Nos. 11-6391 and 11A297

IN THE
SUPREME COURT OF THE UNITED STATES

DUANE EDWARD BUCK,
Petitioner,
v.
RICK THALER, 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

PROOF OF SERVICE

I hereby certify that on the 15th day of September, 2011, one copy of **Respondent's Brief in Opposition** was mailed to Kate Black, Texas Defender Service, 1927 Blodgett St., Houston Texas 77004, Counsel for the Petitioner. All parties required to be served have been served. I am a member of the Bar of this Court.

/s/ Edward L. Marshall

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

Petitioner Duane Edward Buck was found guilty and sentenced to death for murdering Kenneth Butler and Debra Gardner—a mother of two whom Buck shot while her children looked on—during a shooting spree at the Gardner family home. During the punishment phase of the trial, the defense presented expert testimony that Buck would not be a future danger. Buck's counsel elicited the race-related testimony on direct examination that Buck now challenges in this Court. The State acknowledges and agrees that it is inappropriate for it to raise an issue such as race for the jury to consider when assessing a defendant's guilt or punishment. But as the lower court explained, Buck's constitutional rights were not violated because Buck himself presented the testimony about which he complains. *Buck v. Thaler,* 345 Fed. Appx. 923, 929-30 (5th Cir. 2009) (per curiam).

Buck is scheduled to be executed at 6 p.m. CDT today, September 15, 2011. More than five years after the district court denied his federal habeas petition, nearly two years after the Fifth Circuit rejected his request for a COA, and almost five months after this Court denied his petition for writ of certiorari, Buck filed motions for relief from judgment under Federal Rules of

Civil Procedure 59(e), 60(b), & 60(d); for sanctions under Rule 11; and for a stay of execution. Buck did so in an attempt to relitigate the very same claims that every court including this Court already rejected, despite the fact that the factual and legal basis of his claims was available to him as early as 2000 (when then Attorney General John Cornyn confessed error in *Saldano* and identified Buck's case as "similar") and no later than 2005 (when the Attorney General determined that Buck's case was not actually similar to *Saldano* and opposed his petition for habeas relief).

Indeed, the instant petition before this Court apparently relies on a June, 2000 press release, which the defense's petition describes as a promise that "no death sentence obtained in such a constitutionally offense manner would ever be carried out." Notwithstanding Buck's apparently erroneous inclusion on a list of cases that were thought to be similar to *Saldano*, the record in Buck's case reveals that no constitutional violation occurred during his sentencing trial and that the trial court record materially distinguishes his case from that of other defendants named in the press release. Importantly, it was Buck's counsel---not the prosecution---that elicited the very testimony from the defense's own expert witness that Buck now challenges before this Court. Although Buck failed to raise the instant claims

before now, nothing legally or factually significant about this case has changed in the intervening six years.

Although nominally he is seeking to appeal the lower court's denial of motions under Rules 59 and 60, in truth he is simply hoping for another bite at the apple to appeal the denial of his substantive claim which has not changed in the seven years since he first raised it. Reasonable jurists would not debate that Buck's substantive claim is patently meritless and procedurally barred. Thus, neither certiorari review nor a stay of execution is appropriate under the circumstances.

STATEMENT OF THE CASE

I. Trial Proceedings

The facts supporting Buck's conviction have been set forth in detail in the lower court's opinion and will not be repeated here. During sentencing, the prosecution presented evidence that Buck was likely to perpetrate violent criminal acts in the future. First, the State detailed Buck's general criminal history, which included previous convictions for delivery of cocaine and for unlawfully carrying a weapon. 28 RR 5-28. Subsequently, the prosecution offered evidence revealing Buck's propensity for violence even before he was arrested for the instant murders. For example, Vivian Jackson—Buck's

former girlfriend and the mother of his son—described multiple instances where she endured violent physical encounters with Buck. As the Fifth Circuit explained, Jackson "testified that Buck had physically abused her on several occasions and once threatened her with a gun." 28 RR 31-40.

In addition, Buck's jury was also told that Buck showed no remorse and even laughed about murdering Kenneth Butler and Debra Gardner in front of Ms. Gardner's two children. Deputy Sheriff D. R. Warren, who transported Buck to the Harris County jail shortly after he was arrested for both murders, testified that Buck laughed so much so that the officer admonished Buck that such a tragic situation was no laughing matter. In response, referring to his victim, Ms. Gardner, Buck dismissively replied: "[t]he bitch deserved what she got." 28 RR 68-69.

Although Buck had multiple prior criminal convictions, a history of domestic violence, and committed this murderous shooting spree, the defense nonetheless attempted to portray Buck as a nonviolent individual who was not likely to commit future acts of criminal violence. To support their effort to rebrand their client and thereby help him avoid the death penalty, defense counsel called several witnesses who testified that they had never known Buck to be violent. 28 RR 83-96. In addition to these fact witnesses, the

defense also chose to present testimony from two expert witnesses, both of whom testified that Buck would be unlikely to perpetrate additional crimes if he were sentenced to life and therefore remained incarcerated.

Specifically, the defense called Dr. Walter Quijano, who previously served as the Texas Department of Criminal Justice's (TDCJ) Chief Psychologist (28 RR 101-02) and Dr. Patrick Lawrence, a psychologist who specialized in predicting future criminal behavior. 28 RR 177, 182-85. Both experts attempted to convince the jury to impose a life sentence—rather than capital punishment—by telling jurors that they believed Buck did not pose a continuing threat to society. 28 RR 109-19, 186-206. As both defense experts explained to the jury, their conclusions about the defendant's lack of future dangerousness were based upon multiple factors, including Buck's age, the nature of the double homicide he perpetrated, and the prison environment. Thus, the testimony at issue was provided by one of the defense's own experts, elicited by Buck's own lawyers and, most saliently, testimony that urged jurors to impose a life sentence rather than the death penalty.

Both the trial court record and the Fifth Circuit's 2009 decision denying a COA reveal that defense counsel "presumably made [a] strategic decision" to elicit Dr. Quijano's testimony—including his conclusion that Buck would

not pose a continuing threat to society if he were imprisoned—because the defense thought the former TDCJ Chief Psychologist would impress jurors and successfully persuade them to render a life sentence.

