No. _____

IN THE
# Supreme Court of the United States

TARUS VANDELL SALES,
*Petitioner*,

v.

STATE OF TEXAS,
*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

## PETITION FOR A WRIT OF CERTIORARI

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## CAPITAL CASE

## I. QUESTIONS PRESENTED

This petition is brought by a capital defendant, Tarus Sales, who was convicted for a murder unilaterally planned and committed by another man: Herschel Ostine. Despite no evidence at trial whatsoever attributing Ostine's crime to Mr. Sales, Mr. Sales was convicted under Texas's law of parties on the theory that Ostine's murder was "committed in furtherance of" and at least "should have been anticipated as a result of" a conspiracy between Ostine and Mr. Sales. *See* Tex. Penal Code Ann. § 7.02(b). Ostine, the shooter, received a sentence of life in prison, while Mr. Sales—who was nowhere near the scene and played no part in the planning or commission of the murder—was sentenced to death.

Twelve years later, Mr. Sales discovered new evidence directly contradictory to the theory under which he was convicted and sentenced. Ostine signed a sworn affidavit unequivocally explaining that he independently decided to commit the murder and that Mr. Sales was not involved in Ostine's crime. Mr. Sales presented this evidence to the state habeas court, corroborated by both Ostine's live, sworn testimony and the statements of two other individuals with knowledge of Ostine's crime.

The questions presented are:

1. Whether Mr. Sales's death sentence violates the Sixth, Eighth, and Fourteenth Amendments, where the jury did not and could not find, based on the evidence at trial, that Mr. Sales (as a non-triggerman) intended to kill or acted as a major participant in the shooter's crime with reckless indifference to human life—as

required by this Court's precedent in *Enmund v. Florida*, 458 U.S. 782 (1982), *Tison v. Arizona*, 481 U.S. 137 (1987), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002)?

2. Whether the Texas Court of Criminal Appeals ("TCCA") violated Mr. Sales's Fourteenth Amendment rights by deferring to the trial court's clearly erroneous findings—based on improper and unequally applied legal principles and facts in direct contravention of clearly established federal law—to apply an inapplicable procedural bar to prevent Mr. Sales's constitutional claims from being heard?

3. Whether the cumulative impact of the TCCA's errors outlined in Questions 1 and 2 undermine all confidence in the constitutionality of Mr. Sales's death sentence, such that no reasonable juror assessing the newly discovered evidence of Mr. Sales's actual innocence would be able to make a constitutionally sufficient finding at sentencing to warrant the death penalty?

## II. RELATED PROCEEDINGS

Texas Court of Criminal Appeals:

*Sales v. State*, No. AP-74,594 (Tex. Crim. App. Jan. 26, 2005) (affirming Petitioner's sentence on direct review).

*Ex parte Sales*, No. WR-78,131-01 (Tex. Crim. App. Jan. 14, 2015) (denying Petitioner's initial state post-conviction writ of habeas corpus).

*Ex parte Sales*, No. WR-78,131-02 (Tex. Crim. App. Feb. 14, 2018) (remanding Petitioner's successor state post-conviction writ of habeas corpus to the trial court).

*Ex parte Sales*, No. WR-78,131-02 (Tex. Crim. App. Jan. 25, 2023) (denying Petitioner's successor state post-conviction writ of habeas corpus).

U.S. District Court for the Southern District of Texas:

*Sales v. Davis,* No. H-15-256 (S.D. Tex. Feb. 13, 2017) (staying and administratively closing Petitioner's federal post-conviction writ of habeas corpus).

U.S. Supreme Court:

*Sales v. Texas*, No. 05-5182 (Oct. 3, 2005) (denying certiorari on direct appeal).

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CAPITAL CASE

PETITION FOR A WRIT OF CERTIORARI

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Tarus Vandell Sales respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals ("TCCA").

## III. OPINIONS BELOW

The TCCA opinion denying Mr. Sales's successor state post-conviction writ of habeas corpus, Pet. App. at 1a–8a, is unpublished but available at *Ex parte Sales*, 2023 WL 382321 (Tex. Crim. App. Jan. 25, 2023). The findings of fact and conclusions of law ("FFCL") of the state habeas trial court recommending that the TCCA deny Mr. Sales's successor state post-conviction writ of habeas corpus, Pet. App. at 9a–50a, are unpublished. The TCCA order remanding Mr. Sales's successor state post-conviction writ of habeas corpus to the trial court is unpublished but available at *Ex parte Sales*, No. WR-78,131-02, 2018 WL 852323 (Tex. Crim. App. Feb. 14, 2018). The United States District Court for the Southern District of Texas decision staying and administratively closing Mr. Sales's federal post-conviction writ of habeas corpus is unpublished. *Sales v. Davis*, No. H-15-256 (S.D. Tex. Feb. 14, 2017). The TCCA decision denying Mr. Sales's initial state post-conviction writ of habeas corpus is unpublished but available at *Ex parte Sales*, No. WR-78,131-01, 2015 WL 222162 (Tex. Crim. App. Jan. 14, 2015). The TCCA decision affirming Mr. Sales's sentence on direct review is unpublished. *Sales v. State*, No. AP-74,594 (Tex. Crim. App. 2005).

## IV. JURISDICTION

The TCCA entered judgment against Mr. Sales on January 25, 2023. Pet. App. at 1a–8a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

## V. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant state statutory provisions are reproduced in the Appendix at 51a–52a.

## VI. STATEMENT OF THE CASE

### A. Factual Background

Mr. Sales stands convicted and sentenced to death for a murder in which he was patently uninvolved—a murder that Herschel Ostine later confessed to unilaterally committing.

1. Ostine's Crime

In July 2000, Ostine "felt [his] life could be in danger" after losing $50,000 in drug money that belonged to Officer Ernest Cecil, a corrupt police officer who has since been convicted of conspiracy to possess with intent to distribute cocaine, Hobbs Act robbery, and brandishing a firearm in relation to a crime of violence. Pet. App. at 59a; Subsequent Application for Writ of Habeas Corpus ["Subsequent Writ"] at 10–11, *Ex parte Sales*, Trial Cause No. 893161-B (Tex. Dist.—Harris Cty. [179th] July 10, 2017). Ostine became desperate and illogical in his search for protection. Pet. App. at 59a. He believed if he curried favor with Mr. Sales, Mr. Sales would "maybe vouch for [him] . . . so [that] Cecil wouldn't kill [Ostine] for losing [Cecil's] money." *Id.*

In a panicked and drug-altered state, Ostine quickly formulated and executed his plan. *See* Pet App. at 59a. He shot and killed Tyron Butler, a witness for the prosecution against Mr. Sales in an unrelated case. *Id.* Mr. Sales was nowhere near the scene of Ostine's crime and did not know of Ostine's plan. Applicant's Proposed Findings of Fact and Conclusions of Law ["Petitioner's PFFCL"] at 39 n.8, *Ex parte Sales*, No. 893161-B (Aug. 3, 2022). Ostine not only acted without Mr. Sales's approval or consent but also in direct contravention of his wishes. *See* Pet. App. at

20a; Subsequent Writ at 49.

