No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CARL WAYNE BUNTION,
Petitioner,

v.

BOBBY LUMPKIN,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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Capital Case

Questions Presented

If neither of the two purposes this Court has deemed to be a legitimate purpose for the death penalty—i.e., retribution and deterrence— would be served by carrying out the execution of a man who has spent thirty years under a sentence of death, would carrying out that execution violate the Eighth Amendment's prohibition against cruel and unusual punishments or amount to an unnecessary infliction of excessive punishment?

Is the death penalty as applied in Texas inherently arbitrary and therefore a violation of the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment?

List of Parties and Corporate Disclosure Statement

All parties to the proceeding in the court of appeals are listed in the caption.

Petitioner is not a corporate entity.

List of All Directly Related
Proceedings in State and Federal Courts

Trials:

State v. Carl Wayne Buntion, No. 3149 (216th Dist. Ct., Gillespie County, Tex. Jan. 24, 1991)

State v. Carl Wayne Buntion, No. 588227 (178th Dist. Ct., Harris County, Tex. Mar. 6, 2012)

Direct appeals:

Carl Wayne Buntion v. State, No. 71,238 (Tex. Crim. App. May 31, 1995)

Carl Wayne Buntion v. State, 482 S.W.3d 58 (Tex. Crim. App. Jan. 27, 2016)

State habeas proceedings:

Ex parte Carl Wayne Buntion, No. 22,548-02 (Tex. Crim. App. Nov. 5, 2003)

Ex parte Carl Wayne Buntion, No. AP-76,236 (Tex. Crim. App. Sept. 30, 2009)

Ex parte Carl Wayne Buntion, No. WR-22,548-04 (Tex. Crim. App. June 7, 2017)

Federal habeas proceedings in district court:

Carl Wayne Buntion v. Douglas Dretke, No. 4:04-cv-01328 (S.D. Tex. Apr. 28, 2006)

Carl Wayne Buntion v. Lorie Davis, No. 4:17-cv-2683 (S.D. Tex. Mar. 5, 2020)

Federal habeas proceedings in court of appeals:

Carl Wayne Buntion v. Nathaniel Quarterman, 524 F.3d 664 (5th Cir. Apr. 11, 2008)

Carl Wayne Buntion v. Bobby Lumpkin, 982 F.3d 945 (5th Cir. Dec. 14, 2020)

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Introduction

Having recently turned seventy-seven-years old, Petitioner Carl Wayne Buntion is the oldest prisoner on Texas' death row. He has spent the past thirty years incarcerated under a sentence of death, the last twenty years of which he has been isolated in solitary confinement for twenty-three hours a day. For thirty years, he has faced the anxiety and uncertainty of a death sentence. After a delay of such magnitude, none of which is attributable to Mr. Buntion, no legitimate purpose purportedly served by the Eighth Amendment would be furthered by carrying out Buntion's execution.

Buntion was initially sentenced to death in 1991 for killing Houston Police Officer James Irby. Two years before Buntion's trial, however, this Court held that Texas' death penalty statute was unconstitutional insofar as it did not allow the sentencer to make the individualized assessment of the appropriateness of the death penalty that the Eighth Amendment requires. Specifically, the statute did not give jurors a means by which they could consider mitigating factors.

The immediate response of the Texas legislature to this Court's ruling was to do nothing. The State did not modify its death penalty statute and add a question expressly requiring jurors to consider mitigating factors, which this Court had indicated was constitutionally required. Hence, because of legislative inaction, trial court judges across the state were left to their own devices. Many of them attempted to fill in the legislative void by instructing jurors to edit their answer to another of the special issues—in other words, to defy their oaths by lying—if they believed, after considering the mitigating evidence, that a life sentence was appropriate. Yet that improvised solution (the so-called nullification instruction) was not constitutionally adequate. As this Court made clear ten years after Buntion's initial trial, in its opinion issued in *Penry v. Johnson* (*Penry* II), 532 U.S. 782 (2001), any belief by the state courts in Texas that the nullification instruction given at Buntion's trial had satisfied the Court's earlier mandate was objectively unreasonable.

Eight years after this Court issued its opinion in *Penry* II, the Texas Court of Criminal Appeals (CCA) ordered the trial court to give Buntion a new sentencing

trial, one in which the jury would have to give effect to any mitigating evidence presented at trial. The jurors, however, were not able to conduct the individual assessment about whether death was an appropriate sentence for Buntion that should have been done in 1991, because during the twenty years that had passed since Buntion's initial trial, important witnesses had died or become unavailable, and vital life history records had been destroyed. Because of these developments—all of which are directly attributable to the State of Texas's dilatory response to this Court's decision in *Penry I*—the case for mitigation presented to Buntion's 2012 jury fell woefully short of what could have been presented at trial in 1991, and Buntion was again sentenced to death.

