No. 18-9676

IN THE
Supreme Court of the United States

RANDY ETHAN HALPRIN,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Randy Halprin was a member of the infamous Texas Seven, who violently escaped from a Texas prison and conducted a series of robberies that culminated in the shooting death of Irving Police Officer Aubrey Hawkins. In the district court below, Halprin challenged the state court's rejection of his *Enmund*/*Tison* and *Lockett* claims.[1] The district court denied relief, finding his *Enmund*/*Tison* claim procedurally defaulted and meritless and his *Lockett* claim meritless. He then sought a certificate of appealability (COA) in the Fifth Circuit.

Having filed six extra briefs (two of them extra-length) in the Fifth Circuit, Halprin now asserts that the court's extensive briefing procedures reveal the façade of its "merits-cum-COA practices." He goes on to say that the court erred in denying a COA on his claims.

The questions before the Court are thus:

1. Should this Court grant certiorari to resolve whether the Fifth Circuit's past misapplications of the COA standard and procedures in other cases prove a misapplication in this case?

2. Is the district court's procedural determination on Halprin's *Enmund*/*Tison* claim debatable based on a theory that was not before the district court—i.e., actual innocence of the death penalty rather than ineffective assistance of state habeas counsel?

3. Did the Fifth Circuit err when it applied 28 U.S.C. § 2254(d) to Halprin's claims that the state court adjudicated on the merits?

4. Is it debatable that *Lockett* and its progeny clearly held that trial courts are prohibited from applying evidentiary rules in punishment proceedings?

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[1] *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987); *Lockett v. Ohio*, 438 U.S. 586 (1978).

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BRIEF IN OPPOSITION

Petitioner Randy Ethan Halprin, a member of the group known as the "Texas Seven," is one of seven inmates who escaped from a Texas prison and committed a series of robberies that culminated in the shooting death of Irving Police Officer Aubrey Hawkins. He now petitions this Court for a writ of certiorari from the Fifth Circuit's denial of a COA on his *Enmund*/*Tison* and *Lockett* claims. His complaint is that the lower court erred, but he frames it differently. He asks this Court to invoke its supervisory powers to stop judicial "gaslighting" and to confront the Fifth Circuit's bias against capital petitioners. Pet. Cert. 33–37. As support for his accusations, he directs the Court to the Fifth Circuit's misapplication of the COA standard in 2001, 2003, and 2015, as well as its procedures in other, more recent cases. Pet. Cert. 3–4, 13–15. Finally, he links his theory to his case, alleging that the Fifth Circuit erred when it reviewed the district court's determinations in light of 28 U.S.C. § 2254(d) and when it found those determinations undebatable. Pet. Cert. 15–29.

Halprin's petition does not raise any issue warranting this Court's attention. This case is not *Buck*[2] or *Tennard*[3] or *Miller-El*.[4] Nor is it a case in which the Fifth Circuit requested extra briefing or granted oral argument before denying COA. This is a case in which the Fifth Circuit correctly identified the COA standard and then correctly applied it to the district court's determinations. This Court should deny certiorari.

STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

I. Facts of the Crime

Halprin was a member of the Texas Seven who escaped from TDCJ's Connally Unit. ROA.7193–94, 7609, 7612, 7731–32. During their escape, the group took hostages, whom they threatened, bound, assaulted, and stripped. ROA.7622–23. Halprin used violence and death threats to control the hostages. At one point, he stated to a supervisor: "I hate you. And if you give us any problem. I'll just kill your fucking ass." ROA.7963. Halprin overpowered hostages. ROA.7913, 7958, 7961, 7976, 7979, 7963–65, 7982. He stood over victims and watched as they were beaten; he mopped up blood as the violence

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2 *Buck v. Davis*, 137 S. Ct. 759 (2017).

3 *Tennard v. Dretke*, 542 U.S. 274 (2004).

4 *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

escalated. ROA.7866, 7898–99. Halprin also left a note behind in his prison bunk stating, "Believe me, you have not heard the last of us." ROA.7741–42.

The Seven went on to commit a spree of robberies. For their third, they decided to rob an Oshman's Supersports store in Irving, Texas. Each member took on a role. Halprin and Michael Rodriguez cased the store beforehand, and, on the day of the robbery, were tasked with pretending to be shoppers and stealing apparel. ROA.6801, 7629, 7760–61.

On Christmas Eve, all armed with loaded guns, Halprin and five of the other escapees entered Oshman's just before closing. ROA.6802, 7668, 7762. The escapees held employees at gunpoint and led them to a breakroom. ROA.6663–64, 6667–68. George Rivas made the store manager lead him to the store safe, security room, gun department, and gun safe. ROA.6675–80. While walking from the store's safe to the security room, Rivas left a bag of cash with Halprin (who was posing as an employee in the front window of the store to deter suspicion). ROA.7634. While the other escapees tied employees up in the breakroom, Halprin and Rodriguez carried goods to the back of the store to load the getaway vehicle. ROA.6667–70, 6681, 6803,7633–34, 7763–64, 9544–9561.

An employee's girlfriend, who was parked outside the store, saw the commotion inside and called the police. ROA.687686. Officer Aubrey Hawkins was the first to respond. ROA.7635–43. Patrick Murphy radioed Rivas a

warning as Hawkins pulled up to the store. ROA.6683, 6803–04, 7635, 9554–61. Before Hawkins could exit his car or unholster his gun, Rivas approached the vehicle and began firing. Other escapees then opened fire on the police cruiser. ROA.6804, 7639–43; 9554–61. Hawkins suffered eleven gunshot wounds fired by at least five different guns. ROA.6919–21, 6981–82, 7442–55, 7643–44.[5] Hawkins was then pulled from his patrol car and left on the pavement. The men backed their vehicle over Officer Hawkins and dragged him several feet. ROA.6955–74, 7140–41, 7186–87, 8910–13. The Seven stole $70,000 in cash and forty-four guns. ROA.6675–80. Halprin received a share of the proceeds. ROA.7668–69.

Minutes after the Seven fled, Officer Cassout arrived and found Officer Hawkins behind Oshman's with no pulse. ROA.6749. Police secured the area, interviewed employees, and collected evidence, including a firearm stolen from TDCJ during the escape. ROA.6754, 6773, 6790–91, 6977–78; 8649–50, 8910–11. They also observed that Officer Hawkins's gun was missing from his holster. ROA.6754. Later that night, several of the employees identified members of the Texas Seven from a photographic lineup. ROA.6692–94.

The Seven fled to Colorado, purchased an RV and a Jeep, and rented space at an RV park in Woodland Park, Colorado. ROA.6791–95, 6806, 7203–

[5] Police recovered other unidentifiable bullet fragments from the scene that could have been fired from a sixth gun. ROA.7450–51, 7455, 7482.