Ostine's shooting was a drastic and unexpected departure from the plan formulated by Cheryl Kissentaner (Mr. Sales's then-girlfriend) to persuade Butler not to testify against Mr. Sales in the unrelated case. Subsequent Writ at 70. Kissentaner's plan, unlike Ostine's, was a nonviolent one: Kissentaner and her friend, Deanndra Darfour, would offer Butler sex and money for his cooperation. *Id.* at 48. Kissentaner and Darfour met up with Butler and his friends, flirting to establish a connection. Darfour then decided to go to Butler's house, "maybe go out with him, maybe have sex with him," so she followed Butler home from the mall, with Ostine in tow.[1] Petitioner's PFFCL at 18. While stopped at a red light, Darfour asked Ostine to leave so she could arrive alone at Butler's house. *Id.* at 2. But when Ostine exited the car, to Darfour's horror, he approached Butler's vehicle and shot him. *Id.*; *see* Pet. App. at 14a.

When Mr. Sales learned Butler had been murdered, he immediately asked Ostine, "Do you realize you really fucked up?" Pet. App. at 20a. Ostine now admits, "If I think about it with a clear mind now I wouldn't have done what I did." *Id.*

2. Mr. Sales's Conviction

Despite being nowhere near the scene of Ostine's crime and uninvolved in its plan, preparation, or execution, Mr. Sales was charged with capital murder. *See*

[1] Key witnesses proffered conflicting explanations as to why Ostine joined Darfour in her car that day. Still, *none of these explanations* even hint that Mr. Sales was involved. *See* Subsequent Writ at 64, 73.

Petitioner's PFFCL at 39 n.8.[2] Because Mr. Sales did not shoot Butler, the State acknowledged that he "could only have been guilty of . . . capital murder . . . as a party to [Ostine's] offense." *Id.* at 28. Under Texas's law of parties, non-triggermen are guilty of murder if found to have either "solicit[ed], encourage[d], direct[ed], aid[ed], or attempt[ed] to aid" the triggerman in the murder, or merely participated in a conspiracy with the triggerman to commit a felony, which the non-triggerman "should have . . . anticipated" would result in death. Tex. Penal Code Ann. § 7.02(a)(2), (b).

At trial, the State presented no evidence that Mr. Sales solicited, encouraged, directed, aided, or attempted to aid Ostine in the murder, or that Mr. Sales conspired with Ostine to commit a felony that should have been anticipated to result in death. Ostine had not been apprehended by the time of Mr. Sales's trial, and the State did not call the only other witness to Ostine's crime—Darfour—to testify. Petitioner's PFFCL at 7, 16, 19. Instead, the State presented physical evidence that Butler was shot to death,[3] an uncontested fact, and called a series of unreliable, motivated, and contradictory witnesses who *did not even suggest* that Mr. Sales directed or encouraged *Ostine's* crime.[4] *See id.* at 19. The State presented no evidence

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[2] Mr. Sales was charged with "unlawfully, while in the course of committing and attempting to commit the RETALIATION of TYRON BUTLER, intentionally caus[ing] the death of TYRON BUTLER by SHOOTING TYRON BUTLER WITH A DEADLY WEAPON, NAMELY A FIREARM." Subsequent Writ at 5.

[3] The State presented physical evidence of a recovered firearm, bullets from the crime scene that matched the firearm, and an autopsy report revealing that Butler had died from gunshot wounds. *See* Applicant's Objections to the District Court's Findings of Fact and Conclusions of Law ["Objections to FFCL"] at 35, *Ex parte Sales*, Trial Cause No. 893161-B (Tex. Crim. App. Sept. 22, 2022).

[4] The State's primary witnesses were Leon Hatfield, Kevin Howell, and Martinez Hardnett. Hatfield's and Howell's testimonies were directly contradictory, and neither testified that Mr. Sales directed or encouraged Ostine to kill Butler. Petitioner's PFFCL at 30. Hardnett, a self-identified career jailhouse

whatsoever that Mr. Sales was involved in the planning or execution of Ostine's crime. *Id.* at 4.

The State acknowledged the weakness of its case in its closing argument. The prosecutor told the jury, "The evidence in this case is not ever going to be overwhelming evidence," and the jury should not expect "all the answers and the puzzle . . . to fit perfectly together." Petitioner's PFFCL at 24. Over defense counsel's objections, the prosecutor instructed the jury that the State's "burden of proof . . . [is] simply this: If you believe in your *heart* with all your *heart* and with your *gut* that Tarus Sales committed this capital murder, then you find him guilty of capital murder." *Id.* at 24–25 (emphases in original).

3. Mr. Sales's Unconstitutional Death Sentence

Standing convicted of capital murder in Texas, Mr. Sales was eligible for the death penalty. Mr. Sales would be sentenced to life imprisonment without parole unless the jury answered the following special issues in the affirmative: (1) "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"; and (2) "the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken." Tex. Code Crim. Proc. Ann. art. 37.071 § 2(b), (g); *see* Pet. App. at 54a–55a. The jury answered "yes" to the above special issues, also finding an absence of mitigating circumstances, and the trial court sentenced Mr. Sales to death. Pet. App. at 63a–

informant, testified that—at most—Mr. Sales had knowledge of Kissentaner's plan to bribe and seduce Butler, and not of Ostine's plan to murder. *Id.* at 23.

66a. Mr. Sales's sentence was thus enhanced beyond the statutory maximum upon a minimum finding that, whether or not he caused or intended to cause Butler's death, he *anticipated* it.

4. Ostine's Conviction and Life Sentence

In 2003, after Mr. Sales's conviction and sentencing, Ostine was apprehended and interrogated. Pet. App. at 18a, 21a. At the time, Ostine was aware that the State had evidence that he shot Butler and understood that his conviction was inevitable. *Id.* at 60a. Ostine also understood that the State's theory, which secured Mr. Sales's death sentence, was that the murder was committed in the course of a conspiracy with Mr. Sales to commit retaliation against Butler. *Id.* Desperate to avoid the death penalty, Ostine told the officer what he thought he wanted to hear, regardless of its falsity. Petitioner's PFFCL at 11. To that end, "Ostine simply agree[d] with . . . leading questions" for most of his 2003 interrogation. Pet. App. at 37a. When he was not answering leading questions, Ostine often appeared paranoid, confused, and incoherent, and even forgot names of people he knew. Objections to FFCL at 34. By following the State's lead, Ostine avoided the death penalty and was sentenced to life in prison in 2005. *Id.* at 17.

