Sixth Amendment — Ineffective Assistance of Counsel — Race and Sentencing — Buck v. Davis

Issues of race often expose deep ideological divisions within the Roberts Court. Justice Ginsburg was biting in her proclamation that "[h]ubris is a fit word" for the Court's invalidation of section 4(b) of the Voting Rights Act.[1] Chief Justice Roberts's claim that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"[2] was met seven years later by Justice Sotomayor's pointed response that "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."[3] But the Court reached an unusual accord last Term in *Buck v. Davis*.[4] In holding that defense counsel was ineffective because they called a witness who directly tied the defendant's race to future dangerousness, the Court suggested that explicit racial categorization in sentencing "can be deadly in small doses."[5] The opinion reflects Chief Justice Roberts's colorblind jurisprudence and, since its holding is sharply limited to the case's unusual facts, despite its sweeping language, the decision all but guarantees that the Court will remain focused on only the overt use of racial classification.

Convinced that his former girlfriend, Debra Gardner, had begun a new relationship, Duane Buck arrived at her home on July 30, 1995, armed with a rifle and a shotgun.[6] Within minutes of arriving, he had shot both his stepsister and Gardner's friend.[7] Gardner's children looked on as Buck then shot their mother in the chest.[8] Neither Gardner nor her friend survived.[9]

A Texas trial court convicted Buck of capital murder.[10] In capital cases, Texas law requires that the jury unanimously find beyond a reasonable doubt "a probability that the defendant would commit [future] criminal acts of violence that would constitute a continuing threat to society."[11] Attempting to combat evidence of Buck's criminal history,

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1 Shelby Cty. v. Holder, 133 S. Ct. 2612, 2648 (2013) (Ginsburg, J., dissenting).

2 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion).

3 Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting).

4 137 S. Ct. 759 (2017).

5 *Id.* at 777.

6 *See* Buck v. Stephens, No. H-04-3965, 2014 WL 11310152, at *1 (S.D. Tex. Aug. 29, 2014).

7 *Buck*, 137 S. Ct. at 767.

8 *Id.*

9 *Id.*

10 *Id.* at 768.

11 TEX. CODE CRIM. PROC. ANN. Art. 37.071, § 2(b)(1) (West 2006). The jury was also charged with deciding, should it find Buck likely to be a future danger, whether mitigating circumstances

lack of remorse, and alleged domestic abuse,[12] Buck's court-appointed lawyers[13] called two psychologists to testify as experts.[14] Both concluded that Buck was unlikely to commit further violent acts,[15] but one, Dr. Walter Quijano, suggested that the fact Buck is black was relevant to the "future dangerousness" question.[16]

Quijano testified that his analysis was based on a seven-point statistical model, in which one factor was race.[17] Black defendants were rated as more likely to commit future violent acts.[18] Buck's defense asked specifically about these factors, and on cross-examination from the State, Quijano agreed that "the race factor, black, increases the future dangerousness for various complicated reasons."[19]

The trial court sentenced Buck to death,[20] kicking off a byzantine series of death penalty appeals.[21] An initial appeal was rejected.[22] Buck, with new counsel, then filed for postconviction relief in state court, but did not raise the issue of Quijano's testimony.[23] Only after the Texas Attorney General agreed to resentencing hearings in cases in which Quijano had provided similar expert testimony for the State[24] did Buck file a second habeas petition raising the issue.[25] Finding that this new petition was covered by the prior one, the state court dismissed it.[26]

Filing next in federal court, Buck asserted that the introduction of Quijano's testimony violated his right to effective counsel.[27] However,

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nevertheless warranted life imprisonment without parole rather than the death penalty. *See id.* § 2(e).

12 *Buck*, 137 S. Ct. at 768.

13 One of the lawyers earned a reputation as among the worst capital defense lawyers in the country. *See* Adam Liptak, *A Lawyer Known Best for Losing Capital Cases*, N.Y. TIMES (May 17, 2010), http://www.nytimes.com/2010/05/18/us/18bar.html [https://perma.cc/DU9R-GFPX].

14 *Buck*, 137 S. Ct. at 768.

15 *Id.* at 768–69.

16 *Id.* at 769.

