IN THE 208TH JUDICIAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

AND

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
IN AUSTIN, TEXAS

EX PARTE Duane Edward Buck	)	CAUSE NO. _____
APPLICANT	)	

APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS

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INTRODUCTION

Duane Buck's death sentence is a product of broken promises. The promise of fair and colorblind justice was broken when the State relied on racial bias and stereotype in its pursuit of a death sentence for Mr. Buck and when the jury's decision to impose a death sentence was compromised by unfair consideration of race. The promise of effective assistance of counsel was broken when Mr. Buck's trial counsel unreasonably failed to conduct an appropriate sentencing investigation and failed to uncover and present the powerful, available mitigating evidence which could have supported a life verdict. And, an execution in Mr. Buck's case can only take place if the promises of due process and equal protection are broken by Texas' failure to honor its commitment to provide Mr. Buck a new, fair sentencing

proceeding. Under these circumstances, Mr. Buck's death sentence is plainly unconstitutional and he is entitled to a new capital sentencing.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Mr. Buck's Trial, Direct Appeal, and Initial State Habeas Proceedings.

In 1996, Harris County District Attorney ("DA") Johnny Holmes ("Holmes") charged Duane Edward Buck, an African-American man, with capital murder in connection with the shooting deaths of Debra Gardner and Kenneth Butler. During Mr. Buck's capital sentencing hearing, Dr. Walter Quijano ("Dr. Quijano"), a psychologist, was called as a witness by the defense. He testified that he believed Mr. Buck would not be dangerous in the future because, among other things, Mr. Buck had no violent criminal record and did not display violent tendencies. On cross-examination, however, the State elicited testimony from Dr. Quijano that a person is more likely to commit acts of violence if he is African American:

> Q: You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that *the race factor, black increases the future dangerousness for various complicated reasons; is that correct?*
>
> A: Yes.

Ex. 1, R.R. Vol. 28 at 160[1] (emphasis added). The State, in its closing argument, then urged the jury to rely on Dr. Quijano's testimony, characterizing such testimony as encompassing an opinion that Mr. Buck would be dangerous in the

[1] Exhibits to this Application for Post-Conviction Writ of Habeas Corpus are cited as "Ex. _." Excerpts from the Reporter's Record are cited as "R.R. Vol. __ : __."

future. *Id.* at 260. The jury found that Mr. Buck would be a future danger and he was sentenced to death.

On direct appeal, the Texas Court of Criminal Appeals ("CCA") affirmed Mr. Buck's death sentence. Ex. 2, *Buck v. State*, No. 72,810 (Tex. Crim. App. Apr. 28, 1999). The State's use of race as a factor establishing Mr. Buck's future dangerousness was not raised as a ground of error.[2]

On March 15, 1997, Mr. Buck filed a state habeas application alleging constitutional violations relating to the trial judge's refusal to admit evidence regarding parole. Once again, the State's use of race as a factor to assess Mr. Buck's future dangerousness was not raised as a claim for relief.

B. The *Saldaño* Cases.

Separately, in the criminal case of Mr. Victor Hugo Saldaño, the State called Dr. 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 relevant to a determination of future dangerousness was the defendant's race or ethnicity. Thereafter, Mr. Saldaño was sentenced to death. After the CCA affirmed the constitutionality of Mr. Saldaño's death sentence, Mr. Saldaño filed a petition for writ of *certiorari* in the United States Supreme Court, asking the Court to decide "[w]hether a defendant's

[2] No petition for writ of *certiorari* was filed in the United States Supreme Court.

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." *Saldaño v. State*, 70 S.W.3d 873, 875 (Tex. Crim. App. 2002) (quoting *Saldaño v. State,* No. 99–8119 (U.S.), Pet. for Cert. at 3).

The Texas Attorney General, on behalf of the State, filed a response to the petition for writ of *certiorari*, admitting constitutional error. Quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979), the Attorney General admitted that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." Ex. 3, *Saldaño v. State*, No. 99-8119 (U.S.), Resp. to Pet. for Cert. at 7 (internal quotation marks omitted). He also conceded, on behalf of the State, that the "infusion of race as a factor for the jury to weigh in making its determination violated [Mr. Saldaño's] constitutional right to be sentenced without regard to the color of his skin." *Id.* at 8.

On June 5, 2000, the United States Supreme Court granted *certiorari*, vacated the CCA's decision affirming Mr. Saldaño's capital murder judgment, and remanded for further consideration in light of a "confession of [constitutional] error made by the [Attorney] General of Texas." *Saldaño v. Texas*, 530 U.S. 1212 (2000).

On that same day, then-Texas Attorney General John Cornyn released a statement in which he announced:

> [The Office of the Attorney General has] been conducting an audit over the past couple of months. We've identified eight other cases that may be similar [to Mr. Saldaño's]. We will release our findings by the end of the week. We will continue to vigilantly monitor all death penalty cases. Our goal is to assure the people of Texas that our criminal justice system is fairly administered.

Ex. 4, Press Release, Office of the Texas Attorney General, U.S. Supreme Court Grants State's Motion in Capital Case (June 5, 2000) (internal quotation marks omitted).

Days later, on June 9, 2000, the Attorney General issued another press release in which he identified six additional cases, then in post-conviction proceedings, in which the State similarly relied on the unconstitutional racially-biased testimony by Dr. Quijano:

> 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***. We have sent letters to opposing counsel and to the local prosecutors involved advising them of our findings.[3]

Ex. 5, Press Release, Office of the Texas Attorney General, Statement from Attorney General John Cornyn Regarding Death Penalty Cases (June 9, 2000) (emphasis added) (internal quotation marks omitted). Mr. Buck's case was one of the six cases identified as similar to Mr. Saldaño's.

The Attorney General then announced that, for those cases determined by its audit to be similar to *Saldaño*, Texas "will not object if they seek to overturn the death sentences based on Mr. Quijano's testimony." Ex. 6, Jim Yardley, *Racial Bias*

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[3]The Attorney General concluded that two of the eight cases it had previously identified as being potentially comparable to *Saldaño*, were ultimately unlike Mr. Saldaño's case. Those were the cases of Michael Blair and Anthony Graves. The Attorney General distinguished *Blair* because Mr. Blair was not a member of a racial group that Dr. Quijano testified increased the risk of future dangerousness. In *Graves*, the State did not introduce race as a factor.

Found in Six More Capital Cases, N.Y. Times, June 11, 2000, at 1. "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 . . . . [T]he United States Supreme Court agreed. The people of Texas want and deserve a system that affords the same fairness to everyone." Ex. 5, June 9, 2000 Tex. Atty. Gen. Press Release (internal quotation marks omitted). "Our goal is to assure the people of Texas that our criminal justice system is fairly administered." Ex. 7, Steve Lash, *Texas Death Case Set Aside: U.S. Supreme Court Sees Possible Racial Bias*, Hous. Chron., June 6, 2000, at A1 (internal quotation marks omitted). The Attorney General acknowledged that some cases might still be in state proceedings and promised, "if and when those cases reach this office they will be handled in a similar manner as the *Saldaño* case." Ex. 8, James Kimberly, *Death Penalties of 6 in Jeopardy: Attorney General Gives Result of Probe into Race Testimony*, Hous. Chron., June 10, 2000, at 2. Mr. Buck's case was the only case still in state proceedings at the time of the Attorney General's June 2000 statement.[4]

The six cases in which the Attorney General's audit discovered equal protection violations were those of Gustavo Garcia, Eugene Broxton, John Alba, Michael Gonzales, Carl Blue, and Duane Buck. *Id.* at 1. In all six cases, the State relied on the impermissible and unconstitutional testimony of Dr. Quijano in asking the jury to sentence the defendant to death. In three of the cases (*Broxton*, *Gonzales*,

[4] In Texas, the district attorney of the county of conviction typically represents the State during state post-conviction proceedings.

and *Garcia*), the prosecution called Dr. Quijano as a witness; in the three others (*Alba*, *Blue*, and *Buck*), the defense called Dr. Quijano, but the unconstitutional testimony was elicited by the State on cross-examination. Ex. 9, *Blue v. Johnson*, No. 4:99-cv-00350, Mem. Op. & Order at 15-16 (S.D. Tex. Sep. 29, 2000).

Carl Blue's habeas corpus petition was already pending in the United States District Court for the Southern District of Texas when the Attorney General identified his case as containing constitutional error. Mr. Blue had not raised an equal protection or due process claim in state or federal court. Despite this default, and despite the fact that Dr. Quijano was originally called as a defense witness at Mr. Blue's trial, Texas permitted Mr. Blue to file a "supplemental" habeas petition raising such claims; waived the exhaustion requirement and all procedural defenses (including the statute of limitations); and conceded that Dr. Quijano's testimony violated equal protection and required a new sentencing hearing. *Id.* at 16-17. On September 29, 2000, District Court Judge Kenneth Hoyt granted Mr. 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." *Id.* at 17.

John Alba's federal habeas petition had already been denied by the federal district court at the time the Attorney General conceded that his death sentence had been obtained in violation of the Equal Protection Clause. Again, notwithstanding the fact that Dr. Quijano was called as a defense witness in Mr. Alba's capital trial, Texas, through the Attorney General, confessed error in that

case to the United States Court of Appeals for the Fifth Circuit. On August 21, 2000, the Fifth Circuit vacated the district court's denial and remanded the case back to the district court with instructions to grant the petition. On September 25, 2000, District Court Judge Paul Brown granted resentencing Ex. 10, *Alba v. Johnson*, No. 4:98-cv-221, Order at 1 (E.D. Tex. Sept. 25, 2000) (citing *Alba v. Johnson*, No. 00-40194, Op. & Order (5th Cir. Aug. 24, 2000)).

In the cases of Eugene Broxton, Michael Gonzales, and Gustavo Garcia, Dr. Quijano was called by the State. All three cases were pending in federal district court when the Attorney General confessed error and acknowledged their entitlement to new sentencing hearings. At the time, none of them had raised a claim alleging equal protection or due process violations concerning the State's use of race as a factor in sentencing. As in *Blue*, Texas permitted Mr. Broxton, Mr. Gonzales, and Mr. Garcia to file "supplemental" habeas corpus petitions, waived all procedural defenses, and conceded error.

District Court Judge Thad Heartfield granted Mr. Garcia a new hearing on September 7, 2000, in an order that cited the Attorney General's concession. Ex. 11, *Garcia v. Johnson*, No. 1:99-cv-00134, Order at 1 (E.D. Tex. Sep. 6, 2000). Mr. Broxton, whose case originated from Harris County, like Mr. Buck's, was granted a new sentencing hearing on March 28, 2001, when District Court Judge Vanessa Gilmore found the introduction of race by the government "constitutionally impermissible and totally irrelevant to Texas' special issues." Ex. 12, *Broxton v. Johnson*, No. H-00-CV-1034, Order at 10-11 (S.D. Tex. March 28, 2001). Mr.

Gonzales was granted a new sentencing hearing on December 19, 2002 by District Court Judge Royal Ferguson, based on Texas's concession and the "inexcusable nature of the testimony." Ex. 13, *Gonzales v. Cockrell*, No. MO-99-CA-072, Order at 44-50 (W.D. Tex. Dec. 19, 2002).

C. Mr. Buck's Post-*Saldaño* State and Federal Habeas Proceedings.

In 2002, while Mr. Buck's state habeas application was pending, counsel for Mr. Buck filed a subsequent state post-conviction application, raising equal protection and due process claims challenging the State's reliance on race during his capital sentencing proceeding. On October 15, 2003, the Court of Criminal Appeals denied Mr. Buck's initial habeas application and dismissed his subsequent post-conviction application. Ex. 14, *Ex parte Buck*, No. WR-57,004-02, Order (Tex. Crim. App. Oct. 15, 2003).

Relying on the Attorney General's promise that Mr. Buck's case would be "handled in a similar manner as the *Saldaño* case," Ex. 8, James Kimberly, *supra* at A1, on October 14, 2004, Mr. Buck, represented by different counsel, filed his federal habeas corpus petition raising his equal protection and due process claims. Ex. 15, *Buck v. Thaler*, No. 4:04-cv-03965, Pet. for Writ of Habeas Corpus (S.D. Tex. Oct. 14, 2004). Unlike the other five cases that the Attorney General identified as similar to *Saldaño*, however, Texas did not keep its promise to waive the procedural defenses available to it. Instead, Texas argued for the first time that Mr. Buck's circumstances "present[ed] a strikingly different scenario than that presented in *Saldano* — Buck himself, not the State offered Dr. Quijano's testimony into

evidence." Ex. 16, *Buck v. Thaler*, No. 4:04-cv-03965, Respondent's Answer at 17 (S.D. Tex. Sept. 6, 2005). Based on this distinction, Texas asserted that the Court of Criminal Appeals' dismissal of Mr. Buck's equal protection and due process claims caused a procedural default and that federal habeas relief should be denied. *Id*

Texas's position before the federal court was false and misleading in several respects:

- The Attorney General had already explicitly identified Mr. Buck's case as *similar* to Saldaño's and warranting the same relief.
- Despite the Attorney General's insinuation to the contrary, two of the other five cases identified by the Attorney General as warranting relief were cases in which the defense had called Dr. Quijano to testify and Texas *had* conceded error.
- The Attorney General waived all available procedural defenses in each of the other five cases.
- The Attorney General did not disclose to the federal courts that it had explicitly warranted to Mr. Buck that it would concede error and waive any available procedural defenses once Mr. Buck raised the equal protection and due process claims in federal court.

The federal district court denied relief based on Texas's assertion of procedural default, finding the claim barred because the state court had dismissed it on an independent and adequate state ground. Ex. 17, *Buck v. Thaler*, No. 4:04-cv-03965, Mem. & Order at 24-25 (S.D. Tex. July 24, 2006).

Of all the cases the Attorney General identified as irretrievably tainted by unconstitutional racial discrimination, Mr. Buck's was the only case in which the

conceded due process and equal protection violations were left unremedied, despite Texas's explicit promise to both waive all procedural defenses and concede error.[5]

[5] In 2001, the Texas Legislature amended the Texas Code of Criminal Procedure to expressly forbid the State from introducing evidence that a defendant's race makes it more likely that he will constitute a continuing threat to society. *See* Acts 2001, 77th Leg., ch. 585 (S.B. 133) (amending Tex. Code Crim. Proc. art. 37.071 to provide that "…evidence may not be offered by the state to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct."). Similarly, the Federal Death Penalty Act (FDPA) requires that jurors in capital cases be expressly instructed by the court not to consider such factors as race during their deliberations, and that they each sign a certificate following their jury service averring that they did not actually take into account race or other impermissible circumstances in assessing the defendant's punishment. 21 U.S.C. § 848 (o)(1). When this statute was challenged in the Fifth Circuit as an unconstitutional limitation on the right of capital defendants to present mitigating evidence in opposition to the death penalty, the Court of Appeals wrote:

> "[T]he FDPA can pass constitutional muster only if it is interpreted absolutely to prohibit racial considerations in sentencing. Because we are obligated to interpret a statute in such a way as to preserve, if possible, its constitutionality, we reason that race cannot be considered as either a mitigating or aggravating factor under the FDPA. Although the use of race in government decision-making is, as a general matter, odious to a free people whose institutions are founded upon the doctrine of equality, the use of race in sentencing determinations is particularly invidious. Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. And, in capital sentencing, the use of race becomes more offensive still: Considering the race of the defendant or victim in deciding if the death penalty should be imposed is completely at odds with the concern that an individual be evaluated as a unique human being."

United States v. Webster, 162 F.3d 308, 355-56 (5th Cir. 1998) (citations and internal quotations marks omitted). *Accord United States v. Plaza*, 179 F. Supp. 2d 444, 459-60 (E.D. Pa. 2001); *United States v. Cooper*, 91 F. Supp. 2d 90, 101-102 (D.D.C. 2000).

ARGUMENT

I. THE ATTORNEY GENERAL'S REFUSAL TO CONCEDE ERROR WAS A VIOLATION OF THE EIGHTH AMENDMENT, PROCEDURAL AND SUBSTANTIVE DUE PROCESS, AND EQUAL PROTECTION, GUARANTEED BY THE UNITED STATES CONSTITUTION.

Mr. Buck, as a living, death-sentenced prisoner, retains a constitutionally-protected interest in his life until he is executed. As a result, the State of Texas's actions that implicate his life interest must comply with due process and cannot be arbitrary and capricious.

As detailed above, three years after Mr. Buck's conviction, Texas made clear and unequivocal promises to Mr. Buck and five other death-sentenced individuals regarding how it would respond to their post-conviction claims for relief based on Texas's improper reliance on race during their capital trials. Specifically, Texas promised that it would concede error in their federal court challenges to the State's reliance on race and assured these individuals that it would not assert procedural defenses to those claims. Texas further guaranteed that it would monitor the cases of these six individuals and handle their cases similarly if and when they reached federal court.

In each of the five cases *other than Mr. Buck's*, Texas kept its promises and, as a result, each individual received a new sentencing hearing free from the State's unconstitutional reliance on race. Texas has, however, acted arbitrarily and capriciously towards Mr. Buck. As explained above, when Mr. Buck's case reached federal court in 2004 — last among all the identified cases to do so — and he

asserted his right to a fair sentencing, free of governmental reliance on race, Texas reneged on its promise, misled the federal courts, asserted procedural defenses to the claim, and refused to concede error as it had done in every other case it had explicitly identified as warranting relief. The totality of these circumstances demonstrates that Texas's conduct was arbitrary and capricious and deprived Mr. Buck of due process and equal protection.

A. Texas Has Engaged in Arbitrary and Capricious Conduct That Deprived Mr. Buck of His Protected Interest in His Life in Violation of Procedural Due Process and Equal Protection.

Mr. Buck has a protected interest in his life until he is executed. As such, Texas may not act to deprive him of life in a manner inconsistent with the process due him. Texas's arbitrary, capricious, and disparate treatment of Mr. Buck, described above, violates due process and equal protection.

"[T]he touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (quotations and internal citations omitted). Procedural due process applies when government action deprives a person of a protected interest in life, liberty, or property. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979). When a denial of procedural due process is alleged, a court must inquire into the nature of the individual's claimed interest and, if protected, must ascertain the process due. *Id.*

> Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. 'Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (citations and internal quotation marks omitted).

Although a valid criminal judgment ordinarily extinguishes the protected liberty interests of the person confined pursuant to it, *Greenholtz*, 442 U.S. at 7, there are post-conviction circumstances in which a defendant retains a liberty or, in a capital case, life interest sufficient to support a right to due process. *See Morrissey*, 408 U.S. at 482, 484-89 (the liberty occasioned by parole "is valuable" and that due process requires the state to afford the parolee a hearing before its termination). *Cf. Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981) (non-death-sentenced prisoner's "unilateral hope" of obtaining clemency relief is not a protected liberty interest). Mr. Buck falls into this category.

In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the Supreme Court addressed the question of whether a capitally-sentenced inmate has

a protected life or liberty interest in clemency proceedings and, if so, what process is constitutionally necessary to protect that interest. While the Supreme Court, in *Dumschat,* 452 U.S. at 467, concluded that a prisoner in custody had no liberty interest at stake in clemency proceedings, five justices in *Woodard* recognized that a person condemned to death retains a protected interest in his life until he is physically executed. *Woodard*, 523 U.S. at 288 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 291-92 (Stevens, J., dissenting). Accordingly, a majority of Justices have agreed that some minimal procedural safeguards apply to capital clemency proceedings. *Id.* at 289 (O'Connor, J., concurring) ("When a person has been fairly convicted and sentenced, his liberty interest, in being free from such confinement, has been extinguished. But it is incorrect, as Justice Stevens' dissent notes, to say that a prisoner has been deprived of all interest in his life before his execution."). *Woodard* thus stands for the principle that, until the moment of execution, a death-sentenced prisoner has a constitutionally-protected interest in his life to which the State must pay appropriate heed whenever its acts impact that interest.

Accordingly, under *Woodard*, Mr. Buck, as a living, death-sentenced prisoner, retains a constitutionally-protected interest in his life and the courts must determine whether the process due him has been denied. Justice O'Connor's opinion in *Woodard* observed that arbitrary post-conviction acts by the State that negatively implicate the prisoner's protected interest in his life can violate due process. *Id.* at 289 (state's arbitrary denial of access to clemency might warrant judicial

interference). In this case, Texas committed a series of acts that served to arbitrarily deny Mr. Buck review of his constitutional claim and a new, constitutional sentencing hearing.

