No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

CARL WAYNE BUNTION,

Petitioner

v.

BRYAN COLLIER, ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I certify that on the 21st day of April 2022, one copy of Mr. Buntion's Motion for Stay of Execution Pending Filing, Consideration, and Disposition of his Petition for Writ of Certiorari was emailed to Ms. Cara Hanna, Assistant Attorney General of Texas at cara.hanna@oag.texas.gov. All parties required to be served have been served. I am a member of the Bar of this Court.

s/ David R. Dow

David R. Dow
Texas Bar No. 06064900
University of Houston Law Center
4170 Martin Luther King Blvd.
Houston, Texas 77204-6060
713-743-2171

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MOTION FOR STAY OF EXECUTION PENDING FILING, CONSIDERATION, AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

This is a capital case. Mr. Buntion is scheduled to be executed after 6 o'clock p.m. central time today, April 21, 2022.

David R. Dow*
Texas Bar No. 06064900
Jeffrey R. Newberry
Texas Bar No. 24060966
University of Houston Law Center
4170 Martin Luther King Blvd.
Houston, Texas 77204-6060
713-743-2171
713-743-2131 (f)
* Member, Supreme Court Bar

QUESTIONS PRESENTED

Capital Case.

Carl Buntion first arrived on death row in Texas in January 1991 – more than thirty-one years ago. The 1991 sentence, however, was unconstitutional. Buntion had sought diligently from before his original trial to obtain a sentencing proceeding that comported with the requirements of the Eighth Amendment, but the State refused . Finally, after resisting providing a constitutional trial for two decades, the State at last did conduct a trial that adhered to constitutional requirements, and Buntion was resentenced to death in 2012. For purposes of this action, Petitioner Carl Buntion concedes that the sentence of death imposed in 2012 was, in fact, a lawful sentence at the time it was imposed.

By 2012, however, through no fault of his own, and owing entirely to the refusal of the State of Texas to provide him with a lawful trial, Buntion had already resided on death row for over two decades. If the State carries out Buntion's execution this evening, April 21, 2022, Buntion will have spent more than thirty-one years – more precisely, 11,410 days – under a sentence of death awaiting execution. He is 78 years old. A delay between sentence and execution of three decades, two-thirds of which saw Buntion held pursuant to an unconstitutional sentence, and all of which resulted entirely from the action of the State, gives rise to the following questions.

1. Is a challenge to the length of time an inmate has been held on death row prior to his scheduled execution properly viewed as a challenge to the state's method of execution and, if so, is such a challenge properly cognizable pursuant to 42 U.S.C. § 1983?

2. Does a claim that the Eighth Amendment prohibits a state from carrying out a lawfully-imposed death sentence because, as a result of the state's own conduct, the inmate has been on death row for over three decades, become ripe only once the state sets an execution date and is therefore not second or successive?

3. Where a state, and not the inmate, bears primary responsibility for an excessive stay on death row prior to the scheduling of an execution date, does the Eighth Amendment prohibit the State from carrying out an execution, even when the sentence was, at the time it was imposed, lawful?

PARTIES TO THE PROCEEDING

Petitioner (plaintiff and petitioner in the district court and plaintiff-appellant and petitioner-appellant in the court of appeals) is Carl Wayne Buntion. Buntion is currently incarcerated under a sentence of death at the Polunsky Unit of the Texas Department of Criminal Justice in Livingston, Texas. He is scheduled to be executed today, April 21, 2022.

Respondents (defendants and respondent in the district court and defendants-appellees and respondent-appellee in the court of appeals) are Texas Department of Criminal Justice (TDCJ) employees Bryan Collier, Bobby Lumpkin, and Dennis Crowley. Bryan Collier is the executive director of the Texas Department of Criminal Justice. He is being sued in his official capacity.

Bobby Lumpkin is the director of the Correctional Institutions Division of the Texas Department of Criminal Justice. He is being sued in her official capacity. Mr. Lumpkin is the person charged by the trial court's order to execute the judgment of death against Buntion. In addition to being one of three defendants in the § 1983 proceeding, Mr. Lumpkin was the lone respondent in the habeas proceeding. (As explained below, the two proceedings were consolidated by the court of appeals.)

Dennis Crowley is the senior warden of the Huntsville Unit, the unit at which TDCJ executes inmates. He is being sued in his official capacity. As the warden of the Huntsville Unit, Mr. Lewis is the TDCJ official that supervises Texas executions.

