No. 19–8778

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN MICHAEL ALLEN,
PETITIONER,
-vs-
STATE OF ARIZONA,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED FOR REVIEW

Did Allen forfeit a claim that the death penalty may not be imposed "for an accomplice to a felony that is not likely to result in the loss of innocent life" by failing to present it to the State courts? Does Allen improperly seek an advisory opinion, given that his Question Presented does not reflect the circumstances of his conviction and death sentence?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF THE CASE

In 2011, Petitioner John Michael Allen, his wife Sammantha, and their four children lived in a three-bedroom residence in Phoenix, Arizona, with Sammantha's mother and grandmother. Pet. App. 1, ¶ 2; R.T. 11/02/17 at 54–56. Sammantha's mother was the legal guardian of A.D. and her two older siblings, who also lived in the house. Pet. App. 1, ¶ 2; RT 11/02/17 at 56. Allen and the other adults "extensively abused A.D. when imposing punishments," including confining A.D. for hours in a plastic storage container that was approximately 21 inches shorter than she was.[1] Pet. App. 1, 3, ¶¶ 2, 12.

On the night of July 11, 2011, Allen and Sammantha decided to punish A.D. for taking a popsicle without asking permission. Pet. App. 1, ¶ 3. They made A.D. stand facing a wall with her hands above her head and her head back; perform jumping jacks and run around the yard; and remain in a backbend (arching her back into the air with her feet and head on the floor) for 3 hours. Pet. App. 1–2, ¶ 3. At approximately 1:00 a.m. on July 12, Allen made A.D. drag a storage container from the patio into the house and ordered her to get inside. Pet. App. 2–3, ¶¶ 3, 12. Allen secured the lid with a padlock so A.D. could not escape. *Id.* Allen and Sammantha then went to bed, leaving A.D. alone, folded up inside the locked container in an unventilated room in the middle of summer, where she suffocated. *Id.*; R.T. 10/31/17, at 34.

[1] Allen admitted that sometimes he put hot sauce in A.D.'s mouth or on her food to punish her. Tr. Ex. 106 (07/27/11 interview) at 26–27. He had also spanked A.D. "four or five" times with a wooden paddle that was called the "Butt Buster." *Id.* at 31–35.

Allen initially told police that A.D. must have been accidently locked in the storage container while playing hide and seek with the other children. Pet. App. 2, ¶ 4. Police, however, learned that Allen had previously punished A.D. by locking her in the storage container, and Allen eventually admitted that he had been abusing A.D. and had locked her inside the storage container. *Id.*

Allen was convicted of first-degree felony murder, conspiracy to commit child abuse, and three counts of child abuse. Pet. App. 2, ¶ 5. The jury found three statutory aggravating circumstances: (1) Allen had been previously convicted of a serious offense, A.R.S. § 13–751(F)(2)[2]; (2) Allen killed A.D. in an especially cruel, or heinous or depraved manner, A.R.S. § 13–751(F)(6); and (3) Allen was an adult and A.D. was a minor under the age of 15 when Allen killed her, A.R.S. § 13–751(F)(9). Pet. App. 2, ¶ 6. The jury also found that Allen "either killed or was a major participant in the commission of child abuse and was recklessly indifferent regarding a person's life" pursuant to *Tison v. Arizona*, 481 U.S. 137, 158 (1987), and *Enmund v. Florida*, 458 U.S. 782, 801 (1982). *Id.* It then sentenced Allen to death for the murder. Pet. App. 2, ¶ 7.

[2] Respondent cites the statutory provisions in effect at the time of trial. The former (F)(6) aggravator is currently set forth in § 13-751(F)(4), and the former (F)(9) aggravator is set forth in § 13-751(F)(7).

REASONS FOR DENYING THE WRIT

This Court grants certiorari "only for compelling reasons," Sup. Ct. R. 10, and Allen has presented no such reason. In contrast, compelling reasons exist for this Court to deny review. First, Allen did not present in the courts below the question he now asks this Court to review, and he gives no reason for this failure. Further, because Allen was not a "'nontriggerman'[3] accomplice to a felony that [was] not likely to result in the loss of innocent life," any ruling on his Question Presented would be merely advisory and would not affect Allen's case. Pet. i.

I. Allen did not present this claim to the Arizona Supreme Court.

"With 'very rare exceptions,' [this Court has] adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (quoting *Yee v. Escondido*, 503 U.S. 519, 533 (1992)); *see also Illinois v. Gates*, 462 U.S. 213, 218–20 (1983). Because the Arizona Supreme Court's opinion does not address Allen's Question Presented, this Court will "assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here.'" *Adams*, 520 U.S. at 86–87 (quoting *Webb v. Webb,* 451 U.S. 493, 501 (1981)) (internal citations omitted); *see* Pet. App. 1–12.

3 Respondent presumes that Allen uses the term "nontriggerman" to suggest he did not actually kill A.D. As discussed below, the evidence established that his actions directly led to her foreseeable death.