5. New Evidence Establishing Mr. Sales's Actual Innocence

Mr. Sales's counsel did not speak to Ostine for ten years.[5] In 2015, Ostine made a sworn, written statement admitting that he "made the decision on [his] own to shoot Tyron[ ] Butler," misguidedly believing that this "might make Sales protect

[5] Mr. Sales's counsel was prohibited from contacting Ostine, and Ostine was instructed by counsel not to speak with Mr. Sales's counsel. Pet. App. At 16a–17a.

[him]." Pet. App. at 20a. He elaborated that he decided to kill Butler not "with a clear mind" but after "snorting cocaine all day" and taking "four hits of acid or LSD." *Id.* Ostine emphasized that "Tarus [Sales] had nothing to do with the decision" and did not "hire," "ask," "assist," or "counsel" Ostine to murder Butler. *Id.*

After speaking with Ostine, Mr. Sales's counsel interviewed Kissentaner and Darfour. In recorded interviews, they each corroborated Ostine's sworn statement exculpating Mr. Sales while admitting their own unlawful plan. Kissentaner explained that her plan "was to . . . seduce and date [Butler]," that "Tarus [Sales] was never planning on killing the security guard [Butler]," and that she never heard Mr. Sales discuss any idea or plan to kill Butler, or ask anyone to kill him. Subsequent Writ at 12. Darfour similarly discussed this bribery plan, acknowledging that "bribing a state witness . . . [was] serious" and confirming that Ostine's shooting was entirely unexpected. *Id.* at 61.

The credibility of Ostine's 2015 affidavit was tested at an evidentiary hearing in June 2022, where Ostine explicitly retracted his 2003 statements implicating Mr. Sales. Petitioner's PFFCL at 10 (stating that these 2003 statements were "not true"). Ostine explained that he told the investigators what he thought they wanted to hear because he was "trying to get a plea deal" and avoid the death penalty, and that anger, fear, and years of consistent drug use influenced his decision to lie to investigators in 2003. *Id.* at 11–12. Ostine's live testimony supported his affidavit, reiterating that Mr. Sales did not "have anything to do with" Ostine's decision to shoot Butler. *Id.* at 9. When providing the court with the details of his murder, Ostine was calm and

rational, unequivocally explaining that only he is to blame. *Id.* at 14. Ostine confidently confronted the contradictions between his 2003 statements and his new testimony, effectively recanting the former. *Id.*

### B. Legal Background

After being convicted and sentenced on March 1, 2003, Mr. Sales filed a motion for a new trial, which was denied by the court on March 31, 2003. Subsequent Writ at 5–6. Mr. Sales challenged his conviction and sentence on direct appeal, but the TCCA affirmed on April 6, 2005. *Id.* at 6. This Court denied Mr. Sales's petition for a writ of certiorari on October 3, 2005. *Id.*

Mr. Sales filed his initial application for a post-conviction writ of habeas corpus in state court on October 9, 2004. Petitioner's PFFCL at 5. Mr. Sales challenged the constitutionality of his conviction in part based on newly discovered evidence of actual innocence (separate from Ostine's affidavit, which did not yet exist) and challenged the constitutionality of his sentence on the grounds that the jury failed to make all findings necessary to recommend death under the Eighth Amendment and this Court's precedent. Initial State Writ of Post-Conviction Habeas Corpus at 9–11, *Ex Parte Sales*, No. 893161-A (Tex. Crim. App. Sept. 9, 2004). The TCCA denied these claims on the merits, deferring to the trial court's FFCL, which adopted the State's proposed FFCL. Pet. App. at 11a; State's Proposed Findings of Fact and Conclusions of Law, *Ex parte Sales*, No. 893161-A (Tex. Dist.—Harris Cty. [179th] May 1, 2013).

After interviewing Ostine in 2015, Mr. Sales filed a post-conviction writ of habeas corpus in federal district court on January 14, 2016. Petitioner's PFFCL at 5.

Mr. Sales argued under *Schlup v. Delo*, 513 U.S. 298 (1995), that his procedurally defaulted constitutional claims can be heard based on the newly discovered evidence of actual innocence in Ostine's affidavit, corroborated by Kissentaner's and Darfour's interview transcripts. Federal Application for Post-Conviction Writ of Habeas Corpus ["Federal Writ"] at 48, *Sales v. Stephens*, No. H-15-256 (S.D. Tex. Jan. 14, 2016). Mr. Sales also raised a claim arguing that his death sentence is unconstitutional because the jury and state courts failed to make findings necessary to sentence a non-triggerman to death under *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); and *Ring v. Arizona*, 536 U.S. 584 (2002). Federal Writ at 52.

The federal district court stayed the federal habeas case and instructed Mr. Sales to exhaust these claims in state court. *Sales v. Davis*, No. H-15-256 (S.D. Tex. Feb. 14, 2017). Pursuant to that order, Mr. Sales filed a subsequent application for a writ of habeas corpus in state court on July 10, 2017, raising his *Schlup*, *Enmund/Tison*, and *Apprendi/Ring* claims. Subsequent Writ at 7, 21–23. In 2018, the TCCA held that all claims with the possible exception of Claim 1 (*Schlup*) did not meet Texas's requirements for successor habeas writs and were procedurally defaulted. Pet. App. at 4a–5a. The TCCA also found that Kissentaner's and Darfour's statements did not meet Texas's standard for newly discovered evidence of actual innocence to support a claim in a successor petition. *Id.* at 5a. The TCCA instructed the trial court to assess whether Ostine's affidavit met the standard, and if so, to evaluate Claim 1 on the merits. *Id.* at 7a.

After the 2022 evidentiary hearing, Mr. Sales and the State filed respective Proposed Findings of Fact and Conclusions of Law ("PFFCL") *See* Petitioner's PFFCL; State's Proposed Findings of Fact and Conclusions of Law, and Order After Remand ("State's PFFCL"), *Ex parte Sales*, Trial Cause No. 0893161-B (Tex. Dist.—Harris Cty. [179th] Aug. 4, 2022). To alert the trial court to the State's PFFCL's many errors, Mr. Sales filed objections to the State's PFFCL. Applicant's Objections to State's Proposed Findings of Fact and Conclusions of Law ["Objections to State's PFFCL"], *Ex parte Sales*, Trial Cause No. 893161-B (Tex. Dist.—Harris Cty. [179th] Aug. 11, 2022). The trial court nevertheless adopted many of the objected-to findings in the State's PFFCL—which misapplied clearly settled law and inaccurately cited the record—in its FFCL, recommending that the TCCA deny the writ. Pet. App. at 9a–50a. Mr. Sales then filed with the TCCA his Objections to the trial court's FFCL. *See* Objections to FFCL. Despite being notified of the falsehoods, improper inferential leaps, and misapplications of law on which the FFCL was based, the TCCA presented one conclusory paragraph deferring to the trial court's FFCL, denying the writ without further explanation. Pet. App. at 8a.

