

JURISPRUDENCE

Lawyers and Toxins: *Buck v. Davis*
(SCOTUS, 2017)

François R. VAN DER MENSBRUGGHE

Lecturer ("chargé de cours") at the Faculty of Law, Political Science,
and Criminology of the University of Liège

The case, *Buck v. Davis*,⁽¹⁾ handed down by the United States Supreme Court on February 22, 2017, illustrates a host of problems with respect to federal jurisdiction and American criminal justice.⁽²⁾ Delivered by a 6 to 2 majority that reversed the 5th Circuit Court of Appeals, the decision touches first and foremost on the issues of legal representation and race. The facts that gave rise to this case were both simple and chilling. In 1995, Duane Buck shot and killed a former girlfriend and her companion.⁽³⁾ Buck was tried for capital murder, and a Texas jury convicted. At the penalty phase, the issue arose as to whether to impose the death penalty. Under Texas law, the jury could impose this sentence only if it found that Buck was likely to commit acts of violence in the future (a standard termed "future dangerousness"). Specifically, a jury would have to find – unanimously and beyond a reasonable doubt – "a probability that the defendant would commit acts of violence that would constitute a continuing threat to society".⁽⁴⁾ In the event, mitigating circumstances might nevertheless warrant a sentence of life imprisonment instead of death.⁽⁵⁾ Of particular importance to the case were the lay witnesses and professional

(1) *Buck v. Davis*, 580 U.S. — (2017).

(2) For extended discussion on the criminal justice system in the United States, see William J. STUNTZ, *The Collapse of American Criminal Justice* (Cambridge, MA.: Harvard University Press, 2013); Bryan STEVENSON, *Just Mercy* (London: Scribe UK: 2015); Paul BUTLER, *Let's Get Free: A Hip-Hop Theory of Justice* (New York: The New Press, 2009).

(3) The woman's children begged for their mothers' life. When arrested, an officer later testified that Buck was laughing at the scene and that he remained "happy" and "upbeat" as he was driven to the police station.

(4) Tex. Code Crim. Proc. Ann., Art. 37.071, §2(b)(1) (Vernon 1998).

(5) See §2 (e).

experts who testified and considered Buck's behavioral record. The presiding judge entrusted one expert, Dr. Walter Quijano, with the task of conducting a psychological evaluation. While Dr. Quijano concluded future violence on Buck's part was unlikely (his prior acts of violence having arisen from romantic relationships with women and his now being incarcerated), Dr. Quijano further considered seven "statistical factors" regarding "future dangerousness". The fourth factor – concerning "race" – was the most contentious. Dr. Quijano's report read, in relevant part: "4. Race. Black: Increased probability. There is an over-representation of Blacks among the violent offenders".⁽⁶⁾ Taking the stand at the invitation of defense counsel, a public defender,⁽⁷⁾ Dr. Quijano compounded his written statements with a verbal backup of the race factor impacting "future dangerousness". On direct examination from Buck's lawyer, Dr. Quijano stated that certain factors were "know[n] to predict future dangerousness" and he identified race as one of them.⁽⁸⁾ On cross-examination by the prosecutor, Dr. Quijano repeated this. The prosecutor asked: "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?". Dr. Quijano replied; "Yes".⁽⁹⁾ In terms of outcome, the jury returned a verdict of death after two days of deliberation. Thereafter, the case entered what the Supreme Court itself labeled "a labyrinth of state and federal collateral review where the case has wandered for the better part of two decades".⁽¹⁰⁾ State and federal habeas corpus petitions were denied. Forsaking a detailed account of the procedural history of the case, the ruling illustrates three particular issues.

The first issue in the *Buck* case concerned the standard for federal courts of appeals when considering whether to allow appeals from the denial of habeas corpus petitions.⁽¹¹⁾ Under federal law, a state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal.⁽¹²⁾ Federal law requires that he first obtain a "certificate of appealability" (hereafter, COA) from a Circuit justice or judge. Various conditions stand out to obtain a COA.⁽¹³⁾ In addition to exhausting all state remedies,⁽¹⁴⁾ the applicant must make "a substantial showing of the denial of a

constitutional ri
tance claim, der
Applying *Strick*
counsel's perfor
ant must show
anteed by the Si
but also that cc
fair trial becaus
fessional errors.
further discusse

On the be
2003, the COA
the case.⁽¹⁷⁾ In
of Appeals den
was "not extra
ing that his lav
testimony that
the jury",⁽¹⁹⁾ th
dice. For the C
death, with or v
the United Statu
had to do with
not been comp
in granting a c
that "jurists of r
constitutional c
deserve encour
be decided with
support of the
a court of appe
an appeal, and
the actual meri
The Supreme C

(6) *Buck v. Davis*, slip op., p. 4.

