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# Buck v. Davis: Anti-Discriminatory Principles in Habeas Corpus Cases

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# ***BUCK V. DAVIS: ANTI-DISCRIMINATORY PRINCIPLES IN HABEAS CORPUS CASES***

*Daniella Rubin\**

## I. INTRODUCTION

The judicial system is built upon various principles. Some of these principles have developed over the course of this country's history as a result of changing attitudes and perspectives.<sup>1</sup> One of the most prevalent principles is the notion that every defendant will receive a fair trial, irrespective of their race.<sup>2</sup> The creation of the Equal Protection Clause of the Fourteenth Amendment reflects a societal view that discrimination, particularly race-based discrimination, should be disallowed and condemned in the strongest sense. This Comment argues that anti-discriminatory notions necessarily associated with analysis of equal protection claims should be utilized even absent an equal protection claim. Specifically, where it is clear that race played any role in the prosecution of a defendant and particularly where the jury is charged with determining whether to sentence the defendant to death. Last term in *Buck v. Davis*,<sup>3</sup> the Supreme Court issued an opinion that both considered the harmful effects of de facto racial discrimination in criminal cases, and opened the door for the application of Equal Protection principles in cases not involving Equal Protection claims.

Part II of this Comment lays out the factual history of *Buck v. Davis*. Part III recounts the trial and highlights the racially prejudicial testimony of the court-appointed expert witness. Part IV details

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1. See, e.g., Destiny Peery, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J.L. & SOC. POL'Y 473, 473 (2011) (discussing the surge of colorblindness under the law following *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

2. See U.S. CONST. amend. VI; see also Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF., 107, 119 (1976).

3. 137 S. Ct. 759 (2017).

Buck's protracted appeals process, and Part V analyses the Court's majority opinion and the dissenting opinion of Justice Thomas. Finally, part VI defends the outcome of the case and the Court's willingness to engage with Equal Protection principles in a case devoid of Equal Protection claims. Part VII concludes.

## II. FACTUAL HISTORY

On July 30, 1995, Duane Buck entered the home of his then-girlfriend, Debra Gardner, carrying a shotgun and a rifle.<sup>4</sup> Upon entering, Buck shot his own stepsister, Phyllis Taylor, as well as Gardner's friend, Kenneth Butler.<sup>5</sup> Upon witnessing the shootings, Gardner and her children fled for their lives with Buck in pursuit.<sup>6</sup> Gardner's children begged Buck to spare their mother's life, but to no avail.<sup>7</sup> Buck shot Gardner in the chest, killing her.<sup>8</sup> Shortly thereafter police officers arrived at the scene and arrested Buck.<sup>9</sup> Following the incident, only Taylor survived her wounds.<sup>10</sup>

## III. TRIAL

In 1995, Buck was prosecuted and convicted of capital murder in a Texas district court.<sup>11</sup> In order to determine Buck's sentence, the jury contemplated two primary considerations: (1) Buck's "future dangerousness" and (2) possible mitigating circumstances.<sup>12</sup> The first consideration of "future dangerousness" requires the jury to find beyond a reasonable doubt that there is "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."<sup>13</sup> The second consideration, only to be reached if the first is answered "yes," asks "whether mitigating circumstances nevertheless warrant a sentence of life imprisonment instead of death."<sup>14</sup>

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4. *Buck*, 137 S. Ct. at 767.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 768.

10. *Id.* at 767.

11. *Id.* at 767–68.

12. *Id.* at 768; TEX. CODE CRIM. PROC. ANN. art. 37.071, §§ 2(b)(1), (e)(1) (West 2006).

13. *Buck*, 137 S. Ct. at 768 (quoting TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (West 2006)).

14. *Id.*; see TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e) (West 2013).

The thrust of the sentencing portion of trial focused on the first question: whether Buck would inevitably pose a danger to society again in the future.<sup>15</sup> The State's case focused primarily on past behavior including, *inter alia*, Buck's criminal record, past violent relationships, and his unusual upbeat behavior following the shootings while in custody.<sup>16</sup> Defense counsel attempted to combat the negative testimony by calling family members and expert witnesses to the stand.<sup>17</sup> The first expert, psychologist Dr. Patrick Lawrence, testified that he believed Buck committed a crime of passion.<sup>18</sup> Dr. Lawrence further testified that during Buck's previous incarceration, Buck never displayed signs of violence nor gang affiliation and, as such, was unlikely to be a danger should he be sentenced to life in prison.<sup>19</sup>