07, 7649–55, 9554–61. Almost a month after the Oshman's incident, a resident of the RV park recognized Rivas and Rodriguez and alerted the authorities, who quickly converged on the area. ROA.7217–27, 7244–51. The next day, a Colorado SWAT team captured Rivas, Joseph Garcia, and Rodriguez at a gas station just off the highway. ROA.7251–52, 7273, 7285–98, 7330–35. Halprin and Larry Harper, who were at the RV, were also surrounded by law enforcement. ROA.7275–57, 7271, 7659–60. Halprin surrendered. Harper committed suicide. ROA.7254–57, 7274–79, 7660. Two days later, police captured Murphy and Donald Newbury after a standoff at a Colorado Springs hotel. ROA.6806.

A search of the RV and Jeep uncovered Officer Hawkins's handgun, firearms stolen from Oshman's, and firearms stolen during the TDCJ escape. ROA.7394–7400, 8687–88. The agents recovered an insurmountable amount of evidence connected to the Seven's TDCJ escape, robbery, and murder. ROA.7366–7404, 7429–33, 7808–09. Police also found two-way radios, scanners, and radio-frequency guides for both Texas and Colorado. ROA.7366–7404, 7429–33. The frequencies used by the Irving Police Department were marked. ROA.7384–85.

After being taken into custody, Halprin, Rivas, Rodriguez, and Newbury confessed to the robbery. ROA.6795–51. 7504–05, 9554–61. In his statement,

Halprin admitted to voluntarily participating in the armed robbery but claimed that he never fired his gun. ROA.6800–05, 7753–54, 9554–61.

During the trial Halprin presented evidence that he was the youngest and least intelligent of the escapees, had no experience with guns or history of robbery, and lacked leadership abilities. ROA.7580–81, 8267, 8275, 12689–13071. TDCJ civilian employee Patrick Moczygemba testified that Halprin was "dumb as a bag of rocks" and that his role was to follow orders. ROA.7900–03, 12268. TDCJ civilian employee Mark Burgess similarly testified that Halprin "was not a leader type." ROA.7986–87. Halprin testified that he was a follower and his participation in the escape and murder was minimal. ROA.7622–73, 7749–63, 7808–22. Halprin also admitted his codefendants' confessions into evidence, which characterized him as "a follower and not a leader." ROA.10204–12, 10220–56.

II. Evidence Relating to Punishment

A. The State's case

In 1996, Halprin had been dating a woman named Charity Smith and was babysitting her toddler son, Jarrod. ROA.7600, 7693. Halprin savagely beat the toddler, fracturing his skull, legs, and arms. ROA.7594, 7601–02, 7697–99, 7705–10, 7989–91. The jury heard Halprin's confession in which he admitted repeatedly hitting, kicking, and shoving little Jarrod, while the child cried for his mother. ROA.8136–37.

B. The defense's case in mitigation

Former TDCJ Assistant Director and a TDCJ employee testified to TDCJ's classification system and the conditions that Halprin would face if he received a life sentence. ROA.8180–81, 8216, 8230–44. Halprin had only four minor disciplinary violations prior to his escape, no major violations, and had no gang affiliation, ROA.8199–8202, and he had only one minor incident while in custody awaiting trial. ROA.8275–76.

Halprin's childhood friends, Mindi Sternblitz and Jason Goldberg, testified that Halprin had a good heart and did not get into any more trouble at school than any other boy his age. ROA.8290–98, 8319–31. Halprin and his brother had a strained relationship with their adoptive father, Dan, and Halprin was always trying to please Dan. ROA.8293–99, 8322–27. Jason's mother, Terri Goldberg, added that Halprin was well-behaved. ROA.8339–53.

The defense also called Dr. Kellie Goodness, a clinical and forensic psychologist, who interviewed Halprin and twelve of his acquaintances and gave Halprin a battery of psychological tests. ROA.8374–96, 8447–94. Dr. Goodness testified that in her opinion, Halprin had a tumultuous childhood, a rigid adoptive father, untreated attention deficit disorder, avoidant personality disorder, and a predilection for drug abuse and depression. ROA.8374–8423. She further stated that Halprin's disorders were not properly treated and there

was a complete absence of guidance from his parents that was necessary for a child with such special needs. ROA.8468–70.

As he did during the guilt-innocence phase of trial, Halprin presented evidence that he was not a leader. He introduced TDCJ records that summarized the histories, personalities, and leadership styles of the escapees. One of them opined that "none of the three Anglo escapees appear to demonstrate a 'leadership-alpha male mentality.'" ROA.8266–67, 12443–13113. Along the same lines, Halprin attempted to introduce the Ranking Document into evidence pursuant to the business-records exception to hearsay.[6] The document had been created to help apprehend the escapees and "rank[ed] the offenders from likeliest to least likely leader of the group." It identified Halprin as the least likely:

> HALPRIN - was quiet and never exhibited leadership qualities. Was consistently worried about whether his work was acceptable to the civilian workers. Very submissive characteristic. This worrisome attitude was seen to escalate a month before the escape.

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[6] Texas Rule of Evidence 803(6) provides that "records of regularly conducted activity" are not excluded by the hearsay rule. It defines "records of regularly conducted activity" as:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information, transmitted by, a person with knowledge, if kept in the course of regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.

> One civilian worker speculated whether HALPRIN was undergoing some type of depression.

ROA.12270. But at that time, neither Halprin nor the prosecutors knew who had prepared the document or contributed to it. ROA.8370, 8446, 13186, 14663–64, 14670–75, 14685–725, 16051–52, 16922–30, 18063–64.[7] Because Halprin could not demonstrate that a TDCJ employee had personal knowledge of the statements therein, the trial court sustained the prosecutor's hearsay objection. *See* ROA.7904–05, 8267–69, 8370–73, 8443–47. It further explained that documents conclusions were "all hearsay from unnamed sources." ROA.8446.

In his closing argument, defense counsel continued with the theme that Halprin was a follower and reminded the jury the evidence demonstrating as much:

> You know what Halprin is? He's a follower. No leadership qualities. Everybody down at TDC has figured that out. Burgess said he's dumb as a bag of rocks. Tell him what to do. And you look during the course of the scheme of conduct. Is he one of the guys with the shank? No he's the guy with the mop. What's he doing? He's not even engaging in any independent thought through the course of the escape. He's waiting until he's being told to do something and then he does it. And that comes from [the State's] witnesses.

