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IN THE SUPREME COURT OF THE UNITED STATES

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DUANE EDWARD BUCK, :

Petitioner : No. 15-8049

v. :

LORIE DAVIS, DIRECTOR, TEXAS :

DEPARTMENT OF CRIMINAL JUSTICE, :

CORRECTIONAL INSTITUTIONS :

DIVISION, :

Respondent. :

- - - - - x

Washington, D.C.
Wednesday, October 5, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

CHRISTINA A. SWARNS, ESQ., New York, N.Y.; on behalf of the Petitioner.

SCOTT A. KELLER, ESQ., Solicitor General, Austin, Tex.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next today in Case 15-8049, Buck v. Davis.

Ms. Swarns.

ORAL ARGUMENT OF CHRISTINA A. SWARNS

ON BEHALF OF THE PETITIONER

MS. SWARNS: Mr. Chief Justice, and may it please the Court:

Duane Buck was condemned to death after his own court appointed trial attorneys knowingly introduced an expert opinion that he was more likely to commit criminal acts of violence in the future because he is black. This evidence encouraged the sentencing jury to make its critical future dangerousness decision which was a prerequisite for a death sentence and the central disputed issue at sentencing based not on the individual facts and circumstances of Mr. Buck's crime or his life history, but instead based on a false and pernicious group-based stereotype.

JUSTICE GINSBURG: Didn't that expert say, I don't think he's a future -- I don't think he's going to be a future danger?

MS. SWARNS: On cross-examination Dr. Quijano testified that he did believe that Mr. Buck

1 was likely to commit future crimes of violence. He said
2 that -- at the prosecutor's questioning that Mr. Buck
3 was on the low end of the continuum, but that he could
4 not say that Mr. Buck was not likely to commit criminal
5 acts of violence. But Mr. Buck was, unquestionable --

6 JUSTICE GINSBURG: But more likely than not
7 that he wouldn't.

8 MS. SWARNS: Yes. He was on the low end of
9 the spectrum in terms of the risk of violence.

10 But here this expert's evidence not only
11 prejudiced Mr. Buck at sentencing, it also put the very
12 integrity of the courts in jeopardy. For that reason,
13 Texas acknowledged that its ordinary interest and
14 finality does not apply. It publicly declared that it
15 would waive its procedural defenses and allow new
16 sentencing hearings in six capital cases, including
17 Mr. Buck's, that involved the same expert's race as
18 criminal violence opinion. Texas conceded error in five
19 cases and then reversed course in Mr. Buck's case alone.

20 As a result, Mr. Buck is the only Texas
21 prisoner to face execution pursuant to a death sentence
22 that Texas itself has acknowledged is compromised by
23 racial bias that undermines confidence in the criminal
24 justice system.

25 CHIEF JUSTICE ROBERTS: There's a tension in

1 your -- your briefing over what you're really arguing
2 for. In the question presented, you focus on the Fifth
3 Circuit standard for a COA in saying they're imposing an
4 improper and unduly burdensome. But most of the
5 briefing, and as you sort of begun today, is really
6 focused on the underlying merits of the case. And you
7 sort of have to make a choice, don't you, because if we
8 didn't focus on the merits and rule in your favor, we
9 don't get to say too much about the threshold for
10 Certificate of Appealability. Well, if we focus on the
11 Certificate of Appealability, all we're saying on the
12 merits is there's a substantial showing. So what do you
13 want us to do, on the merits or on the Certificate of
14 Appealability?

15 MS. SWARNS: Well, in order to determine
16 whether Mr. Buck was expired -- was entitled to a
17 Certificate of Appealability, this Court and the Fifth
18 Circuit was required to determine whether or not the
19 district court decision with respect to both the
20 constitutional question and the procedural question
21 would be debatable among jurors.

22 CHIEF JUSTICE ROBERTS: Right. Right. So
23 is that what you want us to say, that because the merits
24 are debatable, he should have gotten a Certificate of
25 Appealability? Or do you want us to say, well, he

1 should have won, and so he obviously should have gotten
2 a Certificate of Appealability?

3 MS. SWARNS: We believe that the district
4 court's decision is wrong, and, therefore, Mr. Buck was
5 entitled to a Certificate of Appealability.

6 CHIEF JUSTICE ROBERTS: Okay. So on the
7 merits -- on the merits then, you just want us to say,
8 oh, reasonable jurists could disagree about whether or
9 not he was unconstitutionally sentenced?

10 MS. SWARNS: Or that the -- that the
11 reasonable jurists would conclude that the district
12 court's decision that Mr. Buck was not prejudiced was
13 incorrect, and, therefore, Mr. Buck was -- was entitled
14 to a Certificate of Appealability.

15 JUSTICE KAGAN: But, for example, last year
16 in a case called Welch, the question came up on the
17 Certificate of Appealability, and we just said, well, of
18 course he should have gotten a Certificate of
19 Appealability because he's right. And similarly, we did
20 the same thing, oddly enough, in one of the cases here.
21 We did the same thing in Trevino. Yes, he should have
22 gotten a Certificate of Appealability because he has the
23 merits on his side. That's essentially what you would
24 want us to do?

25 MS. SWARNS: Yes.

1 JUSTICE KAGAN: I mean, that does leave on
2 the table -- maybe this is what the Chief Justice was
3 saying -- this question of whether the Fifth Circuit is
4 just using the wrong approach and the wrong standards
5 for the Certificate of Appealability question.

6 MS. SWARNS: Well, in this case the Fifth
7 Circuit's analysis completely ignored the heart of the
8 case in making its Certificate of Appealability
9 determination, right?

10 The center of Mr. Buck's claim has always
11 been the introduction of racial discrimination that
12 undermines the confidence in, not only his own death
13 sentence, but the integrity of the court's as well.

14 In assessing the debatability of the
15 district court's decision, the Fifth Circuit doesn't
16 engage at all around the central question here about
17 the -- the critical role of race in Mr. Buck's case, in
18 his sentence, in the integrity of the court's, and
19 ultimately in what Texas did in terms of acknowledging
20 the absence of finality in its case. So the Fifth
21 Circuit's conduct in conducting the Certificate of
22 Appealability analysis, you know, ignored critical facts
23 in this case. So that --

24 JUSTICE SOTOMAYOR: The centers in this
25 case --

1 MS. SWARNS: Yes.

2 JUSTICE SOTOMAYOR: -- argue that the Court
3 had improperly denied a COA, and that was their basic
4 position. They didn't really engage the merits; they
5 just engaged the standard of issuance of a COA. We go
6 back to that. Are you satisfied if we say they used the
7 wrong standard for denying the COA, or will you only be
8 satisfied if we say you win?

9 MS. SWARNS: I think that the Fifth
10 Circuit -- you know, obviously, I would like for this
11 Court to say we win and Mr. Buck is entitled to a new --
12 a new, fair sentencing hearing. That would obviously be
13 my preference.

