No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MATTHEW JOHNSON,
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

1. Does 28 U.S.C. § 2244(d), which provides in part that a "1-year period of limitations *shall apply*" to applications filed pursuant to 28 U.S.C. § 2254, require that a federal district court allow the applicant the full period provided for by statute, notwithstanding the court's inherent power to control its docket?

2. Does the Equal Protection Clause require a district court to treat indigent prisoners who seek habeas relief pursuant to 28 U.S.C. § 2254 similarly to non-indigent prisoners by allowing both classes of applicants the one-year period provided for by 28 U.S.C. § 2244(d)?

3. Does the special issue asked of the sentencing jury in a capital case in Texas violate a defendant's right to due process and to a fair trial because the jury is punishing the defendant for future conduct, rather than past conduct, and because the predictions about future conduct are inherently unreliable and wrong far more often than they are right?

4. Does the Texas death penalty punishment scheme run afoul of *In re Winship* and its progeny by placing the burden of proof on a capital murder defendant to persuade the jury that he should not be sentenced to death because mitigating factors outweigh the single aggravating factor (i.e., future dangerousness) established by the state?

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

Trial:

State v. Johnson, No. F12-23749-W (363rd Dist. Ct., Dallas, County, Tex. Nov. 8, 2013).

Direct appeal:

Johnson v. State, No. AP-77,030, 2015 WL 7354609 (Tex. Crim. App. Nov. 18, 2015).

State habeas proceeding:

Ex parte Johnson, No. WR-86,571-01 (Tex. Crim. App. Sept. 11, 2019).

Federal habeas proceeding in district court:

Johnson v. Lumpkin, 593 F. Supp. 3d 468 (N.D. Tex. 2022).

Federal habeas proceeding in court of appeals:

Johnson v. Lumpkin, 74 F.4th 334 (5th Cir. 2023).

Johnson v. Lumpkin, 76 F.4th 1037 (5th Cir. 2023).

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Introduction

Petitioner-Appellant Matthew Johnson is indigent. Because of that fact, he could not hire counsel to represent him in federal habeas proceedings. Instead, he had to involve the federal district court and seek appointment of counsel before filing his habeas petition. Following Johnson's request that he be appointed counsel, the federal district court, in the same order it issued appointing undersigned Counsel to represent Johnson, also ordered Counsel to file Johnson's petition six months after the issuance of the order appointing them. At the time, Johnson was entitled by federal law ten-and-one-half months to file his habeas petition. Consequently, the same order that provided Johnson with counsel also order

counsel to file Johnson's habeas petition four-and-a-half months before the applicable federal statute mandated that his petition be filed. Such an order would obviously truncate the amount of time counsel had to investigate fully and prepare the federal petition – and such an order would not have been issued had Johnson been able to afford to hire private counsel.

Only after undersigned Counsel filed two separate motions requesting extensions did the district court finally agree to allow Johnson the entire time afforded him by 28 U.S.C. § 2244 to prepare and file his habeas petition. Believing an objective observer, knowing these circumstances, would question the district court's impartiality, Counsel filed a motion asking the district court to recuse. Nevertheless, the district court denied Johnson's recusal motion and subsequently denied Johnson relief on his federal habeas petition.

Two of the five claims for relief raised in the habeas petition filed in the district court are relevant to this Petition. Specifically, the second claim in that petition alleged that Johnson's death sentence is arbitrary, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, because the punishment is based on the jury's answer to the unconstitutionally vague and unreliable future dangerousness special issue. Because every person has a non-zero chance of being violent in the future, the question asked of Texas juries—the only aggravating factor under Texas law—fails to narrow the class of death-eligible defendants. Moreover, recent studies conclusively prove that it is virtually impossible to predict future dangerousness with any degree of scientific accuracy.

This documented unreliability infects Johnson's case, for notwithstanding the jury's prediction, Johnson has not proved dangerousness, and has committed no violent acts while in prison.

Oddly, the district court suggested that the "future dangerousness special issue plays no role" in determining whether a Texas defendant is eligible for a death sentence. Of course, as this Court is well-aware, the future dangerousness instruction plays a determinative role. Nevertheless, the district court denied Johnson relief on the claim, believing Johnson was seeking an extension to this Court's opinion issued in *Johnson v. Mississippi*, 486 U.S. 578 (1988), which the court found to be barred by the nonretroactivity doctrine.

The third claim in Johnson's petition alleged that his death sentence runs afoul of the provisions of the Fifth, Sixth, Eighth, and Fourteenth Amendments because the State was not required to prove the absence of mitigating circumstances sufficient to warrant sentencing Johnson to life in prison, instead of to death. Instead, the relevant state statute effectively shifted the burden on mitigation such that Johnson had to prove he should *not* be sentenced to death. This burden-shifting approach conflicts directly with the well-founded constitutional requirement that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999).

The basis for the district court's denial of relief on this claim is not entirely

perspicuous, but its rationale appears to have been that the jury's answer to the mitigation special issue is not capable of subjecting a defendant to a greater punishment than he otherwise would be. Insofar as that question is the difference between life and death, the district court's intimation that the answer to that question cannot result in a more severe punishment is peculiar.

On appeal, the Fifth Circuit affirmed the district court's decision denying the recusal motion, holding first that a district court's inherent authority to control its docket allows it to shorten the habeas filing timeline mandated by § 2244 and second that a district court's case-management order is not a ground for disqualification.

When enacting 28 U.S.C. § 2244, Congress used mandatory language, stating that this one-year period "*shall apply* to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1) (emphasis added). As this Court has recognized, the enactment of a statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a hard and fast rule rather than a case-specific judicial determination. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 334-35 (2017). This Court has also held that the exercise of a district court's inherent power is subject to limits. *Dietz v. Bouldin*, 579 U.S. 40, 45-46 (2016). To be sure, after repeatedly insisting he was entitled to the full year provided for by the statute's mandatory language, Johnson received it, but the point for purposes of this Petition—and for purposes of the

recusal motion in the courts below—is that the district court's efforts to coerce Johnson's counsel into filing the Petition sooner than federal law requires manifested an animus toward Johnson in particular, and toward indigent petitioners more generally.

