
**BEFORE THE GOVERNOR OF THE STATE OF TEXAS
AND
THE TEXAS BOARD OF PARDONS AND PAROLES**

In re:

Duane Edward Buck,

Petitioner.

**SUPERSEDING
APPLICATION FOR COMMUTATION OF SENTENCE
OR 120-DAY REPRIEVE**

AND

REQUEST FOR HEARING PURSUANT TO

37 Texas Administrative Code § 143.43(f)(3) and
Administrative Procedures Act § 2001.001 et seq.,

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“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.”

-- Texas Attorney General John Cornyn
June 2000

A PROCESS TAINTED BY CONSIDERATIONS OF RACE

On May 5, 1997, Duane Edward Buck was convicted of capital murder in Harris County for the July 1995 shooting deaths of Debra Gardner and Kenneth Butler while under the influence of drugs. A third person, Phyllis Taylor, was also shot, but survived. Ms. Taylor supports a commutation of Mr. Buck’s sentence. Mr. Buck is scheduled to be executed on September 15, 2011 even though the Office of the Attorney General identified Mr. Buck’s case as one containing constitutional error requiring he be resentenced.

During Mr. Buck’s trial, Dr. Walter Quijano was called by the defense and testified that he did not believe Mr. Buck would be a future danger based on several factors, primarily that Mr. Buck had no violent criminal record and did not display violent tendencies. On cross-examination, the government elicited testimony from Dr. Quijano that blacks are more likely to commit future acts of violence:

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.

See Exhibit 1 (Excerpt of Dr. Quijano’s testimony) (emphasis added). The government urged the jury in its closing argument to rely on Dr. Quijano’s testimony. See Exhibit 2 (Excerpt of State’s closing argument). The jury found that Mr. Buck would be a future danger, and he was sentenced to death.

On appeal, the Texas Court of Criminal Appeals (CCA) upheld Mr. Buck's death sentence. The reliance by the government on Mr. Buck's race as a factor increasing his future dangerousness was not raised as a ground of error. Mr. Buck filed a state habeas application on March 15, 1997, alleging constitutional violations relating to the judge's refusal to admit evidence regarding parole. The reliance by the government on Mr. Buck's race as a factor increasing the likelihood of future danger was not raised as a claim for relief. In 2002, after the Attorney General of Texas identified Mr. Buck's case as one deserving of a new sentencing hearing due to the government's reliance on race and therefore agreed to waive any procedural defects in the cases identified, Mr. Buck's state habeas counsel filed a subsequent application for writ of habeas corpus in state court raising equal protection and due process claims related to the government's use of race. On October 15, 2003, the Court of Criminal Appeals denied the initial application and refused, for procedural reasons, to consider the race-related claims. Mr. Buck's federal habeas petition raising the same issues that were raised in state habeas proceedings was also denied.

On June 10, 2000, the Houston Chronicle's front page carried an article entitled *Death penalties of 6 in jeopardy: Attorney general gives result of probe into race testimony*, declaring: "The death sentences for six convicted killers likely will be overturned because prosecutors used racially charged testimony from a clinical psychologist, the Texas attorney general said Friday."¹

One day earlier, the chief legal officer for the State of Texas, Attorney General John Cornyn, issued a press release in which he identified Mr. Buck's and five other cases then pending in post-conviction proceedings as cases in which the government had unconstitutionally relied on testimony of psychologist Walter Quijano, that a defendant's race should be considered in determining future dangerousness and, at least in Mr. Buck's case, that being black was a factor that increased the likelihood of future dangerousness. The press release looked at a total of eight cases in which Dr. Quijano had been

¹ James Kimberly, *Death penalties of 6 in jeopardy: Attorney general gives result of probe into race testimony*, HOU. CHRON. June 10, 2000 at A1 (attached as Exhibit 3).

involved, but concluded that two cases did not have circumstances rising to a constitutional violation.² Through mistake or inadvertence, however, and despite the Attorney General's admission of constitutional error in Mr. Buck's case, he would be the only one of the six whose racially-tainted death sentence was left intact.

The Attorney General first confessed error based on the testimony of Dr. Quijano in the case of Victor Saldaño. In *Saldaño*, the government called Dr. Walter Quijano and elicited testimony about "identifying markers" that help experts determine whether there is a probability a defendant will present a future threat. One of the factors that Dr. Quijano identified as relevant to a determination of future dangerousness is the defendant's race or ethnicity. After the Texas Court of Criminal Appeals affirmed Saldaño's conviction on direct appeal, Saldaño filed a petition for writ of *certiorari* in the Supreme Court asking the Court to decide the question of "[w]hether a defendant's race or ethnic background may ever be used as an aggravating circumstance in the punishment phase of a capital murder trial in which the State seeks the death penalty."