RELATED PROCEEDINGS IN LOWER FEDERAL COURTS

Southern District of Texas:

Buntion v. Lumpkin, No. 4:22-cv-01104 (S.D. Tex. Apr. 14, 2022)

Buntion v. Collier, *et al.*, No. 4:22-cv-01125 (S.D. Tex. Apr. 18, 2022)

Court of Appeals for the Fifth Circuit

Buntion v. Lumpkin, No. 22-70003, consolidated with, *Buntion v. Collier, Lumpkin, Crowley*, No. 22-70004 (5th Cir. Apr. 20, 2022)

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INTRODUCTION

Petitioner Carl Wayne Buntion is scheduled to be executed by the State of Texas after 6 o'clock p.m. today, Thursday, April 21, 2022. Since this Court reinstated the death penalty forty-six years ago in *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court has repeatedly observed that the death penalty is a permissible punishment under the Eighth Amendment only when it serves a valid penological purpose. This case presents a quintessential scenario where a punishment

originally imposed over three decades ago will further no legitimate aim if carried out today. Buntion therefore respectfully requests that this Court issue a stay of execution pending the filing and disposition of a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The April 20, 2022 opinion of the United States Court of Appeals for the Fifth Circuit denying Mr. Buntion's a stay of execution, dismissing his § 1983 claim, and denying his application for a certificate of appealability is published. A copy is attached as Appendix A.

The April 14 order of the District Court for the Southern District of Texas dismissing Buntion's habeas petition without prejudice is attached as Appendix B.

The April 18 order of the District Court for the Southern District of Texas dismissing Buntion's § 1983 action with prejudice is attached as Appendix C.

STATEMENT OF JURISDICTION

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

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment of the United States Constitution states, in relevant part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The Fourteenth Amendment of the United States Constitution states, in relevant part: "nor shall any state deprive any person of life, liberty, or property,

without due process of law; not deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983: Appendix D

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. 1990-2009: Jurors in his initial trial sentence Buntion to death in a proceeding which, over his objection, did not provide those jurors an opportunity to consider mitigating evidence, and Buntion appeals.

On June 28, 1990, Buntion was indicted for intentionally and knowingly causing the death of Houston Police Officer James Irby. I Tr. 5.[1] Pretrial publicity was extensive in the Houston area, and, as a result, Judge William Harmon ordered the trial be convened in Gillespie County. *Id.* at 53. Guilt phase proceedings commenced on January 14, 1991, and the jury subsequently found Buntion guilty of capital murder on January 17. 61 S.F. 945.

The punishment phase commenced on January 21. At the conclusion of the punishment phase proceedings, the court charged the jury with answering two special issues, the answers to which would determine whether Buntion would be sentenced to death or life in prison. 64 S.F. 530; I Tr. 355-58. The first special issue was whether Buntion's conduct that caused the death of Officer Irby was "committed deliberately and with the reasonable expectation that the death of the deceased or another would result." I Tr. 355; *see also* Tex. Code Crim. Proc. art.

[1] Citations to the Clerk's Record of Buntion's 1991 trial appear in this pleading as [volume number] Tr. [page number]. Citations to the Reporter's Record of Buntion's 1991 trial appear herein as [volume number] S.F. [page number].

37.0711, § 3(b)(1). The second special issue asked the jury to determine whether there was "a probability that . . . Buntion would commit criminal acts of violence that would constitute a continuing threat to society." I Tr. 357; *see also* Tex. Code Crim. Proc. art. 37.0711, § 3(b)(2).

More than a year before Buntion's trial – that is, more than a year before the trial judge charged the jury in Buntion's case – this Court had ruled, in another case from Texas, that neither of the special issues then-specified by Texas law required or even permitted the jury to consider mitigating evidence. *See Penry v. Lynaugh* (*Penry I*), 492 U.S. 302, 328 (1989). To that extent, the Texas death penalty statute was unconstitutional. However, rather than instructing the jury in Buntion's case to answer a question related to mitigating evidence, the trial court simply told the jurors to consider mitigating evidence while deliberating on the two special issues and, if they found that a life sentence was appropriate, then they should answer one of the two special issues with a "no" regardless of what they otherwise believed the answer to the special issue should be. I Tr. 353-54.