Further, the district court would not have been able to attempt to exert this coercive power on a lawyer representing a non-indigent petitioner, and there can be no doubt but that the constitutional guarantees of due process and equal protection require that indigent petitioners be treated the same as non-indigent petitioners. In particular, had Johnson's indigence not required him to request appointed counsel, the district court in this case would have had no opportunity to set an earlier filing date for his habeas petition than the one-year deadline afforded him by afforded him by 28 U.S.C. § 2244. By effectively holding that a district court's inherent power to control its docket permits the court to ignore mandatory statutory language, the Fifth Circuit has prepared the groundwork for a rule that treats indigent prisoners different from non-indigent prisoners by enabling district courts to attempt to coerce counsel representing indigent inmates into using less than the full year to which they are statutorily entitled.

Regarding the future dangerousness claim raised in Johnson's petition, the Court of Appeals denied Johnson's application for a certificate of appealability, finding that relief on the claim was precluded by its decision issued in *Buntion v. Lumpkin*, 982 F.3d 945 (5th Cir. 2020). Regarding Johnson's claim involving the mitigation special issue, the Court of Appeals denied Johnson a certificate of

appealability, finding that no opinion issued by this Court mandates that any specific burden of proof be assigned to the mitigation special issue.

Opinions and Orders Below

The decision of the United States Court of Appeals for the Fifth Circuit was issued on July 18, 2023. This opinion, which denied Johnson's application for certificate of appealability and affirmed the district court's denial of the motion to recuse, is attached as Appendix A and published as *Johnson v. Lumpkin*, 74 F.4th 334, 337 (5th Cir. 2023). The court below denied Johnson's petition for rehearing *en banc* on August 11, 2023, and this opinion is attached as Appendix B and published as *Johnson v. Lumpkin*, 76 F.4th 1037 (5th Cir. 2023). The district court entered its order on March 23, 2022, denying Johnson's recusal motion, denying Johnson's relief on the claims raised in his petition, and denying a certificate of appealability. ROA.734. This order is attached as Appendix C and published as *Johnson v. Lumpkin*, 593 F. Supp. 3d 468, 477 (N.D. Tex. 2022).

Statement of Jurisdiction

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

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part: "nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

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.

28 U.S.C. § 2254: Appendix D

28 U.S.C. § 2244: Appendix E

Statement of the Case

Matthew Johnson was convicted of capital murder in October 2013. ROA.2588; ROA.2594-95; ROA.2602; ROA.10260.[1] On November 8, 2013, at the conclusion of the punishment phase, the jury returned with a verdict, unanimously answering "yes" to the first special issue (i.e., the future dangerousness issue)[2] and

[1] Cites to the Record in the court below appear herein as ROA.[page number], consistent with that court's rule 28.2.2.

[2] This special issue asks the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071 § 2(b)(1); *see also* ROA.11350.

"no" to the second special issue (i.e., the mitigation special issue).[3] ROA.832-33; ROA.11350-53. By operation of law, Johnson was sentenced to death. ROA.11353-54; *see also* Tex. Code. Crim. Proc. art. 37.071 § 2(g).

The Texas Court of Criminal Appeals (CCA) affirmed his conviction and sentence on November 18, 2015. ROA.1529. This Court denied Johnson's petition for a writ of certiorari on June 27, 2016, which is the date his conviction became final. ROA.1535.

Before his conviction became final, Johnson properly filed an application for state habeas corpus relief on May 28, 2015, while his direct appeal was pending. ROA.12404-926. On September 11, 2019, the CCA denied Johnson relief in his state habeas proceeding. ROA.17933-39; *see also Ex parte Johnson*, No. WR-86,571-01, 2019 WL 4317046, at *3 (Tex. Crim. App. Sept. 11, 2019). Because on June 27, 2016, Johnson's properly filed state habeas application was pending, the one-year statute of limitations provided by federal law for filing his federal habeas petition did not begin to run at that time; instead, the statute began to run on September 11, 2019, when the CCA denied Johnson relief in his state habeas proceeding. *See* 28 U.S.C. § 2244(d)(1)(A), (2).

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[3] This special issue, which the jury answers only if it unanimously answers the first special issue in the affirmative, asks the jury to determine "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence should be imposed." Tex. Code Crim. Proc. art. 37.071 § 2(e)(1); *see also* ROA.11352.

Through state habeas counsel, on September 27, Johnson promptly filed a motion in the district court requesting the appointment of federal habeas counsel. ROA.10. The district court took no immediate action. ROA.10. In fact, the court did not appoint Counsel to represent Johnson until October 23, 2019—almost four weeks after he filed a motion requesting the appointment of counsel and over a month after he had been denied relief in the state court. ROA.25-26. On October 23, 2019, the district court appointed undersigned Counsel to represent Johnson. ROA.25-26.

In the same order in which the district court appointed the undersigned to represent Johnson, and in contravention of federal statutory law, the court ordered Johnson to file his petition for a writ of habeas corpus on or before May 1, 2020. ROA.28. This deadline, coming only six months after the Court appointed Counsel to represent Johnson, was four-and-a-half months earlier than the applicable deadline established by 28 U.S.C. § 2244.

Both because of the constraints caused by the COVID-19 pandemic and their belief that requiring Johnson to file his petition before the final day of the limitations period would violate his rights to equal protection and due process, on April 6, 2020, Counsel filed a motion that asked the court to order that Johnson's habeas petition be filed on September 11, 2020—the date established by federal law. ROA.51-63.

Nevertheless, the district court again refused to give Johnson the entire one-year period to which he was entitled by federal statute and, on April 23, 2020,

ordered Johnson to file his petition on or before July 1, 2020. ROA.68. On June 11, 2020, Counsel filed yet another motion requesting Johnson be afforded the entire year which Congress intended him to have to prepare and file his habeas petition. ROA.69. Finally, on June 17, 2020, the district court agreed Johnson could take the entire time afforded him by section 2244 to prepare and file his habeas petition. ROA.86. Johnson timely filed his Petition on September 11, 2020. ROA.90.

Counsel raised five claims for relief in Johnson's habeas petition. Relevant to this Petition, the second claim for relief raised in Johnson's federal habeas petition was that his death sentence is arbitrary, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, because the punishment is based on the jury's answer to the unconstitutionally vague and unreliable future dangerousness special issue. ROA.165-77. The third claim for relief alleged that Johnson's death sentence runs afoul of the Fifth, Sixth, Eighth, and Fourteenth Amendments because the State was not required to prove the absence of mitigating circumstances sufficient to warrant sentencing Johnson to life in prison, instead of to death. ROA.177-80. Instead, the relevant state statute effectively shifted the burden on mitigation such that Johnson had to prove he should *not* be sentenced to death.

