No. 15-8049

In The
Supreme Court of the United States

DUANE EDWARD BUCK, *Petitioner,*
v.
WILLIAM STEPHENS,
DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE HONORABLE MARK L. EARLEY, THE HONORABLE TIMOTHY K. LEWIS, THE HONORABLE GREGORY B. CRAIG, AND THE HONORABLE SHEILA JACKSON LEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are individuals who have a deep interest in the fairness of our criminal justice system.

Mark L. Earley is the former Republican Attorney General of the Commonwealth of Virginia. For ten years, Mr. Earley served as President and CEO of the world's largest outreach to prisoners and families—Prison Fellowship. He is now the Head of Earley Legal Group, a Virginia-based legal practice group.

Timothy K. Lewis is a former Circuit Judge on the U.S. Court of Appeals for the Third Circuit. Judge Lewis was elevated to the Third Circuit in 1992 by President George H.W. Bush. Prior to his elevation, Judge Lewis served as a Judge on the U.S. District Court for the Western District of Pennsylvania and as an Assistant United States Attorney for the Western District of Pennsylvania. He is now Counsel at Schnader, Harrison, Segal & Lewis LLP in Pittsburgh, Pennsylvania.

Gregory B. Craig was Counsel to the President in 2009 and 2010. He is of counsel at Skadden, Arps, Slate, Meagher & Flom LLP.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, counsel notes that the law firm of counsel for amici has assisted counsel for Petitioner at earlier stages of this case and has contributed financially to the preparation and submission of this brief. No person other than amici or counsel for amici made a monetary contribution to the preparation or submission of this brief.

Sheila Jackson Lee is a Democrat representing Texas's 18th Congressional District in the United States House of Representatives. Congresswoman Jackson Lee is a senior Member of the House Judiciary Committee, and is now the Ranking Member on the Subcommittee on Crime, Terrorism, Homeland Security and Investigations. Congresswoman Jackson Lee is currently serving her eleventh term as a member of the United States House of Representatives.

INTRODUCTION AND SUMMARY OF ARGUMENT

The explicit use of race in determining the appropriateness of the death penalty – or any criminal sentence – poisons our system of justice. This case is about exactly such a toxic occasion. In the penalty phase of a Texas capital trial, an expert testified that the petitioner's race was evidence of future dangerousness.

This Court has repeatedly declared that race is an arbitrary and pernicious factor which cannot play a role in our system of justice. Accordingly, this Court has consistently and emphatically acted to root out the impermissible use of race in criminal trials. Given this clear and unequivocal precedent, this Court cannot condone a death sentence which was imposed after the defendant's race was presented as an aggravating factor.

Our system of justice depends on the faith and confidence of the citizens. The use of race to support the case for a defendant's death – or any criminal penalty – raises profound and troubling concerns

that go to the integrity of our system of justice. For the reasons detailed in the Petition, this Court must act to ensure that Mr. Buck's punishment does not rest on a proceeding tainted by race.

Amici have different perspectives on the death penalty, and amici express no opinion here on its permissibility or propriety. Amici nevertheless deeply share the conviction that no sentence – especially a death sentence – may be based on a record that includes an explicit invocation of race as a justification for the sentence, and that an essential role of this Court is to ensure that such a miscarriage of justice does not go uncorrected.

ARGUMENT

Duane Edward Buck, an African-American man, was sentenced to death by a Texas jury in 1997. At the penalty phase of his capital punishment trial, the jury was tasked with determining whether Mr. Buck was likely to be dangerous in the future. A jury finding of future dangerousness was a prerequisite for a death sentence. On this crucial threshold question, the jury was told on at least four occasions that Mr. Buck's race rendered him more likely to be dangerous in the future. *First*, Mr. Buck's counsel placed an expert report by Dr. Walter Quijano into evidence. The report stated that Mr. Buck's race—black—made him more likely to be dangerous in the future. *Second*, Mr. Buck's counsel elicited testimony from Dr. Quijano that highlighted the purported connection between Mr. Buck's race and his likelihood to be dangerous in the future. *Third*, the prosecutor elicited the same race-based testimony from Dr. Quijano – again accentuating the supposed

connection between Mr. Buck's race and his future dangerousness. *Fourth*, in his closing argument, the prosecutor, without specifically mentioning race, encouraged the jury to rely on Dr. Quijano's testimony in finding future dangerousness. Pet. at 4-6.

