

No. 25-732

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IN THE  
**Supreme Court of the United States**

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AMOS J. WELLS III,

*Petitioner,*

v.

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

*Respondent.*

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Fifth Circuit

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**REPLY BRIEF FOR PETITIONER**

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## INTRODUCTION

Petitioner was sentenced to death after his own counsel presented expert testimony that he was incurably predisposed to violence, thereby conceding the future-dangerousness predicate for death. That concession vitiated the adversarial process at the all-important sentencing phase and nullified the mitigating evidence that offered petitioner’s best chance of avoiding a death penalty.

Respondent relies almost entirely on the boilerplate assertion that counsel made a “strategic” decision to introduce the violence-genetics evidence. But calling a decision “strategic” does not immunize it from scrutiny. In particular, concessions of significant aspects of the prosecution’s case strike at the heart of the adversarial process, and this Court accordingly has upheld them only to the extent they offer commensurate strategic benefits to the defendant. *Florida v. Nixon*, 543 U.S. 175 (2004). The Court has also made clear that strategic decisions are reasonable only to the extent that counsel makes them after consideration of relevant circumstances. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Those clearly established principles make clear that counsel’s introduction of the violence-genetics evidence fell well outside the range of reasonable decisions.

The evidence had no upside for petitioner—it portrayed him as an inborn predator and established the future-dangerousness predicate for death. Respondent quibbles about whether the evidence amounted to a concession, but for confirmation one need look no further than the prosecution itself, which repeatedly and vigorously argued to the jury—without contradiction from the court—that it could find future dangerousness based on petitioner’s evidence alone. Making

matters worse, the violence-genetics theory required counsel to undermine their only other mitigation theory—that petitioner had a traumatizing childhood. Respondent barely disputes that point, noting weakly that perhaps the jury did not heed Dr. Bernet’s minimization of the evidence—but that is highly implausible, as this Court has recognized, given the weight juries give to defense-expert testimony. *Buck v. Davis*, 580 U.S. 100, 121 (2017). And the counsel affidavits on which respondent heavily relies show that counsel *did not even consider* that the evidence would torpedo the remainder of the mitigation case—a critical consideration in evaluating the wisdom of simultaneously conceding future dangerousness. No competent lawyer would make such a self-defeating “strategic” decision—and the resulting prejudice is obvious.

Counsel’s stark deviation from the adversarial process cannot be reconciled with this Court’s precedents. This Court’s review is warranted to ensure that those precedents continue to have meaning in the Fifth Circuit.

## ARGUMENT

### **I. The Fifth Circuit’s Denial of a Certificate of Appealability Conflicts with This Court’s Decisions.**

#### **A. Counsel’s concession of future dangerousness constitutes deficient performance.**

Respondent never meaningfully engages with the fundamental error at the heart of petitioner’s case: in petitioner’s capital sentencing proceeding, counsel presented evidence that simultaneously conceded the predicate for death—future dangerousness—and severely undermined any chance of convincing the jury

that death was nonetheless not appropriate. Defense counsel thus relieved the prosecution of its burden of establishing future dangerousness and made a death sentence far more likely—effectively functioning as an adjunct of the prosecution. The prosecution, for its part, took full advantage, telling the jury that the defense’s own presentation buttressed the case for death. Only by disregarding this Court’s longstanding precedent could the Fifth Circuit bless counsel’s complete failure to safeguard the adversarial process at petitioner’s capital sentencing.

1. Respondent’s first tack is to attempt to sidestep the issue entirely, insisting that counsel did not concede future dangerousness. That argument is refuted by the record. During the penalty phase, the prosecution repeatedly argued to the jury that future dangerousness was “easy” because the defense “*conceded it through all their experts.*” ROA.13793 (emphasis added). The prosecution returned to this point over and over again, reminding the jury that defense’s own expert, Dr. Bernet, had “agreed” that petitioner was dangerous and was “never going to not be dangerous.” ROA.13751, ROA.13791. As the prosecution put it: “This is the question: Have we proven to you there’s a probability that the Defendant would commit criminal acts of violence that constitute a continuing threat to society? \* \* \* *Their own expert [Bernet] tells you he is going to be dangerous* \* \* \* *The increased probability that he would act in a violent or maladaptive manner. That is their expert.*” ROA.13790-13791 (emphases added).