It is now impossible to know whether Buntion would have been sentenced to death had Texas heeded this Court's 1989 mandate and amended its statute ahead of Buntion's 1991 trial, but it cannot be denied that the state's ignoring this Court's mandate played an impermissible role in Buntion's being sentenced to death. Had he been tried in a state that did not choose to ignore this Court's mandate and in a county that was not the death penalty capital of the country, Buntion might not have been sentenced to death. Buntion's case is just one example that illustrates that the death penalty is not applied with reasonable consistency because factors that should not play a role in its application, such as geography, often do.

Accordingly, Petitioner Carl Wayne Buntion respectfully requests this Court grant his Petition for a Writ of Certiorari and order briefing to address the questions presented in this Petition.

Opinions and Orders Below

The decision of the United States Court of Appeals for the Fifth Circuit was issued on December 14, 2020. The opinion is attached as Appendix A. The district court's order was issued on March 5, 2020. The order is attached as Appendix B.

Statement of Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "…nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Statement of the Case

A. 1991 trial and appeals

On June 28, 1990, Carl Wayne Buntion was indicted for intentionally and knowingly causing the death of Houston Police Officer James Irby on June 27. ROA.495; ROA.10870.[1] Pretrial publicity was extensive in the Houston area, and, as a result, Judge William Harmon granted Buntion's motion to change venue and

[1] Citations to the Record on Appeal in the court of appeals are cited in this Petition as ROA.[page number], pursuant to that court's rule.

ordered Buntion's trial be convened in Gillespie County. ROA.539; ROA.1808. Guilt phase proceedings commenced on January 14, 1991. ROA.10868. On January 17, 1991, the jury found Buntion guilty as charged in the indictment. ROA.481; ROA.11849.

The State began presenting its punishment case on January 21 and rested on January 22. ROA.11860; ROA.12014. Buntion's attorneys began putting on their punishment case on January 23 and rested on January 24. ROA.12396. At the conclusion of the punishment phase proceedings, the court charged the jury with answering two special issues, the answers to which would determine whether Buntion would be sentenced to death or life in prison. ROA.841. The first special issue was whether Buntion's conduct that caused the death of Officer Irby was "committed deliberately and with the reasonable expectation that the death of the deceased or another would result." ROA.845; *see also* Tex. Code Crim. Proc. art. 37.0711, § 3(b)(1). The second special issue asked the jury to determine whether there was "a probability that [Buntion] would commit criminal acts of violence that would constitute a continuing threat to society." ROA.847; *see also* Tex. Code Crim. Proc. art. 37.0711, § 3(b)(2).

More than a year before Buntion's trial—that is, more than a year before the trial judge charged the jury in Buntion's case—this Court had ruled, in another case from Texas, that neither of the special issues specified by Texas law required or even permitted the jury to consider mitigating evidence. *See Penry v. Lynaugh* (*Penry* I), 492 U.S. 302, 328 (1989). To that extent, the Texas death penalty statute

was unconstitutional. However, rather than instructing the jury in Buntion's case to answer a question related to mitigating evidence, the trial court simply told the jurors to consider mitigating evidence while deliberating on the two special issues and, if they found that a life sentence was appropriate, then they should answer one of the two special issues with a "no" regardless of what they otherwise believed the answer to the special issue should be. ROA.843-44. On January 24, 1991, the jury returned with "yes" answers to both of deliberateness special issue and the future dangerousness special issue, and Buntion was sentenced to death. ROA.846; ROA.848; ROA.12490-93.

The Texas Court of Criminal Appeals (CCA) affirmed Buntion's conviction and sentence on May 31, 1995. ROA.13263. Buntion filed his initial state application for a writ of habeas corpus with the convicting court on October 21, 1996. ROA.24917. The convicting court entered its findings and recommended relief be denied on September 29, 2003, and the CCA adopted those findings and denied relief on November 5, 2003. *Ex parte Buntion*, No. WR-22,548-02 (Tex. Crim. App. Nov. 5, 2003).