Although Mr. Buck's race had no proper lawful role in the capital sentencing process, these four occurrences, both separately and cumulatively, ensured that the jury considered race in making its future dangerousness decision. This noxious and deeply prejudicial use of race flouts this Court's consistent holdings that race has no place in our criminal justice system and undermines public confidence in our justice system's ability to treat each defendant fairly.

I. THIS COURT HAS CONSISTENTLY DECLARED THAT RACE IS AN ARBITRARY AND HARMFUL FACTOR WHICH HAS NO PLACE IN THE CRIMINAL JUSTICE SYSTEM.

For over a century, this Court has condemned the consideration of race in the criminal justice process. *See, e.g.*, *Ex Parte Virginia*, 100 U.S. 339, 345 (1880) (prohibiting the race-based exclusion of grand and petit jurors and emphasizing that the Thirteenth and Fourteenth Amendments "were intended to take away all possibility of oppression by law because of race or color."); *Strauder v. West Virginia,* 100 U.S. 303, 309-10 (1880) ("[H]ow can it be maintained that compelling a colored man to submit to a trial for his life drawn from a panel from which the State has expressly excluded every man of

his race, because of color alone . . . is not a denial to him of equal legal protection?"); *Martin v. Texas*, 200 U.S. 316, 319 (1906) ("[I]t is the settled doctrine of this court that whenever, by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the 14th Amendment of the Constitution of the United States[.]"); *Cassell v. Texas*, 339 U.S. 282, 287 (1950) ("An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race."); *Oyler v. Boles*, 368 U.S. 448, 456 (1962) ("Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon a*n unjustifiable standard such as race, religion, or other arbitrary classification*." (emphasis added)); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon *an unjustifiable standard such as race, religion, or other arbitrary classification*." (emphasis added; internal quotation marks and alterations omitted)); *Wayte v. United States*, 470 U.S. 598, 608 (1985) ("[T]he decision to prosecute may not be deliberately based upon an unjustifiable standard such as race[.]" (internal quotation marks and alterations omitted)); *Batson v. Kentucky*, 476 U.S.

79, 85 (1986) ("More than a century ago, the Court decided that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded."); *Powers v. Ohio*, 499 U.S. 400, 411 (1991) ("The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors. The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee." (internal citations omitted)).

Indeed, this Court recognized that "[d]iscrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to black citizens that equal justice which the law aims to secure to all others,'" *Batson,* 476 U.S. at 87-88 (1986) (quoting *Strauder v. West Virginia*, 100 U.S. at 308) (alterations omitted). The perniciousness of race is such that it damages our system of criminal justice when it plays any role:

> For we also cannot deny that, [151] years after the close of the War Between the States and [over] 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.

Rose v. Mitchell, 443 U.S. 545, 558-59 (1979). Not only has this Court consistently emphasized that

there is no place for race in criminal trials, Congress likewise has legislated that there is no place for race in federal sentencing. *See* 28 U.S.C. § 994(d) ("The [United States Sentencing] Commission shall assure that the [sentencing] guidelines and policy statements are entirely neutral as to the race . . . of offenders.").

It is for these very reasons that the Texas Attorney General, when confronted with this expert's race-as-dangerousness testimony in another case, acknowledged that "it is inappropriate to allow race to be considered as a factor in our criminal justice system." Press Release, Office of the Texas Attorney General (June 9, 2000).