## VII. REASONS FOR GRANTING THE PETITION

### A. Mr. Sales Is Actually Innocent of the Death Penalty, and Mr. Sales's Sentence—Recommended By a Jury Who Did Not and Could Not Make the Threshold Findings for a Death Sentence—Violates Mr. Sales's Sixth, Eighth, and Fourteenth Amendment Rights.

Mr. Sales was sentenced pursuant to Article 37.071 of the Texas Code of Criminal Procedure, which imposes the death penalty upon a threshold jury finding that the defendant "anticipated that a human life would be taken." Pet. App. at 54a–55a, 63a–66a. The evidence at trial did not support this threshold finding. More importantly, "anticipated" is so low a threshold as to render Texas's death penalty eligibility scheme unconstitutional.

This Court has jurisdiction to review this Claim, which was properly raised and passed upon by the TCCA in Mr. Sales's successor state writ of habeas corpus. Petitioner's PFFCL at 34. This Court can review a "[f]inal judgment[ ] . . . rendered by the highest court of a State," where the "validity of a statute of any State"—in this case, Article 37.071, § 2(b)(2)—is claimed to be "repugnant to the Constitution." 28 U.S.C. § 1257(a). The TCCA rendered a final judgment when it ruled that this Claim was procedurally defaulted, inexplicably finding that the Claim did not meet the requirements under Article 11.071, § 5, of the Texas Code of Criminal Procedure to bring it in a subsequent writ of habeas corpus. Pet. App. at 4a.

This Claim was *not* procedurally defaulted under Texas's rules; it falls squarely within the purview of Article 11.071, § 5(a)(3).[6] The TCCA used Article

[6] Article 11.071, § 5(a)(3), permits a court to hear a subsequent application for a writ of habeas corpus when, "but for a violation of the United States Constitution no rational juror would have answered in

11.071, § 5, as a pretext to arbitrarily decline review. As such, the TCCA's final judgment does not rest on independent and adequate state law grounds. A state ground is inadequate where—as here—it is "without fair support, or so unfounded as to be essentially arbitrary, or merely a device to prevent a review of the other federal ground of the judgment." *Cruz v. Arizona*, 143 S. Ct. 650, 658 (2023) (cleaned up). This Court should not compound the TCCA's errors by allowing this Claim to go unreviewed.

Even if this Court finds this Claim procedurally defaulted, such default should be excused. Mr. Sales's claim quintessentially embodies the "fundamental miscarriage of justice" standard. *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (applying this standard to "allow a prisoner to pursue his [procedurally defaulted] constitutional claims" upon "a credible showing of actual innocence"). As discussed below, Mr. Sales is actually innocent of the death penalty; no reasonable juror would have been able to sentence Mr. Sales to death if required to make findings that complied with the Eighth and Fourteenth Amendments. Further, as discussed in Section VII.B., Mr. Sales is actually innocent of his conviction, established by newly discovered evidence.

A showing of actual innocence is sufficient to overcome procedural default for "failure to observe state procedural rules." *McQuiggin*, 569 U.S. at 393. "This . . . exception[ ] is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons."

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the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071." Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(3).

*Id.* at 392–93.

This Court should exercise its jurisdiction to address the unconstitutionality of Texas's death penalty eligibility scheme. Texas law sentences to death defendants who did not kill, intend to cause death, or even act with reckless indifference to human life. Texas law contravenes this Court's fundamental principle that "[c]apital punishment must be limited to those offenders who commit a *narrow category* of the most serious crimes and whose *extreme culpability* makes them the most deserving of execution." *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (emphases added) (internal quotation marks omitted); *see also Enmund*, 458 U.S. at 797 (reiterating that the death penalty is limited to crimes "so grievous an affront to humanity that the only adequate response may be the penalty of death") (quoting *Gregg v. Georgia*, 428 U.S. 153, 184 (1976)).

This Court has made clear that, to impose the death penalty for defendants who did not cause the death of another, a jury must make certain findings about the defendant's *own* culpability. In *Enmund*, this Court held that a death sentence imposed on a defendant who aided and abetted a felony but "did not kill, attempt to kill, and . . . did not intend to kill" is disproportionate punishment under the Eighth Amendment and is therefore unconstitutional. 458 U.S. at 794–96 (emphasis omitted). *Tison* qualified *Enmund* by holding that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." 481 U.S. at 158.

*Enmund/Tison* findings must be made by a jury. This Court explained in

*Apprendi* that the Sixth Amendment requires any fact that "exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone" to be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. at 482–83 (emphasis omitted); *see also Blakely v. Washington*, 542 U.S. 296, 303–04 (2004). *Ring* applied *Apprendi* to require the jury to find facts necessary to enhance a sentence to death. 536 U.S. at 604–05.

A plain reading of the special issues with which Texas charges capital sentencing juries makes clear that they are insufficient. While Article 37.071, § 2(b)(2), provides for imposition of the death penalty upon a finding that the defendant, at minimum, anticipated resultant death, this Court has explicitly explained that "anticipation" does not meet the intent requirement in *Enmund*. *See Tison*, 481 U.S. at 150–51. If the jury does not find that the defendant intended to cause death, a death sentence violates the Eighth Amendment unless the jury finds that the defendant both was a "major participa[nt]" and acted with a "reckless disregard for human life." *Id.* at 157–58.

"Anticipated" is a far cry from acting as a "major participant" with "reckless disregard for human life." The Western District of Texas found as much, holding that a jury charged under Article 37.071 had not made both requisite *Tison* findings: (1) that [the defendant] substantially participated in the robbery-conspiracy; and (2) that he acted with reckless indifference to human life. Op. at 82–83, *Foster v. Dretke*, No. SA-02-CA-301-RF (W.D. Tex. Mar. 3, 2005) (granting partial habeas

relief where—though "a rational jury *could* have made . . . a[n] [*Enmund/Tison*] determination from the evidence"—the jury "was never asked to make such a factual determination") (emphasis added). While the Fifth Circuit ultimately reversed on appeal, *Foster v. Quarterman*, 466 F.3d 359 (5th Cir. 2006), its reasoning should not be followed, as Article 37.071 satisfies neither *Tison* prong.

Finding that the defendant "anticipated" that a human life would be taken is insufficient to find "major participation" in the crime under *Tison*'s first prong. In *Foster*, while the jury did not make the finding that the defendant was a major participant in the armed robbery conspiracy that culminated in murder, the Fifth Circuit nonetheless reasoned that the jury *could* have made that finding. *Foster*, 466 F.3d at 372. While supporting evidence was presented to the *Foster* jury that the defendant controlled where the conspirators went, participated in previous robberies, and shared in their proceeds, no such supporting evidence exists here.