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[7] Three months prior to the trial, the State disclosed twenty boxes of TDCJ records to Halprin's counsel and prison expert, S.O. Woods. *See* ROA.8197–99, 8444–46, 13199–200, 17345–48, 18063–64. The Ranking Document was included in the boxes, and Woods brought it to defense counsel's attention. ROA.8269, 13186–87, 13195–96, 13199–200, 17345–48, 18063–64.

ROA.8045, *see also* ROA.8060 (reminding jury that Moczygemba and others indicated that Halprin was not a leader and had low mental ability).

C. The jury's answers to the special issues

The jury was given the traditional future-dangerousness and mitigating-circumstances special issues. *See* Tex. Code Crim. Proc. Ann. art. 37.071 § 2(b)(1), (d)(1). It found that Halprin posed a future danger and failed to demonstrate mitigating circumstances warranting a life sentence. Because Halprin was convicted of capital murder as a party, the jury was also given the "anti-parties" special issue, which asks whether the defendant, at the very least, "anticipated that a human life would be taken." Tex. Code Crim. Proc. art. 37.071 § 2(b)(2). The jury found that Halprin did. ROA.8576.

III. Direct Appeal and Postconviction Proceedings

On direct appeal, Halprin asserted as a point of error that the trial court's exclusion of the Ranking Document violated his Eighth Amendment right to present mitigating evidence. The CCA rejected his claim, finding that the trial court did not abuse its discretion because Halprin failed to provide any evidence of who prepared the document or that it was a record of regularly conducted business activity. ROA.1914. The court further found that the Ranking Document was cumulative of other evidence Halprin presented and, thus, any error in excluding the document was harmless. ROA.1914–16.

Rejecting his other points of error as well, the CCA affirmed Halprin's conviction on direct review. ROA.1910–25.

Halprin also filed a state habeas application. Among other claims, he asserted that his death sentence violated *Enmund*/*Tison* because he lacked the requisite culpability. The state habeas court found his *Enmund*/*Tison* claim procedurally barred because he did not contemporaneously object at trial or raise the claim on direct appeal. ROA.18048–49. Addressing the merits in the alternative, the state habeas court found (1) that by its affirmative answer to the anti-parties special issue, the jury found that Halprin possessed the requisite culpability under *Enmund* and *Tison*; and (2) that Halprin was a major participant in the robbery and acted with reckless disregard for human life. *See* ROA.18050–59. Based on the state habeas court's findings and its own review of the record, the CCA denied relief. *Ex parte Halprin*, Nos. WR-77,175-01 to -04, 2013 WL 1150018 (Tex. Crim. App. Mar. 20, 2013).

Halprin then sought habeas relief in federal court. The district court denied relief and a COA. ROA.8809–23. The Fifth Circuit denied a COA. Halprin now petitions this Court for certiorari on the Fifth Circuit's denial of COA. The Director's response follows.

REASONS FOR DENYING THE WRIT

I. Halprin Provides No Compelling Reason to Grant Certiorari.

The questions that Halprin presents are unworthy of this Court's review. There is no conflict among circuits, nor important issue proposed, nor similar case pending. He asserts that the Fifth Circuit correctly identified the COA standard but misapplied it. His complaint is a textbook example of a purported "misapplication of a properly stated rule of law." *See* Sup. Ct. R. 10. Such complaints are not compelling, Sup. Ct. R. 10, and Halprin's is particularly not so. He discusses the Fifth Circuit's errors over the decades, all to say that the court's consideration of the COA issue has been too thorough. But then, when he finally gets to his case, his complaints seem to be that the court was not thorough enough. See Pet. Cert. 15, 18 (complaining about the appellate court's rejection of his miscarriage of justice argument in "one conclusory sentence"), 20–21 (complaining about the appellate court's "wholesale" rejection and "pretermission" of his assertion that AEDPA does not apply), 23 (complaining that the appellate court resolved his claims "without ever analyzing the underlying merits"). Halprin's argument appears to be that the Fifth Circuit's historically thorough approach to the COA inquiry proves that the court got it wrong in this case, where its analysis was too succinct. His premises are not only tangential; they also fail to support his conclusion. This Court should deny certiorari.

II. Standard of Review

A COA may only issue "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). The inquiry is a threshold one. *Buck*, 137 S. Ct. at 773. But it requires the applicant to show that "reasonable jurists could debate whether (or for that matter, agree that)" the district court should have resolved the claims in a different manner, or that the claims "deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 335. For procedurally barred claims, the applicant also must show that reasonable jurists could debate the district court's procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The district court's determinations must be reviewed in light of § 2254(d), which "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Hardy v. Cross*, 565 U.S. 65, 66 (2011) (per curiam) (internal quotation marks omitted).

III. The Fifth Circuit Correctly Applied the COA Standard When It Found Reasonable Jurists Could Not Debate the District Court's Determinations that Halprin's *Enmund/Tison* Claim is Procedurally Defaulted and Meritless.

Halprin alleges that the Fifth Circuit's inquiry in this case "flouts this Court's guidance on the threshold inquiry for [COA] determinations." Pet. Cert. 13. Having filed six extra briefs (and two extra-length briefs) in the lower

court,[8] he now suggests that all that briefing proves that "bad habits die hard" there. *See* Pet. Cert. 3, 12, 14. Beyond his compilation of the Fifth Circuit's past errors and procedures in cases not his own, little remains. Halprin's assertions of the debatability of the district court's resolution of his *Enmund*/*Tison* claim are based on a legal theory that was not before the district court and a misrepresentation about what the state habeas court never found. While it is true that the Fifth Circuit has gotten it wrong in the past, it is Halprin who flouts the COA standard today.

A. Halprin's assertion of the *Sawyer*[9] exception for the first time in the Fifth Circuit does not retroactively render the district court's procedural determination debatable.

Halprin represents that he asserted in the district court that his innocence of the death penalty excused the default of his *Enmund*/*Tison* claim. Pet. Cert. 15. But he did not. He conceded that the claim was defaulted because he failed to contemporaneously object and because he failed to raise the claim on direct appeal. And he asked the district court to apply *Martinez* and *Trevino* to excuse its default. *See* ROA.406–11. The district court declined to do so and found the claim defaulted. *See* Pet. Appx. 39–40.

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[8] *See Halprin v. Davis*, No. 17-70026, Appellant's Supp. Letter Brief (June 4, 2018); Supp. Reply Letter Brief (July 3, 2018); Supp. Authorities (July 6, 2018); Opposed Mtn. Reconsider Order Granting Mtn to File Extra-Length Reply (Aug. 8, 2018); Opposed Mtn. File Supp. (Aug. 10, 2018); Reply (Aug. 28, 2018).

[9] *Sawyer v. Whitley*, 505 U.S. 333 (1992).

