Nos. 20-8043

IN THE
Supreme Court of the United States

CARL WAYNE BUNTION,
Petitioner,

vs.

BOBBY LUMPKIN, Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

JOSH RENO
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

CARA HANNA
Assistant Attorney General
Criminal Appeals Division
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400
cara.hanna@oag.texas.gov

Counsel for Respondent

QUESTIONS PRESENTED

1. Where an inmate has spent several years on death row, does the Eighth Amendment prohibit his execution?

2. Is the death penalty arbitrarily imposed in Texas as applied due to geography and lack of emphasis on the egregiousness of the capital crime, in violation of the Eighth Amendment?

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

BRIEF IN OPPOSTION

Petitioner Carl Wayne Buntion murdered a Houston police officer in cold blood and has pursued his right to appeal and collateral review for thirty years, during which time he successfully obtained a resentencing hearing in 2012, approximately twenty years after he was sentenced to death in 1991.

Buntion claims that an inmate's right to be free from cruel and unusual punishment under the Eighth Amendment is violated when s/he is subjected to a lengthy stay on death row. He also asserts that, in violation of the Eighth Amendment, Texas arbitrarily applies the death penalty by failing to focus on the egregiousness of the crime; rather, Buntion alleges that the assessment of the death penalty is primarily based on geography, and that he would have been able to develop mitigating evidence that would have resulted in a sentence of life, had he been tried in another state.

But this petition is a poor vehicle to decide these issues because both are raised in a procedurally improper manner. The Fifth Circuit correctly found his first issue to be procedurally defaulted, and Buntion did not present his second issue to either the district court or to the court of appeals. And in each case, his arguments cannot be reconciled with this Court's precedent. The petition should be denied.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Facts of the Crime

The Fifth Circuit entered the following summary of the facts presented at Buntion's trial:

> Houston Police Officer James Irby made his final traffic stop on June 27, 1990. *Buntion v. Quarterman*, 524 F.3d 664, 666–67 (5th Cir. 2008). Buntion, the lone passenger, exited the vehicle while Officer Irby spoke to the driver. *Id.* at 667. Officer Irby motioned for Buntion to return to the car, but he refused. *Id.* Buntion continued toward Officer Irby until he was within five feet of him. *Id.* Then, without provocation, Buntion raised a long-barrel revolver with both hands and shot Officer Irby in the forehead. *Id.* Officer Irby fell to the pavement, and Buntion shot him in the back twice more. *Buntion v. State*, 482 S.W.3d 58, 66 (Tex. Crim. App. 2016). Officer Irby died almost instantly. *Buntion*, 524 F.3d at 667.
>
> Buntion then fled on foot. *Buntion*, 482 S.W.3d at 66. He attempted to steal a car by shooting at the driver through the windshield. *Id.* When that effort failed, he walked into a nearby warehouse and pointed his gun at an employee. *Id.* Then he trained his gun on the employee's supervisor and directed him to raise his hands, surrender his wallet, and get on the ground. *Id.* Then he tried to steal the supervisor's vehicle. *Id.* Finally, a responding officer arrested him. *Id.* at 67.

Buntion v. Lumpkin, 982 F.3d 945, 947 (5th Cir. 2020).

II. Punishment Evidence from Re-sentencing

A. The State's case for future dangerousness

At Buntion's resentencing hearing, the State presented thirty witnesses to testify to the facts of the crime, along with additional aggravating evidence

surrounding the commission of the offense. It also presented evidence regarding Buntion's lack of remorse, extensive criminal record, and threats of violence.

1. Buntion's lack of remorse

The State presented evidence of Buntion's conduct immediately after his arrest, which suggested a lack of remorse. Buntion refused to give the arresting officer his name or any other information and claimed that he was diabetic and paralyzed. While in the police station following his arrest, Buntion was uncooperative and appeared to be "mad at everybody." The State also presented evidence suggesting an ongoing lack of remorse. During a 2009 recorded interview with a television reporter, Buntion stated that his murdering Officer Irby was justified because the officer spread his legs and assumed a combat stance. Buntion also stated that if he were faced with the same situation today, he would do it again.