(7) The public defender, by the name of Jerry Guerniot, no longer handles death penalty cases: see Matt FORD, "Some Toxins Can Be Deadly in Small Doses", *The Atlantic*, February 22, 2017.

(8) *Buck v. Davis*, slip op., p. 4.

(9) *Buck v. Davis*, slip op., p. 5.

(10) *Buck v. Davis*, slip op., p. 6.

(11) For extended discussion on habeas corpus and federal court collateral review of criminal convictions, see Erwin CHERMERINSKY, *Federal Jurisdiction*, 3rd Ed. (New York: Aspen Law & Business, 1999), Chapter 15.

(12) 28 U.S.C. §2253(b).

(13) See Erwin CHERMERINSKY, *Federal Jurisdiction*, op. cit., pp. 849-855.

(14) 28 U.S.C. §2254(b)(1)(A).

(15) 28 U.S.C. §;

(16) *Strickland v.*
2052 (1984).

(17) *Miller-El v.*
trial in the state of
concerned Dallas C
Americans eligible t

(18) *Buck v. Step*

(19) *Buck v. Dav*

(20) *Buck v. Dav*

(21) *Miller-El v.*

d. The presiding
sk of conducting
ture violence on
n from romantic
. Quijano further
gerousness". The
is. Dr. Quijano's
bability. There is
s".⁽⁶⁾ Taking the
r,⁽⁷⁾ Dr. Quijano
f the race factor
m Buck's lawyer,
ct future danger-
amination by the
"You have deter-
a female because
reases the future
t?". Dr. Quijano
lict of death after
e Supreme Court
w where the case
id federal habeas
of the procedural

for federal courts
: denial of habeas
se petition for a
oes not enjoy an
obtain a "certifi-
or judge. Various
hausting all state
of the denial of a

s death penalty cases:
February 22, 2017.

al review of criminal
: Aspen Law & Busi-

constitutional right".⁽¹⁵⁾ In the present case, Buck relied on an ineffective assistance claim, derived from the 6th Amendment to the United States Constitution. Applying *Strickland v. Washington* (1984), this meant Buck had to show that counsel's performance was both deficient and prejudicial: "a convicted defendant must show not only that counsel was not functioning as the counsel guaranteed by the Sixth Amendment so as to provide reasonably effective assistance but also that counsel's errors were so serious as to deprive the defendant of a fair trial because of a reasonable probability that, but, for the counsel's unprofessional errors, the results would have been different".⁽¹⁶⁾ This matter will be further discussed below.

On the basis of *Miller El v. Cockrell*, delivered by the Supreme Court in 2003, the COA inquiry must further be devoid of any analysis on the merits of the case.⁽¹⁷⁾ In the present instance, the New Orleans-based 5th Circuit Court of Appeals denied a certificate of appealability, concluding that Buck's case was "not extraordinary at all in the habeas context".⁽¹⁸⁾ Whilst acknowledging that his lawyer had performed deficiently in calling Dr. Quijano to give testimony that "lent credence to any potential latent racial prejudice held by the jury",⁽¹⁹⁾ the 5th Circuit considered Buck had failed to demonstrate prejudice. For the Court of Appeals, the jury likely would have sentenced him to death, with or without Dr. Quijano's expert testimony. The Supreme Court of the United States took issue with this appraisal of the lower court. The reason had to do with the fact the standard articulated in *Miller-El v. Cockrell* had not been complied with. According to the Supreme Court, the key question in granting a certificate of appealability is "whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues are adequate to deserve encouragement to proceed further'. This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims'".⁽²⁰⁾ Most notably, the Court in *Miller-El* stated: "When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction".⁽²¹⁾ The Supreme Court concluded that in denying Buck a COA, the 5th Circuit

⁽¹⁵⁾ 28 U.S.C. §2253(c)(2).