II. Postconviction Proceedings.

Buck's conviction and sentence were affirmed on direct appeal. *Buck v. State,* No. 72,810, slip op. (Tex. Crim. App. 1999) (unpublished); *see also* SHCR-01 132.[1] Buck did not petition this Court for certiorari review. Concurrently with his direct appeal, Buck filed an application for habeas relief in the trial court. SHCR-01 3. However, before the state habeas court rejected Buck's initial state habeas application—but after the deadline for filing had passed—Buck filed a second state habeas application in which he raised this claim for the first time. SHCR-02 2. The Court of Criminal Appeals of Texas (CCA) thereafter entered an order disposing of both state habeas applications, denying Buck's first application on the merits, and dismissing the second as an abuse of the writ. *Ex parte Buck,* Nos. 57,004-01, -02 (2003) (per curiam) (unpublished order).

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[1] "SHCR" refers to the clerk's record of Buck's state habeas corpus proceedings. The relevant writ number (i.e., -01 or -02) and page number(s) follow citations to the state habeas clerk's record. "CR" refers to the clerk's record of pleading and documents filed with the court during trial. "RR" refers to the reporter's record of transcribed trial proceedings, preceded by

Buck then filed a federal habeas petition in the district court below on October 14, 2004. The district court granted summary judgment, denied habeas relief, and denied Buck's request for a COA. *Buck v. Dretke*, No. 4:04-cv-3965 (S.D. Tex. 2006) (unpublished order). The court determined that Buck procedurally defaulted his claim regarding Dr. Quijano's testimony in state court and failed to demonstrate actual innocence or valid legal cause. *Id.* at 16-17. Buck then sought a COA from the Fifth Circuit. However, the Fifth Circuit denied a COA after considering his claim and determining the allegation was procedurally barred and meritless. *Buck v. Thaler*, 345 Fed. Appx. at 930. This Court denied certiorari. *Id.*, 130 S. Ct. 2096 (2010).

Buck filed Rule 60 and stay-of-execution motions in the district court on Wednesday, September 7, 2011 and they were denied on September 9, 2011. Motion, ECF No. 28, and Order, ECF No. 30. He then filed Rule 59(e) and Rule 11 motions in the district court on September 12, 2011 and they were denied the same day. Motions, ECF Nos. 33, 34; Order, ECF No. 36. Buck requested a COA from the Fifth Circuit on only the Rule 59(e) and 60(b)(6) denials. The Fifth Circuit denied a COA to appeal these rulings on

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volume number and followed by page numbers.

September 14, 2011. *Buck v. Thaler*, No. 11-70025 (5th Cir.) (unpublished opinion) (hereinafter Order of Sept. 14, 2011). This appeal follows.

ARGUMENT

I. Because It Was a Successive Petition, The District Court Was Without Jurisdiction to Address Buck's Untimely Rule 60 Motion, and Buck Still Fails to Meet the Requirements of 28 U.S.C. § 2244(b)(1) and (2).

Review on writ of certiorari is not a matter of right, but of judicial discretion and will be granted only for "compelling reasons." Sup. Ct. R. 10 (West 2011). Buck advances no compelling reason, and none exists. His motions for relief from judgment were thinly veiled attempts to circumvent the successive petition rules of AEDPA, which in pertinent part read:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> 2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no

> reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b) (West 2011).

Buck's motions sought to reopen the district court's 2006 judgment denying his constitutional claim regarding Dr. Quijano's testimony. The claim was presented in Buck's 2004 petition and denied with prejudice. Thus, dismissal was mandatory under § 2254(b)(1). Moreover, even assuming Buck's claim was not presented in his 2004 petition, he fails to show it relies on a new rule of law or previously unavailable facts establishing his innocence. As such, the courts below lacked jurisdiction to hear the substance of his claim, regardless of whether he cloaked it in Rule 59 and 60 motions. Order of Sept. 14, 2011 at 6 (citing *Gonzalez v. Crosby*, 545 U.S. 524, 530-31 (2005)).

In *Gonzalez* this Court made it clear that a Rule 60(b) motion is to be treated as a successive habeas petition if it asserts or reasserts claims that there was error in a state court conviction. *Id.*; *see also Fierro v. Johnson*, 197 F.3d 147, 151 (5th Cir.1999); *Kutzner v. Cockrell*, 303 F.3d 333 (5th Cir. 2002). As a result, § 2244(b)(3)(A) acts as a jurisdictional bar to the district court's asserting jurisdiction over any successive habeas petition until the court of appeals has granted permission to file one. *U.S. v. Key*, 205 F.3d

773, 774 (5th Cir. 2000). Buck was explicitly denied that permission. Order of Sept. 14, 2011 at 6.

Buck's Rule 60(b) motion was nothing more than an attempt to circumvent the 2006 denial of his federal habeas petition in the district court below. Because Buck's Rule 60(b) motion is a successive petition, his failure to request and obtain permission from the Fifth Circuit to file it precluded the district court from addressing the substantive merits of his claims. Order of Sept. 14, 2011 at 6, citing 28 U.S.C. § 2244(b)(1) and (3)(West 2011). Additionally, the district could not have abused its discretion in denying Buck's post-judgment motions if they were actually successive habeas petitions. It clearly lacked the authority under § 2244(b)(3)(A). Finally, Buck's petition for certiorari review in this Court is prohibited because "The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E); *cf.* Order of Sept. 14, 2011 at 5-7 (construing Buck's claim as a successive habeas petition).

Gonzalez further shows that Buck's failure to comply with the "reasonable time" requirement in Rule 60(c)(1) proves the absence of

extraordinary circumstances. 545 U.S. at 537; Order, ECF No. 31, at 6-7. In *Gonzalez*, the Court held that a Rule 60(b)(6) motion was sufficiently dilatory and the case was far from "extraordinary" and therefore denied relief. 545 U.S. at 537. Here, Buck waited to present his Rule 60 motion for over five years after the district court's decision and more than two years after the lower court's denial of a COA. Order, ECF No. 31, at 6-7. There is no reason he could not have presented his motions sooner. *Id.* His strategic delay illuminates the non-extraordinariness of his claim.