Ordinarily, a habeas corpus petitioner has no reason to expect the State to waive procedural defenses available to it or to concede constitutional error. In this case, however, the statements and actions of the Attorney General gave rise to a reasonable expectation that error would be conceded. First, Texas publicly and correctly identified Mr. Buck's case, along with five other cases, as legally similar to the *Saldaño* case – where it had conceded constitutional error in the U.S. Supreme Court on the ground that the prosecution relied on the defendant's race in obtaining a death sentence. Second, Texas publicly promised Mr. Buck and five other death-sentenced individuals that it would not object if and when they sought to overturn their death sentences based on Dr. Quijano's unconstitutional testimony. Third, Texas promised that it would monitor these cases throughout the post-conviction process and treat each of them identically in federal court. Fourth, in each of the five cases besides Mr. Buck's, Texas kept its promises by waiving procedural defenses and conceding constitutional error when due process and equal protection claims related to Dr. Quijano's testimony were raised in federal court. As a result of the actions taken by the State of Texas during Mr. Buck's post-conviction proceedings, Mr. Buck had a reasonable expectation – not a mere "unilateral hope," *Dumschat*, 452 U.S. at 465 – that Texas would waive procedural defenses and concede error with regard to Dr. Quijano's testimony, and that he would receive a

new sentencing hearing in which the State would not rely on his race as a basis for obtaining a death sentence. In this way, Texas's own willful acts contributed to raising Mr. Buck's life interest.

Despite its prior promises, however, Texas failed to comply with its representations, and treated Mr. Buck starkly differently than it had promised, and different from every other case in which it had made equivalent promises. Texas's violation of its promise to handle Mr. Buck's case in a manner similar to all the cases its audit had identified as being legally similar to the *Saldaño* case was arbitrary and capricious. Texas's decision to assert procedural defenses and contest Mr. Buck's claim was not based on any information that had been unavailable to the State when it decided to promise Mr. Buck that it would waive defenses and concede error in his case once he raised due process and equal protection claims in federal court. The trial record did not change between 2000 when Texas made its promises to Mr. Buck, and 2004 when Texas willfully broke those promises.

Texas honored the promises it made in every other case it had identified as being similar to *Saldaño*. But when Mr. Buck asserted his right to be sentenced free from the State's reliance on racial prejudice, Texas reneged on its promise, misled the federal court, asserted procedural defenses to the claim, and refused to concede error as it had done in every other case it had identified as being similar to *Saldaño*. The totality of the circumstances reflect arbitrary and capricious conduct by Texas violated Mr. Buck's right to due process.

B. Texas Has Engaged in Arbitrary and Capricious Conduct Towards Mr. Buck, in Violation of Substantive Due Process.

The substantive due process guarantee was "intended to prevent government officials from abusing their power, or employing it as an instrument of oppression." *Lewis*, 523 U.S. at 846 (internal quotation marks and brackets omitted) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992)); *see also Daniels v. Williams*, 474 U.S. 327, 331 (1986) (substantive due process protects against government power arbitrarily and oppressively exercised). With respect to acts by executive officials (as distinguished from legislative acts), the substantive component of the Due Process Clause is violated when the executive action "'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *Lewis*, 523 U.S. at 847 (quoting *Collins*, 503 U.S. at 128). Conduct that shocks the conscience is that which does not "comport with traditional ideas of fair play and decency." *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957). As with procedural due process, rules of substantive due process "are not subject to mechanical application in unfamiliar territory." *Lewis*, 523 U.S. at 850. Actions that do not shock in one context may be patently egregious in another. *Id.* Finally, whether an abuse of power is condemned as conscience shocking must take account of the totality of the circumstances. *Id.*

The actions taken by Texas state officials towards Mr. Buck were arbitrary and do not comport with traditional ideas of fair play and decency. This is not a situation in which state officials merely made a decision about an individual and

then subsequently reversed it upon further review. Rather, the totality of the circumstances reflects an egregiously arbitrary course of conduct by Texas officials.

It is not merely the breaking of promises made by Texas that shocks the conscience; it is the broken promises in conjunction with wholly arbitrary and disparate treatment from the other cases in which Texas's highest legal officer made the same promises. It is also the fact that the arbitrary conduct occurred in a capital case and directly implicated an individual's constitutionally-protected life interest. *See United States v. Salerno*, 481 U.S. 739, 746 (1987) ("'substantive due process' prevents the government from engaging in conduct that … interferes with rights 'implicit in the concept of ordered liberty'") (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937)). Further, in the course of breaking its promises and falsely distinguishing Mr. Buck's case from the other *Saldaño* cases in order to assert a procedural default before the federal court, Texas failed to disclose to the court, or to Mr. Buck's federal habeas counsel, that it had previously identified Mr. Buck's case as similar to the *Saldaño* case. It failed to disclose that it had promised it would waive procedural defenses in Mr. Buck's case. It failed, most egregiously, to disclose that Texas's Attorney General had promised to treat Mr. Buck's case as it treated every other case the State had identified as being similar to *Saldaño*. The State even affirmatively proffered reasons to the federal court for distinguishing Mr. Buck's case that were patently false and misleading. *See Buck v. Thaler*, 132 S. Ct. 32, 35 (2011) (Sotomayor, J., dissenting from denial of *certiorari*) (federal habeas record "compromised by misleading remarks and omissions made by the State of

Texas"); *id.* at 37 ("the State justified its assertion of a procedural defense in the District Court based on statements and omissions that were misleading"); *id.* ("the District Court denied relief based on a record compromised by the State's misleading remarks and omissions"). All of this conduct occurred despite the fact that the Attorney General, as counsel to Texas in all of the *Saldaño* cases, was the best positioned of all involved – including the federal courts – to know the details of cases involving the unconstitutional testimony of Dr. Quijano.

Finally, the Attorney General failed, wholly arbitrarily, to *treat* Mr. Buck's case as it promised it would – in the same manner as the cases previously identified as similarly situated by the Attorney General, where the promises to each, except Mr. Buck, Texas rightly fulfilled. Mr. Buck, an individual whose case was identified by Texas as containing constitutional error, is now the only individual who has not received the fair and racial-bias free sentencing trial that he was promised by the State of Texas.

In the present context of a capital case implicating a person's constitutionally-protected life interest and the wildly disparate treatment from the other individuals previously identified by the State as being similarly situated, the totality of the circumstances reflects a violation of Mr. Buck's right to due process. The court should accordingly grant habeas corpus relief and remand the case for a new sentencing hearing free from considerations of Mr. Buck's race.

C. The Court Should Authorize Further Consideration of Mr. Buck's Eighth Amendment, Procedural and Substantive Due Process, and Equal Protection Claims Concerning Texas's Post-Conviction Conduct.

1. This Claim Satisfies Article 11.071, § 5.

Mr. Buck's claims premised on the State of Texas's post-conviction conduct satisfy the requirements of Texas Code of Criminal Procedure, Article 11.071, Sec. 5. Subsection 5(a) provides that a subsequent habeas application may not be considered or granted unless the application "contains sufficient specific facts establishing that . . . the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." The Court of Criminal Appeals has interpreted this provision to mean that (1) the factual or legal basis for an applicant's current claims must have been unavailable as to all of his previous applications; and 2) the specific facts alleged, if established, would constitute a constitutional violation that would likely require relief from either the conviction or sentence. *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007) (citing *Ex parte Brooks*, 219 S.W.3d 396, 400-01 (Tex. Crim. App. 2007) (noting that, in a subsequent application, a habeas applicant must make a *prima facie* showing of facts that establish a cognizable constitutional claim)).

First, Mr. Buck has alleged facts that, if established, would constitute constitutional violations requiring relief from his death sentence. *Campbell*, 226 S.W.3d at 421. Mr. Buck's arguments under the federal constitution, *supra*, explain

why he would be entitled to relief should the facts alleged be established at a hearing.

Second, the factual bases for Mr. Buck's claims were unavailable as to his previous applications. *See id.* Mr. Buck's constitutional claim for relief is based on events that transpired after the filing of Mr. Buck's previous application. Specifically, Mr. Buck's claims are based on actions taken by the State of Texas occurring after December 13, 2002, the date Mr. Buck's previous application was filed. In short, Mr. Buck's claims did not become ripe until 2004, when the State deprived him of his right to be free from cruel and unusual punishment, of procedural and substantive due process, and of equal protection. *See, e.g., Colburn v. State*, 966 S.W.2d 511, 513 (Tex. Crim. App. 1998) (claim challenging competency to be executed not ripe until execution is "imminent."); *Gallo v. State*, 239 S.W.3d 757, 780 (Tex. Crim. App. 2007) (claim challenging manner in which lethal injection administered not ripe for review until execution is imminent) (citing *Doyle v. State*, No. AP-74,960, 2006 WL 1235088, at *4 (Tex. Crim. App. May 10, 2006)). The factual bases for Mr. Buck's claims were accordingly unavailable when he filed his previous application. Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(1).

2. Alternatively, Article 11.071, § 5 Does Not Apply to Mr. Buck's Claims Because They Were Not Ripe When His Last Application Was Filed.

By enacting Article 11.071, Section 5, the Texas legislature intended that all death-sentenced habeas applicants get "one bite at the apple" and that all available claims be raised in an initial application. *Ex parte Torres*, 943 S.W.2d 469, 474

(Tex. Crim. App. 1997). Section 5, which prohibits the consideration of "subsequent" applications under most circumstances, therefore advances the interest of finality by limiting the number of applications a person is able to file. This principle, however, does not apply to Mr. Buck's claims concerning his post-conviction treatment by Texas, because the claims were not ripe when he filed his previous applications.

A statute should be interpreted in accordance with the plain meaning of its language unless that language is ambiguous or the plain meaning leads to absurd results that the legislature could not possibly have intended. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991); *Whitelaw v. State*, 29 S.W.3d 129, 131 (Tex. Crim. App. 2000). Section 5 was not intended by the legislature to apply to claims that were not ripe when previous applications were filed. The "one bite at the apple" for these claims can only occur *after* they are ripe. Article 11.071, Section 5 is meant to regulate the consideration of claims where extraordinary circumstances such as legal and/or factual unavailability and innocence justify a "second bite." Unless the unavailability of a legal/factual basis is construed to encompass claims that were not ripe when previous applications were filed, Section 5 leads to absurd results. In other words, whether "reasonable diligence" was exercised to locate a factual basis, Tex. Code Crim. Proc. Ann. art. 11.071, § 5(e), and whether a court could "recognize" or "reasonably formulate" a legal basis of a claim, *id.*, § 5(d), are irrelevant inquiries when, regardless of the answers to those questions, the claim was not ripe (and was thus unavailable) when a previous application was filed.

Helpfully, the Supreme Court addressed the issue of limitations on "second or successive" habeas petitions contained in the Antiterrorism and Effective Death Penalty Act (AEDPA) in the context of *Ford* claims in federal habeas corpus proceedings brought pursuant to 28 U.S.C. § 2254. In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Court decided that the habeas petition, although the second in time the petitioner had filed, did *not* constitute a "second or successive" petition within the language of 28 U.S.C. § 2244(b). *Id.* at 943-44 ("The phrase 'second or successive' is not self-defining. It takes its full meaning from our case law, including decisions predating the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 . . . . We conclude, in accord with this precedent, that Congress did not intend the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe."). This Court should adopt the reasoning of the Supreme Court regarding the interpretation of what constitutes a "subsequent" application under Section 5 and hold that a claim that was not ripe when previous applications were filed is not subject to Section 5 because it is not "subsequent" within the meaning of the statute.

II. MR. BUCK'S DEATH SENTENCE IS THE UNCONSTITUTIONAL PRODUCT OF RACIAL DISCRIMINATION IN VIOLATION OF THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION.

Duane Buck's death sentence is the unconstitutional product of pervasive racial discrimination. Mr. Buck's trial prosecutor intentionally elicited and relied on racially-discriminatory testimony at Mr. Buck's capital sentencing. These

actions were consistent with, and a product of, the practices of the Harris County District Attorney's Office, which was more likely to seek death sentences for African-American offenders like Mr. Buck than for similarly-situated white offenders; the judgments of Harris County juries, which were more likely to impose death sentences on African-American offenders like Mr. Buck than similarly-situated white offenders; the Harris County District Attorney's Office's entrenched culture and history of racial bias and discrimination; the Harris County capital punishment system that disproportionately condemned African Americans; and Harris County's significant history of racial bias and prejudice. Mr. Buck is therefore entitled to a new capital sentencing.

A. Evidence of Racial Discrimination.

1. Mr. Buck's Death Sentence Was Imposed in a Jurisdiction with a Significant History of Racial Bias and Discrimination.

Houston's African-American community has long been subjected to race-based exclusion, marginalization, and unfairness in significant aspects of civic life. The racism that corrupted Mr. Buck's capital prosecution and death sentence is a deplorable byproduct of the pervasive racial discrimination in the political, educational, and legal landscape of Harris County, Texas.

a. Racial Discrimination in Harris County Schools.

Harris County's educational system has deep roots in racial segregation and exclusion. Its higher education system has a long history of racial exclusion. For example, Rice University was "chartered in 1891 as a college for 'the instruction of the white inhabitants of the City'" and it was not until some seventy-five years later

that the "University went to court to reconstitute its charter in order to admit nonwhite students." Ex. 52, Michael A. Olivas, Brown *and the Desegregative Ideal: Location, Race, and College Attendance Policies*, 90 Cornell L. Rev. 391, 399 (Jan. 2005) (footnotes and citations omitted). Similarly, the University of Houston was "chartered a junior college that grew into a small private institution open only to whites, until the State of Texas reconstituted [it] into a public institution in 1963 and began to admit black students." *Id.* at 400. Furthermore, "[r]ather than admit blacks to [Texas] A&M [University], Texas established a rural [Historically Black College/University] in 1876, the Agricultural and Mechanical College of Texas for Colored Youth," which later became Prairie View A & M University. *Id.* at 402. In 1947 Texas finally established its first public college in Houston as the Texas State University for Negroes (TSUN).

> The school was created after a black student was rejected from the University of Texas Law School (UTLS) "solely because he [was] a Negro" and successfully challenged the state's law school admission policies. Heman Marion Sweatt's successful challenge struck down the admissions policy of the State's first public law school, but did not require the State to admit blacks to the school. Rather, the State was required to provide a "substantially equal" law school open to blacks and therefore established TSUN, an evening law school for blacks in the state capital. Its programs so lacked in quality and resources, however, that the Supreme Court eventually found that there was not "substantial equality in the educational opportunities offered white and Negro law students by the state" and ordered UTLS to admit black students.

Id. at 400-01 (alteration in original)(footnotes and citations omitted).

Harris County's public school system has also struggled with persistent racial discrimination and segregation. Even after the Supreme Court declared racial

segregation to be unconstitutional in *Brown v. Board of Education*, 347 U.S. 483 (1954), many of Harris County's public schools remained segregated. A 1983 decision described the bleak state of Houston's school integration efforts:

> The student population in twenty-two of the 226 schools in the system have been 90% or more black continuously since 1960. And there are thirty-three more schools whose student population is 90% or more black. There are, however, only two all-white schools, both elementary. Fourteen of the twenty-two predominantly black schools were rezoned or paired in 1970 and were projected to be desegregated on a bi-racial basis. That goal failed when white students did not enroll in these public schools. Many of the remaining one-race black schools were at one time integrated or projected to be integrated, but all are now one-race because of housing patterns.

Ross v. Hous. Indep. Sch. Dist., 699 F.2d 218, 226 (5th Cir. 1983).

This trend has persisted: today Houston has one of the highest rates of segregation among students in the country for African Americans. *See* Ex. 53, Rich Motoko, *Segregation Prominent in Schools, Study Finds*, N.Y. Times, Sept. 19, 2012, at A5.

b. Racial Discrimination and Harris County's Political System.

Harris County's political system has long been plagued by a legacy of racial bias and discrimination.

During the 1920s, the Ku Klux Klan successfully sponsored political candidates throughout Texas, including Harris County. In the 1922 Democratic primaries, for instance, Klan candidates carried all state-wide races in Texas. Their largest margins of victory were in Houston and other East Texas cities. *See* Ex. 54,

Ku Klux Klan Candidates Leading in Texas; Most Big Cities and Counties Carried by Them, N.Y. Times, June 24, 1922.

Consistent with this history, African Americans have faced significant exclusion from elected office in Harris County. Houston's judiciary provides a clear example of this phenomenon:

> [In 1993,] the countywide election system consistently had resulted in an all-white bench, although 20% of the county's electorate was African American and 22% Mexican American. . . . [W]hite voters, voting as a bloc, consistently defeated the judicial candidate whom African American voters favored when that candidate was also African American.

Ex. 55, Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee L. Rev. 405, 462 (Spring 2000).

c. Racial Discrimination in Harris County's Court System.

Harris County also has a long history of racial discrimination in its court system. African-American attorneys in Houston were traditionally excluded from the county bar association and, along with African-American clients, were treated unfairly by the courts because of their race.

> Although the 1940 United States Census reveals that Houston had four black attorneys, the [Houston Bar Association (HBA)] remained segregated until 1965. By 1950, 1,250 of Harris County's 2,044 lawyers were members of the HBA. However, some members of the bar were still denied access to the organization because of race. The HBA's constitutional provisions required applicants to be 'white.' A motion to strike the 'white' requirement was first introduced in 1952, and amazingly, the issue of integration was debated for the next 14 years until the 'white only' clause was finally removed in 1965!
>
> In the 1960's, racial inequality in the legal community was still prevalent. . . . [B]lack lawyers were the last to be heard at docket call. White lawyers representing black clients were the next to last to be

> heard, while white lawyers representing white clients were first on the docket.

Ex. 56, Mary Thompson, *A Long and Winding Road: An Historical Perspective on the Role of Women and Minorities in the Houston Bar Association*, 33 OCT Hous. Law. 36, 37 (1995).

The Harris County court system's prejudice against African Americans was not limited to the order in which cases were called or the exclusion of African-American lawyers from the bar association. Starting as early as 1900, Harris County court officials systematically excluded African Americans from jury service. In *Collins v. State*, 60 S.W. 42 (Tex. Crim. App. 1900), the CCA held that a defendant's motion to quash an indictment was improperly denied where the evidence showed that African Americans were intentionally and persistently excluded from Harris County juries. In that case, a Harris County jury commissioner testified that African Americans were excluded from service on grand and petit juries because "negroes or persons of African descent had never been put on juries . . . [,] in Harris County, within his recollection." *Id.* at 43. He further testified that although he knew African Americans who could read, write and owned their own homes, he intentionally selected only white men for jury service. *Id.* Another jury commissioner testified that he never considered including African Americans for service on juries. *Id.* He further stated that although he had lived in Harris County his entire life, he knew of no African American to serve on a jury. *Id.* An African-American Harris County resident testified that of the 40 percent of the African-American Harris County population qualified to vote, 25 percent could read,

write and/or owned property and were therefore qualified for jury service. *Id.* This African-American witness testified that the Harris County black population included educators, physicians, lawyers and other affluent individuals but he knew of no blacks being permitted to serve on a Harris County jury (except in a brief period during Reconstruction). *Id.*

The Court of Criminal Appeals reached a similar conclusion in *Whitney v. State*, 59 S.W. 895, 896 (Tex. Crim. App. 1900). In that case, the appeals court reversed trial court's denial of a motion to quash a Harris County indictment finding:

> [T]here was sufficient evidence to show that, in the formation of the grand jury, negroes were intentionally excluded from the grand jury which found the bill of indictment. The witnesses show a large population of negroes, and among them material competent to constitute grand juries. They state that no negroes, within their knowledge, had ever been impaneled on any grand jury in Harris county. And the commissioner who assisted in drawing the grand jury stated that, if negroes had been given him on the list from which to form a grand jury, he would not have put them on, unless he had been so instructed by the court; that he did not regard them as fit material for juries.

Id.