Buntion then sought federal review of his conviction and sentence, filing his amended petition for a writ of habeas corpus on December 30, 2004. *Buntion v. Dretke*, No. 4:04-cv-01328, ECF No. 23 (S.D. Tex. Dec. 30, 2004), ECF No. 23. Buntion's then-counsel raised thirty-eight claims for relief. The majority of these were concerned with whether Buntion's right to due process had been violated by the trial court's presumptive bias. With respect to these claims, the federal district

court found Buntion was entitled to relief. Mem. & Order, *Buntion v. Dretke*, No. 4:04-cv-01328 (S.D. Tex. Apr. 28, 2006), ECF No. 42. Following the government's appeal, the court of appeals vacated the portion of the district court's order granting Buntion relief. *Buntion v. Quarterman*, 524 F.3d 664, 671 (5th Cir. 2008).

B. Subsequent state habeas proceeding

After his initial federal habeas proceeding had concluded, Buntion returned to state court and raised a claim pursuant to this Court's opinion in *Penry* II. ROA.25209-29. The CCA granted relief on Buntion's *Penry* II claim, holding that the "nullification instruction given to [Buntion's] jury was not a sufficient vehicle to allow jurors to give meaningful effect to the mitigating evidence presented" at his 1991 trial; the CCA therefore remanded Buntion's case to the trial court for a new punishment hearing. ROA.13580; *see also* ROA.13574.

C. 2012 retrial and subsequent state court appeals

Punishment phase proceedings commenced on February 21, 2012. The mitigation case put on by trial counsel was remarkably thin—not necessarily because there was no mitigation case to be had, but because the passage of time had made it impossible to adequately investigate and present the mitigating evidence. During the twenty years that passed between Buntion's first and second trials (a period during which he was being held under an unconstitutional sentence), life history records were destroyed and crucial witnesses either died or became otherwise unavailable.

At the conclusion of the evidence, the trial court charged the jury. At this trial, the jury had to answer four special issues. The first question, which was also asked of his 1991 jury was whether Buntion had acted deliberately in killing Officer Irby. ROA.14905; *see also* Tex. Code Crim. Proc. art. 37.0711, § 2(b)(1). The second special issue the jury addressed was the so-called future dangerousness special issue, which asks the jury to determine whether the evidence had demonstrated "beyond a reasonable doubt there is a probability that [Buntion] would commit criminal acts of violence that would constitute a continuing threat to society." ROA.14906; *see also* Tex. Code Crim. Proc. art. 37.0711, § 2(b)(2). The third special issue asked the jury to determine whether Buntion's action was an unreasonable response to any provocation by Officer Irby. ROA.14907; *see also* Tex. Code Crim. Proc. art. 37.0711, § 2(b)(3). Finally, addressing the error which led to Buntion's being retried, the fourth special issue asked the jury whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." ROA.14908; *see also* Tex. Code Crim. Proc. art. 37.0711, § 2(e). On March 6, 2012, the jury returned answers to each of the four special issues, finding that Buntion had acted deliberately, would commit future acts of violence, had acted unreasonably in response to any provocation from Officer Irby, and that there were not sufficient mitigating circumstances to warrant sentencing Buntion to life in prison instead of the death. Accordingly, on March 6, 2012, Buntion was again sentenced to death. ROA.23355-56.

The CCA affirmed Buntion's sentence on direct appeal on January 27, 2016. ROA.24387. Buntion's sentence became final when this Court denied his petition for a writ of certiorari on June 27, 2016. *Buntion v. Texas*, 136 S. Ct. 2521 (2016).

Prior to the date on which the judgment sentencing Buntion to death became final, Buntion properly filed a state habeas application pursuant to Article 11.071 of the Texas Code of Criminal Procedure. ROA.25300. However, without first affording Buntion any opportunity to introduce evidence in support of his claims, the trial court entered its findings of fact and conclusions of law recommending relief be denied on December 28, 2016. ROA.25874. Based on the trial court's findings and conclusions and its own review, the CCA denied Buntion relief on June 7, 2017. ROA.25952.[2]

D. Federal habeas proceeding in the district court

The district court appointed undersigned Counsel to represent Buntion in his federal habeas proceeding on September 18, 2017. ROA.14. Counsel filed Buntion's federal habeas petition on June 7, 2018. The petition raised seven claims for relief, two of which are pertinent to this Petition.

