

1 is JA154A and 165A. And the prosecutor is walking
2 through all of the various factors that Quijano had
3 considered in his testimony, but it did not go beyond
4 what was elicited on direct.

5 And to highlight an example in contrast, the
6 Alba case, in which we did confess error, there, the
7 prosecutor mentioned race four times, and at closing
8 said, quote, "And I went down all the indicators. They
9 didn't want to talk about those indicators, but I did,
10 and I forced the issue. He's male, he's Hispanic," etc.
11 That's at Volume 28 of the trial --

12 JUSTICE GINSBURG: Doesn't -- doesn't the
13 fact that Petitioner's own counsel introduced this show
14 how abysmal his representation was? I don't know why it
15 should make a difference that the Petitioner's counsel
16 introduced this evidence. This evidence, everyone
17 agrees, should not have -- not have come in. And -- and
18 what -- what counsel would put that kind of evidence
19 before a jury? What competent counsel would put that
20 evidence before a jury.

21 MR. KELLER: And we are not defending
22 defense counsel's actions. But the nature of that claim
23 is a Sixth Amendment ineffective assistance claim that
24 the court also reviews for prejudice. In the context of
25 a prosecutor offering the testimony and using it as an

1 aggravator, that would be an equal protection and due
2 process violation. And the nature of the evidence
3 coming in, in that instance would be significantly
4 highly prejudicial when the State is putting its in
5 primata behind it and using it as an aggravator.

6 JUSTICE SOTOMAYOR: Why does it matter who
7 uses race? I mean, in Batson challenges we don't care
8 if the person exercising a racial challenge is the
9 prosecutor or the defense attorney. We say neither
10 should use race in a negative way against a defendant.
11 So why is it different here? Why is it okay or not okay
12 for the prosecutor to introduce the greater likelihood
13 of a person being dangerous on the basis of race alone?
14 Not okay for the prosecutor, but it's less bad for the
15 defense attorney to do it?

16 MR. KELLER: Yeah. To be clear, it's not
17 okay. The issue, though, goes to the level of
18 prejudice. And when defense counsel --

19 JUSTICE SOTOMAYOR: Well, the level of
20 prejudice is the reasonable possibility that if one
21 juror, because Texas uses one juror does not agree with
22 death, death is not imposed, correct?

23 MR. KELLER: Correct.

24 JUSTICE SOTOMAYOR: So if one -- is it a
25 reasonable possibility that one juror, even the one who

1 sent the note that says is it possible to do parole,
2 life without parole, could have been convinced to
3 exercise mercy if race wasn't used, can you answer that
4 question "absolutely not"? When, in at least one of the
5 Saldano cases, a man poured gasoline on a woman and
6 watched her die, we had a nation that was mortified,
7 shocked, and completely traumatized by watching a pilot
8 burn to death. So why is that crime any less heinous
9 than this one?

10 MR. KELLER: Here, Petitioner executed a
11 mother when she was on her knees in front of her
12 children with her daughter jumping on her --

13 JUSTICE SOTOMAYOR: I don't say it's not,
14 but why is that heinousness so much greater that no jury
15 could have exercised mercy? No juror.

16 MR. KELLER: The standard -- the standard in
17 the Strickland second-prong prejudice analysis is
18 whether there is a substantial likelihood of a different
19 outcome. As Juan vs. Valmontez noted, the State doesn't
20 have to rule out --

21 JUSTICE SOTOMAYOR: "Reasonable probability"
22 is the actual language, not "substantial."

23 MR. KELLER: And Harrington v. Richter said,
24 "The likelihood of a different result must be
25 substantial, not just conceivable." It's 562 U.S. at

1 111.

2 If I can address the jury deliberation point
3 for a moment: The Petitioner is correct the jury
4 deliberated over the course of two days, but this is
5 only for three hours and 13 minutes. This is at Record
6 1918 to 1919. On the first day, the jury asked for the
7 police reports and the psychology reports. On the
8 second day, the jury asked to see the crime scene video.
9 This was JA210A, Record 5956 and Record 6333.

10 So insofar as the Court were to look at the
11 circumstances of the jury's deliberations -- and I'm not
12 sure that that is necessary for the Court to do, but the
13 inference to be drawn is in this final 95 minutes before
14 the jury returned a verdict to future dangerousness. It
15 was looking at the crime scene video.