14 I think in the posture of this case, this
15 Court can and should say that Mr. Buck is entitled to a
16 Certificate of Appealability because all of the
17 explanations and justifications that were presented by
18 Texas and the district court are incorrect and
19 unsustainable.

20 JUSTICE SOTOMAYOR: All right. Now let's
21 start with the COA issue. With respect to the COA
22 issue, I read your adversaries who are -- to say
23 Martinez, Trevino could never constitute an exceptional
24 circumstance to -- to justify the issuance of a COA.
25 Basically that's their position, 'cause they weren't

1 made retroactive.

2 MS. SWARNS: Yes.

3 JUSTICE SOTOMAYOR: So first, what does the
4 retroactivity argument have to do with anything? All
5 right? What does it apply to? And aren't you making
6 Martinez and -- and Trevino retroactive if we recognize
7 it as an exceptional reason to forgive a procedural
8 default.

9 And then second, there's a circuit split on
10 this question, and you recognize it in your brief. You
11 have the Third Circuit using a three-part test that says
12 Martinez and Trevino, under certain circumstances, can
13 be a reason to find exceptional circumstance.

14 The Ninth Circuit has a six- or seven- or
15 eight-part test. They never make it simple. And the
16 Fifth says never.

17 Where do you stand on all these tests? And
18 what's your position with respect to this -- to this
19 retroactivity question?

20 MS. SWARNS: Well, with respect to
21 retroactivity, Teague governs new rules of
22 constitutional law that apply at the trial stage. This
23 is just a rule that doesn't -- has no applicability. It
24 squarely arises only in the habeas context, so Teague
25 just doesn't apply to Martinez and Trevino.

1 With respect to its applicability to
2 Mr. Buck and to -- to Mr. Buck, this is a circumstance
3 where if the 60B was properly granted, Mr. Buck would be
4 back in the same exact position as were the Petitioners
5 in Martinez and Trevino. He would be arguing -- seeking
6 cause to excuse the default of his trial counsel in
7 effectiveness claim in the first petition for habeas
8 corpus relief.

9 JUSTICE ALITO: This is a very -- a very
10 unusual case, and what occurred at the penalty phase of
11 this trial is indefensible. But what concerns me is
12 what the implications of your argument would be for all
13 of the other prisoners who -- let's say they're not even
14 capital cases, but they have -- they want now to raise
15 some kind of ineffective-assistance-of-counsel claim.
16 That is procedurally defaulted. And they say we should
17 have relief from a prior judgment denying habeas relief.

18 And that -- what would prevent a ruling in
19 your favor in this case from opening the door to the
20 litigation of all of those issues so that those --
21 Martinez and Trevino would effectively be retroactive.

22 MS. SWARNS: Well, I think there are three
23 factors, I think, that makes Mr. Buck's case unique.

24 First and foremost, it involves an express
25 appeal to racial bias that not only undermined the

1 integrity of his own death sentence, it undermined the
2 integrity of the court's.

3 Second, he now faces execution. This is a
4 death penalty case. He now faces execution pursuant to
5 that death sentence that is unquestionably -- and I will
6 agree with you -- indefensible and uncompromised by
7 racial bias.

8 Third, there's no question of Mr. Buck's
9 diligence here. Mr. Buck has consistently and
10 unrelentingly, you know, pursued relief on his claims.
11 So I think that those factors make Mr. Buck's case
12 unique from the vast majority --

13 JUSTICE SOTOMAYOR: That's the Third Circuit
14 test, isn't it?

15 MS. SWARNS: Yes. It is. And that makes
16 Mr. Buck unique from the vast majority of noncapital or
17 other prisoners who are going to bring these cases to
18 the Federal courts.

19 CHIEF JUSTICE ROBERTS: So the -- the -- the
20 answer to Justice Alito is that in our opinion, we
21 should say our interpretation of Rule 60B, in case it
22 doesn't apply unless it's a capital case? Rule 60B
23 doesn't draw that distinction.

24 MS. SWARNS: No. I think in terms of the
25 question of the extraordinariness factors, I think this

1 Court can and should look to those that we've identified
2 in our brief.

3 First, is there a risk of injustice to the
4 Petitioner? Here we unquestionably have that. We're
5 facing an execution.

6 CHIEF JUSTICE ROBERTS: The risk of
7 injustice, if it was a sentence for ten years, that's
8 unjust.

9 MS. SWARNS: Absolutely.

10 CHIEF JUSTICE ROBERTS: Okay. So that
11 doesn't work.

12 MS. SWARNS: So there are more.

13 CHIEF JUSTICE ROBERTS: What else?

14 MS. SWARNS: There are more.

15 The risk of injustice and impairing the
16 integrity of the judicial system more broadly. The
17 States --

18 CHIEF JUSTICE ROBERTS: I guess the same
19 answer there. Sentenced to 40 years, that impairs the
20 integrity of the system. I mean, I know that obviously,
21 death is different.

22 MS. SWARNS: Right.

23 CHIEF JUSTICE ROBERTS: But it's hard to
24 factor in why it's different in the context of
25 interpreting particular rules.

1 MS. SWARNS: You know, I would say
2 additionally, though, here, Your Honor, particularly
3 unique to Mr. Buck's case, we have the State
4 acknowledging that it has no significant finality
5 interest in Mr. Buck's death sentence.

6 And when you add to that the fact that
7 Mr. Buck's claim of ineffective assistance of counsel
8 is -- is, you know, to be mildly meritorious, you know,
9 you have a group of factors which I think can -- this
10 Court should provide guidance around --

11 JUSTICE KENNEDY: The State did change its
12 mind with respect to Mr. Buck's case, and I assume
13 they'll tell us that there's a reason for that. It's
14 not just because his defense counsel introduced it,
15 because that -- that was true in some other cases as
16 well.

17 But if -- if we rely on that too much, won't
18 this discourage prosecutors from offering discretionary
19 concessions?

20 MS. SWARNS: You know, this is a unique
21 circumstance. I think that -- I don't believe it would
22 discourage prosecutors, because Texas doesn't actually
23 disagree with -- and cannot disagree with -- the
24 fundamental problem in this case, which is that it is
25 compromised by racial bias that undermines the integrity

1 of the courts.

2 Texas has certainly taken a different
3 position about what it should do about it, but it cannot
4 get away from those -- those core facts that establish
5 that, like no State has an interest in a death sentence
6 that is undermined by racial bias.

7 CHIEF JUSTICE ROBERTS: To the -- to the
8 extent it is a unique case, it really doesn't provide a
9 basis for us to say anything at all about how the Fifth
10 Circuit approaches Certificates of Appealability, does
11 it? It's a unique case, so this would be an odd
12 platform to issue general rules.