2. Buntion's extensive criminal record and violent threats

The State also presented evidence that Buntion had thirteen prior felony convictions, many of which involved assaulting other people. Most notably, Buntion was convicted in 1965 of "assault to murder" an Alabama peace officer. Further, Buntion murdered Officer Irby just over a month after he was

released to parole while serving a sentence for the offense of sexual assault of a child.

In addition, Buntion committed unadjudicated extraneous offenses and bad acts, both in and out of prison. During a previous term of imprisonment, a corrections officer found a twelve-inch knife under Buntion's mattress during a routine inspection. Approximately a week before the instant offense, Buntion showed an acquaintance a gun and told her that he always carried it because he would rather kill than go back to prison. While in jail awaiting trial for the instant offense, Buntion threatened other detainees who asked him why he was there. Buntion said that he would kill them "like [he] killed the cop" if they did not leave him alone.

The State presented additional evidence indicating that Buntion's character had not changed during his time in prison. In July 2011, Buntion stated in a letter to his brother, Bobby, that he was glad he would never be released from prison because he would "hate to think about what [he would] do to certain people that have screwed [him] around." In an August 2011 letter, Buntion advised Bobby that if the district attorney questioned Bobby about Bobby's criminal record, Bobby should just say that the district attorney "made [Bobby] what [he was]" by sending him to prison on his first offense instead of giving him probation. "If they create a 'monster,' they should not complain when it feeds (on society,) right? [sic] Right.".

B. Buntion's mitigation case and rebuttal of the State's case for future dangerousness

The defense presented a robust case to secure favorable answers to the special issues. Buntion's counsel called eight witnesses and read into evidence the prior testimony of three other witnesses. The witnesses testified to Buntion's troubled childhood, to his good behavior and religiosity in prison, and to the low likelihood of his violence while in prison.

1. Evidence of Buntion's troubled childhood

The defense first called Bobby Joe Buntion (Bobby), Buntion's younger brother. Bobby testified that Buntion's twin brother was killed by the police in 1971. He described his and Buntion's parents' background, stating that neither parent received much education and that their mother married their father when she was about fifteen years old. The family moved to Houston when Buntion was about eight years old and lived in a bad area of town. In Houston, their father worked as a mechanic and often required Bobby and Buntion to work for him. Bobby and Buntion were never encouraged to attend school, and Buntion left school after the sixth or seventh grade.

Bobby further testified their father was an alcoholic and a gambler, who abused their mother, them, and animals. Bobby described one such incident in which his father beat his mother with a beer bottle, knocking her teeth out. Bobby testified that the neighbors feared his father and therefore never tried

to intervene during this abuse. Bobby and Buntion tried to intervene on occasion. Bobby stated that he once stabbed his father and threatened to kill him if he continued to abuse his mother. But the abuse never stopped.

Bobby told the jury about specific instances in which he and Buntion suffered physical abuse at the hands of their father. Bobby testified that his father broke his arm in five places when he was nine years old and broke Buntion's wrist by hitting him with a baseball bat when Buntion was eleven or twelve. Bobby also told the jury that, at age fifteen, he witnessed his father murder a man over a dispute concerning a car repair bill, and that his father had sex with the family's pet dog and pet pig.

Regarding his own background, Bobby testified that he spent twenty to twenty-five years in prison with multiple criminal convictions before he was released in 2002. He admitted that he had killed two or three men but testified that he subsequently became religious. Bobby then told the jury that he did not consider Buntion to be a violent person.

2. Evidence of Buntion's character and good behavior in prison

S.O. Woods, former director and chairman of classifications at the Texas Department of Criminal Justice (TDCJ), summarized the prison records for the sixty-eight-year-old Buntion, who had been imprisoned for over thirty-seven years. Woods testified that, prior to going to death row for his 1991 capital

murder conviction, Buntion had been in general population, where he was loosely supervised and allowed some freedom to walk around to jobs, commissary, and other areas and activities within the prison. Woods testified that, aside from receiving a disciplinary infraction for possession of a weapon, Buntion had received only a few minor infractions while he was in general population. Woods testified that, after being convicted in 1991, Buntion was placed on death row in the Ellis Unit. Woods testified that during his time on death row, Buntion had only three minor disciplinary infractions: one for creating a disturbance by refusing to be strip searched; the second was for possession of contraband, namely two towels and four pairs of shorts; and the third was for engaging in a fight without a weapon. Woods testified that, while Buntion was on death row in the Ellis Unit, he volunteered and was qualified for a program called "work capable," in which he was allowed to go to a job assignment in the garment factory on a daily basis. Woods also testified that, for some of the time Buntion was on death row in the Ellis Unit, he would have shared a cell with another inmate.

