(ORDER LIST: 565 U.S.)

MONDAY, NOVEMBER 7, 2011

ORDERS IN PENDING CASES

11M40 CHEETAM, CHRISTOPHER V. STATE FARM FIRE & CASUALTY CO.

11M41 PERRY-BEY, CHRISTINA D. V. NORFOLK, VA

The motions to direct the Clerk to file petitions for writs of certiorari out of time are denied.

11M42 IN RE SAEED BAKHOUCHE, AKA ABDUL RAZAK ALI

The motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner is granted.

10-704 MESSERSCHMIDT, CURT, ET AL. V. MILLENDER, AUGUSTA, ET AL.

10-708 FIRST AMERICAN FINANCIAL V. EDWARDS, DENISE P.

10-844 CARACO PHARMACEUTICAL, ET AL. V. NOVO NORDISK A/S, ET AL.

The motions of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument are granted.

10-1121 KNOX, DIANNE, ET AL. V. SERVICE EMPLOYEES INT'L UNION

Further consideration of respondent's motion to dismiss as moot is deferred to the hearing of the case on the merits.

11-301 SAINT-GOBAIN CERAMICS V. SIEMENS MEDICAL SOLUTIONS

The Solicitor General is invited to file a brief in this case expressing the views of the United States.

11-5149 WELENC, LARRY V. FLORIDA

11-5682 REYES, CARLOS V. UNITED STATES

The motions of petitioners for reconsideration of orders denying leave to proceed *in forma pauperis* are denied.

11-6227 HAMPTON, CHARLES W. V. J.W. SQUIRE CO., INC.

The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until November 28, 2011, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

CERTIORARI GRANTED

10-1032 MAGNER, STEVE, ET AL. V. GALLAGHER, THOMAS J., ET AL.

The motion of International Municipal Lawyers Association for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is granted.

10-9646 MILLER, EVAN V. ALABAMA

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The case is to be argued in tandem with No. 10-9647, *Jackson* v. *Hobbs, Dir., AR DOC*.

10-9647 JACKSON, KUNTRELL V. HOBBS, DIR., AR DOC

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The case is to be argued in tandem with No. 10-9646, *Miller* v. *Alabama*.

CERTIORARI DENIED

10-10293 McGOWAN, JOSEPH V. LaVALLEY, SUPT., GREAT MEADOW

10-10377 MIRANDA, WAYNE V. MASSACHUSETTS

10-11035 PARKER, GARY N. V. UNITED STATES

10-11064 WILSON, BRUCE A. V. RYAN, DIR., AZ DOC, ET AL.

11-26 WATCHTOWER BIBLE & TRACT, ET AL. V. SEGARDIA DE JESUS, ANTONIO

11-37 MONTEIRO, ALFREDO D. V. HOLDER, ATT'Y GEN.

11-102 NAT. PETROCHEMICAL, ET AL. V. EPA, ET AL.

11-162 CNOCKAERT, JAMES D. V. UNITED STATES

11-274 AUTEN, DAWN V. STEIGMANN, ROBERT J., ET AL.

11-280 GLOBAL INDUSTRIAL TECHNOLOGIES V. HARTFORD ACCIDENT CO., ET AL.

11-281 AGUILAR-RAYGOZA, PEDRO V. NEVADA

11-292 ALEA LONDON LIMITED V. AMERICAN HOME SERVICES, ET AL.

11-307 ZANGARA, JASON A. V. SOMERSET MEDICAL CENTER

11-332 PAN, BAO QUAN V. HOLDER, ATT'Y GEN.

11-337 WESTERN RADIO SERVICES, ET AL. V. U.S. FOREST SERVICE

11-340 SPRINT SPECTRUM, L.P. V. AYYAD, RAMZY, ET AL.

11-369 DiGUGLIELMO, RICHARD D. V. NEW YORK

11-382 PALMER, WARDEN V. COOPER, RICKEY D.

11-390 MARRO, DONALD C. V. FAUQUIER CTY. BD. OF SUPERVISORS

11-404 BURNS, MICHAEL J., ET AL. V. PLUMBERS & PIPEFITTERS, ET AL.

11-406 DiMECO, GABRIEL R. V. CONNECTICUT

11-411 DEL-RAY BATTERY COMPANY, ET AL. V. DOUGLAS BATTERY COMPANY

11-422 STIERHOFF, NEIL V. USDC RI

11-435 DAVIS, EUGENE V. UNITED STATES

11-5005 WILLIAMS, MARCELLUS V. ROPER, SUPT., POTOSI

11-5294 BARTELT, CHERYL L. V. ILLINOIS

11-6123 WATKINS, GLEN P. V. JOHNSON, LANNY, ET AL.

11-6160 WESTON, VINCENT V. PRELESNIK, WARDEN

11-6164 HOBSON, TIMOTHY V. CAMPBELL, WARDEN

11-6176 HINES, DEJUAN V. HARRINGTON, WARDEN

11-6181 McGREW, CARLOS V. DUFRESNE, EDWARD A., ET AL.

11-6187 MATOS, RAY A. V. TUCKER, SEC., FL DOC

11-6190 HAMMONTREE, RYAN V. FLORIDA

11-6193 HARRIS, RICHARD V. DORMIRE, SUPT., JEFFERSON CITY

11-6196 COLLINS, XAVIER A. V. HEDGPETH, WARDEN

11-6200 F. J. V. FL DEPT. OF CHILDREN & FAMILIES

11-6208 McPHERRON, PATRICK V. FL UNEMPLOYMENT APPEALS COMM'N

11-6209 KEMP, THOMAS V. RYAN, DIR., AZ DOC, ET AL.

11-6218 LAWSON, JAMES D. V. SWORD, EDDIE, ET AL.

11-6220 VELASQUEZ, RONALD V. KIRKLAND, WARDEN

11-6233 THROOP, EDWARD A. V. GONZALEZ, WARDEN

11-6277 MANSPEAKER, LYNETTE V. FLORIDA

11-6281 SKANDHA, BODHISATTVA V. RODEN, SUPT., NORFOLK

11-6283 RICE, GLENN V. HUDSON, WARDEN

11-6301 WELLMAN, DEBRA-ANN V. DuPONT DOW ELASTOMERS, ET AL.

11-6332 ZIVKOVIC, DAVID V. IDAHO

11-6344 LEDFORD, MICHAEL W. V. GEORGIA

11-6357 BENDSHADLER, MARCEL R. V. UNITED STATES

11-6367 FLOWERS, MARLON V. NEW YORK

11-6394 FAIRCLOUGH, HEILIA V. WAWA INC.