13 But in the brief you say, well, the Fifth
14 Circuit grants these in a very small percentage of
15 cases. The other circuits are much higher.

16 But if it is so unique, I don't know how we
17 can use it to articulate general rules.

18 MS. SWARNS: Well, it's certainly an
19 extraordinary case. And I think that because it is so
20 extraordinary, and because the lower courts failed to,
21 you know, acknowledge that and -- and reach that
22 conclusion, that this case sort of underscores the deep
23 need for guidance to the lower courts on the evaluation
24 and assessment and what factors should be considered in
25 determining when 60B is or is not appropriate.

1 CHIEF JUSTICE ROBERTS: Was it wrong? Was
2 it wrong for the court of appeals to conduct the merits
3 inquiry in this case? I mean, they went to considerable
4 length in trying to determine whether or not the claims
5 were valid.

6 Was that an error? Should they have just
7 said, well, you know, the -- the test is what,
8 substantial -- showing a substantial -- a substantial
9 showing of denial? They should have just done, you
10 know, kind of a sort of quick-and-dirty peek at the
11 merits and say, yeah, there might be something there.

12 MS. SWARNS: Yes.

13 CHIEF JUSTICE ROBERTS: So did they err in
14 looking at it more closely?

15 MS. SWARNS: Certainly this Court has made
16 clear time and again the COA analysis is a threshold
17 review of the merits.

18 CHIEF JUSTICE ROBERTS: So should our
19 decision be just that, they erred in looking at the
20 merits? They should have just issued a Certificate of
21 Appealability and sent it back? That's not what you
22 want, is it?

23 MS. SWARNS: I -- no, no, it's not. Again,
24 I believe that this Court, because we do have the Fifth
25 Circuit and the district court going past the threshold

1 analysis and speaking substantively to the merits, this
2 Court can and should explain that those reasons that
3 have been offered by those courts are incorrect. And
4 under the COA standard, if this Court -- a COA should
5 issue if the district court's decision was debatable or
6 wrong.

7 CHIEF JUSTICE ROBERTS: Well, but it seems
8 to me we're well beyond a COA should issue. You don't
9 want us to say that. You want us to say that there's
10 been a constitutional violation in this case and the
11 court of appeals was wrong in determining that there
12 wasn't.

13 MS. SWARNS: I would like for this Court to
14 say that there was a constitutional violation in this
15 case --

16 JUSTICE KAGAN: Ms. Swarns, I would have
17 thought that your answer would be that, you know, you
18 think this is so -- such an extraordinary case, and that
19 the Fifth Circuit got this so wrong, that it's the best
20 proof that there is that the Court is -- is approaching
21 the COA inquiry in the wrong way.

22 MS. SWARNS: Right.

23 JUSTICE KAGAN: If they reached the wrong
24 result in this case --

25 MS. SWARNS: Right.

1 JUSTICE KAGAN: -- it's because they are
2 just not understanding what the COA inquiry is all
3 about.

4 MS. SWARNS: Right. I mean, I agree,
5 absolutely. I mean, just the fact that this Court
6 found -- was unable to find these facts and
7 circumstances debatable shows the -- the fact that the
8 Fifth Circuit is applying the standard incorrectly for
9 sure.

10 And it goes also to the need for guidance,
11 right, to the Fifth Circuit not only on the COA point,
12 but again, on the 60(b) point, because there really is a
13 substantial lack of information available to the lower
14 courts with respect to the evaluation of what is or is
15 not extraordinary.

16 CHIEF JUSTICE ROBERTS: So what is the test
17 you -- should we say the Fifth Circuit should apply in
18 considering whether to issue Certificates of
19 Appealability? Do you have anything to add to the
20 statutory language?

21 MS. SWARNS: You know, I don't think -- I --
22 I don't have additional language. I think this Court
23 has made quite clear that it's a threshold application.
24 What this case demonstrates is that the Fifth Circuit
25 has not been, and as this Court has noted in previous

1 decisions, that the Fifth Circuit has not scrupulously
2 adhered to the application of the COA standard, and the
3 data that we provided to this Court sort of amplifies
4 and demonstrates that fact.

5 So I think that what you can do is use this
6 Court, again, as an example of how far the Fifth Circuit
7 is out of line from the -- the proper application of the
8 COA standard under these circumstances.

9 JUSTICE ALITO: Would it be possible to
10 defend what the Fifth Circuit did based on the prejudice
11 prong of Strickland? There -- there was a lot of
12 evidence both relating to the offense that was committed
13 and to other conduct by Petitioner that would show
14 future dangerousness. It would -- it didn't have to
15 rest exclusively on this bizarre expert testimony; isn't
16 that correct?

17 MS. SWARNS: There is certainly the -- Texas
18 certainly presented evidence of future dangerousness in
19 this case. I think that, however, the heart of those --
20 that evidence was sort of the facts and circumstances of
21 the instant crime, Mr. Buck's lack of remorse
22 immediately after he was arrested for the instant crime,
23 and the domestic violence incidents and the prior
24 offenses.

25 This Court has recognized that aggravated

1 crimes like this, exactly like the kind we are talking
2 about here, can and do trigger a racialized fear of
3 violence that can yield arbitrary death sentencing
4 decisions. That was your holding in *Turner v. Murray*.
5 So the fact that we do face a case that does have very
6 aggravated facts sort of compounds the risk of prejudice
7 to Mr. Buck.

8 And what we have here is a circumstance
9 where not only do the terrible facts of the crime
10 trigger that real risk of an arbitrary death sentencing
11 decision, you have the expert stepping in and
12 compounding that risk and putting it -- putting an
13 expert scientific validity to this pernicious idea that
14 Mr. Buck would be more likely to commit criminal acts of
15 violence because he's black. So the risk in Mr. Buck's
16 case is doubled, essentially.

17 In light of -- in light of those facts, in
18 light of the aggravating evidence here, and how
19 Dr. Quijano's opinion compounded the risk of violence --

20 JUSTICE SOTOMAYOR: Counselor, I know that
21 there's been a lot of talk about how small the reference
22 to race was with respect to the questioning at trial on
23 both sides, but how much was it a part of the actual
24 report, because that's what the jury asked for?