Allen does not attempt to demonstrate that he gave the court below an opportunity to address the question, either by "establish[ing] that the claim was raised 'at the time and in the manner required by the state law,'" or "persuading [the Court] that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment."[4] *Id.* at 87 (quoting *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77–78 (1988)). This Court should, therefore, deny review.

II. A ruling on the Question Presented would not affect Allen's case.

Allen asserts that this Court has not yet considered whether "a defendant who is an accomplice to a nonviolent felony that is not likely to result in the taking of innocent life but results in an inadvertent killing that no actor intended" may be sentenced to death. Pet. 8. Because Allen does not fall into this category of offenders, however, any ruling on the Question Presented would be merely advisory and would not affect him. *See Princeton University v. Schmid*, 455 U.S. 100, 102 (1982) ("We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us."); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."). Further, as demonstrated below, Allen's death sentence comports with the Eighth Amendment.

[4] Allen did not, in fact, present the claim in the state courts.

Arizona's felony murder statute makes it unlawful for a person, "[a]cting either alone or with one or more other persons[,] … [to] commit[] or attempt[] to commit [certain enumerated felonies] and, in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person." A.R.S. § 13–1105(A)(2). Relevant here, "child abuse under § 13–3623, subsection A, paragraph 1" is one of the enumerated felonies provided in Arizona's felony murder statute. *Id.* A.R.S. § 13–3623(A)(1) states in relevant part:

> Under circumstances likely to produce death or serious physical injury, any person who causes a child … to suffer physical injury or, having the care or custody of a child … who causes or permits the person or health of the child … to be injured or who causes or permits a child … to be placed in a situation where the person or health of the child … is endangered is guilty of an offense as follows: … [i]f done intentionally or knowingly, the offense is a class 2 felony and if the victim is under fifteen years of age it is punishable pursuant to § 13–705.

Thus, only intentional or knowing child abuse committed "[u]nder circumstances likely to produce death or serious physical injury" provides a basis for felony murder. In convicting Allen of child abuse for locking A.D. in the box and leaving her overnight, the jury found that Allen's actions satisfied these elements. R.O.A. 541 (signed verdict); R.O.A. 531, at 10–11 (jury instructions).

Accordingly, even if Allen is correct that "a scar that will fade" qualifies as serious physical injury under A.R.S. § 13–3623(A)(1), his murder conviction was not based on such an injury.[5] Pet. 8 (citing *State v. Pena*, 104 P.3d 873, 875 (Ariz. App.

[5] In *Pena*, the court explained that "the victim had a five- to six-inch cut on his face and a cut on his ear that separated the top part of the ear…. The cut to the victim's ear penetrated all layers of skin." 104 P.3d at 874–75, ¶¶ 3–4. And the victim's scar "would diminish, but the scar itself would not get smaller. At the time of trial, which occurred four months after the injury, the victim still had a scar on his face."

2005)). Rather, after abusing A.D. for hours, Allen locked her in a plastic container in an unventilated room on a summer night in Phoenix and left her to die. Nor was Allen's felony murder conviction based on his allowing a child to ride in a car containing "glassware for the production of methamphetamine"—a hypothetical he posits after noting that the definition of "endangered" and "abuse" in A.R.S. § 13–3623(C) includes allowing a child "to 'enter or remain in any structure or vehicle in which volatile, toxic or flammable chemicals are found or equipment is possessed by any person for the purpose of manufacturing dangerous drugs." Pet. 8 (quoting A.R.S. § 13–3623(C)). Allen concludes that "the death penalty for such conduct is prohibited by the Eighth Amendment." Pet. 9. Even so, A.D.'s death did not result from riding in a car containing equipment for producing drugs, but from being locked in a plastic container in which she could not breathe.

Allen attempts to downplay his role in A.D.'s death, suggesting he was merely "an accomplice to a nonviolent felony that [was] not likely to result in the taking of innocent life."[6] Pet. 8. Allen was not, however, an unwitting accomplice to A.D.'s abuse. Allen ordered A.D. to do jumping jacks and to remain in a backbend position for

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Id. at 875, ¶ 4.

[6] Allen's abuse of A.D. was not "nonviolent" as he claims. *See* Pet. 8. Rather, he violently "us[ed] or involv[ed] physical force intended to hurt, damage, or kill someone or something." https://www.google.com/search?q=nonviolent&rlz=1C1CHBF_enUS892US892&oq=nonviolent&aqs=chrome..69i57j0l2j46j0l4.22__71j0j8&sourceid=chrome&ie=UTF-8#dobs=violent; *cf.* 18 U.S.C.A. § 924(e)(2)(B) ("[T]he term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, … if committed by an adult, that … has as an element the use, attempted use, or threatened use of physical force against the person of another."). Allen used physical force, or at least the threat of force, when he ordered A.D. into the box. He further exerted physical force when he placed a lock on the box so she could not escape. In any event, *Enmund* and *Tison* do not require that the underlying felony be "violent" in order to warrant the death penalty; they require that the offender kill, attempt to kill, or intend to kill, *Enmund*, 458 U.S. at 798, or is a "major participa[nt] in the felony committed, combined with reckless indifference to human life" to satisfy the culpability requirement for

3 hours. He then forced A.D. into the box, locked her inside, and left her there for 6 hours. Pet. App. 1–2, ¶ 3. His actions directly, and violently, led to A.D.'s foreseeable death.