11-6399 GLICK, RONALD A. V. EDWARDS, DAVE, ET AL.

11-6402 FORNESS, RODNEY J. V. ASTRUE, COMM'R, SOCIAL SEC.

11-6424 AJLANE, ZAKARIA V. HOLDER, ATT'Y GEN.

11-6430 DUMBRIQUE, EDWARD R. V. CALIFORNIA

11-6432 CAMPBELL, CALVIN C. V. FLORIDA

11-6433 DONNER, CARL V. ILLINOIS

11-6446 DONIS, DAVID V. COLORADO

11-6462 KLYM, KENNETH V. WARNER, SEC., WA DOC, ET AL.

11-6490 DEMOE, MICHAEL B. V. FRANKE, SUPT., TWO RIVERS

11-6510 BROGLI, CARL V. OREGON

11-6511 BASSETT, RICHARD D. V. CALIFORNIA

11-6560 WEATHERSPOON, MARCUS V. McDANIEL, WARDEN

11-6578 PRINCE, JAMMIE L. V. COLORADO

11-6612 SIFRIT, BENJAMIN V. ROWLEY, WARDEN, ET AL.

11-6613 RIVERA, MIGUEL V. UNITED STATES

11-6615 BYERS, GREGORY V. MARLBORO CO. SCH. DISTRICT

11-6618 AVILA, GABRIEL V. McDONALD, WARDEN

11-6655 ARELLANO, RICARDO J. V. UNITED STATES

11-6660 RUBIO-AYALA, ALFONSO V. UNITED STATES

11-6665 CUDJOE, LAVERTISE A. V. UNITED STATES

11-6671 LARA-VENTURA, ISRAEL V. UNITED STATES

11-6687 SIMMONS, LESTER V. TUCKER, SEC., FL DOC

11-6691 BITON, DANIELLE V. CIR

11-6694 WIGREN, MICHAEL V. UNITED STATES

11-6702 RUSSELL, KEITH V. UNITED STATES

11-6722 WOLFE, ERIC V. UNITED STATES

11-6730 BORGERSEN, ROD G. V. UNITED STATES

11-6735 WOLTZ, HOWELL W. V. UNITED STATES

11-6736 WOOLSEY, KAREY L. V. UNITED STATES

11-6738 WALTOWER, STEPHEN V. UNITED STATES

11-6740 TRINH, QUOC BOA V. UNITED STATES

11-6742 LOPEZ, RANFERIS V. UNITED STATES

11-6743 LANDWER, CHARLES V. UNITED STATES

11-6744 ROSSI, PHILIP D. V. UNITED STATES

11-6748 GARDNER, SHAWN V. UNITED STATES

11-6749 PEEPLES, JAMES S. V. UNITED STATES

11-6750 STOKES, ANTHONY R. V. UNITED STATES

11-6751 MESCHINO, MARIO V. UNITED STATES

11-6753 MINGO, JAMAINE V. UNITED STATES

11-6755 DANCY, WILLIE V. UNITED STATES

11-6756 HERNANDEZ, FABIAN V. ARIZONA

11-6757 PENNIEGRAFT, EUGENE S. V. UNITED STATES

11-6759 HAYES, ERIC V. UNITED STATES

11-6760 FLORES-OLMOS, RUBEN V. UNITED STATES

11-6761 GOODWIN, FRANKLIN V. UNITED STATES

11-6764 RIVAS-MOREIERA, JUAN V. UNITED STATES

11-6767 PSICK, MARK R. V. UNITED STATES

11-6772 CARAWAY, THOMAS G. V. UNITED STATES

11-6777 CARTER, DeWAYNE V. UNITED STATES

11-6780 BURNETT, ALBERT V. UNITED STATES

11-6784 MURILLO, ALVARO V. UNITED STATES

11-6789 RAMON-MORENO, JUAN L. V. UNITED STATES

11-6790 SANCHEZ-JAIMES, ANTONIO V. UNITED STATES

11-6791 MOSCOL, ANTONIO V. UNITED STATES

11-6792 CRUZ, EDGAR V. UNITED STATES

11-6793 MARION, ISAAC V. UNITED STATES

11-6797 SMITH, WILBERT B. V. UNITED STATES

11-6802 MANCARI, BRUNO J. V. UNITED STATES

11-6810 LOVE, MARTAY V. UNITED STATES

11-6816 PEREZ-SANCHEZ, ADRIAN V. UNITED STATES

11-6817 MEDINA-ORTIZ, ROQUE V. UNITED STATES

11-6818 BONE, LAVELL V. UNITED STATES

11-6821 WILLIAMS, MICHAEL D. V. UNITED STATES

11-6822 VILLEGAS-VALDEZ, TRANSITO V. UNITED STATES

11-6824 McANDREW, JAMES J. V. UNITED STATES

11-6877 HUDSON, GRADY V. LORENCE, GERALD M.

The petitions for writs of certiorari are denied.

10-1477 HARGROVE, JACK L. V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

11-143 PILGRIM FILMS & TV, INC., ET AL. V. MONTZ, LARRY, ET AL.

The motion of Reveille LLC, et al. for leave to file a brief as *amici curiae* is granted. The motion of California Broadcasters Association, et al. for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is denied.

11-287 SKECHERS U.S.A., INC. V. TOMLINSON, PATTY

The motion of Center for Class Action Fairness for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is denied.

11-5113 JONES, MARCUS D. V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Kagan took no part in the consideration or decision of this petition.

11-5731 ABULKHAIR, ASSEM A. V. BOEHM, EDWARD W., ET AL.

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8.

11-6165 HANEY, MONTE L. V. ADAMS, WARDEN

The petition for a writ of certiorari is denied. Justice Breyer took no part in the consideration or decision of this petition.

11-6197 BRANHAM, RODNEY V. MI DOC, ET AL.

The motion of petitioner for leave to proceed *in forma*

pauperis is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U.S. 1 (1992) (*per curiam*).

11-6206 OSBORNE, TIMOTHY J. V. O'BRIEN, CONAN

The petition for a writ of certiorari is denied. Justice Breyer took no part in the consideration or decision of this petition.

11-6261 FLORES, ERIC V. HOLDER, ATT'Y GEN., ET AL.

The petition for a writ of certiorari before judgment is denied.

11-6692 BEVERLY, KENNETH D. V. UNITED STATES

11-6725 SERRANO, RAYMOND V. UNITED STATES

The petitions for writs of certiorari are denied. Justice Kagan took no part in the consideration or decision of these petitions.

11-6727 MORALES, RICHARD V. UNITED STATES

The petition for a writ of certiorari is denied. Justice Sotomayor took no part in the consideration or decision of this petition.