25 MS. SWARNS: Uh-huh.

1 JUSTICE SOTOMAYOR: And they asked for two
2 things: Could they consider life without parole?

3 MS. SWARNS: Uh-huh.

4 JUSTICE SOTOMAYOR: So they were obviously
5 considering mercy. Somebody was.

6 MS. SWARNS: Correct.

7 JUSTICE SOTOMAYOR: I don't know if all of
8 them, but someone wanted to talk about it, that's what
9 they told the judge. Can we talk about life without --
10 life without parole? I don't even know what the answer
11 to that was. I should have checked that --

12 MS. SWARNS: Uh-huh.

13 JUSTICE SOTOMAYOR: -- but if you do you,
14 can tell me?

15 MS. SWARNS: Yeah.

16 JUSTICE SOTOMAYOR: But, number two, they
17 asked for the psychiatric report.

18 MS. SWARNS: That's correct.

19 JUSTICE SOTOMAYOR: Does that -- not to have
20 the testimony reread, but for the report.

21 So tell me what -- how that changes the
22 calculus, those two things in any way.

23 MS. SWARNS: Sure. So first the issue of
24 life without parole was negotiated in the trial
25 proceedings. It was absolute -- they were not given any

1 information about the feasibility of parole in this
2 case, but as Your Honor correctly observes --

3 JUSTICE GINSBURG: They were told that he
4 would be eligible for parole after, what was it,
5 40 years?

6 MS. SWARNS: No, they were not.

7 JUSTICE GINSBURG: They were not given that
8 information?

9 MS. SWARNS: If that were true -- no, they
10 were not. They were not given information. In fact,
11 the trial prosecutor fought very hard to make sure that
12 this jury did not receive the information about parole
13 eligibility. It was one of the issues that she was very
14 concerned about making sure was redacted from
15 Dr. Quijano's report because he, in his report, had a
16 reference to the -- the 40 --

17 JUSTICE SOTOMAYOR: How old was Mr. Buck?
18 How old was Mr. Buck at the time?

19 MS. SWARNS: I think he was in his 20s. I
20 a.m. not sure at this moment.

21 So we do know that the jury was considering
22 the possibility of -- of a life sentence, and then we
23 have them asking for the psychiatric report, which
24 contains a sentence that says that Mr. Buck is, in fact,
25 more likely to commit criminal acts of violence because

1 he's black. That evidence, of course, once you have
2 that report, after the jury had heard it on direct and
3 cross-examination from the witness stand, so ultimately
4 we have a situation where the jury is literally making
5 the decision about Mr. Buck's life and death -- making
6 the future-dangerous decision while they have this
7 imprint in their hands.

8 And we also know, this is a jury that was
9 not able to make a quick decision on sentence. You
10 know, notwithstanding Texas's claims that its case in
11 future dangerousness was overwhelming, this jury didn't
12 make a quick decision as you would have expected to see
13 if the case was, in fact, overwhelming. This jury was
14 out for two days on the questions that it was presented
15 with. And so what this shows is at -- during this
16 pivotal time when it was obviously struggling to
17 determine an answer to the question of whether or not
18 Mr. Buck was or was not likely dangerous, it had in its
19 hands a piece of paper that validated evidence that came
20 from both sides of the aisle in this case.

21 JUSTICE GINSBURG: Do we know what the
22 composition of the jury was in this case?

23 MS. SWARNS: It's not in the records, Your
24 Honor. Our research that we would -- the only thing
25 we've been able to confirm on our own is that ten of the

1 jurors were white. I don't know the race of the other
2 two, and it's certainly not in the record.

3 But ultimately I don't think it matters what
4 the race of the jury is. This is evidence of an
5 explicit appeal to racial bias. This is the kind of
6 evidence that courts for over a hundred years have said,
7 once it is introduced, even just once, it's impossible
8 to unring the bell. And the -- this is because this --
9 this evidence in this case spoke to the pivotal question
10 of whether or not Mr. Buck would be executed.

11 The future dangerousness question in Texas
12 was the prerequisite for a death sentence. If this jury
13 did not find a future dangerousness, then Mr. Buck
14 couldn't be executed. This evidence put the thumb
15 heavily on the -- on the death scale, and particularly
16 as it fit into the evidence in this case.

17 As I said, Texas presented three categories
18 of evidence. The crime, the lack of remorse, and the
19 prior domestic violence, but nothing that Texas
20 presented spoke to the question of whether or not
21 Mr. Buck was likely to commit criminal acts of violence
22 if he was, in fact, sentenced to life in prison. They
23 just didn't present any evidence on that subject.

24 Mr. Buck, on the other hand, presented
25 Dr. Lawrence, and Dr. Lawrence spoke -- you know,

1 powerfully to the question of whether Mr. Buck was
2 likely to commit criminal acts of violence if he were in
3 prison, which was the only alternative to a death
4 sentence that the jury was presented with.

5 Dr. Lawrence --

6 JUSTICE ALITO: He killed people. You --
7 you said that the evidence of his dangerousness was
8 limited to those with whom he had a romantic
9 relationship, but he killed at least two people with
10 whom he didn't have a -- he killed two people with whom
11 he did not have a romantic relationship; isn't that
12 right?

13 MS. SWARNS: No. He killed --

14 JUSTICE ALITO: His stepsister?

15 MS. SWARNS: No. She survived.

16 JUSTICE ALITO: I'm sorry. All right.

17 Well, he shot her --

18 MS. SWARNS: Yes, exactly. And this is all
19 clearly in the context -- absolutely, he did. There's
20 no question about the fact that he shot his -- his
21 sister. And -- but all of that was in this one sequence
22 of events where it arises out of the breakdown of his
23 relationship with his ex-girlfriend. And again,
24 however, Dr. Lawrence presents evidence that the record
25 is that Mr. Buck has a positive institutional adjustment

1 history, that when he was previously incarcerated he was
2 held in minimum security, and that all of the crimes of
3 violence that took place in the Texas Department of
4 Corrections in the prior year were committed by people
5 who were getting involved, and there was no gang
6 involvement here.

7 So Dr. Lawrence's testimony highlights the
8 shortcomings or the limitations in Texas's case for
9 future dangerousness, right? They say here we do have
10 evidence that -- that goes beyond what Texas has
11 presented. And what fills the gap for Texas, the only
12 evidence that Texas has that says he will be dangerous
13 in that context is Dr. Quijano's evidence that he has
14 immutable characteristics which establishes that he will
15 be dangerous no matter where he is. And I would like to
16 reserve the remainder of my time for rebuttal.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.
18 Mr. Keller.

19 ORAL ARGUMENT OF SCOTT A. KELLER

20 ON BEHALF OF THE RESPONDENT

21 MR. KELLER: Thank you, Mr. Chief Justice,
22 and may it please the Court:

23 We're here today defending the death
24 sentence because Petitioner murdered a mother in front
25 of her children. He put a gun to the chest of his

1 stepsister and shot her, and he murdered another man.

2 CHIEF JUSTICE ROBERTS: I assume the
3 facts -- I assume the facts in the other Saldano cases
4 are similarly heinous, the ones where the state
5 determined that nonetheless that there was a risk that
6 they would be sentenced to death because of their race.
7 And I don't understand -- I understand the procedural
8 differences in this case, but I don't understand why
9 that ultimate conclusion doesn't apply here as well. In
10 other words, regardless of whether the evidence was
11 admitted by the prosecution or by the defense, it would
12 seem to me that the same concern would be present.