The Arizona Supreme Court summarized the evidence supporting the finding of 11 jurors that Allen actually killed A.D., as *Enmund* requires:

> Sufficient evidence exists that A.D. died as a direct result of Allen's actions. He told her to get inside a plastic box that was twenty-one inches shorter than her, shut the lid, placed a lock on it to prevent her escape, kept the only key, and left her there unsupervised while he went to bed. Dr. Philip Keen, the chief medical examiner, testified that A.D. died from "being stuffed inside this box," which had decreased air availability and, given the size of the box, also restricted her "ability to have air exchange" by pushing her chin down against her chest.

Pet. App. 3, ¶ 12; *see* R.O.A. 548 ("Degree of Participation" verdict).

Moreover, Allen is incorrect that his actions were "not likely to result in the taking of innocent life." Pet. 8. The Arizona Supreme Court held that Allen's actions demonstrated that he was a major participant in the child abuse, was recklessly indifferent to human life, and that he "subjectively appreciated that his acts were likely to result in the taking of innocent life," as *Tison* requires and 11 jurors found. Pet. App. 3, ¶ 14 (internal quotation and alteration marks omitted); *see Tison*, 481 U.S. at 152 ("[T]he Tison brothers' participation in the crime was anything but minor; [the facts] also would clearly support a finding that they both subjectively appreciated that their acts were likely to result in the taking of innocent life."). The court explained:

> Locking a child in a plastic box that, according to a police detective, was "not perfectly air tight but [ ] fairly tight" and twenty-one inches shorter than she is for more than six hours without

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imposition of the death penalty, *Tison*, 481 U.S. at 158.

> supervision and with no way to escape carries a significant risk of death. That A.D. had previously been confined in the box and had not been seriously injured did not lessen the risk of death, just as playing Russian Roulette without injury does not lessen the risk of death attendant to that "game." *See* [*Tison*, 481 U.S.] at 157–58, 107 S.Ct. 1676 (stating that reckless disregard for human life can exist when "conduct causes its natural, though also not inevitable, lethal result"). Also, on those occasions, A.D. had only been inside the box for a couple hours. Even then, she would emerge from the box sweaty. On the day she died, Allen left her in the box for more than six hours in a room "significantly warmer" than other rooms in the house, creating an even greater risk of death. Unlike on prior occasions, A.D. was also unable to escape if in distress because the box was locked.
>
> Allen's indifference towards A.D.'s life is further evidenced by his decision to leave her unsupervised and go to bed, which risked his falling asleep and rendering him incapable of checking on A.D.'s welfare. And upon awakening, rather than immediately unlocking the box, he took the time to dress while giving the lock key to Sammantha. ***Substantial evidence supports the*** Tison ***finding that Allen was a major participant in commission of the child abuse that resulted in A.D.'s death and that he subjectively appreciated that his acts would likely kill A.D., making him recklessly indifferent regarding her life***.

Pet. App. 3, at ¶¶ 14–15 (emphasis added). Thus, Allen was not merely "an accomplice to a felony that [was] not likely to result in the loss of innocent life," and as a result his sentence would not be affected even were this Court to agree with his conclusion that such offenders may not be sentenced to death. Pet. 9.

Citing *Gregg v. Georgia*, 428 U.S. 153 (1976), Allen finally asserts that his death sentence serves neither a retributive nor a deterrent purpose and therefore violates the Eighth Amendment. Pet. 9–10. He seems to believe that, despite the fact that he inflicted severe abuse on A.D., leading to her foreseeable death, he was not culpable

because her death was "inadvertent."[7] But even if A.D.'s death was unintended or "inadvertent," Allen's conduct in causing A.D.'s death deserves retribution and deters other offenders who might also contemplate abusing a child in a similar manner.

Further, "[a] narrow focus on the question of whether or not a given defendant 'intended to kill,' … is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers." *Tison*, 481 U.S. at 157. This Court explained:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill."

Id. Thus, "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment." *Id.* at 157–58. Because Allen both killed A.D. and showed a reckless disregard for her life when he locked her in the unventilated box and left her there for 6 hours, his death sentence falls squarely within the requirements of both *Enmund* and *Tison*, and his culpability is sufficient to warrant the death penalty.

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[7] Allen cites *Atkins v. Virginia*, 536 U.S. 304, 319 (2002), in which this Court held that intellectually disabled persons may not be sentenced to death because their disability lessens their culpability. Pet. 9; *see Atkins*, 536 U.S. at 319 ("If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."). Allen does not suggest he is ineligible for the death penalty because he is intellectually disabled.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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