HABEAS CORPUS DENIED

11-443 IN RE ANDREW J. JOHNSON

11-6758 IN RE NEVILLE PORRAS

11-6807 IN RE NARICCO SCOTT

11-6889 IN RE BALJIT SINGH

11-6917 IN RE LEONARD WALKER

The petitions for writs of habeas corpus are denied.

MANDAMUS DENIED

11-6183 IN RE SAMUEL RIVERA

The petition for a writ of mandamus is denied.

REHEARINGS DENIED

10-1508 ANSARI, AZAM V. NCS PEARSON, INC., ET AL.

11-5473 KAMPFER, DOUGLAS E. V. REU, WENDY, ET AL.

The petitions for rehearing are denied.

Per Curiam

SUPREME COURT OF THE UNITED STATES

KPMG LLP *v.* ROBERT COCCHI ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

No. 10–1521. Decided November 7, 2011

PER CURIAM.

Agreements to arbitrate that fall within the scope and coverage of the Federal Arbitration Act (Act), 9 U. S. C. §1 *et seq.*, must be enforced in state and federal courts. State courts, then, "have a prominent role to play as enforcers of agreements to arbitrate." *Vaden* v. *Discover Bank*, 556 U. S. 49, 59 (2009).

The Act has been interpreted to require that if a dispute presents multiple claims, some arbitrable and some not, the former must be sent to arbitration even if this will lead to piecemeal litigation. See *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 217 (1985). From this it follows that state and federal courts must examine with care the complaints seeking to invoke their jurisdiction in order to separate arbitrable from nonarbitrable claims. A court may not issue a blanket refusal to compel arbitration merely on the grounds that some of the claims could be resolved by the court without arbitration. See *ibid.*

In this case the Fourth District Court of Appeal of the State of Florida upheld a trial court's refusal to compel arbitration of respondents' claims after determining that two of the four claims in a complaint were nonarbitrable. Though the matter is not altogether free from doubt, a fair reading of the opinion indicates a likelihood that the Court of Appeal failed to determine whether the other two claims in the complaint were arbitrable. For this reason, the judgment of the Court of Appeal is vacated, and the case remanded for further proceedings.

Per Curiam

* * *

Respondents are 19 individuals and entities who bought limited partnership interests in one of three limited partnerships, all known as the Rye Funds. The Rye Funds were managed by Tremont Group Holding, Inc., and Tremont Partners, Inc., both of which were audited by KPMG. The Rye Funds were invested with financier Bernard Madoff and allegedly lost millions of dollars as a result of a scheme to defraud. Respondents sued the Rye Funds, the Tremont defendants, and Tremont's auditing firm, KPMG.

Only the claims against KPMG are at issue in this case. Against KPMG, respondents alleged four causes of action: negligent misrepresentation; violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), Fla. Stat. 501.201 *et seq.* (2010); professional malpractice; and aiding and abetting a breach of fiduciary duty. Respondents' basic theory was that KPMG failed to use proper auditing standards with respect to the financial statements of the partnerships. These improper audits, respondents contend, led to "substantial misrepresentations" about the health of the funds and resulted in respondents' investment losses. 51 So. 3d 1165, 1168 (Fla. App. 2010).

KPMG moved to compel arbitration based on the audit services agreement that existed between it and the Tremont defendants. That agreement provided that "[a]ny dispute or claim arising out of or relating to . . . the services provided [by KPMG] . . . (including any dispute or claim involving any person or entity for whose benefit the services in question are or were provided) shall be resolved" either by mediation or arbitration. App. to Pet. for Cert. 63a. The Florida Circuit Court of the Fifteenth Judicial Circuit Palm Beach County denied the motion.

The Court of Appeal affirmed, noting that "[n]one of the plaintiffs . . . expressly assented in any fashion to [the audit services agreement] or the arbitration provision." 51

So. 3d, at 1168. Thus, the court found, the arbitration clause could only be enforced if respondents' claims were derivative in that they arose from the services KPMG performed for the Tremont defendants pursuant to the audit services agreement. Applying Delaware law, which both parties agreed was applicable, the Court of Appeal concluded that the negligent misrepresentation and the violation of FDUTPA claims were direct rather than derivative. A fair reading of the opinion reveals nothing to suggest that the court came to the same conclusion about the professional malpractice and breach of fiduciary duty claims. Indeed, the court said nothing about those claims at all. Finding "the arbitral agreement upon which KPMG relied would not apply to the direct claims made by the individual plaintiffs," *id.,* at 1167, the Court of Appeal affirmed the trial court's denial of the motion to arbitrate.

Respondents have since amended their complaint to add a fifth claim. Citing the Court of Appeal's decision, the trial court again denied KPMG's motion to compel arbitration.

The Federal Arbitration Act reflects an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 631 (1985); *Moses H. Cone Memorial Hospital* v. *Mercury Constr. Corp.*, 460 U. S. 1, 24–25 (1983) (noting that "questions of arbitrability [must]. . . be addressed with a healthy regard for the federal policy favoring arbitration"). This policy, as contained within the Act, "requires courts to enforce the bargain of the parties to arbitrate," *Dean Witter*, *supra*, at 217, and "cannot possibly require the disregard of state law permitting arbitration by or against nonparties to the written arbitration agreement," *Arthur Andersen LLP* v. *Carlisle*, 556 U. S. 624, 630, n. 5 (2009) (emphasis deleted). Both parties agree that whether the claims in the complaint are arbitrable turns on the question whether they must be deemed

direct or derivative under Delaware law. That question of state law is not at issue here. What is at issue is the Court of Appeal's apparent refusal to compel arbitration on any of the four claims based solely on a finding that two of them, the claim of negligent misrepresentation and the alleged violation of the FDUTPA, were nonarbitrable.

In *Dean Witter*, the Court noted that the Act "provides that written agreements to arbitrate controversies arising out of an existing contract 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' " 470 U. S., at 218 (quoting 9 U. S. C. §2). The Court found that by its terms, "the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." 470 U. S., at 218 (emphasis in original). Thus, when a complaint contains both arbitrable and nonarbitrable claims, the Act requires courts to "compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Id.*, at 217. To implement this holding, courts must examine a complaint with care to assess whether any individual claim must be arbitrated. The failure to do so is subject to immediate review. See *Southland Corp.* v. *Keating*, 465 U. S. 1, 6–7 (1984).

The Court of Appeal listed all four claims, found that two were direct, and then refused to compel arbitration on the complaint as a whole because the arbitral agreement "would not apply to the direct claims." 51 So. 3d, at 1167. By not addressing the other two claims in the complaint, the Court of Appeal failed to give effect to the plain meaning of the Act and to the holding of *Dean Witter*. The petition for certiorari is granted. The judgment of the Court of Appeal is vacated, and the case is remanded. On

remand, the Court of Appeal should examine the remaining two claims to determine whether either requires arbitration.