The jury in Mr. Sales's case *did not* and *could not* find that Mr. Sales was a major participant in Ostine's crime. The State's witnesses' testimony, rife with flawed credibility and contradictions, failed to indicate that Mr. Sales took *any steps* to encourage or enlist Ostine to kill Butler. Instead, the evidence at trial established that Mr. Sales had even *less* participation in Ostine's crime than did Enmund in *his* triggerman's crime—which this Court found insufficient to justify the death penalty. This Court considered Enmund a minor participant when he took part in the planning of the crime and was only a few blocks away from the scene of the underlying crimes, waiting as the getaway driver. 458 U.S. at 802–04 (O'Connor, J., dissenting). Mr.

Sales cannot be considered a major participant in Ostine's crime where, by contrast, he was nowhere near the scene and was wholly uninvolved in the planning of the crime.

What's more, the Fifth Circuit impermissibly substituted its own factual findings for those explicitly designated for jury determination under *Apprendi/Ring*. In so doing, the Fifth Circuit explicitly rested on the notion that the defendant's "conviction became final . . . before *Apprendi*, *Ring*, and *Blakely* were decided." *Foster*, 466 F.3d at 369–70. As Mr. Sales was sentenced in 2003, after *Apprendi/Ring*, the Fifth Circuit's reasoning is wholly inapplicable and should not be followed. *Apprendi* and *Ring* squarely apply. Mr. Sales's death sentence cannot stand without the jury making *Enmund/Tison* findings of his specific intent or participation.[7]

Further, a jury finding of "anticipation" of death does not rise to the level of reckless indifference to human life required under *Tison*'s second prong. After the *Tison* jury found *only* that the defendants "intended, contemplated, or anticipated . . . that life would or might be taken"—a finding similar to that charged in Article 37.071—this Court remanded to determine whether defendants actually acted with reckless indifference. 481 U.S. at 150–52. In doing so, this Court necessarily implied that more is needed. A California state court hit the nail on the head: "[O]nly knowingly creating a 'grave risk of death' satisfies" the reckless indifference to human life standard. *People v. Banks*, 61 Cal. 4th 788, 800 (2015) (quoting *Tison*, 481 U.S.

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[7] *See* Michael Antonio Brockland, *See No Evil, Hear No Evil, Speak No Evil: An Argument for a Jury Determination of the* Enmund/Tison *Culpability Factors in Capital Felony Murder Cases*, 27 ST. LOUIS U. PUB. L. REV. 235 (2007) (describing why *Apprendi*'s progeny require *Enmund/Tison* findings to be found by a jury).

at 157).

Texas's death penalty eligibility scheme for non-triggermen fails to ensure that a death sentence is proportionate to a defendant's own conduct and intent. Contrary to this Court's precedent, this scheme has no intent requirement and does not assess the defendant's degree of participation. Pet. App. at 54a–55a. This Court's intervention is necessary to end the continuing violations of Mr. Sales's and similarly situated Texans' constitutional rights. If properly charged with instructions that complied with *Enmund/Tison* and *Apprendi/Ring*, no rational juror would have sentenced Mr. Sales to death, as none could have found that he was a major participant in Ostine's crime acting with reckless indifference. Mr. Sales is actually innocent of the death penalty.

**Texas is the only State where a defendant convicted as Mr. Sales was could be sentenced to death.** Twenty-three States[8] permit the execution of non-triggermen. Other than Texas, each of these States either: (1) requires intent, knowledge, or reckless indifference to human life; (2) limits eligibility for non-triggerman to those who conspired to commit certain enumerated or inherently dangerous felonies;[9] or (3) specifically defines minor participation in the triggerman's crime as a mitigating

[8] Alabama, Arizona, Arkansas, California, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, and Utah.

[9] Texas limits the felonies for which a non-triggerman may be convicted of capital *felony murder*. Tex. Penal Code Ann. § 19.03(a)(2). But Texas's death penalty eligibility scheme is broader, covering not just capital *felony* murder but *all* capital murder. Article 37.071 explicitly applies to defendants convicted under Texas's *law of parties* (Tex. Penal Code Ann. § 7.02), which permits a defendant who conspired to commit *any* felony to be found guilty of any other felony a coconspirator committed. Pet. App. C. at 55a.

factor. *See, e.g.*, La. Rev. Stat. Ann. § 14:30(A)(1) (requiring intent); Fla. Stat. Ann. § 782.04(1)(a)(2) (enumerating felonies); Tenn. Code Ann. § 39-13-204(j)(5) (defining minor participation as a mitigating circumstance). Texas is an anomaly not only within the United States but also among democratic nations. *See* Int'l Covenant on Civil and Political Rights art. 6(2), Dec. 16, 1966, 999 U.N.T.S. 171 (permitting the death penalty "only for the most serious crimes").

Texas was recently forced to confront Article 37.071's incompatibility with this Court's rulings and criminal justice norms. On May 5, 2021, the Texas House of Representatives passed, by an overwhelming bipartisan majority of 135 to 6, a bill that would eliminate death penalty eligibility for a non-triggerman conspirator with no intent to kill, unless he is a "major participant in the conspiracy" and, "in attempting to carry out the conspiracy, [he] acts with reckless indifference to human life." H.B. 1340, 87th Leg., Reg. Sess. (Tex. 2021). This language echoes this Court's Eighth Amendment jurisprudence. *See Enmund*, 458 U.S. 782; *Tison*, 481 U.S. 137.

While this bill once signaled progress, no action has occurred since May 2021, when H.B. 1340 was referred to Texas's Senate Jurisprudence Committee. *See* James Barragan et al., *Priority Bills Imperiled as End-of-Session Tensions Rise Between Texas House and Senate*, TEX. TRIB. (May 20, 2021). After two years, the bill effectively died in committee.[10] In the meantime, Article 37.071's unconstitutional minimum threshold remains in place. Meanwhile, more defendants convicted as was

[10] Texas Legislative Council, The Legislative Process in Texas 7 (Nov. 2022) ("Although nearly all bills are referred to a committee, a large number of bills are never reported out of committee and are considered to have 'died' in committee.").

Mr. Sales will continue to be sentenced to death in Texas in violation of the Eighth Amendment. Even if this bill were eventually enacted, many Texans' constitutional rights would continue to be violated, as the bill would not apply retroactively.[11]

Only this Court can resolve the constitutional conflict between Texas's scheme and those of *all* other States. *See* Sup. Ct. R. 10(b). Because Mr. Sales's case falls within the alarming gap of death penalty eligibility between Texas's unconstitutional minimum threshold and the minimum standard required by the Constitution, this Court must intervene.