Buntion's attorneys had anticipated the trial court would give the jury this so-called nullification instruction rather than do what it should have done pursuant *Penry I* – i.e., ask the jurors to decide a separate special issue pertaining to mitigating evidence – and for that reason, on November 4, 1990 (over two months before Buntion's trial commenced), the attorneys filed a motion that asked the trial court to include a special issue that would have expressly required the jury to consider mitigating evidence. I Tr. 196-97. The trial court did not immediately act

on the motion but instead denied it near the end of the punishment phase of Buntion's trial. 14 S.F. 6; 63 S.F. 488-89. On January 24, 1991, the jury returned with "yes" answers to both the deliberateness special issue and the future dangerousness special issue, and Buntion was sentenced to death. I Tr. 355-58; 64 S.F. 618-22.

Buntion then appealed his conviction and sentence to the Texas Court of Criminal Appeals ("CCA"). Two of the claims Buntion raised on direct appeal – i.e., points of error 49 and 62 – pertained the trial court's denying his motion that asked the trial court to include a special issue pertaining to mitigation. *Buntion v. State*, No. 71,238, 1995 Tex. Crim. App. Unpub. LEXIS 2, at *60-61 (Tex. Crim. App. May 31, 1995). In denying relief on these claims, the CCA wrote that the jurors could have given "proper effect" to mitigation by answering "no" to the future dangerousness question. *Id.* That court affirmed Buntion's conviction and sentence on May 31, 1995.

Buntion filed his initial state application for a writ of habeas corpus on March 31, 1997. SHCR-2 182.[2] The forty-seventh, fifty-seventh, and fifty-eighth claims raised in the application asked the state habeas court to reverse Buntion's death sentence because the jurors were not able to give effect to the mitigating evidence presented at trial, because the trial court denied Buntion's request for a

[2] Citations to the State Habeas Clerk's Record of Buntion's initial state habeas proceeding, No. WR-22,548-02, appear in this pleading at SHCR-2 [page number]. Citations to the Supplemental volume of the record appear herein as Supp. SHCR-2 [page number].

special issue that would specifically address mitigation. SHCR-2 134-36, 162-63. The trial court issued its Findings of Fact and Conclusions of Law on September 29, 2003. Supp. SHCR-2 69. Two years before the trial court entered its findings, on June 4, 2001, this Court issued its opinion in *Penry v. Johnson* (*Penry II*), 532 U.S. 782 (2001). In *Penry II*, the Court made clear that any belief that its mandate in *Penry I* was satisfied by a nullification instruction was "objectively unreasonable." *Penry II*, 532 U.S. at 803-04.

In light of *Penry II*, therefore, it was unmistakably clear that Buntion was entitled to relief on his claims. The trial court, however, found that Buntion's claims should not "be considered in the instant writ proceeding" because the CCA had denied Buntion relief on related claims on direct appeal. Supp. SHCR-2 64, para. 37. The CCA adopted the trial court's findings and conclusions in denying Buntion relief on November 5, 2003. *Ex parte Buntion*, No. WR-22,548-02, 2003 Tex. Crim. App. Unpub. LEXIS 9, at *1 (Tex. Crim. App. Nov. 5, 2003).

Buntion then sought federal review of his conviction and sentence, filing his amended petition for a writ of habeas corpus in the district court on December 30, 2004. *Buntion v. Dretke*, No. 4:04-cv-01328 (S.D. Tex. Dec. 30, 2004), ECF No. 23. Buntion's then-counsel raised thirty-eight claims for relief. The twenty-forth claim was that Article 37.071 of the Texas Code of Criminal Procedure is unconstitutional as applied to Buntion's case because it failed to allow his jurors to give effect to mitigating evidence. *Id.* at 96-98. With respect to this claim, the district court found Buntion was not entitled to relief because, notwithstanding the nullification

instruction, the jury was able to give *sufficient effect* to the mitigating evidence he presented at trial. *Buntion v. Dretke*, No. 4:04-cv-01328, 2006 WL 8453025, at *27-28 (S.D. Tex. Apr. 28, 2006). The district court's opinion relied on a March 22, 2006 decision from the court of appeals from Billie Coble's case. *Buntion*, 2006 WL 8453025, at *27-28. That opinion was subsequently withdrawn in light of this Court's opinions in *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007), and *Brewer v. Quarterman*, 550 U.S. 286 (2007), in which the Court made clear that a jury must be able to give *full effect*, and not merely *sufficient effect*, to mitigating evidence. *Coble v. Quarterman*, 496 F.3d 430, 433 (5th Cir. 2007); *see also Abdul-Kabir*, 550 U.S. at 264-65; *Brewer*, 550 U.S. at 296.[3]

B. 2009: At last, the state habeas court orders Buntion receive a new sentencing proceeding, at which jurors would be able to consider the mitigating evidence that had not been lost or destroyed by that time.

