No. 20-8043

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

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

THIS IS A CAPITAL CASE

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Introduction

Petitioner Carl Wayne Buntion filed his Petition for a Writ of Certiorari ("Petition") on May 12, 2021. Respondent filed his Brief in Opposition to Buntion's Petition ("BIO") on July 16, 2021. Buntion now files this reply to Respondent's Brief in Opposition.[1]

[1] In this Reply, Petitioner addresses only those assertions made by Respondent he deems merit a response.

I. The delay in Buntion's case was caused by the State of Texas's decision to ignore this Court's mandate.

Respondent argues that this Court should not grant certiorari to address the question Buntion presented in his Petition related his having been on death row for thirty years because Respondent believes "Buntion actively contributed to the delay in his execution." BIO at 18. Buntion, of course, did not choose for it to take the State twenty years to give him a proceeding at which his jurors were given a vehicle by which it would have been possible to consider mitigating evidence. On the contrary, as the record reveals, Buntion actively argued for a fair sentencing trial—one which did not run afoul of this Court's opinion in *Penry I*—at every possible opportunity.

Buntion asked for such an instruction at multiple points during his 1991 trial, beginning during the jury selection phase. *See, e.g.*, ROA.7482-83.[2] The State consistently argued a special issue focusing on mitigating evidence was not necessary and should not be presented to the jury. ROA.7483. The trial court refused every one of Buntion's requests for an instruction that would have given effect to this Court's opinion in *Penry I*. *See, e.g.*, *id.*

On direct appeal, Buntion argued that the special issues his jurors answered during his 1991 trial were not sufficient because they failed to allow the jurors to consider mitigating evidence. The State replied that Buntion's claim was "utterly

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

groundless because the trial judge did give the jury a special instruction . . . concerning mitigating circumstances . . .." ROA.13471. (Of course, the instruction the trial judge gave was the nullification instruction this Court subsequently found to be inadequate.) In affirming Buntion's conviction and sentence, the Texas Court of Criminal Appeals ("CCA") denied relief because it believed the trial court's nullification instruction "allowed [the jury] to give effect to any constitutionally mitigating evidence." *Buntion v. State*, No. 71,238, 1995 Tex. Crim. App. Unpub. 2, at *60 (Tex. Crim. App. May 31, 1995).

Buntion continued pressing his claim in state habeas. The forty-seventh claim raised in his 1997 state habeas application was that Article 37.071 of the Texas Code of Criminal Procedure (which contains the special issues presented to capital juries) was unconstitutional as it was applied to Buntion because it failed to allow the jurors to consider mitigating evidence. The twenty-ninth claim raised in Buntion's 2004 amended federal habeas petition similarly addressed the fact that his jury was not given a vehicle by which to consider mitigating evidence.

Beginning in the jury selection phase of his 1991 trial, Buntion raised the issue that the instruction the jurors at that trial were given was not sufficient to satisfy this Court's opinion in *Penry I* in every proceeding. Far from actively contributing to the delay, as Respondent suggests, Buntion actively sought the relief he was finally given in 2009 at every possible opportunity.

Ten years after Buntion's 1991 trial, this Court held that the nullification instruction given to the jurors at Buntion's trial did not properly implement the

holding of *Penry*. *Penry v. Johnson (Penry II)*, 532 U.S. 782, 803-04 (2001). Accordingly, Buntion subsequently sought state habeas relief pursuant to *Penry II*. *Ex parte Buntion*, No. AP-76,236, 2009 WL 3154909, at *1 (Tex. Crim. App. Sept. 30, 2009). Finally, in 2009, the CCA found that the nullification instruction given to Buntion's jury did not permit jurors to properly consider mitigating evidence and accordingly ordered that a new punishment hearing be held. *Id.* at *2. The new punishment hearing commenced on February 21, 2012. ROA.35.

As the foregoing summary of the procedural history clearly demonstrates, Buntion did nothing whatsoever to cause this delay. On the contrary, had the State acceded to Buntion's request for a constitutional jury instruction at any point, the delay would not have occurred. The responsibility for this constitutional violation rests entirely with the State.