Woods testified that Buntion was moved to the Polunsky Unit in 2000. While Buntion was in the Polunsky Unit, he received no disciplinary infractions. Woods reported that Buntion's reputation was that he was not really a high escape risk, was not assaultive to staff or other inmates, and was

generally not a problem. Woods noted that, since 1999, Buntion had not received any write ups on death row.

Woods testified that, if Buntion were to receive a life sentence, he would not be housed in general population because he had been confirmed by TDCJ's Security Threat Office to be a member of the Aryan Brotherhood of Texas, which would mean that he would be placed in administrative segregation. Woods testified that administrative segregation was almost identical to death row, and at Buntion's age, he would likely serve the rest of his life in administrative segregation. Woods testified that, although reneging his membership in the Aryan Brotherhood could allow Buntion to be removed from administrative segregation, it was unlikely.

Bobby Joe Blanton, TDCJ correctional officer, testified that he had almost daily contact with Buntion while he was housed in the Polunsky Unit. Blanton testified that Buntion was quiet, never gave anyone any trouble, was never mean or disrespectful, never cussed him out, never threatened, and had never been found with contraband by Blanton. Blanton testified that he had never found letters directing somebody to hurt anybody else or attempting to bribe a guard. Blanton testified that it was still possible to get in trouble on death row, as shown by Brian Davis, who had thrown feces on guards, threatened guards many times, had contraband in his cell, and Aryan Brotherhood related materials. Blanton testified that he had nothing bad to

say about Buntion, as he had never seen him act up or found anything inappropriate in his cell.

William Lee Griffin, TDCJ training sergeant, testified that he worked on death row from 2000 to 2005 and that, although he does not know Buntion personally and although the officers tended to know who the troublemakers were, he had no knowledge of any write-ups or disciplinaries for Buntion. Captain Virgil Miller, TDCJ captain and Disciplinary Hearing Officer (DHO), also testified that, during his five years on death row and one year as DHO, he had no personal knowledge of any allegations of rule violations against Buntion. Captain Miller testified that, although he knew Buntion's name, no one had ever told him to watch out for Buntion.

Defense counsel read into evidence the transcripts of the 1991 testimony of witnesses Helen Smith, Gary Stretcher, and Jerry Jordan. Helen Smith, former prison guard in the Hobby Unit, testified that she met Buntion because he was the baker in the food service department where she was working, and she never saw him do anything violent, he was always polite, and he never got out of line with her. Gary Stretcher, Dean of Continuing Education at McClennan Community College in Waco, testified that he counseled Buntion through an instructional program started in the Spring of 1990. Stretcher testified that Buntion approached him about becoming an optometrist, so Stretcher examined his educational record but determined that, although he

"had the grades to be considered," he would be ineligible to become licensed. Stretcher testified that Buntion enrolled in three college level courses and achieved a Grade Point Average of 3.65 and that Buntion was polite and seemed interested in his education. Jerry Jordan was one of Buntion's teachers in the McClennan Community College program and testified that Buntion regularly attended class, was very well prepared, seemed extremely interested in the subjects, and was never rude, belligerent, violent, or disruptive. Buntion received a B grade in his class.

3. Evidence of Buntion's religiosity in prison

The defense also presented two witnesses who testified as to Buntion's religious activities in prison. The first, Earl Hicks, testified that he regularly visited the Harris County Jail to minister to Buntion and other inmates. Hicks testified that Buntion said he was a "born again believer" and knew Jesus Christ as his Savior. Hicks testified that Buntion expressed interest in Hicks's life and that they would discuss issues in Buntion's life as well. Hicks testified that he and Buntion would pray together. Hicks considered Buntion to be a friend.