Evidence of racial bias and/or insensitivity by court officials has persisted through modern times. Indeed, in 2003, "Jim Crow art" was displayed in a Harris County District Court jury room. Ex. 57, Tim Fleck, *As the Jim Crow Flies: Court Art Attracts Heat But No Media Light*, Hous. Press, July 10, 2003, at 1. The paintings, entitled "*Mississippi Afternoon* and *Working on the Levee*," depicted "blacks with caricatured physical features in happy, carefree poses." *Id.* They were

observed by an African-American lawyer and his African-American client when in the jury room for a mediated settlement in a civil lawsuit. The attorney observed that the paintings had the potential to undermine the fairness of the deliberation process: "'You ask jurors to leave all their prejudices at the courthouse door and have a clear mind, . . . [but] [w]hen they see that art on the wall, whatever discriminatory thoughts they may have creep back in and become a clear distraction." *Id.* Both the attorney and his client were "offended by the artwork" but the client asked his lawyer not to "raise the issue because [the judge whose courtroom the painting was in] was mediating the proceeding." *Id.* When journalists inquired about the paintings, the judge initially defended them by asserting that they had been placed in the jury room by an African-American member of her staff. *Id.* The judge ultimately removed the paintings, however, after declaring that they had become "a distraction to the court's business." *Id.*

Similarly, in 2012, two federal judges complained that paintings on display in Houston's federal courthouse "dredge up offensive imagery of slavery." Ex. 58, Craig Malisow, *Some Judges Want Paintings of 'Shirtless Black Men Hauling . . . Bales of Cotton' Removed from Courthouse*, Hous. Press Blogs, Feb. 9, 2012. Specifically, one U.S. District Judge objected to "a 1941 painting by Alexandre Hogue called 'The Diana Docking,' showing laborers and spectators along Buffalo Bayou . . . [including] a white fellow with a gun, a black fellow with a bundle of logs and no shirt, and a Native American fellow who is made out of wood." *Id.* The Judge noted that court employees had commented to her that "'this picture as well

as others in the series are offensive to persons who would rather not be reminded about that period in history or their part as either overseers or 'workers.'" *Id.* A second federal judge shared these concerns and had heard similar complaints voiced by court employees. *Id.* The court chose not to remove the pictures, citing the prominence of the artists. *Id.*

Today, the Harris County jails are disproportionately filled with African Americans and African Americans receive the least favorable treatment by the criminal justice system:

> [S]tatistics show that while only 18.9% of the population, African-Americans represent almost 50% of the persons detained in Harris County jails. The racial and ethnic make-up of the county is 40.8% Hispanic or Latino, 33% non-Hispanic white, and 18.9% non-Hispanic African-Americans. Yet the Harris County jail population is 49.2% African-American, 48.84% white (which includes Hispanics), and 1.24% 'other.'
>
> . . . Additionally, data show that African-Americans are less likely to be released on their own recognizance or on bail than whites or Hispanics. In 2011, a Houston-based community activist group commissioned a report about the effect of Harris County criminal justice policies on African-Americans, particularly as it related to pretrial release. That report found that African-Americans make up the highest percent of misdemeanor arrests, yet bear the lowest pretrial release rate for misdemeanor offenses. Records show that while white defendants were released on bond about 70% of the time for misdemeanor offenses and 44% for felonies, and Hispanics were released about 52% of the time for misdemeanors and 31% of the time for felonies, African Americans were released only 45% of the time for misdemeanors and 30% for felonies.

Ex. 59, Marcia Johnson & Luckett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact of Race on Detention, and Community Revival in Harris County, Texas*, 7 NW J. L. & Soc. Pol'y 42, 67-68 (2012) (footnotes

omitted) (citing, *inter alia*, Ex. 60, Janis Bane et. al., *Harris County Pre-Trial Services: Policies and Practices, Hous. Ministers Against Crime* (2011).

2. Mr. Buck's Death Sentence was the Product of a Capital Punishment System that Has Long Exhibited Evidence of Racial Bias and Disproportionality.

Consistent with the significant history of racial discrimination in Harris County's educational, political and civic systems, there is longstanding evidence of racial bias and disproportionality in Harris County's, and Texas's, capital punishment system.

a. Harris County's Capital Punishment System.

Harris County has maintained an extraordinary rate of death sentences and executions that "has often captured the national and international spotlight in the death-penalty debate." Ex. 37, Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 Hous. L. Rev. 131, 133 (Fall 2012) (hereinafter "Phillips/Rosenthal Report"). This is because, "[i]f Harris County were a state it would rank second in executions after Texas, outpacing both Virginia . . . and Oklahoma." *Id.*

The disparities are truly staggering. Between 1924 and 1973, no Texas county sent more people convicted of murder or rape to death row than Harris County. *See* Ex. 38, James W. Marquart, Sheldon Ekland-Olson & Jonathan R. Sorenson, *The Rope, the Chair, and the Needle: Capital Punishment in Texas, 1923-1990*, at 42 (1994) (Table 3.2, "*Percentage Distribution of Death-Sentenced Rapists by Personal Characteristics, 1924-1972*"); *id.* at 72 (Table 4.1, "*Percentage Distribution of Death-Sentenced Murderers by Personal Variables, 1923-1972*").

Since 1976, one quarter of all prisoners condemned to death in Texas were from Harris County; one-quarter of all prisoners executed in Texas were from Harris County; and one-third of the prisoners currently on Texas's death row are from Harris County. *See* Ex. 39, Tex. Dep't of Criminal Justice, *County of Convictions for Offenders on Death Row*; Ex. 40, Tex. Dep't of Criminal Justice, *County of Conviction for Executed Offenders*; Ex. 41, Tex. Dep't of Criminal Justice, *Total Number of Offenders Sentenced to Death from Each County*. Even though African Americans make up only one-fifth of the county's population and twelve percent of the state's population, *see* Ex. 42, U.S. Census Bureau, U.S. Dep't of Commerce, State & County Quick Facts, Texas & Ex. 43, U.S. Census Bureau, U.S. Dep't of Commerce, State & County Quick Facts, Harris County, Texas, approximately half of the African-American prisoners on Texas's death row are from Harris County and 68% of the last 34 executions from Harris County involved African-American offenders. *See* Ex. 44, Tex. Dep't of Criminal Justice, Executed Offenders. Given these statistics, it is not surprising that in Harris County, "[b]lacks account for about half of recent murder arrests. . . . [b]ut they more often get charged with capital murder than whites or Hispanics." Ex. 45, Lise Olsen, *Harris Death Penalties Show Racial Pattern*, Hous. Chron., Nov. 14, 2011.

b. Texas's Capital Punishment System.

Despite the significant role Harris County plays in Texas's death penalty system, the vast majority of studies about the influence of race on Texas's capital punishment system have focused on statewide trends. Because a significant percentage of the state's death-sentenced prisoners – and, indeed, the African-

American death row prisoners – are from Harris County, however, this research is instructive.

From its earliest days, Texas's death penalty has been tainted by racial bias and disproportionality. Between 1875 and 1923, 76% of the men executed for the crime of rape were African-American. "Black murderers represented 61% of the murderers executed, and blacks convicted of murder where rape was involved were the only people executed for such crimes." Ex. 46, Robert J. Hunter et al., *The Death Sentencing of Rapists in Pre-Furman Texas (1942-1971): The Racial Dimension*, 20 Am. J. Crim. L. 313, 323 (Spring 1993) (citing M. Watt Espy & John O. Smylka, *Executions in the United States, 1608-1987: The Espy File* (1987) (machine-readable data file)).

Between 1923 and 1973, 56.9% of Texas's death-sentenced prisoners were African-American. Ex. 47, Tex. Dep't of Criminal Justice, *Racial and Gender Breakdown of Death Row Offenders 1923-1973*. And "[o]f the death row prisoners executed for rape between the years 1924 and 1968, 83% were black, while only 14% were white. . . . [B]lacks convicted of rape in Texas were far more likely to receive death sentences than were whites or Hispanics." Ex. 46, Hunter et. al., *supra*, at 317 (citing Rupert C. Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 Crime & Delinq. 132, 141 (1969)).

In 1972, when the United States Supreme Court declared that the death penalty was so arbitrarily imposed that it violated the Eighth Amendment's ban on cruel and unusual punishment, *Furman v. Georgia*, 408 U.S. 238 (1972), Justice

Douglas drew specific attention to Texas's application of the death penalty and noted that race played an improper role in death sentencing:

> A study of capital cases in Texas from 1924 to 1968 reached the following conclusions:
>
> > 'Application of the death penalty is unequal: most of those executed were poor, young, and ignorant.
> >
> > 'Seventy-five of the 460 cases involved co-defendants who, under Texas law, were given separate trials. In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty.
> >
> > 'Another ethnic disparity is found in the type of sentence imposed for rape. The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty.'

Id. at 250-51 (concurring, Douglas, J.).

In the wake of this opinion, Texas revised its death penalty statute and the Supreme Court, in *Jurek v. Texas*, 428 U.S. 262 (1976), declared that the new law eliminated the unconstitutional risk of arbitrariness. Studies of Texas's post-*Furman* death sentences, however, reveal "a clear pattern of minority-victim devaluation." Ex. 48, Brent E. Newton, *A Case Study in Systemic Unfairness: The Texas Death Penalty, 1973-1994*, 1 Tex. F. on C.L. & C.R. 1, 13 (Spring 1994). Specifically, between 1974 and 1983;

> [O]nly 51% of all Texas capital murders . . . involved white victims, yet 85% of all death sentences were for the capital murder of whites. Conversely, 23.4% of all Texas capital murders involved black victims, but such murders resulted in only 3.6% of all death sentences. Finally, it is notable that, with the rarest of exceptions, whites in Texas do not receive death sentences for the capital murders of blacks.

Id. at 12-13; Ex. 49, Sheldon Eckland-Olson, *Structured Discretion, Racial Bias, and the Texas Death Penalty*, 69 Pol. Sci. Q. 853, 858-60, 861-63 (1988) (study based on Texas capital murder statistics from 1974-1988)); Ex. 50, Jonathan Sorenson & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. Rev. L. & Soc. Ch. 743, 765-72 (1990-91); *Vigneault v. State*, 600 S.W.2d 318 (Tex. Crim. App. 1979)). Indeed, a study of Texas capital murders "from 1980-86 show[s] that a white who committed the capital murder of an African-American during those years had, statistically speaking, *no* chance of receiving the death penalty." Ex. 48, Newton, *supra*, at 13 n.79 (citing Ex. 50, Sorenson & Marquart, *supra*, at 765 n.38).

c. Studies of Race and Capital Punishment in Harris County.

Although the vast majority of studies on race and capital punishment in Texas have focused on statewide patterns, two studies have examined the role of race in capital charging and death sentencing in Harris County: (1) a 2008 study of "whether race influenced the District Attorney's (DA) decision to pursue a death trial or the jury's decision to impose a death sentence against adult defendants indicted for capital murder in Harris County, Texas from 1992 to 1999," when the elected District Attorney for Harris County was Johnny Holmes, Ex. 51, Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 Hous. L. Rev. 807, 809 (Summer 2008) (hereinafter "Phillips/Holmes Report"); and (2) a 2012 study of the role of race in the administration of the death penalty in Houston between 2001 and 2008, when the elected District Attorney for Harris County was

Charles Rosenthal, Ex. 37, Scott Phillips, *Continued Racial Disparities in the Capital of Capital Punishment: The Rosenthal Era*, 50 Hou. L. Rev. 131 (Fall 2012) (hereinafter "Phillips/Rosenthal Report"). Not surprisingly, given the entrenchment of racial bias, stereotypes and disproportionality in Texas's administration of the death penalty, both studies found that race played an inappropriate role in the disproportionate administration of capital punishment in Harris County.

The Phillips/Holmes Report – which covered the time period during which Mr. Buck was capitally prosecuted and sentenced to death – examined the final years of DA Holmes' administration and made three significant findings:

- The "DA pursued death against black defendants and white defendants at the same rate despite the fact that black defendants committed murders that were less serious along several dimensions, meaning murders that were less likely to include the features that tend to lead to a death trial. Put differently, the bar appears to have been set lower for pursuing death against black defendants." Ex. 51, Phillips/Holmes Report at 833-34.

- The "DA pursued death less on behalf of black victims than white victims despite the fact that black victims were killed in more serious murders with multiple victims. Put differently, the bar appears to have been set higher for pursuing death on behalf of black victims." *Id.* at 834.

- "[D]eath is more likely to be imposed against black defendants than white defendants, and death is more likely to be imposed on behalf of white victims than black victims." *Id.* at 838.

The Phillips/Rosenthal Report on the death penalty in Harris County from 2001 to 2008 examined whether the race effect found in the Phillips/Holmes Report continued after the retirement of DA Holmes and during the administration of DA Rosenthal. This study found:

> [D]eath sentences were imposed on behalf of white victims at 2.5 times the rate one would expect if the system were blind to race, and death sentences were imposed on behalf of white female victims at 5 times the rate one would expect if the system were blind to race and gender.

Ex. 37, Phillips/Rosenthal Report at 131-32. The evidence of apparent bias against victims of color was amplified by the fact that "minority victims were more likely to be killed in the most heinous murders." *Id.* at 135.

Thus, the racial bias and disproportionality contaminating Duane Buck's case is consistent with the widespread racial bias that infected Harris County's administration of the death penalty for the seventy years that preceded Mr. Buck's capital trial and for many years after it. Mr. Buck's death sentence – infected with this racial animus – is unconstitutional.

3. The History of Racial Discrimination and Bias in the Harris County's District Attorney's Office.

The above-described evidence of racial bias in Harris County overall and Harris County's administration of the death penalty in particular, is consistent with the culture of racial prejudice, stereotype, and discrimination which existed in the Harris County District Attorney's Office before, during, and after Mr. Buck's capital trial. This long legacy of racial bias is further evidence that Mr. Buck's death sentence was the product of unconstitutional racial discrimination.

a. District Attorney Johnny Holmes.

From 1979 to 2001, Johnny Holmes served as the elected District Attorney for Harris County. Holmes personally decided whether to seek the death penalty in every potential capital case. *See* Ex. 19, Allan Turner, *Former DA Ran Powerful Death Penalty Machine*, Hous. Chron., July 25, 2007, at 2 ("Holmes defended his

department's handling of capital cases, noting that the final decision to seek the death penalty in such instances was his."). Holmes was the District Attorney when the Harris County District Attorney's Office decided to seek death for Mr. Buck, when the trial prosecutor infected Mr. Buck's capital trial proceedings with racial bias, and when the Harris County jury sentenced Mr. Buck to death. Throughout his tenure as District Attorney, Holmes and his office made numerous statements and decisions evincing bias against African Americans.

There is an abundance of evidence demonstrating that throughout Holmes' tenure, the Harris County District Attorney's Office excluded African Americans from jury service because of their race. For example, in hearings concerning a claim of discrimination in jury selection raised by an African-American man who was tried and convicted of capital murder after a prosecution that took place during the administration of District Attorney Holmes, Joseph Guarino, a Texas judge with 28 years' experience in Harris County's criminal justice system testified that he could "not recall a single instance in which a Negro juror sat on a petit jury in a criminal case in which the complainant was white and the defendant Negro." *Harris v. Texas*, 467 U.S. 1261, 1263 (1984) (Marshall, J., dissenting). Similarly, Judge Miron Love testified that "in 'most of those cases' the prosecution 'would eliminate most of the black jurors' through the exercise of peremptory challenges." *Id.* (Marshall, J., dissenting) (citations omitted).

The testimony of these Harris County judges "was corroborated by a variety of informed witnesses" including a Harris County attorney who testified that in only

two of the roughly 140 criminal cases in which he participated where the complainant was white and the defendant black, "did Negroes ultimately sit on the jury, and in these cases it was only because the prosecution ran out of peremptory challenges." *Id.* Similarly, a Harris County court reporter testified he "could not recollect a single case in which a prospective Negro juror had been empanelled." *Id.* Prosecutors who worked in the Harris County District Attorney's Office also "confirmed that in this class of cases, the exclusion of Negro jurors was 'the general rule.'" *Id.*

Similar testimony was offered in *Tompkins v. State*, 774 S.W.2d 196 (Tex. Crim. App. 1987), *aff'd*, 490 U.S. 754 (1989), and, in that case, the CCA acknowledged that African Americans appeared to be systematically excluded from Harris County capital juries. *Id.* at 203 Indeed, under Holmes, Harris County prosecutors tried Phillip Tompkins, an African-American man, for capital murder in front of an all-white jury in 1981. That jury convicted Mr. Tompkins and sentenced him to death. The prosecutors used their peremptory strikes to exclude all African Americans from service on Mr. Tompkins' jury. On appeal, Mr. Tompkins asserted that he was entitled to a new trial because the Harris County prosecutors "selectively exercised their peremptory strikes on several black prospective jurors and fashioned their respective voir dire examination of the remaining black prospective jurors in such a manner so that all blacks would be prevented from serving as jurors." *Id.* at 198. In response, the Court of Criminal Appeals ordered the trial judge to conduct an evidentiary hearing on Mr. Tompkins' claim of

discriminatory jury selection pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986) (prohibiting the race-based use of peremptory challenges in individual cases). The evidence in that hearing established "that black jurors ha[d] been relatively uncommon on capital murder juries in Harris County during the [previous] several years." *Tompkins*, 774 S.W.2d at 203.

Witnesses who testified at the *Tompkins Batson* hearing stated that, in the late 1970s and early 1980s, Harris County prosecutors routinely used their peremptory challenges to exclude potential jurors of color. For example, Robert Moen, a Harris County Assistant District Attorney from 1974 to 1985, testified that:

> [D]uring that period the general rule in capital murder selection, [was] be wary of minorities. If you don't have an opportunity to talk with them individually, because of the historical relationship they have had and because of the percentage of times that we run up against minority members of this community, there is a very good chance they are not going to identify with you as a prosecutor and the police officers that will testify in a case.

Ex. 20, *Tompkins* R.R. Vol. 1, 31:1-32:4 (June 3, 1987). Thomas Royce, another Harris County prosecutor, testified that: "everybody" in the Harris County District Attorney's Office engaged in conversations about "the undesirability of minorities on juries," *Id.* at 161:20-162:3; and that he considered, in selecting a jury, "the notion that blacks are more inclined to be sympathetic towards black defendants," *Id.* at 156:19-24, and the idea that "blacks or minorities were more inclined to be lenient to defendants." *Id.* at 162:11-16.

Holmes himself testified in the *Tompkins Batson* hearing, and echoed similar sentiments. He stated that, in the late 1970s and early 1980s, it was "the general

feeling among prosecutors" that minorities were more sympathetic to defendants than non-minorities. *Id.* at 181:15-21; *see also id.* at 182:8-14 (stating that "there was a caution exercised when dealing with minorities"). Holmes also expressed concern about prospective minority jurors of an older generation, explaining that:

> [i]f I have a minority person on the panel and the person is an individual of my age or older, I am cautious with that person and I think common sense dictates that. These are people who have experienced a different environment than we now have and many of those people have preconceived notions about law enforcement and government, justifiably, and they need to be explored, but exploring it is not the same thing, in my opinion, as saying I am not going to take him under any circumstance. I don't feel that way and none of the guys that work for me feel that way to my knowledge.

Id. at 184:17-185:4.

A third Harris County case, *Williams v. State*, 804 S.W.2d. 95 (Tex. Crim. App. 1991), corroborates the evidence that, under Holmes, Harris County prosecutors systematically excluded prospective African-American jurors. In *Williams*, an all-white jury convicted Arthur Lee Williams, Jr., an African-American man, of capital murder and sentenced him to death. Mr. Williams claimed that "the 'trial court committed reversible error by not quashing the venire where it was shown that the Prosecutor exercised six peremptory challenges against black jurors,'" resulting in no blacks serving on the jury. *Id.* at 96, 102. At the December 9, 1988, *Batson* hearing in *Williams* (transcript attached as Ex. 21), Mr. Williams "presented the testimony of several local defense attorneys who related that they were unaware of blacks being on *any* jury which they tried in Harris County." *Id.* at 107 (emphasis added).

For instance, Will Gray, who had been a criminal defense lawyer for thirty years by the time of the *Williams Batson* hearing, "believe[d] [he] ha[d] been able to isolate and identify [the] practices [of the Harris County District Attorney's Office as to their jury selection process]" and testified that "based on [his] personal experience and experience with other lawyers that [he has] participated in, it was a practice to eliminate all Black jurors from the capital murder cases." Ex. 21, *Williams* R.R. Vol. 1 at 11:14-21, 13:1-4.

Carolyn Garcia, a criminal lawyer in Harris County since 1977, corroborated Mr. Gray's testimony. Ms. Garcia testified that "all Blacks were either struck peremptorily [from capital murder juries] or if they could not be struck for cause, Blacks were not permitted to be seated in a capital case, particularly when a defendant was black." *Id.* at 21:11-16. Ms. Garcia indicated that "what [she] observed in trials that [she] was involved in and in observing other lawyers in trials was that the Black prospective juror was either questioned on a very limited area that tended to either result in a disqualification for cause or was only questioned in one area and then peremptorily struck." *Id.* at 24:2-9. In other words, "the breadth or width of the examination was not the same as for most White jurors where one went into the facts of the case, but the legal issues that would be raised by the facts in the case, which would be a broad-based type of what they would say." *Id.* at 24:14-20. Ms. Garcia further stated that the State "often zeroed in on a prospective juror with the main attempt of trying to disqualify them if they can without having to use one of their peremptory challenges." *Id.* at 25:10-15.

