No. _____

In the Supreme Court of the United States

DUANE EDWARD BUCK,

Petitioner,

v.

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

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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

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CAPITAL CASE

QUESTIONS PRESENTED

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

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

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

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

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

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

PARTIES TO THE PROCEEDINGS BELOW

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

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

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

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

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

OPINIONS BELOW

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

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

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that:

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

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

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

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

(c)

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

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

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

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

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

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

STATEMENT OF THE CASE

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

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

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

> After a thorough audit of cases in our office, we have identified eight more cases in which testimony was offered by Dr. Quijano that race should be a factor for the jury to consider in making its determination about the sentence in a capital murder trial. ***Six of these eight cases are similar to that of Victor Hugo Saldano***.[3]

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

[2] *Id.* at 8.

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

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

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

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

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

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

[7] *Id.*

[8] *Id.*

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

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

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

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

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

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[10] James Kimberly, *supra*.

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

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

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

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

[12] *Id*.

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

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

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

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

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

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

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

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

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

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

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

Id. at 20 (emphases supplied).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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substantial showing of the denial of a constitutional right. "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 US 473,484 (2000). Hence, the Fifth Circuit merely confused Mr. Buck's attempt to make this showing in connection with the denial of his motion to reopen the judgment as a request for a COA on the underlying claim.

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

REASONS FOR GRANTING THE WRIT

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

The Fifth Circuit held that Mr. Buck

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

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

App. 1. at 10 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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