### B. The TCCA Clearly Erred in Its Misapplication of Well-Settled Legal Standards to Improperly Find Mr. Sales's Constitutional Claims Procedurally Barred.

More than a decade after Mr. Sales was convicted and sentenced to death based on shockingly weak evidence presented at trial and unconstitutional special issues at sentencing, Mr. Sales discovered evidence affirmatively establishing his actual innocence. Petitioner's PFFCL at 1, 8, 16. In sworn written and live testimony, Ostine confessed to *independently* planning and *unilaterally* executing the murder. *Id.* at 1. This newly discovered exculpatory evidence gives rise to Mr. Sales's *Schlup* claim and reveals both Mr. Sales's innocence and the constitutional deficiencies of the proceedings below. This Court can and should grant certiorari to correct the state courts' egregious misapplications of law in their denial of habeas relief based upon this newly discovered evidence of actual innocence.

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[11] If enacted, H.B. 1340 directs the Texas Board of Pardons and Paroles to review the cases of prisoners sentenced to death under the law of parties to "identify appropriate inmates to recommend to the governor for purposes of granting clemency." H.B. 1340, 87th Leg., Reg. Sess. (Tex. 2021). Review by the Board of Pardons and Paroles and the *potential* for clemency are insufficient to right the grave constitutional injustices that Mr. Sales and others are experiencing.

This Court can review the TCCA's final judgment, which incorrectly found this new evidence insufficient to overcome the procedural bar for constitutional claims raised in Mr. Sales's successor writ of habeas corpus. *See* Pet. App. at 8a; 28 U.S.C. § 1257(a); Sup. Ct. R. 14.1(g)(i); *see also Castaneda v. Partida*, 430 U.S. 482, 485 n.4 (1977) (The Supreme Court is "free" to consider a claim in a habeas corpus proceeding where "the Texas courts considered the claim on its merits."). In recent years, this Court demonstrated its willingness to grant certiorari to address a state high court's clear error in a post-conviction order before the claim passes through federal post-conviction proceedings. *See, e.g.*, *Wearry v. Cain*, 577 U.S. 385, 395–96 (2016) (per curiam) (explaining that this Court under 28 U.S.C. § 1257(a) "has jurisdiction over the final judgments of state postconviction courts," and that reviewing a state court's denial of postconviction relief is not a "bold" procedural "departure" where the alternative is "forcing [the petitioner] to endure yet more time on . . . death row in service of a conviction that [was] constitutionally flawed"); Petition for Writ of Certiorari at 28–29, *Cruz*, 2021 WL 5827769 (Nov. 22, 2021) ("[I]n recent years [this Court] has not hesitated to review the habeas decisions of state high courts rather than awaiting those cases on federal habeas."), *cert. granted*, 142 S. Ct. 1412 (2022).

This Court is best suited to "intervene" and "enforc[e] the commands of the United States Constitution" when state courts commit "wrongs of constitutional dimension." *Dickerson v. United States*, 530 U.S. 428, 438 (2000) (internal quotation marks omitted). Such wrongs occurred here. The "severity" of a capital conviction "mandates careful scrutiny in the review of any colorable claim of error." *Zant v.*

*Stephens*, 462 U.S. 862, 885 (1983). Despite Mr. Sales's notification to the TCCA of the constitutional, factual, and legal infirmities of the trial court's FFCL, the TCCA failed to conduct *any* meaningful scrutiny. *See* Objections to FFCL; Pet. App. at 8a. Instead, the TCCA hastily deferred to the trial court's erroneous FFCL—finding, without support, insufficient evidence of innocence to overcome the procedural bar to Mr. Sales's constitutional claims—amounting to a complete frustration of Mr. Sales's federal due process rights and resulting in the grave miscarriage of justice of denying Mr. Sales habeas relief. Pet. App. at 8a.

This Court "has not shied away from summarily deciding fact-intensive cases where . . . lower courts have egregiously misapplied settled law," *Wearry*, 577 U.S. at 395, and is well positioned to rectify the TCCA's errors. *See, e.g.*, *Moore v. Texas*, 139 S. Ct. 666 (2019) (per curiam) (vacating and remanding the TCCA order); *Moore v. Texas*, 581 U.S. 1 (2017) (same); *Rippo v. Baker*, 580 U.S. 285 (2017) (per curiam); *Foster v. Chatman*, 578 U.S. 488 (2016).

1. The State Courts Ignored the Well-Settled Schlup Standard, Instead Using Invalid Assumptions to Invent a Higher Standard for Granting Relief Based on New Evidence of Actual Innocence.

When presented with newly discovered evidence of actual innocence in Mr. Sales's *Schlup* claim, the trial court was required to follow this Court's analytical framework: determining, first, whether Mr. Sales presented "new reliable evidence" of actual innocence, and, second, whether that evidence "persuade[d] the district court that . . . no juror, acting reasonably, would have voted to find [Mr. Sales] guilty beyond a reasonable doubt." *Howell v. Superintendent Albion SCI*, 978 F.3d 54, 59

(3d Cir. 2020) (internal quotation marks omitted). The court "must be free to evaluate independently all of the evidence, old and new, to determine whether that evidence may show that the petitioner is factually innocent." *Doe v. Menefee*, 391 F.3d 147, 163 (2d Cir. 2004) (emphasis omitted). The relevant *Schlup* inquiry is "how reasonable jurors would react to the overall, newly supplemented record," applying "a holistic judgment about all the evidence and its likely effect on reasonable jurors applying the reasonable-doubt standard." *House v. Bell*, 547 U.S. 518, 538–39 (2006) (internal citations and quotation marks omitted).

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Newly discovered evidence, therefore, must be compelling enough to cast reasonable doubt on a conviction, in light of the evidence at trial. New evidence need not be *stronger* than evidence at trial; it need only cast *reasonable doubt*. A court's role is not to compare whether a witness's new statements are *more* persuasive than testimony at trial but rather to analyze the "likely impact on reasonable jurors of [a witness's] pre-trial statements . . . [when] considered with the newly-discovered evidence of [the witness's] contradictory affidavit." *Floyd v. Vannoy*, 894 F.3d 143, 159 (5th Cir. 2018) (per curiam).

Contrary to this well-settled standard, the trial court required Mr. Sales "to provide sufficient evidence that would raise Ostine's persuasiveness *higher* than that of the witnesses who testified at trial," Pet. App. at 45a (emphasis added), inventing

a standard that required a showing far higher than *Schlup* requires.

Then, the trial court inflated the strength of the evidence of guilt at trial. It dismissed Mr. Sales's proposed finding that the State's witnesses' testimonies were "either uncorroborated or contradicted during trial," because the facts "that could affect their credibility and show bias on their motive to testify were known by the jury," and "the jury was privy" to this information "in reaching their verdict." Pet. App. at 44a. Effectively, the trial court reasoned that, because the jury convicted Mr. Sales, it must have concluded that the State's witnesses' testimonies were ironclad.