It is so ordered.

Per Curiam

SUPREME COURT OF THE UNITED STATES

DAVID BOBBY, WARDEN *v.* ARCHIE DIXON

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 10–1540. Decided November 7, 2011

PER CURIAM.

Under the Antiterrorism and Effective Death Penalty Act, a state prisoner seeking a writ of habeas corpus from a federal court "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 562 U. S. ___, ___ (2011) (slip op., at 13). The Court of Appeals for the Sixth Circuit purported to identify three such grievous errors in the Ohio Supreme Court's affirmance of respondent Archie Dixon's murder conviction. Because it is not clear that the Ohio Supreme Court erred at all, much less erred so transparently that no fairminded jurist could agree with that court's decision, the Sixth Circuit's judgment must be reversed.

* * *

Archie Dixon and Tim Hoffner murdered Chris Hammer in order to steal his car. Dixon and Hoffner beat Hammer, tied him up, and buried him alive, pushing the struggling Hammer down into his grave while they shoveled dirt on top of him. Dixon then used Hammer's birth certificate and social security card to obtain a state identification card in Hammer's name. After using that identification card to establish ownership of Hammer's car, Dixon sold the vehicle for $2,800.

Hammer's mother reported her son missing the day after his murder. While investigating Hammer's disap-

pearance, police had various encounters with Dixon, three of which are relevant here. On November 4, 1993, a police detective spoke with Dixon at a local police station. It is undisputed that this was a chance encounter—Dixon was apparently visiting the police station to retrieve his own car, which had been impounded for a traffic violation. The detective issued *Miranda* warnings to Dixon and then asked to talk to him about Hammer's disappearance. See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Dixon declined to answer questions without his lawyer present and left the station.

As their investigation continued, police determined that Dixon had sold Hammer's car and forged Hammer's signature when cashing the check he received in that sale. Police arrested Dixon for forgery on the morning of November 9. Beginning at 11:30 a.m. detectives intermittently interrogated Dixon over several hours, speaking with him for about 45 minutes total. Prior to the interrogation, the detectives had decided not to provide Dixon with *Miranda* warnings for fear that Dixon would again refuse to speak with them.

Dixon readily admitted to obtaining the identification card in Hammer's name and signing Hammer's name on the check, but said that Hammer had given him permission to sell the car. Dixon claimed not to know where Hammer was, although he said he thought Hammer might have left for Tennessee. The detectives challenged the plausibility of Dixon's tale and told Dixon that Tim Hoffner was providing them more useful information. At one point a detective told Dixon that "now is the time to say" whether he had any involvement in Hammer's disappearance because "if Tim starts cutting a deal over there, this is kinda like, a bus leaving. The first one that gets on it is the only one that's gonna get on." App. to Pet. for Cert. 183a. Dixon responded that, if Hoffner knew anything about Hammer's disappearance, Hoffner had not

told him. Dixon insisted that he had told police everything he knew and that he had "[n]othing whatsoever" to do with Hammer's disappearance. *Id.*, at 186a. At approximately 3:30 p.m. the interrogation concluded, and the detectives brought Dixon to a correctional facility where he was booked on a forgery charge.

The same afternoon, Hoffner led police to Hammer's grave. Hoffner claimed that Dixon had told him that Hammer was buried there. After concluding their interview with Hoffner and releasing him, the police had Dixon transported back to the police station.

Dixon arrived at the police station at about 7:30 p.m. Prior to any police questioning, Dixon stated that he had heard the police had found a body and asked whether Hoffner was in custody. The police told Dixon that Hoffner was not, at which point Dixon said, "I talked to my attorney, and I want to tell you what happened." *State* v. *Dixon*, 101 Ohio St. 3d 328, 331, 2004–Ohio–1585, 805 N. E. 2d 1042, 1050. The police read Dixon his *Miranda* rights, obtained a signed waiver of those rights, and spoke with Dixon for about half an hour. At 8 p.m. the police, now using a tape recorder, again advised Dixon of his *Miranda* rights. In a detailed confession, Dixon admitted to murdering Hammer but attempted to pin the lion's share of the blame on Hoffner.

At Dixon's trial, the Ohio trial court excluded both Dixon's initial confession to forgery and his later confession to murder. The State took an interlocutory appeal. The State did not dispute that Dixon's forgery confession was properly suppressed, but argued that the murder confession was admissible because Dixon had received *Miranda* warnings prior to that confession. The Ohio Court of Appeals agreed and allowed Dixon's murder confession to be admitted as evidence. Dixon was convicted of murder, kidnaping, robbery, and forgery, and sentenced to death.

The Ohio Supreme Court affirmed Dixon's convictions and sentence. To analyze the admissibility of Dixon's murder confession, the court applied *Oregon* v. *Elstad*, 470 U. S. 298 (1985). The Ohio Supreme Court found that Dixon's confession to murder after receiving *Miranda* warnings was admissible because that confession and his prior, unwarned confession to forgery were both voluntary. *State* v. *Dixon*, *supra*, at 332–334, 805 N. E. 2d, at 1050–1052; see *Elstad*, *supra*, at 318 ("We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings").

Dixon then filed a petition for a writ of habeas corpus under 28 U. S. C. §2254 in the U. S. District Court for the Northern District of Ohio. Dixon claimed, *inter alia*, that the state court decisions allowing the admission of his murder confession contravened clearly established federal law. The District Court denied relief, but a divided panel of the Sixth Circuit reversed. *Dixon* v. *Houk*, 627 F. 3d 553 (2010).

The Sixth Circuit had authority to issue the writ of habeas corpus only if the Ohio Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law," as set forth in this Court's holdings, or was "based on an unreasonable determination of the facts" in light of the state court record. §2254(d); see *Harrington*, 562 U. S., at ___ (slip op., at 10). The Sixth Circuit believed that the Ohio Supreme Court's decision contained three such egregious errors.

First, according to the Sixth Circuit, the *Miranda* decision itself clearly established that police could not speak to Dixon on November 9, because on November 4 Dixon had refused to speak to police without his lawyer. That is plainly wrong. It is undisputed that Dixon was not in custody during his chance encounter with police on No-

vember 4. And this Court has "never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'" *McNeil* v. *Wisconsin*, 501 U. S. 171, 182, n. 3 (1991); see also *Montejo* v. *Louisiana*, 556 U. S. 778, ___ (2009) (slip. op., at 16) ("If the defendant is not in custody then [*Miranda* and its progeny] do not apply").