⁽¹⁶⁾ *Strickland v. Washington*, 466 U.S. 668, 687 (1984), 80 L. Ed. 2d 674 (1984), 104 S. Ct. 2052 (1984).

⁽¹⁷⁾ *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). This case also concerned a capital murder trial in the state of Texas and an ensuing death sentence. The constitutional right denied here concerned Dallas County prosecutors using peremptory strikes to exclude 10 of the 11 African-Americans eligible to serve on the jury: the exclusions were claimed to violate equal protection.

⁽¹⁸⁾ *Buck v. Stephens*, 623 Fed. Appx. 668, 673 (2015).

⁽¹⁹⁾ *Buck v. Davis*, slip op., p. 11.

⁽²⁰⁾ *Buck v. Davis*, slip op., p. 13.

⁽²¹⁾ *Miller-El v. Cockrell*, 537 U.S. 322, 336-337.

had essentially decided the case on the merits of his claim and hence exceeded the limited scope of the COA analysis. Chief Justice Roberts explained that in asking whether Buck had shown "extraordinary circumstances", the 5th Circuit focused on the wrong question, repeatedly faulting Buck for having failed to demonstrate extraordinary circumstances. The question for the Court of Appeals was not whether Buck had shown that his case was extraordinary. It was whether jurists of reason could merely debate that issue. Quoting the Chief Justice: "We reiterate what we have said before: 'A 'court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims' and ask 'only if the District Court's decision was debatable'".⁽²²⁾ In effect, the State hurt, rather than helped its case when pointing to the Fifth Circuit's thorough consideration of the merits to defend that court's approach.⁽²³⁾

The second issue in the *Buck* case had to do with the possible existence of ineffective assistance of counsel. Buck's request for a COA in the first place was related to the question as to whether reasonable jurists could *debate* the District Court's conclusion that Buck was not denied his right to effective assistance of counsel. By way of reminder, ineffective assistance of counsel is a trademark feature of American criminal law. It goes hand in hand with the right of an accused person to have counsel for his defense, a right expressly guaranteed by the Sixth Amendment (as respects the federal government) and the Fourteenth Amendment (as respects the States). As of 1932, in *Powell v. Alabama*, the Supreme Court of the United States – in an opinion penned by Justice Sutherland – noted with respect to defendants who were unable to employ counsel in capital cases: "it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law, and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may ignore".⁽²⁴⁾ Many cases followed *Powell*.⁽²⁵⁾ In 1973, a prominent member of

⁽²²⁾ *Buck v. Davis*, slip op., p. 14 (internal quotation omitted).

⁽²³⁾ *Ibidem*. The two dissenters – Justice Clarence Thomas and Samuel Alito – argued that a reviewing court that deems a claim non-debatable "must necessarily conclude the claim is meritless". For the Chief Justice, this was correct, but he insisted the converse was not true (and actually places too heavy a burden on the prisoner at the COA stage): "That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable": *Buck v. Davis*, slip op., p. 14.

⁽²⁴⁾ *Powell v. Alabama*, 287 U.S. 45, 70-71 (1932). This was the first of the infamous Scottsboro cases.

⁽²⁵⁾ *Reece v. Georgia*, 350 U.S. 85, 76 S. Ct. 167, 100 L.Ed. 77 (1955): "[effective assistance of counsel is a constitutional requirement of due process and] 'no member of the Union may disregard' [it]. Cf. *McMann v. Richardson*, 397 U.S. 759, 771 (1970): '[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel.' The Court further added: 'if the

the American judiciary States Court of Appeals I have seen in 23 years not most indigent defendants guaranteed them by the scope of [this] procedure considerable lengths to but effective assistance is some of the counsel Amendment".⁽²⁶⁾ By *lawyers*", those lawyers with clients or even far cry from the idea of United States Supreme ineffective assistance already been mentioned here for war general framework.

right to counsel guaranteed the mercies of incompetence.⁽²⁶⁾ David L. BAZELON (1973). For extended discussion see Erwin CHEMERINSKY, *Federal Failure of Courts to Adhere to the Sixth Amendment* (2005); Note, "Gideon's 113th Anniversary: Not for the Worst Crime Comparative Law, see Justice in the United States a (2000), p. 583. For a French "Accès à la justice: égalité" pp. 41-54.