When Halprin reached the Fifth Circuit, then, his job was to show that the district court's resolution of the procedural question before it was debatable—i.e., that *Martinez* and *Trevino* should apply to excuse the default of his *Enmund*/*Tison* claim. Instead, he raised new arguments. He revoked his concessions about the default of his claim, and then he went on to say that, if his claim was defaulted, *Sawyer*'s actual-innocence exception excused its default. *See* Mot. Cert. App. 41–43. In other words, Halprin first faulted the district court for accepting his concession that his claim was defaulted (which the Director agreed with). And then he faulted the district court for failing to adjudicate an issue that neither party had raised. It is difficult to understand how issues that were not before the district court might render its determination debatable.

B. The Fifth Circuit correctly found the district court's procedural determination undebatable.

The Fifth Circuit considered Halprin's new arguments but found that the district court's procedural determination was still not debatable:

> Here, jurists of reason would not debate that Halprin's petition does not state a valid claim of the denial of a constitutional right or that the district court's procedural ruling was correct. Although Halprin conceded in the district court that his claim was procedurally barred because he failed to raise it at trial or on direct appeal, he now argues that the contemporaneous objection rule does not apply, or alternatively that he complied with the rule. But regardless of whether the contemporaneous objection rule bars Halprin's claim, Halprin does not dispute that his claim is barred for failure to raise it on direct appeal. . . . Halprin has not shown

> cause for and prejudice attributable to the default or demonstrated that a failure to address his claim will result in a fundamental miscarriage of justice. We thus conclude that jurists of reason would not debate the district court's determination that Halprin's *Enmund*/*Tison* claim is procedurally barred.

Pet. Appx. 16–17 (internal citations omitted).

Either because the Fifth Circuit did not reach his desired outcome, or because it did not write "reasonable jurists could not debate" before each of its sentences, Halprin complains that the court misapplied the COA standard. He argues that his *Enmund*/*Tison* claim is debatable; therefore, his assertion of the *Sawyer* exception is too. Pet. 18–19. "If the Fifth Circuit found [his] evidence of death-ineligibility under *Enmund*/*Tison* . . . irrelevant to the *Sawyer* determination," it would be in conflict with the Fourth and Eighth Circuits, he says. Pet. Cert. 19. But his hypothetical is irrelevant, as the Fifth Circuit did not find anything of the sort. It found only that Halprin failed to satisfy *Sawyer*'s actual innocence exception (with his undebatably meritless *Enmund*/*Tison* claim). The Fourth and Eighth Circuit cases are not different. *See Fairchild v. Norris*, 21 F.3d 799 (8th Cir. 1994) (finding evidence that petitioner did not have a gun and was not present for the murder insufficient for *Sawyer* exception); *Buckner v. Polk*, 453 F.3d 195 (4th Cir. 2006) (finding evidence that petitioner did not pull the trigger insufficient for *Sawyer* exception).

Halprin asserts that his *Enmund*/*Tison* claim is tantamount to *Sawyer*'s actual-innocence exception. Pet. Cert. 17. If he is correct, then *Enmund*/*Tison* claims would never be subject to procedural default. But in *Sawyer*, this Court explained that an underlying constitutional claim is not enough to demonstrate actual innocence of the death penalty: "[P]etitioner must show something more in order for a court to reach the merits of his claims . . . than he would have had to show to obtain relief on his first habeas petition." 505 U.S. at 345. Indeed, a petitioner must "show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found [him] eligible for the death penalty." *Id.* at 336. In this context, the contemplated "constitutional error" is typically one that "precluded the development of true facts" or "resulted in the admission of false ones" during the punishment phase of trial. *Smith v. Murray*, 477 U.S. 527, 538 (1986); *see also Sawyer*, 505 U.S. at 346 (approving the Fifth Circuit's miscarriage-of-justice definition). Halprin neither alleges that untruthful evidence was admitted nor that truthful evidence was excluded. Instead, he alleges he did not want to participate in the robbery or to carry a gun. *See* Pet. Cert. 18–19. Halprin's self-serving "evidence" about what he wanted—when he joined forces with murderers, rapists, and robbers to violently escape from prison and engage in a series of armed robberies—is neither clear, nor convincing, nor suggestive of a

constitutional error that *Sawyer*'s "very narrow exception" requires. Not even debatably so.

C. The Fifth Circuit correctly found the district court's alternative merits determination undebatable.

Through all of his accusations about the Fifth Circuit's misapplication of the COA standard, Halprin overlooks his burden thereunder. Even if the Fifth Circuit broached the threshold in its consideration of the district court's procedural determination, that does not mean the court was wrong to deny a COA. To be entitled to a COA, Halprin also needed to demonstrate that the district court's merits determination was debatable. *Slack*, 529 U.S. at 484. He seems to imply in a footnote that it was. *See* Pet. Cert. 18 n.8. But that is as far as he gets.

1. *Enmund* and *Tison* and their implementation

In *Enmund* and *Tison*, this Court addressed the culpability required for assessing the death penalty in felony-murder convictions. In both, it applied a proportionality measurement under the Eighth Amendment, which prohibits "punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." *Enmund*, 458 U.S. at 788 (citations omitted); *Tison*, 481 U.S. at 152. The Court held in *Enmund* that the death penalty may not be imposed on one who "aids and abets a felony in the course of which murder is committed by others but who does not himself kill, attempt

to kill, or intend that a killing take place or that a level of lethal force will be employed." 458 U.S. at 790–91. But the Court created an exception in *Tison*, when it was faced with two brothers who assisted their father in an armed prison escape and went on to commit robberies to further that escape. It held that the concerns of *Enmund* are not implicated where an accomplice was a major participant in the felony and displayed a "reckless indifference to human life." 481 U.S. at 158. It explained that reckless disregard for human life is "implicit in knowingly engaging in criminal activities known to carry a grave risk of death" and represents a highly culpable mental state when that conduct "causes its natural, though also not inevitable, lethal result." *Id.* at 157–58.

Critically, this Court did not establish any procedural guidelines or instructions on how to implement *Enmund*. Later, in *Cabana*, the Court expressly left discretion to the states: "*Enmund* does not impose any particular form of procedure upon the States." *Cabana v. Bullock*, 474 U.S. 376, 386 (1986). Rather, "[t]he Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under *Enmund*." *Id.* at 386. A determination of requisite culpability, then, can be made at any point in the proceedings—and it can be made by a jury, a judge, or an appellate court. *Id.* at 386–87; *see also Hopkins v. Reeves*, 524 U.S. 88, 99–100 (1998) (states can comply with *Enmund* requirement at sentencing or on appeal).