First, Buntion's petition raised a claim arguing that because he had, at that time, been incarcerated on death row over a quarter of a century, the Eighth Amendment would not permit his execution. ROA.127-30. The district court noted that this Court has never held that the Eighth Amendment imposes a duty to

[2] The CCA did not adopt the trial court's findings of fact and conclusions of law. *See* ROA.25952.

execute a death sentence expeditiously." ROA.456. The court further found Buntion would be barred from obtaining relief by any new decision by the non-retroactivity principle. ROA.456.

Second, Buntion raised a due process claim that his death sentence is unconstitutional because his ability to investigate and present mitigation evidence was thwarted by the State. Specifically, because of the State's dilatory response to this Court's decision in *Penry*, by the time of Buntion's sentencing hearing in 2012, significant areas of mitigation investigation had been foreclosed. ROA.123. Life history records were destroyed and critical witnesses either died or became otherwise unavailable. ROA.123. As undersigned Counsel explained, Buntion had already spent twenty years on death row before he ever received a sentencing proceeding at which the jury was charged in accordance with this Court's mandate. In that time, Buntion had only limited contact with his family, friends, and the outside world. It was not possible for Buntion's trial counsel to investigate and present the same type of mitigation evidence that might have been available to them had Buntion received a constitutional sentencing proceeding sooner. *Id.* Buntion's federal habeas Counsel (i.e., undersigned Counsel) explained in habeas proceedings how Buntion's state habeas attorneys were prevented from developing factual support for the claim in the state court, and Counsel argued that the federal district court should grant Buntion an evidentiary hearing to develop evidence in support of the claim. ROA.125. The district court, referencing the CCA's holding that Buntion's claim should have been raised on direct appeal, found the claim to be

defaulted. ROA.455. In the alternative, the court held Buntion had failed to demonstrate "what mitigating themes were suppressed, which witnesses were unavailable or dead, or what evidence no longer remained viable." ROA.455-56. The district court's opinion did not address Buntion's argument that he was entitled to an evidentiary hearing to develop evidence; the district court faulted Buntion for not presenting evidence even though the reason he presented no evidence was that the state court denied him a hearing at which he could have done so.

The district court found Buntion was not entitled to a certificate of appealability for either claim.

E. Federal habeas proceeding in the court of appeals

Regarding his claim that the Eighth Amendment will not permit his execution because of the amount of time he has been incarcerated on death row, the court of appeals, as had the district court, noted that this Court has never held that the Eighth Amendment's protections are triggered by a delay in executing a defendant. *Buntion v. Lumpkin*, 982 F.3d 945, 952 (5th Cir. 2020). The court of appeals did not endorse the district court's view that granting relief on the basis of this claim would be barred by *Teague*'s non-retroactivity principle, but the court of appeals did deem the claim to be unexhausted (despite the fact the district court had not mentioned exhaustion in its order denying relief). *Id.*

The court of appeals found that Buntion's due process claim was defaulted. *Id.* In the alternative, the Court found the claim was without merit because this Court has never interpreted the Due Process Claim to apply to questions regarding

whether states can impose the death sentence in circumstances similar to Buntion's. *Id.*

Reasons for Granting the Writ

I. This Court should grant certiorari to address the question of whether the Constitution permits a State to carry out the execution of an inmate who has resided on death row for thirty years when the delay in carrying out the sentence cannot be attributed to the inmate and where neither of the two purposes this Court has deemed to be a legitimate purpose for the death penalty—i.e., retribution and deterrence—would be served by carrying out such an execution.

In his opinion dissenting from the denial of certiorari in *Lackey v. Texas*, 514 U.S. 1045 (1995), Justice Stevens observed that neither of the two acceptable purposes for the death penalty—i.e., retribution and deterrence—is served in the case of a defendant who has spent a significant period of time under a sentence of death. *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., dissenting from the denial of certiorari). Since *Lackey*, Justice Breyer has embraced Justice Stevens' argument. *See, e.g.*, *Barr v. Purkey*, 140 S. Ct. 2594 (2020) (Breyer, J., dissenting from the order vacating stay); *Jordan v. Mississippi*, 138 S. Ct. 2567 (2018) (Breyer, J., dissenting from the denial of certiorari); *Conner v. Sellers*, 136 S. Ct. 2440, 2441 (2016) (Breyer, J., dissenting from the denial of certiorari); *Valle v. Florida*, 132 S. Ct. 1 (2011) (Breyer, J., dissenting from the denial of certiorari); *Smith v. Arizona*, 552 U.S. 985 (2007) (Breyer, J., dissenting from the denial of certiorari).