Respondent also offers the hair-splitting argument that Dr. Bernet did not testify that the MAOA genetic variant made it “more likely than not” that petitioner would be violent in the future. Opp.22. But that was

not the standard the jury was asked to apply. Instead, the jury was instructed that it only had to find a probability—that is, “more than a possibility,” ROA.7989—that petitioner might be violent in the future. And the prosecution urged the jury that it could lawfully make that finding based on nothing more than defense counsel’s concession of future dangerousness.

2. Respondent next argues that even if defense counsel conceded future dangerousness, that concession was the sort of mine-run “strategic” decision that courts cannot second-guess. Opp.21, 23-26. But that boilerplate defense is unavailing here.

For one thing, a concession—particularly of the predicate for a death sentence—is no ordinary trial decision. Because such concessions are in tension with counsel’s core Sixth Amendment function of “mak[ing] the adversarial testing process work in the particular case” by zealously advocating for the defendant, *Strickland*, 466 U.S. at 690, this Court has carefully scrutinized defense-counsel concessions. See *Nixon*, *supra*; cf. *McCoy v. Louisiana*, 584 U.S. 414, 422 (2018). In *Nixon*, the Court held that conceding the defendant’s *guilt* in a capital case was not ineffective because counsel reasonably anticipated that the concession would benefit the defendant at the critical sentencing phase—but the Court recognized that “such a concession” “might present a closer question” in a trial where prosecutors have not sought the death penalty. 543 U.S. at 190-191. That is because such a concession would relieve the prosecution’s burden on the only question before the jury (guilt), with uncertain benefits. *Id.* at 189-191. That concern is even more acute here, where counsel conceded future dangerousness *at the sentencing stage*. At minimum, to fall within the range of reasonable strategic decisions, such a

concession must—as in *Nixon* itself—reflect a reasonable anticipation of a commensurate strategic benefit to the defendant. There were *no* such benefits here.

Although respondent describes petitioner’s reliance on *Nixon* as “misguided,” Opp.24, he does not offer any contrary understanding of counsel’s Sixth Amendment duty in the context of concessions. Respondent simply repeats that counsel’s decision to introduce the violence-genetics evidence was a “strategic” one. But that characterization cannot save counsel’s performance, for two reasons.

First, as any competent counsel would have understood, the evidence established an element of the prosecution’s case for the death penalty while *simultaneously* undermining petitioner’s mitigation case based on his traumatic childhood. Respondent argues at length that counsel presented evidence of petitioner’s difficult upbringing. But defense counsel undercut that very evidence by presenting Dr. Bernet’s testimony—necessary to support the violence-genetics theory—that petitioner had suffered only *moderate*, but not severe, childhood maltreatment. ROA.13045. Indeed, Dr. Bernet asserted that petitioner had not experienced maltreatment *at all* under one prominent study’s definition. ROA.13084, ROA.13103. Respondent’s only rejoinder, buried in a footnote, is the ipse dixit that there is “no reason to conclude the jury disregarded the extensive expert and lay witness testimony regarding Wells’s background.” Opp.26 n.7. But the *defense’s own expert* told the jury that that evidence did not amount to much. This Court has repeatedly recognized that jurors “value[]” defense-expert testimony. *Buck*, 580 U.S. at 121 (citing *Satterwhite v. Texas*, 486 U.S. 249, 259 (1988)). And in all events, respondent does not dispute the larger point: Dr.

Bernet undermined the mitigation case in service of the argument that petitioner was genetically predisposed to violence.

Second, respondent attempts but fails to rehabilitate counsel's introduction of the violence-genetics evidence on the ground that counsel reasonably believed it suggested petitioner's offense was not his fault. That choice could not have fallen within the "range of professionally reasonable judgments," *Strickland*, 466 U.S. at 699, because any mitigating upside was starkly outweighed by the fact that the evidence would concede future dangerousness and undermine petitioner's primary mitigation argument that he had a traumatic childhood. No hindsight is necessary to understand those fatal flaws in the violence-genetics "strategy": the prosecution immediately capitalized on the concession, and defense counsel themselves elicited the testimony that the defense's violence-genetics theory held true only for children who had *not* experienced "severe[]" abuse. ROA.13045. Yet counsel *did not even consider* the effect on the mitigation case before deciding that the violence-genetics theory "might be helpful." Sealed ECF No. 78-13 at 2696-2697, 2829-2830. An unconsidered decision is not strategic—and in all events, it is reasonable only to the extent that counsel reasonably evaluates upsides and downsides. *Strickland*, 466 U.S. at 690-691. The record demonstrates counsel did not do that here.