On behalf of the State of Texas, the Attorney General filed a response to the petition for writ of *certiorari* admitting constitutional error had occurred. Quoting *Rose v. Mitchell*, the AG noted that "[d]iscrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice."³ The Attorney General argued that the "infusion of race as a factor for the jury to weigh in making its determination violated [Saldaño's] constitutional right to be sentenced without regard to the color of his skin."⁴ At the request of the Attorney General, the Supreme Court, on

² News Release, Office of the Attorney General, Texas Attorney General John Cornyn offers the following information on capital cases that involved Dr. Walter Quijano's testimony using race as a factor to determine future dangerousness (June 9, 2000) (attached as Exhibit 4).

³ Response to Petition for Writ of *Certiorari* at 7, *Saldaño v. State*, No. 99-8119 (attached as Exhibit 5).

⁴ *Id.* at 8.

June 5, 2000, granted *certiorari*, vacated the judgment below, and remanded the case for further proceedings.⁵

“As I explained in a filing before the United States Supreme Court...it is inappropriate to allow race to be considered as a factor in our criminal justice system,” Attorney General Cornyn wrote in a June 2000 statement. “[T]he United States Supreme Court agreed. The people of Texas want and deserve a system that affords the same fairness to everyone.” Mr. Cornyn promised that Texas would “continue to vigilantly monitor all death-penalty cases.”⁶ “Our goal,” Mr. Cornyn said, “is to assure the people of Texas that our criminal justice system is fairly administered.”⁷

Following an intensive review of cases in which Dr. Quijano had testified, the Attorney General identified six cases in which constitutional error had occurred:

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.***⁸

Mr. Cornyn said Texas would not contest federal appeals in those six cases. “[I]f the attorneys [for the six identified defendants] amend their appeals currently pending in federal court to include objections to Quijano’s testimony, the attorney general will not object.”⁹

⁵ See Exhibit 6.

⁶ News Release, Office of the Attorney General, Statement from Attorney General John Cornyn regarding death penalty cases (June 9, 2000) (attached as Exhibit 7).

⁷ Steve Lash, *Texas death case set aside: U.S. Supreme Court sees possible racial bias*, HOU. CHRON., June 6, 2000 at A1 (attached as Exhibit 8).

⁸ News Release, Office of the Attorney General, Statement from Attorney General John Cornyn regarding death penalty cases (June 9, 2000) (emphasis added) (attached as Exhibit 7).

⁹ James Kimberly, *Death penalties of 6 in jeopardy: Attorney general gives result of probe into race testimony*, HOU. CHRON., June 10, 2000 at A1 (attached as

The six cases in which the Attorney General found violations of equal protection were those of **Gustavo Garcia, Eugene Broxton, John Alba, Michael Gonzales, Carl Blue, and Duane Buck.**

Of the five other cases identified by the Attorney General as having been obtained in violation of equal protection, two were situated identically to Mr. Buck. In the cases of Carl Blue and Gustavo Garcia, Dr. Quijano had been called by the defense. As in Mr. Buck's case, in both *Blue* and *Garcia*, the State elicited testimony from Dr. Quijano during cross-examination that the accused's race was a factor that increased the probability of future dangerousness.¹⁰

Both Mr. Blue and Mr. Garcia had habeas corpus petitions already pending in federal district court at the time the Attorney General identified their cases as containing constitutional error, and neither had raised an equal protection or due process claim in state or federal court at that time. Despite this, as promised, the Attorney General waived the exhaustion requirement and conceded that Dr. Quijano's testimony violated equal protection in both cases and required a new sentencing hearing.¹¹

The district court granted Mr. Garcia a new hearing on September 7, 2000 in a short order that cited the Attorney General's concession.¹² On September 29, 2000, the district court 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."¹³

Exhibit 3).

¹⁰ See Memorandum Opinion and Order at 15-16, *Blue v. Johnson*, No. 4:99-cv-00350, slip op. at 16 (S.D. Tex. Sep. 29, 2000) (attached as Exhibit 9).

¹¹ Memorandum Opinion and Order at 17, *Blue v. Johnson*, No. 4:99-cv-00350, slip op. at 16 (S.D. Tex. Sep. 29, 2000) (attached as Exhibit 9); Response to Supplemental Petition and Confession of Error, *Garcia v. Johnson*, No. 1:99-cv-00134 (E.D. Tex. Aug. 18, 2000).