Second, the Sixth Circuit held that police violated the Fifth Amendment by urging Dixon to "cut a deal" before his accomplice Hoffner did so.[1] The Sixth Circuit cited no precedent of this Court—or any court—holding that this common police tactic is unconstitutional. Cf., *e.g.*, *Elstad*, *supra*, at 317 ("[T]he Court has refused to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily"). Because no holding of this Court suggests, much less clearly establishes, that police may not urge a suspect to confess before another suspect does so, the Sixth Circuit had no authority to issue the writ on this ground.[2]

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[1] In the Sixth Circuit's view, the Ohio Supreme Court's contrary conclusion that Dixon's confession was voluntary "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." §2254(d)(2). The Sixth Circuit did not, however, purport to identify any mistaken factual finding. It differed with the Ohio Supreme Court only on the ultimate characterization of Dixon's confession as voluntary, and this Court's cases make clear that "the ultimate issue of 'voluntariness' is a legal question." *Miller* v. *Fenton*, 474 U. S. 104, 110 (1985); see also *Arizona* v. *Fulminante*, 499 U. S. 279, 287 (1991). This Court therefore addresses the question the Sixth Circuit should have addressed: whether the Ohio Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." §2254(d)(1).

[2] The only case the Sixth Circuit cited on this issue was *Mincey* v. *Arizona*, 437 U. S. 385 (1978). *Mincey* involved the "virtually continuous questioning of a seriously and painfully wounded man on the edge of consciousness" who was in a hospital's intensive care unit and who

Third, the Sixth Circuit held that the Ohio Supreme Court unreasonably applied this Court's precedent in *Elstad*. In that case, a suspect who had not received *Miranda* warnings confessed to burglary as police took him into custody. Approximately an hour later, after he had received *Miranda* warnings, the suspect again confessed to the same burglary. This Court held that the later, warned confession was admissible because "there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second [warned] statement was also voluntarily made." 470 U. S., at 318 (footnote omitted).

As the Ohio Supreme Court's opinion explained, the circumstances surrounding Dixon's interrogations demonstrate that his statements were voluntary. During Dixon's first interrogation, he received several breaks, was given water and offered food, and was not abused or threatened. He freely acknowledged that he had forged Hammer's name, even stating that the police were "welcome" to that information, and he had no difficulty denying that he had anything to do with Hammer's disappearance. *State* v. *Dixon*, 101 Ohio St. 3d, at 331, 805 N. E. 2d, at 1049. Prior to his second interrogation, Dixon made an unsolicited declaration that he had spoken with his attorney and wanted to tell the police what had happened to Hammer. Then, before giving his taped confession, Dixon twice received *Miranda* warnings and signed a waiver-of-rights form which stated that he was acting of his own free will.

"clearly expressed his wish not to be interrogated" while in a "debilitated and helpless condition." *Id.*, at 399–401. There is simply nothing in the facts or reasoning of *Mincey* suggesting that any of Dixon's statements were involuntary.

The Ohio Supreme Court recognized that Dixon's first interrogation involved "an intentional *Miranda* violation." The court concluded, however, that "as in *Elstad*, the breach of the *Miranda* procedures here involved no actual compulsion" and thus there was no reason to suppress Dixon's later, warned confession. 101 Ohio St. 3d, at 334, 805 N. E. 2d, at 1052 (citing *Elstad*, *supra*, at 318).

The Sixth Circuit disagreed, believing that Dixon's confession was inadmissible under *Elstad* because it was the product of a "deliberate question-first, warn-later strategy." 627 F. 3d, at 557. In so holding, the Sixth Circuit relied heavily on this Court's decision in *Missouri* v. *Seibert*, 542 U. S. 600 (2004).[3] In *Seibert*, police employed a two-step strategy to reduce the effect of *Miranda* warnings: A detective exhaustively questioned Seibert until she confessed to murder and then, after a 15- to 20-minute break, gave Seibert *Miranda* warnings and led her to repeat her prior confession. 542 U. S., at 604–606, 616 (plurality opinion). The Court held that Seibert's second confession was inadmissible as evidence against her even though it was preceded by a *Miranda* warning. A plurality of the Court reasoned that "[u]pon hearing warnings only in the aftermath of interrogation and just after mak-

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[3] *Seibert* was not decided until after the Ohio Supreme Court's opinion in this case, but was issued before this Court denied Dixon's petition for certiorari seeking review of the Ohio Supreme Court's decision. It is thus an open question whether *Seibert* was "clearly established Federal law" for purposes of §2254(d). See *Smith* v. *Spisak*, 558 U. S. ___, ___ (2010) (slip op., at 3). It is not necessary to decide that question here because *Seibert* is entirely consistent with the Ohio Supreme Court's decision. Thus, if *Seibert* was clearly established law, the Ohio Supreme Court's decision was not "contrary to" or "an unreasonable application of" *Seibert*. §2254(d). And if *Seibert* was not clearly established law, *Seibert*'s explication of *Elstad* further demonstrates that the Ohio Supreme Court's decision was not contrary to or an unreasonable application of *Elstad*.

ing a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again." 542 U. S., at 613; see also *id.,* at 615 (detailing a "series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object"). JUSTICE KENNEDY concurred in the judgment, noting he "would apply a narrower test applicable only in the infrequent case . . . in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." *Id.*, at 622.

In this case, no two-step interrogation technique of the type that concerned the Court in *Seibert* undermined the *Miranda* warnings Dixon received. In *Seibert*, the suspect's first, unwarned interrogation left "little, if anything, of incriminating potential left unsaid," making it "unnatural" not to "repeat at the second stage what had been said before." 542 U. S., at 616–617 (plurality opinion). But in this case Dixon steadfastly maintained during his first, unwarned interrogation that he had "[n]othing whatsoever" to do with Hammer's disappearance. App. to Pet. for Cert. 186a. Thus, unlike in *Seibert*, there is no concern here that police gave Dixon *Miranda* warnings and then led him to repeat an earlier murder confession, because there was no earlier confession to repeat. Indeed, Dixon *contradicted* his prior unwarned statements when he confessed to Hammer's murder. Nor is there any evidence that police used Dixon's earlier admission to forgery to induce him to waive his right to silence later: Dixon declared his desire to tell police what happened to Hammer before the second interrogation session even began. As the Ohio Supreme Court reasonably concluded, there was simply "no nexus" between Dixon's unwarned admission to forgery and his later, warned confession to murder. 101 Ohio St. 3d, at 333, 805 N. E. 2d, at 1051.