The final defense witness Zeke Young was the founder of Less Than the Least Ministries, a prison ministry that ministered to twenty-six prisons and broadcasted a radio show to thirty-five prisons. Young testified that Buntion reached out to him after hearing their radio show, and Young was first

introduced to death row through Buntion. Young visited Buntion a handful of times but exchanged correspondence with Buntion. Young described Buntion as one of the friendliest guys he had ever met and that he had never been anything but kind to Young. Young testified that Buntion seemed genuinely interested in the word of the Lord and had asked Young to be present at his execution.

4. Evidence suggesting future dangerousness unlikely

Finally, defense counsel called Dr. Mark Dr. Vigen, a psychologist with experience in the prison systems. Dr. Vigen testified that, although he had never interviewed or spoken with Buntion, there was a "unique quality" about Buntion's case—it was twenty-two years after the offense was committed, and he had spent twenty of those years on death row, so the jury had "a working test period" before them. Dr. Vigen testified that, in reviewing Buntion's records, he had multiple arrests and multiple convictions for acts done in the free world, but while Buntion had been in prison, "his disciplinary actions have been fairly sparse." Indeed, prior to death row, Buntion had only received disciplinary actions for smoking, interfering with count, failure to obey an order, using fake identification at the county jail, and possession of a weapon—all of which, except for the last, were fairly minor. Dr. Vigen noted that, although Buntion had possessed the weapon, there was no indication that he used it before confiscated.

Dr. Vigen then testified about studies he had participated in and conducted which addressed future dangerousness. Dr. Vigen testified that his studies showed that former death row inmates do not commit violations of the rules in any greater degree than other inmates who have been convicted of capital murder but received a life sentence. Dr. Vigen also testified to numerous factors that have an impact on future dangerousness. Dr. Vigen said that "the number one" factor is age. Dr. Vigen testified that age is inversely related to violent behaviors in that as men get older they are less likely to be engaged in disciplinary problems or acts of violence. A second factor related to future violence is gang activity, which was associated with increased assaultive conduct, although Dr. Vigen said that conflicting information existed about that correlation. Dr. Vigen testified that, third, education had a strong inverse relationship with assaultive prison misconduct. Fourth, Dr. Vigen testified that having a prior prison sentence was associated with increased risk of violence, especially if the prior sentence was for violent behavior. Finally, Dr. Vigen testified that the last two factors were psychological disturbances, which increase the probability of future violence, and the type of sentence being served, which showed mixed results.

Dr. Vigen then testified about how these factors applied to Buntion. He testified that "aging out" was the idea that most violent crime is perpetrated by people 18 to 26 years old, and it is unusual for an older person to commit a

violent crime, so as a person ages, the probability of them being violent lessens. Dr. Vigen testified that Buntion was 68 years old at the time of trial, and the studies had "borne out in that for the last 22 years no violent acts, no disciplinary write-ups for any violent acts." Regarding education, Dr. Vigen testified that Buntion was average range of intelligence, with an eighth or ninth grade education but also having taken some college-level courses. Dr. Vigen also agreed that the use of a gun in the commission of the offense is a better predictor of nonviolent behavior in the future.

Dr. Vigen testified that, based on his review of the records, the in-court testimony, his training, and the studies he has written and read, he had formed an opinion as to whether there was a probability that Buntion would constitute a continuing threat to society. Dr. Vigen concluded that "prison works for Carl Buntion" and "has been very effective at controlling Carl Buntion, such that he's not assaulted or hurt anybody else."

III. Procedural History

Buntion was convicted of capital murder in 1991. Buntion filed another state habeas application in 2009 after he failed to obtain relief on direct appeal and in state and federal habeas proceedings. *Ex parte Buntion*, No. AP-76,236, 2009 WL 3154909 (Tex. Crim. App. 2009) (per curiam). This time, the Texas Court of Criminal Appeals (CCA) granted the application. *Id.* The CCA found that the jury instructions at Buntion's trial provided an insufficient vehicle for

the jury to consider his mitigation evidence during the sentencing phase. *Id.* at *2 (citing *Penry v. Johnson*, 532 U.S. 782 (2001)). The CCA remanded the case for the trial court to conduct a new punishment hearing, *id.*, which the trial court held in February 2012. *See Ex parte Buntion*, No. WR-22,548-04, 2017 WL 2464716 (Tex. Crim. App. 2017) (per curiam).