17 *Id.* at 768. The report stated at factor four: "Black: Increased probability. There is an overrepresentation of Blacks among the violent offenders." *Id.*

18 *See id.* at 768–69.

19 *Id.* at 769; *see id.* at 768–69.

20 State v. Buck, No. 699684, 1997 WL 34659157 (205th Dist. Ct., Harris Cty., Tex. May 5, 1997).

21 *Buck*, 137 S. Ct. at 769–73. Further contributing to the complicated nature of the appeals process was that the defense, rather than the State, called Quijano as a witness.

22 *Id.* at 769.

23 *Id.*; *Ex parte* Buck, 418 S.W.3d 98, 101–02 (Tex. Crim. App. 2013) (per curiam) (Alcala, J., dissenting).

24 *Buck*, 137 S. Ct. at 769–70. Texas's decision resulted from the Supreme Court's first encounter with Quijano's testimony, in a case where Quijano stated that the defendant's Hispanic heritage weighed in favor of finding future dangerousness. Saldano v. Texas, 530 U.S. 1212 (2000); *see Buck*, 137 S. Ct. at 769–70.

25 *Buck*, 137 S. Ct. at 770.

26 *See id.*

27 *Id.*

the district court denied the petition.[28] The denial was upheld,[29] in part because a 1991 precedent held that federal habeas courts could not consider a claim of ineffective counsel if it had been procedurally defaulted during state habeas proceedings.[30] Buck sought to reopen the case in 2011, arguing that his Fourteenth Amendment rights had been violated when the prosecution asked Quijano about how race might impact future violence.[31] The Fifth Circuit denied the appeal,[32] and the Supreme Court denied certiorari.[33]

Undeterred, Buck sought to reopen the federal district court's ruling in 2014, relying on Federal Rule of Civil Procedure 60(b)(6), which allows a court to "relieve a party . . . from a final judgment" for "any . . . reason that justifies relief."[34] He argued that two intervening Supreme Court cases excused his procedural defaults and that his case satisfied the "extraordinary circumstances" standard of Rule 60(b)(6).[35]

Again, Buck's motion was denied.[36] The district court found that Buck had not shown "extraordinary circumstances," as the changes in decisional law and Texas's response to Quijano's testimony in other cases were insufficient.[37] Looking into the merits, the court found that, under *Strickland v. Washington*,[38] Buck had not shown the necessary prejudice.[39] The court concluded that the "introduction of any mention of race" was "de minimis" at worst.[40] In a Hail Mary effort, Buck challenged this denial of the Rule 60(b)(6) motion and sought a certificate of

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[28] Buck v. Dretke, No. H-04-3065, 2006 WL 841181, at *12 (S.D. Tex. July 24, 2006).

[29] *See Buck*, 137 S. Ct. at 771.

[30] *Id.* at 770–71; Coleman v. Thompson, 501 U.S. 722, 752–53 (1991) (holding ineffective assistance of counsel in a state habeas case cannot constitute cause to excuse procedural default, since "[t]here is no constitutional right to an attorney in state post-conviction proceedings," *id.* at 752).

[31] *Buck*, 137 S. Ct. at 771. Relief was also warranted, Buck argued, because he was treated differently from other defendants whose races Quijano had discussed at trial. *Id.*

[32] *Id.*

[33] Buck v. Thaler, 565 U.S. 1022 (2011). Following that denial, Buck filed a new habeas petition in state court in 2013, which Texas's highest criminal court denied. *Ex parte* Buck, 418 S.W.3d 98, 98 (Tex. Crim. App. 2013) (per curiam).

[34] FED. R. CIV. P. 60(b)(6); *Buck*, 137 S. Ct. at 771–72.

[35] *Buck*, 137 S. Ct. at 772 (quoting Gonzalez v. Crosby, 545 U.S. 524, 535 (2005)); *see also* Martinez v. Ryan, 556 U.S. 1, 9 (2012) (altering "the unqualified statement in *Coleman*" to "recogniz[e] a narrow exception" when a state formally limits ineffective assistance claims); Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013) (expanding the *Martinez* holding to state systems, like Texas's, that effectively deny criminal defendants "a meaningful opportunity" to make such claims on direct appeal).

[36] *Buck*, 137 S. Ct. at 772; Buck v. Stephens, No. H-04-3965, 2014 WL 11310152, at *8 (S.D. Tex. Aug. 29, 2014).

