No. 18-5948

IN THE
Supreme Court of the United States

PATRICK HENRY MURPHY,
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

Patrick Henry Murphy was found guilty of capital murder and sentenced to death. In his state direct appeal, Murphy raised an Eighth Amendment challenge to the constitutionality of his *conviction* under *Enmund v. Florida*, 458 U.S. 782 (1982). The Texas Court of Criminal Appeals (CCA) overruled Murphy's claim, finding that his reliance on *Enmund* was misplaced. On state habeas, Murphy reiterated his Eighth Amendment *Enmund* challenge to his conviction and *separately* raised an Eighth Amendment *Enmund*-based challenge to his *sentence*. The state habeas court found that Murphy could have challenged the constitutionality of his sentence on direct appeal, but did not, and his claim was thus barred from review. Murphy did not at any point in state court proceedings present a Sixth Amendment *Enmund* challenge to his sentence.

In federal district court, Murphy raised both Eighth and Sixth Amendment challenges, arguing specifically that this Court's precedent in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), required the jury to make the requisite findings under *Enmund*. Then, in the Fifth Circuit, Murphy cited the Sixth Amendment, but otherwise appeared to abandon his arguments under *Apprendi* and *Ring*. Both lower federal courts found his Eighth Amendment claim to be procedurally barred. The questions before the Court are thus:

1. Whether Murphy's Sixth Amendment claim, having not been raised until federal habeas and therefore being procedurally defaulted, is properly before this Court given its inconsistent presentation in the lower courts?

2. Whether the Fifth Circuit erred in finding that Murphy's Eighth Amendment claim was undebatably procedurally barred?

3. Whether the Sixth or Eighth Amendments require that, before a defendant may be sentenced to death, a *jury* must explicitly find under *Enmund* and *Tison v. Arizona*, 481 U.S. 137 (1987), that a defendant was a major participant in the felony who exhibited a reckless indifference to human life?

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BRIEF IN OPPOSITION

Petitioner Patrick Henry Murphy, a member of the group known as the "Texas Seven," is one of seven inmates who escaped from a Texas prison and embarked on a crime spree that culminated in the robbery of an Oshman's Sporting Goods store and the shooting death of Irving Police Officer Aubrey Hawkins. During the offense, Murphy waited in the vehicle with four loaded weapons, including an AR-15, monitored the police scanner, and communicated with the heavily armed and violent escapees inside the store. Murphy's role, in his own words, was to "initiate firefight" in the case of a standoff. There is no question that Murphy was a major participant in the robbery and exhibited a reckless disregard for human life. As such, Murphy was properly convicted of capital murder and sentenced to death.

Murphy unsuccessfully protested in the state and federal courts the extent of both his participation and culpable mental state. Murphy now petitions this Court for a writ of certiorari from the Fifth Circuit's denial of a Certificate of Appealability (COA). But Murphy fails to identify any compelling reasons for this Court to review the decision of the court below. Notably, Murphy primarily complains about an issue the Fifth

Circuit did not reach—the merits of the claim. Indeed, the Fifth Circuit found Murphy's Eighth Amendment claim to be undebatably procedurally barred, and Murphy never raised an *Enmund*-based Sixth Amendment claim to the state courts. Thus, this case is undoubtedly a poor vehicle for this Court to address the questions Murphy presents. Moreover, the CCA reasonably applied clear Supreme Court precedent when it found that *Enmund* and *Tison* were satisfied in this case. This Court should deny Murphy's petition.

STATEMENT OF THE CASE

I. Facts of the Crime

A. The escape and subsequent crime spree

The Fifth Circuit summarized the facts of the Texas Seven's escape as follows:

> On December 13, 2000, seven inmates escaped from a Texas state prison located in Kenedy, Texas. The seven inmates—George Rivas, Larry Harper, Donald Newbury, Randy Halprin, Joseph Garcia, Michael Rodriguez, and Patrick Henry Murphy—all were serving long sentences for violent crimes. The newspapers would call this group the "Texas Seven."
>
> The breakout happened during lunch. Six of the seven, including Murphy, had work assignments in the prison's maintenance department. The day of the breakout, those six stayed behind during their lunch break to work in the warehouse. Once most of the people had cleared out for lunch,