⁽²⁷⁾ Atticus Finch is the *Mockingbird* (1960). The absolute. His defense of Mayella Ewing, a white woman who is an African American.⁽²⁸⁾ *Strickland v. Washington* (1984).

⁽²⁹⁾ *United States v. [redacted]* Court in this case: "[t]he has long been recognized ... The text of the Sixth Amendment the provision of counsel 'the core purpose of the confrontation with both the no actual 'Assistance' 'for' been violated".

d hence exceeded explained that in ces", the 5th Cir- c for having failed for the Court of as extraordinary. ssue. Quoting the 'court of appeals d inquiry into the t Court's decision ped its case when : merits to defend

ssible existence of the first place was debate the District ctive assistance of sel is a trademark h the right of an ressly guaranteed nt) and the Four- owell v. Alabama, penned by Justice nable to employ requested or not, ocess of law, and or under such cir- paration and trial imental postulate, es of justice which of the Union may ainent member of

Alito – argued that a ide the claim is merit- not true (and actually ner has failed to make e failed to make a pre- 4.

ie infamous Scottsboro

[effective assistance of the Union may disre- g been recognized that : further added: "if the

the American judiciary, David L. Bazelon (1909-1993), judge on the United States Court of Appeals for the District of Columbia Circuit wrote: "[W]hat I have seen in 23 years on the bench leads me to believe that a great many if not most indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment.... There are no statistics to illustrate the scope of [this] problem because... the criminal justice system goes to considerable lengths to bury the problem. But no one could seriously dispute that ineffective assistance is a common phenomenon. A very able trial judge described some of the counsel coming before the courts as 'walking violations of the Sixth Amendment'".⁽²⁶⁾ Bazelon was doubtless referring to "meet 'em and plead 'em lawyers", those lawyers who do not have adequate time or resources to consult with clients or even investigate their cases prior to the date of arraignment, a far cry from the ideal image of *Atticus Finch*.⁽²⁷⁾ Two cases, both decided by the United States Supreme Court in 1984, provided practical flesh to a finding of ineffective assistance of counsel. The first case – *Strickland v. Washington* – has already been mentioned.⁽²⁸⁾ The second case, *U.S. v. Cronin*, deserves no explanation here for want of relevance.⁽²⁹⁾ The *Strickland* judgment sets down the general framework. First and foremost, the Supreme Court in this case intended

right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of *incompetent counsel*" (emphasis added).

⁽²⁶⁾ David L. BAZELON, "The Defective Assistance of Counsel", 42 U. Cin. L. Rev. 1, 22-23 (1973). For extended discussion on ineffective assistance of counsel in the United States, see also Erwin CHERMERINSKY, *Federal Jurisdiction*, op. cit., pp. 889-890; Note, "Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems", 118 Harv. L. Rev. 1731 (2005); Note, "Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense" 113 Harv. L. Rev. 2062 (2000); Stephen B. BRIGHT, "Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer", 103 Yale L.J. 1835 (1994). For an overview in Comparative Law, see Justice Earl Johnson, Jr., "Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies", 24 Fordham International Law Journal (2000), p. 583. For a French perspective on the situation in the United States, see Anne DEYSINE, "Accès à la justice: égalité et qualité de la représentation aux Etats-Unis", *Droits et Cultures*, 2005, pp. 41-54.

⁽²⁷⁾ Atticus Finch is the main character of Harper Lee's Pulitzer-prize winning novel, *To Kill a Mockingbird* (1960). The faith of Atticus Finch in justice and the American justice system is near absolute. His defense of Tom Robinson, an African American accused of having an affair with Mayella Eving, a white woman, is grounded on his belief in Tom Robinson's innocence, not on the fact he is an African American. Atticus simply believes the justice system should be color-blind.

⁽²⁸⁾ *Strickland v. Washington*, 466 U.S. 668 (1984), 80 L. Ed. 2d 674 (1984), 104 S. Ct. 2052 (1984).