16 CHIEF JUSTICE ROBERTS: I'm not sure how the
17 quickness of the determination helps you at all, when
18 one response would be, well, they had this evidence that
19 he was, by virtue of his race, likely to be dangerous,
20 so they didn't spend that much time on it.

21 MR. KELLER: And the -- and the argument
22 here is that under these circumstances when they were
23 focused on the crime scene video, that would have been
24 what the jury --

25 JUSTICE BREYER: We're not in the jury room.

1 We do know that the prosecutor asked the expert witness,
2 is it correct that the race factor, black, increases the
3 future dangerousness for various complicated reasons.
4 And he says, yes.

5 So that seems -- I mean, you can't prove it,
6 that that was the key factor, but it seems like it could
7 have been a substantial factor. And Texas, in six
8 cases, says this is totally wrong. And now in this
9 seventh case, you're taking the opposite position. And
10 I have to admit, like what the Chief Justice seemed, I
11 don't understand the reason. It seems to me it proves
12 the arbitrariness of what's going on.

13 But regardless, the issue here is, is there
14 some good reason why this person shouldn't have been
15 able to reopen his case? I mean, that's the question.
16 What's the reason?

17 I mean, after all, we later decided these
18 other cases, Martinez. His circumstances seem to fit
19 Martinez pretty much like a glove. The State certainly
20 doesn't have a strong interest any more than in the
21 other cases, or at least not obvious to me, some kind of
22 reliance. So he has a case where Martinez seems to
23 apply. He couldn't -- he was diligent -- diligent, not
24 much -- not too much reliance on the other side, and
25 seems to meet Martinez's criteria for hearing the issue.

1 Why doesn't that make it extraordinary
2 enough to reopen under Rule 60(b)? That seems to me the
3 question in the case.

4 MR. KELLER: For two reasons, and both are
5 controlled by Gonzalez v. Crosby. The first is that the
6 only changed circumstance in this case since 2006 is the
7 Martinez and Trevino change in the law. And the second
8 is there was a lack of diligence in pursuing this claim.
9 An ineffective assistance claim is raised on Federal
10 habeas in the district court. The COA is not asked for
11 on that claim. And the ineffective assistance claim
12 also is not even raised in the first 60(b) motion.

13 JUSTICE BREYER: And all this took place
14 after this Court decided Martinez and Trevino?

15 MR. KELLER: In the context of the second
16 60(b) motion.

17 JUSTICE BREYER: Yeah, I mean, you listed a
18 whole bunch of things in which he could have done. Did
19 those take place or not after we decided our case? If
20 some of them did, which?

21 MR. KELLER: The Federal habeas petition
22 asking for a COA and the first 60 (b) motion were before
23 Martinez. But in Gonzalez v. Crosby, the Court noted
24 that there the Petitioner was not pursuing the claim
25 with diligence even before the change in the law. And

1 the court said --

2 JUSTICE KAGAN: He did exactly what you
3 would have expected him to do. Given that Coleman was
4 still on the books, you would have said it would be --
5 had been improper for him to ask for the relief that you
6 are now suggesting that he should have asked for. At
7 least it would have been futile with Coleman still on
8 the books.

9 MR. KELLER: Yeah. Although the same would
10 have been said under existing precedent in Gonzalez v.
11 Crosby, there that the statute of limitations would have
12 run. And so the essence --

13 JUSTICE KAGAN: Isn't this substantially
14 different than Gonzalez? Wasn't it important in
15 Gonzalez that the nature -- what the nature of the error
16 was? In Gonzalez what the court said, the error is
17 commonplace to -- lawyers misjudge time limits all the
18 time. The one thing we know about this error is that
19 it's not commonplace. Even the two people who called
20 the Quijano as defense witnesses never themselves raised
21 race as a cause -- as a reason for future dangerousness.
22 Only this attorney who's been disciplined repeatedly for
23 his malfeasance in representing clients, who one
24 newspaper said if you want to ensure a death penalty,
25 hire this lawyer. In that situation, isn't this that

1 rare case that Gonzalez talked about?

2 MR. KELLER: This is certainly an unusual
3 case. And the standard for extraordinary circumstances
4 in this posture, though, is not simply would an
5 appellate judge in the first instance conclude that, but
6 did the district court abuse its discretion in declining
7 to find extraordinary circumstances when Gonzalez v.
8 Crosby is on the books.

9 JUSTICE BREYER: Gonzalez v. Crosby, to my
10 understanding, involved a change in the AEDPA statute of
11 limitations; is that right?