13 MR. KELLER: There's a key distinction
14 between when a government, a prosecuting authority, is
15 introducing evidence of racist dangerousness. That
16 would be the equivalent of using race as an aggravator.
17 When the defense injects race, although we don't defend
18 counsel's actions in injecting race into the
19 proceeding --

20 JUSTICE KENNEDY: But the prosecutor
21 revisited it, Mr. Keller, in cross-examination.

22 MR. KELLER: To put that into context, the
23 prosecutor did not go beyond the scope of direct. The
24 prosecutor saw the expert report for the first time that
25 day and had just reviewed it over the lunch hour. This

1 is JA154A and 165A. And the prosecutor is walking
2 through all of the various factors that Quijano had
3 considered in his testimony, but it did not go beyond
4 what was elicited on direct.

5 And to highlight an example in contrast, the
6 Alba case, in which we did confess error, there, the
7 prosecutor mentioned race four times, and at closing
8 said, quote, "And I went down all the indicators. They
9 didn't want to talk about those indicators, but I did,
10 and I forced the issue. He's male, he's Hispanic," etc.
11 That's at Volume 28 of the trial --

12 JUSTICE GINSBURG: Doesn't -- doesn't the
13 fact that Petitioner's own counsel introduced this show
14 how abysmal his representation was? I don't know why it
15 should make a difference that the Petitioner's counsel
16 introduced this evidence. This evidence, everyone
17 agrees, should not have -- not have come in. And -- and
18 what -- what counsel would put that kind of evidence
19 before a jury? What competent counsel would put that
20 evidence before a jury.

21 MR. KELLER: And we are not defending
22 defense counsel's actions. But the nature of that claim
23 is a Sixth Amendment ineffective assistance claim that
24 the court also reviews for prejudice. In the context of
25 a prosecutor offering the testimony and using it as an

1 aggravator, that would be an equal protection and due
2 process violation. And the nature of the evidence
3 coming in, in that instance would be significantly
4 highly prejudicial when the State is putting its in
5 primata behind it and using it as an aggravator.

6 JUSTICE SOTOMAYOR: Why does it matter who
7 uses race? I mean, in Batson challenges we don't care
8 if the person exercising a racial challenge is the
9 prosecutor or the defense attorney. We say neither
10 should use race in a negative way against a defendant.
11 So why is it different here? Why is it okay or not okay
12 for the prosecutor to introduce the greater likelihood
13 of a person being dangerous on the basis of race alone?
14 Not okay for the prosecutor, but it's less bad for the
15 defense attorney to do it?

16 MR. KELLER: Yeah. To be clear, it's not
17 okay. The issue, though, goes to the level of
18 prejudice. And when defense counsel --

19 JUSTICE SOTOMAYOR: Well, the level of
20 prejudice is the reasonable possibility that if one
21 juror, because Texas uses one juror does not agree with
22 death, death is not imposed, correct?

23 MR. KELLER: Correct.

24 JUSTICE SOTOMAYOR: So if one -- is it a
25 reasonable possibility that one juror, even the one who

1 sent the note that says is it possible to do parole,
2 life without parole, could have been convinced to
3 exercise mercy if race wasn't used, can you answer that
4 question "absolutely not"? When, in at least one of the
5 Saldano cases, a man poured gasoline on a woman and
6 watched her die, we had a nation that was mortified,
7 shocked, and completely traumatized by watching a pilot
8 burn to death. So why is that crime any less heinous
9 than this one?

10 MR. KELLER: Here, Petitioner executed a
11 mother when she was on her knees in front of her
12 children with her daughter jumping on her --

13 JUSTICE SOTOMAYOR: I don't say it's not,
14 but why is that heinousness so much greater that no jury
15 could have exercised mercy? No juror.

16 MR. KELLER: The standard -- the standard in
17 the Strickland second-prong prejudice analysis is
18 whether there is a substantial likelihood of a different
19 outcome. As Juan vs. Valmontez noted, the State doesn't
20 have to rule out --

21 JUSTICE SOTOMAYOR: "Reasonable probability"
22 is the actual language, not "substantial."

23 MR. KELLER: And Harrington v. Richter said,
24 "The likelihood of a different result must be
25 substantial, not just conceivable." It's 562 U.S. at

1 111.

2 If I can address the jury deliberation point
3 for a moment: The Petitioner is correct the jury
4 deliberated over the course of two days, but this is
5 only for three hours and 13 minutes. This is at Record
6 1918 to 1919. On the first day, the jury asked for the
7 police reports and the psychology reports. On the
8 second day, the jury asked to see the crime scene video.
9 This was JA210A, Record 5956 and Record 6333.

10 So insofar as the Court were to look at the
11 circumstances of the jury's deliberations -- and I'm not
12 sure that that is necessary for the Court to do, but the
13 inference to be drawn is in this final 95 minutes before
14 the jury returned a verdict to future dangerousness. It
15 was looking at the crime scene video.

16 CHIEF JUSTICE ROBERTS: I'm not sure how the
17 quickness of the determination helps you at all, when
18 one response would be, well, they had this evidence that
19 he was, by virtue of his race, likely to be dangerous,
20 so they didn't spend that much time on it.

21 MR. KELLER: And the -- and the argument
22 here is that under these circumstances when they were
23 focused on the crime scene video, that would have been
24 what the jury --

25 JUSTICE BREYER: We're not in the jury room.

1 We do know that the prosecutor asked the expert witness,
2 is it correct that the race factor, black, increases the
3 future dangerousness for various complicated reasons.
4 And he says, yes.

5 So that seems -- I mean, you can't prove it,
6 that that was the key factor, but it seems like it could
7 have been a substantial factor. And Texas, in six
8 cases, says this is totally wrong. And now in this
9 seventh case, you're taking the opposite position. And
10 I have to admit, like what the Chief Justice seemed, I
11 don't understand the reason. It seems to me it proves
12 the arbitrariness of what's going on.

13 But regardless, the issue here is, is there
14 some good reason why this person shouldn't have been
15 able to reopen his case? I mean, that's the question.
16 What's the reason?

17 I mean, after all, we later decided these
18 other cases, Martinez. His circumstances seem to fit
19 Martinez pretty much like a glove. The State certainly
20 doesn't have a strong interest any more than in the
21 other cases, or at least not obvious to me, some kind of
22 reliance. So he has a case where Martinez seems to
23 apply. He couldn't -- he was diligent -- diligent, not
24 much -- not too much reliance on the other side, and
25 seems to meet Martinez's criteria for hearing the issue.

1 Why doesn't that make it extraordinary
2 enough to reopen under Rule 60(b)? That seems to me the
3 question in the case.