[37] *Buck*, 137 S. Ct. at 772; *Buck*, 2014 WL 11310152, at *4–5.

[38] 466 U.S. 668 (1984) (establishing the standard for determining when a criminal defendant's Sixth Amendment right to counsel is violated by that counsel's inadequate performance).

[39] *Buck*, 137 S. Ct. at 772; *Buck*, 2014 WL 11310152, at *5.

[40] *Buck*, 137 S. Ct. at 772; *Buck*, 2014 WL 11310152, at *5.

appealability (COA) from the Fifth Circuit.[41] But the court denied a COA, characterizing the facts of Buck's case as "not extraordinary at all in the habeas context," and noting that Texas's confession of error in similar cases did not alter the merits of Buck's claim.[42] After the Fifth Circuit denied an en banc rehearing, the Supreme Court granted certiorari.[43]

The Supreme Court reversed and remanded.[44] Chief Justice Roberts wrote for the majority,[45] holding that the Fifth Circuit improperly conducted its COA analysis and that Buck had made a sufficient showing of ineffective assistance of counsel.[46] The Court explained that the proper two-step analysis for a COA requires first "an initial determination whether a claim is reasonably debatable," and, if such a determination is made, "an appeal in the normal course."[47] The Fifth Circuit, however, exceeded the restricted scope of the first step in resting its conclusion on the merits of Buck's claims, as indicated by its comments on Buck's failure to show extraordinary circumstances.[48]

Perhaps ironically, the Court then delved into the merits of Buck's ineffective assistance claim to hold that Buck had met *Strickland*'s requirements for establishing inadequate counsel.[49] As "[n]o competent defense attorney would introduce evidence" that his client "is liable to be a future danger because of his race,"[50] Chief Justice Roberts explained that the first *Strickland* prong — a showing of deficient performance — was satisfied.[51] Furthermore, Quijano's testimony linking race and violence fulfilled the second *Strickland* prong that a defendant demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[52] The majority found that the testimony unambiguously appealed to a pernicious racial stereotype.[53] That appeal, combined with Quijano's status as an expert witness, would have likely had a powerful influence on jurors.[54] Even though the testimony had only two references to race, "when a jury hears expert testimony that expressly makes a defendant's

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41 *Buck*, 137 S. Ct. at 772.

42 *Id.* at 773 (quoting Buck v. Stephens, 623 F. App'x 668, 673 (5th Cir. 2015)); *Buck*, 623 F. App'x at 672–74.

43 *Buck*, 137 S. Ct. at 773.

44 *Id.* at 780.

45 The opinion was joined by Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan.

46 *Buck*, 137 S. Ct. at 780.

47 *Id.* at 774.

48 *Id.* at 773–74.

49 *See id.* at 775–77.

50 *Id.* at 775.

51 *Id.* at 775–76.

52 *Id.* at 776–77 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

53 *Id.* at 776.

54 *Id.* at 777.

race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by . . . how many pages it occupies in the record."[55] The fact that the defense introduced the testimony gave it even further prejudicial weight as an admission against interest.[56]

Finally, the Court looked beyond the COA analysis to conclude that "the District Court abused its discretion in denying Buck's Rule 60(b)(6) motion."[57] While Rule 60(b)(6) relief is available only in "extraordinary circumstances,"[58] Buck's sentencing clearly met that standard.[59] In particular, the Court found the conclusion that the mention of race had only a de minimis role to be erroneous.[60] Chief Justice Roberts asserted that allowing explicit mention of race in criminal proceedings would effectively allow "punishment on the basis of an immutable characteristic" and "flatly contravene [a] guiding principle" of our judicial process.[61] Further, he voiced concern that it would undermine public confidence in the justice system.[62] But the Court left undecided whether its decisions providing for more permissive federal review of state habeas ineffective counsel claims applied retroactively, finding instead that Texas had waived its argument on that issue.[63]