> George Rivas asked Patrick Moczygemba, a civilian supervisor overseeing their work, to check some equipment under a table. As Moczygemba bent down, he was struck on the back of the head and knocked unconscious.
>
> When he came to, Moczygemba struggled but was quickly subdued when Joseph Garcia put a shank to his throat. Moczygemba's clothes were stripped and he was tied, gagged, blindfolded, and carried to an electrical room. As other employees and inmates trickled back from lunch, they received similar treatment. In total, about 14 people were caught and stuffed in the electrical room.
>
> Sometime shortly after, the back-gate guard got a phone call from a person identifying himself as Patrick Moczygemba. The man said maintenance was en route to install surveillance equipment. Soon after, two inmates—one of whom was Murphy—and a man dressed as a civilian supervisor (who turned out to be Larry Harper) showed up at the back gate. Using a telephone call as a distraction, the inmates overpowered the guard, taped his ankles, handcuffed him to a chair, and shut him in a restroom. From there, the seven stole a variety of firearms and ammunition, and fled the prison in a stolen vehicle.

Pet'r App. A, at 2–3; *Murphy v. Davis*, 737 F. App'x 693 (5th Cir. 2018) (per curiam) (unpublished).

In addition to the above, the evidence presented during the punishment phase of trial shows that a search conducted of Murphy's cell within an hour of the escape uncovered a letter, which read:

> I refuse to abide by the dictations of a police state, which Texas has surely become. Today I fire the first shot of THE NEW REVALUTION [sic]. Long Live Freedom. Death to Tyranny.

ROA.7784–96, 9875.[1]

After the escape, the gang engaged in a string of armed robberies. The first was a Radio Shack. ROA.8041. The second occurred when, five days after the escape, Rivas, pretending to be a customer, pulled a gun from his pants and told a Pasadena, Texas, Auto Zone manager that he was being robbed. ROA.7805–06. The cash registers and safe were emptied, with over $6,000 in cash taken. ROA.7813. Rivas had a small two-way radio that he talked into during the robbery. ROA.7809, 7816. Two earpieces were later found in a stolen vehicle by Pasadena police. ROA. 7816–17, 7824–28. Another Pasadena police officer, suspecting the Texas Seven after the Oshman's robbery, gave the earpieces to the Texas Department of Public Safety for DNA testing. ROA.7831–36. The first ear piece matched Halprin, Rivas, and Garcia, and the second matched Murphy. ROA.7880–83.

B. The Oshman's robbery and resulting murder

The final armed robbery was fatal. The Fifth Circuit summarized the events that resulted in the Officer Hawkins's death as follows:

> The group then headed to Irving, Texas, where they hatched a plan to rob Oshman's Supersports on December 24. It was during the Oshman's robbery that Officer Aubrey Hawkins was shot and killed.

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[1] "ROA" refers to the record on appeal filed in the United States Court of Appeals for the Fifth Circuit. It includes the pleadings, orders, and other documents filed with the district court clerk, and the state-court record for Murphy's capital murder trial and direct appeal.

Fifteen minutes before Oshman's closed, George Rivas and Larry Harper entered the store disguised as security guards. The other escapees—besides Murphy—were already inside, spread around the store, and pretending to be customers. Murphy was parked in Oshman's lot in a Chevrolet Suburban. He was, in his words, the "backup and lookout."

Back in the store, Rivas and Harper approached a store manager and told him they were investigating a local shoplifting ring. Rivas convinced the manager to let him check the store's security tapes. After viewing the tapes, Rivas said they did not help his investigation, and they returned to the store floor. By then, most of the store employees were gathered at the front, talking with Harper. With them gathered, Rivas announced that they were robbing the store.

The escapees surrounded the employees, guns drawn. The employees surrendered, got patted down, and were walked to a breakroom in the back. Rivas took the store manager back through the store, grabbing cash from the registers and guns from the gun department. The manager was then returned to the back, where he and the other employees were tied up. Rivas took the keys to the manager's Ford Explorer and told the other escapees to meet him behind the store. Rivas left Oshman's, retrieved the manager's Explorer, and drove it around to the back of the store. While Rivas was retrieving the car, a witness who spotted some of the events inside Oshman's called the police.

