1 (2012); *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

⁴⁵ *Martinez*, 566 U.S. at 17; *Trevino*, 133 S. Ct. at 1921.

⁴⁶ *Buck*, 137 S. Ct. at 767.

⁴⁷ *Id.*

⁴⁸ For a list of the amici briefs, see SCOTUSBLOG, *BUCK V. DAVIS*, (Mar. 27, 2017), <http://www.scotusblog.com/case-files/cases/buck-v-stephens/> [<https://perma.cc/S7Z3-QAN7>]; see, e.g., Brief for Former Prosecutors as Amici Curiae Supporting Petitioner, *Buck*, 137 S. Ct. 759 (2017) (No. 15-8049).

⁴⁹ See, e.g., Gerald Kogan & Tim Cole, Opinion, *Duane Buck Deserves a Color-Blind Sentencing Trial*, WASH. POST (Oct. 2, 2016), https://www.washingtonpost.com/opinions/duane-buck-deserves-a-color-blind-sentencing-trial/2016/10/02/3010f396-8748-11e6-92c2-14b64f3d453f_story.html?utm_term=.f9441af2da1d [<https://perma.cc/7UVX-79HY>].

⁵⁰ NAACP LDF, MORE THAN 100 CIVIL RIGHTS LEADERS, ELECTED OFFICIALS, CLERGY, FORMER PROSECUTORS AND JUDGES, PAST ABA PRESIDENTS, AND A FORMER TX GOVERNOR CALL FOR NEW, FAIR SENTENCING FOR DUANE BUCK (Mar. 20, 2013), <http://www.naacpldf.org/news/more-100-civil-rights-leaders-elected-officials-clergy-former-prosecutors-and-judges-current> [<https://perma.cc/U7HN-PYCL>].

⁵¹ *Id.*; Mackey Torres, *Former Texas Governor Mark White Joins Others Calling for a Proper Sentence for Duane Buck, Since the Last One Was a Tad Bit Racist*, HOUS. PRESS (Mar. 21, 2013, 7:00 AM), <http://www.houstonpress.com/news/former-texas-governor-mark-white-joins-others->

prosecutors who tried Buck's case, called for a new penalty phase hearing for Buck.

C. *The Supreme Court Opinions*

1. Ineffective assistance of counsel ("IAC")

Buck's request for a COA raised two questions. The majority opinion, written by Chief Justice Roberts, turns to the substantive question first: "whether reasonable jurists could debate the District Court's conclusion that Buck was not denied his right to effective assistance of counsel under *Strickland v. Washington*."⁵³ Somewhat surprisingly, the Court did not confine its answer to the application of the COA standard: debatability among reasonable jurists. With respect to the COA standard, the Court criticized the Fifth Circuit for deciding the merits of the IAC issue before turning to debatability, then itself turned to the merits of the issue rather than remanding to the Fifth Circuit for that determination.⁵⁴

A defendant who claims to have been denied effective assistance must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice. Despite characterizing *Strickland*'s first prong as "a high bar," the majority dispenses with it in two paragraphs, noting first that the district court had found that "counsel's performance fell outside the bounds of competent representation."⁵⁵ Then, after naming three related deficiencies—calling Quijano knowing his methodology included consideration of race, eliciting testimony about the purported connection between Buck's race and the likelihood of future violence, and putting into evidence a report that stated that Buck's race increased his likelihood of future dangerousness—the majority concludes that "[n]o competent defense attorney would introduce such evidence about his own client."⁵⁶

The Court's discussion of *Strickland*'s second prong, prejudice, is only slightly longer, and concludes, contrary to the district court's determination, that it was reasonably probable that the proceeding would have ended differently absent counsel's incompetence.⁵⁷ Initially, the Court notes that future dangerousness was

calling-for-a-proper-sentence-for-duane-buck-since-the-last-one-was-a-tad-bit-racist-6737801
[<https://perma.cc/D5JD-NKRW>].

⁵² NAACP LDF, *supra* note 50; Linda Geffin, *Justices, Give Duane Buck a Second Chance*, CNN (Sept. 30, 2016 8:59 AM), <http://www.cnn.com/2016/09/30/opinions/reverse-duane-buck-sentence-geffin/index.html> [<https://perma.cc/Y6LR-6G56>].

⁵³ *Buck v. Davis*, 137 S. Ct. 759, 775 (2017) (referencing *Strickland v. Washington*, 466 U.S. 668 (1984)).

⁵⁴ *Id.* at 774–75.

⁵⁵ *Id.* at 775.

⁵⁶ *Id.*

⁵⁷ *Id.* at 776.

the key issue in Buck's sentencing, and deems it "an unusual inquiry" because "[t]he jurors were not asked to determine a historical fact concerning Buck's conduct, but to render a predictive judgment inevitably entailing a degree of speculation."⁵⁸ According to the majority, despite the brutality of Buck's crime and lack of remorse, because "Buck's prior violent acts had occurred outside of prison, and within the context of romantic relationships with women," a jury could conclude that a change in his situation—incarceration for life away from romantic involvements—"would minimize the prospect of future dangerousness."⁵⁹

But one thing would never change: the color of Buck's skin. Buck would always be black. And according to Dr. Quijano, that immutable characteristic carried with it an "[i]ncreased probability" of future violence. Here was hard statistical evidence—from an expert—to guide an otherwise speculative inquiry.

And it was potent evidence. Dr. Quijano's testimony appealed to a powerful racial stereotype—that of black men as "violence prone." In combination with the substance of the jury's inquiry, this created something of a perfect storm. Dr. Quijano's opinion coincided precisely with a particularly noxious strain of racial prejudice, which itself coincided precisely with the central question at sentencing. The effect of this unusual confluence of factors was to provide support for making a decision on life or death on the basis of race.⁶⁰

Therefore, according to the Court, it had to reject the district court's reasoning that because race was only mentioned twice, it was "*de minimis*;" "when a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record."⁶¹

Justice Thomas' dissent on this issue first notes the oddity of criticizing the Fifth Circuit for deciding the IAC issue on the merits as part of its COA debatability-by-reasonable-jurists determination,⁶² then criticizes the majority for itself jumping to the merits instead of remanding that issue,⁶³ and finally, disputes the majority's conclusion on the merits of Buck's IAC claim. Thomas objects that "[t]he majority neglects even to mention the relevant legal standard in Texas,

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* (internal citations omitted).

⁶¹ *Id.* at 777.

⁶² *Id.* at 781–82 (Thomas, J., dissenting).