Upon recommendation from the jury at Buntion's resentencing hearing, the trial court reimposed the death penalty. *Id.* The CCA affirmed Buntion's conviction and sentence on direct appeal. *Buntion v. State*, 482 S.W.3d 58 (Tex. Crim. App. 2016). While his appeal was pending, Buntion filed a state habeas application raising twelve claims. *Buntion*, 2017 WL 2464716 at *1. The CCA denied seven claims on the merits and dismissed five claims due to Buntion's failure to raise those claims on direct appeal. *Id.* at *1–2. Buntion then filed a federal habeas petition raising seven claims which were denied by the district court. *Buntion v. Davis*, No. 4:17-CV-2683 (S.D. Tex. Mar. 5, 2020). The district court further denied a certificate of appealability (COA). *Id.* The Fifth Circuit later denied Buntion's COA, as well. *Buntion*, 982 F.3d at 953.

REASONS TO DENY THE PETITION

I. Buntion Fails to Justify a Grant of Writ of Certiorari.

At the outset, Buntion fails to provide justification for granting a writ of certiorari. He does not allege a circuit split. He relies primarily upon dissenting opinions to support his issues, as well as statistics from Connecticut and Texas

in support of his second issue. But this Court's precedent provides clear answers to the questions he poses. Buntion does not demonstrate the type of conflict that warrants review, *see* Sup. Ct. R. 10(a)–(c), therefore this Court should deny Buntion's petition. Alternatively, Buntion's petition is not worthy of certiorari for the reasons discussed below.

II. Bunton's Petition Is Not Worthy of Certiorari Review because He Failed to Properly Present His Questions to the Highest State Court and the Lower Courts.

This case would be a poor vehicle to address the questions Buntion presents to this Court because (1) he failed to present Question One to the state court—that the death penalty violates the Eighth Amendment when an inmate has experienced a delay between sentencing and execution—and (2) he failed to present Question Two to the lower courts—that the death penalty is imposed arbitrarily due to geography and a lack of emphasis on the egregiousness of the crime.

A. The Fifth Circuit Properly Held that Question One Is Procedurally Defaulted.

Buntion did not present the CCA with the issue of whether the Eighth Amendment prohibits the execution of an inmate who has been held on death row for a lengthy duration of time. *See Buntion*, 982 F.3d at 952. His claim is therefore unexhausted and unreviewable in federal habeas. *Id.* (citing 28 U.S.C. § 2254(b); *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011)).

This Court has repeatedly held that "principles of comity and federalism" prevent petitioners from obtaining federal habeas relief based on arguments not presented in state court. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). In *Edwards*, for example, the Court held that a basis for "cause" to escape a procedural default and achieve de novo review in federal court must first be presented to state courts. *Id*. at 451–52. Thus, cause itself may be procedurally defaulted. *Id*.[1] And in *Sexton v. Beaudreaux*, the Court rejected a petitioner's attempt to satisfy § 2254(d)(1) and achieve de novo review with "arguments . . . never even made in his state habeas petition." *Beaudreaux*, 138 S. Ct. 2555, 2560 (2018) (per curiam). Namely, "the States' interest in correcting their own mistakes is respected in all federal habeas cases." *Edwards*, 529 U.S. at 453 (quoting *Coleman v. Thompson*, 501 U.S. 722, 732 (1991)).

In failing to raise in state court the issue that he presents in Question One, Buntion has deprived the highest court in Texas of the opportunity to address his complaint. *See Buntion*, 982 F.3d at 952 (Buntion's claim is "unexhausted and unreviewable"). Even now, Buntion makes no argument to save his claim from procedural default, effectively conceding default and the bar against review of his claim. Because of this default, the federal courts may

[1] The Court has recognized a narrow exception to this rule for certain ineffective-assistance-of-trial-counsel claims that were not raised at all in state habeas proceedings, which is not at issue here. *See Martinez v. Ryan*, 566 U.S. 1, 17 (2012).

not consider the complaint Buntion presents in Question One, and the Court should not grant certiorari.