More recently, Hon. Patricia Lykos, who was a District Court judge in the 180th District Court of Harris County, Texas, from 1980 until 1994, and Harris County District Attorney from 2008 until 2012, remarked that Harris County prosecutors had a "habit" of "using race as their index" for jury selection. Ex. 22, Alan Bernstein, *DA candidates view office in different ways; Siegler says she hasn't seen racism; all vow equal treatment, transparency*, Hous. Chron., Feb. 7, 2008, at B1. Judge Lykos stated that "as a felony court judge [during the Holmes administration], she saw prosecutors eliminate potential jurors from a trial solely because of their race." *Id.*

Ultimately, allegations of discrimination against prospective jurors of color were repeatedly raised – and sustained – throughout Johnny Holmes' tenure as DA. In *Rosales v. Quarterman*, the United States District Court for the Southern District of Texas concluded that the Harris County District Attorney's Office exercised peremptory challenges in a racially-discriminatory manner in a 1985 capital murder trial. Ex. 23, *Rosales v. Quarterman*, No. H-03-1016, Mem. Order at 47 (S.D. Tex. Dec. 12, 2008). Specifically, the court found that the trial prosecutors tracked the race of the prospective jurors of color but did not track the white prospective jurors, *id.* at 14-15; admitted to believing that prospective jurors of color would be "more sympathetic" toward defendants of color, *id.* at 15-17; used disparate questioning for prospective jurors of color and white prospective jurors; disproportionately struck prospective jurors of color, *id.* at 14, 20; and proffered pretextual justifications for striking three prospective jurors, *id.* at 17-19, 24-43.

The court further concluded that Harris County prosecutors commonly used race as a factor for excluding prospective jurors of color in 1985. *Id.* at 17-19

Rosales was not alone. Prosecutors working for Holmes were repeatedly found to have improperly exercised peremptory challenges based on race: *Butler v. State*, 872 S.W.2d 227 (Tex. Crim. App. 1994) (*Batson* violated for exercise of peremptory challenge against prospective African-American juror in a capital murder case); *Emerson v. State*, 851 S.W.2d 269, 271-74 (Tex. Crim. App. 1993) (*Batson* violated where prosecutor's race-neutral explanations for peremptory challenge to African-American prospective juror were insufficient as a matter of law to rebut *prima facie* showing of racial discrimination because the proffered reason was not uniformly applied to black and non-black venire members); *Esteves v. State*, 859 S.W.2d 613 (Tex. App. 1993) (*Batson* violated for the exercise of peremptory challenges against three prospective jurors of color where the prosecutor's proffered justifications were not supported by the record, were not legally justifiable, and/or were equally applicable to accepted white jurors); *Vargas v. State,* 859 S.W.2d 534 (Tex. App. 1993) (*Batson* violated for four racially discriminatory peremptory challenges by Harris County District Attorney's office); *Wright v. State*, 832 S.W.2d 601 (Tex. Crim. App. 1992) (*Batson* violated where prosecutor failed to proffer a race-neutral explanation for his peremptory challenge of a prospective African-American juror); *Brooks v. State*, 802 S.W.2d 692, 694-695 (Tex. Crim. App. 1991) (en banc) (*Batson* violated where the prosecutor "utterly failed" to proffer race-neutral explanations of his peremptory challenges); *Garcia v. State*, 802 S.W.2d 817,

819 (Tex. App. 1990) (*Batson* violated where prosecutor noted stricken prospective juror's race and gender in writing and was unable to offer a race-neutral explanation for his peremptory challenge); *Lewis v. State,* 775 S.W.2d 13 (Tex. App. 1989) (*Batson* violated by three racially discriminatory peremptory challenges by Harris County District Attorney's office); *Whitsey v. State*, 796 S.W.2d 707, 727-28 (Tex. Crim. App. 1989) (*Batson* violated where all African Americans were struck from the panel and the prosecution used over half of its strikes to remove all blacks from the jury in a process that involved a "total lack of questioning" of individual venire persons); *Robinson v. State*, 756 S.W.2d 62, 63 (Tex. 1988) (*Batson* violated where the prosecutor used all ten of his peremptory challenges to strike blacks from the panel and "[w]ith one exception, the State here gave no racially neutral reason for striking the blacks from the panel, and candidly admitted that race was a consideration.").

Notwithstanding this pervasive history of discrimination against African Americans by the Harris County DA's Office during Johnny Holmes' tenure, Holmes publicly dismissed the African-American community's well-founded concerns about the role of race in the administration of criminal justice in Harris County. In 1986, Mr. Holmes walked out of a meeting with members of Houston's African-American community, discarding their concerns about racial discrimination in the criminal justice system as "crap." Ex. 24, Alan Bernstein, *Consensus Is Lacking in Meeting on Racism*, Hous. Chron., Nov. 25, 1986, at 1. Holmes reportedly objected to the meeting's "written agenda that said blacks are the victims of a double standard in

the administration of the death penalty, in the makeup of juries and in other operations of the criminal justice system." *Id.* In response to an assertion that African Americans had lost faith in the justice system, Holmes declared, "'[y]ou've never had faith in the justice system'" and "[a]t another point, Holmes sat down and turned his back to the audience as a questioner delivered his own opinion about treatment of blacks in the legal system." *Id.* at 2.

This lengthy and pervasive history of the exclusion of prospective jurors on the basis of race is, and was throughout Mr. Holmes' administration, plainly unconstitutional. *See Norris v. Alabama*, 294 U.S. 587, 599 (1935) ("[I]t was a 'violent presumption,' . . . that the uniform exclusion of negroes from juries, during a period of many years, was solely because, in the judgment of the officers, charged with the selection of grand and petit jurors, fairly exercised, 'the black race in Delaware were utterly disqualified by want of intelligence, experience, or moral integrity, to sit on juries.' Such a presumption at the present time would be no less violent." (citation omitted)); *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880) ("It is not easy to comprehend how it can be said that while every white man is entitled to a . . . jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former."), *abrogated by Taylor v. Louisiana*, 419 U.S. 522 (1975).

b. District Attorney Charles A. Rosenthal.

Charles "Chuck" Rosenthal became District Attorney of Harris County in 2001, following the retirement of Johnny Holmes after "20 rough and often rocky

years." Ex. 25, Mike Clark-Madison, *A Day at the Races*, Austin Chron., Mar. 3, 2000, at 3.[6] Before his election, Mr. Rosenthal had worked as an Assistant District Attorney in the office for twenty-three years, emerging as one of the leading prosecutors of the office. Ex. 27, Steve McVicker, *Profile: District Attorney Chuck Rosenthal*, Hous. Chron., Aug. 31, 2003, at 2. Indeed, "when Holmes announced his retirement, top lieutenant Rosenthal immediately became the most likely choice to succeed him. Rosenthal campaigned on the promise of keeping the district attorney's office on the same track Holmes engineered." *Id.* at 3. During Rosenthal's campaign for District Attorney in 2000, he was supported by Holmes. *See* Ex. 25, Clark-Madison, *supra.*

Mr. Rosenthal was the Harris County District Attorney in 2004 when Mr. Buck filed his federal habeas corpus petition with the expectation, detailed above, that the State would honor its promise to concede constitutional error given the trial prosecutor's reliance on Dr. Quijano's racially-biased penalty phase testimony. Mr. Rosenthal remained the District Attorney through almost four years of federal court litigation in Mr. Buck's case, during which time the State reneged on its promise and Mr. Buck continued to pursue sentencing relief based on the trial prosecutor's improper appeal to racial bias.

Mr. Rosenthal's tenure as Harris County District Attorney is notorious for racial bias, discrimination, and stereotyping of African Americans.

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[6] Mr. Rosenthal held this position until his resignation in February of 2008. Ex. 26, Brian Rogers, *Rosenthal Cites Prescription Drugs in Resignation as DA*, Hous. Chron., Feb. 15, 2008, at 1.

i. Racist Emails.

In 2008, by order of a federal court, Rosenthal released more than 1,500 emails stored on his official computer in conjunction with a civil rights lawsuit against the Harris County Sheriff's Office. Ex. 28, Associated Press, *Rosenthal Testifies in His Own Defense*, Feb. 1, 2008; *see also* Ex. 29, Ralph Blumenthal, *Prosecutor, Under Fire, Steps Down in Houston*, N.Y. Times, Feb. 16, 2008, at A10. The disclosed emails contained offensive stereotypes of Hispanics and women, racial slurs, racist "jokes," and statements of racial bias against African Americans in general and African-American jurors in particular. Ex. 30, Matt Stiles & Alan Bernstein, *State Probe Sought into DA's Emails*, Hous. Chron., Jan. 10, 2008, at A1. Among the emails containing racial slurs and "jokes" was a photograph titled "Fatal Overdose," depicting a black man sprawled out on a sidewalk amid watermelon peels, a cup of soda, and Kentucky Fried Chicken containers:

See Ex. 31, Leslie Casimir, *Blacks Urge Rosenthal to Quit*, Hous. Chron., Jan. 12, 2008; *see also* Ex. 32, Ralph Blumenthal, *New Investigation in Texas E-mail Case*, N.Y. Times, Jan. 9, 2008. Rosenthal "joked" in another email that Bill Clinton was like having a black man as President because he "smoked marijuana and receives a check from the government each month." Ex. 31, Casimir, *supra*. Furthermore, the disclosed emails contained apparent code words, which were used to make derogatory comments about African-American jurors. Ex. 33, Lisa Falkenberg, *When is a Canadian not a Canadian?*, Hous. Chron., Jan. 23, 2008 (describing email using the code name Canadians to refer to African-American jurors).

ii. Culture of Discrimination.

In the wake of the disclosure of the Rosenthal emails, "[c]ommunity and religious leaders in Houston said the racist and sexist e-mails found on Mr. Rosenthal's computer were an indication of deeper problems in the district attorney's office." Ex. 34, Juan A. Lozano, *Harris County DA Resigns Amid Scandal*, Dall. Morning News, Feb. 16, 2008. "Houston City Councilwoman Jolanda 'Jo' Jones, a criminal defense lawyer, said the e-mails confirmed what she and others have suspected about the DA's office for years. 'It's systemic, the racism there,' Jones said." Ex. 31, Casimir, *supra.* Further, Kelly Siegler, then-Chief of the Special Crimes Division, acknowledged that "racist attitudes persist in the district attorney's office." Ex. 35, Alan Bernstein, *Opponents Dispute Status of DA's Office*, Hous. Chron., Mar. 27, 2008, at B5. Hon. Patricia Lykos, who, as previously noted, was the elected Harris County District Attorney from 2008 to 2012, and the District Court judge in the 180th District Court of Harris County from 1980 until 1994, said

of racism in the DA's Office, "[y]ou would have to be deaf or blind not to realize that there was that element among a certain segment at the district attorney's office." *Id.*

African-American prosecutors confirmed and lamented the persistence of these racist attitudes, stereotypes, and biases in the Harris County District Attorney's Office:

- "There is a subtle pressure . . . to keep minorities off juries and what seems like a higher-level of scrutiny and second-guessing for blacks than whites at the same experience level." Ex. 36, Lisa Falkenberg, *A Lonely Feeling in the DA's Office*, Hous. Chron., Feb. 7, 2008.
- "[A] dark-complexioned young prosecutor sitting in a dimly lit room said hello to a senior prosecutor and he responded with something to the effect of: 'All I see is eyes and teeth. You need to turn the light on, girl.'" *Id.*
- "[T]hey've heard Hurricane Katrina evacuees referred to as 'Katrinians' or 'NFLs,' which reportedly stands for 'N-word From Louisiana.'" *Id.*
- "[T]hey've heard white prosecutors talk down to or crack jokes about black defendants." *Id.*

iii. Jury Discrimination.

This culture of racial bias, insensitivity, and stereotype manifested itself as not only inappropriate and unlawful conduct within the Rosenthal District Attorney's Office, but also as discrimination against prospective jurors of color. *See Moore v. State*, 265 S.W.3d 73, 86-90 (Tex. App. 2008) (*Batson* violated where prosecutor's proffered justification for her strike applied to similarly-situated, accepted white prospective jurors, prosecutor used a disproportionate number of her peremptory challenges against prospective jurors of color, and prosecutor offered a false explanation for her strike), *pet. dism'd, improvidently granted*, 286 S.W.3d 371

(Tex. Crim. App. 2009); *State v. Thomas*, 209 S.W.3d 268, 275 (Tex. App. 2006) (*Batson* violation where the prosecution struck six of seven qualified black venire members; the State's sole proffered reason – that the potential juror was a victim of crime – was insufficient because non-black venire members who were also crime victims were not struck).

4. A Comprehensive Analysis of Capital Charging and Sentencing in Harris County Reveals That, at the Time of Mr. Buck's Trial, the Harris County District Attorney's Office Disproportionately Sought Death Sentences for African-American Defendants like Duane Buck and Harris County Juries Disproportionately Imposed Death Sentences on African-American Defendants like Duane Buck.

The above-described history of racial bias and disproportionality in Harris County, in the Harris County DA's Office, and in Harris County's the administration of the death penalty is consistent with evidence demonstrating that, at and around the time of Mr. Buck's trial, Harris County prosecutors and Harris County juries systematically discriminated against African-American defendants like Mr. Buck.

University of Maryland Professor Raymond Paternoster reviewed Mr. Buck's case and conducted a rigorous and comprehensive evaluation of all available data to determine "whether the defendant's race affected either the decision to advance the case to a penalty trial or the decision to impose death among . . . cases that were most comparable to Mr. Buck's." Ex. 18, Report of Raymond Paternoster, *Racial Disparity in the Case of Duane Edward Buck*, at 5 (Dec. 28, 2012) (hereinafter "Paternoster Report"). Professor Paternoster's findings are significant and damning: he concluded that "[t]here is reason to suspect that Duane Buck's race played a role

in the decision to advance his case to a penalty trial and impose a death sentence." *Id.* at 7.

Professor Paternoster "examined data on 504 adult defendants indicted for capital murder in [Harris County] from 1992 to 1999." *Id.* at 1. He considered "21 variables for which [he] had data and which were expected to explain why a case was advanced to a penalty trial and others were not." *Id.* at 2. Those variables were:

- Defendant prior conviction for a violent offense;
- Defendant prior conviction for a non-violent offense;
- Victim was a female;
- Victim was of a vulnerable age (16 and under or over 60);
- Victim had prior conviction;
- Type of Capital Murder: Burglary;
- Type of Capital Murder: Multiple Victims;
- Type of Capital Murder: Kidnapping;
- Type of Capital Murder: Rape;
- Type of Capital Murder: Remuneration:
- Type of Capital Murder: Child Victim;
- Type of Capital Murder: Other;
- Method of Murder: Victim was Beaten;
- Method of Murder: Victim was Stabbed;
- Method of Murder: Victim was Asphyxiated;
- Victim was white;
- Attorney was hired;
- Defendant was male;
- Heinous Level 2;
- Heinous Level 3; and
- Multiple defendants indicted.

Id. at 2-3. With this data, Prof. Paternoster estimated "a logistical regression equation with the district attorney's decision to advance a case to a penalty trial as the outcome variable." *Id.* at 2.

Professor Paternoster "estimated for each of the 504 cases . . . a propensity score [which] is the estimated probability that a case [would] be advanced to a penalty trial." *Id.* at 4. He then identified the 21 "cases among the 504 that [were] most similar to Mr. Buck's, in terms of the overall estimated likelihood that the case would be advanced to a penalty trial." *Id.* at 5. In examining these cases, he concluded that at the time of Mr. Buck's capital murder trial:

> The probability that the district attorney will advance a case to a penalty trial is *more than three times as high* when the defendant is African-American than for white defendants (this includes Mr. Buck's case). This disparity by race of the defendant, moreover, cannot be attributed to observed case characteristics because these cases are those that were most comparable in terms of the estimated propensity score.
>
> This racial disparity is only partially corrected at the jury sentencing stage . . . . Ultimately, among this group of comparable cases a death sentence was *twice as likely to be imposed on an African American defendant as a white defendant.*

Id. at 6 (emphasis added).[7]

Thus, there is strong evidence indicating that *because of his race*, the Harris County District Attorney's Office pursued a death sentence for Mr. Buck and the Harris County jury was more likely to impose a death sentence on him. Combined with the record-based evidence of intentional discrimination by the trial prosecutor in his case, Professor Paternoster's conclusions further establish that Mr. Buck's

[7] Professor Paternoster noted that his analysis can be strengthened with access to "information on the quality of evidence in the 504 cases" and, more importantly, with information on the Harris County District Attorney's decision to seek a death sentence. *Id.* at 6-7. Mr. Buck is currently gathering this publicly available data and will seek discovery from this Court to secure any and all additional information necessary to inform this analysis.

death sentence was unconstitutional because it was a product of racial bias and discrimination.

5. Mr. Buck's Trial Prosecutor Skewed the Sentencing Jury Toward a Death Verdict by Eliciting Testimony That Mr. Buck Was More Likely To Present a Future Danger Because of His Race and by Arguing in Favor of a Death Sentence on That Basis.

As described elsewhere herein, Mr. Buck's trial prosecutor intentionally elicited and relied on racially-discriminatory testimony during the penalty phase of Mr. Buck's capital trial. Specifically, during the cross-examination of psychologist Dr. Quijano, the State elicited testimony that a person is more likely to commit acts of violence if he is African American:

> Q: You have determined that the sex factor, that a male is more violent than a female because that's just the way it is, and that *the race factor, black increases the future dangerousness for various complicated reasons; is that correct?*
>
> A: Yes.

Ex. 1, R.R. Vol. 28 at 160 (emphasis added). Later, during her closing argument to the sentencing jury the prosecutor argued that this expert testimony supported the jury's finding of future dangerousness:

> What else do you know? You heard from the Defense's own experts that they called who prepared reports to aid you in the defense of this man. You heard from Dr. Quijano, who had a lot of experience in the Texas Department of Corrections, who told you that there was a probability that the man would commit future acts of violence.

Id. at 260. This evidence establishes that a critical "decisionmaker[] in [Mr. Buck's] case acted with discriminatory purpose," and Mr. Buck's right to equal protection under the Fourteenth Amendment to the United States Constitution was violated. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987).[8]

B. Mr. Buck's Death Sentence Was Unconstitutional Because It Was Imposed on the Basis of Race in Violation of his Rights to Due Process, Equal Protection, and Fair Sentencing, under the United States Constitution.

The abundance of evidence establishing that Mr. Buck's death sentence is a product of racial discrimination renders it unconstitutional.

1. The Harris County District Attorney's Racially Biased Exercise of Prosecutorial Discretion Violated Mr. Buck's Rights to Due Process and Equal Protection Under the Law.

The United States Supreme Court has made clear that "a prosecutor's discretion is 'subject to constitutional constraints.' One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, is that the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979); *Oyler v. Boles*, 368 U.S. 448, 456 (1962)) (citing *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954)). In order to establish that a

[8] Notably, Mr. Buck's case is not the only one in which the Harris County DA's Office relied on testimony from Dr. Quijano to establish a link between race and future dangerousness. *See* Ex. 12, *Broxton v. Johnson*, No. H-00-CV-1034, Order at 10-11 (S.D. Tex. March 28, 2001).

prosecutor's exercise of discretion violates the Equal Protection Clause, a defendant must prove both "'the existence of purposeful discrimination,'" and "that the purposeful discrimination 'had a discriminatory effect' on him." *McCleskey*, 481 U.S. at 292 (quoting *Whitus v. Georgia*, 385 U.S. 545, 550 (1967); *Wayte v. United States*, 470 U.S. 598, 608 (1985)). Mr. Buck has met this standard.

a. Discriminatory Intent.

"[T]o prevail under the Equal Protection Clause, [a defendant] must prove that the decision makers in *his* case acted with discriminatory purpose." *McCleskey*, 481 U.S. at 292. The wealth of evidence marshaled by Mr. Buck sets forth a compelling case of intentional discrimination by the Harris County District Attorney's Office.

First, the conduct of Mr. Buck's trial prosecutor – in eliciting and relying on racially prejudiced and stereotyped testimony and argument at the penalty phase of Mr. Buck's individual case – is powerful proof of discriminatory purpose in Mr. Buck's individual case. *See Batson*, 476 U.S. at 97 (providing that "the prosecutor's questions and statements . . . may support or refute an inference of discriminatory purpose.").