Justice Thomas dissented,[64] writing that the majority merely "settled on a desired outcome [and] bulldoze[d] procedural obstacles and misapplie[d] settled law to justify it."[65] While he agreed that the majority and the lower courts used the correct standards, he thought the majority had applied those standards incorrectly.[66] Justice Thomas argued that Buck's crime was so depraved, and Buck so lacking in remorse, as to provide the jury a sufficient basis to recommend the death penalty irrespective of Quijano's testimony.[67] But he found some consolation in his view that the majority's "opinion should have little effect on the broader law" based on both the unique facts and the preservation of settled law.[68]

Justice Thomas's dissent has the correct view of *Buck*'s importance. Closely read, the majority opinion exemplifies Chief Justice Roberts's colorblind approach to racial discrimination, and, because *Buck* is

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[55] *Id.*
[56] *Id.*
[57] *Id.* at 778.
[58] *Id.* at 772 (quoting Gonzalez v. Crosby, 545 U.S. 524, 535 (2005)).
[59] *Id.* at 778–79.
[60] *Id.* at 778.
[61] *Id.*
[62] *See id.* (citing Davis v. Ayala, 135 S. Ct. 2187, 2208 (2015)).
[63] *Id.* at 780 (noting that Teague v. Lane, 489 U.S. 288 (1989), was inapplicable because the State had waived any argument that *Martinez* and *Trevino* did not apply retroactively).
[64] Justice Thomas's dissent was joined by Justice Alito.
[65] *Buck*, 137 S. Ct. at 780–81 (Thomas, J., dissenting).
[66] *See id.* at 781.
[67] *See id.* at 782.
[68] *Id.* at 785.

bound by a rare set of facts, it provides little support to challenges of racism in criminal justice. Despite its stirring rhetoric, *Buck*'s underlying logic is consistent with the Chief Justice's jurisprudential theory of colorblind constitutionalism, seen throughout his high-profile opinions and even in his seemingly inconsistent vote in another recent criminal justice case.[69] In fact, *Buck*'s concern for public confidence in the judicial system is best understood through the colorblind lens.

Of course, given the Chief Justice's talent for memorable turns of phrase,[70] it is easy to mistake *Buck* as endorsing contemporary efforts to combat systemic racism. Rather than following the Court's historic sidestepping of issues of race in criminal justice,[71] *Buck* strongly condemned any use of race in the process and waded into the merits — a wholly discretionary step given that the questions presented were procedural.[72] One could even read the majority's concern with testimony that "appeal[s] to . . . powerful racial stereotype[s]"[73] as a tentative acceptance of the antisubordination principle long thought absent from the Court's racial jurisprudence.[74] But *Buck* provides no such great ideological shift, nor any profound alteration to the law. Instead, *Buck* makes more sense as a thread in the larger tapestry of the Chief Justice's colorblind constitutionalism.[75]

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69 Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).

70 The majority opinion's pithy line, "[s]ome toxins can be deadly in small doses," *Buck*, 137 S. Ct. at 777, was particularly emphasized in media coverage of the opinion. *See, e.g.*, Matt Ford, *"Some Toxins Can Be Deadly in Small Doses,"* THE ATLANTIC (Feb. 22, 2017), https://www.theatlantic.com/politics/archive/2017/02/supreme-court-duane-buck/517542/ [https://perma.cc/MUE2-B9CY]; Adam Liptak, *Citing Racist Testimony, Justices Call for New Sentencing in Texas Death Penalty Case*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/duane-buck-texas-death-penalty-case-supreme-court.html [https://perma.cc/8XNQ-SDQS].

71 *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 283 (2015) (noting the Supreme Court's tendency, in the 1960s and 1970s, to "largely avoid[] explicit discussion of race, even in cases in which the racial context was undeniably significant").

72 Indeed, the Court's finding of ineffective assistance of counsel is striking given the dearth of cases in which courts have held the exacting standard was met. *See, e.g.*, Nancy J. King, Essay, *Enforcing Effective Assistance After* Martinez, 122 YALE L.J. 2428, 2446–48 (2013).

73 *Buck*, 137 S. Ct. at 776.

74 For an explanation of the antisubordination view, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1470–78 (2004), and see also DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 167 (1987), for an argument that under the antisubordination principle "[t]he Court must review with great care laws that burden a racial minority."