As a defendant's time on death row lengthens, the justification for the imposition of the death penalty weakens, and the Eighth Amendment concerns accordingly grow. *See Lackey*, 514 U.S. at 1045 (suggesting that a 17-year delay in

execution would not have been acceptable to the Framers, nor would execution after such delay serve the societal purposes of retribution and deterrence); *see also Gregg v. Georgia*, 428 U.S. 153, 177, 182-83 (1976) (cautioning that any criminal sanction imposed "cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"); *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring) (noting that when the death penalty ceases to further the social purposes of retribution and deterrence, "its imposition would then be the pointless and needless extinction of life" and the death penalty "would be patently excessive and unusual punishment violative of the Eighth Amendment"). Further, execution after extraordinary delay is especially cruel when the cause of delay is a defendant's meritorious exercise of his constitutional rights. *See Ellege v. Florida*, 525 U.S. 944 (1988) (Breyer, J., dissenting from the denial of certiorari) (concluding that execution after imprisonment for 23 years under a sentence of death may be cruel in light of the fact that the delays were not because of defendant's frivolous appeals, but rather due in large part to his successful litigation).

The Eighth Amendment's prohibition on cruel and unusual punishments draws the constitutional line of acceptable punishments at "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). The death penalty cannot become "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently

excessive and cruel and unusual punishment violative of the Eighth Amendment." *Furman*, 408 U.S. at 312.

For thirty years, Buntion has faced the anxiety and uncertainty of a death sentence. The responsibility for this inordinate delay lies entirely at the feet of the State of Texas, which obstinately refused to immediately follow this Court's mandate in *Penry* and give Buntion a fair and constitutional sentencing proceeding. As this Court observed over a century ago, "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890). For twenty of the thirty years he has been on death row, Buntion has been kept in isolation for twenty-three hours a day. "[I]t is well documented that such prolonged solitary confinement produces numerous deleterious harms." *Glossip v. Gross*, 576 U.S. 863, 926 (2015) (Breyer, J., dissenting) (citing numerous sources).

This delay of three decades undermines the rationale for the death penalty. *Purkey*, 140 S. Ct. at 2595. As numerous studies have shown, there is insufficient evidence to establish the death penalty has any deterrent effect at all. *Glossip*, 576 U.S. at 930-31. Whatever deterrent effect there is diminished by delay. *Id.* Similarly, the delay of an "execution must play some role in any calculation that leads a community to insist on death as retribution." *Id.* at 933. While the family of Officer Irby might still want Buntion to be executed, his advanced age and model behavior while on death row, especially during the nine years since he was

resentenced to death, must be taken into account when considering whether the rationale of retribution would be served by Buntion's execution.

This Court should grant certiorari to determine whether the execution of a man who has been on death row for thirty years could possibly serve either of the acceptable rationales for the death penalty.

II. **This Court should grant certiorari to address whether the death penalty** the death penalty as applied in Texas is inherently arbitrary and therefore a violation of the Eighth Amendment's prohibition against the infliction of cruel and unusual punishments.

Nearly half a century ago, this Court briefly suspended the imposition of the death penalty throughout the United States. *See Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam). While each of the nine justices wrote his own opinion, Justice Stewart's is most closely associated with the idea that the Eighth Amendment forbids arbitrary punishments, yet the death penalty, in Stewart's view, was deeply arbitrary. *Id.* at 310 (Stewart, J., concurring) (observing that the death penalty was wantonly and freakishly imposed). Four years later, the Court validated the newly enacted capital punishment statutes of a few states—including those of Georgia, Florida, and Texas—all of which appeared to include safeguards against the arbitrary and capricious application of the death penalty. *Gregg*, 428 U.S. at 189 ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."). While capital juries would enjoy some discretion in reaching their determinations regarding sentencing under the

new statutes, the statutes aimed to cabin and channel this discretion—and thereby prevent arbitrariness—by identifying "clear and objective standards so as to produce non-discriminatory application." *Id.* at 198 (citation omitted). The statutes enacted following *Furman* aimed to achieve consistency and rationality by directing sentencing juries to focus on two overarching factors: the particularized nature of the defendant's crime, and the particularized individual characteristics of the defendant. *Id.* at 207; *see also Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death").