On February 8, 2022, believing the impartiality of the district court judge might reasonably be questioned, Counsel filed an Amended Unopposed Motion to Recuse the United States District Court Judge. ROA.709. As the unopposed motion

argued,[4] Counsel believed the district court's refusal to afford Johnson the full one-year period provided by Congress suggested that the district court harbored animus toward Johnson before ruling on the merits of the claims raised in his petition and before Johnson had even filed his petition. ROA.721-24. In addition, the district court threatened to sanction Johnson's counsel for raising an argument the district court believed to be without merit, notwithstanding that Johnson was required to raise the claim in both the district court and court of appeals in order to be able to press that claim in this Petition (which he is doing). ROA.658-60. Johnson argued that the district court's threat to sanction counsel for taking steps necessary to preserve what they believe to be a meritorious claim further reflected bias and hostility toward Johnson or his counsel, and thereby further required recusal. ROA.699-706.

On March 23, 2022, the district court entered its order denying the recusal motion, denying Johnson relief on the claims raised in his petition, and denying a certificate of appealability. ROA.734. In its order, the district court indicated it believes that a "federal habeas petitioner possesses no right to wait until the very last day of the applicable one-year statute of limitations before filing his initial federal habeas petition." ROA.735. Perplexingly, notwithstanding the plain language of the congressionally enacted statute, the district court indicated it believes that giving habeas petitioners the full year to develop their claims "would

[4] Notably, the Attorney General's Office (which represents Respondent in this proceeding) did not oppose Petitioner's recusal motion. ROA.733.

be inconsistent with the congressional intent underlying" the passage of AEDPA. *Id*.

With respect to Johnson's claim alleging his death sentence is unconstitutional because it is grounded in a finding that he would be dangerous in the future, a finding which is inherently unreliable and has proved false, the district court found that the "future dangerousness special issue plays no role" in determining whether a Texas defendant is eligible for a death sentence. ROA.764. Because the district court believed the future dangerousness special issue plays no role in determining eligibility, it found this Court's decision in *Johnson v. Mississippi*, 486 U.S. 578 (1988), which requires that factual determinations that make a capital murder defendant eligible for death be reliable, does not apply to the Texas death penalty scheme. ROA.762-65. Believing Petitioner was therefore seeking an extension of this Court's opinion in *Johnson v. Mississippi*, the district court found Johnson's claim to be, in part, foreclosed by the nonretroactivity doctrine. ROA.756-70.

With respect to Johnson's claim his death sentence is unconstitutional because Texas law impermissibly places the burden of establishing mitigation on the, the district court appears to have denied relief because it does not believe that the jury's answer to the mitigation special issue is capable of subjecting a defendant to a greater punishment than he would otherwise receive. ROA.774.

The Court of Appeals for the Fifth Circuit subsequently denied Johnson's application for a certificate of appealability and affirmed the district court's decision denying Johnson's motion to recuse. In addressing Counsel's argument that

Johnson had been entitled to use up to a full year to submit his federal habeas petition, the Fifth Circuit found that "Johnson cited no governing legal authority recognizing the right to delay his briefing until the final day of AEDPA's one-year statute of limitations." Appendix A at 11. Instead, relying solely on this Court's decision in *Dietz v. Bouldin*, the Fifth Circuit held that a district court need not allow a federal habeas petitioner the full year provided by § 2244(d) because a district court has the inherent authority to manage its docket with a view toward the efficient and expedient resolution of cases. *Id.* The court of appeals reasoned that insofar as the district court had the authority to do what it did, its exercise of that authority could perforce not represent animus toward or bias against Johnson, and it was therefore not required to recuse itself.

Additionally, the Fifth Circuit rejected both of Johnson's constitutional arguments concerning the special issues, relying primarily on the court's own precedent in *Buntion v. Lumpkin*, 982 F.3d 945 (5th Cir. 2020). Rather than examine whether evidence that has emerged over the past forty years regarding the unreliability of predictions of future dangerousness has undermined this Court's previous rulings on the constitutionality of Texas's future dangerous special issue, the Fifth Circuit simply stated that "the Supreme Court has twice upheld the exact same provision." Appendix A at 6 (quoting *Buntion*, 982 F.3d at 948-50). Further, like the district court, the Fifth Circuit held that Johnson could not attack his sentence by relying on *Johnson v. Mississippi*, because any ruling in Johnson's favor would represent a "new rule of law" and was thus barred by the non-retroactivity

doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). Appendix A at 8. Finally, citing several of its own decisions, the Court of Appeals dispensed with Johnson's mitigating special issue argument, holding that "no Supreme Court or Fifth Circuit authority requires the State to prove the absence of mitigating circumstances beyond a reasonable doubt" and "no Supreme Court or Circuit precedent constitutionally requires that Texas's mitigation special issue be assigned a burden of proof." *Id.* at 9 (*quoting Rowell v. Dretke*, 98 F.3d 370, 378 (5th Cir. 2005)).

On August 1, 2023, Johnson filed a Petition for Rehearing En Banc on the issues of whether the district court had inherent authority to set an earlier filing deadline for a federal habeas petition than the statutorily defined filing deadline and whether a district court could thereby treat indigent petitioners differently on account of their indigence. On August 11, 2023, the Fifth Circuit denied Johnson's Petition for Rehearing En Banc and denied that the earlier opinion had anything to do with the proposition that a district court has power to shorten the applicable statute of limitations. Appendix B at 4. Instead, the Court of Appeals stated that the prior opinion held "only that the district court's case-management order is not a ground for disqualification under 28 U.S.C. § 455(a)." *Id.* Johnson now petitions this Court for a Writ of Certiorari.

Reasons for Granting the Writ

I. This Court should grant certiorari to determine whether 28 U.S.C. § 2244(d), which provides in part that a "1-year period of limitations *shall apply*" to applications filed pursuant to 28 U.S.C. § 2254, requires that a federal district court allow the applicant the full period provided for by statute, notwithstanding the court's inherent power to control its docket.