Moreover, in *Seibert* the Court was concerned that the *Miranda* warnings did not "effectively advise the suspect that he had a real choice about giving an admissible statement" because the unwarned and warned interrogations blended into one "continuum." 542 U. S., at 612, 617. Given all the circumstances of this case, that is not so here. Four hours passed between Dixon's unwarned interrogation and his receipt of *Miranda* rights, during which time he traveled from the police station to a separate jail and back again; claimed to have spoken to his lawyer; and learned that police were talking to his accomplice and had found Hammer's body. Things had changed. Under *Seibert*, this significant break in time and dramatic change in circumstances created "a new and distinct experience," ensuring that Dixon's prior, unwarned interrogation did not undermine the effectiveness of the *Miranda* warnings he received before confessing to Hammer's murder. 542 U. S., at 615; see also *id.*, at 622 (KENNEDY, J., concurring in judgment) ("For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn").[4]

The admission of Dixon's murder confession was consistent with this Court's precedents: Dixon received *Mi-*

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[4]The Sixth Circuit also concluded that "the Ohio Supreme Court erroneously placed the burden of proof on Dixon to prove that his confession was coerced." *Dixon* v. *Houk*, 627 F. 3d 553, 558 (2010). But the Ohio Supreme Court clearly said that "the state carries the burden of proving voluntariness." *State* v. *Dixon*, 101 Ohio St. 3d 328, 332, 2004–Ohio–1585, 805 N. E. 2d 1042, 1050. That the court's opinion discusses the absence of evidence of coerciveness alongside the affirmative evidence of voluntariness in no way indicates that the court shifted the burden onto Dixon.

randa warnings before confessing to Hammer's murder; the effectiveness of those warnings was not impaired by the sort of "two-step interrogation technique" condemned in *Seibert;* and there is no evidence that any of Dixon's statements was the product of actual coercion. That does not excuse the detectives' decision not to give Dixon *Miranda* warnings before his first interrogation. But the Ohio courts recognized that failure and imposed the appropriate remedy: exclusion of Dixon's forgery confession and the attendant statements given without the benefit of *Miranda* warnings. Because no precedent of this Court required Ohio to do more, the Sixth Circuit was without authority to overturn the reasoned judgment of the State's highest court.

The petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis* are granted. The judgment of the Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

DUANE EDWARD BUCK *v.* RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11–6391. Decided November 7, 2011

The petition for a writ of certiorari is denied.

Statement of JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE BREYER join, respecting the denial of certiorari.

One morning in July 1995, petitioner Duane E. Buck went to his ex-girlfriend's house with a rifle and a shotgun. After killing one person and wounding another, Buck chased his ex-girlfriend outside. Her children followed and witnessed Buck shoot and kill their mother as she attempted to flee. An arresting officer testified that Buck was laughing when he was arrested and said "[t]he bitch deserved what she got." 28 Tr. 51 (May 6, 1997).

Buck was tried for capital murder, and a jury convicted. He was sentenced to death based on the jury's finding that the State had proved Buck's future dangerousness to society.

The petition in this case concerns bizarre and objectionable testimony given by a "defense expert" at the penalty phase of Buck's capital trial. The witness, Dr. Walter Quijano, testified that petitioner, if given a noncapital sentence, would not present a danger to society. But Dr. Quijano added that members of petitioner's race (he is African-American) are statistically more likely than the average person to engage in crime.

Dr. Quijano's testimony would provide a basis for reversal of petitioner's sentence if the prosecution were responsible for presenting that testimony to the jury. But Dr.

Quijano was a defense witness, and it was petitioner's attorney, not the prosecutor, who first elicited Dr. Quijano's view regarding the correlation between race and future dangerousness. Retained by the defense, Dr. Quijano prepared a report in which he opined on this subject. His report stated:

> "Future Dangerousness, Whether there is probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? The following factors were considered in answer to the question of future dangerousness: statistical, environmental, and clinical judgment.
>
> "**I. STATISTICAL FACTORS**
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> "1. **Past crimes**. . . .
>
> "2. **Age**. . . .
>
> "3. **Sex**. . . .
>
> "4. **Race**. Black: Increased probability. There is an over-representation of Blacks among the violent offenders.
>
> "5. **Socioeconomics**. . . .
>
> "6. **Employment stability**. . . .
>
> "7. **Substance abuse**. . . ." Defense Exh. No. 1 in No. 699684 (208th Jud. Dist., Harris Cty., Tex.), p. 7.

The defense then called Dr. Quijano to the stand, and elicited his testimony on this point. Defense counsel asked Dr. Quijano, "[i]f we have an inmate such as Mr. Buck who is sentenced to life in prison, what are some of the factors, statistical factors or environmental factors that you've looked at in regard to this case?" 28 Tr. 110 (May 6, 1997). As he had done in his report, Dr. Quijano identified past crimes, age, sex, race, socioeconomic status, and substance

abuse as statistical factors predictive of "whether a person will or will not constitute a continuing danger." *Id.*, at 111; see also *id.*, at 110 (identifying the "statistical factors we know to predict future dangerousness"). With respect to race, he elaborated further that "[i]t's a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System." *Id.*, at 111. Not only did the defense present this testimony to the jury but Dr. Quijano's report was also admitted into evidence—over the prosecution's objection—and was thus available for the jury to consider. See *id.*, at 233–234.

It is true that the prosecutor briefly went over this same ground on cross-examination. The prosecutor asked a single question regarding whether race increased the probability that Buck would pose a future danger to society:

> "Q. 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?
>
> "A. Yes." *Id.,* at 160.

But this colloquy did not go beyond what defense counsel had already elicited on direct examination, and by this point, Dr. Quijano's views on the correlation between race and future dangerousness had already been brought to the jury's attention. Moreover, the prosecutor did not revisit the race-related testimony in closing or ask the jury to find future dangerousness based on Buck's race.

The dissent makes much of the fact that the State at various points in federal habeas proceedings was inaccurate in its attempts to explain why the present case is different from the others in which, as a result of similar testimony by Dr. Quijano, the State did not assert proce-

dural default and new sentencing proceedings were held. But the fact remains that the present case *is* different from all the rest. In four of the six other cases, see, *e.g.*, *Saldano* v. *Texas*, 530 U. S. 1212 (2000), the prosecution called Dr. Quijano and elicited the objectionable testimony on direct examination. In the remaining two cases, see *Alba* v. *Johnson*, 232 F. 3d 208 (CA5 2000) (Table); *Blue* v. *Johnson*, Civ. Action No. 99–0350 (SD Tex., Sept. 29, 2000), while the defense called Dr. Quijano, the objectionable testimony was not elicited until the prosecution questioned Dr. Quijano on cross-examination. See Record, Doc. 511601677, at 44–49; *id.*, Doc. 511601676, at 39–44. And, on redirect, defense counsel mentioned race only to mitigate the effect on the jury of Dr. Quijano's prior identification of race as an immutable factor increasing a defendant's likelihood of future dangerousness.* Only in

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*On redirect in *Alba*, defense counsel tried to downplay the significance of Dr. Quijano's testimony with respect to the statistical factors:

"Q. [The prosecutor] asked you about statistical factors in predicting future dangerousness. When we're talking about statistics, are we talking about correlation or causation?