B. The Court Should Not Grant Certiorari because Buntion Did Not Raise Question Two in the Courts Below.

In the courts below, Buntion asserted that the death penalty was imposed arbitrarily because the jury's assessment of future dangerousness is based on "unreliable speculation." *Buntion v. Davis*, No. 4:17-cv-02683, ECF No. 4 at 92–93; *see generally, id.* at 92–102. He did not raise a claim based on the arbitrariness of the death penalty as applied in Texas under the Eighth Amendment, and made no mention of geography purportedly affecting the imposition of the death penalty, or that there is a lack of emphasis placed on the "egregiousness of the crime." Pet. for Cert. at 18–19. His inadequate presentation of this claim in the lower courts precludes consideration of the claim on certiorari review. *Meyer v. Holley*, 537 U.S. 280, 292 (2003) ("But in the absence of consideration of that matter by the Court of Appeals, we shall not consider it."); *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212–13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). Given that this Court has stated its role is "a court of review, not of first view," Buntion's Question Two should not be considered. *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005).

III. The Court Should Deny Certiorari on Question One because The Fifth Circuit's Alternative Ruling Recognizes the Unbroken Line of Circuit and Court Precedent.

In the alternative to default, the Fifth Circuit stated that the claim presented in Question One "is undebatably meritless. We, like Justice Thomas, are 'unaware of any support in the American constitutional tradition or in th[e] [Supreme] Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.' " *Buntion*, 982 F.3d at 952–53 (citing *Knight v. Florida*, 528 U.S. 990, 120 S.Ct. 459 (1999) (mem.) (Thomas, J., concurring in the denial of certiorari)).

Here, Buntion has pursued appeals, state habeas relief, and federal habeas relief over the past thirty years. This is *not* to say that an inmate sentenced to death row should not seek relief related to his conviction or sentencing. But, in asserting that the State has delayed his execution, Buntion ignores that he actively contributed to the delay in his execution.

The Fifth Circuit also addressed Buntion's citation to dissenting opinions in support of his complaint that a lengthy delay between sentencing and execution is in violation of the Eighth Amendment: "Buntion's observation that '[r]easonable jurists[ ] such as Justices Breyer and Ginsburg' have signaled a willingness to entertain similar claims does not change that" the constitution and Court precedent do not stand for the proposition that a defendant can

"avail himself of the panoply of appellate and collateral procedures" and then complain of delay. *Buntion,* 982 F.3d at 953 (citing *Knight*, 120 S.Ct. at 459).

And Buntion does not allege a circuit split on the question of whether a delayed execution violates the Eighth Amendment, often called a "Lackey claim" based upon this Court's ruling in *Lackey v. Texas*, 514 U.S. 1045 (1995). There, the Court denied a petition for writ of certiorari that alleged a seventeen-year confinement on death row was a violation of Lackey's Eighth Amendment rights. And it appears that both state and federal courts have long agreed no such violation exists. *See Ruiz v. Davis*, 850 F.3d 225, 229 n.10 (5th Cir. 2017) (citing *Knight*, 120 S.Ct. at 461 (Thomas, J., concurring) ([recognizing state courts have rejected argument]); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995) ("We conclude that Appellant has failed to show that executing him after fifteen years on death row, during which time he faced at least seven execution dates, would constitute cruel and unusual punishment."); *Johns v. Bowersox*, 203 F.3d 538, 547 (8th Cir. 2000) (holding that, even if petitioner's Lackey claim were not barred, "[a]bsent evidence that the delay was caused intentionally to prolong the defendants time on death row, we [have] held that it [does] not even begin to approach a constitutional violation"); *Smith v. Mahoney*, 611 F.3d 978, 998 (9th Cir. 2010) (holding, in the context of AEDPA review, that "the Supreme Court has never held that execution after a long tenure on death row is cruel and unusual punishment")));