¹² Order, *Garcia v. Johnson*, No. 1:99-cv-00134 (E.D. Tex. Sep. 7, 2000) (attached as Exhibit 10).

¹³ Memorandum Opinion and Order at 17, *Blue v. Johnson*, No. 4:99-cv-

In the cases of Eugene Broxton, Michael Gonzales, and John Alba, the prosecution called Dr. Quijano. Broxton's and Gonzales's cases were pending in federal district court when Mr. Cornyn identified them as cases warranting new sentencing hearings. At the time, neither had raised a claim alleging equal protection or due process violations based on the State's reliance on race as a factor increasing the likelihood of future dangerousness. As in *Garcia* and *Blue*, the Attorney General permitted Gonzales and Broxton to file "supplemental" habeas corpus petitions, waived all procedural defenses, and conceded error.

Mr. Broxton, whose case originated from Harris County like Mr. Buck's, was granted a new sentencing hearing on March 28, 2001, when the federal court found the introduction of race by the government "constitutionally impermissible and totally irrelevant to Texas' special issues."¹⁴ Gonzales was granted a new sentencing hearing by the federal court on December 19, 2002, based on Attorney General Cornyn's concession and the "inexcusable nature of the testimony."¹⁵

Unlike *Gonzales* and *Broxton*, Mr. Alba's federal habeas petition had already been denied by the federal district court at the time the Attorney General identified his case as having contained error. The Attorney General therefore confessed error in that case to the United States Court of Appeals for the Fifth Circuit. That court then vacated the district court's denial and remanded the case back to the district court with instructions to grant the petition.¹⁶ The court granted resentencing on September 25, 2000.¹⁷

00350, slip op. at 16 (S.D. Tex. Sep. 29, 2000) (attached as Exhibit 9).

¹⁴ Order at 10-11, *Broxton v. Johnson*, No. 4:00-cv-01034 (S.D. Tex. Mar. 28, 2001) (attached as Exhibit 11).

¹⁵ Order Granting Respondent's Partial Summary Judgment and Recognizing Respondent's Notice of Error Allowing Petitioner a New Sentencing Hearing to Determine if a Life or Death Sentence Should Be Imposed in This Case, *Gonzales v. Johnson*, No. 7:99-cv-00072 (W.D. Tex. Dec. 19, 2002) (attached as Exhibit 12).

¹⁶ *Alba v. Johnson*, No. 00-40194 (5th Cir. Aug. 21, 2000).

¹⁷ Order, *Alba v. Johnson*, No. 4:98-cv-221 (E.D. Tex. Sept. 25, 2000) (attached as Exhibit 13). As previously mentioned, the Attorney General identified two cases that it concluded did not contain constitutional violations. Those cases

Of all the cases identified by Attorney General Cornyn as having equal protection violations, Mr. Buck's was the only one which, at the time, was not yet in federal court. Mr. Buck's state habeas application, although it had been filed in 1999, was not decided until late 2003. His case did not enter the federal courts until October 14, 2004.

That the Attorney General had already conceded error in Mr. Buck's case and promised to waive all procedural defenses was never mentioned in the federal proceeding. This oversight resulted in Mr. Buck's habeas application being denied and his equal protection and due process challenges being procedurally defaulted. Mr. Buck, despite the Attorney General's admission of constitutional error in the case, remains the only one of the six whose racially-tainted death sentence stands.¹⁸

Mr. Buck takes full responsibility for the pain he has caused, and he accepts that he must spend the rest of his days in prison for what he has done. But he should not be executed on the basis of a process tainted by considerations of race.

MR. BUCK'S LIFE SHOULD BE SPARED

Mr. Buck's many supporters hope that this Board takes a moment to read his story, and that in so doing, the Board sees that Duane still has the capacity to be a good, productive Christian, and that his life should be spared.

were 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 government did not introduce race as a factor.

¹⁸ 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 (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.").

Duane was born on July 5, 1963 in Houston, Texas. The eldest of five children born to Reverend James and Leona Buck, Duane grew up in a wood-frame house in front of the family's northeast Houston auto shop. Along with his younger siblings, Marvin, Monique, Keith, and Felicia, Duane grew up working in the family business.



James and Leona Buck

At 5'9" and 200 pounds, James Buck had a muscular and imposing build, and a strict parenting style to match. Everyone in the family was expected to work in the family's auto shop, including his young children. By the age of 9, Duane would help his father change tires, sweep out the garage, and make appointments for auto repairs. The children were also in charge of the garden, where the family grew watermelon, jalapeños, cucumber, and

squash. When the neighborhood kids stopped by to visit the Buck house, they were often put to work in the garden.