12 MR. KELLER: Correct.

13 JUSTICE BREYER: As soon as I say those
14 words, I'm confused.

15 (Laughter.)

16 JUSTICE BREYER: I mean, there are all kinds
17 of statutes of limitations, and this is one of them that
18 the court said he didn't -- he didn't pursue the change
19 diligently, and besides, it wasn't that big a deal, and
20 not every interpretation of Federal statute setting
21 habeas requirements provides cause for reopening cases
22 long since filed, and the change was not extraordinary,
23 and it was because in part of Petitioner's lack of
24 diligence in pursuing it. There's a whole list of
25 reasons there. As I read those reasons, I don't think

1 one of them applies here. So which one applies here.

2 MR. KELLER: Well, insofar as the
3 extraordinary circumstances analysis under 60(b) has
4 been performed, I believe the Fifth Circuit was correct
5 in that it has to be an extraordinary circumstance
6 justifying relief from the judgment. And when the facts
7 of this case obviously have existed for over 20 years,
8 there's been nothing new about raising that claim in a
9 second rule 60(b) motion to reopen the judgment. And so
10 in that sense, this is even further than Gonzalez v.
11 Crosby where that was just a 60(b) motion. This is the
12 second 60(b) motion.

13 CHIEF JUSTICE ROBERTS: I understand your
14 arguments on the merits, but do they apply equally to
15 the Certificate of Appealability? I mean, you argue
16 that you should prevail on the merits. But the question
17 on a Certificate of Appealability is whether there's
18 been a substantial showing of denial of a constitutional
19 right.

20 Assuming you haven't already seen the
21 analysis on the merits and you're looking at this
22 question for the first time before going through this
23 analysis, wouldn't it seem pretty straightforward to
24 say, okay, maybe he's right, maybe he's wrong, but at
25 least he's made a substantial showing. Let's give him a

1 Certificate of Appealability, and then we'll go through
2 the normal procedures on the merits?

3 MR. KELLER: It's clearly a harder standard
4 for us under the Certificate of Appealability standard,
5 but even then you'd be asking would reasonable jurists
6 debate whether the district court abused its discretion
7 in declining to find extraordinary circumstances.

8 CHIEF JUSTICE ROBERTS: Well, that gets
9 tougher and tougher. I mean, you're talking about
10 reasonable jurists debate. Okay. That's -- that's a
11 very low threshold. But when you say reasonable jurists
12 debate, whether there's been an abuse of discretion, I
13 mean, abuse of discretion gives a broad range to the
14 district court. And now you're asking, well, is there a
15 reasonable person out there who could debate that you
16 ought to have deferred to that exercise of discretion?
17 It seems to me, yes, it's a different standard, but it's
18 quite a different standard.

19 And the broader question here is whether the
20 Fifth Circuit applies the wrong standard on a
21 Certificate of Appealability, and it seems to me that if
22 you're going to say, particularly when you are reviewing
23 an abuse of discretion standard, that you're going to be
24 able to look at and say, no, no, there's nothing
25 substantial here.

1 MR. KELLER: And I think this would be a
2 difficult case to infer anything widespread from the
3 Fifth Circuit's practice. Just to put some context into
4 the substantial practice that was allowed here, the
5 Petitioner filed a 70-page opening brief. The State
6 filed a 37-page response brief, and Petitioner filed and
7 moved to file a 35-page reply brief. And so this was
8 also the third time that the Fifth Circuit had seen this
9 case.

10 CHIEF JUSTICE ROBERTS: You know, I guess my
11 question kind of cuts the other way. I'm saying they
12 don't -- yes, and you make the point, there was a
13 substantial amount of process. There was a long
14 consideration. There was a lot of briefing. I would
15 have thought the purpose of a Certificate of
16 Appealability would be to make the decision to move
17 forward without all that elaborate process?

18 MR. KELLER: Well, and the Fifth Circuit on
19 occasion hears oral argument in considering whether to
20 grant a COA in the capital posture insofar as the court
21 would provide or believe that that is not the type of
22 process that should be afforded at the COA stage, in
23 accordance with AEDPA --

24 JUSTICE SOTOMAYOR: Oral argument -- oral
25 argument on whether to grant the COA?

1 MR. KELLER: Yes. The Fifth Circuit on
2 occasion -- this is page 50 and 51 of our Respondent's
3 brief -- will hear oral argument --

4 JUSTICE KAGAN: Mr. Keller, you know, some
5 of the statistics that Petitioner have pointed us to --
6 in capital cases, a COA is denied in 60 percent of Fifth
7 Circuit cases as compared to 6 percent of Eleventh
8 Circuit cases, two roughly similar circuits where COA's
9 are denied in capital cases ten times more in the Fifth
10 Circuit. I mean, it does suggest one of these two
11 circuits is doing something wrong.