In 1976, this Court believed that Texas' newly enacted statute satisfied these core requirements that death sentences not be arbitrary, and that sentencing juries have the opportunity to take into consideration the individual characteristics of the defendant in determining whether death is the appropriate punishment. *Jurek v. Texas*, 428 U.S. 262, 274 (1976); *see also Penry* I, 492 U.S. at 303 (explaining the Court approved of the State's statute in *Jurek* only because of assurances the State had made "that the special issues would be interpreted broadly enough to permit the jury to consider all of the relevant mitigating evidence a defendant might present in imposing sentence"). But by the time Buntion was tried and sentenced to death, this Court had come to recognize that its endorsement of the Texas statute had been premature. In *Penry*, the Court reiterated: "For it is only when the jury is

given a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision, that we can be sure that the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence." *Penry* II, 532 U.S. at 797. And at the same time, the Court acknowledged the Texas statute under which Buntion had been sentenced to death did not provide this assurance.

If there is a single thread or principle that unites this Court's vast death penalty jurisprudence, from *Furman* to the present day, it is that the Eighth Amendment cannot tolerate arbitrariness in the imposition of death. And yet, as Justice Breyer recently observed, the manner in which the death penalty is currently applied appears to suffer from the same problem noted by the *Furman* Court: it "seems capricious, random, indeed, arbitrary." *Glossip*, 576 U.S. at 923 (2015) (Breyer, J., dissenting). While the egregiousness of the crime of which he was convicted should be the primary factor determining whether a defendant is sentenced to death, as Justice Breyer noted, egregiousness does not appear to actually play this role. *Id.* at 917 (citing John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. Empirical Legal Stud. 637 (2014)). A recent study, cited by Justice Breyer, found that out of 205 instances in which Connecticut law made the defendant eligible for a death sentence, that state's courts imposed a death sentence in twelve of them and only nine were sustained. Donohue, *supra*, at 641. Pursuant to the study's metrics, only one of the nine was a

defendant who should be considered to be among the "worst of the worst." *Glossip*, 576 U.S. at 917; Donohue, *supra*, at 678. The behavior of the eight others was no worse than the behavior of at least thirty-three other defendants who had not been sentenced to death. *Glossip*, 576 U.S. at 917, Donohue, *supra*, at 678-79.

At the same time that factors that should matter (e.g., the egregiousness of the crime) appear to play little or no role in determining who is sentenced to death, factors that should play no role at all (e.g., geography) appear to be decisive. *See Glossip*, 576 U.S. at 918. Specifically, the imposition of the death penalty depends heavily on the county and state in which a defendant is tried. *Id.* at 918-19 (citing Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.U.L. Rev. 227, 231-32) (2012)). Thus, since 1976, 1,114 defendants have been sentenced to death in Texas.[3] Harris County, the county in which Buntion was sentenced to death in 2012, accounts for 297 of these death sentences, or almost 27%. This geographic distribution remains relatively unchanged if one focuses only on the 294 defendants sentenced to death since 2000. Harris County alone accounts for 67 (almost 25%) defendants on Texas' death row sentenced since 2000.

Of course, as explained above, the county in which he was sentenced to death was not the only factor that played an impermissible role in Buntion's death sentence. Buntion was originally sentenced to death in the state of Texas in 1991. At that time, although this Court had already issued its opinion in *Penry I*, the

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[3] Tex. Dep't Crim. Justice, *Total Number of Offenders Sentenced to Death from Each County*, https://www.tdcj.texas.gov/death_row/dr_number_sentenced_death_county.html.

State of Texas was continuing not to follow it. Yet had Buntion been tried in the state courts of any other death penalty state, states that were adhering to this Court's judgments, his jurors would have had to have considered mitigation evidence. Buntion's trial attorneys would have had the opportunity to develop and present to the jury facts about Buntion's life—particularized factors—that would have warranted the jury in sentencing Buntion to life in prison instead of death.

But because Texas insisted on adhering to and administering an unconstitutional sentencing scheme, it effectively ran out the clock. It precluded Buntion's counsel from learning what the witnesses who died or whose memories faded between 1991 and 2012 would have testified to had they been called to testify in 1991. We cannot know what the records that were destroyed between 1991 and 2012 would have shown. And while we do not know precisely the extent of the role geography played in Buntion's being sentenced to death, we know it played some role, and any role is too much for the Eighth Amendment to bear..

The last half century has not eliminated arbitrariness in capital sentencing. It has merely replaced one form of arbitrariness with another. This Court should grant certiorari to address the question of whether death penalty runs afoul of the Eighth Amendment because it is inherently arbitrary.

Conclusion and Prayer for Relief

Petitioner requests this Court grant certiorari and schedule the case for briefing and oral argument.

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Respectfully submitted,

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