3. Counsel's decision to introduce the violence-genetics evidence was also deficient because it invited the jury to sentence petitioner to death based on an immutable characteristic with no relationship to any permissible sentencing consideration. As discussed in the petition, there was no scientifically reliable connection between petitioner's MAOA gene and any

predisposition to violence, making the violence-genetic evidences irrelevant. Pet.24-25. In *Buck*, the Court held that punishing a defendant on the basis of an “immutable characteristic” that is irrelevant to the sentencing process “flatly contravenes th[e] guiding principle” that “[o]ur law punishes people for what they do, not who they are.” 580 U.S. at 123. Yet by introducing the violence-genetics evidence during the penalty phase, defense counsel invited the jury to do exactly that.

Respondent contends that *Buck* is irrelevant because the case dealt with race, rather than other immutable characteristics. That is manifestly incorrect. *Buck* itself stated that race is “among [the] factors” that are “constitutionally impermissible or totally irrelevant to the sentencing process.” 580 U.S. at 119 (emphasis added) (second quotation from *Zant v. Stephens*, 462 U.S. 862, 885 (1983)). And *Zant* referred to characteristics other than race (such as vacated convictions) as “totally irrelevant” and therefore invalid. *Buck* and *Zant* thus establish that a jury may not be permitted to sentence the defendant to death based on an immutable characteristic bearing no connection to a permissible sentencing consideration.

Nor is it the case, as respondent asserts, that the violence-genetics evidence was in fact reliable. Opp.29. As *amici* explained, there has long been a “scientific consensus discrediting the \* \* \* MAOA studies on which Dr. Bernet relied.” Brief of Professors Nita A. Farahany, Steven E. Hyman, Joshua A. Gordon, Gene E. Robinson, and 25 Other Scientists and Scholars at 2. And in *State v. Yopez*, 483 P.3d 576 (N.M. 2021), which the respondent cites, the court *excluded* evidence connecting the MAOA gene to “impulsive violent behavior” as “lacking in scientific reliability.” *Id.*

at 585.<sup>1</sup> That is precisely the testimony that defense counsel improperly introduced here. ROA.13017, ROA.13044. It is no answer to say, as respondent does, that counsel was “entitled to rely” on Bernet’s assertion that the theory was reliable. Opp.29. As in *Buck*, this was not unambiguously mitigating evidence whose questionable reliability did not risk harming the defendant’s case; rather, it was evidence with obvious aggravating import whose unreliability could lead to an invalid death sentence. Moreover, counsel was aware at the outset that the studies underlying the violence-genetics theory were “fraught with problems,” ROA.12836.

Worse still, the evidence carried an obvious racial connotation. Pet.25. Respondent’s protest that no party expressly mentioned race is no answer: petitioner’s own counsel called him a “gangster” and a “black kid[] with [a] gun[]” while arguing that he was genetically predisposed to violence. *Ibid.* The implicit message was unmistakable. No competent attorney would have purported to defend his client in that manner.

**B. Presentation of the discredited violence-genetics theory prejudiced petitioner.**

Counsel’s presentation of the violence-genetics testimony was undoubtedly prejudicial. That expert testimony established one of the prerequisites to a death sentence—future dangerousness—and substantially

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<sup>1</sup> Respondent’s only other purported support is the factual background section of *People v. Adams*, 336 P.3d 1223 (Cal. 2014), which did not address the reliability of the violence-genetics theory. In *Adams*, the expert testified only that the MAOA gene was powerfully associated with antisocial behavior, and the reliability of that testimony was not addressed on appeal. *Id.* at 1241.

undermined the defense’s presentation on the other—mitigation. Without that testimony, petitioner would not have been portrayed as incurably violent, and the defense could have emphasized the severity of his adverse childhood experiences. That gives rise to “a reasonable probability that \* \* \* at least one juror would have harbored a reasonable doubt about whether” petitioner should receive the death penalty. *Buck*, 580 U.S. at 119-120.