⁶³ *Id.* at 782.

relying instead on rhetoric and speculation to craft a finding of prejudice.”⁶⁴ State law permits an inference of future dangerousness based solely on evidence of the heinousness of the crime, or upon evidence of the defendant’s lack of remorse, both of which, Thomas argues, were overwhelming.⁶⁵ Consequently, he concludes that Quijano’s “*de minimis*” racial testimony did not prejudice Buck.⁶⁶

2. Rule 60(b)(6)

For Buck to win in the Supreme Court, he not only had to prevail on the substantive IAC question discussed above, but also had to prevail on the Rule 60(b)(6) procedural question decided against him by the Fifth Circuit. According to the majority, the district court abused its discretion in refusing to permit Buck to reopen his case under Rule 60(b)(6) because its conclusion that Buck had failed to establish “extraordinary circumstances” rested in large part upon the mistaken view that Quijano’s mention of race played only a “*de minimis*” role in the proceeding.⁶⁷

As the majority explains, *that* determination was wrong for the same reason that the lower court’s determination that Buck had failed to show prejudice from the introduction of Quijano’s testimony was wrong: “But our holding on prejudice makes clear that Buck may have been sentenced to death in part because of his race [A] disturbing departure from a basic premise of our criminal justice system”⁶⁸ According to Chief Justice Roberts, Texas’s litigation concessions in the other five Quijano cases demonstrated the extraordinary nature of Buck’s claim; rejecting the claim that the State’s lack of responsibility for introducing race distinguishes Buck from those other cases.⁶⁹

The other component of “extraordinary circumstances” that the majority identifies as significant is change in the law; at the time he moved to reopen his case—unlike when he filed his initial petition—“a claim of ineffective assistance of trial counsel defaulted in a Texas post-conviction proceeding may be reviewed in federal court if state habeas counsel was constitutionally ineffective in failing to raise it, and the claim has ‘some merit.’”⁷⁰ To deem that circumstance significant, the majority needed to address Texas’s contention that the cases permitting such review are not retroactive, because if they are not, Buck could not possibly prevail on his IAC claim. The majority sidesteps that potential roadblock by deeming the no-retroactivity argument waived by the State’s failure to raise it earlier, and

⁶⁴ *Id.*

⁶⁵ *Id.* at 782–83.

⁶⁶ *Id.* at 782.

⁶⁷ *Id.* at 778 (majority opinion).

⁶⁸ *Id.*

⁶⁹ *Id.* at 778–79.

⁷⁰ *Id.* at 779–80 (citations omitted).

declines to consider it.⁷¹ Holding that *Martinez/Trevino* applies to Buck's claim, the Court explicitly reserves the question of retroactivity to any other case.⁷²

Justice Thomas' dissent complains that the majority fails to apply the deferential review required by 60(b)(6), and in particular, ignores prior Supreme Court admonitions that the requisite "extraordinary circumstances" "will rarely occur in the habeas context."⁷³ With respect to the majority's argument that the potential influence of racial bias creates "extraordinary circumstances" justifying reopening the case, Thomas points out that the cases cited by the majority are all Fourteenth Amendment Equal Protection Clause cases, not Sixth Amendment Right to Counsel cases, and that concomitantly, "the injury to public confidence derives from the fact that the government itself is discriminating against the defendant."⁷⁴ Finally, he argues that the majority wrongly disparages the State's interest in finality,⁷⁵ which is particularly strong given the length of time that has passed since Buck's conviction.

III. DEVIATIONS FROM BUSINESS AS USUAL

Justice Thomas, joined by Justice Alito, protests that ordinary application of established procedural and substantive doctrines normally would have thwarted Buck's claim, or at least would have garnered votes to do so from Chief Justice Roberts, the author of the majority opinion; they find some solace in the fact that *Buck* changes no doctrine, and therefore, will have no implications for future cases. I do not dispute that the majority's application of procedural doctrines is unusually favorable.⁷⁶ But in my view, that is not the problem with the *Buck* decision. Rather, the problem is that the majority opinion treats the injustices apparent in Buck's sentencing as aberrational, purporting to be shocked by them, when in fact those injustices are intrinsic to death penalty cases, or at least death penalty cases involving future dangerousness determinations.

⁷¹ *Id.* at 780.

⁷² *Id.*

⁷³ *Id.* at 784 (Thomas, J., dissenting).

⁷⁴ *Id.*

⁷⁵ *Id.* at 785.

⁷⁶ Indeed, the oral argument transcript strongly suggests that the goal of Buck's counsel had been a remand to the Fifth Circuit for a determination on the merits of the IAC claims and that she was surprised (albeit pleasantly) by the Chief Justice's willingness to entertain the merits of that claim.

A. *Ineffective Assistance of Counsel*

1. The Performance Prong

The State in its brief “agrees that the introduction of race into petitioner’s capital-punishment proceedings by petitioner’s own trial counsel *was at least debatably deficient performance*.”⁷⁷ The majority quickly accepts,⁷⁸ and the dissent does not address, the proposition that trial counsel’s decision to call Quijano as a witness was incompetent. While I agree that counsel’s choice was appalling, and that such stupid decisions should be deemed outside the range of acceptable representation, it bears noting that most ineffective assistance of counsel cases emphasize how wide the acceptable range is;⁷⁹ that great deference must be given to strategic choices made by counsel after adequate investigation;⁸⁰ and that no hindsight is permissible in evaluating those choices.⁸¹

Of the three actions the majority deemed incompetent, at least two can easily be defended under these standards. Assuming that trial counsel was going to call Quijano, *of course* he elicited the unfavorable “statistical” race factor from the witness; he was better off eliciting it himself—thereby blunting its effect—than allowing the prosecution to bring it out for the first time on cross-examination. Although one might argue that the State would be precluded from eliciting this factor, such an argument depends upon hindsight; trial counsel could not have known that until after the State’s concession in *Saldano*.⁸² Then, again assuming that Quijano was going to be called as a witness, and that the jury had heard his views on the increased probability of violence attributable to Buck’s race, it was not surprising that trial counsel moved to introduce Quijano’s report; if Quijano’s testimony, on balance, favored Buck, then letting the jury have access to the report did make sense.

So we are back to one error: the decision to call Quijano, given what he had to say about Buck’s race increasing the likelihood of future dangerousness but also given that he would conclude Buck was not a danger in the future. True, counsel had another expert who had said that Buck was not a danger in the future, but wanting a second witness on the critical issue in the case—particularly given the brutal crime and lack of remorse, which weigh heavily against Buck on that

⁷⁷ Brief for Respondent, *supra* note 10, at 1 (emphasis added).

⁷⁸ *Buck*, 137 S. Ct. at 775 (majority opinion).

⁷⁹ *Strickland v. Washington*, 466 U.S. 668, 669, 681 (1984); *Wiggins v. Smith*, 539 U.S. 510, 521–22 (2003).

⁸⁰ *Wiggins*, 539 U.S. at 521–22.

⁸¹ *Strickland*, 466 U.S. at 669 (“Judicial scrutiny of counsel’s performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”).