II. The Court of Appeals Properly Found that Reasonable Jurists Would Not Debate That the District Court Did Not Abuse Its Discretion in Denying Buck's Rule 60(b)(6) Motion For Relief From the Judgment.

The issue in this case involves only the district court's exercise of discretion in declining under Rule 60 to vacate its judgment of five years earlier.[2] The Fifth Circuit's judgment that reasonable jurists would not disagree regarding the district court's rulings forecloses a stay of execution or certiorari review.

[2] Buck abandoned his Rule 60(d) fraud on the court claim in his COA Application. COA Application 1-33. Since Buck did not press this claim in the court below, this Court lacks jurisdiction to review it. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 266 (1987). Further, accidental error in a pleading is far from fraud on the court. Surely Buck's consistent omission of *Granados* from his briefing is not fraud in his eyes.

Dr. Quijano testified in other cases in Texas in which error was conceded by the Attorney General's Office because Quijano's testimony, offered by the State, alleged that minorities were more likely to recidivate. Buck avers that his case is like those other cases and therefore it is unfair he did not likewise receive a confession of error. However, Buck's case is different because not only did Buck call Quijano to the stand, *Buck opened the door by asking Quijano about race* as a factor in his future dangerousness analysis.[3] 28 RR 111. Further, Dr. Quijano testified Buck was *not* likely to commit future acts of violence if sentenced to life in prison. 28 RR 111-13. In other words, Buck's own expert witness told jurors he believed Buck was an appropriate candidate for a life sentence. Yet Buck now argues that Dr. Quijano's testimony suggested that jurors should *impose the death penalty,* in part, because of the Buck's race.

As it is different from the other cases, it is not subject to any inferred promises regarding confession of error. In addition, Buck slept on his rights, waiting some two years after the Attorney General's comments before attempting to raise the claim. He did so in the procedurally incorrect way

[3] Buck's case stands in marked contrast to the two other cases—Alba and Blue—in which Quijano was called as a defense witness. In those cases, it was the State that first asked Dr. Quijano to elaborate upon the issue of race. See Section

and his claim was cited for abuse of the writ. Nothing changed about Buck's claim as it wound its way through the federal courts. Buck presented identical arguments when he filed the Rule 60 motion as those denied, procedurally and for lack of merit, in courts below. Motion, ECF No. 33, at 7. Buck presented an identical argument in the Fifth Circuit two years ago, and it denied a COA because Buck introduced the very evidence he now complains about. *Buck v. Thaler,* 345 Fed. Appx. at 930. Because Buck adds nothing new that would impugn this analysis, the court below properly found reasonable jurists would not debate the district court's exercise of discretion in denying his motion. Order, ECF No. 31, at 7.

A. Standard of Review

A motion for relief under Rule 60(b) is extraordinary. *Washington v. Patlis*, 916 F.2d 1036, 1038 (5th Cir. 1990). "That spirit of finality which is implicit in all judgments commands that courts be cautious in exercising the discretion vested in them to reopen proceedings for a new trial[.]" *Id.* "Our cases have required a movant seeking relief under Rule 60(b)(6) to show 'extraordinary circumstances' justifying the reopening of a final judgment. Such circumstances will rarely occur in the habeas context." *Gonzalez,* 545

II-B-3 infra.

U.S. at 535 (citing *Ackermann v. United States,* 340 U.S. 193, 199 (1950); *Liljeberg v. Health Sers. Acquisition Corp.,* 486 U.S. 847, 864 (1988), *id.,* at 873 (Rehnquist, C.J., dissenting) ("This very strict interpretation of Rule 60(b) is essential if the finality of judgments is to be preserved")). And, any motion under Rule 60(b) must "be made within a reasonable time . . . ." Rule 60(c)(1)(West 2011); Order, ECF No. 31 at 6.

Rule 60(b) proceedings are subject to only limited and deferential appellate review. *Browder v. Director, Dept. of Corrs. of Illinois*, 434 U.S. 257, 263 n.7 (1978). The COA requirement applies to Buck's appeal of the lower court's denial of Rule 60(b) relief. *Ochoa Canales v. Quarterman*, 507 F.3d 884, 888 (5th Cir. 2007). The COA inquiry should be viewed through the lens of the abuse-of- discretion standard which applies to Rule 60(b) motions. *Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 204, 210 (5th Cir. 2003). Under this standard, "[i]t is not enough that the granting of relief might have been permissible, or even warranted—denial must have been so unwarranted as to constitute an abuse of discretion." *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981). Additionally, any factual determinations underlying the decision are reviewed for clear error. *Jenkins & Gilchrist v. Groia & Co.*, 542 F.3d 114, 118 (5th Cir. 2008) (citing *Lacy v. Sitel Corp.*, 227

F.3d 290, 292 (5th Cir. 2000)). See also *Hess*, 281 F.3d at 214 n.5, citing *Fierro*, 197 F.3d 151. A COA will only issue if Buck makes a substantial showing of the denial of a constitutional right, which requires a showing that "reasonable jurists could debate whether (or, for that matter, agree that)" the court below should have resolved the claims in a different manner or that this Court should encourage Buck to further litigate his claims in federal court. *Miller-El v. Cockrell*, 537 U.S. 322, 335 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000)); *Dowthitt v. Johnson*, 230 F.3d 733, 740 (5th Cir. 2000).

An appeal reviews the Rule 60 ruling only for abuse of discretion, and does not bring up the underlying judgment for review. *Daily Mirror v. New York News*, 533 F.2d 53, 56 (2d Cir. 1976); *Brennan v. Midwestern United Life Ins. Co.*, 450 F.2d 999, 1003 (7th Cir. 1971). An independent action for relief from judgment is available only to prevent a grave miscarriage of justice. *U.S. v. Beggerly*, 524 U.S. 38 (1998). Such is not the case here.