The second expert, Dr. Walter Quijano, was appointed by the district court judge to conduct a psychological evaluation.<sup>20</sup> After meeting with Buck in prison, Dr. Quijano wrote a report regarding his observations and shared his findings with defense counsel.<sup>21</sup> Dr. Quijano used several statistical factors in his analysis, including race.<sup>22</sup> The report included the following excerpt: "*Race. Black: Increased Probability. There is an over-representation of Blacks among the violent offenders.*"<sup>23</sup>

At trial, the bulk of Dr. Quijano's testimony was similar to that of Dr. Lawrence's—he "thought it significant that Buck's prior acts of violence had arisen from romantic relationships with women."<sup>24</sup> At one point during Dr. Quijano's testimony, defense counsel asked Dr. Quijano to discuss the statistical factors he considered.<sup>25</sup> Consistent with his report, Dr. Quijano discussed the various factors, including race, noting that these factors are "known to predict future

15. *Buck*, 137 S. Ct. at 768.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* Because the alternative to being sentenced to death is life imprisonment, the consideration of future dangerousness concerns the interaction between inmates and guards. *See id.* However, even this is a large inferential step from the testimony. *See id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 768–69 (internal quotation marks omitted).

dangerousness.”<sup>26</sup> The report was then submitted into evidence.<sup>27</sup>

During cross-examination of Dr. Quijano, the prosecutor inquired about the nature of the statistical factors: “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?” Dr. Quijano responded “Yes.”<sup>28</sup> During jury deliberations, the jury sent out a note requesting copies of all “psychology reports” that were admitted into evidence, including those provided by Dr. Quijano.<sup>29</sup> At the end of the deliberations, the jury sentenced Buck to death.<sup>30</sup>

#### IV. THE APPEALS PROCESS

##### A. *First State Petition*

On appeal, Buck’s conviction and sentence were affirmed.<sup>31</sup> Buck’s first state petition (“State Petition I”) for a writ of habeas corpus advanced four claims, none of which were related to defense counsel’s introduction of Dr. Quijano’s race-related testimony.<sup>32</sup> Buck’s State Petition I resulted in affirmation of his conviction and sentencing.<sup>33</sup> During the time State Petition I was pending, another Texas case in which Dr. Quijano testified reached the United States Supreme Court.<sup>34</sup> In *Saldano v. Texas*,<sup>35</sup> the state of Texas confessed error and asked this Court to grant Saldano’s petition for certiorari, in light of the fact that his “death sentence had been tainted by Dr. Quijano’s testimony that . . . Saldano’s Hispanic heritage ‘was a factor weighing in the favor of future dangerousness.’”<sup>36</sup>

The Texas Attorney General later issued a public statement regarding the cases in which Dr. Quijano had testified.<sup>37</sup> The Attorney General declared, “it is inappropriate to allow race to be considered as a factor in our criminal justice system” and noted that his office would

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26. *Id.* at 769.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. 530 U.S. 1212 (2000).

36. *Buck*, 137 S. Ct. at 769 (citing *Saldano*, 530 U.S. 1212).

37. *Id.* at 770.

be examining the other cases in which Dr. Quijano had served as an expert.<sup>38</sup> Through his investigation, the Attorney General identified six cases which were similar to *Saldano*.<sup>39</sup> Of those six cases, the Texas Attorney General “confessed error, waived any available procedural defenses, and consented to resentencing” in five.<sup>40</sup> Despite having been one of the six originally identified cases, *Buck* was the remaining case in which the Texas Attorney General did not confess error.<sup>41</sup>

### *B. Second State Petition & First Federal Petition*

In 2002, Buck’s attorney then filed a second state habeas petition (“State Petition II”), “alleging that trial counsel had rendered ineffective assistance by introducing Dr. Quijano’s testimony.”<sup>42</sup> The Texas Court of Criminal Appeals dismissed the case as an abuse of the writ due to the fact that the petition alleging ineffective counsel was successive.<sup>43</sup>

In 2004, Buck then attempted to petition for habeas corpus in federal court under 28 U.S.C. section 2254 (“Federal Petition I”).<sup>44</sup> Buck’s argument was that the trial counsel’s choice to utilize Dr. Quijano’s testimony was “constitutionally ineffective.”<sup>45</sup> In response, the State argued that Buck’s petition should be denied on procedural grounds because he waived his right to claim ineffective assistance of counsel when he did not raise the issue in State Petition I.<sup>46</sup> The State further argued that despite having admitted error in other cases, Buck’s case was distinguishable as it was the defense who called Dr. Quijano to the stand.<sup>47</sup>

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38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* (citing *Ex parte Buck*, 418 S.W. 3d 98, 105–06 (Tex. Crim. App. Oct. 15, 2003) *dismissed per curiam*).