Less than five months after his initial federal habeas proceeding concluded, on July 14, 2009, Buntion raised a claim pursuant to *Penry II* in the state habeas court. SHCR-3 22.[4] On September 30, 2009, the CCA held the "nullification

[3] The district court did grant Buntion relief on his claims related to the trial court's bias, claims which made up a large part of the habeas petition. *Buntion*, 2006 WL 8453025, at *24. However, following the government's appeal, the court of appeals vacated the portion of the district court's order granting Buntion relief. *Buntion v. Quarterman*, 524 F.3d 664, 671 (5th Cir. 2008). This Court denied Buntion's Petition for a Writ of Certiorari on February 23, 2009. *Buntion v. Quarterman*, 555 U.S. 1176 (2009).

[4] Citations to the State Habeas Clerk's Record of Buntion's subsequent state habeas proceeding, in which he raised a claim pursuant to *Penry II*, i.e., No. WR-22,548-03, appear in this pleading as SHCR-3 [page number].

instruction given to [Buntion's] jury was not a sufficient vehicle to allow jurors to give meaningful effect to the mitigating evidence presented" at his 1991 trial and remanded his case to the trial court for a new punishment hearing. *Ex parte Buntion*, No. AP-76,236, 2009 WL 3154909, at *2 (Tex. Crim. App. Sept. 30, 2009). As explained above, Buntion had, by this point, argued for almost nineteen years that the nullification instruction was not adequate to protect his Eighth Amendment right to have the jury be able to give effect to mitigating evidence.

C. 2012 – 2021: Buntion finally receives a sentencing trial free of the error he identified over twenty years before, is again sentenced to death, and subsequently appeals his sentence.

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

At the conclusion of the evidence, the trial court charged the jury. At this trial, the jury had to answer four special issues. Addressing the error which led to Buntion's being retried, the fourth special issue asked the jury whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." Tex. Code Crim. Proc.

art. 37.0711, § 2(e). As indicated above, much if not all of the evidence that would have supported an affirmative answer to this question had, as a result of the State's unconstitutional behavior, disappeared by the time of trial. On March 6, 2012, the jury returned answers to each of the four special issues, finding that Buntion had acted deliberately, would commit future acts of violence, had acted unreasonably in response to any provocation from Officer Irby, and that there were not sufficient mitigating circumstances to warrant sentencing Buntion to life in prison instead of the death. Accordingly, on March 6, 2012, Buntion was again sentenced to death. 45 R.R. 38.[5]

The CCA affirmed his sentence on January 27, 2016. *Buntion v. State*, 482 S.W.3d 58 (Tex. Crim. App. 2016). His case became final when this Court denied his petition for a writ of certiorari on June 27, 2016. *Buntion v. Texas*, 136 S. Ct. 2521 (2016).

On September 25, 2014, Buntion filed a state habeas application pursuant to Article 11.071. The trial court entered its findings of fact and conclusions of law recommending relief be denied on December 28, 2016. State's Proposed Findings of Fact, Conclusions of Law & Order, *Ex parte Buntion*, No. 588227-C (178th Dist. Ct., Harris County, Tex. Aug. 30, 2016). Based on the trial court's findings and conclusions and its own review, the CCA denied Buntion relief on June 7, 2017. *Ex parte Buntion*, No. WR-22,548-04, 2017 WL 2464716 (Tex. Crim. App. June 7, 2017).

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[5] Citations to the Reporter's Record Buntion's second trial—*State v. Buntion*, No. 588227 (178th Dist. Ct., Harris County, Tex. Mar. 6, 2012)—are cited herein as [volume number] R.R. [page number].

The district court appointed undersigned Counsel to represent Buntion in his federal habeas proceeding on September 18, 2017, and Counsel filed Buntion's federal habeas petition on June 7, 2018. Relevant to this Motion, the petition included a claim that because Buntion had, at that time, been incarcerated for over a quarter of a century, the Eighth Amendment would not permit his execution. On March 5, 2020, the district court entered an order denying Buntion relief and a certificate of appealability. Mem. & Order, *Buntion v. Lumpkin*, No. 4:17-cv-02683 (S.D. Tex. Mar. 5, 2020), ECF No. 26. On appeal, the court of appeals agreed that Buntion was not entitled to a certificate of appealability on any of his claims. *Buntion v. Lumpkin*, 982 F.3d 945, 953 (5th Cir. 2020).