2. It is undebatable that the state habeas court correctly applied this Court's precedent when it rejected Halprin's *Enmund/Tison* claim.

Halprin asserts that no state court ever determined that he was a major participant in the robbery or murder or that he exhibited a reckless disregard for human life. Pet. Cert. 17. But that is precisely what the state habeas court found when it rejected the merits of his claim:

> This Court finds the evidence shows that [Halprin] was a major participant in the robbery and the murder. The record is replete with evidence that reflects [Halprin's] intent to kill and his reckless indifference to Officer Hawkins's life. There is even evidence from which the jury could conclude that [Halprin] himself fired a lethal shot.

ROA.18050. And contrary to Halprin's assertions, the evidence did so establish: After "weighing the pros and cons," Halprin joined murderers, rapists, and robbers to escape from prison. ROA.7609, 7612, 7727–31, 7739. Although not the mastermind behind the escape, he was involved in and aware of the plans. ROA.7608–09, 7621–22, 7726, 7729–33. During the escape, he assaulted and threatened victims and watched and mopped blood from the floor as his teammates did the same. ROA.7866, 7898–99, 7913, 7958, 7961, 7976, 7979, 7963–7965, 7982.

After the group had successfully escaped from prison, Halprin asserted his autonomy. He participated in the first robbery, then opted out of the second. ROA.7626–27. Although he admitted that he could have left the group,

ROA.7752, he voluntarily joined forces again for the Oshman's robbery. ROA.7751–53. He cased the store the day before, ROA.6801, 7756, and, on Christmas Eve, he entered the store armed with a loaded revolver, alongside five other armed and violent felons. ROA.6803, 7629, 7631–32, 7668, 7762, 7754, 7758, 7763. Halprin then executed his role in the robbery, which included loading a sleeping bag of forty-four stolen guns into the group's getaway car. ROA.6804, 7637–38, 7757, 7764. Although the physical evidence is not conclusive as to whether Halprin shot at Officer Hawkins, it indicates a strong possibility that he did. ROA.10852–53 (¶¶41–42) (synthesizing trial evidence ROA. 6789–90, 6951–60, 7450–51, 7455,7482, 7512–17, 7771–78, 8677–80, 8708–09, 9739). Halprin did not disassociate himself from the group after the murder but instead traveled with them to Colorado.

The state habeas court's analysis reflects a faithful application of *Enmund* and *Tison*. ROA.18050–53. Accordingly, the district court's application of § 2254 (d) and (e)(1) left no room for debate. *See* ROA.900. While Halprin bypasses the relevant part of the state habeas court's analysis by asserting that it never happened, he seems to take issue with another one of the state court's findings. In addition to its independent *Enmund*/*Tison* analysis, the state habeas court found the jury's affirmative answers to the anti-parties special issue meant that it found that Halprin had a culpable state sufficient to render him death eligible. ROA.18049, 18053. Halprin argues in a

footnote that it is debatable whether the state habeas court contravened this Court's precedent in so finding. Pet. Cert. 18 n.8.

But it is not. Halprin's jury was permitted to find him guilty of capital murder as a co-conspirator to the felony offense of robbery, which resulted in the death of Officer Hawkins, or as a party to the capital murder of a peace officer acting in the lawful discharge of an official duty. *See* Tex. Penal Code §§ 7.01, 7.02 (b). Because the charge permitted the jury to find Halprin guilty upon the belief that he should have anticipated that a life would be taken or as a party to the murder itself, the jury was given the anti-parties special issue. The anti-parties special issue requires juries to find, at the very least, that the defendant "anticipated that a human life would be taken." Tex. Code Crim. Proc. art. 37.071 § 2(b)(2). The CCA has found such inquiry indicative of "a highly culpable mental state, at least as culpable as the one involved in *Tison*," and therefore held that, "according to contemporary social standards, the death penalty is not disproportionate for defendants with such a mental state." *Ladd v. State,* 3 S.W.3d 547, 573 (Tex. Crim. App. 1999). Thus, even assuming the jury found only "anticipation," such a culpable mental state satisfies *Tison*.

This Court's precedent is not to the contrary. It gave states discretion to implement *Enmund* in *Cabana* and has yet to provide any specific procedures or language to guide states in so doing. Accordingly, Texas must be given "leeway." *See Harrington v. Richter*, 562 U.S. 86, 101 (2011). Texas's

implementation of *Enmund* through the jury's consideration of the anti-parties special issue is consistent with this Court's precedent—or, at the very least, cannot be said to contradict it. The Fifth Circuit faithfully applied the COA standard to find that the district court's procedural and merits determinations of Halprin's *Enmund*/*Tison* claim are not debatable.

IV. The Fifth Circuit Correctly Applied § 2254(d)'s Deference to the State Habeas Court's Findings and Conclusions.

Among other legal theories, Halprin asserted in his motion for COA that AEDPA deference does not apply to a state court's findings where the judge who signed them was not present for the evidentiary hearings held in state habeas proceedings. Mot. Cert. App. 39–40. The Fifth Circuit rejected his argument in a footnote as unsupported by post-AEDPA precedent. Pet. Appx. 18 n.4. Halprin now asserts that the lower court's rejection of his argument contravened *Buck*. Pet. Cert. 20. But *Buck* had nothing to do with when and whether AEDPA deference applies to a state court's findings.

As support for his argument that the lower court erred when it applied AEDPA to his claims, Halprin cites three pre-AEDPA cases that note a potential difficulty in making credibility determinations from a cold record. Pet. Cert. 21 (citing *United States v. Raddatz*, 447 U.S. 667 (1980); *Cabana v. Bullock*, 474 U.S. 376, 388 n.5 (1986); *Wainwright v. Witt*, 469 U.S. 412, 429 (1985)). But significantly, none of those cases prohibited courts from making

such determinations—quite the opposite, actually. In *Raddatz*, this Court *upheld* a statute permitting a judge to make a de novo determination of credibility assessments without hearing the live testimony. 447 U.S. at 680–81. And in *Cabana*, this Court *authorized* appellate courts to make the *Enmund/Tison* determination based on a paper record. *Id.* 386–87.[10] While this Court has recognized that ascertaining credibility determinations from a cold record "*might*, in a given case" be difficult, *Cabana*, 474 U.S. at 388 n.5, it does not follow that a state court that engages in a *potentially* difficult inquiry is stripped of all deference.