44. *Buck*, 137 S. Ct. at 770; 28 U.S.C. § 2254(b) (1996) (stating that: “(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—(A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.”(emphasis added)).

45. *See Buck*, 137 S. Ct. at 770–71.

46. *Id.*

47. *Id.*

At the time of Buck's Federal Petition I, *Coleman v. Thompson*<sup>48</sup> was the controlling law on section 2254 habeas petitions.<sup>49</sup> In *Coleman*, the United States Supreme Court "made clear that an attorney's failure to raise an ineffective assistance claim during state post-conviction review could not constitute cause" for excusing a default.<sup>50</sup> As a result, Buck was not able to argue his default should be excused on a showing of cause and prejudice.<sup>51</sup> Thus, the district court deemed Buck's ineffective assistance claim unreviewable.<sup>52</sup>

### C. Motion to Reopen Case I

In 2011, Buck attempted to reopen his case on the grounds that the prosecution violated the Equal Protection and Due Process Clauses.<sup>53</sup> The thrust of his argument was that the prosecution's solicitation of and reference to Dr. Quijano's testimony regarding the relationship between race and future dangerousness was unconstitutional.<sup>54</sup> The Fifth Circuit denied Buck's motion and, with *Coleman* still controlling, Buck did not attempt to pursue his ineffective assistance of counsel claim.<sup>55</sup>

In 2012, the United States Supreme Court made a ruling in *Martinez v. Ryan*<sup>56</sup> which altered the rule set forth in *Coleman*.<sup>57</sup> In *Martinez*, the Court held that where "a state formally limits the adjudication of claims of ineffective assistance of trial counsel to collateral review,"<sup>58</sup> a petitioner may establish cause for procedural default where: (1) "the state court[] did not appoint counsel in the initial-review collateral proceeding," or "appointed counsel in [that] proceeding . . . was ineffective under the standards of *Strickland v. Washington* [,]" and; (2) "the underlying . . . claim is a substantial one, which is to say that . . . the claim has some merit."<sup>59</sup> Not long after *Martinez* was decided, the United States Supreme Court determined

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48. 501 U.S. 722 (1991).

49. See *Buck*, 137 S. Ct. at 770.

50. *Id.* at 770–71.

51. *Id.*

52. *Id.* at 771.

53. *Id.*

54. *Id.*

55. *Id.*

56. 566 U.S. 1 (2012).

57. *Id.* at 9.

58. *Buck*, 137 S. Ct. at 771.

59. *Id.* (quoting *Martinez*, 566 U.S. at 14)).

in *Trevino v. Thaler*<sup>60</sup> that “*Martinez* extended to state systems[, such as Texas,] that, as a practical matter, deny criminal defendants ‘a meaningful opportunity’ to press ineffective assistance claims on direct appeal.”<sup>61</sup> During the time *Trevino* was being decided, Buck’s third state habeas petition was pending and ultimately denied.<sup>62</sup>

#### *D. Motion to Reopen Case II*

In 2013, Buck filed a motion in federal court to reopen his section 2254 case under Federal Rule of Civil Procedure 60(b)(6).<sup>63</sup> Relief specified in Rule 60(b)(6) may only be given in “extraordinary circumstances” and “such circumstances will rarely occur in the habeas context.”<sup>64</sup> In support of Buck’s contention that his situation fit within this category of rare and extraordinary circumstances, he identified eleven factors which justified the reopening of the judgment.<sup>65</sup> Some of the factors paralleled arguments Buck consistently made throughout his previous petitions, such as: Dr. Quijano’s race related testimony, the prosecutions race related questions on cross-examination, the State’s confession of error in similar cases, and the change in law resulting from *Martinez* and *Trevino*.<sup>66</sup>

The district court denied relief on the grounds that Buck failed to satisfy both prongs of Rule 60(b)(6).<sup>67</sup> The district court determined that a change in law did not qualify as an “extraordinary circumstance” in Buck’s case and noted that Buck’s case “is different in critical

60. 133 S. Ct. 1911 (2013).