Counsel subsequently filed a Petition for a Writ of Certiorari in this Court, the second question presented of which pertained to whether either of the permissible purposes for the death penalty would be served by executing a man who had been incarcerated under a sentence of death as long as Buntion. The Court denied Buntion's Petition for a Writ of Certiorari on October 4, 2021. *Buntion v. Lumpkin*, 142 S. Ct. 3 (2021). In a statement respecting the denial of certiorari, Justice Breyer recognized that Buntion's lengthy confinement was problematic and called into question the constitutionality of Buntion's punishment and expressed his belief that there is a need for this Court, or other courts, to consider the question. *Id.* However, Justice Breyer also noted that procedural obstacles made it difficult for the Court to grant Buntion's petition for certiorari. *Id.*

D. 2022: The trial court schedules Buntion's execution, and Counsel pursue claims that did not become ripe until a date was set.

The day after this Court denied certiorari, the District Attorney's Office informed Counsel it intended to ask the trial court to set an execution date for Buntion. Believing a claim that Buntion's execution would violate the Eighth Amendment's prohibition against cruel and unusual punishment because of his lengthy confinement under a sentence of death would ripen and therefore become available once an execution date was set, Counsel immediately began their efforts to raise the claim in a manner that would not be encumbered by the procedural obstacles identified by Justice Breyer. To that end, Counsel elected to present the claim to the federal courts via two separate vehicles: a habeas petition and a complaint filed pursuant to 42 U.S.C. § 1983. The first of these two vehicles (and perhaps also the second) required Counsel attempt to exhaust the claim in the state courts. Counsel therefore filed a state habeas application raising the claim on December 8, 2021 – almost a full month before the trial court entered its January 4 order scheduling Buntion to be executed, and more than four months in advance of the scheduled execution. Yet the CCA did not act on the application immediately, or even soon after a date was set. Instead, the CCA waited until March 30, 2022 – almost four months after Counsel filed the application and only three weeks before Buntion is scheduled to be executed – to enter its boilerplate order dismissing the

application. *See Ex parte Buntion*, No. WR-22,548-05 (Tex. Crim. App. Mar. 30, 2022).[6]

On April 6, 2022 (exactly one week after the CCA issued its order dismissing Buntion's state habeas application), Counsel filed Buntion's habeas petition in the district court. In the habeas petition, Buntion argued that his present claim was different from his 2018 claim because it rests on facts that did not exist until an execution date was set. Specifically, at that time, the delay was four years less than it is now. Perhaps the State had not crossed the constitutional line in 2018, but by 2022, surely it had. Moreover, until a date was set, any speculation about how long Buntion would be incarcerated under a sentence of death before the State finally sought to execute him could not be known. Consequently, because the claim was not previously available and because Counsel raised it as soon as it became ripe, Counsel argued that pursuant to this Court's opinion in *Panetti v. Quarterman*, 551 U.S. 930 (2007), the claim was not subject to the bar on successive applications. *See Panetti*, 551 U.S. at 947.

The following day, April 7, 2022, Counsel filed the § 1983 complaint. In the Complaint, Counsel argued explicitly that Buntion's claim does not challenge the legality of the 2012 sentencing proceeding; instead, it is a challenge to the State's

[6] While the district court's opinion did not address whether the CCA's order constituted a decision on the merits of the claim, the court of appeals found that it did not. However, even that court appears to agree that the order did not constitute a decision on the merits only if the factual predicate was previously available. Appendix A at 14-15. If the factual predicate was previously unavailable, as Buntion has argued throughout these proceedings to be the case, then the order unquestionably involves a consideration of the merits of Buntion's claim. *See Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007).

method of holding Buntion on death row for over three decades, most of which time it was holding him under an unconstitutional sentence. *See Johnson v. Bredesen*, 130 S. Ct. 541, 543 (2009) (Stevens, J., respecting the denial of certiorari). As Counsel argued, had the State not directly caused the delay of Buntion's execution by providing him an unconstitutional sentencing trial in 1991 and then resisting his attempts to have the error corrected for almost twenty years, "the State would have been quite free, as a constitutional matter, to 'go forward with the sentence.'" *Id.* (*quoting Nelson v. Campbell*, 541 U.S. 637, 644 (2004)).

On April 14, the district court issued its order dismissing Buntion's habeas petition. Appendix B. While the district court recognized that Buntion's claim was at least somewhat different from his claim raised in his 2018 petition (because it rested, in part, on facts that were not available in 2018), the district court nonetheless found that the factual predicate was available when Buntion filed his 2018 petition and was for that reason, subject to the bar on successive petitions. Appendix B at 3-4.

