**No. _____**

# 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**

I certify that on the 15th day of September, 2011, I have served the enclosed REPLY TO BRIEF IN OPPOSITION on Edward Marshall, Assistant Attorney General of Texas, Office of the Texas Attorney General, Post Office Box 12548, Austin, Texas 78711, via email (georgette.oden@oag.state.tx.us) and through the United States Postal Service by first-class mail in accordance with Sup. Ct. R. 29(3). All parties required to be served have been served. I am a member of the Bar of this Court.

s/ Gregory W. Wiercioch

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## REPLY TO BRIEF IN OPPOSITION

The Director's Brief in Opposition ("Opposition") fails to comprehend the nature of the underlying claims that Mr. Buck has raised, and this failure has caused the Attorney General's legal analysis to miss the mark. The Attorney General is surprised, for example, that although "Buck's own expert witness told jurors he believed Buck was an appropriate candidate for a life sentence," Mr. Buck "now argues that Dr. Quijano's testimony suggested that jurors should impose the death penalty, in part, because of Buck's race." Opposition at 12. That is a misstatement of Mr. Buck's claim. Mr. Buck's claim is that the ***government***

suggested that jurors should impose the death penalty, in part, because of Buck's race, and that it used Quijano to do so.

The Attorney General argues that this case does not present extraordinary circumstances justifying reopening because (1) Mr. Buck's case is not "similar to" Saldaño's case (notwithstanding a 2000 press release from the Attorney General identifying Mr. Buck's case as "similar to" Saldaño's case), Opposition at 18-25; (2) Mr. Buck's case is "entirely dissimilar" to *Blue* and *Alba* (notwithstanding a 2000 press release from the Attorney General identifying Mr. Buck's case as "similar to" *Blue* and *Alba*), *id.* at 25-28; and (3) it is not unconstitutional for the government to rely on the defendant's race as a basis for asking a jury to find him dangerous and sentence him to death. *Id.* at 28-33. Whatever the merit of these contentions, the Director does not present any direct rebuttal to Mr. Buck's assertion that the Attorney General's material misrepresentations and omissions to the federal district court concerning (1) his office's prior statements about Mr. Buck's case in 2000 that were diametrically opposite its statements made to the federal court in 2004; (2) the circumstances of the *Saldaño* cases in which it waived procedural defenses, conceded error, and federal court granted relief; and (3) that Mr. Buck's case is the only case of the six that the Attorney General identified as having been similarly situated to Saldano which has not been treated similarly ***do*** constitute extraordinary circumstances.

The Director's argument on the merits that *Blue* and *Alba* are distinguishable is wholly unavailing. The government relied ***less*** on race in *Blue*

than it did in Mr. Buck's case, because the prosecutor never intentionally elicited testimony about a causal relationship between the defendant's race and future dangerousness (as Mr. Buck's prosecutor did). In the hierarchy of equal protection violations, *Blue* is far less egregious than Mr. Buck's case.

Moreover, the Attorney General's analysis when comparing *Blue* and *Alba* to Mr. Buck's case misses the mark about what matters to an equal protection or due process claim: the courts look to the ***State's conduct***. And, in fact, a careful scrutiny of then-Attorney General John Cornyn's review of cases in 2000 reflects that this is precisely the distinction he drew. When Attorney General Cornyn released the names of the six cases he identified as being similar to Saldaño, he placed Mr. Buck's case one side of the ledger and Anthony Graves's case on the other.

In Graves's case, like Mr. Buck's, the defense called Quijano to testify. Quijano testified on direct examination that the "ethnic background" of a person was relevant to an assessment of his dangerousness. The government, however, did not ask any questions about race or ethnic background in its cross-examination of Quijano, instead focusing on Quijano's failure to conduct forensic testing and his cursory review of the record. *See* 43 RR 4427-40. And, unlike Mr. Buck's case, the government asked the jury ***not to credit*** Quijano's testimony in its closing argument. 44 RR 4484-85 ("They brought a psychologist in to testify…He acknowledged that he administered no type of testing. Isn't that one of the key things of a clinical psychologist, to administer testing, a battery of tests, to tell you

something about the person? He told us he thought that he had read the autopsy reports, but he didn't remember a whole lot about them….He called it situational violence, not random violence…[I]t doesn't make any difference, they're just as dead either way."). In short, the government did not rely on the defendant's race as evidence of future dangerousness in *Graves*, and that is why then-Attorney General Cornyn found that Mr. Buck's death sentence should be overturned and Graves's should not.

The Attorney General's reliance on *Granados* – the "case Buck hypocritically fails to acknowledge" – is completely unavailing for the same reason. Indeed, *Granados* ***confirms*** the validity of Mr. Buck's analysis and supports Attorney General Cornyn's placement of Mr. Buck on the opposite side of the ledger. *Granados* is identical to *Graves* in that, while race was mentioned during the defense's direct examination of Quijano, the government did not elicit ***any*** testimony on cross-examination about race enhancing future dangerousness nor did it ask the jury to rely upon Quijano's testimony during its closing argument. *See Granados v. Quarterman*, 455 F.3d 529, 534 (5th Cir. 2006) ("In recommending that habeas relief be denied, the state trial judge made explicit findings that neither of the two defense counsel nor the state's attorney made any mention of race or ethnicity or suggested in any manner that a decision on future dangerousness should be based on race or ethnicity.").

Finally, the Attorney General's current position that Mr. Buck must bear the burden for the Attorney General's previous lack of candor towards federal tribunals

is reminiscent of its "prosecutor may hide, defendant must seek" position rejected by this Court in *Banks v. Dretke*, 540 US 668, 696 (2004). The Attorney General, as counsel to the Director in every *Saldaño* case in which his office conceded error, had a responsibility of candor, if not to Mr. Buck, then to the courts. Mr. Buck should not be punished for the timing of his discovery of the Attorney General's unconscionable conduct.

## CONCLUSION

Mr. Buck has raised claims that the government violated equal protection and due process when it chose to rely on his race as a basis for asking the jury to sentence him to death. As *Graves* and *Granados* clearly show, the government had a choice to make during its cross-examination of Quijano and in its closing argument. The government could have made the choice that the prosecutors in *Graves* and *Granados* did, and refrained from relying on Mr. Buck's race to ask the jury to sentence him to death. It did not make that choice. For the foregoing reasons, the Court should grant a stay of execution pending consideration and disposition of Mr. Buck's petition for writ of *certiorari*.

s/ Gregory W. Wiercioch

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