61. *Buck*, 137 S. Ct. at 771 (quoting *Trevino* 133 S. Ct. at 1921)); *Trevino* 133 S. Ct. at 1921 (identifying Texas as a state whose system denies criminal defendants a meaningful opportunity to press ineffective assistance of counsel claims).

62. *Buck*, 137 S. Ct. at 771.

63. *Id.*; FED. R. CIV. P. 60(b) (stating that “(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.” (emphasis added)).

64. *Buck*, 137 S. Ct. at 771.

65. *Id.*

66. *Id.* at 772.

67. *Id.*



aspects” from those cases where the State admitted error.<sup>68</sup> The district court went on to say that even if Buck’s situation were “extraordinary,” Buck’s claim would fail on the merits.<sup>69</sup> The district court determined that Buck had failed to demonstrate he had been prejudiced by his trial attorney’s misnomer.<sup>70</sup> The Court then stated that though Buck’s trial attorney performed below the proper standard, Buck’s crime was so heinous that Dr. Quijano’s discussion of race was “*de minimis*.”<sup>71</sup>

Buck then attempted to appeal the denial of his Rule 60(b)(6) motion by filing an application for a certificate of appealability (“COA”) with the Fifth Circuit per 28 U.S.C. section 2253(c)(2).<sup>72</sup> In order to obtain a COA, Buck was required to demonstrate “a substantial showing of the denial of a constitutional right.”<sup>73</sup> The Fifth Circuit determined that Buck’s case was not unique and did not constitute an extraordinary circumstance justifying relief under Rule 60(b)(6).<sup>74</sup> As a result, the Fifth Circuit denied the application for a COA.<sup>75</sup> The United States Supreme Court granted certiorari.<sup>76</sup>

## V. CASE ANALYSIS

### *A. Review Standards for an Application for Certificate of Appealability*

The Supreme Court focused on the lower courts’ faulty legal analysis of Buck’s previous petitions.<sup>77</sup> The Court noted that despite having recited the correct rules, the lower courts failed to apply them accurately.<sup>78</sup> According to the Court, the proper analytic method for reviewing an appeal for an application for a COA is as follows: “A ‘court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims,’ and ask ‘only if the District Court’s decision was debatable.’”<sup>79</sup>

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68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 772–73.

73. 28 U.S.C. § 2253(c)(2) (1996); *Buck*, 137 S. Ct. at 773.

74. *Buck*, 137 S. Ct. at 773.

75. *Id.*

76. *Id.*

77. *Id.* at 773–74.

78. *Id.* at 773.

79. *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327, 348 (2003)).

The Court elaborated on the “debatable” standard, holding that should a court of appeals determine “that a prisoner’s claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true.”<sup>80</sup> In order for a claim to be “debatable” a prisoner is *not* required to demonstrate that they will prevail on the claim—they simply need to prove it is possible.<sup>81</sup> Furthermore, a claim may be found to be debatable even if after the COA has been granted, every jury of reason might later disagree that petitioner will not prevail.<sup>82</sup> The Court concluded that when the order of the analysis is inverted and a court of appeals “‘first decides the merits of an appeal, . . . then justifies its denial of a COA based on its adjudication of the actual merits,’ it has placed too heavy a burden on the prisoner *at the COA stage*.”<sup>83</sup>

The Supreme Court determined that Buck’s request for a COA raised two essential questions:

first, whether reasonable jurists could debate the District Court’s conclusion that Buck was not denied his right to effective assistance of counsel under *Strickland*; and second, whether reasonable jurists could debate the District Court’s procedural holding that Buck had not made the necessary showing to reopen his case under Rule 60(b)(6).<sup>84</sup>

#### *A. Buck’s Ineffective Counsel Claim*

A claim for ineffective assistance of counsel requires a showing “that counsel performed deficiently *and* that counsel’s deficient performance caused [the claimant] prejudice.”<sup>85</sup> The district court found that Buck’s trial counsel performed below the threshold of competent representation and the Supreme Court agreed.<sup>86</sup> The plain fact that Buck’s counsel called Dr. Quijano to the stand and proceeded to elicit race-related testimony was sufficient to qualify as deficient performance.<sup>87</sup>

80. *Id.*

81. *Id.* This would require the prisoner to prove his entire claim just to obtain a COA and therefore would require the appellate court to decide the absolute merits of the prisoner’s claim.