A strict parent, James believed in the axiom, *Spare the rod, Spoil the child*. If the children forgot to put up a hose or didn't sweep the driveway to satisfaction, they would be whipped with a belt, switch, electric cord or hit with a spark plug. Duane often found refuge in school. He was popular and, though small, a successful athlete. He instilled his love of math in his brother Marvin, whom he helped with his homework nightly.



Duane with his mother, Leona Buck

In the early hours of a crisp December morning in 1974, five days before Christmas, Leona Buck, Duane's mother, was killed in a car accident. She was on her way home from her job as a night nurse when an 18-wheeler broadsided the car in which Leona was a passenger. Leona, riding in the backseat, was killed.

Leona left behind her five young children, including Duane, then aged 11. A proud "Mama's Boy" since birth, Duane was devastated by the loss and decided to live in Louisiana with his grandmother. He attended school for several years there, clinging to the closest thing he had to his mother.

Shortly after the death of his mother, Duane's father married Sharon Williams, known around the neighborhood as "Dee Dee." Just 17 years old, Sharon came to the family with two children of her own, bringing the family to eleven (James had two kids, Patrick and Lydia, from a previous extramarital affair). James and Sharon had five more kids together and James fathered several other children. When Sharon passed in 2009, there were twenty-two children.

Throughout Duane's childhood, James Buck spent periods in jail on charges related to his operation of the auto shop, including charges for possessing and transporting stolen vehicles. When James was incarcerated, Sharon would run the shop, driving the wrecking trucks and supervising Duane, Marvin and Keith, who attended to the body and mechanic work.

With a young mother, a busy or absent father, and over a dozen children running around, Duane, the eldest child, having returned from Louisiana, became a father-figure to the younger children. He taught his brothers to fix cars and his sister Monique to ride a bike. He took Marvin and Monique to the skating rink and the park and patiently taught Marvin how to swim. When she was old enough, Duane taught his half-sister Tyrhonda how to drive in a field in the back of the family home.



Buck children with James Buck

In their teenage years, Duane and his younger brother Marvin were inseparable. Marvin cherished their time together and found comfort in knowing his brother was always there. He remembers vividly pulling up next to his brother's Mustang in the high school parking lot, proud to park next to his older brother's fixed-up car.

As Duane aged, and the pain of the loss of his mother continued to ache, Duane's relationship with his father became more strained. Despite his father's request that he stay to help run the family business, Duane returned to his grandparents' home in Louisiana to finish high school.

In 1982, Duane's father asked him to return to Houston to help run a second store, opening on U.S. Route 59 and Harper, which would sell used parts and serve as a storage lot. Duane agreed and moved back into the family home to help run the newest branch of the business.



Duane and a Date at a School Dance

Unfortunately, now in his late teens, Duane fell into the vices so prevalent in the neighborhood in which he grew up. Duane began smoking marijuana, which led to an addiction to crack cocaine. Duane tried to become sober, but he was able to stay clean for only brief periods of time before falling back into drugs.

As his drug habit worsened, his relationship with his high school sweetheart, and the mother of his son, Duane, Jr., deteriorated. Duane found himself locked in the cycle of addiction, and his relationship with the mother of his child fell apart. They began to fight constantly. Trying to avoid the acrimonious relationship he saw between his father and step-mother growing up, Duane ended the relationship.

A couple of years later, though still struggling with his addiction to drugs, Duane began seeing Debra Gardner, whom he had known in high school, but only recently had been reacquainted with. Duane moved in with

Ms. Gardner and her two children, Shennel and Devon, and began raising them as though they were his own.

Regrettably, Duane's drug abuse began to affect his relationship with Ms. Gardner and they began to fight regularly. They broke up and reconciled regularly, with Duane often moving out for short periods of time. One of those times occurred in late July 2005. In the early morning hours of July 30, 2005, Ms. Gardner, Phyllis Taylor, and brothers Kenneth Butler and Harold Ebenezer, returned to Ms. Gardner's house to play cards after a night shooting pool at a local game room.

Not long after they arrived home, Duane, severely intoxicated, arrived at Ms. Gardner's apartment. Seeing two men whom he did not know in the house, Duane became angry, argued with Ms. Gardner, and left.