Back inside the store, the manager heard someone on the radio tell the escapees to hurry up and get out because they "had company." Another employee said he heard, "Come on, we got to go. We got to go. We got company."

Officer Aubrey Hawkins was the company. He was the responding officer, sent to Oshman's on a suspicious persons call. When he drove around the store to the back, a firefight ensued. Hawkins was shot multiple times (Rivas and Halprin

were as well). Hawkins was then pulled out of his car, run over, and dragged several feet by the escapees fleeing the scene in the Explorer. At the scene, Hawkins was found lying face down on the ground without a pulse.

The six in the Explorer met up with Murphy at a nearby apartment complex. From there, they headed to Colorado. A little less than a month after the shooting, Murphy and five of the other escapees were captured (Larry Harper committed suicide before being taken). Murphy and the surviving escapees were brought back to Texas, charged with capital murder, and informed that Texas would seek the death penalty in all their cases.

Pet'r App. A, at 3–4.

C. Murphy's statement

The clearest indication of Murphy's role in the offense was his own statement:

> Pursuant to Texas's death-penalty scheme, Murphy's trial was split into guilt and penalty phases. Central to the State's case for Murphy's guilt was a statement Murphy wrote for police after he was captured. In this statement, Murphy explained the rationale for the robbery, his role in the heist, and what occurred.
>
> Murphy wrote that the group picked Oshman's because it had a wide range of weaponry and clothing. Their goal was to increase their "arsenal" and ditch the guns taken from prison. Murphy explained that members of the group "were pretty much equal," and they "weighed the pro's and con's" of robbing Oshman's. Murphy added that he was against the plan because Oshman's had a lot of employees and he was afraid of being recognized. Nevertheless, he went along as the "backup and lookout."

> To play his part, Murphy had a two-way radio and a radio scanner he programmed to police frequencies. He also had several loaded guns in the Suburban—two .357 revolvers, an AR-15, and a .12-gauge pump shotgun. Murphy knew that the escapees inside the store were similarly armed. Murphy added that if he were pursued by police, his purpose "was to initiate a firefight with the AR-15."
>
> Murphy also described the events that precipitated Hawkins's death. While the robbery was in progress, Murphy spotted a police car and heard over the scanner a report of suspicious activity at Oshman's. Murphy radioed the group "to abort" because the police were there. He told them the patrol car's location and the direction it was headed. When he saw the car pass Oshman's and pull around to the back, Murphy radioed, "He's coming around the corner. Leave. Leave." Shortly after, one of the other escapees radioed Murphy and told him to meet them at the pickup point. Murphy secured his guns and rendezvoused with the group. When they met up, the other escapees told Murphy they had shot a police officer.

Pet'r App. A, at 4–6.

II. Course of State and Federal Proceedings Related to Murphy's *Enmund* Claim

Murphy was convicted and sentenced to death in 2003 for the murder of Officer Hawkins during the course of committing a robbery. ROA.1758–59. At the guilt phase of Murphy's trial, the jury was instructed on four total theories of capital murder, presented as two means or methods theories and two criminal liability theories. The two means or methods of capital murder were murder of a peace officer or murder in the course of a robbery. *See* ROA.1752–53; Tex. Penal Code.

Ann. § 19.03(a)(1)–(2). The two criminal liability theories were "law of parties" instructions—aider and abettor liability or conspirator liability. *See* ROA.1752–53; Tex. Penal Code. Ann. § 7.02(a)–(b).