75 This case comment is merely a small addition to the significant works that have already discussed the Chief Justice's colorblind approach. *See, e.g.*, Lauren Sudeall Lucas, Essay, *Identity as Proxy*, 115 COLUM. L. REV. 1605, 1648–51 (2015) (exploring Chief Justice Roberts's colorblind constitutional interpretation through the lens of his plurality opinion in Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007)); Ronald Turner, *"The Way to Stop Discrimination on the Basis of Race . . .,"* 11 STAN. J. C.R. & C.L. 45, 76–82, 84–87 (2015) (same); *see also* Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73 (2010).

The Chief Justice has long focused his race-based discrimination jurisprudence on classification, eschewing contextual and historical analyses.[76] In the equal protection context, this framework stresses the evils of racial classification, whether for pernicious or benign purposes.[77] Any overt consideration of race is "discrimination."[78] Chief Justice Roberts best articulated this theory in *Parents Involved in Community Schools v. Seattle School District No. 1*.[79] There, two school districts were operating plans that, in pursuit of diverse student bodies, assigned students to schools in part based on their races.[80] The Chief Justice's plurality opinion invalidated the plans, finding that the open racial categorization of students was unconstitutional racial balancing.[81] Relying on *Grutter v. Bollinger*,[82] the opinion asserted that "[r]acial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"[83]

The Chief Justice's more recent majority opinion in *Shelby County v. Holder*[84] reflects that fixation on racial classification. Despite noting that the Voting Rights Act (VRA) was enacted to combat "entrenched racial discrimination in voting,"[85] the majority found that section 4(b), the formula used to determine which jurisdictions were subject to preclearance, was unconstitutional.[86] Probative for Chief Justice Roberts was that the record did not "show[] anything approaching the 'pervasive,' 'flagrant,' 'widespread,' and 'rampant' discrimination that faced Congress in 1965."[87] But he ignored that legislative attempts to suppress minority voting remain, even if not as "flagrant" as they were fifty years ago.[88] Modern efforts to restrict voting rights through voter ID laws,[89]

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[76] *See, e.g.*, Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1616–21 (2009); *see also* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1287–89 (2011) (describing two constitutional theories in racial equality cases: the colorblind, anticlassification approach and the antisubordination principle).

[77] *See* Siegel, *supra* note 76, at 1287–88.

[78] Turner, *supra* note 75, at 86.

[79] 551 U.S. 701.

[80] *Id.* at 709–10 (plurality opinion).

[81] *Id.* at 725–33.

[82] 539 U.S. 306 (2003).

[83] *Parents Involved*, 551 U.S. at 732 (plurality opinion) (quoting *Grutter*, 539 U.S. at 330).

[84] 133 S. Ct. 2612 (2013).

[85] *Id.* at 2618.

[86] *Id.* at 2631. The 1965 formula originally covered jurisdictions that had engaged in voting procedures that Congress deemed egregiously discriminatory, and the jurisdictions covered were expanded in 1970 and 1975. *Id.* at 2619–20. As of 2013, the whole of nine states and parts of seven others were covered. *See id.* at 2620.

[87] *Id.* at 2629 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 309, 315, 331 (1996); Nw. Austin Muni. Util. Dist. No. One v. Holder, 557 U.S. 193, 201 (2009)).

[88] Justice Ginsburg noted preclearance states' recent efforts to alter voting laws in ways that would disproportionately impact racial minorities. *Id.* at 2640–42 (Ginsburg, J., dissenting).

[89] In 2011, for instance, Texas passed a voter ID law that would have required all voters to have one of five forms of photo ID and banned the use of nonphotographic IDs or voter registration

redistricting,[90] and early voting limits[91] are at times racially discriminatory. But the fact that voting discrimination has evolved "into more subtle second-generation barriers"[92] producing similarly racially disparate outcomes as those contemplated in the VRA[93] is of little consequence under a colorblind approach.