82. *Id.* (citing *Miller-El*, 537 U.S. at 338).

83. *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 336–37) (internal brackets omitted).

84. *Id.* at 775.

85. *Id.* (emphasis added).

86. *Id.*

87. *Id.*

The Supreme Court disagreed, however, with the district court's finding that Buck failed to demonstrate he was prejudiced by his trial counsel's deficient performance.<sup>88</sup> The Court noted there are a number of factors which were present at trial that clearly indicate prejudice.<sup>89</sup> The Court expressly rejected the district court's remark that any mention of race was "*de minimis*" just because it was only mentioned briefly during the trial.<sup>90</sup> Specifically, the Court focused on the potential impact Dr. Quijano's testimony could have had on the jury, given that he was "an expert" and his actual testimony very clearly linked Buck's race to a propensity for violence.<sup>91</sup> As the Supreme Court put it, "the impact of . . . evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses."<sup>92</sup>

### *B. Buck's Application to Reopen His Case Under Rule 60(b)(6)*

The Supreme Court determined that the district court abused its discretion when it denied Buck's application to reopen his case under Rule 60(b)(6).<sup>93</sup> The Court noted that the district court and Fifth Circuit's classification of Buck's case as "unremarkable," simply because they deemed his claim as meritless, was ill-founded.<sup>94</sup> The Supreme Court explained that any possibility that race was a factor in dispensing punishment to a defendant is a "disturbing departure from . . . our criminal justice system."<sup>95</sup> The Court then identified this departure as one which is "precisely among those we have identified as supporting relief under Rule 60(b)(4)."<sup>96</sup> Accordingly, the Court reversed the lower court's decision and remanded the case.<sup>97</sup>

### *C. Justice Thomas's Dissent*

The most prevalent part of Justice Thomas's dissent lies not within his disapproval of the majority's method of analysis, but rather with his own determination of whether Dr. Quijano's testimony

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88. *Id.* at 776.

89. *Id.*

90. *Id.* at 777.

91. *Id.* at 776–77.

92. *Id.* at 777.

93. *Id.* at 778.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 781 (Thomas, J. dissenting).

actually prejudiced Buck.<sup>98</sup> Justice Thomas agrees with the assertions of the lower courts that Buck failed to demonstrate that he was prejudiced by his trial counsel's failed performance.<sup>99</sup> Justice Thomas pointed to facts omitted by the majority which further support the incredibly heinous nature of Buck's crimes and reiterated that the race-related testimony was, in fact, "*de minimis*" when taking all the evidence together as a whole.<sup>100</sup>

Justice Thomas further disagreed with the majority's use of Equal Protection principles regarding race to determine a non-Equal Protection claim.<sup>101</sup> Justice Thomas "agree[d] that racial classifications are categorically impermissible under the Equal Protection Clause—but [because Buck was] not raising an equal protection claim," he found the consideration of potential discrimination is inappropriate.<sup>102</sup> Furthermore, Justice Thomas noted that the "majority identifies no precedents regarding race in the Rule 60(b)(6) context."<sup>103</sup>

Justice Thomas also focused on the fact that it was Buck's own counsel who introduced Dr. Quijano's testimony,<sup>104</sup> and used this fact to support the notion that there was no harm to public confidence in the judicial system.<sup>105</sup> Justice Thomas claimed that this was particularly true given the "*de minimis*" nature of the testimony.<sup>106</sup>

## VI. DISCUSSION

This Comment argues that *Buck v. Davis*<sup>107</sup> was decided correctly. The majority provided clarity on the logical sequence of analysis that should necessarily follow any inquiry into whether a certificate of appealability should be granted. However, the significance of this case goes beyond the clarity provided—it also engaged in a discussion of race outside the traditional context of equal

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98. *Id.* at 782.

99. *Id.*

100. *Id.* at 782–83. The dissent specifically referred to the fact that Buck drove 28 miles to reach the home of Gardner with the specific intent of shooting her and whoever was inside. Buck proceeded to taunt Gardner after he inflicted the fatal shot, and laughed with no apparent remorse when taken into custody. *Id.* at 783.

101. *Id.* at 784.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. 137 S. Ct. 759 (2017).

protection.