This reasoning defies the logic of a claim presenting newly discovered evidence of actual innocence.[12] This inquiry does not require a review of the "evidence in the light most favorable to the prosecution." *Rivas v. Fischer*, 687 F.3d 514, 542 (2d Cir. 2012). Rather, "because an actual innocence claim necessarily implies a breakdown in the adversarial process, the conviction is not entitled to the nearly irrebuttable presumption of validity afforded to a conviction on a direct appeal challenging the sufficiency of the evidence." *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. 2003); *Jones v. Calloway*, 842 F.3d 454, 461–62 (7th Cir. 2016) (A *Schlup*-type "actual-innocence standard isn't deferential to the verdict.").

2. The State Courts Skewed the Schlup Inquiry by Arbitrarily Applying An Inapplicable Standard Unequally Across Parties.

When assessing whether newly discovered evidence of actual innocence

[12] In presuming the strength of the evidence of guilt at trial, the trial court also deviated from its own practice of acknowledging when convictions are more easily overcome by new evidence of innocence. *See, e.g.*, *Ex parte Mayhugh*, 512 S.W.3d 285, 299 (Tex. Crim. App. 2016) (finding actual innocence where "the [new] evidence presented by the Applicants has eroded the persuasiveness of the State's already weak case[ ]").

sufficiently casts doubt on the outcome of the trial, the trial court "is not bound by the rules of admissibility that would govern at trial," and is required to consider "a broader array of evidence." *Schlup*, 513 U.S. at 327–28; *Jones*, 842 F.3d at 461. Accordingly, the trial court was to "make its determination concerning the petitioner's innocence 'in light of all the evidence'" to find whether "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327–28. Indeed, "where constitutional rights directly affecting the ascertainment of guilt are implicated," the Due Process Clause *requires* the consideration of evidence, even when otherwise inadmissible, if it has "persuasive assurances of trustworthiness" and is "critical to [one's] defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

Mr. Sales presented transcripts of taped interviews from Darfour—the only person present at the murder other than Ostine—and Kissentaner. These statements were submitted not as substantive evidence of Mr. Sales's innocence but as evidence corroborating Ostine's account. Petitioner's PFFCL at 16. Yet, the trial court refused to consider these statements in their narrow corroborative context, on the ground that they were not "sworn and signed affidavits or live sworn testimony." Pet. App. 43a-44a. The trial court erred. These critical statements to Mr. Sales's defense should have been considered because they are reliable, as they inculpated the declarants and are corroborated by both each other's and Ostine's testimony. *See Chambers*, 410 U.S. at 300–01 (finding hearsay testimony reliable when "corroborated by some other evidence" and is "self-incriminatory").

Then, the trial court applied its faulty standard unequally by declining to apply it to the State. Despite refusing to consider Kissentaner's and Darfour's unsworn statements presented by Mr. Sales, the trial court did not hesitate to consider unsworn statements presented by the State, including those from Ostine's 2003 interrogation. Pet. App. at 38a–39a. What's more, the trial court actually found Ostine's 2003 unsworn statements *more credible* than Ostine's "sworn and signed affidavit[ ] [and] live sworn testimony." *Id.* at 36a–38a. In applying an arbitrary legal standard to only consider unsworn statements presented by the State, while ignoring parallel statements that evidenced Mr. Sales's innocence, the state courts violated the Due Process Clause and this Court's standard in *Schlup*. These violations constitute reversible error.

3. The State Courts Irrationally Applied a General Rule to an Exception to the Rule.

In general, a witness may be impeached for providing testimony that contradicts their prior statements. Fed. R. Evid. 613. However, an unadjusted application of this rule is unfair in cases involving recantation, wherein the value of the speaker's new statement is that it completely contradicts his prior statement. Finding that contradictions between a recanted statement and an affirmed statement detract from a witness's credibility, as the trial court did here, would preclude *any* recantation testimony from *ever* being found credible—a result that could not be intended by any court. *See Howell*, 978 F.3d at 60 ("In declaring the recantations here to be unreliable simply because they are recantations, the District Court's *Schlup* analysis went astray.").

At the 2022 credibility hearing, Ostine explicitly retracted his 2003 statements implicating Mr. Sales—effectively, if not technically, recanting his prior testimony. Petitioner's PFFCL at 10. Ostine's 2003 statements pertaining to Mr. Sales's involvement in Ostine's crime are *completely* contradictory to those in his 2015 affidavit and 2022 live testimony. *Compare* Pet. App. at 21a–25a, *with id.* at 8–10. And thus the trial court's finding that "Ostine failed to provide adequate or persuasive reasons for the inconsistencies between his 2003 statement . . . and his 2015 writ affidavit at the 2022 post-conviction evidentiary hearing" simply defies the evidence. Pet. App. at 37a.

Rather than attempting to reconcile inconsistencies between recanted and affirmed statements, the trial court should have assessed Ostine's relative motives and the internal consistency and corroboration of those statements to determine his credibility. *See Cleveland v. Bradshaw*, 693 F.3d 626, 640 (6th Cir. 2012) (finding a recantation reliable when it was "not internally inconsistent" and the witness had "no motive to recant . . . but instead sought to do so on his own free will[ ] and ha[d] not subsequently withdrawn that testimony"); *Reeves v. Fayette SCI*, 897 F.3d 154, 161 (3d Cir. 2018) (evaluating a recantation through, among other things, "the circumstances surrounding the evidence and any supporting corroboration"—not the similarity to the witness's previous statements).

Had the trial court evaluated Ostine's recantation-like statements properly, it would have found Ostine's 2015 affidavit and 2022 testimony credible. While Ostine had the strongest motivation to lie in 2003—since admitting to saying whatever the

police suggested to give him the best shot at survival—Ostine had no motivation to lie in 2015 or 2022. Objections to FFCL at 43–46. Ostine's exculpatory statements were driven by nothing other than his conscience. Moreover, while Ostine's 2003, 2015, and 2022 statements about *his own* involvement are corroborated by physical evidence at trial, this physical evidence did not connect Mr. Sales to the murder. *Id.* at 35. Only Ostine's exculpatory statements concerning Mr. Sales, and none of Ostine's statements *inculpating* Mr. Sales, are corroborated by other evidence—namely, the statements by Kissentaner and Darfour. This exculpatory evidence reliably shows Mr. Sales's innocence, which is precisely why the State could not make "the puzzle . . . fit perfectly together" in its theory to convict him. Subsequent Writ at 82.