4 MR. KELLER: For two reasons, and both are
5 controlled by Gonzalez v. Crosby. The first is that the
6 only changed circumstance in this case since 2006 is the
7 Martinez and Trevino change in the law. And the second
8 is there was a lack of diligence in pursuing this claim.
9 An ineffective assistance claim is raised on Federal
10 habeas in the district court. The COA is not asked for
11 on that claim. And the ineffective assistance claim
12 also is not even raised in the first 60(b) motion.

13 JUSTICE BREYER: And all this took place
14 after this Court decided Martinez and Trevino?

15 MR. KELLER: In the context of the second
16 60(b) motion.

17 JUSTICE BREYER: Yeah, I mean, you listed a
18 whole bunch of things in which he could have done. Did
19 those take place or not after we decided our case? If
20 some of them did, which?

21 MR. KELLER: The Federal habeas petition
22 asking for a COA and the first 60 (b) motion were before
23 Martinez. But in Gonzalez v. Crosby, the Court noted
24 that there the Petitioner was not pursuing the claim
25 with diligence even before the change in the law. And

1 the court said --

2 JUSTICE KAGAN: He did exactly what you
3 would have expected him to do. Given that Coleman was
4 still on the books, you would have said it would be --
5 had been improper for him to ask for the relief that you
6 are now suggesting that he should have asked for. At
7 least it would have been futile with Coleman still on
8 the books.

9 MR. KELLER: Yeah. Although the same would
10 have been said under existing precedent in Gonzalez v.
11 Crosby, there that the statute of limitations would have
12 run. And so the essence --

13 JUSTICE KAGAN: Isn't this substantially
14 different than Gonzalez? Wasn't it important in
15 Gonzalez that the nature -- what the nature of the error
16 was? In Gonzalez what the court said, the error is
17 commonplace to -- lawyers misjudge time limits all the
18 time. The one thing we know about this error is that
19 it's not commonplace. Even the two people who called
20 the Quijano as defense witnesses never themselves raised
21 race as a cause -- as a reason for future dangerousness.
22 Only this attorney who's been disciplined repeatedly for
23 his malfeasance in representing clients, who one
24 newspaper said if you want to ensure a death penalty,
25 hire this lawyer. In that situation, isn't this that

1 rare case that Gonzalez talked about?

2 MR. KELLER: This is certainly an unusual
3 case. And the standard for extraordinary circumstances
4 in this posture, though, is not simply would an
5 appellate judge in the first instance conclude that, but
6 did the district court abuse its discretion in declining
7 to find extraordinary circumstances when Gonzalez v.
8 Crosby is on the books.

9 JUSTICE BREYER: Gonzalez v. Crosby, to my
10 understanding, involved a change in the AEDPA statute of
11 limitations; is that right?

12 MR. KELLER: Correct.

13 JUSTICE BREYER: As soon as I say those
14 words, I'm confused.

15 (Laughter.)

16 JUSTICE BREYER: I mean, there are all kinds
17 of statutes of limitations, and this is one of them that
18 the court said he didn't -- he didn't pursue the change
19 diligently, and besides, it wasn't that big a deal, and
20 not every interpretation of Federal statute setting
21 habeas requirements provides cause for reopening cases
22 long since filed, and the change was not extraordinary,
23 and it was because in part of Petitioner's lack of
24 diligence in pursuing it. There's a whole list of
25 reasons there. As I read those reasons, I don't think

1 one of them applies here. So which one applies here.

2 MR. KELLER: Well, insofar as the
3 extraordinary circumstances analysis under 60(b) has
4 been performed, I believe the Fifth Circuit was correct
5 in that it has to be an extraordinary circumstance
6 justifying relief from the judgment. And when the facts
7 of this case obviously have existed for over 20 years,
8 there's been nothing new about raising that claim in a
9 second rule 60(b) motion to reopen the judgment. And so
10 in that sense, this is even further than Gonzalez v.
11 Crosby where that was just a 60(b) motion. This is the
12 second 60(b) motion.

13 CHIEF JUSTICE ROBERTS: I understand your
14 arguments on the merits, but do they apply equally to
15 the Certificate of Appealability? I mean, you argue
16 that you should prevail on the merits. But the question
17 on a Certificate of Appealability is whether there's
18 been a substantial showing of denial of a constitutional
19 right.

20 Assuming you haven't already seen the
21 analysis on the merits and you're looking at this
22 question for the first time before going through this
23 analysis, wouldn't it seem pretty straightforward to
24 say, okay, maybe he's right, maybe he's wrong, but at
25 least he's made a substantial showing. Let's give him a

1 Certificate of Appealability, and then we'll go through
2 the normal procedures on the merits?

3 MR. KELLER: It's clearly a harder standard
4 for us under the Certificate of Appealability standard,
5 but even then you'd be asking would reasonable jurists
6 debate whether the district court abused its discretion
7 in declining to find extraordinary circumstances.

8 CHIEF JUSTICE ROBERTS: Well, that gets
9 tougher and tougher. I mean, you're talking about
10 reasonable jurists debate. Okay. That's -- that's a
11 very low threshold. But when you say reasonable jurists
12 debate, whether there's been an abuse of discretion, I
13 mean, abuse of discretion gives a broad range to the
14 district court. And now you're asking, well, is there a
15 reasonable person out there who could debate that you
16 ought to have deferred to that exercise of discretion?
17 It seems to me, yes, it's a different standard, but it's
18 quite a different standard.

19 And the broader question here is whether the
20 Fifth Circuit applies the wrong standard on a
21 Certificate of Appealability, and it seems to me that if
22 you're going to say, particularly when you are reviewing
23 an abuse of discretion standard, that you're going to be
24 able to look at and say, no, no, there's nothing
25 substantial here.

1 MR. KELLER: And I think this would be a
2 difficult case to infer anything widespread from the
3 Fifth Circuit's practice. Just to put some context into
4 the substantial practice that was allowed here, the
5 Petitioner filed a 70-page opening brief. The State
6 filed a 37-page response brief, and Petitioner filed and
7 moved to file a 35-page reply brief. And so this was
8 also the third time that the Fifth Circuit had seen this
9 case.

10 CHIEF JUSTICE ROBERTS: You know, I guess my
11 question kind of cuts the other way. I'm saying they
12 don't -- yes, and you make the point, there was a
13 substantial amount of process. There was a long
14 consideration. There was a lot of briefing. I would
15 have thought the purpose of a Certificate of
16 Appealability would be to make the decision to move
17 forward without all that elaborate process?