As detailed above, in Mr. Buck's case, Dr. Walter Quijano testified, consistent with his expert report, that Mr. Buck's race made him more likely to be dangerous in the future. The fact that Dr. Quijano was a defense witness severely exacerbates the prejudice caused by his testimony. And the prosecution made this already bad situation worse by reiterating the putative connection between race and dangerousness, and urging the jury to rely on that testimony in closing argument.

There is no benign interpretation for this use of race. And because we cannot measure the impact of this plainly false, prejudicial and unconstitutional testimony on the jury, this Court cannot conclude, much less assure the public, that Mr. Buck's death sentence was not based on his race.

II. THE USE OF RACE TO JUSTIFY A DEATH SENTENCE THREATENS PUBLIC CONFIDENCE IN OUR JUSTICE SYSTEM.

"Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). Our justice system depends on American citizens' faith in its fairness for its effective operation. Indeed, one of the animating rationales for this Court's decision in *Batson* was the concern that "[s]election procedures that purposefully exclude black persons from juries undermine our public confidence in the fairness of our system of justice." 476 U.S. at 87. As this Court has explained:

> Batson is based in large part on the right to be tried by a jury whose members are selected by nondiscriminatory criteria *and on the need to preserve public confidence in the jury system*. These are not values shared only by those of a particular color; they are important to all criminal defendants.

Holland v. Illinois, 493 U.S. 474, 489 (1990) (emphasis added). For this reason, this Court has held that criminal defendants are "entitled to require that the State not deliberately and systematically deny to members of his race the right to participate as jurors in the administration of

justice." *Alexander v. Louisiana*, 405 U.S. 625, 628 (1972).

Public confidence in the justice system is undermined not only by racial bias in juror selection, but also by perceptions of racial bias in the criminal justice system writ large. "The claim that the court has discriminated on the basis of race in a given case brings the integrity of the judicial system into direct question." *Rose*, 443 U.S. at 563.

It is increasingly well established that public confidence in the judiciary is weakened by the perception that minorities, particularly African Americans, are treated differently – worse – in our justice system. An August 2013 Pew Research Center survey found that 68 percent of black people believe that blacks are treated less fairly than whites in the courts, and that more than a quarter of whites (27%) hold the same belief. Eileen Patten, *Pew Research Center, The Black-White and Urban-Racial Dividends in Perceptions of Racial Fairness* (Aug. 28, 2013). A Gallup poll similarly found that 68 percent of non-Hispanic blacks perceive that the American justice system is biased against black people, and that a quarter (25%) of non-Hispanic whites hold the same view. Frank Newport, *Gallup:, Gulf Grows in Black-White Views of U.S. Justice System Bias* (July 22, 2013).

Mr. Buck's case reinforces this perception of unequal justice and threatens to validate concerns about racial bias in the court system. *See, e.g.*, American Bar Association Death Penalty Representation Project, *Texas Court Refuses to Correct Taint of Race-Based Testimony in Duane*

Buck Case, 8 PROJECT PRESS 1, (Spr. 2014); Eric Guster, *Man on Death Row because in Texas, Being Black Means You're Dangerous*, THE GRIO, (Oct. 19, 2014), http://thegrio.com/2014/10/19/black-means-dangerous/; Charles J. Ogletree Jr., *Condemned to Die Because He's Black*, N.Y. TIMES, Aug. 1, 2013, at A21; Nathan Koppel, *Did Race Play an Improper Role in Duane Buck's Death Sentence*, WALL STREET J.: LAW BLOG, (Sept. 8, 2011), http://blogs.wsj.com/law/2011/09/08/did-race-play-an-improper-role-in-duane-bucks-death-sentence/.

The proper administration of justice relies on the public confidence of all Americans, regardless of race. If Mr. Buck is executed without full and fair review of his claim that his lawyer was ineffective for injecting racial bias into the sentencing proceedings, his case can and will further undermine public confidence in our justice system's ability to treat all defendants fairly. This Court should not permit this unnecessary, harmful, and unacceptable damage to our criminal justice system.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to grant petitioner's request for a writ of certiorari.

Respectfully submitted,

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