4. The State Courts Abused Their Discretion by Making Erroneous Conclusions Knowingly Based on Inaccurate Information.

The trial court and the TCCA were plainly opposed to impartial consideration of the newly discovered evidence of Mr. Sales's actual innocence. Not only did they make hasty conclusions based on false information—worse—they did so *after being alerted* by Mr. Sales that this information was *directly* contradicted by the record. *See* Objections to State's PFFCL; Objections to FFCL. In concluding that the newly discovered evidence of actual innocence—Ostine's 2015 affidavit and 2022 testimony—was not credible, the state courts relied on falsehoods to artificially bolster Ostine's contradictory 2003 statements. For example, the trial court found Ostine to be "calm and lucid" and "cohesive and coherent" in his 2003 interrogation, Pet. App. At 36a. But, as the interrogation video clearly shows, and as Mr. Sales

alerted the trial court in advance of the FFCL, Ostine was often confused and incoherent. *See* Objections to FFCL at 34. The state courts relied *again* on falsehoods to artificially diminish the credibility of Ostine's 2015 and 2022 statements. For example, the trial court improperly found that Ostine's 2022 testimony did "not give any details regarding the plan and preparation of the murder." Pet. App. at 27a. However, the state courts *knew* that Ostine did not meticulously plan and prepare for Butler's murder. *See* Objections to FFCL at 39–40. At the hearing, Ostine explained all of the key details about his preparation: he found someone to drive him, went to Butler's place of work, and followed Butler home. *Id.* Ostine's hearing testimony about his plan was not very detailed because the plan itself was not very detailed. Rather, it was haphazardly conceived by a frightened and intoxicated person, driven by the unsubstantiated belief that he would be compensated for it. *Id.* Ostine's testimony was not insufficiently detailed; rather, the details the trial court sought *did not exist*.

Further, the state courts knowingly relied on the State's misquotation of the record to inflate the strength of the evidence at trial. For example, Hardnett—a self-identified career informant—testified at trial that Mr. Sales told Kissentaner to "take the witnesses out, treat them nice so they wouldn't testify." Objections to FFCL at 50. Yet, the State's PFFCL included a misleading excerpt that transformed this misguided but nonviolent plan into a sinister order—that Mr. Sales told Kissentaner to "'take out' the witnesses." State's PFFCL at 6. The trial court adopted this language from the State's PFFCL, despite warnings by Mr. Sales of its misquotation.

Pet. App. at 15a; Objections to FFCL at 49–50. Further, the state courts ignored Mr. Sales's reminders that the State's key witnesses all provided contradictory testimony, that these witnesses were motivated to lie, and that the State still had *no direct evidence* supporting what it was required to prove beyond a reasonable doubt—that Mr. Sales *conspired* with Ostine to kill or retaliate against Butler. Objections to FFCL at 16.

5. These Clear Errors Prejudiced Mr. Sales, Deprived Him of His Right to Due Process, and Require This Court to Grant Certiorari.

The state courts fundamentally erred from beginning to end. The state courts would have found Mr. Sales's newly discovered evidence of actual innocence strong, had they not applied faulty legal standards to (1) misevaluate the credibility of Ostine's recantation-like testimony and (2) refuse to consider the reliable evidence corroborating it. The state courts would have found the State's case at trial weak, had they not (1) presumed, rather than independently evaluated, its strength and (2) knowingly relied on information that directly contradicted the record. And the state courts would have found that a reasonable juror would have acquitted Mr. Sales, had they not required new evidence to be more persuasive than the evidence of guilt at trial and instead evaluated the record as a whole, as supplemented by the new evidence. In arbitrarily applying these unfounded legal standards, the state courts abused their discretion in concluding that Mr. Sales made an insufficient showing of actual innocence. The state courts thus violated Mr. Sales's federal due process rights and this Court's precedent to improperly prevent Mr. Sales's constitutional claims

from being heard.[13]

### C. The Cumulative Effect of the Newly Discovered Evidence of Actual Innocence and the Constitutional Errors in the Jury Findings Undermines All Confidence in Mr. Sales's Death Sentence.

Should this Court fail to grant certiorari based on either individual claim, it should do so upon their cumulative effect. Even assuming, *arguendo*, that a rational juror *could* make the constitutionally required findings to sentence Mr. Sales to death based on the evidence presented at trial, *no rational juror* could make such a finding if also presented with Ostine's reliable and corroborated testimony, unequivocally exculpating Mr. Sales in Ostine's crime.

This Court can and should conduct a cumulative assessment of harm where the "errors have so infected the trial with unfairness as to [amount to] a denial of due process." *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007) (internal quotation marks omitted) (finding the cumulative effect of errors denied petitioner due process and warranted habeas relief). The claims in this petition are well positioned for the cumulative impact calculus because even "if they have been individually denied for insufficient prejudice," "their cumulative effect . . . is such that collectively they can no longer be determined to be harmless." *Cargle v. Mullin*, 317 F.3d 1196, 1206–07 (10th Cir. 2003) ("[T]o deny cumulative-error consideration of claims unless they have first satisfied their individual substantive standards for actionable prejudice would

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[13] The TCCA improperly ruled that seven of the eight claims Mr. Sales raised in his successor state writ were procedurally defaulted. Pet. App. at 4a. As he has made the requisite *Schlup* showing, his constitutional claims of actual innocence, ineffective assistance of counsel, state suppression of evidence, and failure to make required findings at sentencing should have been heard. *See* Subsequent Writ.

render the cumulative error inquiry meaningless.") (internal quotation marks omitted). Moreover, errors from the sentencing phase can be compounded with errors from the guilt phase, where, as here, "the prejudicial effect of the latter influenced the jury's determination of sentence." *Id.* at 1208.

Due process requires this analysis of cumulative harm here. To protect a defendant's right to a fair opportunity to defend against the State's accusations, this Court has added together the separate prejudicial impacts from multiple errors to assess whether their "cumulative effect . . . violated the due process guarantee of fundamental fairness." *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978). This Court is especially called upon to evaluate the cumulative impact of harm in capital cases. *See, e.g.*, *Gregg*, 428 U.S. at 187 ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed."); *Ake v. Oklahoma*, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring in the judgment) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases.").

Here, the cumulative impact of the errors warrants a reversal of Mr. Sales's sentence. The evidence of guilt at trial was already exceedingly weak. Considering the newly discovered evidence of actual innocence, coupled with the unconstitutional special issue at sentencing, Mr. Sales's death sentence becomes untenable. No reasonable juror evaluating the evidence at trial with the newly discovered evidence of actual innocence would find beyond a reasonable doubt that Mr. Sales was a major participant in Ostine's crime acting with reckless indifference to human life. Thus,

there is more than a reasonable probability that the outcome of sentencing would have changed if the jury were presented with Ostine's exculpatory statements and a special issue at sentencing that meets the constitutional threshold.

## VIII. CONCLUSION

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

Respectfully Submitted,

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