"A. Oh. These statistics are strictly correlation. There's a big distinction, and we must keep that in mind. Correlation simply says that two events happened—coincidentally happened at the same time. It does not mean that one causes the other.

"Q. So when we're talking about these statistical factors—that more men re-offend than women, Hispanics offend more than blacks or whites, people from the low socioeconomic groups offend more than people from the higher socioeconomic groups, people who have opiate addiction or alcohol abuse offend more often than those who don't, people who have less education offend more often than those who have—do all those things cause people to offend?

"A. No. They are simply contributing factors. They are not causal factors. One cannot control one's gender or one's color. And obviously there are many, many Hispanics, many whites, many Orientals who don't commit crimes. But the frequence *[sic]* among those who commit crimes, these are the characteristics. They don't cause each other; they just happen to be coincidental to each other." Record, Doc. 511601677,

Buck's case did defense counsel elicit the race-related testimony on direct examination. Thus, this is the only case in which it can be said that the responsibility for eliciting the offensive testimony lay squarely with the defense.

Although the dissent suggests that the District Court may have been misled by the State's inaccurate statements, the District Court, in denying petitioner's motion under Rule 60 of the Federal Rules of Civil Procedure, was fully aware of what had occurred in all of these cases. It is for these reasons that I conclude that certiorari should be denied.

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at 104–105 (one paragraph break omitted). See also *id.,* Doc. 511601676, at 82–84 (seeking to show that incarceration could decrease a defendant's likelihood of future dangerousness, notwithstanding the immutable factors, such as race); *id*., at 82–83 ("If the person is put in a prison many of these factors will not be operative anymore because the prison restriction will not allow those factors to be present, and so the more of those factors are controlled by the prison structure, the less the danger—the less dangerous the person is in the prison").

SUPREME COURT OF THE UNITED STATES

DUANE EDWARD BUCK *v.* RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11–6391. Decided November 7, 2011

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN joins, dissenting from denial of certiorari.

Today the Court denies review of a death sentence marred by racial overtones and a record compromised by misleading remarks and omissions made by the State of Texas in the federal habeas proceedings below. Because our criminal justice system should not tolerate either circumstance—especially in a capital case—I dissent and vote to grant the petition.

Duane E. Buck was convicted of capital murder in a Texas state court. During the penalty phase of Buck's trial, the defense called psychologist Walter Quijano as a witness. The defense sought Quijano's opinion as to whether Buck would pose a continuing threat to society—a fact that the jury was required to find in order to sentence Buck to death. Quijano testified that there were several "statistical factors we know to predict future dangerousness," and listed a defendant's past crimes, age, sex, race, socioeconomic status, employment stability, and substance abuse history. 28 Tr. 110–111 (May 6, 1997). As to race, Quijano said: "Race. It's a sad commentary that minorities, Hispanics and black people, are over represented in the Criminal Justice System." *Id.,* at 111. The defense then asked Quijano to "talk about environmental factors if [Buck were] incarcerated in prison." *Id.,* at 111–112. Quijano explained that, for example, Buck "has no assaul-

tive incidents either at TDC or in jail," and that "that's a good sign that this person is controllable within a jail or prison setting." *Id.,* at 115. He also explained that Buck's "victim [was] not random" because "there [was] a pre-existing relationship," and that this reduced the probability that Buck would pose a future danger. *Id.,* at 112. Ultimately, when the defense asked Quijano whether Buck was likely to commit violent criminal acts if he were sentenced to life imprisonment, Quijano replied, "The probability of that happening in prison would be low." *Id.,* at 115. The defense also offered into evidence, over the prosecutor's objection, a report containing Quijano's psychological evaluation of Buck, which substantially mirrored Quijano's trial testimony.[1]

On cross-examination, the prosecutor began by asking Quijano about the financial compensation he received in return for his time and the methods he used to examine Buck. The prosecutor then said that she would "like to ask [Quijano] some questions from [his] report." *Id.,* at 155. After inquiring about the statistical factors of past crimes and age and how they might indicate future dangerousness in Buck's case, the prosecutor said: "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?" *Id.,* at 160. Quijano answered, "Yes." *Ibid.* After additional cross-examination and testimony from a subsequent witness, the prosecutor argued to the jury in summation that

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[1]The report listed the following statistical factors relevant to the question whether Buck would pose a continuing threat to society: past crimes, age, sex, race, socioeconomics, employment stability, and substance abuse. As to race, the report stated: "4. **Race.** Black: Increased probability. There is an over-representation of Blacks among the violent offenders." Defense Exh. 1 in No. 699684 (208th Jud. Dist., Harris Cty., Tex.), p. 7.

Quijano "told you that there was a probability that [Buck] would commit future acts of violence." *Id.,* at 260. The jury returned a verdict of death.

This was not the first time that Quijano had testified in a Texas capital case, or in which the prosecution asked him questions regarding the relationship between race and future dangerousness. State prosecutors had elicited comparable testimony from Quijano in several other cases. In four of them, the prosecution called Quijano as a witness. See *Gonzales* v. *Cockrell*, Civ. Action No. 99–72 (WD Tex., Dec. 19, 2002); *Broxton* v. *Johnson*, Civ. Action No. 00–1034 (SD Tex., Mar. 28, 2001); *Garcia* v. *Johnson*, Civ. Action No. 99–134 (ED Tex., Sept. 7, 2000); *Saldano* v. *Texas*, 530 U. S. 1212 (2000). In two, the defense called Quijano, but the prosecution was the first to elicit race-related testimony from him. See *Alba* v. *Johnson*, 232 F. 3d 208 (CA5 2000) (Table); *Blue* v. *Johnson*, Civ. Action No. 99–0350 (SD Tex., Sept. 29, 2000). In each case, as in Buck's, however, the salient fact was that the prosecution invited the jury to consider race as a factor in sentencing. And in each case, the defendant was sentenced to death.