12 MR. KELLER: And the court has said that the
13 COA should serve a gatekeeping function. The court also
14 noted that death is different. And at the same time,
15 the Fifth Circuit is provided substantial process. Now,
16 insofar, though, as this Court were to -- if it were
17 going to conclude in this case that a COA should have
18 issued, it -- any such decision, I think, would be
19 limited to the unique facts of this case. And I don't
20 think there's anything that could be drawn by the Fifth
21 Circuit's wider practice in denying or granting COAs,
22 particularly in the capital posture when substantial
23 process is being afforded. This is not a situation
24 where the Fifth Circuit is simply ignoring these cases
25 and ignoring these claims. Quite the opposite.

1 CHIEF JUSTICE ROBERTS: So is your
2 suggestion that they deny more because they've taken up
3 more search and look at the merits than the other
4 circuits?

5 MR. KELLER: I think it -- insofar as the
6 statistics could be shown that there is, in fact, a
7 different denial and grant rate, I think the level of
8 process that the Fifth Circuit is receiving and -- and
9 the quantum of argument may be going to those
10 statistics, because the Fifth Circuit is not simply
11 ignoring these claims. And even here --

12 JUSTICE KAGAN: But this is the whole point,
13 really. They are not supposed to be doing what you do
14 when you decide an appeal. And they -- and they
15 actually don't have jurisdiction to decide the appeal.
16 I mean, they are supposed to be performing a gatekeeping
17 function, not deciding the merits of the case.

18 MR. KELLER: And I don't think what the
19 Fifth Circuit did here is decide the merits. It
20 correctly articulated the COA standard, and it examined
21 the 11 facts that Petitioner alleged as a basis for
22 ruling on the 60(b) motion. Now, five of those were
23 essentially the underlying and effective assistance
24 claim, and if the Fifth Circuit had --

25 JUSTICE SOTOMAYOR: It doesn't say anything

1 to the Fifth Circuit that three State court judges, two
2 of their colleagues on the Fifth Circuit, two justices
3 of this Court, have said or found Mr. Buck's case
4 debatable, because that's the standard. It's debatable.
5 They don't pause and say, you know, people have some
6 basis for an argument here? This is not frivolous.
7 This is a serious question.

8 MR. KELLER: And the Fifth Circuit took
9 these arguments seriously. And this is our response --

10 JUSTICE SOTOMAYOR: That's not the issue.
11 They are supposed to decide whether to grant COA or not
12 on whether the questions are serious or not, debatable,
13 not decide the merits. I know it can appear a fine line
14 in some situations, but how do you justify saying that
15 this is not debatable?

16 MR. KELLER: Here the issue would be could
17 reasonable jurists debate whether the district court
18 abused its discretion in finding extraordinary
19 circumstances?

20 And so while the reasonable jurist standard
21 is lower, that's balanced, though, against the more
22 deferential abuse of discretion standard and the
23 heightened extraordinary circumstances standard that
24 this Court has noted will rarely be met in the habeas
25 context.

1 In our brief we present a few examples of
2 courts finding extraordinary circumstances. That would
3 be when counsel wholly abandons a Petitioner, or a
4 prison guard actively thwarts a Petitioner filing a
5 habeas petition.

6 Now, we don't mean to suggest those are the
7 only instances in which that can give rise to --

8 JUSTICE GINSBURG: There -- there were
9 extraordinary circumstances in the other cases? In the
10 other five cases?

11 MR. KELLER: In the other five cases in
12 which the State confessed error?

13 JUSTICE GINSBURG: Yes.

14 MR. KELLER: Well, there we admit that since
15 the prosecution was the one that was eliciting the
16 race-based testimony, that that would go to a -- a due
17 process and equal protection violation, and that would
18 be an extraordinary circumstance --

19 JUSTICE KAGAN: But if you said that that's
20 because those -- that's -- it's more prejudicial when
21 the prosecution introduces this? Is that what you said
22 --

23 MR. KELLER: Yes.

24 JUSTICE KAGAN: -- to Justice Ginsburg?
25 That -- that's your basic theory?

1 MR. KELLER: The State was using it as an
2 aggravator.

3 JUSTICE KAGAN: Yeah. But -- and -- and
4 that makes it more prejudicial. That's your basic
5 theory?

6 MR. KELLER: Both points. The State --

7 JUSTICE KAGAN: Because I don't -- I guess
8 if there's both points, tell me what the other point is
9 because I guess I just don't understand that point. But
10 it seems more prejudicial when the defense attorney uses
11 it.