The question here is not simply whether an indigent habeas petitioner is entitled to the period Congress has granted for the filing of a habeas petition; the further question is whether a district court that treats an indigent inmate in a manner at odds with federal law is exhibiting bias that warrants recusal. As for the matter of what the inmate is legally entitled to, there can be little doubt. Congress established a one-year statute of limitations that "*shall apply* to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d) (emphasis added). *Shall* is a mandatory word, a command, and as this Court has made clear, the enactment of a statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a hard and fast rule rather than a case-specific judicial determination. *SCA Hygiene Prods. Aktiebolag*, 580 U.S. at 334-35. The statute reflects Congress's belief as to the appropriate balance between a state's interest in the finality of convictions, and a state prisoner's right to raise constitutional challenges in a federal habeas proceeding. Congress having made that judgment, the district courts in individual cases may not make it anew.

Unlike the court below, many of the Courts of Appeals have expressly acknowledged the balance Congress struck and have found, "it is . . . inherently

reasonable for a petitioner to rely on that statute of limitations and to plan on filing at any point within that period." *Grant v. Swarthout*, 862 F.3d 914, 919 (9th Cir. 2017); *see also Valverde v. Stinson*, 224 F.3d 129, 135-36 (2d Cir. 2000) (holding that a habeas petitioner would have acted reasonably by filing his petition any time during the applicable one-year period of limitations); *cf. United States v. Gabaldon*, 522 F.3d 1121, 1126 (10th Cir. 2008) (holding the same when analyzing the one-year period of limitations for filing a habeas petition pursuant to § 2255). Therefore, a habeas petitioner is "entitled to use the full one-year statute-of-limitations period for the filing of his . . . habeas petition[]." *Grant*, 862 F.3d at 919.

The opinion from the court below in this proceeding treats a district court's inherent authority over its docket as sufficient to empower it to disregard mandatory language in federal statutory law. This view of a district court's power contradicts precedent from this Court that makes clear that the exercise of a district court's inherent power is subject to limits, which include that action taken by the district court: (1) must be a reasonable response to a specific problem, and (2) cannot contradict any express rule or statute that limits the district court's power. *Dietz*, 579 U.S. at 45-46. These limits on a court's authority are critical, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority. *Degen v. United States*, 517 U.S. 820, 823 (1996); *see also Hamilton v. Wal-Mart Stores, Inc.*, 39 F.4th 575, 590 (9th Cir. 2022) (holding that a district court could not

use its inherent powers to impose a manageability requirement when such a rule would be "inconsistent" with a statute's purpose and scheme).

In addition to establishing a statutory deadline for seeking habeas relief, which can only be extended when there are extraordinary circumstances, *see, e.g.*, *Holland v. Florida*, 560 U.S. 631 (2010), Congress has also respected the states' interest in finality in other ways, including the codification of the requirement that habeas applicants present all available claims to the federal courts in one federal petition. *See* 28 U.S.C. § 2244(b). In short, Congress has enacted a statutory scheme that gives due weight to competing interests, including the states' interest in the finality of their judgments, the promotion of judicial efficiency, and the conservation of judicial resources.

Notwithstanding that § 2244(d) reflects congressional intent to create a hard and fast rule for the timeliness of federal habeas petitions, the district court in this proceeding ignored the congressional determination regarding the timing of habeas petitions, and instead chose to substitute its own determination. ROA.28. That decision by the district court reflects an animus toward Johnson. Yet, when given an opportunity to correct this error, the Court of Appeals held that a district court's inherent authority to control its docket extends to the point of allowing the court to ignore the statute. Appendix A at 11 ("Johnson cited no governing legal authority recognizing the right to delay his briefing until the final day of AEDPA's one-year statute of limitations. To the contrary, it is firmly established that a district court has 'the inherent authority to manage their dockets and courtrooms with a view

toward the efficient and expedient resolution of cases.'") (*quoting Dietz*, 579 U.S. at 47). The Fifth Circuit's decision makes it possible for a district court to seek to coerce a habeas petitioner's counsel into filing the habeas petition sooner than federal law requires, and worse, it empowers the district court to attempt to coerce counsel for indigent inmates but not for those with sufficient resources to retain private counsel.

In resolving this case in a manner that permits both coercion as well as discrimination on the basis of economic status, the Fifth Circuit has also ignored this Court's precedent regarding appropriate limits on a district court's inherent powers. Specifically, the Fifth Circuit relied on this Court's affirmation in *Dietz* that "district courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases." Appendix A at 11 (*quoting Dietz*, 579 U.S. at 47). But the court of appeals paid no heed to this Court's admonition that there are limits on the exercise of such inherent powers. *See Dietz*, 579 U.S. at 45-46. One such limit, of course, is a duly enacted statute that uses mandatory language to define what a habeas petitioner is entitled to.

While its initial opinion dealt primarily with the issue of a district court's power or inherent authority over its docket, the court of appeals, in its opinion denying rehearing, claimed that its previous opinion stood only for the proposition that the district court's refusal to grant Johnson his full filing period was not a ground for disqualification under 28 U.S.C. § 455(a). Appendix B at 4. But the two issues—what Johnson was entitled to, and what conclusions about the fairness of

the district court can fairly be drawn from that court's reluctance to give Johnson was he was entitled to—cannot be disentangled. The Fifth Circuit's original opinion faulted Johnson for failing to cite "any governing legal authority recognizing the right to delay his filing until the final day of AEDPA's one-year statute of limitations" and then, in the following sentence, made clear the court believed a district court could require a petitioner to file in less than one year as part of its inherent authority to manage its docket. Appendix A at 11. Only then did the court quote this Court's opinion issued in *Liteky v. United States*, 510 U.S. 540 (1994), which makes clear that judicial rulings are rarely indicative of the type of bias that would require recusal. Appendix A at 11.[5] Yet if the Fifth Circuit's premise was wrong -- that is, if it was wrong in assuming Johnson was not entitled to the full year -- then its conclusion that depriving him of that year could not represent judicial bias must also be wrong.

II. This Court should grant certiorari to resolve whether the Equal Protection Clause requires a district court to treat indigent prisoners who seek habeas relief pursuant to 28 U.S.C. § 2254 similarly to non-indigent prisoners by allowing both classes of applicants the one-year period provided for by 28 U.S.C. § 2244(d).