II. The issue addressed in Buntion's first Question Presented—i.e., whether the Eighth Amendment would permit his execution after he has been incarcerated on death row for thirty years—is not barred by the nonretroactivity doctrine.

Respondent asserts that any opinion from this Court finding that the Eighth Amendment will not permit the execution of someone who has been incarcerated on death row for thirty years could not benefit Buntion because of the nonretroactivity doctrine explained in this Court's opinion issued in *Teague v. Lane*, 489 U.S. 288 (1989). BIO at 20-21 n.2.[3] However, the new rule Buntion seeks would proscribe the

[3] It is, at best, disingenuous for Respondent to argue that "Buntion does not appear to debate *Teague*'s application to his claim . . .." BIO at 20 n.2. Because the district court found that relief would be barred by *Teague*, on pages forty and forty-one of Buntion's Application for a Certificate of Appealability, filed on May 18, 2020

execution of individuals who have been held on death row for an excessive length of time. Notwithstanding this Court's recent modification of its *Teague* exceptions (see *Edwards v. Vannoy*, 593 U.S. ___, No. 19-5807 (May 17, 2021)), a critical exception to the nonretroactivity principle remains intact: *Teague* requires that courts retroactively apply new rules to final convictions if the new rule—like the one Buntion now seeks—prohibits a certain punishment for a class of defendants because of their status. *Teague*, 489 U.S. at 307.

III. Both the state and federal courts addressed the constitutionality of Buntion's sentence in light of the fact that mitigating evidence was lost or destroyed during the delay caused by the State.

Respondent argues that the issue addressed in the second question presented in Buntion's Petition was not raised in the court below. BIO at 17. The second question presented in Buntion's Petition pertains to the fact that he was not able to develop mitigating evidence ahead of his 2012 trial because that evidence was lost or destroyed during the twenty years between his initial trial and the second trial. Buntion raised this claim was denied relief on it in both the state and federal courts. He was denied relief because he was unable to demonstrate what evidence he would have put on had it not been destroyed during the period between his two

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in the court of appeals, Counsel argued relief would not be barred by *Teague*. The court of appeals, however, does not appear to have agreed with the district court on this point, having denied Buntion a certificate of appealability on a different ground. Only because the opinion below did not find relief to be barred by *Teague*, did Counsel find it unnecessary to address the applicability of *Teague* in Buntion's Petition.

trials.[4] Of course, the attorneys who represented Buntion at his 2012 trial and subsequent habeas proceedings cannot know what evidence was destroyed because the evidence has been destroyed. In effect, the State's delay in giving Buntion a trial in which the jury should have been able to give weight to mitigating evidence caused the second proceeding to be ineffective at protecting Buntion's rights because, by the time the State got around to giving him a trial not infected by the error this Court addressed in its *Penry* decisions, the mitigating evidence that should have been presented to the jury no longer existed.

The question presented in this Petition pertains to this same issue. The scenario would have only played out the way it did in no other state besides Texas. Of all the states that authorized capital punishment, only Texas ignored this Court's requirement that jurors be permitted to give effect to mitigating evidence; and even after this Court specifically rebuked Texas in its decision in *Penry I*, the state continued its recalcitrance and continued to permit juries to sentence defendants to death without giving effect to mitigating evidence. Had Buntion been tried in any other state, his trial would not have been infected with this error. As such, geography—specifically, that he was tried in Texas—played an impermissible role in Buntion's being sentenced to death.

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[4] While the state habeas court found the claim should have been presented on direct appeal, there can be no doubt that the claim would have been found to be cognizable in habeas had state habeas counsel been able to demonstrate what mitigating evidence had been lost during the delay because this evidence would have been developed after trial and, for that reason, would not have been contained in the record on appeal.

Conclusion and Prayer for Relief

For the foregoing reasons, Petitioner requests that this Court grant certiorari.

DATE: August 3, 2021

Respectfully submitted,

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