Indeed, the Chief Justice's decision to join the dissent in *Peña-Rodriguez v. Colorado*[94] speaks to his commitment to this colorblind jurisprudence. During jury deliberations in a case involving a Hispanic defendant, a juror allegedly made several racially biased comments.[95] The Chief Justice did not join the majority, which held that the juror's "blatant racial prejudice" required judicial intervention even with "the general bar of the no-impeachment rule,"[96] and instead signed on to Justice Alito's stinging dissent.[97] The apparent tension between his *Buck* opinion and his signing on to the *Peña-Rodriguez* dissent is resolved if one sees the Chief Justice's overriding concern as public confidence in the justice system. Importantly, the racially biased remarks in *Peña-Rodriguez* were made behind closed doors, not in open court. Although the Court was willing to challenge private racism when explicit in the

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cards. Texas v. Holder, 888 F. Supp. 2d 113, 115 (D.D.C. 2012), *vacated*, 133 S. Ct. 2886 (2013) (mem.). Under the VRA, the Attorney General denied preclearance, noting that "a Hispanic registered voter is at least 46.5 percent, and potentially 120.0 percent, more likely than a non-Hispanic registered voter to lack this identification." Objection Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to Keith Ingram, Dir. of Elections, Office of Tex. Sec'y of State 3 (Mar. 12, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_120312.pdf [https://perma.cc/UZ6K-KMWD].

90 Once again, Texas provides an example. A 2011 redistricting plan was found in a preclearance review to show intentional "cracking" — spreading minority voters among districts in order to deny them a voting bloc in any one area. *See* Texas v. United States, 887 F. Supp. 2d 133, 163–66 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013) (mem.).

91 For example, the Fourth Circuit struck down portions of a North Carolina law as racially discriminatory because it imposed severe limits on early voting. *See* N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 239 (4th Cir. 2016). Because the state legislature had requested data as to the racial breakdown of early voters — which showed that black Americans disproportionately took advantage of early voting in the 2008 and 2012 elections — the Fourth Circuit found that "discriminatory racial intent motivated the enactment" of the law. *Id.* at 216, 233.

92 *Shelby Cty.*, 133 S. Ct. at 2651 (Ginsburg, J., dissenting).

93 *See, e.g.*, Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. F. 19, 26 (2013) (describing recent gerrymanders' impact on racial minorities); *see also* Kathleen M. Stoughton, Note, *A New Approach to Voter ID Challenges: Section 2 of the Voting Rights Act*, 81 GEO. WASH. L. REV. 292, 298–99 (2013) (evaluating the negative impact of voter ID laws on black voters' turnout).

94 137 S. Ct. 855 (2017).

95 *Id.* at 861–62. The juror expressed, among other things, that he thought the defendant "did it because [the defendant is] Mexican and Mexican men take whatever they want." *Id.* at 862.

96 *Id.* at 871.

97 *Id.* at 874–85 (Alito, J., dissenting).

criminal justice system, the Chief Justice's voting indicates that privately held beliefs are not a concern of colorblind jurisprudence.[98] Instead, the Chief Justice's votes suggest a view that colorblindness and the cloistered nature of jury deliberations are both fundamental to the justice system: just as sentencing based on race undermines public confidence in the courts, so too does opening jury deliberations to public scrutiny.

These twin concerns with preserving colorblindness in open court and public confidence in the judicial process support the *Buck* majority's proclamation that the use of race in sentencing was "a disturbing departure from a basic premise of our criminal justice system."[99] Indeed, the danger of a mention of race like that seen in *Buck*, according to the Chief Justice, was at bottom the likelihood that it could "'poison[] public confidence' in the judicial process."[100] Read against the well-documented racial inequality in capital punishment[101] and evidence of distrust for the criminal justice system among minority populations,[102] the Court's opinion might appear naïve. But as a text supporting colorblind jurisprudence, the opinion and its concern with public confidence are coherent. For the majority, the issue was not necessarily that private prejudices could play a role. Instead, the opinion asserts a rule that the criminal justice system — like any state institution — should not openly talk about race.[103] The procedural obstacles standing between the Court and the merits of Buck's case gave way because the discussion of

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[98] At least one commentator has suggested that this public/private distinction explains the Chief Justice's conflicting votes. Garrett Epps, *The Supreme Court Confronts Racism in the Jury Room*, THE ATLANTIC (Mar. 16, 2017), https://www.theatlantic.com/politics/archive/2017/03/the-supreme-court-confronts-racism-in-the-jury-room/519747/ [https://perma.cc/KU9A-BD4H].

[99] *Buck*, 137 S. Ct. at 778; *see also id.* at 776–77 (noting as dispositive factors Quijano's status as an expert witness, the unique dangerousness question of Texas death penalty sentencing, and Quijano's clear statement linking race to dangerousness).