⁸² *Saldano v. State*, 70 S.W.3d 873, 891 (Tex. Crim. App. 2002) (en banc).

issue—was not crazy. Indeed, other Texas trial attorneys made the exact same decision *with respect to Quijano's testimony*.⁸³ Let me reiterate: I am not defending trial counsel's decision but only pointing out that in most (read: not so highly publicized) cases, no court would so quickly deem incompetent the decision of trial counsel to put on a witness whose ultimate conclusion was favorable but whose testimony introduced a negative consideration.⁸⁴ The reader who is skeptical that the Supreme Court treats less charged cases with far more deference to counsel's strategic choices should consider *Yarborough v. Gentry*,⁸⁵ a per curiam opinion in which the Court credited truly ridiculous strategic reasons to redeem a closing argument rife with idiocy.⁸⁶

Another indication of the fickleness of the Court's interest in competent representation lies in the other failures of Buck's trial counsel, in Buck's case and in others. Buck's trial counsel failed to inform the jury of his traumatic life history, which included surviving severe and regular beatings from his violent father; exposure to alcohol beginning at the age of five; exposure to prostitution as a child; exposure to toxic substances in an auto shop where he was forced to work from childhood through adulthood; the traumatic death of his mother when he was 11 years old; his experience of life-threatening incidents as a young person, including being shot in the leg; and undiagnosed, untreated Asperger's Syndrome.⁸⁷ The opinion does not mention the name of Buck's trial attorney, Jerry Guerinot, who long before this case was infamous for his terrible representation of capital defendants. As *New York Times* reporter Adam Liptak put it, "A good way to end up on death row in Texas is to be accused of a capital crime and have Jerry Guerinot represent you."⁸⁸ Guerinot was defense counsel in

⁸³ Brief for Respondent, *supra* note 10, at 10–11, 45–46.

⁸⁴ See, e.g., *Johnson v. United States*, 860 F. Supp. 2d 663, 868 (N.D. Iowa 2012) (finding no ineffective assistance of counsel where the negative aspects of each witness's testimony did not outweigh the mitigating aspects); *Holland v. Horn*, 150 F. Supp. 2d 706, 738 (E.D. Pa. 2001) (finding no ineffective assistance of counsel where trial counsel allowed a witness to testify and minimize the petitioner's intoxication to protect himself from prosecution, thereby minimizing the petitioner's intoxication defense); *Garcia v. State*, 57 S.W.3d 436, 440–41 (Tex. Crim. App. 2000) (finding trial counsel's decision to call Quijano reasonable).

⁸⁵ *Yarborough v. Gentry*, 540 U.S. 1, 3–5 (2003) (per curiam).

⁸⁶ According to the Court, counsel's failure to address all of the exculpatory evidence may have reflected a strategy of "[f]ocusing on a small number of key points [rather than taking] a shotgun approach"; counsel's mention of legally irrelevant details that hurt his client's position could have been an attempt to emphasize that those factors were irrelevant, despite his characterization of his client as a "bad person, lousy drug addict, stinking thief, jail bird"; counsel's failure to expressly ask for an acquittal might have been consistent with the strategy of not "challenging the jury to find for your client"; and counsel's acknowledgement that he could not be sure of the truth could have served as a "rhetorical device that personalizes the doubts anyone but an eyewitness must have." *Id.* at 3, 7, 10–11 (citations omitted).

⁸⁷ Ex parte Buck, 418 S.W.3d 98, 101, 111–12 (Tex. Crim. App. 2013) (Alcala, J, dissenting).

⁸⁸ Adam Liptak, *A Lawyer Best Known for Losing Cases*, N.Y. TIMES (May 17, 2010), http://www.nytimes.com/2010/05/18/us/18bar.html?_r=0 [<https://perma.cc/5E3Y-H826>].

twenty cases in which his client received a death sentence and never represented a client who was spared the death penalty.⁸⁹ In many of those cases he was equally derelict; as Professor David Dow, then-director of the Texas Defender Service observed, “He doesn’t even pick the low-hanging fruit which is hitting him in the head as he’s walking under the tree.”⁹⁰ Guerinot has given up capital work but now takes a volume of noncapital cases so large it is impossible to imagine he could provide his clients adequate representation. An analysis in the *Houston Chronicle* found that in a two-year period, Guerinot had represented 2,000 felony defendants.⁹¹ The Supreme Court has shown no interest in policing other Guerinot cases with equally inadequate—but not as sensational—incompetence.⁹²

2. Prejudice

To the reader unfamiliar with typical IAC cases, the Supreme Court’s analysis of the prejudice prong might seem unremarkable, save perhaps for its cursoriness, given that the Fifth Circuit had not analyzed the merits of Buck’s IAC claim. The district court had concluded that Buck failed to establish the reasonable likelihood of a different result absent counsel’s errors because the crime was “horrific,” and because the introduction of race was “de minimis,”⁹³ and the State’s briefing of the issue in the Supreme Court emphasized both the brutality of Buck’s crime and his lack of remorse.⁹⁴ But according to the majority, “notwithstanding the nature of Buck’s crime and his behavior in the aftermath,” the jury could have concluded that he would not be a danger in the future because romantically motivated crimes would be unlikely to occur in prison.⁹⁵

The dissent vigorously disputes that determination, detailing both the brutality of the crime and Buck’s contemporaneous absence of remorse, but the majority’s assessment of error is consistent with the Supreme Court’s treatment of prejudice in other successful IAC cases, several of which involved brutal crimes.⁹⁶

⁸⁹ *Id.*

⁹⁰ *Id.* (describing his paltry efforts to defend Linda Carty).

⁹¹ Lise Olsen, *Hundreds of Indigent Inmates Jailed for Months Pretrial*, HOUS. CHRON. (Oct. 3, 2009, 5:30 AM), <http://www.chron.com/news/houston-texas/article/Hundreds-of-indigent-inmates-jailed-for-months-1566415.php?plckFindCommentKey=CommentKey:73f02b7c-0c09-4141-99f0-7fb297af8cfd> [<https://perma.cc/F5Z8-YL8X>].

⁹² *See, e.g.*, Liptak, *supra* note 88 (discussing the case of Linda Carty and noting the Supreme Court’s recent denial of certiorari).

⁹³ *Buck v. Davis*, 137 S. Ct. 759, 772 (2017).

⁹⁴ *See* Brief for Respondent, *supra* note 10 at 23–27.

⁹⁵ *Buck*, 137 S. Ct. at 775.

⁹⁶ *Williams v. Taylor*, 529 U.S. 362 (2000) (finding prejudice arising from counsel’s failures despite petitioner being convicted of robbery and a brutal capital murder); *Wiggins v. Smith*, 539 U.S. 510 (2003) (finding prejudice arising from counsel’s failures despite petitioner being convicted of brutal capital murder and robbery); *Rompilla v. Beard*, 545 U.S. 374 (2005) (finding prejudice arising from counsel’s failures despite petitioner torturing the victim to death); *Sears v. Upton*, 561

However, the Fifth Circuit *routinely* ignores those cases and holds that brutality of the crime trumps any favorable evidence trial counsel failed to develop, and therefore precludes a finding of prejudice for that failure.⁹⁷ The absence of any discussion of the Fifth Circuit's recalcitrance on this point does suggest, as Justice Thomas hopes, that the impact of the decision may well be limited to Buck's case.

