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

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

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

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

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

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

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

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

MR. KELLER: Correct.

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

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

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

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

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

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

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

111.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the court said --

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

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

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

rare case that Gonzalez talked about?

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

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

MR. KELLER: Correct.

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: It doesn't say anything

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: Yes.

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

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

MR. KELLER: Yes.

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

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

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

MR. KELLER: Both points. The State --

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

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

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

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

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

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

JUSTICE KAGAN: Yes. And the legal question

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

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

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

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

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

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

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

MR. KELLER: I --

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

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

If you have no further questions, we'd ask

the Court to affirm the judgment of the Fifth Circuit.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Swarns, you have four minutes remaining.

REBUTTAL ARGUMENT OF CHRISTINA A. SWARNS

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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

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