Absent the need for court-appointed counsel brought about by indigence, a federal habeas petitioner would be neither obligated nor expected to communicate

[5] The district court's order abbreviating the period for filing Johnson's federal habeas petition was contained in the same order by which the undersigned were appointed to represent Johnson, which was the first action taken by the district court in the case. *See* ROA.25-29. Actions such as this, which are not based on anything the court learned during the course of the proceeding and reveal a deep-seated antagonism which makes fair judgment impossible, are ones which this Court made clear in *Liteky* should be found to require a court's recusal. *See Liteky*, 510 U.S. at 555.

with a federal district court at all prior to the filing of a federal habeas petition. Consequently, if a federal habeas petitioner is financially capable of retaining counsel instead of having to ask the district court to appoint counsel to represent him, a district court would have no opportunity to enter an order requiring the petitioner to file his petition in less time than that provided by § 2244(d).

Johnson, however, is indigent, and must therefore rely on court-appointed counsel. It is due to his indigence (and the resulting need for the appointment of counsel) that Johnson was required to involve the district court in this proceeding before filing his federal habeas petition. In seeking the appointment of counsel, however, Johnson did nothing to waive his right to take the same time to prepare his petition for filing as a non-indigent petitioner would, or to subject himself to the imposition of deadlines which a federal district court would have no occasion to impose upon a prisoner who could afford his own lawyer. Under these circumstances, the district court treated Johnson differently solely on account of his indigency by requiring his petition be filed months ahead of the expiration of the period of limitation. The action of holding an indigent prisoner to a different standard from that applicable to a non-indigent prisoner is incompatible with the mandates of due process and equal protection of the law as guaranteed by the Fifth and Fourteenth Amendments. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."). The Equal Protection

and Due Process Clauses require Johnson not be treated differently on account of his indigence.

The Fifth Circuit has created a rule that is incompatible with the Fifth and Fourteenth Amendments, because it permits district courts to treat indigent habeas petitioners differently from non-indigent petitioners.

III. This Court should grant certiorari to resolve whether the special issue asked of the sentencing jury in a capital case in Texas violates a defendant's right to due process and to a fair trial because the jury is punishing the defendant for future conduct, rather than past conduct, and because the predictions about future conduct are inherently unreliable and wrong far more often than they are right.

A. The future dangerousness special issue is unconstitutionally vague and fails to narrow the class of death-eligible defendants.

As is true of all death penalty trials in Texas, the jurors at Johnson's 2013 capital murder trial had to answer two questions, or special issues, before he could be sentenced to death Johnson's. The first of these, commonly referred to as the "future dangerousness question" ask jurors "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071, § 2(b)(1); ROA.2594.

Article 37.071, section 2(b)(1) of the Texas Code of Criminal Procedure, which contains the future dangerousness question, is unconstitutionally vague in that it fails to define any of the key terms of the question. As a result, "[j]urors are left to comprehend [these terms] so broadly that a death sentence would be deemed warranted in virtually every capital murder case." ABA Death Penalty Due Process

Review Project, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report* at viii (September 2013).

This Court has long held that juror discretion must be channeled in capital cases. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("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 by suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."). In *Godfrey v. Georgia*, the Court held that a state's aggravating factors must not be defined in such a way that people of ordinary sensibilities could find that nearly every murder met the stated criteria. *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980). Yet given that there is *some* probability (no matter how small that probability might be) that anybody, including any convicted murderer, will commit future acts of violence, the Texas future dangerousness question facially runs afoul of *Godfrey*.

In order to avoid the arbitrary and capricious imposition of the death penalty, states must narrow the class of death-eligible defendants "by providing specific and detailed guidance to the sentencer." *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987) (internal citations and quotation omitted); *see also Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) ("Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.").

While future dangerousness question is not presented to the jury until the

punishment phase of trial, the jury must find a defendant is a future danger for that defendant to be sentenced to death. Indeed, before the jury begins considering mitigating evidence, it must first answer the future danger issue in the affirmative. Accordingly, the future danger special issue is a factor in determining whether a Texas defendant is eligible for a death sentence; it therefore must narrow the class of death-eligible defendants for the statute to be constitutional. But it does not do so.

Texas does not statutorily define the key terms in the first special issue. Rather, the terms are left to be interpreted according to their ordinary meaning. *See Druery v. State*, 225 S.W.3d 491, 509 (Tex. Crim. App. 2007). Absent a statutory definition to the contrary, the term "probability" is reasonably understood to mean some "likelihood of the occurrence of any particular form of an event." *Granviel v. State*, 552 S.W.2d 107, 117 n.6 (Tex. Crim. App. 1976); *see also Jurek v. State*, 522 S.W.2d 934, 945 (Tex. Crim. App. 1975) (Odom, J., dissenting) ("The statute does not require a particular degree of probability but only directs that some probability need be found."). But likelihood is not a narrowing concept. There is a likelihood anyone who purchases a lottery ticket will win the lottery, despite the fact the likelihood is infinitesimally small. As a matter of ordinary language, therefore, the answer to the future dangerousness question will always be yes, and for that reason, the question does not serve a narrowing function.

Neither is the degree of violence specified. "Criminal acts of violence" could reasonably range from capital murder all the way down to simple assault. *See*

Christopher Slobogin, *Capital Punishment and Dangerousness*, *in* Mental Disorder and Criminal Law: Responsibility and Competence 119, 121, 125 (Robert E. Schopp et al. eds., 2009) (questioning what qualifies as "dangerousness" and "criminal acts of violence"). This absence of statutory definition clearly proved to be problematic in this case. During the jury's punishment phase deliberations, the foreman of Johnson's jury sent a note to the court which read, "What does criminal acts of violence mean?" ROA.404. Despite the jurors' apparent confusion over what, in fact, the first special issue was asking of them, the trial court simply stated that the jury had "all the law and evidence to which [it was] entitled" and instructed them to continue deliberations. ROA.403. Essentially, Johnson's jury was asked to determine whether there is *any* likelihood that Johnson might commit *any* act of violence in the future that poses a continuing threat to society. As a matter of ordinary English, the answer to this question is always yes, no matter which human being alive the question is asking about.