But that is precisely what Halprin argues. He asserts that this Court's concerns noted in dicta—in cases in which it ultimately authorized non-present judges to make credibility determinations on a paper record—should be read to override AEDPA. He argues that the Fifth Circuit's reference to post-AEDPA precedent is "bizarre" because the statute requires state courts to comply with this Court's precedent up to the date of a given judgment. Pet. Cert. 21. But Halprin's argument is not that the state court's adjudication of his claims contravened or unreasonably applied this Court's holdings. It is that

[10] In *Wainwright v. Witt*, 469 U.S. 412 (1985), this Court held that § 2254(d)'s presumption of correctness applies to a trial court's juror bias determinations. It explained that such determinations involve credibility findings that are difficult to discern from the paper record.

AEDPA does not apply when a state court's process *may* invoke procedural concerns that this Court has noted in its footnotes.

The statute refutes Halprin's contention: Before AEDPA, § 2254 made deference to state court findings contingent upon the state court's compliance with certain procedural requirements. 28 U.S.C. § 2254(d) (1994) (repealed 1996). AEDPA jettisoned those procedural requirements and erected in their place a presumption of correctness that can only be rebutted by clear and convincing evidence. *See Valdez v. Cockrell*, 274 F.3d 941, 949 (5th Cir. 2001) (citing Pub. L. No. 104-132, 110 Stat. 1214 (1996), amending § 2254)). To reintroduce a procedural requirement would render AEDPA's amendment a nullity. *See id.* Also, § 2254 (d) states that relief "*shall* not be granted with respect to *any* claim adjudicated on the merits in State court proceedings." (emphasis added). The use of "any" makes clear that this section was meant to apply to *all* cases adjudicated on their merits in state court. *See id.* at 951. But because this Court has recognized one exception to the statute,[11] post-AEDPA precedent provides the next best answer. And the Fifth Circuit correctly found that there is none supporting Halprin's position. Pet. Appx. 18 n.4.

Still, Halprin contends that the issue is at least debatable. He assumes that petitioners are constitutionally entitled to hearings and to continuity in

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[11] *See Panetti v. Quarterman*, 551 U.S. 930, 948–49 (2007).

the judges from the start of trial to the postconviction court's final denial of relief (a process that lasted nearly ten years in this case). While it is beyond debate that this Court has never recognized any such right, it is also worth noting that the process is the opposite in federal postconviction proceedings: Petitioners are generally not entitled to hearings, and judges are largely confined to the cold record. *See* 28 U.S.C. § 2254(e)(2); *Cullen v. Pinholster*, 563 U.S. 170, 180–81 (2011). The processes in postconviction proceedings are different from those of a criminal trial because the interests at stake are different. *Cf. Raddatz*, 447 U.S. at 679 (concluding that process due at suppression hearing is less than that due at a trial because the interests at stake are of lesser magnitude in suppression hearing). Halprin's proposed rule fails to account for that.

Furthermore, the credibility determinations were not difficult to make in this case; the paper record provided indisputable answers. Trying to find a way around those answers, Halprin extracts 3 of the state court's 1104 findings from their context and calls them contradictory. Pet. Cert. 20. Because the state court noted his testimony with regard to its finding that the Ranking Document was cumulative of evidence admitted at trial, Halprin suggests that, to be consistent, it would also have to accept his testimony that he did not anticipate the use of lethal force and did not violently assault prison guards. Pet. 20. Not so.

With respect to his *Brady*[12] claim, the state habeas court found that the Ranking Document's author was not material for several reasons.[13] Among them was that it was cumulative of other evidence admitted at trial. It explained that two TDCJ employees testified to Halprin's character for leadership. ROA.18068. The first testified that Halprin was unintelligent and that his role was to follow orders. ROA.18068. He described Halprin as "dumb as a bag of rocks" and as a person who "had to be told time after time how to complete a task." ROA.18068. The second testified that Halprin was "not a leader type." ROA.18068. The state habeas court found that the TDCJ employees were more credible than the inmates that Halprin proposed as witnesses. ROA.18068. It went on to note that Halprin testified that he was a follower and that his codefendants characterized him as a follower. ROA.18069.

With respect to Halprin's *Enmund/Tison* claim, the state court considered his assertions that the Seven's preparations were intended to

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[12] *Brady v. Maryland*, 373 U.S. 83 (1963).

[13] It found that (1) even if the author had been known, the document still would have been inadmissible; (2) Halprin failed to demonstrate that any of the contributing inmates would have testified at trial; (3) evidence from the Ranking Document was cumulative of other evidence offered at trial; (4) even though the document was not admitted, the jury was aware of its nature and contents, as trial counsel injected the information into his questions before the jury; (5) if the document had been admitted with the author's sponsorship, the author would have testified that he and other officers who contributed to the document considered the last three on the list (Garcia, Murphy, and Halprin) interchangeable. ROA.18066–70.

prevent a lethal confrontation, that he never anticipated the use of lethal force, and that he did not resort to violence or threats during the escape. But the paper record led to a different conclusion: The state habeas court found his assertions incredible because they were "predicated in large part on his own trial testimony, the credibility of which was severely impeached on cross-examination." ROA.18051 (emphasis added). Also, "the facts and circumstances . . . significantly impugn[ed Halprin's] denials of an intent to kill and knowledge that lethal force would be used." ROA.18051.

Here is what the cold record showed: Halprin admitted on cross-examination that he had been a pathological liar. ROA.7679, 7681. Confronting an example of his dishonesty, he admitted that he had lied to police after beating sixteen-month-old Jarrod Smith. Rather than taking responsibility for Jarrod's injuries, he attempted to shift the investigation's focus to Jarrod's mother. *See* ROA.7695–7710. Excerpts from a letter Halprin had written his parents revealed more about his character for dishonesty: He wrote, "I don't expect y'all to believe [me]. Sometimes I don't even believe myself." ROA.7680. Halprin further indicated that he had been "pretty good at conning people and manipulating them when [he had] to." ROA.7692, 7711–12. And a letter he had written to a friend just before his trial for capital murder revealed that he was actively trying to distract the sitting jurors from the merits of his case. ROA.7712–15. The record is replete with evidence of Halprin's dishonesty. *E.g.*,

ROA.7677–78, 7692–93, 7719–22, 7749. Contrary to his assertions, then, it was not unreasonable for any judge—present for his trial testimony or not—to find his allegations incredible, which, again, were that he intended to avoid lethal confrontation and did not resort to violence when he escaped from prison and participated in armed robberies.

The state court's findings with respect to Halprin's *Brady* and *Enmund*/*Tison* claims are not inconsistent. While the court noted Halprin's testimony that he was a follower in its *Brady* analysis, it did not find that he was a credible witness, as it had explicitly done for the TDCJ employees who so testified. But the state court certainly could have credited Halprin's testimony that he was a follower (which was corroborated by credible evidence) while at the same time discrediting his denial of any anticipation of lethal force or resort to violence incredible (which was refuted by the evidence and *Tison*). Credible or not, Halprin's testimony that he was a follower was not dispositive to the state court's *Brady* determination, and it had no bearing on his *Enmund*/*Tison* claim. Halprin was a major participant in the escape and robbery, and by his participation in those activities—known to carry a grave risk of death—he demonstrated a reckless disregard for human life. That he was a follower does not change that.