One more thing should be noted about the Court's prejudice analysis. The Court considers whether the jurors' consideration of Buck's race as a factor likely to increase his future dangerousness was reasonably likely to alter their verdict.⁹⁸ A more precise formulation of the prejudice question, however, would be one that focuses on the extent to which the introduction of Quijano's testimony and report *increased* the likelihood that Buck's jurors would be influenced by his race and that their *increased* consideration of that factor would tilt them toward death. That is, the majority assumes, and the dissent does not question, that absent Quijano's testimony, the jury was unlikely to consider Buck's race in assessing his future dangerousness. As I will turn to shortly, that assumption is ridiculous, but it serves both Chief Justice Roberts and Justice Thomas.

B. *Future Dangerousness*

Before I turn to the prevalence and triggering of racial prejudice, I want to detour to the concept of future dangerousness, in part because that detour will shed some light upon the race discussion. The majority characterizes the future dangerousness inquiry as both "the key issue" in Buck's sentencing, and "an unusual inquiry" because "[t]he jurors were not asked to determine a historical fact

U.S. 945 (2010) (finding prejudice arising from counsel's failures despite petitioner's brutal crime, which included armed robbery and kidnaping with bodily injury).

⁹⁷ Santellan v. Cockrell, 271 F.3d 190, 198 (5th Cir. 2001) (finding that, in light of the defendant's dangerousness and the "horrific nature" of the offense, there was "no substantial likelihood that the outcome of the punishment phase would have been altered by evidence that [the defendant] suffered organic brain damage"); Vasquez v. Thaler, 389 Fed. App'x 419, 429 (5th Cir. 2010) (finding no prejudice where trial counsel failed to develop and present evidence of post-traumatic stress disorder, fetal alcohol syndrome, and a borderline IQ given "overwhelming evidence of guilt" and the "brutality" of the offense); Clark v. Thaler, 673 F.3d 410, 421–25 (5th Cir. 2012) (describing the aggravating evidence in the case as overwhelming, thus making it "virtually impossible to establish prejudice" under Fifth Circuit case law, notwithstanding extensive evidence of childhood abuse and trauma) (internal quotation marks and citation omitted); Ladd v. Cockrell, 311 F.3d 349, 360 (5th Cir. 2002) (finding the failure to uncover and present evidence of Ladd's diagnosis of mental retardation as a child as well as his harsh childhood insufficient to establish prejudice given his aggravated crimes); Hernandez v. Thaler, No. SA-08-CA-805-XR, 2011 WL 4437091, at *33 (W.D. Tex. Sept. 23, 2011) (relying on the brutality of the crime and "the lack of any evidence of genuine remorse or sincere contrition in the record" before the Court and concluding that "there is no reasonable probability that, but for the failure of petitioner's trial counsel to present evidence of petitioner's abused and deprived childhood, the outcome of the punishment phase of petitioner's trial would have been different.").

⁹⁸ *Buck*, 137 S. Ct. at 776.

concerning Buck's conduct, but to render a predictive judgment inevitably entailing a degree of speculation."⁹⁹ Well, yes, and no.

After *Furman*, most state legislatures opted for the Model Penal Code system of a separate sentencing proceeding that requires the finding of a specified aggravating factor and then requires the jury to consider that factor along with mitigating factors; the constitutionality of this kind of system was upheld in *Gregg v. Georgia*.¹⁰⁰ Texas took another path, passing a statute that required the jury to find whether the murder was committed deliberately, whether the defendant's conduct was unreasonable in response to any provocation by the victim, and "whether the evidence established beyond a reasonable doubt that there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."¹⁰¹ The Court upheld the Texas statutory scheme because it "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death."¹⁰² Texas is one of the few states that organize imposition of the death penalty around future dangerousness.¹⁰³

But though the future dangerousness statutory *scheme* is unusual, the future dangerousness *inquiry* is not. Texas has executed 543 defendants since 1976, and 247 individuals now sit on death row in Texas.¹⁰⁴ The Supreme Court has had many run-ins with future dangerousness before, and despite the salience of its failings as a method of selection, the Court has nonetheless upheld it.

As the brief of amici curiae National Association of Criminal Defense Lawyers and Texas Criminal Defense Lawyers Association in support of reversal sets forth in some detail, the Supreme Court has spent decades trying to get Texas and the Fifth Circuit to graft established, constitutionally required mitigation principles onto the Texas statutory scheme.¹⁰⁵ I am, however, here not so much interested in the melding of future dangerousness and mitigation as in the concept of future dangerousness itself. In theory, at least, Texas could have embraced a system that required a determination of future dangerousness, followed by a

⁹⁹ *Id.*

¹⁰⁰ *Gregg v. Georgia*, 428 U.S. 153, 155 (1976).

¹⁰¹ *Jurek v. Texas*, 428 U.S. 262, 267–68 (1976); *see also* TEX. CODE CRIM. PROC., art. 37.071 (2017).

¹⁰² *Jurek*, 428 U.S. at 274.

¹⁰³ Robert Clary, *Texas's Capital-Sentencing Procedure Has a Simmons Problem: Its Gag Statute and 12-10 Rule Distort the Jury's Assessment of the Defendant's "Future Dangerousness,"* 54 AM. CRIM. L. REV. 57, 114–15 (2017).

¹⁰⁴ DEATH PENALTY INFORMATION CENTER, *State by State Database: Texas*, https://deathpenaltyinfo.org/state_by_state [<https://perma.cc/5PZB-QJRJ>] (last visited Sept. 13, 2017) (showing that although both death sentences and executions have fallen in recent years, five men have been executed in Texas in 2017, and six more are scheduled for execution).

¹⁰⁵ *See* Brief for Nat'l Ass'n of Criminal Def. Lawyers & Texas Criminal Def. Lawyers Ass'n as Amici Curiae in Support of Reversal at 12–19, *Buck v. Davis*, 137 S. Ct. 759 (2017) (No. 15-8049).

weighing of the evidence of future dangerousness against whatever evidence of mitigation the defendant offered. That it did so only after a long struggle says much about recalcitrance in the Texas state courts and the Fifth Circuit but not so much about the concept of future dangerousness.