Second, the Phillips/Holmes Report (finding that the Harris County District Attorney's Office was 1.75 times more likely to seek death for African-American defendants than for similarly-situated white defendants) and the Paternoster Report (concluding that the Harris County District Attorney's Office was three times more likely to seek death for African American defendants with case

characteristics like Mr. Buck's, than for similarly situated white defendants) strongly support a finding of discriminatory intent.

In *McCleskey*, the Supreme Court considered whether a statewide study showing that African-American defendants who killed white victims were most likely to be sentenced to death could, in and of itself, prove discriminatory intent. 481 U.S. at 286. In addressing this question, the Court acknowledged that in some instances – such as jury venire challenges and alleged violations of Title VII of the Civil Rights Act of 1964 – statistics alone can support such an inference. *Id.* at 293-94 (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 & n.13 (1977); *Bazemore v. Friday*, 478 U.S. 385, 400-01 (1986)). When comparing *McCleskey*'s claim to the contexts in which the Court has accepted statistics as proof of intentional discrimination, the Court found that in the latter instances, "the decisionmaker ha[d] an opportunity to explain the statistical disparity," 481 U.S. at 296 and "the statistics relate[d] to fewer entities, and fewer variables [were] relevant to the challenged decisions," *id.* at 295 (footnote omitted). The Court concluded that *McCleskey*'s statistical evidence failed to prove intentional discrimination because it sought to establish a "state 'policy,'" *id.* at 295 n.15, based on a multitude of individual jury decisions, despite the fact that juries cannot be asked to explain their sentencing choices, *id.* at 296, and on the past decisions of "scores", *id.* at 297 n.17, of county-elected prosecutors that each had an "infinite" number of possible bases for deciding whether to prosecute and what to charge, *id.* at 295 n.15. Under these circumstances, the Court held that *McCleskey*'s evidence

was "insufficient to support inference that any of the decision makers . . . acted with discriminatory purpose." *Id.* at 297.

Mr. Buck's statistical proffer does not suffer from the same limitations. Unlike *McCleskey*, Mr. Buck does not attempt to rely on statistics alone.[9] Instead, his considerable statistical record is supported by proof that his trial prosecutor relied on racial stereotype and discrimination during the penalty phase of Mr. Buck's capital trial, and is bolstered by significant evidence of a history of discrimination.

Furthermore, both the Phillips/Holmes Report and the Paternoster Report examine the charging decisions of one prosecutor's office, in one county, over a discrete time period: the Harris County District Attorney (which, as previously discussed, was the entity solely responsible for deciding whether or not to seek the death penalty for Mr. Buck) between 1992 and 1999. This distinction is critical because in *McCleskey* the Supreme Court acknowledged (a) that "[r]equiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts," 481 U.S. at 297 n.17 (citing *Batson*, 476 U.S. at 79), and (b) that *McCleskey*'s statewide study failed to prove intentional discrimination because it could not shed light on the conduct of the prosecutor in McCleskey's county of

[9] McCleskey also proffered historical evidence but it focused on "Georgia laws in force during and just after the Civil War," and was, therefore, too remote in time to be relevant to Mr. McCleskey's capital trial. *McCleskey*, 481 U.S. at 298 n.20. Mr. Buck, on the other hand, has offered more contemporaneous evidence of discrimination.

conviction. *Id.* at 295 n.15 ("Moreover, the statistics in Fulton County alone represent the disposition of far fewer cases than the statewide statistics. Even assuming the statistical validity of the Baldus study as a whole, the weight to be given the results gleaned from this small sample is limited."). Because the statistical evidence on which Mr. Buck relies pertains to "decisions . . . over time [that] *are* fairly attributable to" the Harris County District Attorney's Office itself, it supports the inference of purposeful discrimination. *Id.* (emphasis added); *see also United States v. Bass*, 536 U.S. 862, 864 (2002) (per curiam) (distinguishing nationwide statistics from "a showing regarding the record of the decision makers in respondent's case" in evaluating the persuasiveness of statistical evidence in proving discriminatory intent); *Belmontes v. Brown*, 414 F.3d 1094, 1127 (9th Cir. 2005) (statistics "limited to the charging entity . . . and its death penalty charging practices over time" can be sufficient to establish a prima facie case of discriminatory intent), *rev'd on other grounds sub nom. Ayers v. Belmontes*, 549 U.S. 7 (2006).

Third, Mr. Buck has presented evidence of a history of racial discrimination by the Harris County District Attorney's Office in its administration of the death penalty, as well as a history of racial discrimination in Harris County's political, educational, and legal systems. This further substantiates the inference of purposeful discrimination, because historical background which is "reasonably contemporaneous with the challenged decision" is an "'evidentiary source' for proof of intentional discrimination." *McCleskey*, 481 U.S. at 298 n.20 (quoting *Arlington*

Heights, 429 U.S. at 267); *see also Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003) (granting a Certificate of Appealability on a jury discrimination claim while finding that "[i]rrespective of whether the evidence could prove sufficient to support a charge of systematic exclusion of African-Americans, it reveals that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection. This evidence, of course, is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions. . . . Even if we presume . . . that the prosecutors . . . were not part of this culture of discrimination, the evidence suggests they were likely not ignorant of it."). Thus, "[i]f anything more is needed for an undeniable explanation of what was going on, history supplies it." *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005) (relying, in part, on historical evidence of racial discrimination to find that Texas prosecutors intentionally discriminated against African-American prospective jurors). The historical evidence of racial discrimination against African Americans in Harris County corroborates Mr. Buck's case of intentional discrimination.

Cumulatively, the evidence of specific racial discrimination in Mr. Buck's case, statistical evidence of racial discrimination by the Harris County District Attorney's Office, and historical evidence of racial discrimination in Harris County, establishes purposeful discrimination.

b. Discriminatory Effect.

"To establish a discriminatory effect of prosecution in a race case, defendant must show that similarly situated individuals of a different race were not prosecuted." *Armstrong*, 517 U.S. at 465. To meet this standard, the United States

Supreme Court has emphasized the importance of focusing on "the record of the decision makers in [the defendant's] case" and the need to examine "charges brought against *similarly situated defendants*." *Bass*, 536 U.S. at 864. Mr. Buck has amply met this standard.

As detailed above, the Phillips/Holmes Report shows that the Harris County District Attorney's Office – the entity with the power to decide to seek the death penalty for a particular defendant – was 1.75 times more likely to seek the death penalty for African-American defendants, like Mr. Buck, than for similarly-situated white defendants. Moreover, the Paternoster Report reveals that among defendants with cases whose characteristics are most similar to Mr. Buck's, the Harris County District Attorney's Office was *over three times* more likely to seek the death penalty for African-American defendants than for similarly-situated white defendants. Additionally, the trial prosecutor in Mr. Buck's individual case elicited and relied on explicitly racially-discriminatory evidence and argument to secure a death sentence. Given that the Supreme Court has found discriminatory effect in evidence showing that blacks were "1.7 times as likely as whites to suffer disenfranchisement," *Hunter v. Underwood*, 471 U.S. 222, 227 (1985), Mr. Buck has met his burden.

c. Conclusion.

Mr. Buck was sentenced to death in violation of his rights to due process and equal protection under the United States Constitution. He is entitled to a new capital sentencing.[10]

2. The Racial Bias that Infected Mr. Buck's Death Sentence Violates the Eighth Amendment's Ban on Cruel and Unusual Punishment.

Because Mr. Buck's death sentence is a product of racial discrimination, it violates the Eighth Amendment's prohibition on cruel and unusual punishments. "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). The evidence presented by Mr. Buck makes clear that racial bias,

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[10] In *Ex Parte Morris*, No. WR-43,550-03, Order (Tex. Crim. App. Mar. 4, 2009) (Price, J., dissenting) (attached as Ex. 61), the Court of Criminal Appeals dismissed the petitioner's claim that the "decision to seek the death penalty in his capital murder case [was based] on . . . race" and held that Mr. Morris had failed to set forth a prima facie case of discrimination. Mr. Buck's case is distinguishable. In *Morris*, the petitioner placed primary reliance for his claim on the Phillips/Holmes Report and offered only limited additional information about a culture of bias in the Harris County District Attorney's Office. Here, Mr. Buck relies on the Phillips/Holmes Report *in addition to* the Paternoster Report (focusing on the specific characteristics of Mr. Buck's case), the evidence of reliance on racial discrimination and stereotype by his trial prosecutor in the penalty phase of his capital trial, the history of discrimination in the Harris County District Attorney's Office and the history of discrimination in Harris County. Because Mr. Buck has presented significantly more evidence to support his claim of racial bias in the imposition of his death sentence – including evidence that the trial prosecutor relied on a blatantly inappropriate appeal to racial discrimination and stereotype – *Morris* is not controlling.

discrimination, and stereotype played a dispositive role in the Harris County District Attorney's Office's exercise of discretion in Mr. Buck's case, and that the death penalty in Harris County is administered in an arbitrary and capricious manner. As such, it violates the Eighth Amendment to the United States Constitution.

3. The Court Should Authorize Further Consideration and Development of Mr. Buck's Claims.

Article 11.071, section 5(a) of the Texas Code of Criminal Procedure provides as follows:

> If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution, no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(1). Because Mr. Buck's due process and equal protection claims satisfy both subsections (a)(1) and (3), they are entitled to further consideration in the convicting court.

In *Ex Parte Morris*, the CCA reviewed the merits of a claim that was procedurally and substantively similar to Mr. Buck's case. Ex. 61, *Ex Parte Morris*, No. WR-43,550-03, Order (Tex. Crim. App., Mar. 4, 2009). There, the petitioner had raised a challenge to the constitutionality of his death sentence based, in substantial part, on the Phillips/Holmes Report, *supra.* Ex. 62, *Ex Parte Morris*, No. WR-43,550-03, *Subsequent Action for Post-Conviction Relief Pursuant to Article 11.071 § 5*. In that application, Mr. Morris explained that his claim met the requirements for authorization of subsequent applications because the factual basis for his claim (the Phillips/Holmes Report) was unavailable when he filed his prior habeas applications and because his claim asserted that he would not have been subject to the death penalty but for the Harris County District Attorney's Office's unconstitutional exercise of prosecutorial discretion based on race. *Id.* The CCA found that Mr. Morris failed to satisfy Section 5 not because the factual basis of his claim was previously available but rather because the allegations he relied upon "failed to make a *prima facie* case of discrimination."[11] Ex. 61, *Morris*, Order at 2.

[11] Justices Price and Womack dissented from the CCA's Order dismissing Mr. Morris' petition, finding, instead, that Mr. Morris makes a *prima facie* showing of discriminatory effect by virtue of his showing that "between 1992 and 1999, the District Attorney sought the death penalty against blacks at 1.75 times the rate at which he sought the death penalty against whites. . . . [Because] the applicant alleges other instances of racial discrimination on the part of the Harris County District Attorney's Office during the same period of time that provides at least some inferential support to the claim that the decision to seek the death penalty against blacks at a disproportionate rate was racially motivated. I would give the applicant the benefit of the doubt on this question, grant his motion to stay the execution, and remand the cause to the convicting court for full evidentiary development under Article 11.071, Section 5(a)(1)." Ex. 61, *Morris*, Order at 3-4 (Price, J., dissenting) (citation and footnote omitted).

As in *Morris*, the factual bases supporting Mr. Buck's claim were unavailable when he filed his previous habeas applications and were "not ascertainable through the exercise of reasonable diligence on or before" the date of the previously filed application. Tex. Code Crim. Proc. Ann. art. 11.071, § 5(e). The factual bases on which Mr. Buck predicates his claim – the Phillips/Holmes Report and the Paternoster Report (which relied in part on the data underlying the Phillips/Holmes Report) – first became available when the Phillips/Holmes Report was published in September 2008, well after Mr. Buck filed his initial habeas corpus application in March of 1999, and his subsequent habeas corpus application in December of 2002. Furthermore, Phillips obtained the necessary raw data through a special arrangement with the chief counsel to the Harris County District Attorney's Office. *See* Ex. 51, Phillips/Holmes Report at 808 n.1. This data was essential to both studies, and could not have been collected without the cooperation of the District Attorney's Office. As this cooperation was provided for the first time in conjunction with the Phillips/Holmes Report, it was previously unavailable.

Second, but for the District Attorney's unconstitutional exercise of prosecutorial discretion, the death penalty would not have been sought against Mr. Buck. The Phillips/Holmes Report and the Paternoster Report reveal that a race-neutral exercise of prosecutorial discretion would have rendered Mr. Buck significantly less likely to face a capital trial and significantly less likely to receive a death sentence. As such, "clear and convincing evidence [that], but for a violation of the United States Constitution no rational juror would have answered in the state's

favor one or more of the special issues that were submitted to the jury in applicant's trial under Article 37.071, 37.0711, or 37.072" has been alleged. Tex. Code Crim. Proc. Ann art. 11.071, § 5(a)(3).

Because Mr. Buck satisfies the statutory criteria for a subsequent application, the application should be authorized for further review. In the alternative, as the United States constitution forbids race-based decision-making, and contemporary society finds the racially-biased exercise of lethal discretion fundamentally repugnant to notions of fairness and justice, authorization for further review should be granted regardless of when or how the information was discovered.

III. MR. BUCK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL MURDER TRIAL, ON DIRECT APPEAL, AND IN HIS INITIAL HABEAS PROCEEDINGS, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A jury cannot make a constitutionally reliable and individualized sentencing decision without knowing the actual mitigating evidence about the defendant. *Gregg v. Georgia*, 428 U.S. 153, 206 (1976). Indeed, the importance of mitigating evidence in capital sentencing proceedings is a fundamental tenet of U.S. Supreme Court jurisprudence. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (holding that the federal constitution requires that the sentencer "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death"). *See also Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982). A reasonable investigation of mitigating evidence in a capital case is thus

an absolute prerequisite to constitutional representation. The core constitutional principle – that "respect for humanity" requires consideration of information about the offender – allows for no less. *See Lockett*, 438 U.S. at 602 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)); *see also Tennard v. Dretke*, 542 U.S. 274 (2004).

These longstanding requirements for capital case representation were not met in Mr. Buck's case. Mr. Buck was represented at his capital trial and sentencing by attorneys Danny Easterling and Jerry Guerinot. Mr. Guerinot has a long and well-documented history of grossly inadequate representation of his capitally charged clients. *See* Ex.63, Adam Liptak, *A Lawyer Known Best for Losing Capital Cases*, N. Y. Times, May 17, 2010 ("Twenty of Mr. Gueriont's clients have been sentenced to death. That is more people than are awaiting execution in about half of the 35 states that have the death penalty."); Ex. 64, David Rose, *Lethal Counsel*, The Observer, December 2, 2007 ("Guerinot has managed to persuade a jury to give his client life instead of death just five times since 1983. Not one of his capital clients has been found not guilty. Thirty-eight states in the US have the death penalty: former Guerinot clients have either been executed or are on death row in 15 states besides Texas."). Consistent with this history, in Mr. Buck's case, Mr. Guerinot and his co-counsel unreasonably failed to conduct a constitutionally appropriate sentencing investigation and failed to present the abundance of available mitigating evidence to the jury.

During the sentencing phase of Mr. Buck's capital trial, trial counsel provided the jury with very little information about Mr. Buck, his childhood, his background, or his mental health. Instead, trial counsel presented the sentencing jury with only the cursory and unprepared testimony of four lay witnesses and two psychologists. *See* Ex. 65, *Buck v. Texas*, No. 72, 810 (Tex. Crim. App. May 6, 1997), R.R. Vol. 113:9-117:11 (Punishment Tr. at 76:1-234:1).

From the lay witnesses – Reverend J.C. Neal, the pastor of Pleasant Grove Baptist Church; Mr. Buck's sister, Monique Winn; Mr. Buck's stepmother, Sharon Buck; and Mr. Buck's father, James Buck – trial counsel gleaned the following: Mr. Buck attended church, participated in Sunday School for ten or fifteen years off and on, and was "awful quiet"; Mr. Buck's mother died in a car wreck involving an eighteen-wheeler when Mr. Buck was twelve years old; Mr. Buck's father remarried after his mother's death; Mr. Buck worked as a mechanic in his family's auto repair garage performing paint and body repair work; Mr. Buck was "nice" and had been a "good brother"; if Mr. Buck had abused his former girlfriend Vivian Jackson, it must have happened "behind closed doors"; Mr. Buck's father had a history of prior arrests and incarceration; and Mr. Buck's father had four other children with Sharon Buck and kept guns in the home. *Id.* at 113:9-12 (R.R. Vol. 28 at 76:1-79:1); 113:14-19 (R.R. Vol. 28 at 81:1-86:15); 113:17 (R.R. Vol. 28 at 84:2-5); 113:20-26 (R.R. Vol. 28 at 87:1-93:23); 113:27-33 (R.R. Vol. 28 at 94:5-100:11); 113:28-29 (R.R. Vol. 28 at 95:19-23, 96:12-15).

From the expert witnesses – Dr. Walter Quijano and Dr. Patrick Lawrence – counsel elicited the following: Mr. Buck had a dependent personality disorder that made him need other people to "get along," made it difficult for him to disengage from relationships, and required him to receive more nurturing and reassurance than his peers, *id.* at 113:38-39 (R.R. Vol. 28 at 105:10-106:25), 116:9 (R.R. Vol. 28 at 192:7-21); Mr. Buck suffered from alcohol and cocaine dependence, which were in remission because of his incarceration, *id.* at 114:2 (R.R. Vol. 28 at 109:3-7); Mr. Buck's I.Q. appeared to be around 74, which was at the low end of the borderline range, *id.* at 114:28 (R.R. Vol. 28 at 171:2-16), 116:6, 9 (R.R. Vol. 28 at 189:5-17, 192:2-6); and Mr. Buck's personality profile was inconsistent with "psychopathic murderers" who would kill again, *id.* at 116:19 (R.R. Vol. 28 at 202:10-22).

Based on this evidence, defense counsel told the jury that there were four mitigating circumstances: the death of Mr. Buck's mother when he was young; his father's imprisonment and arrest history; Mr. Buck's cocaine and alcohol addiction; and the fact that the offense was a crime of passion. *Id.* (R.R. Vol. 28 at 255:11-22). Counsel freely conceded that any "one of these [factors] may not be enough," in and of itself, to warrant a life sentence as opposed to the death penalty, but suggested that these factors, viewed together, "could be" sufficient. *Id.* (R.R. Vol. 28 at 255:22-256:1).

This limited presentation of evidence was so utterly incomplete as to paint an inaccurate and misleading picture of Mr. Buck's life history. Because trial counsel failed to conduct a reasonable investigation into Mr. Buck's past, the jury heard

virtually nothing about his profoundly traumatic childhood and dysfunctional upbringing. Trial counsel failed to investigate, develop, and present the testimony of numerous available lay witnesses – including his brothers, sisters, aunts, uncles, and cousins – who could have provided powerful mitigating evidence; they failed to provide their experts with a complete and accurate social history of Mr. Buck and therefore secured an inaccurate mental health diagnosis of him; and they failed to elicit critical mitigating information known to the testifying witnesses. As a result, the sentencing phase testimony presented on behalf of Mr. Buck was inaccurate and the sentencing jury never heard the abundant and readily available mitigating evidence that counsel would have uncovered had they conducted the constitutionally-required mitigation investigation.

Had counsel performed a reasonable sentencing phase investigation, the jury would have heard a compelling case for life.

A. A Constitutionally-Adequate Mitigation Investigation Would Have Revealed that Duane Buck's Life Was Characterized by Violence, Addiction, Chaos, and Dysfunction.

In stark contrast to the inaccurate and incomplete picture of Mr. Buck painted by trial counsel, Mr. Buck's true life history was characterized by trauma and tragedy: a family history rooted in slavery; the premature death of his mother; a violent and philandering father who, along with other relatives, was in-and-out of jail; childhood exposure to domestic violence; alcohol, and drug use at an early age; addiction and dependency as a young adult; growing up in an impoverished community plagued by drugs and violence; bouts with depression; and an

undiagnosed, lifelong pervasive developmental disorder. A constitutionally appropriate and reliable determination of sentence required consideration of all of this available, mitigating evidence.

1. A Legacy of Slavery and Sharecropping Haunts Both Sides of Duane Buck's Family.

Duane Buck was born to a family with a history of savage poverty that long predated his birth. Duane's family hailed from Louisiana where his grandparents, great-grandparents, great-aunts, and great-uncles worked the land and struggled to survive the harsh physical and economic realities of chattel slavery and sharecropping.