B. Buck presented nothing to justify relief from the judgment under Rule 60(b)(6).

Buck asked the district court to reverse its prior ruling and grant habeas relief. As stated earlier, however, appeals from a Rule 60 motion may review the ruling only for abuse of discretion, and an appeal from denial

of Rule 60(b) relief does not bring up the underlying judgment for review. *See Daily Mirror,* 533 F.2d at 56.

Relief under Rule 60(b)(6) is unavailable to Buck because he was dilatory and presented no extraordinary circumstances for review. Order of Sept. 14, 2011 at 10; Order, ECF No. 31 at 6-7; *Hess,* 281 F.3d at 216.

1. The ruling that Buck failed to present extraordinary circumstances in a timely fashion is undebatable.

The district court did not abuse its discretion in determining that Buck's Rule 60(b) motion was not brought within a reasonable time. Order of Sept. 14, 2011 at 6-7. He waited for over five years after the district court's denial of habeas relief and more than a year after this Court denied certiorari, an excessive delay under the circumstances of this case. Buck has not even attempted to justify his delay. Buck was fully aware of the other five cases on which he now bases his request for relief. Order of Sept. 14, 2011 at 7. In his briefing to the Fifth Circuit in 2006, Buck argued at some length that he should be treated as the other five defendants were. Appellant's Request for COA, November 22, 2006, at 12. At another juncture in his briefing to the Fifth Circuit in 2006, Buck noted, "[T]he Respondent, unlike the instant case, expressly waived exhaustion and procedural default regarding issues relating to Quijano." *Id.* at 13. The only additional

argument that Buck now makes, five years later, is that in the cases of Blue and Alba, the defendants rather than the State called Quijano as a witness. COA Application, September 13, 2011, at 23. But on September 12, 2011, he admitted to the district court it would have been easy to make this argument if he had exercised greater diligence. "Reasonable investigation into the facts . . . would have revealed that in *Alba*, Quijano testified for the defense, not the prosecution." Motion, ECF No. 34, at 4-5. The Director agrees these facts were ascertainable many years ago. Publicly available court opinions that Buck had attached to his filings in the district court and in the Fifth Circuit revealed that both Blue and Alba received new sentencing hearings eleven years ago. Order of Sept. 14, 2011 at 11. More disturbing, given Buck's latest attacks against the Attorney General's Office, is that Buck's Rule 60 motion in district court expressly disclaimed intent to claim disparate treatment compared to Blue and Alba in his submission to the district court, saying, "Mr. Buck does not assert the second equal protection violation [that he was treated disparately from Blue and Alba] as a substantive claim for habeas corpus relief. He mentions it only to emphasize the extraordinary nature of the circumstances warranting relief from the judgment." Motion, ECF No. 27 at 15, n.24.

Regardless, the court below correctly found that reasonable jurists would not debate whether the district court abused its discretion in denying Buck's Rule 60(b)(6) motion as both untimely and lacking in merit. Order of Sept. 14, 2011 at 11.

2. Buck's case is not similar to Saldano's and therefore no confession of error was made, intended, or implied.

A review of the substance of Buck's claims proves he presents nothing meriting relief. As this Court is well aware, the Director waived procedural bars and confessed error in some cases involving testimony by Dr. Quijano, most notably the case of Victor Hugo Saldano. *See Saldano v. Cockrell,* 267 F. Supp. 2d 635, 639-40 (especially n.3) (E.D. Tex. 2003). Buck avers that when the State introduced the same testimony in *Saldano,* constitutional error occurred, ergo it must be constitutional error here. Motion, ECF No. 27, at 6.

The State agrees and acknowledges that it is inappropriate for the State to ask jurors to consider race when either assessing guilt or imposing a punishment. Buck first illogically and erroneously stated that the prosecutor relied on Quijano's testimony in asking the jury for the death sentence. Motion, ECF No. 27, at 9-10. Actually, the prosecutor mentioned Quijano's testimony during closing in this fashion:

> You heard from Dr. Quijano, who had a lot of experience in the Texas Department of Corrections, who told you that there was a probability that the man would commit future acts of violence. . . I thought what he said was that he was at the low range but the probability did exist that he would be a continuing threat to society.

28 RR 260-61. Race never came up in closing arguments. 28 RR 239-72.

Buck also erroneously stated that Quijano's testimony regarding race was first elicited by the prosecution on cross-examination. Motion, ECF No. 27, at 9-10. This case, however, presents a significantly different scenario than that presented in *Saldano,* where the prosecutor proffered the offending testimony. In *Saldano,* on direct examination by the prosecutor, Quijano "testified that Saldano's Hispanic ethnicity increased the likelihood that he would be a danger in the future." 267 F.Supp.2d at 638. In Buck's case, when asked *on direct examination by the defense*, Dr. Quijano was asked for his opinion "if we have an inmate such as Mr. Buck who is sentenced to life in prison, what are some of the factors. . . that you've looked at in regard to this case"— Quijano promptly identified race as one statistical factor "we know to predict future dangerousness," and he pointed out that African-Americans were overrepresented in the criminal justice system. 28 RR 110-11. Buck called Quijano, and Buck opened the door to this issue. The prosecutor's cross-examination on this topic merely asked Quijano to restate what he had

said on direct. *Id.* at 160. But neither Quijano nor the State suggested to the jury that they rely on race as a factor in deciding that Buck would be a future danger. To the contrary, Quijano opined that Buck would not be dangerous in a prison setting. *Id.* at 115. Consequently, it would have been absurd for the prosecutor to rely on Quijano's future-dangerousness opinion, as Buck now contends. Motion, ECF No. 27 at 9-10. Quijano explained that additional circumstances supported his conclusion, including the fact that Buck had committed a crime because of his relationship with his ex-girlfriend, had a history of dependent relationship problems, and had not violated jail rules while awaiting trial. 28 RR 172-75. Finally, no one argued or even mentioned race or ethnicity during closing arguments, *id.* at 239-72, and the jury was instructed that it was "not to be swayed by mere sentiment, conjecture, sympathy, passion, [or] prejudice. . .." CR 194; *see also Granados v. Quarterman,* 455 F.3d 529, 535 (5th Cir. 2006).