But future dangerousness, at least as it has played out in Texas death penalty cases, is intellectually indefensible. Moreover, it is not just a curiously “unusual inquiry” but one for which the Supreme Court itself bears responsibility; its case law has aggravated the risk of error and caprice in the future dangerousness determination.¹⁰⁶ *Barefoot v. Estelle* challenged the admissibility of psychiatric predictions of future dangerousness on three grounds: First, that psychiatrists are incompetent to predict with an acceptable degree of probability that a particular individual will commit crimes in the future; second, that in any event, they should never be allowed to respond to hypothetical questions without having personally examined the defendant; and finally, that at the very least, the testimony by Dr. Grigson violated due process under the particular circumstances of the case.¹⁰⁷

Despite the fact that the American Psychiatric Association as amicus curiae informed the Court that “unreliability of psychiatric predictions of long-term future dangerousness is . . . an established fact within the profession,” and that *two out of three* predictions of future violence by psychiatrists are wrong,¹⁰⁸ the Supreme Court upheld the admissibility of psychiatric predictions, reasoning that jurors were capable of evaluating their shortcomings.¹⁰⁹ Although the APA had also determined that it is “unethical for a psychiatrist to offer a professional opinion unless he/she has conducted an examination,”¹¹⁰ the *Barefoot* majority declined to prohibit it, relying upon the use of hypothetical questions by experts in other disciplines. Finally, though neither the State of Texas nor the Court could cite a single source contradicting the conclusion that psychiatrists predicting future dangerousness are wrong more often than they are right, the Court upheld the admission of testimony by Dr. Grigson that he was “*one hundred percent and absolute*” certain that *Barefoot* would commit future acts of violence.¹¹¹

Justice Blackmun, then still a middle-of-the-road supporter of the death penalty, wrote a furious dissent. After reviewing the relevant professional literature, he concluded that “[u]ltimately, when the Court knows full well that psychiatrists’ predictions of dangerousness are specious, there can be no excuse for

¹⁰⁶ *Buck*, 137 S. Ct. at 776.

¹⁰⁷ *Barefoot v. Estelle*, 463 U.S. 880 (1983).

¹⁰⁸ *Id.* at 920 (Blackmun, J., dissenting).

¹⁰⁹ *Id.* at 898–99 (majority opinion).

¹¹⁰ *Id.* at 923 n.6 (Blackmun, J., dissenting) (citing THE PRINCIPLES OF MEDICAL ETHICS, WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY § 7(3), 9 (1981)).

¹¹¹ *Id.* at 919.

imposing on the defendant, on pain of his life, the heavy burden of convincing a jury of laymen of the fraud.”¹¹²

Blackmun’s dissent, written a third of a century ago, still accurately characterizes the state of the research on predictions of future dangerousness. In addition, since then, *Barefoot* researchers have adduced evidence in the capital sentencing context that corroborates the general research on future dangerousness predictions available when *Barefoot* was decided. Multiple studies reveal that the rates of serious institutional violence among capital offenders is quite low.¹¹³ For example, one study followed the 558 former death row inmates whose sentences were commuted by *Furman* for 15 years; it found that less than eight percent of them committed acts of serious violence after their commutation and that seventy percent of them had no serious institutional infractions at all.¹¹⁴ Another study followed 421 Texas death row inmates for fifteen years beginning in 1974 and found that less only about ten percent engaged in assaultive acts.¹¹⁵ Thus, the base rate of violent offenses in the death row population is low. Moreover, the most accurate probability is the base rate in the corresponding group to which the individual belongs;¹¹⁶ adjusting a risk of violence from the group’s base rate decreases rather than increases the accuracy of a prediction.¹¹⁷

A more recent study specifically examines the accuracy of experts’ future dangerousness predictions in Texas capital cases. That study followed 155 capital cases where expert witnesses had predicted that the defendant would be a future danger; the experts were wrong in ninety-five percent of those predictions.¹¹⁸ Probably the most notorious error was that of Dr. Grigson in the Randall Dale Adams case, captured in the 1988 movie *The Thin Blue Line*.¹¹⁹ Grigson, who had met with Adams for 15 minutes, told the jury that “regarding Adams’s future

¹¹² *Id.* at 935–36; see also, Diane Wells, *Criminal Law: Federal Habeas Corpus and the Death Penalty: A Need for a Return to the Principles of Furman*, 80 J. CRIM. L. & CRIMINOLOGY 427, 428 (1989) (criticizing *Barefoot* as being among the cases that have caused “the *Furman* precept [to] in practice, if not in theory . . . shrink to a mere formality); Raymond J. Pascucci et al., *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1138 (1984) (with its decision in *Barefoot*, “the Court has paved the way for procedural schemes that violate the eighth and fourteenth amendments’ demand for fair and consistent capital sentencing decisions.”).

¹¹³ Jaymes Fairfax-Columbo & David DeMatteo, *Reducing the Dangers of Future Dangerousness Testimony: Applying the Federal Rules of Evidence to Capital Sentencing*, 25 WM. & MARY BILL RTS. J. 1047, 1059 (2017) (reviewing the literature).

¹¹⁴ James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5, 20–21 (1989).

¹¹⁵ JAMES W. MARQUART ET AL., *THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990*, at 179 (1994).

¹¹⁶ MARK D. CUNNINGHAM, *EVALUATION FOR CAPITAL SENTENCING* 68–69 (2010).

¹¹⁷ *Id.* at 69.

¹¹⁸ TEX. DEF. SERV., *DEADLY SPECULATION: MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS* 22, 34 (2004), http://texasdefender.org/wp-content/uploads/TDS_Deadly-Speculation.pdf [<https://perma.cc/6UZ6-L4JS>].

¹¹⁹ *THE THIN BLUE LINE* (American Playhouse et al. 1988).

dangerousness, he ‘would place [Adams] at the very extreme, worse or severe end of the scale’ and that ‘[t]here is nothing in the world today that is going to change this man.’”¹²⁰ Ironically, documentary producer Errol Morris originally had intended to produce a program focused upon Grigson, but upon interviewing Adams, became convinced of his innocence, and ultimately assisted in Adams’ exoneration.¹²¹ Not only was Adams innocent; during his twelve years of incarceration, Adams was never violent, or even involved in a disciplinary infraction.¹²²

Interestingly, Duane Buck’s prison record also echoes the complete unreliability of future dangerousness determinations. It has been nothing short of exemplary; he has had not a single disciplinary write-up during his fourteen years in prison, despite being incarcerated in a system where prisoners are regularly punished for such minor “offenses” as refusing to shave, or having too many stamps.¹²³ Thus, it is not only the influence of race in the determination of Duane Buck’s deathworthiness that is abhorrent; it is also the complete unreliability of that determination, an unreliability sanctioned by the Supreme Court itself in *Barefoot*.

The majority opinion at no point acknowledges these pervasive problems with future dangerousness determinations, or its own responsibility for their exacerbated unreliability.

C. Race

A very large number of things have been said about race in capital cases, and I myself have said many of them. Reams of empirical studies establish the influence of race in capital cases.¹²⁴ Moreover, every time I look at a new slice of capital litigation—for example, intellectual disability determinations in capital cases,¹²⁵ or juvenile executions,¹²⁶ or the role of empathy in capital sentencing¹²⁷—

¹²⁰ Fairfax-Columbo, *supra* note 113, at 1049 (citations omitted).

¹²¹ *Id.* at 1050.

¹²² *Id.*

¹²³ NAACP LDF, DUANE BUCK: SENTENCED TO DEATH BECAUSE HE IS BLACK (Dec. 5, 2012), <http://www.naacpldf.org/case-issue/duane-buck-sentenced-death-because-he-black> [<https://perma.cc/4RSF-2DKH>].

¹²⁴ U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 6 (1990); John H. Blume, Theodore Eisenberg & Sheri Lynn Johnson, *Post-McCleskey Racial Discrimination Claims in Capital Cases*, 83 CORNELL L. REV. 1771, 1773–74 (1998).

