

No. \_\_\_\_\_

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In the  
Supreme Court of the United States

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DUANE EDWARD BUCK,

*Petitioner,*

v.

RICK THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS DIVISION,

*Respondent.*

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

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I certify that on the 15th day of September, 2011, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*, PETITION FOR A WRIT OF PETITION FOR CERTIORARI, and MOTION FOR STAY OF EXECUTION on Georgette Oden, Assistant Attorney General of Texas, Office of the Texas Attorney General, Post Office Box 12548, Austin, Texas 78711, via email (georgette.odan@oag.state.tx.us) and through the United States Postal Service by first-class mail in accordance with Sup. Ct. R. 29(3). All parties required to be served have been served. I am a member of the Bar of this Court.

s/ Gregory W. Wiercioch

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**MOTION FOR STAY OF EXECUTION PENDING CONSIDERATION  
AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI**

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Mr. Buck requests that this Court grant him a stay of execution pending the Court's consideration and disposition of his petition for writ of *certiorari*.

Texas is scheduled to execute Mr. Buck by lethal injection today, Thursday, September 15, 2011. It is poised to execute him even though Texas's highest legal official had identified Mr. Buck's death sentence as one obtained in violation of the United States Constitution. The government had relied on Mr. Buck's race as a basis for proving dangerousness during capital sentencing, but the Attorney General of the State of Texas promised that the State would remedy the violation by

conceding error in federal court. Instead, the State of Texas successfully persuaded the district court and this Court to uphold Mr. Buck's death sentence, employing material misrepresentations and omissions to distinguish it from the other cases in which the Attorney General had confessed error.

A stay of execution is warranted where there is: (1) a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; (2) a significant possibility of reversal of the lower court's decision; and (3) a likelihood that irreparable harm will result if no stay is granted. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). These criteria are met in the present case.

First, there exists a significant possibility of reversal of the lower court's decision. As demonstrated in Mr. Buck's Petition, the court below failed to appropriately weigh the equities in the case and unreasonably faulted Mr. Buck for the Attorney General's lack of candor towards the federal courts. Moreover, with respect to Mr. Buck's showing of extraordinary circumstances warranting Rule 60(b) relief, the lower court wholly failed to address the facts and arguments supporting Mr. Buck's case for relief, and instead summarily concluded that jurists of reason would all agree that there was nothing extraordinary about his case. As described in the accompanying petition for writ of *certiorari*, Mr. Buck's case is in a class of one, and the Fifth Circuit's conclusion that he was not entitled to a certificate of appealability and a full appeal on this issue is untenable.

Second, Mr. Buck's petition for writ of *certiorari* raises important federal questions in a capital case and asks this Court to resolve a conflict within the circuits regarding what constitutes fraud on the court. Moreover, the merits of Mr. Buck's underlying equal protection and due process claims are sound. A reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of *certiorari* or the notation of probable jurisdiction exists.

Finally, there is a likelihood that irreparable harm will result absent a stay. Mr. Buck, despite a sentence obtained in a trial in which the government unlawfully relied on his race to prove that he was dangerous, will be executed by the State of Texas. ***An execution under these circumstances will do irreparable harm to the criminal justice system in general.*** "Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system, and prevents the idea of democratic government from becoming a reality." *Rose v. Mitchell*, 443 U.S. at 556. Because "[w]ise observers have long understood that the appearance of justice is as important as its reality," *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. at 155 (Scalia, J., dissenting), this Court should stay the execution of a death sentence that was procured based in part on an odious stereotype that African Americans are inherently more dangerous than whites.

## CONCLUSION

For the foregoing reasons, the Court should grant a stay of execution pending consideration and disposition of Mr. Buck's petition for writ of *certiorari*.

s/ Gregory W. Wiercioch

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