⁽²⁹⁾ *United States v. Cronin*, 466 U.S. 648 (1984). According to the United States Supreme Court in this case: "[t]he special value of the right to the assistance of counsel explains why '[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.' ... The text of the Sixth Amendment itself suggests as much. The Amendment required not merely the provision of counsel to the accused, but 'Assistance,' which is to be 'for his defense.' Thus, 'the core purpose of the counsel guarantee was to assure 'Assistance' at trial when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.' ... If no actual 'Assistance' 'for' the accused's 'defense' is provided, then the constitutional guarantee has been violated".

to adopt a presumption that an attorney's decisions do not reflect ineffective assistance. The Court in *Strickland* emphasized that "[i]ntensive scrutiny of counsel ... could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client".⁽³⁰⁾ Urging caution, there was only so much the Supreme Court was willing to accept. The Court set a two-prong test to the notion of ineffective assistance of counsel. A defendant who claims to have been denied effective assistance of counsel must show both that counsel performed deficiently and that counsel's deficient performance caused him prejudice.⁽³¹⁾ On its own admission, the Supreme Court – in *Buck* – accepted that *Strickland*'s first prong sets "a high bar".⁽³²⁾ Besides its inherent *ex post* application,⁽³³⁾ Chief Justice Roberts considered: "[a] defense lawyer navigating a criminal proceeding faces any number of choices about how best to make a client's case. The lawyer has discharged his constitutional responsibility so long as his decisions fall within the 'wide range of professionally competent assistance'. It is only when the lawyer's errors were 'so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment' that *Strickland*'s first prong is satisfied".⁽³⁴⁾ For the Supreme Court it was clear that counsel performed deficiently in the *Buck* case. Chief Justice Roberts found it galling that defense counsel "put into evidence Dr. Quijano's expert report that stated, in reference to factors bearing on future dangerousness, '4. Race. Black: Increased probability'. He further emphasized, in the strongest of terms, that the defense attorney was incompetent: "Given that the jury had to make a finding of future dangerousness before it could impose a death sentence, Dr. Quijano's report said, in effect, that the color of Buck's skin made him more deserving of execution. It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race. [...] No competent defense attorney would introduce such evidence about his own client".⁽³⁵⁾ The conclusion is noteworthy in that there are very few cases in which the Supreme Court has found that this exacting standard of *Strickland* has been met.

With respect to the second prong of *Strickland* – determining that counsel's deficient performance actually caused prejudice to the defendant – the

⁽³⁰⁾ 466 U.S., at 690.

⁽³¹⁾ 466 U.S., at 687.

⁽³²⁾ *Buck v. Davis*, slip op., p. 16. On the general difficulty for a defendant to demonstrate ineffectiveness of counsel, see William J. GENEGO, "The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation", 22 *Am. Crim. L. Rev.* 181 (1984).

⁽³³⁾ For one author: "the *Strickland* standard [...] cannot be used preemptively to challenge the effectiveness of an attorney, regardless of the limitations on time or resources that may hamper the attorney's ability to provide an adequate defense. [...] [N]o recourse is available to the defendant *ex ante*, even when it is apparent that an attorney will inevitably provide an inadequate defense", in Note, "Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems", *op. cit.*, at 1732.

⁽³⁴⁾ *Buck v. Davis*, slip op., p. 16 (internal quotations omitted).

⁽³⁵⁾ *Buck v. Davis*, slip op., p. 17 (internal quotations omitted).

issue was again far from clear. We know whether Buck was guilty. Dr. Quijano's conclusion was based on a reasonable view of the future. Here, the Court was showing (and the State was not) imposing a death sentence on a man (testimony). The Supreme Court's strong view on this issue is that it is reasonable to conclude that his behavior in its aftermath had counsel rendered ineffective assistance as mentioned before. The Court has shown great caution.

The third and most emphatic declaration from criminal trials is that the considerable time and attention he was scathing in his characterization – as a defendant. Without doubt, this is a mistake in the extreme. On the basis of race, at the penalty phase, Thomas, joined by Justice Alito, clear Buck's claimed effect on the outcome stated: "[w]hen a juror's race directly prejudices the evidence cannot be taken into account how many pages it takes to read the evidence could be particularly strident in the opinion of the defendant and the democratic principle. "[o]ur law punishes the punishment on the guiding principle"⁽³⁶⁾

⁽³⁶⁾ *Buck v. Davis*, slip op., p. 17.