Thompson v. Sec'y for Dep't of Corr., 517 F.3d 1279, 1284 (11th Cir. 2008) ("Numerous other federal and state courts have rejected Lackey claims.") (citing, *e.g.*, *Allen v. Ornoski*, 435 F.3d 946, 959 (9th Cir. 2006) (citing cases); *Chambers v. Bowersox*, 157 F.3d 560, 568, 570 (8th Cir. 1998) (noting that death row delays do not constitute cruel and unusual punishment because delay results from the "desire of our courts, state and federal, to get it right, to explore . . . any argument that might save someone's life")); *Harris v. Reed*, 489 U.S. 255 (1989) (twenty-four years on death row); *ShisInday v. Quarterman*, 511 F.3d 514, 526 (5th Cir. 2007) (twenty-five years); *O'Dell v. Johnson*, 131 F.3d 452, 466 (5th Cir. 1997) (fourteen years); *Free v. Peters*, 50 F.3d 1362 (7th Cir. 1995) (twenty years); *Johns*, 203 F.3d at 547 (fifteen years); *Smith*, 611 F.3d at 998 (twenty-five years); *McKenzie v. Day*, 57 F.3d 1493, 1494 (9th Cir. 1995) (twenty years); *Richmond v. Lewis*, 948 F.2d 1473, 1492 (9th Cir. 1990) (sixteen years); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995) (fifteen years).

Given this long, unbroken line of precedent,[2] this Court should deny certiorari on Buntion's Question One.

---

[2] Buntion's claim is also barred by the nonretroactivity principles of *Teague v. Lane*, 489 U.S. 288, 310 (1989); *see also O'Dell v. Netherland*, 521 U.S. 151, 156 (1997). Here, the consequence of holding that a lengthy delay between sentencing and execution would result in the overturning or commutation of a defendant's death penalty sentence. Such a ruling would effectively ignore comity and respect for state courts. Buntion does not appear to debate *Teague*'s application to his claim, as he did not pursue here his argument that his claim is not *Teague*-barred. *Buntion*, No. 20-70004, Application for Certificate of Appealability with

IV. Buntion's Question Two Is Not Worthy of Review because It Is Procedurally Barred from Federal Review.

In the alternative to denying certiorari because Buntion's Question Two was not presented to the lower courts, the Court should deny certiorari because the CCA dismissed Buntion's claim on procedural grounds. More specifically, the highest state court for Texas found the claim to be barred because Buntion had failed to raise it on direct appeal. *Ex parte Buntion*, 2017 WL 2464716, at *1 (citing *Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004)). Buntion fails to excuse his default, and certiorari review is inappropriate, as shown below.

A federal court may not consider the merits of a habeas claim if a state court has denied relief due to a procedural default. *Sawyer*, 505 U.S. at 338; *Ellis v. Lynaugh*, 873 F.2d 830, 837–38 (5th Cir. 1989). The state court opinion must contain a "plain statement" that its decision rests on adequate and independent state grounds. *Reed*, 489 U.S. at 262; *Smith v. Collins*, 977 F. 2d 951, 955 (5th Cir. 1992). Only procedural rules that are firmly established and regularly followed by state courts can prevent habeas review of federal

---

Brief in Support, at 40–41; *see also Buntion*, No. 4:17-CV-2683, ECF No. 26 at 37 ("The Supreme Court has never held that the Eighth Amendment imposes a duty to execute a death sentence expeditiously. The non-retroactivity principle from *Teague* prevents this Court from creating that law.") (citing *Reed v. Quarterman*, 504 F.3d 465, 488 (5th Cir. 2007); *Lackey*, 83 F.3d at 117; *White v. Johnson*, 79 F.3d 432, 439-40 (5th Cir. 1996)). Admittedly, the Fifth Circuit did not address the district court's imposition of the *Teague*-bar, *see Buntion*, 982 F.3d 945, but Buntion could have addressed the issue notwithstanding Fifth Circuit's silence.

constitutional rights. *Hathorn v. Lovorn*, 457 U.S. 255, 262–63 (1982); *Smith v. Black*, 970 F.2d 1383, 1386 (5th Cir. 1992).