12 I mean, prosecution, you have a jury sitting
13 there, and it realizes that the prosecutor has an
14 interest in convicting a person and in getting a -- a
15 sentence that the prosecution wants, so everything is
16 discounted a little bit. But when your own -- when the
17 defendant's own lawyer introduces this, the jury is
18 going to say, well, it must be true. Even the
19 defendant's lawyer thinks that this is true. So, you
20 know, who a.m. I to -- to argue with that? It seems
21 wildly more prejudicial to me when the defense attorney
22 introduces it.

23 MR. KELLER: Except it's not the case here
24 that Quijano was only testifying about race. Quijano
25 said that it would be unlikely the Petitioner would be a

1 future danger. And so Quijano's ultimate conclusion, in
2 multiple other aspects of his testimony, was favorable
3 to Petitioner, as Petitioner conceded. And so in that
4 circumstance, the prejudice would not be nearly as great
5 as when the State is injecting race into a proceeding.

6 JUSTICE ALITO: I didn't think that your
7 primary argument had to do with the -- the relative
8 prejudice of having it done by the prosecutor and the
9 defense attorney. I thought your argument was that the
10 State of Texas feels a certain -- feels a special
11 responsibility when one of its employees engages in this
12 misconduct. And when the -- when the evidence is
13 introduced by the defendant's attorney, it's an
14 ineffective assistance-of-counsel question, and it has
15 to be adjudicated under the Strickland test.

16 MR. KELLER: That's absolutely correct. And
17 then when you look at the aggravating evidence of
18 executing a mother in front of her children and laughing
19 about it, and saying that the mother, quote, "got what
20 she deserved," unquote, and when we put in evidence from
21 ex-girlfriend -- this is a JA127A -- of repeatedly
22 beating her and threatening her with a gun, all of those
23 go to whether there would in fact be prejudice under the
24 Sixth Amendment, ineffective --

25 JUSTICE KAGAN: Yes. And the legal question

1 here, right, is whether this ineffective assistance of
2 counsel claim, which has never been heard by any court,
3 is a strong one. And a strong one including that the
4 ineffective assistance here is likely to be prejudicial,
5 which it seems as though it's -- it's far more likely to
6 be prejudicial when the defense counsel does it.

7 MR. KELLER: Justice Kagan, when the State
8 is the one injecting race into a proceeding, that's
9 using it as an aggravator. And if the Court will --

10 JUSTICE KAGAN: People expect the State to
11 use whatever aggravators it has at hand. Now, people
12 don't expect the State to do something as improper as
13 this, but the people who understand that not everything
14 that the prosecution says about a defendant, you know,
15 that people -- the jurors should -- should think about
16 those claims seriously because the prosecution has
17 interests of its own. But the defense counsel's
18 interests are supposed to be with the defendant.

19 I'm just repeating myself. If the defense
20 counsel does it, I mean, you know, who is the jury to
21 complain?

22 MR. KELLER: Well, this Court, I don't
23 believe, has ever recognized a situation in which a
24 defense counsel's act could give rise to structural
25 error or per se prejudice. And any such rule, I

1 believe, would invite gamesmanship. Of course the
2 prejudice analysis can still be done, but to say whether
3 it would be per se prejudicial, I think it would have to
4 be balanced against the aggravating evidence. And in
5 the context of Quijano testifying helpfully to
6 Petitioner, that there would be an unlikely event of it
7 being a future danger.

8 CHIEF JUSTICE ROBERTS: What is the
9 relationship between the ruling on prejudice with
10 respect to ineffective assistance and the 60(b)
11 analysis? I mean, do you agree that if we disagree with
12 your submission on prejudice under Strickland, that your
13 60(b) analysis kind of falls apart?

14 MR. KELLER: I --

15 CHIEF JUSTICE ROBERTS: Clearly the
16 underlying claim on the merits would be stronger, and --
17 and it would be a lot more extraordinary under 60(b).