When one of those defendants, Victor Hugo Saldano, petitioned for this Court's review, the State of Texas confessed error. It acknowledged that "the use of race in Saldano's sentencing seriously undermined the fairness, integrity, or public reputation of the judicial process." Response to Pet. for Cert. in *Saldano* v. *Texas*, O. T. 1999, No. 99–8119, p. 7. The State continued, "[T]he infusion of race as a factor for the jury to weigh in making its determination violated [Saldano's] constitutional right to be sentenced without regard to the color of his skin." *Id.,* at 8. We granted Saldano's petition, vacated the judgment, and remanded. *Saldano* v. *Texas*, 530 U. S. 1212.

Shortly afterwards, the then-attorney general of Texas announced publicly that he had identified six cases that were "similar to that of Victor Hugo Saldano" in that

"testimony was offered by Dr. Quijano that race should be a factor for the jury to consider" in making its sentencing determination. Record in No. 4:04–cv–03965 (SD Tex.), Doc. 27–5, p. 30 (hereinafter Record) (internal quotation marks omitted). These were the five cases listed above (besides *Saldano*), as well as Buck's. The attorney general declared that "it is inappropriate to allow race to be considered as a factor in our criminal justice system." *Ibid.* (internal quotation marks omitted). Accordingly, in five of the six cases the attorney general identified, the State confessed error and did not raise procedural defenses to the defendants' federal habeas petitions. Five of the six defendants were thus resentenced, each to death.

Only in Buck's case, the last of the six cases to reach federal habeas review, did the State assert a procedural bar. Why the State chose to treat Buck differently from each of the other defendants has not always been clear. As the Court of Appeals for the Fifth Circuit recognized in the decision that is the subject of this petition, "We are provided with no explanation for why the State declined to act consistently with its Attorney General's public announcement with respect to petitioner Buck." No. 11–70025, 2011 WL 4067164, *8, n. 41 (Sept. 14, 2011).

What we do know is that the State justified its assertion of a procedural defense in the District Court based on statements and omissions that were misleading. The State found itself "compelled" to treat Buck's case differently from Saldano's because of a "critical distinction": "Buck himself, not the State[,] offered Dr. Quijano's testimony into evidence." Record, Doc. 6, at 17. The State created the unmistakable impression that Buck's case differed from the others in that only Buck called Quijano as a witness. The State asserted, "[T]he Director is obviously aware of the prior confessions of error in other federal habeas corpus cases involving similar testimony by Dr. Quijano. However, this case is *not Saldano*. In Sal-

dano's case Dr. Quijano *testified for the State*." *Id.,* at 20 (citation omitted; emphasis in original); see also *ibid.* ("Therefore, because it was Buck who called Dr. Quijano to testify and derived the benefit of Dr. Quijano's overall opinion that Buck was unlikely to be a future danger despite the existence of some negative factors, this case does not represent the odious error contained in the *Saldano* cases"). This was obviously not accurate. Like Buck, the defendants in both *Blue* and *Alba* called Quijano to the stand. But on the ground that only Buck had called Quijano as a witness, the State urged the District Court that "the former actions of the Director [in the other five cases] are not applicable and should not be considered in deciding this case." Record, Doc. 6, at 20.[2] The District Court applied the procedural bar raised by the State and dismissed Buck's petition.

Buck later brought the State's misstatements to light in a motion to reopen the judgment under Rule 60 of the Federal Rules of Civil Procedure. In response, the State erroneously identified *Alba* as a case in which the *prosecution* had called Quijano to the stand, and omitted any mention of *Blue*. After the District Court denied Buck's Rule 60 motion, Buck highlighted these errors in a motion under Rule 59(e) to alter or amend the judgment, which the District Court also denied. The Fifth Circuit denied Buck's application for a certificate of appealability (COA) to review these two judgments.

I believe the Fifth Circuit erred in doing so. To obtain a COA, a petitioner need not "prove, before the issuance of a COA, that some jurists would grant the petition for habeas

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[2] Perhaps, under a generous reading of the State's briefing, the State meant to convey to the District Court that Buck's case was distinguishable from the others not only because he called Quijano as a witness, but also because he elicited race-related testimony. But that is not what the briefing says. The distinction that the State offered—that Buck alone proffered Quijano as a witness—is incorrect.

corpus." *Miller-El* v. *Cockrell*, 537 U. S. 322, 338 (2003). Instead, a petitioner must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.*, at 327. See also 28 U. S. C. §2253(c)(2).

Buck has met this standard. The Rule 60 relief that he sought in the District Court was highly discretionary. *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U. S. 847 (1988). Yet the District Court denied relief based on a record compromised by the State's misleading remarks and omissions. I realize that, in denying Buck's Rule 59(e) motion, the District Court was aware of Buck's arguments that the State had mischaracterized *Alba* and *Blue*. But the District Court lacked other information that might have influenced its decision. Significantly, the District Court could not know that the State would later concede in the Fifth Circuit that it had mischaracterized *Alba*.

Nor, for similar reasons, did the District Court have the opportunity to evaluate the State's subsequent efforts in the Fifth Circuit and this Court to try to distinguish Buck's case from *Alba* and *Blue*. The State argues that although the defendants in those cases each proffered Quijano as a witness, they did not, like Buck, elicit race-related testimony on direct examination; instead, the prosecution first did so on cross-examination.

This distinction is accurate but not necessarily substantial. The context in which Buck's counsel addressed race differed markedly from how the prosecutor used it. On direct examination, Quijano referred to race as part of his overall opinion that Buck would pose a low threat to society were he imprisoned. This is exactly how the State has characterized Quijano's testimony. *E.g.*, Thaler's Reply to Buck's Motion for Relief from Judgment and Motion for Stay of Execution in No. 4:04–cv–03965 (SD Tex.), pp. 15–

16 ("In this case, first on direct examination by the defense, Dr. Quijano merely identified race as one statistical factor and pointed out that African-Americans were overrepresented in the criminal justice system; he did not state a causal relationship, nor did he link this statistic to Buck as an individual"). Buck did not argue that his race made him *less* dangerous, and the prosecutor had no need to revisit the issue. But she did, in a question specifically designed to persuade the jury that Buck's race made him *more* dangerous and that, in part on this basis, he should be sentenced to death.

The then-attorney general of Texas recognized that "it is inappropriate to allow race to be considered as a factor in our criminal justice system." Record, Doc. 27–5, at 30 (internal quotation marks omitted). Whether the District Court would accord any weight to the State's purported distinctions between Buck's case and the others is a question which that court should decide in the first instance, based on an unobscured record. Especially in light of the capital nature of this case and the express recognition by a Texas attorney general that the relevant testimony was inappropriately race-charged, Buck has presented issues that "deserve encouragement to proceed further." *Miller-El*, 537 U. S., at 327.