Mr. Butler, Mr. Ebenezer and Ms. Taylor eventually decided to go to sleep. Each took a couch in the living room and Ms. Gardner went into her bedroom. A few hours later, Duane broke into the apartment's back door and began shooting. Duane shot Ms. Taylor and Mr. Butler, and then proceeded outside after Ms. Gardner, whom he shot in the parking lot. He was apprehended immediately.

Ms. Taylor, who knew Duane well at the time, remembers how intoxicated he was that night. "It was like he was a different person. He was so high. His eyes were nothing but bloodshot. There was no white. You could only see pupils and red. And his voice didn't even sound like him. It was like he was taken over by the drugs."

Ms. Gardner and Mr. Butler died of their wounds; Ms. Taylor was taken to a local hospital, where she underwent surgery. After Ms. Taylor was released, Duane called her on the telephone and apologized for what he had done: "I'm sitting here behind these bars and they told me what I did. Please tell me I didn't do what they said I did. I can't believe I shot you." Ms. Taylor forgave him that day.

Since his incarceration in 1997, Duane has not had a single disciplinary infraction, even a minor one. See Exhibits 14-16. He has taken his time to

reflect on his situation and renew his devotion to Christianity. Duane has dedicated himself to the service of God and his fellow man.

To further develop his spirituality, Duane reads the Bible daily. He often shares passages with his family and friends, highlighting sections he thinks will help guide them through the trials of their daily lives.

A Plea of Mercy from Duane's Supporters

Duane appreciates that he has had family and friends who have supported him over the past fourteen years, especially Ms. Taylor, who has forgiven him for what he did. Duane understands the effect his actions have had on the Gardner and Butler families, and he takes full responsibility for the pain and suffering that they have endured.

Pastor J., Spiritual Advisor, volunteer Chaplain:

“Duane is such a peaceful person, a joyful person who smiles all the time. He’s a very different man than he was when he arrived. It would affect me greatly to lose him. I cry thinking about it. When I look at Duane, I see a very kind man. I would truly take his place if I could, because I believe that he would make an immeasurable difference in the outside world.

As a Chaplain, when you visit inmates, you pray with them before leaving, and they often ask you to use your prayers for them. But it’s different with Duane. Duane Buck starts praying for *you*, loud and faithful. When you get to Duane Buck, he’s the one giving you a shower of encouragement and light.”

Pastor Darryl Broussard, Greater Pure Light Church:

“I finally had the opportunity to visit with Duane about a year ago. We spoke about being a child of God and freedom. Although I went to visit Duane so I could encourage him, he ended up encouraging me. He left a great impression on me, as he does on most. During our visit, Duane spoke candidly about the Bible. He spends a lot of time reading and studying scripture. Duane has clearly gained the respect of the guards and has a positive effect on whomever he comes in contact with. I could feel his remorse, and know that he has been reformed. I would love to see him receive a second chance and

pray that the Board of Pardons and Paroles will give him the consideration he deserves.”

Pastor Wayne Whiteside, Crestview Baptist Church:

“I have known Duane Buck for seven years. I have advised over 300 prisoners over the years, and Duane is the most strikingly changed individual that I have encountered in my ministry. He is unlike any other inmate I have met, and in my opinion embodies God’s power to transform. Duane’s faith and dedication to the Lord have been unwavering. His guidance and love for his fellow man has been genuine and true. I hope and pray that the Board of Pardons and Paroles will give him careful consideration.”

Phyllis Taylor, Surviving Victim, devout Christian:

“I thank God that I’m here to tell Duane’s story that I can tell the world that I forgive him and that I can ask and plead for his life. I love my brother so dearly. I hate that things had to turn out this way. I know that if he had been in his right mind, this never would have happened. I want the Board of Pardons and Paroles and Governor Perry to know how hurtful it would be for me to lose him. I would be devastated. I pray that they save Duane’s life.”

Conclusion

Five out of the six cases in which Attorney General John Cornyn conceded error resulted in new sentencing hearings. Mr. Buck has not received the same corrective process. The State of Texas cannot and should not tolerate an execution on the basis of an individual’s race, particularly where this State’s highest legal officer has acknowledged the error, not only in similarly situated cases, but in *this* case.

To that end, Duane Buck, Phyllis Taylor, and all of Duane’s supporters, respectfully request that this Board recommend, and that Governor Perry grant, a commutation of his death sentence. In the alternative, Mr. Buck respectfully requests a 120-day reprieve to provide additional time for the State of Texas to avoid a miscarriage of justice and ensure that Mr. Buck is given an individualized sentence that is not based on improper considerations of his race.

Respectfully submitted, this 31st day of August, 2011,

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