And it is not simply a matter of pure semantics. The special issue is also conceptually flawed. Psychiatrists, for example, are unable to completely rule out the possibility that *any* person will commit future acts of violence. *See* Michael L. Radelet & James W. Marquart, *Assessing Nondangerousness During Penalty Phases of Capital Trials*, 54 Alb. L. Rev. 845, 849 (1990) ("Predictions of violent behavior are difficult because the probabilities considered in the prediction are conditional. That is, each of us, given certain circumstances, might engage in violent behavior in the future; thus, each of us has a non-zero probability of killing another."). Even

when predictions are based on actuarial data, which are now considered to be slightly more accurate than clinical determinations, a defendant's risk of committing future acts of criminal violence is phrased in terms of non-zero probabilities. *See, e.g.*, Laura S. Guy, et al., *Assessing Risk of Violence Using Structured Professional Judgment Guidelines*, 12 J. Forensic Psychol. Prac., May 2012, at 272 ("[Mental Health Professionals] are encouraged to communicate level of risk using categorical levels of low, moderate, and high.").

The fact that every person has a non-zero probability of committing future acts of violence shows that the first special issue fails to narrow the class of death-eligible defendants. Moreover, the fact that any capital defendant is found *not* to be a future danger is evidence that the determination is based on caprice rather than reason. In Johnson's case, the fact that this dubious determination had to be made beyond a reasonable doubt before the jury was presented with the mitigation special issue limited the jury's ability to give full consideration to evidence that might serve as a basis for a sentence less than death. *See Tennard v. Dretke*, 542 U.S. 274, 278 (2004) ("It is not enough simply to allow the defendant to present mitigating evidence to the sentence. The sentence must also be able to consider and give effect to that evidence in imposing the sentence.").

B. Evidence now confirms that predictions of future dangerousness are inherently unreliable.

This Court sanctioned the modern-era Texas death penalty statute through its opinion issued in *Jurek v. Texas*, 428 U.S. 262 (1976). The *Jurek* Court found that predicting future dangerousness, while "difficult," was still possible. *Jurek*, 428

U.S. at 274. Seven years later, the Court was still not convinced that testimony about future dangerousness was sufficiently unreliable to run afoul of the Eighth Amendment. *Barefoot v. Estelle*, 463 U.S. 880, 899 (1983). In upholding the future dangerousness inquiry, however, and, with it, the constitutionality of the Texas death penalty statute, the Court depended upon "first generation" evidence on the reliability of prediction of future dangerousness. *Cf.* John Monahan, *The Prediction of Violent Behavior: Toward a Second Generation of Theory and Policy*, 141 Am. J. Psychiatry 10, 10 (1984). We are well past that first generation of evidence, and it is now clear the factual and theoretical foundations on which *Barefoot* rested have been entirely eroded. Over the last generation, hundreds of capital defendants have been labeled future dangers by juries, and new evidence demonstrates unequivocally that these predictions are, in fact, entirely unreliable.

Specifically, an actuarial study of Texas inmates convicted of capital murder found that the expected rates of violence would be very low for a prisoner convicted of capital murder serving a life sentence with an average duration of forty years. The overall likelihood of inmate-on-inmate homicide would be only 0.2 percent, and the likelihood of an aggravated assault on a correctional officer would be only 1 percent. *See* Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. Crim. L. & Criminology 1251, 1261, 1264 (2000). These data suggest not only that bona fide cases of future dangerousness are infrequent, but also that it is virtually impossible to predict future dangerousness with any degree of scientific accuracy.

Sentencing a defendant to death because of a prediction about what he might do in the future violates the Eighth and Fourteenth Amendments because the sentence is being imposed for a future act, rather than for something the defendant has already done. But as fundamentally, the problem with the future dangerousness inquiry as providing the sole basis for sentencing a capital murder defendant to death is the number of false positives generated by that inquiry. Empirical research unequivocally reveals that predictions of future dangerousness wrongly identify non-dangerous defendants as dangerous. One study focused on 155 Texas inmates in whose capital murder trials experts had testified for the State on the issue of the defendant's propensity to commit future acts of violence. John F. Edens et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is it Time to "Disinvent the Wheel?,"* 29 Law & Hum. Behav. 55, 61 (2005). Of these 155, 65 had been executed by the time of the study, 42 were on death row, and 48 had had their death sentences reduced. *Id.* Of the 155, none committed homicide in prison and only 5.2 percent committed a serious assaultive act. *Id.* at 62. The overwhelming majority had only minor disciplinary infractions, and over 20 percent had none at all. *Id.* at 62-63; *see also* Brittany Fowler, *A Shortcut to Death: How the Texas Death-Penalty Statute Engages the Jury's Cognitive Heuristics in Favor of Death*, 96 Tex. L. Rev. 379, 383 (2017).

Another study examined 92 former Texas death row prisoners whose sentences had been reduced and were therefore living in the general prison population. The behavior of these 92 former death row inmates was compared to the

behavior of other capital murder defendants who had been sentenced to life at their trials. The study demonstrated that the supposed future dangers "were not a threat to the institutional order" and indeed had a lower rate of assaultive institutional misconduct than defendants not deemed to be a future danger. In fact, the rate of violent misconduct in prison among former death row inmates was lower than the rate among the general prison population as a whole. *See* James W. Marquart, Sheldon Ekland-Olson & Jonathan Sorensen, *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 Law & Soc'y Rev. 449, 464 (1989). Further, 12 of these 92 former death row inmates were eventually released, and of those dozen, only one committed an act of violence while in free society. *Id.* at 465.