¹²⁵ Sheri Lynn Johnson, *A Legal Obituary for Ramiro*, 50 U. MICH. J. L. REFORM 291 (2017).

¹²⁶ Sheri Lynn Johnson, John H. Blume & Hannah L. Freedman, *The Pre-Furman Juvenile Death Penalty in South Carolina: Young Black Life Was Cheap*, 68 S.C. L. REV. 331, 334 (2017).

¹²⁷ Sheri Lynn Johnson, Amelia Courtney Hritz, Caisa Elizabeth Royer & John H. Blume, *When Empathy Bites Back: Cautionary Tales from Neuroscience for Capital Sentencing*, 85 FORDHAM L. REV. 573, 574 (2016).

I run smack into race again. Its presence is ubiquitous,¹²⁸ and, in my view, for an obvious reason: Sentencing a person to death requires dehumanizing that person, and in this country, race has been the historically tested, surest road to dehumanization.

But my focus here is narrow: the flaws in the *Buck* opinions related to race. I note three: asserting that explicit bias is unusual; pretending that the Court is committed to rooting out racial bias whenever it occurs; and ignoring the inevitable influence of race on determinations of future dangerousness whether or not someone articulates or argues race as a factor to consider. I address them in ascending order of the degree of my disagreement with the Court's premises.

1. "Extraordinary" Bias

The majority at various junctures and in various ways characterizes this case as extraordinary. After describing Quijano's testimony as "appeal[ing] to a powerful racial stereotype—that of black men as 'violence prone,'" in the context of a future dangerousness determination, it asserts that this "created something of a perfect storm," where "[t]he effect of this unusual confluence of factors was to provide support for making a decision on life or death on the basis of race."¹²⁹ It castigates the district court for dismissing two references to race as "de minimis" because any mention of race constitutes "a disturbing departure from a basic premise of our criminal justice system."¹³⁰ Then it endorses the petitioner's brief's assertion that "[i]t stretches credulity to characterize Mr. Buck's [ineffective assistance of counsel] claim as run-of-the-mill."¹³¹ Finally, it points to Texas's concession in *Saldano* and five other Quijano testimony cases as demonstrating "[t]he extraordinary nature of this case."¹³² Thomas, in dissent, is also happy to note that "the majority's single-minded focus on according relief to *this* petitioner on *these* facts naturally limits the reach of its decision," given that "the facts presented here are unlikely to arise again."¹³³

Is it unusual to have "expressly racial"¹³⁴ references to race in a capital case?

¹²⁸ David A. Love, *The Racial Bias of the US Death Penalty*, GUARDIAN (Jan. 3, 2012, 3:33 PM), <https://www.theguardian.com/commentisfree/cifamerica/2012/jan/03/racial-bias-us-death-penalty> [<https://perma.cc/BM7H-FRSW>] ("[R]ace and capital punishment in the US have always been inseparable. According to the Washington-based Death Penalty Information Center (DPIC), 56% of death row inmates are black or Hispanic. However, although racial minorities comprise half of all murder victims nationwide, a far greater proportion (77%) of the victims in capital convictions were white. The racial identity of the murder victim is thus a leading factor in determining who receives a death sentence in America.").

¹²⁹ *Buck v. Davis*, 137 S. Ct. 759, 776 (2017).

¹³⁰ *Id.* at 778.

¹³¹ *Id.* (alteration in original) (citations omitted).

¹³² *Id.*

¹³³ *Id.* at 785 (Thomas, J. dissenting) (emphasis in original).

¹³⁴ *Id.*

Maybe. Certainly Buck's claim that this was not a "run-of-the-mill" IAC claim is fair. But "extraordinary"? No. Along with colleagues, I examined criminal cases from the first decade of this century for the presence of racial epithets.¹³⁵ We found five cases (four of them capital) where defense counsel used a racial epithet in speaking of a client.¹³⁶ Relatedly, we found nine cases (three capital) where jurors used a racial epithet, either in the course of jury deliberations or in describing the defendant,¹³⁷ one capital case in which a witness did so in the course of the trial,¹³⁸ (not counting cases where the witness was testifying as to someone else's remarks) and three cases (all capital) where prosecutors used a racial epithet to describe a defendant.¹³⁹ Considering that racial epithets are a much narrower category than are explicit references to race, I am sure what we found substantially underestimates the category of express references to race in the course of capital or other criminal proceedings. Thus, express references are hardly "extraordinary."

Of course, if the courts were truly committed to eradicating the influence express racial references whenever they occur, then the characterization of express references as extraordinary would not much matter. But as discussed below, they have not been.

2. The Commitment to Eradicating the Influence of Race

A claim of commitment to the eradication of racial bias in capital sentencing is implicit both in the majority's insistence that this is an extraordinary case, and in its characterization of the possibility "that Buck may have been sentenced to death in part because of his race," as "a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are."¹⁴⁰ The opinion then proclaims that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice," because it "'poisons public confidence' in the judicial process," as well as injures the defendant.¹⁴¹

¹³⁵ Sheri Lynn Johnson, John H. Blume & Patrick M. Wilson, *Racial Epithets in the Criminal Process*, 2011 MICH. ST. L. REV. 755 (2011).

¹³⁶ *Id.* at 768–72.

¹³⁷ *Id.* at 759–68.

¹³⁸ *Id.* at 772.

¹³⁹ *Id.* at 773–74.

¹⁴⁰ *Buck v. Davis*, 137 S. Ct. 759, 778 (2017).

¹⁴¹ *Id.* (citing *Rose v. Mitchell*, 443 U.S. 545, 555 (1979); *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015)). A strong commitment might also be inferred from the majority's decision to decline to reach the retroactivity question, for it declares that entertaining the State's argument that *Martinez* is not retroactive would insulate from consideration "the issues we thought worthy of review." *Id.* at 780. However, I think the decision to put aside the retroactivity question might better be thought of as balancing the Court's desire to hedge regarding the strength of its commitment future *Martinez* claimants, with, as Justice Thomas says, its "single-minded focus on according relief to *this* petitioner on *these* facts." *Id.* at 785 (Thomas, J., dissenting).

There is, of course, *some* evidence that the courts care about racial discrimination in criminal cases. *Buck* is some evidence. *Batson v. Kentucky* is some evidence,¹⁴² and so is the Court's recent decision in *Pena-Rodriguez v. Colorado*.¹⁴³ But what about *McCleskey v. Kemp*,¹⁴⁴ or *Turner v. Murray*?¹⁴⁵ Even with respect to explicit references to race, the cases suggest less than enthusiastic enforcement of the laudable "basic premise," as my review of the eighteen racial epithet cases revealed that relief—of *any* sort, even a remand for factual findings—was granted in only five.¹⁴⁶ Moreover, relief was not granted in even one of the cases involving the use of racial epithets by defense counsel or prosecutors.