18 MR. KELLER: It is a factor that could be
19 considered in doing the extraordinary circumstances
20 analysis, because if there were extraordinary
21 circumstances that were going to justify, really, from
22 the judgment, that would be a factor in the totality of
23 the circumstances the Court would be -- it could
24 consider in doing that analysis.

25 If you have no further questions, we'd ask

1 the Court to affirm the judgment of the Fifth Circuit.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Ms. Swarns, you have four minutes remaining.

4 REBUTTAL ARGUMENT OF CHRISTINA A. SWARNS

5 ON BEHALF OF THE PETITIONER

6 MS. SWARNS: This Court has long recognized
7 that the integrity of the courts requires unceasing
8 events to eradicate racial prejudice from our criminal
9 justice system. That commitment is as urgent today as
10 at any time in our nation's history.

11 Duane Buck's case requires meaningful
12 Federal review of his claim that his trial counsel
13 knowingly introduced an expert opinion that he was more
14 likely to commit criminal acts of violence in the
15 future, a Certificate of Appealability should certainly
16 issue.

17 With respect to -- to Texas's arguments, I
18 want to begin by making clear that, first of all, this
19 Court in Georgia v. McCollum did make clear, as I think
20 Justice Sotomayor noted, that the equal protection
21 concerns that are implicated by the introduction of race
22 into the criminal justice system absolutely are
23 triggered by defense counsel's conduct. And certainly
24 that was a situation where defense counsel exercised
25 preemptory challenges based on race.

1 And in that circumstance, that was actually
2 an exercise of peremptory challenges intended to benefit
3 the client, right? They were trying to strategically
4 gain advantage by using a race-based peremptory
5 challenges.

6 Here, we have trial counsel making an
7 inexplicable decision to introduce -- a knowing,
8 inexplicable decision to introduce race. This is
9 certainly worse and more aggravating for Mr. Buck.

10 I would also like to just be clear that the
11 prosecution's reliance on Dr. Quijano's testimony here
12 was real. This wasn't a circumstance where the
13 prosecutor was required to follow up on Dr. Quijano's
14 opinion and -- and reiterate it on cross-examination,
15 and then go further and argue in closing that the jury
16 should rely on Dr. Quijano to find Mr. Buck likely to
17 commit criminal acts of violence, and further argue that
18 the jury should disregard the aspects of Dr. Quijano's
19 opinion that conflicted with a finding of future
20 dangerousness.

21 When Texas did its -- its review of -- of
22 death row after it conceded error in Saldano, it looked
23 through all of the cases on death row to see what else
24 was contaminated by Dr. Quijano's racist criminal
25 violence opinion. And one of the other cases it looked

1 at and ruled out was the Anthony Graves case, which
2 demonstrates the options available to this prosecutor
3 under these circumstances.

4 In the Anthony Graves case, Dr. Quijano was
5 called as a defense witness, just like he was here. In
6 the Anthony Graves case, the defense elicited
7 Dr. Quijano's race as criminal violence opinion on
8 direct examination, just as here. But the difference is
9 in the Graves case, the prosecutor did not reiterate it
10 on direct examination, and -- and then in closing argued
11 that the jury should disregard Dr. Quijano's opinion.

12 The prosecutor here absolutely capitalized
13 on trial counsel's error. There is just no question
14 about that. They made a choice that, you know, they
15 could have gone the Graves route, but this prosecutor
16 chose to go through the door that was opened by trial
17 counsel and rely on Dr. Quijano's race as criminal
18 violence opinion.

19 Counsel for Texas also notes that the last
20 note that the jury sent out was a request to review the
21 crime scene video, which is absolutely true, but it
22 means that the last two notes that this jury looked
23 at -- the two -- two things that they asked for, right,
24 was the expert's report. So we now have the race, and
25 then we have the crime.

1 This is exactly the circumstance that this
2 Court addressed in Turner. Right? You have the facts
3 of the crime that trigger this racialized fear of
4 violence and raised the real risk of an arbitrary death
5 sentencing decision, and then you have the report which
6 compounds that risk because it gives a defense expert
7 scientific imprimatur to that pernicious group-based
8 stereotype. So that is further evidence of prejudice to
9 Mr. Buck.

10 Last, I would just be clear that when
11 Mr. Buck litigated his first 60(b) motion, Coleman,
12 as -- as Texas has acknowledged, stood as an unqualified
13 bar. There was no opportunity, before Martinez was
14 announced, for him to argue.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 The case is submitted.

18 (Whereupon, at 12:02 p.m., the case in the
19 above-entitled matter was submitted.)

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21

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