Respondent’s scattered responses cannot be reconciled with *Buck*.<sup>2</sup> For instance, respondent contends that petitioner “fails to show that he would not have been sentenced to death but for Dr. Bernet’s testimony.” Opp.31. But that is not the “reasonable probability” prejudice standard articulated in *Buck*—or *Strickland*. *Buck*, 580 U.S. at 119-120. Respondent next emphasizes the “gruesome evidence of the murders.” Opp.31. *Buck* answers that as well. There, the State similarly argued that the petitioner could not show prejudice because he had committed a grave offense, shooting and killing multiple people (including his ex-girlfriend and her friend) in the course of a domestic-violence offense. 580 U.S. at 120. This Court acknowledged the gravity of the offense, yet nonetheless found that the outcome might have been different without the expert testimony. *Ibid*. So too here.

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<sup>2</sup> Respondent separately “[s]tate[s] again” that “Dr. Bernet testified that [petitioner’s] low-activity MAOA gene did *not* make him more likely than not to be violent,” which purportedly precludes any prejudice determination. Opp.31. But that characterization does not become more persuasive through repetition. See pp. 3-4, *supra*. In *Buck*, for instance, the expert asserted only that the defendant’s race was correlated to a greater likelihood of future dangerousness—not that it made him more likely than not to be dangerous. 580 U.S. at 107-108.

Respondent also claims that *Buck*'s prejudice analysis turned entirely on the "particularly noxious" character of race-based testimony. Opp.31. But *Buck* emphasized that (1) testimony that Buck would be dangerous because of an *immutable* characteristic outweighed prison's moderating effect on his behavior, and (2) the fact that the evidence was purportedly scientific and offered *by the defense* gave it undue weight to the jury. 580 U.S. at 119-122. Those exact same concerns are present here. And although *Buck* also emphasized that the expert's testimony evoked racial stereotypes of "black men as 'violence prone,'" *id.* at 121, that same issue is implicated here, even if the purported racial link was not made explicit.<sup>3</sup>

All told, the defense's presentation of the violence-genetics testimony was unusually prejudicial, simultaneously establishing future dangerousness and undermining the mitigation case. The Fifth Circuit's contrary conclusion contravened *Buck*, and is at minimum reasonably debatable.

## **II. The Question Presented Warrants This Court's Review.**

Respondent's brief confirms the urgent need for this Court's review. Simply put, the question presented raises a critically important issue of federal law, and the Fifth Circuit's resolution of that question conflicts with this Court's decisions.

1. Respondent's contention that the question presented does not warrant review rests on respondent's

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<sup>3</sup> Respondent also invokes petitioner's supposed "violence while in jail," Opp.31, which presumably refers to one isolated incident in prison. In all events, the defense presented testimony that petitioner was otherwise a well-behaved inmate while incarcerated. ROA.12287-12290.

mischaracterization of counsel's decision as a mine-run strategic choice. In fact, the question presented is manifestly important for several reasons. First, this Court has regularly granted certiorari to address whether, and if so under what circumstances, the Sixth Amendment permits defense counsel in a capital case to make certain concessions at trial in an effort to avoid the death penalty. See, *e.g.*, *McCoy*, 584 U.S. at 420; *Buck*, 580 U.S. at 104; *Nixon*, 543 U.S. at 186. This case presents a similar and similarly "important question of constitutional law." *Nixon*, 543 U.S. at 186. Second, respondent cannot dispute that resolution of the question presented would provide much-needed guidance to prosecutors and defense counsel, and more generally facilitate the fair and efficient operation of capital trials. Finally, the question presented is of overriding importance to petitioner, who faces the death penalty after his own counsel argued that he was incurably predisposed to violence.

2. Respondent also leans on the lack of a circuit split, but that is no obstacle to this Court's review. This Court often grants certiorari on questions as to which no conflict exists, particularly in capital cases raising important constitutional questions. See, *e.g.*, *Flowers v. Mississippi*, 588 U.S. 284 (2019).

This is one such case. The Fifth Circuit disregarded this Court's Sixth Amendment precedents and approved counsel's unconsidered, deficient concession of petitioner's future dangerousness. Unless this Court intervenes, courts in the Fifth Circuit will be required to reject ineffective-assistance claims founded on counsel's concession of a prerequisite to death. This Court should not countenance that erosion of the adversarial process that counsel has a Sixth Amendment duty to protect.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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