Buck contended that any distinction between *Saldano* and his own case is false and misleading because then-Attorney General John Cornyn had identified Buck's case as being similar to Saldano's. Motion, ECF No. 27, at 13; COA Application at 22. General Cornyn's statement was true and hardly misleading. It was made not to a court, not in a legal pleading, but in a press

release and, later, in comments made by a press officer. Order of Sept. 14, 2011 at 14. Buck's case is only superficially similar to Saldano's:

> It was Buck, not the prosecution, who introduced Dr. Quijano as an expert witness and then solicited testimony from him regarding the use of race as one of several statistical factors for predicting future dangerousness. Buck cannot now claim surprise at the opinions that Dr. Quijano expressed. Indeed, in the punishment phase of the trial, it was Buck's defense counsel who argued for the admission of Dr. Quijano's expert report into evidence, despite language in the report suggesting that Buck's race is one factor that might argue in favor of a finding of future dangerousness... Despite Buck's having opened the door to this testimony during his direct examination, the prosecution referenced the race factor only once during cross-examination, and never mentioned it at all during closing arguments.

Buck v. Thaler, 345 Fed. Appx. at 930. And the fact the Fifth Circuit stated "Buck has offered no basis on which we can disregard our prior holding on this matter" proves that his motions for relief from those judgments are really successive habeas petitions prohibited by 28 U.S.C. § 2244(b)(1). Order of Sept. 14, 2011, at 15-16.

Nor did the Director fail to act on a promise in Buck's case. The Attorney General's offer, if anything, only obligated the Director to evaluate cases on an individual basis, not to take any particular steps. Order, ECF No. 31 at 8. Further, Cornyn's press release referred to "a thorough audit of cases *in our office* . . ." Motion, ECF No. 27, Exh. 5. Consistent with

limitations recognized by the Fifth Circuit after Attorney General Cornyn confessed error in *Saldano*, the Office of the Attorney General had no ability to control or otherwise exercise authority over Buck's case until he sought federal habeas corpus relief and instituted litigation against the State in federal court.[4] *Saldano v. Roach*, 363 F.3d 545, 551-52 (5th Cir. 2004). That distinction is significant because at the time Attorney General Cornyn confessed error in June of 2000, Buck had not yet sought federal habeas corpus relief and therefore did not have litigation pending in the federal courts, or even a file present in the office that could be audited. According to the June 9, 2000 press release, Buck and five other convicted murderers were identified as defendants whose cases Attorney General Cornyn believed were

[4] The CCA's 2002 opinion on remand in *Saldano v. State* contains an exhaustive review of the Attorney General's authority to represent the State in criminal cases. Ultimately, the CCA determined that when Attorney General Cornyn appeared before the Supreme Court and confessed error in *Saldano,* the Attorney General did so not in his capacity as the State's chief legal officer, but rather based upon an implied request for assistance from the Collin County District Attorney. 70 S.W.3d 873, 883. As a result, the CCA determined that the Attorney General's capacity to confess error in state criminal proceedings is limited to those circumstances wherein the Attorney General is asked to do so by a local prosecutor. Accordingly, the Attorney General's authority is circumscribed until an inmate pursues habeas corpus relief in federal court, which is what ultimately happened in *Saldano.* Unlike on direct appeal, the named defendant in federal habeas proceedings is the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice and, "[u]nder Texas law, the Attorney General enjoys the exclusive right to represent state agencies." *League of United Latin Am. Citizens, Council. No. 4434 v.* Clements, 999 F.2d 831, 844 (5th Cir. 1993).

"similar to that of Victor Hugo Saldano"—ostensibly because Dr. Quijano testified during the punishment phases of their capital murder trials. After acknowledging the existence of those six cases, the press release concluded: "Additionally, local prosecutors have been advised to review their *cases that have not yet reached the attorney general's office*." Motion, ECF No. 27, Exh. 5. Thus, while Buck's motion baselessly accuses the Director of "falsely and misleadingly [telling the District] Court that Mr. Buck's case was different from all the others," their own allegations fail by any standard, because defense counsel fail to acknowledge that Attorney General Cornyn had no ability or legal authority to confess error where the defendant had yet to even file a federal habeas petition and would not ultimately end up in the federal courts for four years. Attorney General Cornyn's June 2000 press release specifically stated that his audit was limited to cases that were "in our office"—expressing his mistaken belief that the Attorney General's Office was already handling Buck's case. Motion, ECF No. 27, Exh. 5.

Buck's inclusion on that eleven-year-old press release must have been an error or oversight because nothing in Attorney General Cornyn's public statements indicate he intended to review every capital case in every District Attorney's Office across Texas' 254 counties. To the contrary, Attorney

General Cornyn's statement specifically acknowledged that the audit was confined to cases that had already reached his office—and explicitly stated that local prosecutors would be advised to conduct their own reviews, but did not claim that the Attorney General's Office would conduct such a review. Given Buck's inexplicable inclusion on a list of defendants whose cases were actually being handled by the Attorney General's Office, the Attorney General's lack of authority over state-based criminal proceedings, and Buck's failure to pursue federal habeas relief until four years after Attorney General Cornyn's press release was issued, defense counsel's claim that a confession of error was somehow "explicitly warranted" is utterly baseless. Indeed, Buck waited four years before he even attempted to seek relief from the federal courts.

Notwithstanding all of the above reasons why Buck's purported warranty claim is baseless, defense counsel piles absurdity on top of outright deception by hypocritically suggesting that the State's description of the facts was false and misleading—because neither of the June 9, 2000 press releases even reference the words "confess error" or "waive procedural default." Indeed, a careful examination of the pleadings in this case reveals the defense's concerted effort to distort the record in this case. The only source

defense counsel cites to support the notion that the Attorney General purportedly agreed to concede error in all six cases is a newspaper article. However, Buck's Rule 60(b)(6) motion, ECF No. 27, does not cite a quote from either Attorney General Cornyn or his spokesperson—the language in the news story does not appear in quotes—but instead merely copies a sentence in the text of the article. The information contained in that sentence is attributed to a spokeswoman for Attorney General Cornyn. Thus, Buck's counsel has the audacity to accuse the Director of failing to make adequate disclosures in the very same pleadings where the defense deceptively quotes from the text of a news article to brazenly claim that the journalist's work product somehow reflected an explicit warranty from the Attorney General of Texas.