18 MR. KELLER: Well, and the Fifth Circuit on
19 occasion hears oral argument in considering whether to
20 grant a COA in the capital posture insofar as the court
21 would provide or believe that that is not the type of
22 process that should be afforded at the COA stage, in
23 accordance with AEDPA --

24 JUSTICE SOTOMAYOR: Oral argument -- oral
25 argument on whether to grant the COA?

1 MR. KELLER: Yes. The Fifth Circuit on
2 occasion -- this is page 50 and 51 of our Respondent's
3 brief -- will hear oral argument --

4 JUSTICE KAGAN: Mr. Keller, you know, some
5 of the statistics that Petitioner have pointed us to --
6 in capital cases, a COA is denied in 60 percent of Fifth
7 Circuit cases as compared to 6 percent of Eleventh
8 Circuit cases, two roughly similar circuits where COA's
9 are denied in capital cases ten times more in the Fifth
10 Circuit. I mean, it does suggest one of these two
11 circuits is doing something wrong.

12 MR. KELLER: And the court has said that the
13 COA should serve a gatekeeping function. The court also
14 noted that death is different. And at the same time,
15 the Fifth Circuit is provided substantial process. Now,
16 insofar, though, as this Court were to -- if it were
17 going to conclude in this case that a COA should have
18 issued, it -- any such decision, I think, would be
19 limited to the unique facts of this case. And I don't
20 think there's anything that could be drawn by the Fifth
21 Circuit's wider practice in denying or granting COAs,
22 particularly in the capital posture when substantial
23 process is being afforded. This is not a situation
24 where the Fifth Circuit is simply ignoring these cases
25 and ignoring these claims. Quite the opposite.

1 CHIEF JUSTICE ROBERTS: So is your
2 suggestion that they deny more because they've taken up
3 more search and look at the merits than the other
4 circuits?

5 MR. KELLER: I think it -- insofar as the
6 statistics could be shown that there is, in fact, a
7 different denial and grant rate, I think the level of
8 process that the Fifth Circuit is receiving and -- and
9 the quantum of argument may be going to those
10 statistics, because the Fifth Circuit is not simply
11 ignoring these claims. And even here --

12 JUSTICE KAGAN: But this is the whole point,
13 really. They are not supposed to be doing what you do
14 when you decide an appeal. And they -- and they
15 actually don't have jurisdiction to decide the appeal.
16 I mean, they are supposed to be performing a gatekeeping
17 function, not deciding the merits of the case.

18 MR. KELLER: And I don't think what the
19 Fifth Circuit did here is decide the merits. It
20 correctly articulated the COA standard, and it examined
21 the 11 facts that Petitioner alleged as a basis for
22 ruling on the 60(b) motion. Now, five of those were
23 essentially the underlying and effective assistance
24 claim, and if the Fifth Circuit had --

25 JUSTICE SOTOMAYOR: It doesn't say anything

1 to the Fifth Circuit that three State court judges, two
2 of their colleagues on the Fifth Circuit, two justices
3 of this Court, have said or found Mr. Buck's case
4 debatable, because that's the standard. It's debatable.
5 They don't pause and say, you know, people have some
6 basis for an argument here? This is not frivolous.
7 This is a serious question.

8 MR. KELLER: And the Fifth Circuit took
9 these arguments seriously. And this is our response --

10 JUSTICE SOTOMAYOR: That's not the issue.
11 They are supposed to decide whether to grant COA or not
12 on whether the questions are serious or not, debatable,
13 not decide the merits. I know it can appear a fine line
14 in some situations, but how do you justify saying that
15 this is not debatable?

16 MR. KELLER: Here the issue would be could
17 reasonable jurists debate whether the district court
18 abused its discretion in finding extraordinary
19 circumstances?

20 And so while the reasonable jurist standard
21 is lower, that's balanced, though, against the more
22 deferential abuse of discretion standard and the
23 heightened extraordinary circumstances standard that
24 this Court has noted will rarely be met in the habeas
25 context.

1 In our brief we present a few examples of
2 courts finding extraordinary circumstances. That would
3 be when counsel wholly abandons a Petitioner, or a
4 prison guard actively thwarts a Petitioner filing a
5 habeas petition.

6 Now, we don't mean to suggest those are the
7 only instances in which that can give rise to --

8 JUSTICE GINSBURG: There -- there were
9 extraordinary circumstances in the other cases? In the
10 other five cases?

11 MR. KELLER: In the other five cases in
12 which the State confessed error?

13 JUSTICE GINSBURG: Yes.

14 MR. KELLER: Well, there we admit that since
15 the prosecution was the one that was eliciting the
16 race-based testimony, that that would go to a -- a due
17 process and equal protection violation, and that would
18 be an extraordinary circumstance --

19 JUSTICE KAGAN: But if you said that that's
20 because those -- that's -- it's more prejudicial when
21 the prosecution introduces this? Is that what you said
22 --

23 MR. KELLER: Yes.

24 JUSTICE KAGAN: -- to Justice Ginsburg?
25 That -- that's your basic theory?

1 MR. KELLER: The State was using it as an
2 aggravator.

3 JUSTICE KAGAN: Yeah. But -- and -- and
4 that makes it more prejudicial. That's your basic
5 theory?

6 MR. KELLER: Both points. The State --

7 JUSTICE KAGAN: Because I don't -- I guess
8 if there's both points, tell me what the other point is
9 because I guess I just don't understand that point. But
10 it seems more prejudicial when the defense attorney uses
11 it.

12 I mean, prosecution, you have a jury sitting
13 there, and it realizes that the prosecutor has an
14 interest in convicting a person and in getting a -- a
15 sentence that the prosecution wants, so everything is
16 discounted a little bit. But when your own -- when the
17 defendant's own lawyer introduces this, the jury is
18 going to say, well, it must be true. Even the
19 defendant's lawyer thinks that this is true. So, you
20 know, who a.m. I to -- to argue with that? It seems
21 wildly more prejudicial to me when the defense attorney
22 introduces it.

23 MR. KELLER: Except it's not the case here
24 that Quijano was only testifying about race. Quijano
25 said that it would be unlikely the Petitioner would be a

1 future danger. And so Quijano's ultimate conclusion, in
2 multiple other aspects of his testimony, was favorable
3 to Petitioner, as Petitioner conceded. And so in that
4 circumstance, the prejudice would not be nearly as great
5 as when the State is injecting race into a proceeding.

6 JUSTICE ALITO: I didn't think that your
7 primary argument had to do with the -- the relative
8 prejudice of having it done by the prosecutor and the
9 defense attorney. I thought your argument was that the
10 State of Texas feels a certain -- feels a special
11 responsibility when one of its employees engages in this
12 misconduct. And when the -- when the evidence is
13 introduced by the defendant's attorney, it's an
14 ineffective assistance-of-counsel question, and it has
15 to be adjudicated under the Strickland test.