Halprin's theory suggests that courts are required to make wholesale credibility determinations. If they so much as note a witness's testimony, they

must fully credit everything that the witness says. But this theory is not realistic. And his attempt to impute credibility determinations into the state court's findings does not make them contradictory. His claims are undebatably meritless, and his legal theories are too. The Fifth Circuit properly applied the COA standard to the district court's adjudication of his claims.

V. The Fifth Circuit Correctly Applied the COA Standard When it Found Undebatable that Reasonable Jurists Could Not Debate the District Court's Denial of Halprin's *Lockett* Claim.

Halprin's theory for his next claim is that *Lockett* holds (at least debatably) that evidence proffered by a defendant in mitigation is per se admissible in sentencing proceedings and, thus, not subject to evidentiary rules. *See* Pet. Cert. 25–29. Because the Fifth Circuit did not interpret the case so broadly, Halprin accuses it of "refin[ing] and sharpen[ing]" this Court's jurisprudence in a way that AEDPA prohibits. Pet. Cert. 25. But again, he has the legal standards all mixed up.

The COA inquiry looks to the district court's adjudication of a claim, which reviews the state court's adjudication of a claim under § 2254(d). *See Hardy*, 565 U.S. at 66. Halprin skips both steps and suggests that, since this Court's holdings do not directly confront the issue he raises, it is debatable and therefore requires a COA. But that is not right. In denying relief, the district court found that the state court did not contravene this Court's holdings when it excluded the Ranking Document as hearsay. Pet. Appx. 36. To be entitled to

a COA, then, Halprin was required to show that a reasonable jurist could debate whether the state court's application of the evidentiary rule against hearsay contravened or misapplied the clear holdings of this Court. Thus, Halprin's burden was not to show that this Court's precedent left room for debate, but that it was debatable that it left none. The inquiry requires some background (that Halprin omits).

A. Clearly established law: *Lockett* and its progeny

In rare circumstances, the State's interest in deterring certain homicides may justify its imposition of a mandatory death sentence—say, for example, when a prisoner escapes from prison and goes on to commit murder. *Lockett v. Ohio*, 438 U.S. 586, 604 n.11 (1978). But in all other circumstances, the Eighth Amendment requires individualized consideration before a death sentence is imposed. *Id.* at 604. Thus, States may not preclude "a sentencer . . . from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.* Similarly, a sentencer may not refuse to consider or give effect to relevant mitigating evidence. *Eddings v. Oklahoma,* 455 U.S. 104, 110 (1982). "*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence

could never be part of the sentencing decision at all." *Johnson v. Texas*, 509 U.S. 350, 361–62 (1993) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment).

B. Procedural history

1. The trial court's exclusion of the "Ranking Document"

As noted above, Halprin attempted to introduce the Ranking Document during the punishment phase of trial pursuant to the business-records hearsay exception.[14] But because he did not know who authored the report or who contributed to it, he was unable meet the business records exception. *See* ROA.7904–05, 8267–69, 8370–73, 8443–47. The trial court sustained the prosecutor's objection. ROA.8446.

2. Direct appeal and state habeas

On direct appeal, Halprin raised a state law and Eighth Amendment challenge to the trial court's exclusion of the Ranking Document. ROA.1911. The CCA found that the trial court did not abuse its discretion because Halprin provided no evidence showing who prepared the Ranking Document, or that it was a record of regularly conducted activity. ROA.1914. Regardless, the court

[14] Texas Rule of Evidence 803(6) is substantially the same as Federal Rule of Evidence 803(6), which excepts records of regularly conducted activities from the rule against hearsay.

found no Eighth Amendment violation because the document was cumulative of other evidence Halprin presented; thus, any error was harmless. ROA.1914.

Nearly two years after Halprin's trial, state-habeas counsel asked trial counsel's prison expert, S.O. Woods, who discovered the Ranking Document prior to trial, to reexamine TDCJ's records to determine who authored the document. ROA.14696–97, 16454, 17345–48, 18063–64. From this second review of what appear to be the same records reviewed prior to the trial, Woods found a fax transmittal sheet indicating that DPS Special Crimes Investigator Hank Whitman was the author. ROA.14584–87, 14696–97, 16454, 17345–48, 18063–64.[15] That transmittal sheet—which was separated from the Ranking Document within the disclosed records—showed that Ranking Document was the final page of an eight-page transmittal that included individual profiles of the escapees. ROA.15620–28.

3. Federal habeas

In his federal habeas petition, Halprin asserted that the state trial court's exclusion of the Ranking Document contravened *Lockett* and *Eddings*. ROA.70–79, 90, 477. The district court found that it did not:

> In *Lockett*, the Supreme Court held that these constitutional provisions require that the sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's

[15] Whitman and other law enforcement agents reviewed TDCJ's files and interviewed civilian workers, correctional officers, and inmates who had been taken hostage during the escape or who had interacted with the escapees while they were incarcerated. ROA.14597–600, 14634–37, 16864, 18062.

> character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604. The . . . Fifth Circuit has construed this language to apply to categories rather than items of evidence.
> . . .
>
> In Halprin's case, the trial court did not rule that he could not present evidence of his character for leadership, even as compared with his co-actors, but merely that the report itself was not admissible because it contained multiple levels of unreliable hearsay.
> . . .
>
> In fact, the trial court allowed Halprin to develop this type of evidence, his lack of leadership character, through the witnesses who testified at trial. *See Halprin*, 170 S.W.3d at 116.
>
> Because Halprin has not shown a violation of his constitutional rights in the exclusion of this evidence and the state court findings have not been shown to be unreasonable, Halprin has not established an entitlement to relief.

Pet. Appx. 34–36. And the Fifth Circuit found the district court's determination undebatable. It explained that *Lockett* and *Eddings* dealt with the exclusion of specific types of evidence, rather than specific items in evidence. Pet. Appx. 11–12 (citing *Simmons v. Epps*, 654 F.3d 526, 544 (5th Cir. 2011)). Indeed, they did.

C. It is undebatable that the state court did not contravene or misapply this Court's precedent when it rejected Halprin's Eighth Amendment claim.