On April 18, the district court issued its Memorandum and Order dismissing Buntion's § 1983 action with prejudice. Appendix C. Even though Counsel began pursuing the claim (by first presenting it to the state court) one month before Buntion's execution was even scheduled and four and one-half months before the execution date, the district court believed Buntion could have and should have filed his suit at an earlier time. Appendix C at 4-5. Pertinent to one of the questions presented in this Motion, the district court also found Buntion's claim could not be

brought in a § 1983 action and instead had to be raised in a habeas proceeding. Appendix C at 5-6.

Counsel appealed both orders to the United States Court of Appeals for Fifth Circuit, which consolidated the cases and issued its opinion on April 20. Appendix A. With respect to Buntion's habeas proceeding, while the district court's opinion indicates that it believed Buntion's instant claim to be somewhat different from his 2018 claim, the opinion from the court of appeals indicates it believed the claim to be identical to the 2018 claim and barred for that reason. Appendix A at 18-19. The opinion makes clear that, like the district court, the court of appeals believed the claim to have been available when Buntion filed his 2018 petition. Finally, the court directly insisted that the rule from *Panetti* (i.e., that a second-in-time petition raising a claim as soon as it becomes ripe is not subject to the bar on successive petition) applies only to *Ford* claims. Appendix A at 19.

With respect to Buntion's § 1983 suit, the court of appeals, like the district court, found Buntion's claim to be cognizable only in habeas because the court of appeals (like the district court) found the claim to be a challenge to the validity of Buntion's sentence. Appendix A at 22.

REQUEST FOR RELIEF

Buntion requests that this Court issue an order staying his execution pending the filing and disposition of a Petition for Writ of Certiorari, which will raise the following questions:

1. Is a challenge to the length of time an inmate has been held on death row prior to his scheduled execution properly viewed as a challenge to the state's

method of execution and, if so, is such a challenge properly cognizable pursuant to 42 U.S.C. § 1983?

2. Does a claim that the Eighth Amendment prohibits a state from carrying out a lawfully-imposed death sentence because, as a result of the state's own conduct, the inmate has been on death row for over three decades, become ripe only once the state sets an execution date and is therefore not second or successive?

3. Where a state, and not the inmate, bears primary responsibility for an excessive stay on death row prior to the scheduling of an execution date, does the Eighth Amendment prohibit the State from carrying out an execution, even when the sentence was, at the time it was imposed, lawful?

A stay of execution is warranted where there is: (1) a reasonable probability that four members of the Court would consider the underlying issues sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; (2) a significant possibility of reversal of the lower court's decision; and (3) a likelihood that irreparable harm will result if no stay is granted. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

Buntion satisfies these criteria. First, a reasonable probability exists that four members of the Court would consider at least one of the underlying issues as presenting important questions that warrant guidance from this Court. At the heart of these issues is one central question: Is there any means by which a death-sentenced inmate can raise, in the federal courts, a claim that it would violate the Eighth Amendment's prohibition on cruel and unusual punishment for him to be executed after the state has delayed his execution (and subjected him to being incarcerated under a sentence of death) for an excessively lengthy period of time (in this case, thirty-one years)? This Court has recognized that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution

of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890). Counsel have attempted to raise a claim related to this most horrible of feelings in every conceivable way for Buntion. The result of those efforts is that, absent intervention from this Court, there is no avenue by which a death-sentenced inmate can raise such a claim. If a claim challenging the length of delay between the original imposition of a death sentence and finally carrying it out can ever be pursued, it must be available here.

Second, there exists a significant possibility of reversal of the opinion from the court of appeals. The opinion from the court of appeals forecloses entirely the possibility of ever obtaining relief for an excessive delay. If such claims are cognizable in federal court, the decision below is perforce erroneous

Finally, Buntion will be irreparably harmed if a stay is not granted; if this Court does not stay his execution, Carl Wayne Buntion will be executed tonight, April 21, 2022, after 6:00 pm.

CONCLUSION

Petitioner Carl Wayne Buntion respectfully requests that the Court stay his execution currently set for April 21, 2022, pending the filing and disposition of his Petition for Writ of Certiorari.

Respectfully submitted,

s/ David R. Dow

David R. Dow*
Texas Bar No. 06064900
Jeffrey R. Newberry
Texas Bar No. 24060966
University of Houston Law Center
4170 Martin Luther King Blvd.
Houston, Texas 77204-6060
713-743-2171
713-743-2131 (f)

* Member, Supreme Court Bar