The CCA has held that record-based claims not raised on direct appeal will not be considered in habeas proceedings (in Texas, this is known as a *Gardner* bar). *Nelson*, 137 S.W.3d at 557 & n.5 (citing *Ex parte Gardner*, 959 S.W.2d 189, 191 (Tex. Crim. App. 1996, clarified on reh'g Feb. 4, 1998)). The Fifth Circuit recognizes that the *Gardner* bar sets forth an adequate state ground capable of barring federal habeas review. *See Wainwright v. Sykes*, 433 U.S. 72, 87–88 (1977); *Duncan v. Cain*, 278 F.3d 537, 541 (5th Cir. 2002).

Here, the CCA held that it would "not review the merits of these habeas claims[, including Buntion's Eighth Amendment claim,] because [Buntion] failed to raise them on direct appeal." *Ex parte Buntion*, 2017 WL 2464716 at *1. Because the dismissal of Buntion's claim was based upon an adequate and independent state procedural rule, his claim is procedurally barred unless he can demonstrate cause and prejudice or a miscarriage of justice. *Coleman*, 501 U.S. at 750. But Buntion has failed to allege or show cause and prejudice, or that he has suffered a miscarriage of justice.

Because Buntion procedurally defaulted his claim as presented in Question Two, and he fails to establish he can overcome the bar against federal habeas review of that claim, Question Two is not worthy of review by the Court.

V. Alternatively, Buntion's Question Two Is without Merit.

Alternatively, the claim presented in Buntion's Question Two is without merit. Buntion appears to suggest that it is constitutionally intolerable that some death-eligible defendants are subjected to the possible imposition of capital punishment, while others are not. But the Court has rejected the argument that the Eighth Amendment limits prosecutorial discretion regarding whether the seek the death penalty. *See McCleskey v. Kemp*, 481 U.S. 279, 306–07 (1987). Further, the Court has never held that geographical differences in the imposition of the death penalty violates the Constitution. *See Williams v. Illinois*, 399 U.S. 235, 240 (1970) ("The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences."); *see also Allen v. Stephens*, 805 F.3d 617, 629 (5th Cir. 2015) ("[N]o Supreme Court case has held that the Constitution prohibits geographically disparate application of the death penalty due to varying resources across jurisdictions."), *abrogated on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080 (2018).

As to Buntion's suggestion that there is a lack of emphasis placed on the egregiousness of the crime in the juror's recommendation to assess the death penalty, the sole support upon which Buntion rests his claim is a Connecticut study of the imposition of the death penalty—not Texas. He thus fails to

provide any support for his claim that Texas's sentencing scheme related to consideration of the egregiousness of a crime, as applied, violates the Eighth Amendment.

Furthermore, Buntion fails to demonstrate that the jury at re-sentencing in 2012 failed to consider or appropriately weigh the egregiousness of his crime. Again, Buntion was a passenger in a vehicle that Officer Irby stopped for a traffic violation. He chose not to follow Officer Irby's directive to stay in the car. He chose to grab and hold a gun and shoot Officer Irby in the forehead. He chose to shoot Officer Irby twice more after Officer Irby had fallen to the ground. Buntion's actions show his unabated contempt for lawful authority—evident not only in murdering Officer Irby, but also in his 1965 conviction of "assault to murder" a peace officer. These heinous acts show his utter disregard for that authority, and the span of time between his 1965 conviction for extreme violence towards a police officer and the murder of Officer Irby in 1990 show his inability to—or deliberate decision not to—reform. All of this was presented to the jury at Buntion's re-sentencing hearing.

Because there is no merit to Buntion's Question Two, the Court should not expend its resources in reviewing it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Ken Paxton
Attorney General of Texas

Brent Webster
First Assistant Attorney General

Josh Reno
Deputy Attorney General
for Criminal Justice

Edward L. Marshall
Chief, Criminal Appeals Division

s/ Cara Hanna
CARA HANNA
Assistant Attorney General
Criminal Appeals Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1800
Fax: (512) 320-8132
e-mail: cara.hanna@oag.texas.gov

Counsel for Respondent