Buck did not act promptly. His case sat in state court for nearly two and a half years before Buck finally (and untimely) filed his successive state writ. Buck slept on his rights unlike others and cannot now complain.

3. Buck's case is entirely dissimilar to Blue's and Alba's cases.

In Blue's and Alba's cases, the race issue was initiated by questions from the prosecution. *State v. Blue*, 19 RR 292-93; *State v. Alba*, 27 RR 531-32. In *Alba,* Quijano was first called by the defense, but Quijano mentions no

statistical factors such as race or gender. 27 RR 484-529. The prosecutor makes it clear on cross-examination that Quijano uses the defendant's race to "*determin[e]* whether or not . . . they're *going to* commit those criminal acts of violence" because Hispanics recidivate more than other races. 27 RR 531-32 (italics added). The prosecutor then tied it directly to Alba as an individual- "we have alcohol abuse and opiate abuse; he's Hispanic; he's male; he's 36." 27 RR 537. Race appears in the *Alba* closing arguments when the prosecutor bragged that he "forced" Quijano to explain how "all of the indicators" including that "he's [Alba's] Hispanic" "help juries predict whether somebody is going to be violent or dangerous in the future" based on publications and research by Quijano. 28 RR 641.

In *Blue,* Quijano was first called by the defense and race did not come up. 19 RR 250-88. On cross-examination, Quijano said that men are more violent than women and that statistically, minority races may be more violent just looking at how many are in prison, unless race is neutralized by greater education. 19 RR 292-93. The prosecutor then went from general theory to application (using a chart) in Blue's case where his race made him more likely to be dangerous in the future. 19 RR 300-302. In closing argument, the prosecutor emphasized the "factors [Quijano] takes into

consideration in *determining* somebody's future behavior," referenced the chart with the race category, and summarized that Quijano told the jury that race was one of "those things that *make him* violent." 21 RR 643-44, 46 (italics added).

By comparison, in Buck's case, when asked *on direct examination by the defense*, Dr. Quijano was asked "if we have an inmate such as Mr. Buck . . . what are some of the factors. . . that you've looked at in regard to this case"— Quijano promptly identified race as one statistical factor "we know to predict future dangerousness," and he pointed out that African-Americans were overrepresented in the criminal justice system (much as he did for the prosecutor in Blue). 28 RR 110-11. Buck called Quijano, and Buck opened the door to this issue. The prosecutor's cross-examination on this topic merely asked Quijano to restate what he had said on direct. *Id.* at 160. But in closing arguments, neither Quijano nor the State suggested to the jury that they rely on race as a factor in deciding that Buck would be a future danger. To the contrary, Quijano opined that Buck would not be dangerous in a prison setting. *Id.* at 115.

Similarly, in *Granados*—a case Buck hypocritically fails to acknowledge—defense counsel called Quijano, who opined regarding

Granados's future dangerousness in response to questions posed by the defense. 455 F.3d 529, 534 (5th Cir. 2006). Quijano presented a chart of statistical factors to the jury which included "race or ethnicity." *Id.* He told the jury, just as he did in *Buck,* that the defendant would not be dangerous in spite of his race or ethnicity. *Id.* The State did not pursue the issue on cross-examination and did not reiterate it during closing argument. The Attorney General's decision to confess error in *Alba* and *Blue,* and conversely to defend the death sentences in *Buck* and *Granados,* is thus directly correlated to whether the defense or the State injected the issue of race into the trial first.

4. Quijano's comments caused no constitutional error.

There are multiple factors that distinguish this case from the others in which the Director has conceded error. While the law justly imposes multiple restrictions on the State's ability to introduce evidence, far fewer restrictions are imposed on the defendant. *See United States v. Fairchild,* 505 F.2d 1378, 1383 (5th Cir. 1975) (citing *Harris v. New York,* 401 U.S. 222 (1971) for the proposition that many, if not most, "[c]onstitutional rights, like others, may be waived; and a criminal defendant may, by his conduct, make otherwise constitutionally inadmissible evidence admissible for certain purposes."); *see also Granados,* 455 F.3d at 535-36. A criminal defendant might quite

reasonably wish to rely on apparently unseemly or inappropriate evidence of poverty or culture to explain a poor choice, even when the State should not be permitted to use those factors as the bases for a jury to determine punishment or guilt. To limit defendants from electing to use certain factors could inadvertently or improperly limit their defense. The State acknowledges and agrees that it would be undeniably wrong for the State to introduce evidence of race or ethnicity and argue either factor as a reason to impose any punishment—much less the death penalty.

In this case, defense counsel's decision to elicit that testimony from Buck's own defense expert reflected a concerted choice—perhaps a strategic legal decision. While the State cannot and should not raise the issue of race, defense counsel has chosen to do so before. When faced with an analogous situation in *Granados,* the Fifth Circuit concluded that the defendant's decision to raise the issue precluded them from later attempts to claim it as a basis for appeal.

> The decision by counsel to approach the [future dangerousness] question in the relatively oblique and impersonal terms of a quantitative presentation lay at the heart of [the defense team's] trial strategy. It included facing the reality that blacks and latinos had a disproportionate presence in the state prisons, a social phenomenon about which counsel could not assume the jury was ignorant. . . [T]his approach avoided the necessity of personal testing and examination, the door opener to

examination by experts engaged by the State.

Granados, 455 F.3d at 535-36. Unlike the *Saldano* case, but like *Granados,* Quijano did *not* testify that Buck as an individual was more dangerous because he is African-American. Buck contends that the phrasing of the prosecutor's question, which included the words "the race factor, black, increases the future dangerousness" is important, but Buck is arguing semantics which are irrelevant given that at this point the courts are not reopening the merits of the underlying constitutional claim for appellate review. COA Application at 26-27; *Daily Mirror,* 533 F.2d at 56; 7 J. Moore, Federal Practice ¶ 60.19, p. 231; ¶ 60.30[3], pp. 430-31 (1975).