[100] *Id.* at 778 (quoting Davis v. Ayala, 135 S. Ct. 2187, 2208 (2015)).

[101] *See, e.g.*, U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988–2000), at 6 (2000) (showing that within the federal death penalty system, proportions of black and Hispanic defendants were greater than proportions in the general population). Buck's defense counsel also commissioned a study of racial discrimination in capital punishment in Harris County, Texas. RAY PATERNOSTER, RACIAL DISPARITY IN THE CASE OF DUANE EDWARD BUCK 1–2 (2012), https://assets.documentcloud.org/documents/616589/buck-paternoster-report.pdf [https://perma.cc/N92H-DHL6]. The report examined 504 cases of adult defendants indicted for capital murder between 1992 and 1999 in Harris County, finding that "[t]he probability that the district attorney will advance a case to a [death] penalty trial is more than *three times as high when the defendant is African-American* than for white defendants." *Id.* at 6.

[102] For example, data released in 2014 showed that forty percent of black Americans interviewed had little to no trust in the criminal justice system. Frank Newport, *Gallup Review: Black and White Attitudes Toward Police*, GALLUP (Aug. 20, 2014), http://www.gallup.com/poll/175088/gallup-review-black-white-attitudes-toward-police.aspx [https://perma.cc/R5CV-J8K9].

[103] One might term this view, in which speaking openly about race is a preeminent evil, the "Fight Club" approach to race in law. *See* FIGHT CLUB (20th Century Fox 1999) ("The first rule of Fight Club is you do not talk about Fight Club.").

race was so overt. Racial categorization and the announcement of that categorization within the judicial process, in Buck's case, then, was exceptional and such categorization must be avoided.

Buck's text underscores this narrow, anticlassification stance and shows that Justice Thomas's dissent wins the day.[104] After all, how often will the "perfect storm" of expert testimony explicitly on the dangerousness of a racial group "coincide[] precisely with the central question at sentencing"?[105] While the majority opinion required "an exception to [the] finality" of Buck's sentence,[106] it also left considerable room for analogous racial prejudice in court to occur without rising to the level of ineffective assistance of counsel. Under the colorblind view, the solution to discrimination is simply to cut out any explicit categorization by race.[107] Here, *Buck* suggests — through its emphasis on the unusual facts of the case — that less overt prejudice could be overlooked.[108] *Buck*'s poignant reminders of the obligation not to "[d]ispens[e] punishment on the basis of an immutable characteristic"[109] rest atop an opinion that displays a "single-minded focus on according relief to *this* petitioner on *these* facts" in such a way as to severely "limit[] the reach of its decision."[110] Moreover, the relevant legal standards — those related to collateral review, ineffective assistance of counsel, and Rule 60(b)(6) motions — are unchanged.[111] Indeed, the majority reaffirmed *Strickland*'s strong presumption that counsel's assistance is acceptable.[112] For the vast majority of defendants, *Buck* keeps the bar unattainably high.

Buck, then, while lending itself at first blush to an interpretation that the Court views racism as a preeminent evil, is ultimately in keeping with the view of race and racism as "exist[ing] only when specifically mentioned."[113] The Chief Justice may find commendation for recognizing that, when it comes to racism in the criminal justice system, "[s]ome toxins can be deadly in small doses."[114] Unfortunately, the antidote he prescribed in *Buck* amounts to nothing more than a placebo.

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104 Given Justice Thomas's prediction that the "decision has few ramifications, if any, beyond the highly unusual facts" of Buck's case, a narrow interpretation of the majority's opinion is fitting. *Buck*, 137 S. Ct. at 781 (Thomas, J., dissenting).

105 *Id.* at 776 (majority opinion).

106 *Id.* at 779 (quoting Gonzalez v. Crosby, 545 U.S. 524, 529 (2005)).

107 *See* Lucas, *supra* note 75, at 1649.

108 *Buck*, 137 S. Ct. at 778.

109 *Id.*

110 *Id.* at 785 (Thomas, J., dissenting).

111 *See id.* at 786–87.

112 *See id.* at 775 (majority opinion).

113 IAN HANEY LÓPEZ, WHITE BY LAW 161 (10th anniversary ed. 2006).

114 *Buck*, 137 S. Ct. at 777.