To be sure, the studies mentioned above focus almost exclusively on behavior in prison, but this focus is germane because Texas law construes "the future dangerousness special issue to ask whether a defendant would constitute a threat 'whether in or out of prison.'"[6] *Coble v. State*, 330 S.W.3d 253, 268 (Tex. Crim. App. 2011). And not surprisingly, studies tracking the future behavior of previously death-sentenced inmates outside of prison are all but nonexistent. This is, of course,

[6] This Court's decision in *Buck v. Davis*, 580 U.S. 100 (2017), seems to suggest the Court believes the relevant inquiry should be whether an inmate will commit future acts of violence in prison. *See Buck*, 580 U.S. 120-21 ("Buck's prior violent acts had occurred outside of prison, and within the context of romantic relationships with women. If the jury did not impose a death sentence, Buck would be sentenced to life in prison, and no such romantic relationship would be likely to arise. A jury could conclude that those changes would minimize the prospect of future dangerousness."); *see also* Sheri Lynn Johnson, *Buck v. Davis From the Left*, 15 Ohio St. J. Crim. L. 247, 252-53 (2017).

because very few inmates who are sentenced to death ever re-enter free society. Nevertheless, although there are not many of them, the only studies of this type of which Counsel are aware demonstrates that defendants who are sentenced to death and later released to free society are not a danger to society. A study released in 1989 tracked the 558 inmates who had their death sentences commuted as a result of this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 Loy. L.A.L. Rev. 5, 14 (1989). Of the 558, 239 had been paroled and entered free society by the time the study concluded. *Id.* at 23. Of these 239, only thirteen – 5.4 percent – committed future acts of violence. *Id.* at 24 (including those parolees who committed murder, rape, robbery, and aggravated assault). Of these 239, 188 had been sentenced to death for murder. *Id.*[7] Only one parolee of this group of 188 committed another murder before the end of the study. *Id.* Only six of the 188 committed any violent offense. *Id.*; *see also* Sorensen & Pilgrim, *supra*, at 1254-55 (2000).

Joan Cheever's study reached a similar conclusion. Joan Cheever, Back from the Dead (Wiley 2006). Cheever located 322 men who were released from death row following the Supreme Court's decision in *Furman*. Just more than ten percent (36) went back to prison for an act of violence; three were convicted of murder. There can be no doubt that a legitimate aim of the criminal justice system is to prevent convicted felons from committing additional violent acts, but when the false

[7] The other fifty-one parolees had been sentenced to death for rape.

positives surpass the true positives by a ratio of 99 to 1, the system is quintessentially unreliable, and that unreliability violates the Eighth Amendment.

Two critical studies analyzing capital juries' abilities to predict a defendant's future dangerousness have been recently released and confirm the findings of these earlier studies. The first of these considered a sample of 72 male federal capital defendants whose trials involved a jury determination on the issue of future violence. Mark D. Cunningham, Jon R. Sorensen & Thomas J. Reidy, *Capital Jury Decision-Making: The Limitations of Predictions of Future Violence*, 15 Psychol. Pub. Pol'y & L. 223, 233-34 (2009). In these 72 cases, jurors found 38 defendants would not be a future danger and 34 would. *Id.* at 234. Yet the rates of future violence of the two groups were virtually identical. *Id.* at 236 (Table 3). Jurors' predictions of future violence in these cases were wrong 97% of the time. *Id.* at 240.

The second of these more recent studies was released in 2013 and focused on 115 Oregon inmates who had been convicted of capital murder and sentenced either to life or death. Thomas J. Reidy, Jon R. Sorensen & Mark D. Cunningham, *Probability of Criminal Acts of Violence: A Test of Jury Predictive Accuracy*, 31 Behav. Sci. L. 286, 292 (2013). Oregon adopted the Texas capital sentencing scheme, and so Oregon jurors must decide whether there is a probability a defendant would commit future acts of violence before he can be sentenced to death. *Id.* at 291. Jurors had found 78 of these defendants would be a future danger and 37 would not. *Id.* at 296. Of the 78, only 50 were sentenced to death. *Id.* at 298. The rates at which these two groups – i.e., the 78 whose jurors found they would commit

future acts of violence and the 37 whose jurors found they would not – committed future violent acts were identical, 5.9 incidents per year per 100 inmates. *Id.* In other words, Oregon jurors, like Texas and federal jurors, cannot predict which inmates would commit future acts of violence.

In *Barefoot*, this Court reached the decision to permit experts to testify about a defendant's propensity to be dangerous in the future because it was not persuaded that such predictions are "entirely unreliable"; indeed, the justices seem to have believed that such predictions are accurate approximately one-third of the time. *See Barefoot*, 463 U.S. at 900-01 & n.7. However, studies of Texas death row inmates' behavior conducted since *Barefoot* was decided entirely undermine the factual predicate of *Barefoot* and reveal that predictions of future dangerousness are wrong in more than 95 percent of cases. *See* Jessica L. Roberts, Note, *Futures Past: Institutionalizing the Re-Examination of Future Dangerousness in Texas Prior to Execution*, 11 Tex. J.C.L. & C.R. 101, 121 (2005).

C. Evidence demonstrates that Johnson's jury was wrong.

Johnson has committed no violent acts while incarcerated. His impeccable disciplinary record demonstrates that he poses no threat to guards or fellow inmates. The jury's prediction that he posed a future danger has proved to be inaccurate. Because Johnson's sentence is based on a factual inaccuracy, it should be vacated.

In *Johnson v. Mississippi*, 486 U.S. 578 (1988), the jury found an aggravating circumstance based on a defendant's prior conviction; when that conviction was reversed after the death sentence had been imposed, the Court vacated the

sentence. In *Johnson*, later developments revealed that Johnson's death sentence was unreliable and arbitrary because it was "predicated, in part, on a . . . judgment that is not valid now, and was not valid when it was entered . . . ." *Id.* at 585 n.6. Johnson's sentence is also predicated on an assessment that has proved invalid.[8]

It has been more than a generation since this Court forthrightly examined whether the sole aggravating factor defined in the Texas capital sentencing scheme—future dangerousness—is so fraught with vagueness, so reliant on pure conjecture, and so plagued with error that it cannot satisfy the Eighth Amendment's reliability requirement. The Court should grant certiorari to correct a misunderstanding of the soundness of future predictions that has lain at the core of the Texas sentencing statute for nearly half a century.

IV. This Court should grant certiorari to resolve whether the Texas death penalty punishment scheme runs afoul of *In re Winship* and its progeny by placing the burden of proof on a capital murder defendant to persuade the jury that he should not be sentenced to death because mitigating factors outweigh the single aggravating factor (i.e., future dangerousness) established by the state.