⁽³⁷⁾ *Buck v. Davis*, slip op., p. 17.

reflect ineffective assistance of defense counsel, determine the trustworthiness of the jury only so much the more the prong test to the aims to have been counsel performed him prejudice.⁽³¹⁾ That *Strickland's* application,⁽³²⁾ Chief criminal proceeding-client's case. The 'as his decisions stance'. It is only not functioning as *Strickland's* first that counsel perceived it galling that that stated, in Black: Increased, that the defense finding of future Quijano's report serving of execution that a defendant incompetent defense".⁽³⁵⁾ The conclusion Supreme Court let.

aining that counsel defendant – the

ndant to demonstrate assistance of Counsel: v. 181 (1984). ively to challenge the r resources that may rse is available to the rovide an inadequate nderfunded Indigent

issue was again far from self-obvious. In substance, what was needed was to know whether Buck has demonstrated a reasonable probability that, without Dr. Quijano's consideration of the matter, at least one juror would have harbored a reasonable doubt about whether Buck was likely to be violent in the future. Here, the District Court concluded that Buck had not made such a showing (and the State of Texas forcefully argued that the jury would have imposed a death sentence even if Dr. Quijano had not offered race-based testimony). The Supreme Court disagreed. Again Chief Justice Roberts took a strong view on this matter: "In this case [...], several considerations convince us that it is reasonably probable – notwithstanding the nature of Buck's crime and his behavior in its aftermath – that the proceeding would have ended differently had counsel rendered competent representation."⁽³⁶⁾ These broad statements on ineffective assistance of counsel in *Buck v. Davis* are all the more striking that, as mentioned before, the Supreme Court of the United States has traditionally shown great caution in these matters.

The third and final issue in the *Buck* case concerned the Supreme Court's emphatic declaration on the need to eliminate any form of racial consideration from criminal trials. Chief Justice Roberts came about this by devoting considerable time and attention to Dr. Quijano's testimony before the jury. Precisely, he was scathing in Dr. Quijano's usage of Buck's skin color – an immutable characteristic – as a factor leading to increased probability of future violence. Without doubt, this was potent and noxious evidence that was counterproductive in the extreme as it led to support for making a decision on life or death on the basis of race. Was the effect of the introduction of this mention of race at the penalty phase marginal, or "*de minimis*"? This is what Justice Clarence Thomas, joined by Justice Thomas Alito, argued. For the two dissenters, it was clear Buck's claimed violation of his 6th Amendment rights had only a minimal effect on the outcome. The majority on Supreme Court disagreed. It powerfully stated: "[w]hen a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses". Dr. Quijano's testimony, and defense counsel's reliance on this offending evidence could not be dismissed as "*de minimis*". Chief Justice Roberts was particularly strident in developing a global picture, not one limited to the person of the defendant. This was a matter that concerned the community at large and the democratic ideal reflected in the processes of American courts. For him, "[o]ur law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle"⁽³⁷⁾. It is comforting to hear the Supreme Court rule on the

⁽³⁶⁾ *Buck v. Davis*, slip op., p. 18.

⁽³⁷⁾ *Buck v. Davis*, slip op., p. 21.

inappropriate consideration of race in the American criminal justice system⁽³⁸⁾. Much remains to be done, however, to give tangible reality to these principles, in all areas of public life, where race still influences the administration of justice, where race affects education and employment, or where race governs the choice of those who serve and govern the country.

(38) It is also disheartening to hear more than 50 years after the civil rights movement.



Divisi en petits quelle p

Master e

*Transformer
logements constitu
villes. Ainsi, il y a
le territoire de la
liale, l'opération d
immeuble de rapp
et de la salubrité d*

*L'objet de ce
pour lutter contre
ment, ceux mis en*

*Tout d'abor
chapitre, les outils
logement, en insi
tés imposées. Cepe
bonne volonté des
mission de les met*

*Ensuite, cert
type réglementaire*

(1) Ce texte est issu
l'auteur, qui tient à rem
avisés.