Duane's mother's side of the family lived a destitute life as sharecroppers. *See* Ex. 66, Declaration of Ruby Edwards ¶¶ 4-11 (hereinafter "Ruby Edwards Decl."). They worked on a farm that had no electricity. *Id.* at ¶ 10. They cultivated cotton, sweet potatoes, and corn. *Id.* at ¶ 7. This sharecropping life required sacrifices from all members of the family, no matter how young. Even the children "worked hard and didn't get to go to school until Christmas time because [they] had to gather the crops." *Id.* Sometimes the children were unable to go to school at all. Duane's mother, Leona Edwards, was the oldest child in her family and grew up juggling her schoolwork with her duties as the designated caretaker of her siblings. *Id.* These responsibilities, along with the daily five-mile walk to school, ultimately forced Leona to drop out of school in the tenth grade to support the family. *Id.* Education was a luxury that the family simply could not afford in the face of economic hardship. Leona, like everyone in the family, had to "start[] from scratch

and try[] to establish [herself]," knowing that she was going to have to work hard because she and her family were "dirt poor" and "no one was going to give [them] anything." *Id.*

This experience was not unique to Duane's mother's side of the family. Duane's paternal relatives also worked hard picking cotton in the fields of Louisiana. *See* Ex. 67, Declaration of Monique Winn ¶ 4 (hereinafter "Winn Decl.").[12] And Duane's father, James Buck, was, like Leona, unable to complete his education and, as an adult, could neither read nor write.

In the face of bleak poverty and the cruel legacy of slavery and Jim Crow, Duane's family grappled with alcohol abuse for generations. In particular, Duane's mother – born to an alcoholic father –was exposed to alcoholism at a young age. Ex. 66, Ruby Edwards Decl. ¶ 5 ("Our daddy was a drunk, an alcoholic. The only thing he ever cared about was his bottle of wine[.] We kids worked so hard all day and thought maybe we'd be able to improve our lives but then my father would just drink up all the money we earned at night."). Duane came to learn firsthand about this dysfunction within his grandparents' home because as a teenager, Duane resided with his maternal grandparents, who introduced him to alcohol—the substance that would eventually become a lifelong addiction. *See id.* ¶ at 6 ("We had a very dysfunctional family."); Ex. 68, Declaration of Alex Malveaux ¶ 4

[12] Although Monique Winn testified at trial during the sentencing phase, counsel failed to properly interview her about Duane's life history and failed to present this and other critically important and mitigating information known to Monique to Duane's sentencing jury. *See generally* Ex. 67, Winn Decl.

(hereinafter "Malveaux Decl.") ("Duane really loved our grandfather. Unfortunately, our grandfather had a serious drinking problem. He drank, and got drunk, all of the time. And when he was drunk, our grandfather raised hell . . . . [H]e would want to argue with everybody and would get pretty loud.").

2. Duane Buck Lost His Mother in a Tragic and Traumatic Car Accident at an Early Age.

In the early morning hours of a December morning in 1974 – just five days before Christmas – Duane woke up to the sound of his grandmother crying hysterically. After asking his grandmother what was wrong, Duane was told that his mother, Leona Buck, had been killed in a car accident. Leona was on her way home from her job as a night nurse. She had been carpooling with two other nurses when an eighteen-wheeler broadsided the car in which she was a passenger. Ex. 67, Winn Decl. ¶ 11. Leona was the only one who did not survive the crash. *Id.*

Duane – who was eleven-years-old at the time – was devastated by his mother's death. Ex. 66, Ruby Edwards Decl. ¶ 25; Ex. 67, Winn Decl. ¶ 12. Indeed, Duane was very "close" to his mother and took her death "the hardest of all the children," frequently waking up in the middle of the night crying in terror. Ex. 66, Ruby Edwards Decl. ¶¶ 21, 25; Ex. 67, Winn Decl. ¶ 12. He "talked about her a lot for years after she died. After she passed, he constantly remembered the year she was born and, as her birthday approached, would say, 'if my mother was still here

she'd be ____ years old.'" Ex. 69, Declaration of Michael Siverand ¶ 12 (hereinafter "M. Siverand Decl.").

As described elsewhere herein, Duane's mother was the only source of stability in Duane's life, his only opportunity to have a loving parent, and his only hope of escaping the negative influences around him. As a result, when she died, it was the end of what should have been a normal childhood.

3. Duane Buck Did Not Have a Close Relationship With His Father, Who Was a Violent and Abusive Alcoholic.

Duane Buck's father, James Buck, was a violent and unstable man. "People in the neighborhood knew not the mess with him because he was very tough and not afraid of anyone." Ex. 70, Declaration of Keith Buck ¶ 3 (hereinafter "K. Buck Decl."). Consistent with his reputation in the community, James' relationship with Duane was characterized by violence, neglect, and a lifetime of criminal activities and incarceration.

James Buck played "favorites" among his children, making plain that he preferred Duane's brothers over Duane. If Duane forgot to put a hose away or did not sweep the driveway to his satisfaction, he whipped Duane with a belt, switch, electric cord, or spark plug, frequently leaving welts or bruises all over Duane's body. Ex. 71, Declaration of Marvin Buck ¶ 2 (hereinafter "M. Buck Decl."); Ex. 69, M. Siverand Decl. ¶ 4. At other times, James beat Duane just for being a kid. For example, Duane was severely beat by James for swimming in a pool after having been told to stay inside. Ex. 72, Declaration of James Boutte ¶ 10 (hereinafter

"Boutte Decl.") ("He hit [Duane] with [a] belt all over [his] bod[y], wherever the belt landed. Duane had welts and bruises all over his body after that.").

James Buck not only abused Duane physically, but verbally as well, cursing him out and calling him hurtful names. Ex. 71, M. Buck Decl. ¶ 2. Duane, who internalized everything his father said, was deeply hurt by this abuse. *Id.* In fact, he begged his father to "just whip him instead of talking down to him." *Id.*

James also gave Duane alcohol at a young age. "Starting when Duane was five years old, his father gave him liquor to drink when Duane was working in the shop. Since there was liquor around the shop all the time, and Duane had to be in the shop all the time, his father constantly handed him liquor to drink, even though he was still a child." Ex. 69, M. Siverand Decl. ¶ 5.

James Buck was brazenly unfaithful to his wives and had sexual relationships with dozens of other women while married. This culminated in twenty-two children with multiple women. Ex. 67, Winn Decl. ¶ 14; Ex. 69, M. Siverand Decl. ¶3.

James was also a known gambler with a reputation for staying out "on the streets" late at night, often in the company of prostitutes. Ex. 71, M. Buck Decl. ¶¶ 14-16; Ex. 69, M. Siverand Decl. ¶ 3. James frequently left Duane alone in the car with a gun while he was in the "gamble shack." Ex. 71, M. Buck Decl. ¶ 14; Ex. 69, M. Siverand Decl. ¶ 8.

Guns were commonplace in James Buck's household. Ex. 71, M. Buck Decl. ¶ 15; *see also* Ex. 66, Ruby Edwards Decl. ¶ 18 ("James [] kept a gun in a holster on

him at all times. He also had several guns stashed throughout the house."). Indeed, James "always carried a gun" and Duane witnessed him pull it out and fire shots at people on a number of occasions. Ex. 71, M. Buck Decl. ¶ 15.

Not surprisingly, Duane's father was in jail throughout Duane's childhood. He was arrested and incarcerated on charges relating to the auto shop he owned and operated, including possession and transportation of stolen vehicles – in other words, he ran a "chop shop." Ex. 73, Declaration of Charles Siverand ¶ 4 (hereinafter "C. Siverand Decl."); Ex. 68, Malveaux Decl. ¶ 6; Ex. 77, Harris County District Court Judgment (May 6, 1976); Ex. 78, Harris County District Court Judgment (Oct. 8, 1984). Duane's father was "always stealing something" and was a "man without a conscience." Ex. 66, Ruby Edwards Decl. ¶ 18.

James forced Duane to assist him in his criminal activities, instructing Duane to steal cars, take them apart, and sell the parts at his shop. Ex. 73, C. Siverand Decl. ¶ 4; Ex. 69, M. Siverand Decl. ¶ 5. Under these circumstances, Duane's father "was not a good influence" on Duane. Ex. 66, Ruby Edwards Decl. ¶ 16. James "always had a hustle going and it was usually an illegal one and his children saw that." *Id.* at ¶ 18.

As a result of the abuse and neglect of his father, Duane never developed a close relationship with his father. *See id.* at ¶ 21 ("[Duane] and his dad never really got along."). After his mother's death, Duane's relationship with his father further deteriorated and he moved in with his maternal grandparents in Louisiana, where

he "felt safe." *Id.* at ¶ 30; *see also* Ex. 71, Buck Decl. ¶ 17; Ex. 68, Malveaux Decl. ¶ 3; Ex. 67, Winn Decl. ¶ 16.

4. After His Mother's Death, Duane Buck's Stepmother Did Not Act as a Surrogate Mother Figure.

Duane's father married Sharon Williams shortly after his mother's death.[13] Sharon, however, never became a mother figure to Duane, and never attempted to ease his suffering over his mother's death. In fact, Sharon – who was several years younger than Duane's father – was barely older than Duane. Ex. 71, M. Buck Decl. ¶ 18. For Duane, having Sharon "just [wasn't] the same" as having his own mother. Ex. 72, Boutte Decl. ¶ 13.

Sharon entered the marriage with two children of her own, and James and Sharon had several children together after they married. Ex. 71, M. Buck Decl. ¶ 12. Sharon favored her biological children over James' other children, including Duane. Ex. 67, Winn Decl. ¶ 15; Ex. 74, Declaration of Berlin Edward ¶ 11 (hereinafter "B. Edward Decl."); Ex. 69, M. Siverand Decl. ¶ 11. For instance,

[13] Notably, Duane's father and Sharon started dating long before Leona's death. In fact, they were living together before he even divorced Leona. Ex. 66, Ruby Edwards Decl. ¶ 24.

Sharon bought things for her own biological children before buying anything for the others. She also misappropriated the money from Duane's mother's social security benefits to provide for her own children instead of for Duane and his siblings. Ex. 66, Edwards Decl. ¶ 28; Ex. 70, K. Buck Decl. ¶ 5. For Duane, who was still mourning his mother's death, Sharon's treatment of him added insult to injury. As his aunt, Ruby Edwards, poignantly observed: "Duane was devastated by his mother's passing and I'm sure that played a huge part in his life, especially when he was left to be mistreated by his father and stepmother." *Id.* at ¶ 25. Rather than adding stability, Sharon compounded the dysfunction in Duane's already-chaotic home environment. *Id.* at ¶ 28. [14]

5. As a Child, Duane Buck Was Forced to Work Excessively.

Duane grew up working tirelessly in his father's chop shop. This started when he was only a toddler. While Duane was "still in diapers," he was in the shop handing his father a wrench when he asked for it. Ex. 71, M. Buck Decl. ¶ 5. By the time he could walk and talk, Duane had been taught to sweep out the garage, and make appointments for auto repairs. Ex. 67, Winn Decl. ¶ 9. By the age of ten, Duane was welding, replacing motors, changing brakes and batteries, and taking transmissions out of cars. Ex. 71, M. Buck Decl. ¶ 6; Ex. 72, Boutte Decl. ¶ 7. The

[14] Although the siblings who lived with Duane's father after their parents' separation were ostensibly treated better than Duane, Duane's father did not want to undertake the role of caretaker for *any* of the children. Duane's father only "wanted the kids to live with him so he could get his hands on the social security money from Leona's death." Ex. 66, Ruby Edwards Decl. ¶ 25. James Buck did not really want to raise his children—he wanted the money. *Id.*

work was grueling. Duane often worked from 7:00 in the morning until 10:00 at night, making money for his father. Ex. 72, Boutte Decl. ¶ 8. When his father brought in a wrecked or stolen car, Duane was tasked with stripping it down and taking out all of the parts so that it could be salvaged, used, or sold—a task that often required him to work "all night." *Id.* at ¶ 7.

The work did not end at the chop shop doors. Even at home, Duane was expected to work in his father's vegetable garden, which the family relied on for food. *See id. at* ¶ 6. When neighborhood children stopped by their house wanting to play with Duane, James often put them to work alongside Duane and his siblings. In fact, James put anyone to work; "he didn't care who you were." *Id.* at ¶ 8.

6. Duane Buck Witnessed Constant Violence in his Childhood Home.

Duane was exposed to continuous acts of domestic violence throughout his childhood. Specifically, from a young age, Duane witnessed his father physically attack both his mother and his step-mother. *See* Ex., 66, Ruby Edwards Decl. ¶¶ 14, 28; Ex. 69, M. Siverand Decl. ¶ 9. Duane's father beat his mother, Leona, brutally. *See* Ex. 74, B. Edward Decl. ¶¶ 6-8. "He kicked her and punched her with his fists like she was a man." Ex. 69, M. Siverand Decl. ¶ 9. One beating was so severe that it landed Leona in the hospital. Leona had to have back surgery after Duane's father stomped her with his cowboy boots until one of the disks in her back ruptured. Ex. 66, Ruby Edwards Decl. ¶ 15; *see also* Ex. 74, B. Edward Decl. ¶ 6 ("I have memories of my sister being hospitalized as a result of beatings she received from James."). These beatings took place throughout Duane's parents' relationship.

Ex. 69, M. Siverand ¶ 9. Duane was "devastated" to see his father beat his mother and at times he had to break up the fights between them. *Id.* Duane witnessed his father perpetrate similar acts of violence against his stepmother, Sharon. *See* Ex. 66, Ruby Edwards Decl. ¶ 28.

Duane's parents' relationship was a vicious cycle of violence. Like so many victims of domestic abuse, Leona would "try to leave and then she would go back." *Id.* at ¶ 22; *see also* Ex. 74, B. Edward Decl. ¶ 8 ("We tried to get Leona to leave James. Sometimes she left him for a few days but she always went back, just like in most abusive relationships."). It took "years and years for her to break loose." *Id.*

7. Duane Buck Grew Up Witnessing His Father's Flagrant Infidelity.

In addition to domestic violence, Duane witnessed repeated, overt acts of marital infidelity inside and outside of his childhood home. Duane's father was a "womanizer" and "rolling stone" who "chased everything that had a skirt on" and had children "everywhere." Ex. 66, Ruby Edwards Decl. ¶ 20; Ex. 73, C. Siverand Decl. ¶ 9; Ex. 74, B. Edward Decl. ¶ 7; Ex. 69, M. Siverand ¶ 3. Duane was exposed to his father's philandering at an early age, watching James Buck with various women, including prostitutes, while James was still married to his mother. Ex. 71, Buck Decl. ¶ 16. James even had a sexual relationship with the family's young live-in babysitter. Ex. 66, Ruby Edwards Decl. ¶ 20; Ex. 69, M. Siverand Decl. ¶ 3. As a result of these extramarital affairs, James had a multitude of children outside of wedlock. *Id.* at ¶ 20. Duane was thus forced to navigate the complex contours of a

"family" in which many of his siblings were the product of his father's acts of adultery.

8. Duane Buck's Family Members Were In and Out of Jail Throughout His Life.

Throughout Duane's life, various members of his family were in and out of jail or prison. As previously indicated, Duane's father was repeatedly arrested and incarcerated on charges related to his operation of the auto shop, including charges for possessing and transporting stolen vehicles. Ex. 71, M. Buck Decl. ¶ 19; Ex. 75, Declaration of Sammy Siverand Decl. ¶ 11 (hereinafter "S. Siverand Decl."); Ex. 73, C. Siverand Decl. ¶ 4; Ex. 68, Malveaux Decl. ¶ 6; Ex. 77, Harris County District Court Judgment (May 6, 1976); Ex. 78, Harris County District Court Judgment (Oct. 8, 1984). Duane's stepmother, Sharon Buck, was convicted of tampering with a governmental record in 1994 for her role in falsifying auto titles, stickers, and insurance papers. Ex. 66, Ruby Edwards Decl. ¶ 29; Ex. 70, K. Buck Decl. ¶ 6; Ex. 79, Harris County District Court Probation Order (Mar. 29, 1994).

Duane's brother, Keith Buck, was incarcerated for the burglary of a habitation with intent to commit theft in 1988, and aggravated sexual assault and aggravated robbery in 1989. Ex. 80, Harris County District Court Judgment (Mar. 7, 1989); Ex. 81, Harris County District Court Judgment (Oct. 19, 1988). Another brother, Marvin Buck, was in and out of jail for drug-related offenses, including a 1988 conviction for possession of a controlled substance (methadone). Ex. 82, Harris County District Court Judgment (July 5, 1988).

Duane thus spent his formative years in an environment where criminal behavior was normalized and where he was neglected due to the incarceration of his caregivers. In fact, at one point, his father, stepmother, sister, and four brothers were in prison simultaneously. As a result, Duane frequently found himself alone – left to fend for himself in a crime-riddled community.

9. Poverty, Violence, and Illicit Drug Use Were Rampant in Duane Buck's Childhood Community.

Duane's childhood home was a wood-frame house in a poor, and largely segregated, neighborhood near the Fifth Ward known as "Trinity Gardens." Despite the fact that his family operated an auto repair shop, they didn't have the income people in the neighborhood expected them to have.

The Fifth Ward was plagued by violence. Accordingly, it was one of the toughest areas to raise kids. There were regular neighborhood fights and violence was a mechanism of survival. On numerous occasions, Duane had guns pulled on him. Ex. 71, M. Buck Decl. ¶ 9. Duane was once shot in the back of the leg so severely that he had to be taken to the hospital. *Id.* at ¶ 10.

In this environment, it was "hard to be a young man and stay away from drugs." Ex. 76, Declaration of Phyllis Taylor ¶ 3 (hereinafter "Taylor Decl."). "Drugs were plentiful" in the Fifth Ward and could be easily-obtained anywhere. Ex. 71, M. Buck Decl. ¶ 9. The "drug of choice was crack." *Id.* And Duane's father regularly brought "dope pushers," who sold a wide array of illicit drugs, into the family home. Ex. 75, S. Siverand Decl. ¶ 10 ("These dope pushers were hocking and selling drugs and drug paraphernalia there off the Buck family property. They sold

amphetamines, Reds, and yellow jacks – which are uppers and downers. The medications were all stolen. They also sold pills meant to threat schizophrenia; if you took those pills and drank a couple of beers you'd be high for three days."). Indeed, Duane's step-mother's brothers were involved with drugs and sold drugs out of Duane's father's shop. Ex. 70, K. Buck Decl. ¶ 6. Duane was thus exposed to a community rife with illegal activity.

The frequent absence of Duane's father, who was often incarcerated, only served to compound the dysfunction in Duane's life, ultimately leading him to turn to the vices that were so prevalent in his neighborhood. Indeed, Duane's aunt, Ruby Edwards, blames Duane's father for leading Duane into a life of drug use because, when his father was incarcerated, Duane was left to be raised by his "stepmom and her drug addict family." Ex. 66, Ruby Edwards Decl. ¶ 29. These family members, who "ruled part of the Fifth Ward in terms of street life" and were "into drugs," exposed Duane to illicit drugs. Ex. 75, S. Siverand Decl. ¶ 6; Ex. 66, Ruby Edwards Decl. ¶ 29; Ex. 74, B. Edward Decl. ¶ 12-13. Duane therefore became a product of his environment – what started out as a few sips of whiskey and experimentation with marijuana gradually developed into a full-blown alcohol and crack cocaine addiction.

10. Duane Buck Was Depressed and Suffered From a Debilitating Addiction to Alcohol and Crack Cocaine.

As previously described, Duane was exposed to alcohol and other harmful substances at an early age by people in his family and his community. Duane started using these substances on a consistent basis as a "coping mechanism" for

the abusive and chaotic environment at his father's house. Ex. 66, Ruby Edwards Decl. ¶ 31. Although this started out as Duane's attempt to mask the pain, it ultimately devolved into a crippling addiction in which he was drinking every day, taking pills, shooting up heroin, and smoking crack cocaine. *See* Ex. 71, M. Buck Decl. ¶¶ 21-23. As the drug use progressed, Duane stopped coming around his family and his siblings did not see him for months at a time. *Id.* at ¶ 23.[15]

Although Duane tried on numerous occasions to get sober, he was only able to stay clean for brief periods of time before relapsing. As his addiction worsened, his relationships – including those with his high school sweetheart and the mother of his son, Duane Jr – deteriorated as well. *See id.* at ¶ 24. Duane gradually started "drifting" and became "a different person." *Id.* at ¶ 23 (indicating that Duane's mixing of drugs and alcohol caused him to become abnormally aggressive). The drugs and alcohol took over.