But it is not necessary to stray that far to reveal the shallowness of the Court's commitment to "the basic premise" that "[o]ur law punishes people for what they do, not who they are."¹⁴⁷ We need only look to two of the other Quijano testimony cases. Most obviously, there is *Buck*'s own first venture to the Supreme Court. Three years before he sought to reopen his case to allege the ineffective assistance of trial counsel in 2014, *Buck* sought to reopen his case with another claim: that the prosecution had violated the Equal Protection and Due Process Clauses by asking Dr. Quijano about the relationship between race and future violence on cross-examination and referring to his testimony during summation. The Fifth Circuit disagreed,¹⁴⁸ and the Supreme Court denied certiorari.¹⁴⁹ The majority opinion notes this denied petition for certiorari in its recitation of the procedural history of the case with no comment.¹⁵⁰ But if the mention of race cannot be dismissed as "de minimis," why was a majority of the Court indifferent to the prosecution's *additional* and more invidious reference to race? As Justice Sotomayor's dissent from the denial of certiorari pointed out, the prosecutor's

¹⁴² *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) ("Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure."); *but see* Sheri Lynn Johnson, *Batson from the Very Bottom of the Well: Critical Race Theory and the Supreme Court's Peremptory Challenge Jurisprudence*, 12 OHIO ST. J. CRIM. L. 71, 90 (2014) ("More than a quarter of a century of peremptory challenge jurisprudence suggests that most of the time, most of the Supreme Court is among those who 'simply watch, mesmerized into maintaining their unspoken commitment to keeping us where we are.'").

¹⁴³ *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017).

¹⁴⁴ *McCleskey v. Kemp*, 481 U.S. 279, 308 (1987) ("Even Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing decisions or that race was a factor in *McCleskey*'s particular case.").

¹⁴⁵ *Turner v. Murray*, 476 U.S. 28 (1986) (Affording only capital defendants accused of interracial crimes the right to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias).

¹⁴⁶ Johnson, *supra* note 135, at 759.

¹⁴⁷ *Buck v. Davis*, 137 S. Ct. 759, 778 (2017).

¹⁴⁸ *Buck v. Thaler*, 452 F. App'x. 423, 427–28 (5th Cir. 2011) (per curiam).

¹⁴⁹ *Buck v. Thaler*, 565 U.S. 1022 (2011).

¹⁵⁰ *Buck v. Davis*, 137 S. Ct. at 771.

question about race was not simply a repetition of defense counsel's.¹⁵¹ On direct examination, Quijano merely identified race as one statistical factor and pointed out the overrepresentation of African Americans in the criminal justice system; he neither stated a causal relationship, nor linked this statistic to Buck as an individual. "But [the prosecutor] did, in a question specifically designed to persuade the jury that Buck's race made him *more* dangerous and that, in part on this basis, he should be sentenced to death."¹⁵²

One has to wonder how a Court genuinely committed to eradicating the influence of racial bias on capital sentencing could have been uninterested in Duane Buck the first time around, particularly since the majority reasoning includes that "[r]elying on race to impose a criminal sanction 'poisons public confidence' in the judicial process;" certainly "public confidence" is more eroded *by the State's reliance on race* than it is by the defense's reference to it.¹⁵³ The reader who optimistically wonders if the Court might have been anticipating that Buck would be back with an ineffective assistance of counsel claim should know that his return could not be anticipated, given that *Martinez*, which provided the procedural vehicle for his 2014 motion, had not been decided by the time Buck's first petition was denied.

Moreover, after *Saldano*, Texas Attorney General Cornyn identified eight cases as involving similar testimony by Quijano, but dismissed two as "dissimilar to the *Saldano* case [because in] one, the defendant was not a member of a racial group included in Dr. Quijano's statistical model [and in] the other, the prosecution did not introduce race as a factor."¹⁵⁴ "The other" case was that of Juan Garcia, and Quijano's testimony on direct in that case was virtually identical to his testimony on direct in *Buck*.¹⁵⁵ Garcia raised ineffective assistance of counsel on his direct appeal, but the Texas Court of Criminal Appeals affirmed the denial of his petition because it reasoned that he had failed to demonstrate that counsel's decision to call Quijano was not a valid strategy.¹⁵⁶ This decision was upheld on

¹⁵¹ *Buck v. Thaler*, 452 F. App'x. at 1030 (Sotomayor, J., dissenting).

¹⁵² *Id.*

¹⁵³ *Buck v. Davis*, 137 S. Ct. at 766 (citing *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015)).

¹⁵⁴ OFFICE OF THE TEXAS ATTORNEY GENERAL, STATEMENT FROM ATTORNEY GENERAL JOHN CORNYN REGARDING DEATH PENALTY CASES, (June 9, 2000), <https://texasattorneygeneral.gov/newspubs/newsarchive/2000/20000609death.htm> [<https://perma.cc/5WUF-FWQV>].

¹⁵⁵ *Garcia v. State*, 57 S.W.3d 436, 439 (2001) ("Q: What about whether or not someone is black, white, Hispanic? Does that play a role? A: The race plays a role in that the—among dangerous people, minority people are overrepresented in this population. And, so, blacks and Hispanics are overrepresented in the—in the dangerous-so-called dangerous population.").

¹⁵⁶ *Id.* at 440–41 ("Counsel might have been attempting, with Quijano's testimony, to do two things: (1) place before the jury all the factors it might use against appellant, either properly or improperly, in its assessment of his future dangerousness and (2) persuade the jury that, despite all those negative factors, appellant would not be a future danger if imprisoned for life because the prison system's procedures and techniques would control or eliminate his tendency toward violence.

the merits in federal district court on habeas corpus,¹⁵⁷ and the Fifth Circuit Court of Appeals denied a COA on the issue.¹⁵⁸ The Supreme Court denied certiorari,¹⁵⁹ and Garcia was executed in October 2015.¹⁶⁰ What would distinguish *Garcia*? Procedurally, it would have been much easier, for there was no arguable default in state court, no need for *Martinez*, and no need to satisfy Rule 60(b)(6). There just was not as much publicity.

3. Silent Prejudice

I have no difficulty with the Court's conclusion that there was a significant chance that Buck's sentencing was influenced by race. Its claim that the racial stereotype of black men as "violence prone" is powerful and was not disputed because it really cannot be.¹⁶¹ Moreover, the literature cited in the amicus briefs resolves all doubt; anyone who reads them will be convinced by the overwhelming empirical and historical evidence they cite documenting the stereotype's ugly pervasiveness.¹⁶² Nor can one reasonably doubt the Court's assertion that the stereotype of crime-prone, violence-prone African Americans (and Latinos) "coincided precisely with the central question at sentencing."¹⁶³

The problem is in determining whether the jury was influenced by Quijano's testimony *significantly more than they would have been by unarticulated racial stereotypes*. Although the amicus briefs take pains to establish that stereotypes are easily triggered—thereby demonstrating that the district court was wrong in dismissing Quijano's testimony as "de minimis"¹⁶⁴—they do not address the likelihood of triggering those same stereotypes absent explicit reference to race. But more generally, the related cognitive psychology literature establishes that whether a schema—such as a racial stereotype—is accessible to an individual depends upon both salience and priming.¹⁶⁵ It is true that the salience of a

Under the circumstances—the State had already presented evidence before the jury that appellant had a long and violent criminal record—we cannot say that counsel's conduct could not be considered sound trial strategy.”)