In *Lockett*, this Court struck down Ohio's statute because it precluded the sentencer from considering all but three very narrow mitigating circumstances. 438 U.S. at 608. In *Eddings*, this Court reversed the petitioner's

death sentence because the trial judge refused to admit entire areas of mitigating evidence (relating to the circumstances of the petitioner's unhappy upbringing and emotional disturbance). 455 U.S. at 108–09. Here, the trial court did not disallow evidence that Halprin was a follower, unintelligent, submissive, or depressed, but, in fact, admitted evidence that Halprin was all of those things: TDCJ employee Patrick Moczygemba told the jury that Halprin was "dumb as a bag of rocks" and that his role was to follow orders. ROA.7900–03, 12268. TDCJ employee Mark Burgess told the jury that Halprin "was not a leader type." ROA.7986–87. Dr. Goodness told the jury that Halprin had a predilection for depression. ROA.8374–8423. Halprin testified that he was a follower. ROA.7622–73, 7749–63, 7808–22. Halprin's codefendants' confessions, characterizing him as a "follower and not a leader," were also before the jury. ROA.10204–13, 10220–56, as were TDCJ records summarizing the histories, personalities, and leadership styles of the escapees, including one that opined that "none of the three Anglo escapees appear to demonstrate a 'leadership-alpha male mentality.'" ROA.8266–67, 12443–13113 (DX 55–56).

And defense counsel argued in his closing that the evidence showed that Halprin was a follower:

> You know what Halprin is? He's a follower. No leadership qualities. Everybody down at TDC has figured that out. Burgess said he's dumb as a bag of rocks. Tell him what to do. And you look during the course of the scheme of conduct. Is he one of the guys with the shank? No he's the guy with the mop. What's he doing?

> He's not even engaging in any independent thought through the course of the escape. He's waiting until he's being told to do something and then he does it. And that comes from [the State's] witnesses.

ROA.8526. Halprin cannot claim that his sentencer was precluded from considering "as a mitigating factor, any aspect of [his] character." *Lockett*, 438 U.S. at 604–05. Nor can he claim that the jury was precluded from "giv[ing] effect to that evidence." *Boyd v. California*, 494 U.S. 370, 402 (1990). So instead, he reminds the Court of the previous instances in which it has corrected Texas and the Fifth Circuit and asks it to assume the same in this case. He suggests that history reveals a conspiracy in which Texas and the Fifth Circuit are working together "to limit or foreclose entirely jurors' ability to consider and give meaningful effect to mitigation evidence." Pet. Cert. 27. But there is no conspiracy here—just a trial court applying a standard evidentiary rule. And this Court has never held that trial courts are prohibited from doing that.

While a trial court's egregious application of an evidentiary rule to categorically exclude a type of evidence may give rise to an Eighth Amendment claim,[16] there was no such error or exclusion in this case. The trial court declined to admit the Ranking Document under the business records exception

[16] *See, e.g., Skipper v. South Carolina*, 476 U.S. 1 (1986) (finding Eighth Amendment violation where trial court erroneously excluded relevant evidence as irrelevant).

because Halprin could not show that the document was transmitted by a TDCJ employee with knowledge or in the normal course of business. And even if he had been able to show both of those things, the document would not have qualified for the exception, as the exception requires a showing that *each* of the document's statements qualify for admission under its own hearsay exception. *Garcia v. State*, 126 S.W.3d 921, 926 (Tex. Crim. App. 2004) ("When a business receives information from a person who is outside the business and who has no business duty to report or to report accurately, those statements are not covered by the business records exception."). As the trial court correctly found, the Ranking Document was composed almost exclusively of hearsay statements from "unnamed sources." ROA.8446. Halprin has since indicated that sixty-seven individuals may have contributed to the document. ROA.17242–44. Those individuals included civilian employees and inmates who worked closely with the escapees, neither of whom had a duty to accurately report information. ROA.12270. 17242–44. Accordingly, the trial court correctly found that the Ranking Document and its contents were hearsay and therefore inadmissible.

Halprin overlooks the trial court's evidentiary ruling and focuses instead Fifth Circuit's framework for evaluating it. He suggests that the Fifth Circuit's "type-item" distinction underscores the court's intention to foreclose consideration of a defendant's mitigation evidence. Pet. Cert. 27. But the

appellate court's jurisprudence on this issue demonstrates otherwise. It has only applied the "type-item" framework when evaluating a trial court's valid application of an evidentiary rule, and, in fact, recently declined to apply the framework in another circumstance. *See Rhoades v. Davis*, 914 F.3d 357, 366 n.24 (5th Cir. 2019). When viewed for what it is, the Fifth Circuit's "type-item" distinction is just a way of saying that *Lockett* does not strip a trial court of its discretion to apply evidentiary rules: A trial court may exclude an *item* of evidence if, for example, it is unreliable hearsay but cannot categorically exclude a *type* of evidence. *See Simmons*, 654 F.3d at 544.

The Fifth Circuit's approach is not different than that of the Sixth Circuit, which Halprin defends. *See* Pet. Cert. 29 n.11. In *Alley v. Bell*, 392 F.3d 822, 832 (6th Cir. 2004), the Sixth Circuit found no *Lockett* violation where the trial court excluded a videotape as inadmissible but allowed the defendant to present the information in "a slightly different format." *Id.* In other words, it found that the trial court was permitted to exclude an *item* of evidence pursuant to evidentiary rules, so long as it did not categorically exclude a *type* of evidence. While the appellate courts may have used different language, their interpretation of this Court's precedent was the same: *Lockett* does not prohibit trial courts from applying evidentiary rules in sentencing proceedings.

Essentially, what Halprin is asking this Court to do is to "fashion general evidentiary rules under the guise of interpreting the Eighth Amendment." *See*

Kansas v. Carr, 136 S. Ct. 633 (2016). Under his proposed set of rules, there would be none: a defendant's proposed mitigation evidence would always be admissible. But this Court has indicated that the Eighth Amendment's role is not "to establish a special 'federal code of evidence' governing 'the admissibility of evidence at capital sentencing proceedings.'" *Kansas v. Carr*, 136 S. Ct. 633 (2016) (quoting *Romano v. Oklahoma*, 512 U.S. 1, 11–12 (1994). And even if it was meant to establish such a code, the rule against hearsay would likely be included therein.[17]

In rejecting Halprin's Eighth Amendment claim, then, the CCA did not contravene the holdings of this Court, nor did it misapply them, as this Court has never held that trial courts are prohibited from applying evidentiary rules in sentencing proceedings. Because reasonable jurists could not debate that, the Fifth Circuit correctly denied COA.

CONCLUSION

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

Respectfully submitted,

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[17] This Court indicated in *Tennard* that the general evidentiary standard for relevance applies in sentencing proceedings. 542 U.S. at 284, 286–87. Presumably other rules of evidence do too.

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