"[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, 526 U.S. at 243

[8] The Texas Court of Criminal Appeals recently stated that "the determination of future dangerousness is made at the time of trial and is not properly reevaluated on habeas." *Ex parte Gonzales*, No. WR-70,969-03, 2022 WL 2678866, at *1 (Tex. Crim. App. July 11, 2022). However, the CCA's notion that a finding necessary to sustain a death sentence cannot later be found to have been false cannot be reconciled with this Court's opinion in *Johnson v. Mississippi*.

n.6; *see also In re Winship*, 397 U.S. 358, 364 (1970) (holding that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). This fundamental proposition, by now axiomatic, has been established for more than two decades. Through the Fourteenth Amendment, this Court has applied this rule to state crimes. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the defendant was convicted of the second-degree felony of possession of a prohibited weapon, but he was then sentenced to a term of years available only to those convicted of a first-degree felony based on the trial court's finding that his purpose for possessing the weapon was to intimidate another on the basis the victim's race. *Apprendi*, 530 U.S. at 492. The *Apprendi* Court held that because Apprendi's sentence was outside the prescribed range for second-degree offenses, the finding of racial animus was "the functional equivalent of an element of a greater offense." *Id.* at 494 n.19. *Apprendi* holds that the jury must make all necessary findings that authorize the punishment that the defendant ultimately receives.

Two years later, in *Ring v. Arizona*, 536 U.S. 584 (2002), the Court applied the holding of *Apprendi* to the findings that make convicted murderers death-eligible. The *Ring* Court held that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment

applies to both." *Ring*, 536 U.S. at 609; *see also United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019) ("Because the Constitution's guarantees cannot mean less today than they did the day they were adopted, it remains the case today that a jury must find beyond a reasonable doubt every fact 'which the law makes essential to [a] punishment' that a judge might later seek to impose.") (quoting *Blakely v. Washington*, 542 U.S. 296, 304 (2004)); *Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975) (holding that the prosecution was required to prove the absence of a heat of passion mitigation when the issue was properly presented in the homicide case).

Article 37.071 of the Texas Code of Criminal Procedure mandates that when a defendant is found guilty after being tried for a capital offense where the State seeks a death penalty, there must be a separate sentencing proceeding. Tex. Code Crim. Proc. art. 37.071, § 2(a)(1). If, and only if, the jury returns an affirmative finding to the future dangerousness special issue, it must then determine whether there are sufficient mitigating circumstances to warrant a sentence of life imprisonment without parole rather than a death sentence. *Id.* at § 2(e)(1). This issue is commonly referred to as the mitigation special issue. Only if the jury returns an affirmative finding on the future dangerousness question and a negative finding on the mitigation special issue will the court sentence the defendant to death. *Id.* at § 2(g). If the jury returns a negative finding on the future dangerousness question or an affirmative finding on the mitigation question, or is unable to answer either of these questions, the court will then sentence the defendant to life imprisonment without parole. *Id.*

A negative finding on the mitigation question is a necessary finding for a death sentence in Texas to be sustained. Absent a negative finding on that special issue, a defendant cannot be sentenced to death. Article 37.071 places on the State the burden of proof on the future dangerousness question, but it fails to do so with respect to the mitigation special issue. In so doing, the statute runs afoul of *Ring* because a negative finding on the mitigation special issue is an element of a death sentence in Texas.

In issue fifty-seven of his direct appeal, Johnson argued that the state's death penalty scheme violates due process protections of the U.S. Constitution because it does not require the state to prove, beyond a reasonable doubt, that the correct answer to the mitigation special issue is "no." ROA.1213-14. The Court of Criminal Appeals, denied relief, stating that it had previously rejected the argument in past cases and that Johnson did not persuade the court to revisit the issue. ROA.1529.

The opinion in which the CCA had previously rejected the argument was the one it handed down in *Blue v. State,* 125 S.W.3d 491 (Tex. Crim. App. 2003). In *Blue,* the court held that under Article 37.071, there is "no authorized increase in punishment contingent on the jury's finding on the mitigating special issue." *Blue*, 125 S.W.3d at 501. The court reasoned a jury's finding on mitigation only occurs after the State has proven elements of capital murder beyond a reasonable doubt, and by the time the mitigation issue reaches the jury, the prosecution has already demonstrated a defendant's eligibility for a death sentence and a negative answer on mitigation cannot increase the authorized punishment. *Id*. However, an

affirmative answer to the future dangerousness question by itself cannot sustain a death sentence. For a Texas defendant to be sentenced to death, the jury must not only answer the "yes" to the future dangerousness special issue, it must also answer "no" to the mitigation special issue. Both a yes answer to the first special issue and a no answer to the second are elements of a death sentence. As such, the CCA's opinion in Johnson's direct appeal proceeding (and in *Blue*) is an unreasonable application of federal law.

As was true for Johnson's future dangerousness claim, the district court's finding that Johnson was not entitled to relief on his claim related to the burden on the mitigation question is grounded in the district court's belief that the mitigation special issue does not play a role in determining whether a Texas defendant is eligible for a death sentence and instead functions solely to assist jurors in determining which eligible defendants will be sentenced to death. ROA.775. In support of this finding, the district court quoted extensively from the Supreme Court's opinion in *Kansas v. Carr*, 577 U.S. 108 (2016). ROA.775. The district court's reliance on *Carr* is misplaced. As is true of the death penalty schemes of most states that maintain death as a punishment option, Kansas is a weighing jurisdiction. *See Carr*, 577 U.S. at 115. In these schemes, the jury first determines whether the State proved, at trial, the existence of any aggravating circumstances. *See id.* If the State has met this burden, a defendant is eligible for a death sentence. The jury then determines whether the aggravating circumstances proved by the State are outweighed by any mitigating circumstances. In such a scheme, it is clear

that the jury's consideration of mitigating circumstances is one that relates solely to selection and not eligibility.

Texas, however, is not a weighing jurisdiction. Its scheme, based on its special issues, operates in an entirely different way. Relevant to this claim, if a jury does not determine that there are sufficient mitigating circumstances to warrant a life sentence, the defendant will be sentenced to death. He is not eligible for a death sentence absent a "no" answer to the mitigation special issue. Consequently, the Texas statute presumes death once the jury answers the future dangerousness question and then shifts the burden to the defendant to prove he should instead be sentenced to life. This scheme runs afoul of the holdings of *Ring* and *Apprendi*; those holdings establish that the Constitution requires that the State demonstrate beyond a reasonable doubt that there are not sufficient mitigating circumstances to warrant sentencing a defendant to life in prison instead of to death. Because the State did not have this burden at Johnson's trial, reasonable jurists would, at a minimum, debate the district court's decision that Johnson is not entitled to relief on his claim.

Conclusion and Prayer for Relief

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

DATE: November 9, 2023

Respectfully submitted,

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