11. Duane Buck Suffered from a Pervasive and Undiagnosed Developmental Disorder.

Clinical neuropsychologist, Dr. Diane M. Mosnik, Ph.D., recently evaluated Duane Buck and concluded that throughout his life, Mr. Buck suffered from an undiagnosed developmental disorder: Asperger's Disorder. *See* Ex. 83, Report of Dr. Diane M. Mosnik, Ph.D, "Forensic Psychological/Neuropsychological Evaluation"

[15] Duane's younger brother, Keith Buck, believes that Duane did not want to be a bad influence on his younger siblings and thus did not want them to see him under the influence of drugs. Ex. 70, K. Buck Decl. ¶ 8.

(Feb. 12, 2013) (hereinafter "Mosnik Report").[16] According to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR):

> The essential features of Asperger's Disorder are severe and sustained impairment in social interaction (Criterion A) and the development of restricted, repetitive patterns of behavior, interests, and activities (Criterion B). The disturbance must cause clinically significant impairment in social, occupational, or other important areas of functioning (Criterion C).

Ex. 84, DSM-IV-TR at 80. Dr. Mosnik further explained that:

> Asperger's Disorder is a neurological disorder that affects the functioning of the brain. It is not simply a social pathology. In individuals diagnosed with Asperger's Disorder, it is important to recognize that a considerable amount of scientific research clearly documents identified regions of the brain that are abnormal structurally and abnormal in regards to the neurotransmitter receptor binding in those regions of the brain that are specifically tied to the cognitive and social perceptual deficits also demonstrated in individuals with Asperger's Disorder.

Ex. 83, Mosnik Report at 12. With respect to Mr. Buck, Dr. Mosnik found that:

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[16] Dr. Mosnik's evaluation involved the review of the 1997 Report of Walter Y. Quijano, the 1997 Report of Patrick G. Lawrence, the Declarations of Charles Siverand, James Boutte, Marvin Buck, Sammy Siverand, Alex Malveaux, Ruby Edwards, Monique Winn, Berlin Edward, and Phyllis Taylor, 10 hours of direct contact with Mr. Buck, including the taking of a developmental and psychiatric history and the administration of the following psychological and neuropsychological tests: Weschler Adult Intelligence Scale-IV; WRAT-IV; Wisconsin Card Sorting Test; Tower of London; California Verbal Learning Test-II Standard; Brief Visualspatial Memory Test revised version form 1; Rey Osterreith Complex Figure Copy with immediate and delayed recall and recognition memory; The Awareness of Social Inference Test (TASIT) form A; NEPSY-II tests of block construction & geometric puzzles; Lexical and Semantic Fluency; DKEFS Nonverbal Design Fluency; Symbol Digit Modalities in written and oral formats; Trail Making Test A & B; Hooper Test of Visual Organization; Benton Facial Recognition Test; Benton Judgment of Line Orientation, Form H; and Motor Free Visual Perception Test – Third Edition. *See* Mosnik Report at 1-2.

> On cognitive testing, Duane exhibited significant impairments in the areas of executive functioning and complex problem-solving, separate from his social problem-solving impairments. Specifically, he demonstrated significant difficulty with mental set-shifting, exhibiting significant perseveration, i.e., a pattern of repetitive responding despite receiving verbal feedback to the contrary, indicating an inflexibility to his cognitive problem-solving skills. In addition, he exhibited deficits in visual spacial construction, emotional response, and deficits in nonverbal communication and language pragmatics, including not appreciating the nuances of language and social communication as used in various social interactions. Moreover, he exhibited significant deficits in inferential thinking, interpreting perspectives, and social problem-solving, including a deficit in the awareness of social perception. He also exhibited a profound deficit in the ability to recognize and accurately discriminate a variety of typical human emotions. Social perception is the ability to read social cues (e.g., facial expression and tone of voice, body language, contextual information, and knowledge of the social world in general) in order to make judgments about the behavior, attitudes and emotions of others.

Id. at 12-13. Dr. Mosnik also noted that Mr. Buck's history of substance abuse and dysfunctional childhood had particular relevance given Mr. Buck's Asperger's Disorder:

> Individuals with Asperger's Disorder often resort to the use of alcohol and other illicit drugs during adolescence and young adulthood to help alleviate symptoms of social distress and to help them fit in better with others in a social environment. The use of alcohol and drugs often helps an individual with Asperger's Disorder feel more at ease and comfortable in situations that typically make them feel uncomfortable. In addition, there is evidence in the scientific literature that individuals learn about appropriate behaviors from their environment and are more susceptible to using drugs and alcohol, as well as engaging in illegal acts, if they are exposed to that type of behavior during their development. An individual with Asperger's Disorder is even more susceptible to the effects of their environment as they typically interpret events in a very literal manner, such that if they are taught or exposed to certain situations, they accept, without question, that those activities, behaviors or events are appropriate and acceptable behaviors.

Id. at 16. Thus, throughout his life – including the time of the offense – Mr. Buck was disabled by a "continuous and lifelong disorder." Ex. 84, DSM-IV-TR at 82.

12. Duane Buck Was "Not Himself" on the Night of the Shooting.

On the evening of July 30, 1995, Duane Buck, who was in deep emotional turmoil and under the influence of a combination of drugs and alcohol, went to Debra Gardner's apartment and began shooting.

Duane suspected that the woman he had loved and lived with for years, Debra Gardner, was cheating on him. This wounded him and sparked an argument on the evening of July 30, 1995, causing Duane to become very emotional. *See* Ex. 76, Taylor Decl. ¶¶ 10-11.

By all accounts, Duane was mixing drugs and alcohol at the time. *Id.* at ¶ 11; Ex. 67, Winn Decl. ¶ 23. Phyllis Taylor, the surviving victim of the shooting, remembers how high Duane was that night:

> The Duane Buck that stood in front of me with a gun was different from the person that I grew up with. He was so high. His eyes were nothing but bloodshot. There was no white. You could only see pupils and red. And even his voice sounded different. I could not believe what was happening, because his behavior was completely uncharacteristic for Duane. The drugs were controlling him.

Ex. 76, Taylor Decl. ¶ 14.

The night of July 30, 1995, thus spiraled into a random act of violence that was entirely uncharacteristic of Duane's personality. Clouded by the influence of mind-altering drugs and alcohol, and compounded by emotional distress his developmental disorder left him unable to cope with, a tragedy ensued. Winn Decl.

¶ 23 (stating that it was the "hurt [Duane] felt from what he felt was Debra's unfaithfulness" as well as the "drugs" that caused the tragedy).

13. Conclusion.

All of the above-described mitigating evidence was available at the time of Mr. Buck's 1997 sentencing hearing. Because, however, trial counsel unreasonably failed to investigate, develop and present it, the sentencing jury knew almost nothing about Mr. Buck's truly traumatic life history. The jury never had the opportunity to consider the abundance of evidence that weighed in favor of a life sentence.

B. Trial Counsel was Ineffective for Failing to Investigate, Develop, and Present the Available Mitigating Evidence.

The Sixth Amendment right to the effective assistance of counsel is violated when: (i) counsel renders deficient performance, and (ii) the defendant is prejudiced. *See Rompilla v. Beard*, 545 U.S. 374, 380, 390 (2005); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000); *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Ex parte Gonzales*, 204 S.W.3d 391, 393 (Tex. Crim. App. 2006).

Counsel's representation is "deficient" when it "f[alls] below an objective standard of reasonableness," judged by "prevailing professional norms." *Strickland*, 466 U.S. at 688. In evaluating counsel's representation, the court should consider the then-existing American Bar Association's Standards for Criminal Justice (1993) ("ABA Standards") and Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) ("ABA Guidelines"), attached as Ex. 85. These rules

set forth the "reasonable" professional "standards for capital defense work" at the time of the trial and they are the "standards to which [the Supreme Court] long ha[s] referred as 'guides to determining what is reasonable'" under the Sixth Amendment. *Wiggins*, 539 U.S. at 522-25 (citing *Strickland*, 466 U.S. at 288; *Williams*, 529 U.S. at 396); *accord Rompilla*, 545 U.S. at 387. Deficient performance is prejudicial when there is a "reasonable probability" that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A "reasonable probability" is any probability that is "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The "reasonable probability" standard thus imposes a lower standard of proof than the preponderance of the evidence standard. *Bouchillon v. Collins*, 907 F.2d 589, 595 (5th Cir. 1990) (noting that even when "the evidence arguably supports a different result under a preponderance standard," a reviewing court still can be "confident that it meets the 'reasonable probability' standard"); *Ex parte Gonzales*, 204 S.W.3d at 394 (acknowledging that a lower standard of proof than a preponderance of the evidence is applicable to an adjudication of deficient representation at the sentencing phase of a Texas capital trial).

As detailed above, at the time of Mr. Buck's capital trial, there was significant available mitigating evidence demonstrating that Mr. Buck had a traumatic life history and severe mental and emotional disturbances. Mr. Buck is entitled to a new capital sentencing trial because: (i) trial counsel's unreasonable failure to investigate, develop, and present the available and relevant mitigating

evidence in accordance with prevailing professional norms was constitutionally deficient; and (ii) but for counsel's unprofessional errors, the jury would have heard a compelling case for life and there is a reasonable probability that the result of the sentencing proceeding would have been different.

1. Trial Counsel's Performance Was Deficient. It Fell Far Below the Professional Standards of Capital Representation Recognized in Texas at the Time of Mr. Buck's Capital Trial.

It is well-settled that "[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." *Rompilla*, 545 U.S. at 387 (quoting ABA Standards); *see also Harrison v. Quarterman*, 496 F.3d 419, 425 (5th Cir. 2007) ("It is beyond cavil that an attorney must engage in a reasonable amount of pretrial investigation and . . . interview potential witnesses and make an independent investigation of the facts and circumstances in the case."). *See also Bouchillon*, 907 F.2d at 596 (indicating that counsel "has a duty to make reasonable investigations").

This duty to investigate is particularly important in a capital case, where counsel has an "obligation to conduct a thorough investigation of the defendant's background" for "all reasonably available mitigating evidence." *Wiggins*, 539 U.S. at 522, 524 (quoting *Williams*, 529 U.S. at 396, and ABA Guideline 11.4.1); *see also*

Frierson v. Woodford, 463 F.3d 982, 989 (9th Cir. 2006) ("The imperative to cast a wide net for all relevant mitigating evidence is heightened at a capital sentencing hearing."); *Romano v. Gibson*, 239 F.3d 1156, 1180 (10th Cir. 2001) ("The sentencing stage is the most critical phase of a death penalty case. Any competent counsel knows the importance of thoroughly investigating and presenting mitigating evidence."); *United States ex rel. Emerson v. Gramley*, 883 F. Supp. 225, 243 (N.D. Ill. 1995), *aff'd*, 91 F.3d 898 (7th Cir. 1996) ("Because the scope of mitigation evidence which may be considered by the jury in sentencing is much broader than the range of relevant information which may be considered in determining guilt or innocence, counsel is under a greater obligation to discover and evaluate potential evidence of mitigation.").[17]

As part of this "thorough investigation," counsel should, among other things, interview family members and others familiar with the defendant's background, access records pertaining to the defendant's life history, and obtain appropriate

[17] "Mitigating evidence" is not limited to evidence that would "relate specifically to petitioner's culpability for the crime he committed." *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986). In fact, there is no requirement that mitigating evidence even have a "nexus" to the offenses or that the defendant make any showing that "the criminal act was attributable" in any way to the mitigating factors. *Tennard*, 542 U.S. at 286. Relevant mitigating evidence thus includes any evidence that would be "mitigating" in the sense that it "might serve 'as a basis for a sentence less than death.'" *Skipper*, 476 U.S. at 5 (quoting *Lockett*, 438 U.S. at 604); *see also Lambright v. Schriro*, 490 F.3d 1103, 1115 (9th Cir. 2007) ("If evidence relating to life circumstances with no causal relationship to the crime were to be eliminated, significant aspects of a defendant's disadvantaged background, emotional and mental problems, and adverse history, as well as his positive character traits, would not be considered, even though some of these factors, both positive and negative, might cause a jury to determine that a life sentence, rather than death at the hands of the state, is the appropriate punishment for the particular defendant").

evaluations by mental health experts. *See Wiggins*, 539 U.S. at 516 (capital case counsel ineffective for failing to develop life history information from "social services, medical, and school records, as well as interviews with petitioner and numerous family members"). In other words, counsel's duty to conduct a reasonable sentencing investigation cannot be "discharged merely by conducting a limited investigation." *Lambright*, 490 F.3d at 1120. To the contrary, any decision not to investigate potential evidence or witnesses "must be directly assessed for reasonableness in all the circumstances." *Soffar v. Dretke*, 368 F.3d 441, 473 (5th Cir. 2004) (quoting *Strickland*, 466 U.S. at 690-91). It is the responsibility of defense counsel to walk a mile in the shoes of the client, to see who he is, and to present information to the jury in a way that can be taken into account in deciding whether the client is so beyond redemption that the only appropriate sentence is death. *Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001) (quoting Stephen B. Bright, *Advocate in Residence: The Death Penalty As the Answer to Crime: Costly, Counterproductive and Corrupting*, 36 Santa Clara L. Rev. 1069, 1085-86 (1996)).

In *Ex parte Gonzales*, the CCA delineated the contours of the duty of counsel to conduct a reasonable sentencing phase investigation. .204 S.W.3d at 394. In that case, post-conviction counsel discovered, through interviews with the defendant's family, that the defendant, who was convicted of capital murder and sentenced to death, had been physically and sexually abused as a child. *Id.* In light of this discovery, the CCA remanded for a new sentencing hearing, holding that

defendant's trial counsel rendered ineffective assistance in the 1997 capital trial by failing to interview and investigate available witnesses about mitigating evidence thoroughly. *Id.* at 397. Specifically, although defendant's trial counsel had interviewed the defendant's mother and sister about his background generally – and the sister even testified at sentencing to his difficult childhood – the defendant's counsel never specifically inquired into whether defendant had been abused and thus did not present any evidence of such abuse at sentencing. *Id.* at 394-95. The CCA held that this failure to investigate and inquire into the subject of abuse when interviewing the client and relevant witnesses fell below an objective standard of reasonableness for capital trial counsel in 1997 and rendered trial counsel's mitigation investigation unreasonable under prevailing professional norms. *Id.* at 397.

As recognized by the concurring opinion, these prevailing professional norms included the duty to "seek out all of the circumstances of the offense, the defendant's character and background, and any evidence that lessens the personal moral culpability of the defendant." *Id.* at 400-401 (Cochran, J., concurring). Defense counsel must therefore be armed with a comprehensive checklist of possibilities – like a doctor – and forcefully inquire about each topic, including topics such as:

- Childhood accidents and injuries;
- Trips to the emergency room;
- Serious illnesses at any time;
- Physical abuse to the defendant or any other member of the family;

- Any sexual abuse to the defendant or any other member of the family;
- Size of the immediate family, and a history of the physical, educational, and emotional background of each member;
- The defendant's relationship with and attitudes toward every member of the family;
- Drug or alcohol use or abuse by himself and any or all members of the family;
- Any mental health treatment of any member of the family, including the defendant;
- The cohesiveness of the family;
- The family's standard of living and living conditions;
- Any and all available school records;
- Any record of learning disabilities;
- Childhood and adult social relationships with members of the same and opposite sex;
- Any marriage, divorce, children, step-children, or surrogate family relationships, and their positive or negative influence upon the defendant;
- Any and all awards, honors, or special accomplishments, as well as any and all convictions, arrests, expulsions or suspensions from school, job firings, etc.;
- Any and all traumatic experiences …

Id. These standards were clearly in place in Texas long before Mr. Buck's trial. *See*, *e.g.*, Ex. 86, Jeffrey J. Pokorak, *Capital Sentencing Strategy: A Defense Primer*, 20th Annual Advanced Criminal Law Course (Dallas, TX, 1994) at BB-17-BB-21 (emphasizing the need for thorough penalty phase investigation including the development of an intergenerational life history including where parents and grandparents were from, how they supported themselves and the kind of housing, medical care, nutrition and education they had; investigation of "anyone who had the opportunity to abuse your client in any way"; "find[ing] the folks (aunts, cousins, neighbors) that knew that sexual, physical or psychological abuse occurred in the family"; identifying people who knew the client during the developmental years and

inquiring about such issues as withdrawal, quietness, shyness, anxiety, nervousness, crying, hiding; and securing jail, court and police records for all offenses involving all family members).

As detailed above, at the time of Mr. Buck's capital trial, professional norms unquestionably required Mr. Buck's defense counsel to conduct a reasonable mitigation investigation sufficient to enable the jury to fairly weigh the appropriateness of a death sentence. Mr. Buck's trial counsel, however, failed to meet this well established standard because they failed to investigate, interview, develop, and present the available mitigating evidence – including Mr. Buck's exposure to domestic abuse, the verbal and physical abuse he endured at the hands of his violent father, his being surrounded by criminal activity both inside his home and in his neighborhood, his long history of substance abuse and addiction, his neglectful step-mother, and his Asperger's Syndrome – that Mr. Buck's family and community members could have and would have offered to the jury. Indeed, although trial counsel presented the testimony of three family members and one friend of Mr. Buck, counsel unreasonably failed to investigate, develop, and present all of the information known to those witnesses. For example, counsel failed to investigate, or present the abundance of mitigating testimony known to Monique Winn, Mr. Buck's sister, including evidence that: their paternal grandparents picked cotton in the fields of Louisiana; Duane and rest of his siblings grew up in a small wood-frame house in the Fifth Ward that they built themselves; Duane worked at the family auto shop "from the time he could walk"; as a little boy, Duane

worked on transmissions, alternators, and other parts of cars; Duane was never allowed to go over friends' houses and his father would put his friends to work if they came to visit Duane; Duane was devastated by his mother's death and took it "hard," frequently crying at the thought of it; their father, James Buck, had numerous extramarital affairs; their step-mother, Sharon Buck, treated Duane and his siblings differently from her own children; Duane was exposed to drugs by Sharon's brothers; many family members had been in and out of jail throughout Duane's life; Duane was using drugs and alcohol at the time of the crime and was not in his "right mind"; and Duane has been active in his son DJ's life.

Similarly, counsel failed to elicit from Duane Buck's father, James Buck, that James: did not complete his education and could not read nor write; did not develop a close relationship with Duane; played "favorites" among his children, preferring Duane's brothers over Duane; physically and verbally abused Duane; only wanted Duane and his siblings to live with him in order to get the social security money from their mother's death; was a known gambler who was often in the company of prostitutes and frequently left Duane alone in the car with a gun while he was in the "gamble shack"; forced Duane to participate in his illegal activities, including stripping apart stolen cars and selling the parts at the family auto shop; and physically attacked and cheated on Duane's mother and step-mother in Duane's presence.

Moreover, counsel did not investigate or elicit testimony from Sharon Buck that, although she was Duane's stepmother, she: had started dating Duane's father

before he divorced Duane's mother; favored her own biological children over James's other children, including Duane; misappropriated money from Duane's mother's social security benefits to provide for her own children rather than Duane and his siblings; and had a criminal record.

Because of these repeated failures to thoroughly investigate Mr. Buck's social history, and to elicit relevant mitigating evidence from relevant life history witnesses – including from those who were called as witnesses at trial — counsel failed to meet the professional norms requiring a reasonable sentencing phase investigation. *See Simmons v. Luebbers*, 299 F.3d 929, 937-39 (8th Cir. 2002) (finding deficient performance where capital trial counsel presented only two witnesses at the sentencing phase, neither of whom testified concerning defendant's abusive and traumatic childhood, including the beatings defendant suffered as a child, his fear of those beatings, his father's alcoholism, or his parent's violent relationship); *Ex parte Gonzales*, 204 S.W.3d at 397 (holding that failure to inquire into the subject of abuse when interviewing defendant's mother and sister fell below an objective standard of reasonable performance for Texas capital trial counsel).

Furthermore, although counsel also presented the testimony of two psychologists at trial, his failure to conduct an appropriate investigation of Mr. Buck's life history undermined the ability of these experts to reach a proper diagnosis and prevented the jury from receiving an accurate picture of Mr. Buck's mental health functioning.

Additionally, trial counsel completely failed to interview or call to testify numerous other friends and family members of Duane Buck – such as Marvin Buck, Keith Buck, James Boutte, Ruby Edwards, Berlin Edward, Sammy Siverand, Michael Siverand, Alex Malveaux, Larry Edwards, and Phyllis Taylor – who possessed significant mitigating evidence and were available and willing to testify on Duane Buck's behalf. Trial counsel had no tactical or strategic reason for their failure to conduct this constitutionally-required investigation or their consequent failure to present the critical evidence they possessed to the sentencing jury. *Cf. Ex parte Gonzales*, 204 S.W.3d at 395 (finding that trial counsel was deficient where failure to investigate and present mitigating evidence was "not a strategic or tactical decision"). *See also Williams*, 529 U.S. at 395-96, 416 (finding counsel ineffective where testimony was presented from defendant's mother and two friends, but counsel failed to obtain records and failed to fully interview and present evidence from other "friends, neighbors and family").