Only the very smallest proportion of Quijano's testimony concerned race—eight lines out of some seventy-five pages of testimony— and race was never mentioned again throughout the trial, including the attorneys' arguments. *Id.* at 101-76, 239-72. As the Fifth Circuit noted, "Despite Buck's having opened the door to this testimony during his direct examination, the prosecution referenced the race factor only once during cross-examination, and never mentioned it at all during closing arguments. Even if we were to consider Buck's petition on the merits, we would conclude that it fails to demonstrate a substantial showing of the deprivation of a constitutional

right." *Buck v. Thaler,* 345 Fed. Appx. at 930. Importantly, and contrary to Buck's assertion, not every reference to race or ethnicity during punishment proceedings is "constitutionally impermissible." *Zant v. Stephens,* 462 U.S. 862, 885 (1983). Here, the question by the prosecutor was really just a request for Quijano to restate his opinion already before the jury. 28 RR 160 (emphasis added). Indeed, because neither the State nor the defense advised the jury to attach aggravating weight to Buck's race, there was no Eighth Amendment violation.[5] Order, ECF No. 31 at 8; *Stephens,* 462 U.S. at 885; *Tuilaepa v. California,* 512 U.S. 967, 983 (1994) (Stevens, J., concurring). Instead, Quijano's testimony—and the punishment evidence as a whole—was focused on factors individual to Buck: his history of violent conduct and disregard for authority, his background, the nature of his crime, and the

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Nor would Quijano's testimony be objectionable under the Equal Protection Clause. Racial classifications are ordinarily constitutionally suspect and subject to strict scrutiny. *McLaughlin v. Florida,* 379 U.S. 184, 192 (1964). However, "a defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination," i.e., that the State invited his sentencing jury to act "with discriminatory purpose." *McCleskey v. Kemp,* 481 U.S. 279, 292 (1987) (internal quotation omitted). Discriminatory purpose "implies more than intent as volition or intent as awareness of consequences." *Id.* at 298. Rather, Buck would have to show that counsel elicited the complained of testimony "because of an anticipated racially discriminatory effect." *Id.* (emphasis in original). Under the circumstances, it cannot be argued that counsel anticipated or intended the jury to consider Buck's race as evidence of his future dangerousness.

conditions under which he would serve a life sentence. Quijano testified that Hispanics or African-Americans were overrepresented, something that can occur if a group is not treated the same as other groups. The defense strategy in presenting Quijano's testimony was to give the jury as much information as possible about the future dangerousness special issue and about the prison system and how prison structure can decrease or eliminate dangerousness. Thus, trial counsel encouraged the jury to make "an individualized determination on the basis of the individual and the circumstances of the crime," as required by the Eighth Amendment. Stephens, 462 U.S. at 879. As a result, there was nothing objectionable about Quijano's testimony in Buck's case.

Based on a review of the entire record, the Fifth Circuit concluded that Buck failed to show that the outcome would have been different absent Quijano's testimony, in light of Quijano's comment being an isolated remark among extensive testimony about the security measures and classification system of prison, the lack of questioning by either trial counsel or the State about such comment, the non-specific nature of such comment, and the lack of jury argument concerning such comment. *Buck v. Thaler,* 345 Fed. Appx. at 930. As the lower court held in *Granados,* "We are not persuaded that

these tactical decisions introduced an impermissible use of race or ethnicity or were otherwise objectively unreasonable." 455 F.3d at 536. The evidence of Buck's future dangerousness was overwhelming. Thus, there is no reasonable probability that the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death in the absence of Quijano's passing reference to race. As a result, the court below was well within its discretion to find that relief is unwarranted.

III. The Court of Appeals Properly Found Reasonable Jurists Would Agree the District Court Did Not Abuse Its Discretion in Denying Buck's Rule 59(e) Motion For Relief From the Judgment Denying the Rule 60 Motion.

Buck next complained, in a Rule 59(e) motion, that the district court only denied his Rule 60 motion because it relied on sanctionable misrepresentations and omissions in the Director's responsive pleadings. Buck made three fundamental allegations—that the Attorney General erroneously indicated that Quijano was called by the State, instead of the defense, in Alba's case; second, that the Attorney General failed to mention Blue; and third, that the Attorney General misrepresented a COA denial as a merits review. Motion, ECF No. 33, at 2-3, 5-6. If errors at all, these are immaterial and irrelevant, as the district court noted, because the district court conducted its own thorough re-review of the record and the case law.

Order, ECF No. 36, at 2.

A. Standards of review.

The purpose of a Rule 59(e) motion to alter or amend judgment is "to correct manifest errors of law or to present newly discovered evidence." *Waltman v. Int'l Paper Co.,* 875 F.2d 468, 473 (5th Cir. 1989). The decision to alter or amend a judgment is committed to the sound discretion of the district judge and will not be overturned on appeal absent an abuse of discretion. *Southern Constructors Group, Inc. v. Dynalectric Co.,* 2 F.3d 606, 611 & n. 18 (5th Cir. 1993). Rule 59(e) motions "may not be used as a vehicle for the losing party to rehash arguments previously considered and rejected by the district court." *Torre v. Federated Mut. Ins. Co.,* 862 F.Supp. 299, 300-301 (D. Kan. 1994). Yet this is exactly what Buck attempts to do here.

Like a Rule 60 motion, Buck had to obtain a COA to appeal the denial of his Rule 59(e) motion. Order of Sept. 14, 2011, at 16, citing *Williams v. Quarterman*, 293 Fed. Appx. 298, 315 (5th Cir. 2008).

B. The court below properly exercised its discretion in denying the Rule 59(e) motion.

The court below denied Buck's Rule 60 motion after its independent review of the record and case law, and further held that Buck failed to "establish either a manifest error of law or . . . present newly discovered

evidence" entitling him to Rule 59 relief. Order, ECF No. 36, at 2. Reasonable jurists would not debate that the Fifth Circuit properly held the district court did not abuse its discretion in so holding. Order of Sept. 14, 2011, at 16.