The central question which seemed to stem from the lower courts', the majority's, and the dissent's discussions was: is there such a thing as "*de minimis*" race-related testimony—particularly when given by a court appointed expert?<sup>108</sup> Both the majority and the dissent engaged in a fact intensive analysis to support the idea that Dr. Quijano's testimony either was or was not "*de minimis*."<sup>109</sup> The majority differed, however, when the discussion turned away from the facts immediately surrounding Buck's case and towards a general philosophy of legal determinations/verdicts influenced by racial prejudice.<sup>110</sup>

Ideally, the judicial system operates in way that is free from discrimination when determining the merits of a case.<sup>111</sup> As Justice Harlan put it, "our Constitution is color-blind."<sup>112</sup> This statement accurately reflects an overall view that the judicial system maintains the "obligation . . . to treat similar persons similarly, declaring certain individual characteristics—such as color—irrelevant."<sup>113</sup> Should this view only be honored when equal protection claims arise, it would create inconsistency among the courts in both outcome and principle. Courts should strive to maintain consistent "color-blindness" in their courtrooms.

Here, Buck was required to show that there was "a reasonable probability that, but for [his] counsel's unprofessional errors, the result of the proceeding would have been different."<sup>114</sup> Such a standard places a heavy burden on the defendant and necessarily requires the Court to make a (best guess) determination on how heavily the jury weighed each piece of evidence.<sup>115</sup> While there may be indicators to suggest what evidence the jury gave weight to, such as sending notes to request further evidence, it is difficult to ascertain with certainty the

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108. *See id.* at 777 (majority opinion), 782 (Thomas J., dissenting).

109. *See id.* at 777 (majority opinion), 782–83 (Thomas J., dissenting).

110. *See id.* at 778 (majority opinion).

111. *See Fiss, supra* note 2, at 119.

112. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

113. *Fiss, supra* note 2, at 120.

114. *Buck*, 137 S. Ct. at 776 (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). The *Strickland* test for ineffective assistance of counsel claims requires a showing of: (1) counsel's deficient performance, which causes the defendant (2) prejudice. *Strickland*, 466 U.S. at 687.

115. *See* Josh Bowers, *ABA Policy on the Strickland Prejudice Prong*, AM. BAR ASS'N 3 (last visited Sept. 27, 2017), [https://www.americanbar.org/content/dam/aba/administrative/criminal\\_justice/ABAPolicy\\_StricklandPrejudiceProng.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/criminal_justice/ABAPolicy_StricklandPrejudiceProng.authcheckdam.pdf).

true weight given to each piece of evidence. Given that the nature of this inquiry is a guessing game, it can be inferred that the majority in *Buck* set forth a general presumption that race-related testimony greatly prejudices a defendant, regardless of surrounding evidence. This is especially supported by the majority's discussion of the potential poisonous effect of race-related expert testimony.

Justice Thomas's assertion that the use of equal-protection-like notions of racial discrimination were inappropriate in Buck's case implies a misguided view of the judicial system. It does not follow that the legal community applies harsh scrutiny of racial discrimination under equal protection claims but fails to do so in other contexts. This holds particularly true when considering the "emotional and complex" determination that is required of juries in capital sentencing cases.<sup>116</sup> To hold that race-related expert testimony had only a "*de minimis*" effect on a jury in a capital sentencing case would undermine the notion of constitutional "color-blindness" that the judiciary seeks to maintain.<sup>117</sup>

It is generally accepted that the allowance of race-based classifications or discrimination to permeate the justice system is impermissible.<sup>118</sup> As such, the majority correctly exercised precaution in its reversal in not taking for granted what the jury may or may not have found persuasive in its decision to sentence Buck to death.

## VII. CONCLUSION

The true measure of the effect of Dr. Quijano's testimony on the jury the day Buck was sentenced to death is, at best, a guess. Absent knowledge of what occurred during jury deliberations, it is difficult to answer the question "what if the jury never heard this piece of evidence?" The majority in *Buck* recognized the dangers of assuming the answer to that question, where race possibly played a role in determining the life and death of an individual.<sup>119</sup> This recognition reflects the notion that equal-protection-like views towards racial discrimination can, and should, exist outside the context of equal protection claims.

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116. Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part One)*, 29 U. RICH. L. REV. 1327, 1355 (1995) (discussing a jury's considerations when determining whether to vote for a capital sentence).

117. See, e.g., Peery, *supra* note 1, at 473.

118. Fiss, *supra* note 2, at 129.

119. See *Buck*, 137 S. Ct. at 777.