2. Mr. Buck was Prejudiced by Trial Counsel's Deficient Performance.

As described above, deficient representation is prejudicial when there is a "reasonable probability" that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694 (noting that

a "reasonable probability" is any probability that is "sufficient to undermine confidence in the outcome").[18]

Indeed, under Texas' capital sentencing statute, in determining whether to sentence a defendant to life or death, the jury must take into consideration whether "all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant" indicates that there is "sufficient mitigating circumstance or circumstances." Tex. Code Crim. Proc. Ann. art. 37.071, § 2(e)(1). As detailed above, had trial counsel conducted the constitutionally required sentencing investigation, they would have discovered and presented a wealth of additional mitigating evidence that was highly relevant to Mr. Buck's background, character, and the circumstances of the offense. Specifically, trial counsel could have shown the jury that Mr. Buck's life history was characterized by severe trauma, including a familial history rooted in slavery, the premature death of his mother, an abusive and philandering father who was in-and-out of jail, an early addiction and dependency on drugs and alcohol, a community that was plagued by drugs and violence, bouts with depression, and a pervasive developmental disorder. Trial counsel also could have presented evidence to the jury that Mr. Buck was "not himself" on the night of the murders and was under the influence of drugs and alcohol.

[18] In assessing prejudice, courts should be mindful of the heavy "beyond a reasonable doubt" burden that the State must meet to justify a death sentence. *See Fisher v. Gibson*, 282 F.3d 1283, 1310 (10th Cir. 2002).

If the jury had "been able to place [this significant evidence] on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537 (holding that defendant was prejudiced at capital sentencing by counsel's failure to present mitigating evidence of childhood trauma). Mr. Buck was prejudiced by his trial counsel's deficient performance. *See also Rompilla*, 545 U.S. at 390-91 (death-sentenced prisoner prejudiced by trial counsel's failure to develop and present available evidence of childhood trauma and mental problems); *Williams*, 529 U.S. at 370 (same for childhood trauma, low intelligence, and possible brain damage); *Simmons*, 299 F.3d at 939 (same for childhood trauma and mental problems); *Antwine v. Delo*, 54 F.3d 1357, 1368 (8th Cir. 1995) (same for mental problems); *Ex parte Gonzales*, 204 S.W.3d at 398-400 (same for physical and sexual abuse during childhood).[19]

[19] The State's case in support of the future dangerousness special circumstance was not particularly strong. The sum of the evidence relied on by the State to prove, beyond a reasonable doubt, that Mr. Buck posed a future danger was that Mr. Buck had non-violent prior convictions, that he had an abusive relationship with one prior girlfriend, and that Mr. Buck behaved strangely on the evening of the instant offense (e.g., witnesses testified that after his arrest, Mr. Buck was laughing and saying that he had been forgiven by God for his conduct). R.R. Vol. 28:5-74. The Court of Criminal Appeals has held analogous evidence to be insufficient to meet the State's burden of proving future dangerousness beyond a reasonable doubt. *See Berry v. State*, 233 S.W.3d 847, 864 (Tex. Crim. App. 2007) (state failed to meet its burden of proving future dangerousness beyond a reasonable doubt where the defendant murdered one child and abandoned another but witnesses testified that these incidents were out of character; defendant had no prior criminal record; the state presented no evidence of past violence; experts testified that the defendant was under stress and depressed at the time of her crimes; and her offenses involved pregnancy and the risk of her becoming pregnant if she received a sentence of incarceration was low).

C. Because Counsel Failed to Investigate and Raise This Ineffective Assistance of Trial Counsel Claim on Direct Appeal or at the Collateral Stage, the Section 5 Bar Does Not Foreclose Review of the Merits of Mr. Buck's Ineffectiveness Claim.

Article 11.071, §(1) of the Texas Code of Criminal Procedure establishes "the procedures for an application for a writ of habeas corpus" following the trial court's imposition of the death penalty. Pursuant to the plain terms of Section 3 of this article, appointed state habeas counsel ("habeas counsel"), prior to the filing of a prisoner's initial application, "*shall investigate* expeditiously. . .the factual and legal grounds for the filing of an application[.]" Tex. Code Crim. Proc. Ann. art. 11.071,§(3)(a) ("Section 3") (emphasis added). Once this investigation is complete, and the initial application for a writ of habeas corpus is filed consistent with the other procedures delineated in the article, Section 5 indicates that Texas courts may not consider the merits of claims raised in subsequent habeas petitions. Tex. Code Crim. Proc. Ann. art. 11.071, § (5)(a) ("Section 5"). Because Mr. Buck's state habeas counsel completely failed to investigate the factual and legal bases for Mr. Buck's ineffective assistance at trial claims, as required by Section 3, Mr. Buck's initial petition was improperly filed and Section 5 does not preclude a review Mr. Buck's ineffectiveness claim on its merits.

1. Mr. Buck's Appointed State Habeas Counsel Had a Statutory Duty to Investigate the Factual and Legal Grounds for an Ineffectiveness Claim Prior to the Filing of Mr. Buck's Initial Application.

As a threshold matter, this Court should find that Mr. Buck's habeas counsel had a statutory duty to reasonably investigate the grounds for Mr. Buck's initial

habeas application prior to its filing under the plain terms of Section 3. *Cf. Ex parte Evans*, 964 S.W.2d 643, 645 (Tex. Crim. App. 1998) ("When a statute is clear and unambiguous, we apply the plain meaning of its words.") (citing *Ramos v. State*, 934 S.W.2d 358, 364 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1198 (1997); *Boykin* 818 S.W.2d at 785).

Indeed, Section 3 unambiguously states that habeas counsel must, under the procedures of the statute, investigate the grounds for a habeas application prior to filing one. Tex. Code Crim. Proc. Ann. art. 11.071, § (3)(a) (Section 3 imposes a statutory duty on Article 11.071 counsel to "expeditiously" investigate, "*before and after* the appellate record is filed," the "*factual and legal grounds*" for the filing of a habeas application) (emphasis added). This investigation should be diligently pursued. *See Ex parte Reynoso*, 257 S.W.3d 715, 720 n.2 (Tex. Crim. App. 2008) (habeas corpus counsel has duty to "diligently pursue the investigation"); *see also* Ex. 87, State Bar of Texas, *Guidelines and Standards for Texas Capital Counsel*, Adopted by the State Bar Board of Directors (April 21, 2006), Guideline 12.2(B)(2)(a) (habeas counsel has a duty "to conduct a thorough and independent investigation of both the conviction and sentence" and "must promptly obtain the investigative resources necessary to examine both phases, including the assistance of a fact investigator and a mitigation specialist, as well as any appropriate expert"). It is mandatory, not merely instructive or advisory. *See, e.g.*, *Brinkley v. State*, 320 S.W.2d 855, 856 (Tex. Crim. App. 1959) ("'Must' and 'shall' are synonymous and are usually mandatory when used in statutes.").

Although the text of Section 3 is clear and unambiguous, certain "extratextual factors," including its legislative history, lend further support to the proposition that there is an affirmative duty to investigate prior to the filing of an initial habeas application, and that this duty was intended to be an integral component of habeas corpus procedure in Texas.[20]

Prior to the passing of Senate Bill 440 ("SB 440," or "HB 440" in the Texas House) and the subsequent enactment of Article 11.071, Texas law did not "impose any deadlines for filing habeas corpus appeals nor limit the number of times a person may file a habeas appeal." *See* Ex. 87, House Research Organization Bill Analysis for SB 440 at 2 (May 18, 2995). In discussing SB 440, Senator John Montford noted that habeas corpus procedure thus "had people languishing on death row . . . in some instances up to 17 years[.]" *See* Ex. 89, Debate on S.B. 440 on the Floor of the Texas Senate (Second and Third Readings) 74th Leg., R.S. (April 10, 1995), Rep. John Montford at 1, line 31. He presented SB 440 as "the best way to address that problem." *Id.* at line 33.

Article 11.071 was thus enacted to implement the Texas Constitutional mandate that "[t]he Legislature shall enact laws to render the remedy [of habeas corpus] *speedy and effectual.*" *Ex parte Kerr*, 64 S.W.3d 414, 418 (Tex. Crim. App. 2002) (emphasis added). As framed by the Bill's supporters, the objective was to "promote justice and save the state money." *See* Ex. 87, House Research

[20] This Court may consider certain "extratextual factors" in construing the Code of Criminal Procedure. *See Ex parte Torres*, 943 S.W.2d 469, 473 (Tex. Crim. App. 1997) (citing Texas Gov't Code § 311.023).

Organization Bill Analysis at 7. To that end, the bill instituted several significant changes to state habeas procedure: (i) it instituted mandatory appointment of competent counsel; (ii) it set tighter deadlines for filing by having the habeas and direct appeal procedures run at the same time; and (iii) it limited a prisoner's ability to raise claims in subsequent petitions. *See Ex parte Kerr*, 64 S.W.3d 414 at 418.

The legislation was designed to give habeas applicants one "*well-represented*" bite at the apple; one chance for the applicant to raise all habeas issues in their initial petition. *See Ex parte Graves*, 70 S.W.3d 103, 130 (Tex. Crim. App. 2002) (Johnson, J., dissenting) ("The idea is this: [y]ou're going to be able to fund counsel in these instances, and we are going to give you one *very well-represented run* at a habeas corpus proceeding.") (emphasis added) (quoting Statement of Rep. Pete Gallego, May 18, 1995); *see also* Ex. 90, Debate on H.B. 440 on the Floor of the Texas House (Second Reading) 74th Leg., R.S. (May 18, 1995), Rep. Pete Gallego at 8, lines 22-24 (H.B. 440 is designed to say to applicants "*raise everything at one time.* You get one bite of the apple. If you have to stick the kitchen sink in there, put it all in there and we will go through those claims one at a time and make a decision." (emphasis added)). The legislature recognized that this new procedure would only function effectively if habeas counsel investigated and raised all potential claims in the initial habeas application. When pressed on the issue of whether this new, faster procedure, could result in unjust executions, Representative Pete Gallego retorted that habeas applicants:

> [G]et lawyers from day one. They get fully-paid investigators. They get *all of the investigation* . . . [and] the point that I've been trying to make

> is that in the first time in our state's history *everyone who is convicted will have a fully-paid investigation into their claims of innocence, into their claims of procedural . . . wrongdoing [and] into any claim they can possibly raise* . . . for the first time in our history, we'll actually investigate those claims.

Id. at 18, lines 24-28, 31-32 (emphasis added). A full investigation into "procedural wrongdoing and into any claim [applicants] can possibly raise" is thus necessary for the habeas corpus procedure outlined in Article 11.071 to be effectual.

This is particularly true for claims of ineffective assistance of counsel. The Supreme Court recently noted in *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) that ineffectiveness claims require "investigative work and an understanding of trial strategy[,]" which makes them difficult claims to raise for applicants unless they can rely on a court opinion or attorney work product. The Court also recognized that the raising of ineffectiveness claims is further complicated by the fact that applicants are confined behind bars where they are "in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record." *Id.*; *accord Ex parte Torres*, 943 S.W.2d at 475 ("In most instances, the record on direct appeal is inadequate to develop an ineffective assistance claim.").

Section 3 therefore must be construed as requiring habeas counsel to conduct a diligent investigation into ineffectiveness claims prior to filing the initial habeas application. Otherwise, the entire purpose of the statute would be thwarted. Indeed, as the legislative history reveals, the initial application is a prisoner's first, and only, opportunity to fully investigate an ineffectiveness claim. If habeas

counsel fails to conduct a diligent investigation prior to filing an initial application, the applicant does not receive one "well-represented" bite at the apple as the legislature intended.

The U.S. Supreme Court in *Martinez* highlights this concern. There, the Court stated that "[b]y deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeals process, where counsel is constitutionally guaranteed, [Arizona] significantly diminishes prisoners' ability to file such claims." *Martinez*, 132 S. Ct. at 1318. An Art. 11.071 proceeding provides the first opportunity to fully investigate the ineffectiveness of trial counsel, and is thus considered by the CCA to be the appropriate forum for raising such claims. *See Mata v. State*, 226 S.W.3d 425, 430 n.14 (Tex. Crim. App. 2007) ("As a general rule, one should *not* raise an issue of ineffective assistance of counsel on direct appeal.") (emphasis in original) (citation omitted); *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005); *Mitchell v. State*, 68 S.W.3d 640, 643 (Tex. Crim. App. 2002) (habeas corpus "is the appropriate vehicle [in Texas] to investigate ineffective-assistance claims"); *Mallet v. State*, 65 S.W.3d 59, 62-63 (Tex Crim. App. 2001); *Robinson v. State*, 16 S.W.3d 808, 810 (Tex. Crim. App. 2000) ("a post-conviction writ proceeding . . . is the preferred method for gathering the facts necessary to substantiate" an ineffectiveness claim); *Thompson v. State*, 9 S.W.3d 808, 813-14 (Tex. Crim. App. 1999); *Jackson v. State*, 973 S.W.2d 954, 957 (Tex Crim. App. 1998). The result is that, if habeas counsel is ineffective, "no state court at any level" will have the opportunity to review that applicant's ineffectiveness claim. *See* Tex. Code Crim. Proc. Ann. art. 11.071, §

(5)(a); *see also Martinez*, 132 S. Ct. at 1316.[21] Such a result would be patently at odds with what the legislature intended when it recognized the importance of an investigation by determining that counsel "*shall* investigate" the "factual and legal grounds" for the filing of a habeas application. Tex. Code Crim. P. art. 11.071, § (3)(a) (emphasis added).[22]

Mr. Buck's habeas counsel had a statutory duty under Section 3 to investigate the factual and legal grounds for an ineffectiveness claim prior to the filing of Mr. Buck's initial application.

2. Mr. Buck's Appointed State Habeas Counsel Failed to Investigate the Factual and Legal Grounds for Filing Mr. Buck's Ineffectiveness Claim, and the Merits of That Claim Should Now be Addressed.

In determining whether Mr. Buck's habeas counsel failed in his Section 3 duty to investigate, the Court should look to the legal principles governing the

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[21] This is particularly troubling because "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an 'obvious truth' the idea that 'any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.'" *Martinez*, 132 S. Ct. at 1317.

[22] The CCA's decision in *Graves* does not suggest otherwise. Indeed, although the court held in *Graves* that Tex. Code Crim. Proc. art. 11.071, § (2)(a), which says that an applicant "shall be represented by competent counsel[,]" only requires the appointment of counsel that is competent at the time of appointment, 70 S.W.3d at 114, that holding did not encompass Section 3 and the duty to investigate – a distinct statutory obligation separate and in addition to the competency requirement. *See Ex parte Mines*, 26 S.W.3d 910, 912 (Tex. Crim. App. 2000) ("In this context 'competent' refers to an attorney's qualifications and abilities. [Article 11.071] further requires counsel to investigate expeditiously the factual and legal grounds for an application."). Accordingly, even if the competency requirement only reaches the moment of appointment, the duty to investigate extends far beyond that, until the actual filing of the initial habeas petition.

claims for ineffective assistance of counsel that were established in *Strickland*, 466 U.S. at 668. The *Strickland* standard is appropriate here because it has been applied by the U.S. Supreme Court in the failure to investigate context in *Wiggins*, 539 U.S. at 520, and the Supreme Court, in *Martinez*, 132 S. Ct. at 1318, endorsed the application of the *Strickland* factors to determine whether habeas counsel is ineffective. The *Strickland* analysis is composed of two prongs. The applicant must show that: (i) his habeas counsel was deficient; and (ii) that the deficiency prejudiced the defense. 466 U.S. at 687. Both of these prongs are met in this case.

Mr. Buck's habeas counsel, Mr. Robin Norris, was deficient in failing to reasonably investigate the factual and legal bases for a claim that Mr. Buck's trial counsel was ineffective in failing to investigate and present mitigating evidence at the sentencing phase of his capital murder trial. The ABA Guidelines[23] state that habeas counsel should conduct an investigation in order to raise all meritorious claims. *See* Ex. 85, ABA Guideline 11.9.3; *see also* Ex. 87, SBOT Guideline 12.2(B)(3)(a). The ABA Guidelines also state that, with regard to ineffectiveness claims, state habeas counsel must discuss "[p]ossible deficiencies in the performance

[23] As previously explained, the ABA Guidelines and SBOT Guidelines may provide guidance to this Court in its making a determination as to whether counsel's conduct "f[alls] below an objective standard of reasonableness," judged under "prevailing professional norms." *See Strickland*, 466 U.S. at 688; *supra* Part III.B.).

of prior counsel" with the client. *See* ABA Guidelines 11.9.3 cmt. Such an investigation is necessary to uncover claims that are not clear from the record.[24]

Mr. Norris failed to conduct a reasonable investigation into potential habeas claims. Though Mr. Norris failed to maintain his files relating to his representation of Mr. Buck,[25] his failure to investigate is evidenced by the staggering amount of mitigating evidence that has not been raised before now – evidence that would have altered the course of Mr. Buck's sentencing phase had it been presented to the jury. (*See supra* Parts III.A., 1-13.) Indeed, if Mr. Norris had conducted any independent investigation into Mr. Buck's background, discussed possible deficiencies of trial counsel with Mr. Buck, or sought to uncover possible defenses, Mr. Norris would have readily discovered that Mr. Buck's trial counsel was ineffective in investigating and raising mitigating evidence at sentencing.

Mr. Norris' failure to uncover voluminous mitigating evidence "cannot be justified as a tactical decision." *Wiggins*, 539 U.S. at 521 (citation omitted). To the contrary, Mr. Norris raised exclusively *record-based claims* in Mr. Buck's initial

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[24] The 2003 Revised Edition of the ABA Guidelines ("2003 ABA Guidelines") explain that habeas counsel need to "change the picture that has previously been presented" at trial. Ex. 85, ABA Guideline 10.15.1 cmt. That means that habeas counsel "cannot rely on the previously compiled record but must conduct a thorough, independent investigation" that involves "assembling a more-thorough biography of the client than was known at the time of trial" in order to "discover mitigation that was not presented previously[.]" *See id.* Similarly, the SBOT Guidelines specifically instruct habeas counsel to "investigate all possible defenses and potentially mitigating evidence." Ex. 87, SBOT Guideline 12.2(B)(3)(c).

[25] Mr. Norris has prejudiced Mr. Buck by failing to maintain his files relating to Mr. Buck's state habeas representation. Mr. Norris' actions have deprived Mr. Buck of the ability to present this court with a more thorough portrait of Mr. Norris' deficient performance.

application. These claims were based on alleged failures that were apparent from the face of the record such as: (i) the trial court's refusal to allow evidence of Mr. Buck's parole eligibility; and (ii) trial counsel's failure to request a jury instruction on a lesser included offense. *See* Ex. 14, *Ex Parte Buck*. Mr. Buck's initial petition was thus devoid of any evidence suggesting that Mr. Norris engaged in any extra-record investigation. This falls far short of professional norms and what the Texas legislature intended when it crafted Article 11.071.

CONCLUSION AND PRAYER FOR RELIEF

For all of the above-stated reasons and those presented in any/all submissions accompanying this *Application*, Mr. Buck prays:

1. That Court of Criminal Appeals find that Mr. Buck's *Application* complies with Article 11.071 of the Texas Code of Criminal Procedure;

2. That leave to amend the *Application* be granted;

3. That summary relief be granted on those claims of error which are clear from the facts set forth in this pleading and the record;

4. That an evidentiary hearing on the claims and any and all disputed issues of fact be granted;

5. That discovery as may be necessary to a full and fair resolution herein be allowed;

6. That Mr. Buck's death sentence be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on Wednesday, March 13, 2013, a copy of the foregoing pleading was served on counsel for the State by hand delivery.

Lynn Hardaway
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_____
Katherine C. Black

VERIFICATION

STATE OF TEXAS §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared

Katherine C. Black, who upon being duly sworn by me testified as follows:

> I am a member of the State Bar of Texas. I am *pro bono* counsel for Duane Edward Buck. I have personal knowledge of the facts contained in the foregoing pleading, and I believe all the allegations therein to be true.

_____
Katherine C. Black

SUBSCRIBED AND SWORN TO BEFORE ME on this ___ day of March, 2013.

_____
Notary Public, State of Texas