Buck contends that the "misrepresentations before this Court" constitute grounds for COA, because the court below had a misleading record to review. Petition at 23-24; COA Application at 24; Motion, ECF No. 27, at 16. These alleged misrepresentations are dealt with at length above. The Attorney General did not warrant that Buck was entitled to relief when it issued press releases in the wake of *Saldano. Alba* and *Blue* are wholly dissimilar to Buck's case, which is more like *Granados.*

It is true that in replying to the Rule 60 motion, the Director accidentally included Alba in an illustrative list of cases where, like Saldano, the State proffered Quijano as a witness, when in fact Alba called Quijano himself. Response, ECF No. 29, at 17. This nearly-typographical mistake was immaterial and hardly the basis for the opinion of the court below, which never mentioned Alba. Order, ECF No. 31. Likewise, the Blue case was not mentioned (by both sides, in a majority of the pleadings) where, as in Alba, Quijano was a defense witness. But both are immaterial to the court's

decision. Regardless of who *sponsored* Quijano's testimony, the real concern is *who proffered the race-based opinion*. Buck avers that the Attorney General's briefing "created a misleading record" in the case, but the district court and Fifth Circuit court below were hardly unaware of Blue and Alba as both were cited in Buck's motion. Order of Sept. 14, 2011 at 10-11; Appellant's Application at 24; Motion, ECF No. 28 at 8-10.

And more importantly, Buck's argument continually forgets that the question is *not* whether reasonable jurists would debate the denial of his original claim. Appellant's Application at 26. That question has come and gone years ago and was answered definitively by the Fifth Circuit. *Buck v. Thaler,* 345 Fed. Appx. at 930. Today's question is a much more attenuated analysis— whether reasonable jurists would debate the district court's denial of Rule 59(e) relief attacking the denial of Rule 60(b) relief. *See Ochoa Canales*, 507 F.3d at 888. The COA inquiry should be viewed through the lens of the abuse-of- discretion standard. *Callon Petroleum Co.*, 351 F.3d at 210. Under this standard, "[i]t is not enough that the granting of relief might have been permissible, or even warranted—denial must have been so unwarranted as to constitute an abuse of discretion." *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981).

The district court was within its discretion when it noted that Buck failed to explain how any of the statements at issue by the Attorney General, in press releases or otherwise, were either false or misleading. Order of Sept. 14, 2011 at 10-12; Order, ECF No. 31 at 7-8. The district court properly denied Buck's 59(e) motion attacking the denial of the Rule 60(b)(6) motion, saying "A motion to alter or amend under Fed. R. Civ. P. 59(e) 'must clearly establish either a manifest error of law or must present newly discovered evidence.' . . . 'Relief under Rule 59(e) is also appropriate where there has been an intervening change in controlling law.' Buck fails to demonstrate grounds for relief." Order of Sept. 14, 2011 at 10-12; Order, ECF No. 36, at 2. In other words, yes, Buck should have and could have made this argument, albeit unpersuasive, throughout the years that this claim has been in review in the federal courts. That he did not is his own fault.

Buck also poses a number of new arguments, regarding the exact wording of the questions posed by defense and prosecution attorneys in Blue, Alba and Buck's cases, which were not made in the district court below, and therefore could not have been a justification for COA. COA Application at 25-30. The court below was within its discretion to refuse to grant relief because Buck presented no new reason to consider Buck's case to be legally identical

to Saldano's. Order, ECF No. 31 at 7-8. Reasonable jurists would not debate this outcome. Order of Sept. 14, 2011 at 14-16.

Buck cannot complain that he "relied" on representations by the Attorney General's office yet waited two-and-a-half years to first act on them; he cannot complain he was misled, and yet waited for over five years until the brink of his execution before alleging fraud on the court. In fact, in his Statement on this Court's Rule 8.10, Buck contends his attorneys were unaware of any eleven-year-old alleged promise to confess error until June 2011. Appellant's Statement at 2. Yet they waited until September 7, 2011 to file any motions for relief in any court. *Id.* at 3. As the district court below pointed out, Buck was guilty of "grossly misrepresent[ing]" the court's Rule 60 order and of providing a "dubious, at best" certification of his intent not to delay the proceedings. Order, ECF No. 36, at 3-4. Buck is discontent that this Court rejected his notion of "intra-court comity" and that his attempts to get the courts to enforce confessions of error from other cases in his circumstance have failed. *Buck v. Thaler*, 345 Fed. Appx. at 929. The court below exercised its discretion appropriately in denying his Rule 59(e) motion attacking the denial of his Rule 60(b)(6) motion. Order of Sept. 14, 2011 at 16-17.

IV. Buck Is Not Entitled to a Stay of Execution.

Buck is not entitled to a stay of execution. He cannot show a substantial denial of a constitutional right that would become moot if he were executed. A federal habeas applicant is entitled to a stay only where the court of appeals cannot resolve the merits of an appeal prior to the scheduled execution. *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983). There also must be a "significant possibility of reversal of the lower court's decision." *Id.* at 895. To be entitled to a stay, a petitioner must show more than the "absence of frivolity" or "good faith" on his part. *Id.* at 892–93. He must show that the issues are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. *Id.* at 893 n.4. Although in a death-penalty case, a court may in deciding whether to grant the stay consider the nature of the penalty, the penalty does not in itself suffice to warrant the automatic issuing of a certificate. *Id.* at 893. Buck makes no such showing. The state court dismissed his claim for relief on state-law grounds and Buck shows no good reason for this Court to intervene in that state-court decision. Further, his substantive claims are without merit. Buck cannot show a significant possibility of relief in connection with his certiorari petition.

Hence, Buck is entitled to no stay of execution.

CONCLUSION

Buck's petition for writ of certiorari should be denied and because he does not show significant possibility of relief, he is not entitled to a stay of execution. *See Barefoot,* 463 U.S. at 895.

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