16 MR. KELLER: That's absolutely correct. And
17 then when you look at the aggravating evidence of
18 executing a mother in front of her children and laughing
19 about it, and saying that the mother, quote, "got what
20 she deserved," unquote, and when we put in evidence from
21 ex-girlfriend -- this is a JA127A -- of repeatedly
22 beating her and threatening her with a gun, all of those
23 go to whether there would in fact be prejudice under the
24 Sixth Amendment, ineffective --

25 JUSTICE KAGAN: Yes. And the legal question

1 here, right, is whether this ineffective assistance of
2 counsel claim, which has never been heard by any court,
3 is a strong one. And a strong one including that the
4 ineffective assistance here is likely to be prejudicial,
5 which it seems as though it's -- it's far more likely to
6 be prejudicial when the defense counsel does it.

7 MR. KELLER: Justice Kagan, when the State
8 is the one injecting race into a proceeding, that's
9 using it as an aggravator. And if the Court will --

10 JUSTICE KAGAN: People expect the State to
11 use whatever aggravators it has at hand. Now, people
12 don't expect the State to do something as improper as
13 this, but the people who understand that not everything
14 that the prosecution says about a defendant, you know,
15 that people -- the jurors should -- should think about
16 those claims seriously because the prosecution has
17 interests of its own. But the defense counsel's
18 interests are supposed to be with the defendant.

19 I'm just repeating myself. If the defense
20 counsel does it, I mean, you know, who is the jury to
21 complain?

22 MR. KELLER: Well, this Court, I don't
23 believe, has ever recognized a situation in which a
24 defense counsel's act could give rise to structural
25 error or per se prejudice. And any such rule, I

1 believe, would invite gamesmanship. Of course the
2 prejudice analysis can still be done, but to say whether
3 it would be per se prejudicial, I think it would have to
4 be balanced against the aggravating evidence. And in
5 the context of Quijano testifying helpfully to
6 Petitioner, that there would be an unlikely event of it
7 being a future danger.

8 CHIEF JUSTICE ROBERTS: What is the
9 relationship between the ruling on prejudice with
10 respect to ineffective assistance and the 60(b)
11 analysis? I mean, do you agree that if we disagree with
12 your submission on prejudice under Strickland, that your
13 60(b) analysis kind of falls apart?

14 MR. KELLER: I --

15 CHIEF JUSTICE ROBERTS: Clearly the
16 underlying claim on the merits would be stronger, and --
17 and it would be a lot more extraordinary under 60(b).

18 MR. KELLER: It is a factor that could be
19 considered in doing the extraordinary circumstances
20 analysis, because if there were extraordinary
21 circumstances that were going to justify, really, from
22 the judgment, that would be a factor in the totality of
23 the circumstances the Court would be -- it could
24 consider in doing that analysis.

25 If you have no further questions, we'd ask

1 the Court to affirm the judgment of the Fifth Circuit.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Ms. Swarns, you have four minutes remaining.

4 REBUTTAL ARGUMENT OF CHRISTINA A. SWARNS

5 ON BEHALF OF THE PETITIONER

6 MS. SWARNS: This Court has long recognized
7 that the integrity of the courts requires unceasing
8 events to eradicate racial prejudice from our criminal
9 justice system. That commitment is as urgent today as
10 at any time in our nation's history.

11 Duane Buck's case requires meaningful
12 Federal review of his claim that his trial counsel
13 knowingly introduced an expert opinion that he was more
14 likely to commit criminal acts of violence in the
15 future, a Certificate of Appealability should certainly
16 issue.

17 With respect to -- to Texas's arguments, I
18 want to begin by making clear that, first of all, this
19 Court in Georgia v. McCollum did make clear, as I think
20 Justice Sotomayor noted, that the equal protection
21 concerns that are implicated by the introduction of race
22 into the criminal justice system absolutely are
23 triggered by defense counsel's conduct. And certainly
24 that was a situation where defense counsel exercised
25 preemptory challenges based on race.

1 And in that circumstance, that was actually
2 an exercise of peremptory challenges intended to benefit
3 the client, right? They were trying to strategically
4 gain advantage by using a race-based peremptory
5 challenges.

6 Here, we have trial counsel making an
7 inexplicable decision to introduce -- a knowing,
8 inexplicable decision to introduce race. This is
9 certainly worse and more aggravating for Mr. Buck.

10 I would also like to just be clear that the
11 prosecution's reliance on Dr. Quijano's testimony here
12 was real. This wasn't a circumstance where the
13 prosecutor was required to follow up on Dr. Quijano's
14 opinion and -- and reiterate it on cross-examination,
15 and then go further and argue in closing that the jury
16 should rely on Dr. Quijano to find Mr. Buck likely to
17 commit criminal acts of violence, and further argue that
18 the jury should disregard the aspects of Dr. Quijano's
19 opinion that conflicted with a finding of future
20 dangerousness.

21 When Texas did its -- its review of -- of
22 death row after it conceded error in Saldano, it looked
23 through all of the cases on death row to see what else
24 was contaminated by Dr. Quijano's racist criminal
25 violence opinion. And one of the other cases it looked

1 at and ruled out was the Anthony Graves case, which
2 demonstrates the options available to this prosecutor
3 under these circumstances.

4 In the Anthony Graves case, Dr. Quijano was
5 called as a defense witness, just like he was here. In
6 the Anthony Graves case, the defense elicited
7 Dr. Quijano's race as criminal violence opinion on
8 direct examination, just as here. But the difference is
9 in the Graves case, the prosecutor did not reiterate it
10 on direct examination, and -- and then in closing argued
11 that the jury should disregard Dr. Quijano's opinion.

12 The prosecutor here absolutely capitalized
13 on trial counsel's error. There is just no question
14 about that. They made a choice that, you know, they
15 could have gone the Graves route, but this prosecutor
16 chose to go through the door that was opened by trial
17 counsel and rely on Dr. Quijano's race as criminal
18 violence opinion.

19 Counsel for Texas also notes that the last
20 note that the jury sent out was a request to review the
21 crime scene video, which is absolutely true, but it
22 means that the last two notes that this jury looked
23 at -- the two -- two things that they asked for, right,
24 was the expert's report. So we now have the race, and
25 then we have the crime.

1 This is exactly the circumstance that this
2 Court addressed in Turner. Right? You have the facts
3 of the crime that trigger this racialized fear of
4 violence and raised the real risk of an arbitrary death
5 sentencing decision, and then you have the report which
6 compounds that risk because it gives a defense expert
7 scientific imprimatur to that pernicious group-based
8 stereotype. So that is further evidence of prejudice to
9 Mr. Buck.

10 Last, I would just be clear that when
11 Mr. Buck litigated his first 60(b) motion, Coleman,
12 as -- as Texas has acknowledged, stood as an unqualified
13 bar. There was no opportunity, before Martinez was
14 announced, for him to argue.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 The case is submitted.

18 (Whereupon, at 12:02 p.m., the case in the
19 above-entitled matter was submitted.)

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21

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