¹⁵⁷ *Garcia v. Stephens*, No. H-08-2929, 2013 WL 12100443 (S.D. Tex. Sept. 24, 2013).

¹⁵⁸ *Garcia v. Stephens*, 757 F.3d 220 (5th Cir. 2014).

¹⁵⁹ *Garcia v. Stephens*, 135 S. Ct. 1492 (2015).

¹⁶⁰ *Texas Executes Juan Martin Garcia for Murder in \$8 Robbery*, GUARDIAN (Oct. 6, 2015, 10:16 PM), <https://www.theguardian.com/world/2015/oct/07/texas-executes-juan-martin-garcia-over-8-robbery-and> [<https://perma.cc/XHP5-45BV>].

¹⁶¹ *Buck v. Davis*, 137 S. Ct. 759, 776 (2017).

¹⁶² SCOTUSBLOG, *supra* note 48.

¹⁶³ *Buck*, 137 S. Ct. at 776.

¹⁶⁴ See Brief of Constitutional Accountability Center as Amicus Curiae in Support of Petitioner at 31, *Buck*, 137 S. Ct. 759 (No. 15-8049).

¹⁶⁵ Sheri Lynn Johnson, *Litigating for Racial Fairness After McCleskey v. Kemp*, 39 COLUM. HUM. RTS. L. REV. 178, 196–97 (2007) (citing THOMAS GILOVICH ET AL., SOCIAL PSYCHOLOGY 408 (2006)).

stereotype is increased by overt reference to that stereotype, but it is also true that the salience of the race of a black or Latino defendant is usually quite high, both because the salience of race in our culture is generally high, and because the defendant's race typically contrasts with that of his lawyers, the judge, and the jury.¹⁶⁶ More importantly, however, a schema is triggered "when it is *primed* by other statements or information presented."¹⁶⁷ While statistics might additionally prime the violence stereotype, the far more powerful prime is the crime with which the defendant is accused, which in all capital cases, is a crime of violence.¹⁶⁸ Moreover, the statistical study of capital sentences in Harris County proffered by Buck's lawyers offers further, albeit indirect support for the proposition that future dangerousness determinations, looked at as a whole (and not just those involving explicit references to race), are influenced by race; among a group of cases comparable to Buck's, and controlling for other factors, researchers found that juries were 1.3 times as likely to impose a death sentence on a black defendant as on a white defendant, and 1.7 times more likely to impose a death sentence upon a Latino defendant as upon a white defendant.¹⁶⁹

Thus, considering the evidence from cognitive and social psychology, and the data from Harris County, it is apparent that the effect of the "confluence of factors" of the race of defendants of color and the inquiry of future dangerousness, *with or without explicit mention of race, risks infecting the death selection decision with racial bias. Or to put it in the Court's language, it is the future dangerousness inquiry itself, not the testimony of Dr. Quijano, that "provide[s] support for making a decision on life or death on the basis of race."*¹⁷⁰

Why does the Court not acknowledge this? In the end, we come once more back to colorblindness.¹⁷¹ If we do not say race, we speak no evil; and if we speak no evil, a majority of the Court not only hears no evil but refuses to see it.¹⁷²

¹⁶⁶ *Id.* at 197 (citing SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 145 (1991)).

¹⁶⁷ *Id.* (emphasis in original).

¹⁶⁸ *Id.*

¹⁶⁹ RAY PATERNOSTER WITH SCOTT PHILLIPS, NAACP LDF, *RACIAL DISPARITY IN THE CASE OF DUANE EDWARD BUCK*, (Dec. 19, 2012), [http://www.naacpldf.org/files/case_issue/Duane%20Buck-FINAL%20Signed%20Paternoster%20Report%20\(00032221\).PDF](http://www.naacpldf.org/files/case_issue/Duane%20Buck-FINAL%20Signed%20Paternoster%20Report%20(00032221).PDF) [<https://perma.cc/MP6R-L8E6>].

¹⁷⁰ *Buck v. Davis*, 137 S. Ct. 759, 776 (2017).

¹⁷¹ Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 *STAN. L. REV.* 985, 1062 (2007) ("Colorblindness . . . protects and validates as 'not-racism' the actions of intentional discriminators who exercise the smallest modicum of caution as well as, much more significantly, the inertial persistence of entrenched patterns of racial hierarchy."); Ian Haney-López, *Intentional Blindness*, 87 *N.Y.U. L. REV.* 1779, 1784 (2012) ("[C]olorblindness ignores the changes wrought by the civil rights movement itself, which moved the country from one seeking to enforce racial supremacy to one hoping for its eradication.").

¹⁷² Here I do not mean the *Buck* majority, which includes some justices who, on some occasions, worry about unspoken bias.

IV. CONCLUSION

Because each man's death diminishes me, I am happy for Duane Buck, who has now, by agreement with the Harris County District Attorney's Office, been resented to life in prison plus two terms of sixty years.¹⁷³ And doubtless I would have despaired far more over an affirmance, for we are in an even worse place than I would have imagined if well-publicized overt racism in the imposition of the death penalty is tolerable.

But, what about Linda Carty—also represented by Guerinot, who conducted virtually no investigation in her case either¹⁷⁴—whose future dangerousness was hard to fathom, given that her only crime was of a kind that could *never* be repeated in prison?¹⁷⁵ What about all the defendants Dr. Grigson, or some equally certain “expert,” helped send to their deaths without a shred of scientific evidence supporting their conclusions? And, finally, what about Victor Saldano and the five other defendants who were granted new hearings based on Quijano's testimony? All have now been resented to death. Do we really think none of their resentencing proceedings were influenced by race?

Buck has no answers to any of these questions.

¹⁷³ OFFICE OF THE DISTRICT ATTORNEY, HARRIS COUNTY, TEXAS, BUCK GOES FROM DEATH ROW TO LIFE PLUS TWO 60 YEAR TERMS, (Oct. 3, 2017), <http://app.dao.hctx.net/buck-goes-death-row-life-plus-two-60-year-terms> [<https://perma.cc/8CH6-YNFH>].

¹⁷⁴ I can't help but think of my own client, Ramiro Hernandez Llanas, who was executed by the State of Texas and whose lawyer did nothing to reveal the toxic waste dump he grew up on, the abuse he endured from his parents, or the intellectual disability that caused him to be thrown out of school in third grade as hopeless. Johnson, *supra* note 125. Virtually every death penalty lawyer I know has had a client represented so poorly that his client would have been just as well off with no counsel at all.

¹⁷⁵ Ruth Hill, *Linda Carty: 'Someone Is Trying to Take My Life for Someone Else's Crime,'* GUARDIAN (June 26, 2010, 7:05 PM), <https://www.theguardian.com/world/2010/jun/27/linda-carty-death-row-texas> [<https://perma.cc/UC8T-QZFE>].