Before the jury was instructed, Murphy's trial counsel moved for an instructed verdict based on *Enmund*, arguing that the evidence failed to show that Murphy killed or attempted to kill the deceased. ROA.7537. The trial court denied Murphy's motion. *Id.* Trial counsel then objected to the general verdict jury form presenting all four theories of capital murder as violating a constitutional principle of jury unanimity, as embodied in the Sixth Amendment and the Texas Constitution. ROA.7537–38. The trial court also overruled these objections. *Id.*

At the punishment phase of Murphy's trial, the jury was instructed on Texas's death penalty scheme. *See* Tex. Crim. Proc. Ann. art. 37.071 § 2. The jury received the traditional future-dangerousness and mitigating-circumstances special issues. *See id.* § 2(b)(1), (d)(1). But because Murphy's jury was permitted to find Murphy guilty of capital murder as a co-conspirator or a party, ROA.1750–54, Murphy's jury was also given the "anti-parties" special issue. *See* ROA.1756; Tex. Code Crim. Proc. art. 37.071 § 2(b)(2). The anti-parties special issue requires juries

to answer in the affirmative whether, at the very least, the defendant did not actually cause the death of the deceased but "anticipated that a human life would be taken." Tex. Code Crim. Proc. art. 37.071 § 2(b)(2).

During the jury charge conference, trial counsel again raised an *Enmund* objection, arguing that the anti-parties special issue was contrary to *Enmund* and *Tison* because it allowed the jury to sentence him to death on the basis of anticipating that a human life would be taken, which trial counsel argued "did not measure up to the standards imposed by these two Supreme Court cases for a nontriggerman or nontriggerperson or nonkiller, direct killer." ROA.8271. Trial counsel requested that different language be included in the charge, arguing that the Texas special issues violated the Eighth Amendment and this Court's precedent in *Apprendi*. ROA.8271–72. But the trial court overruled Murphy's objections. ROA.8272.

On direct appeal, Murphy raised forty-two points of error. ROA.2374–75. His claims were broken into four categories: 1) "Issues on Voir Dire;" 2) "Issues on Trial;" 3) "Issues on Punishment;" and 4) "Constitutional Issues." *Id*. Under the "Issues on Trial" section, Murphy raised an *Enmund* claim in appellate point of error eighteen, in which he

alleged that the trial court overruled his objection to the jury charge at the *guilt* phase of trial concerning the applicability of the law of parties to *Enmund*. Pet'r App. C; ROA.2468. In support of this claim, Murphy cited *only* to the portion of the reporter's record in which trial counsel discussed *Enmund* in the context of the directed verdict at the conclusion of the guilt phase. Pet'r App. C. Murphy did not cite to or any way reference his punishment objection based on *Enmund*. *Id*.

As such, the CCA construed Murphy's *Enmund* claim as only raising a challenge to the constitutionality of his *conviction*. Pet'r App. B, at 1719 n.58 (recognizing that Murphy "made an *Enmund* objection at the punishment phase of the trial, but in his brief he cites and refers only to his objection at the guilt or innocence phase"); *Murphy v. State*, No. 74,851, 2006 WL 1096924, at *21 n.58 (Tex. Crim. App. Apr. 26, 2006). The CCA found that Murphy's reliance on *Enmund* was misplaced, as "*Enmund* prevents imposition of the death penalty under certain circumstances; it does not prohibit a capital murder conviction for a non-triggerman under the law of parties." Pet'r App. B, at 1720. The CCA thus overruled his appellate point of error eighteen and affirmed his conviction and sentence. Pet'r App. B, at 1719, 1728.

On state habeas, Murphy again raised an *Enmund* claim. This time, Murphy broke his claim into two parts—one part reiterated his *Enmund*-based challenge to his conviction and the other *separately* raised an *Enmund*-based challenge to his sentence. ROA.1469–73. In both claims, Murphy cited to the Eighth Amendment as the only constitutional principal governing the claim. *See* ROA.1471, 1473. The state habeas court found both claims procedurally barred: the challenge to his conviction had been raised and rejected on direct appeal, and the challenge to his sentence could have been, but was not, raised on direct appeal. ROA.1571–72 (citing *Ex parte Ramos*, 977 S.W.2d 616, 617 (Tex. Crim. App. 1998)). The state habeas court alternatively found that Murphy's challenge to his sentence was meritless because the submission of the anti-parties special issue to the jury accorded with the requirements of *Enmund* and *Tison*. ROA.1572–73 (citing *Ladd v. State*, 3 S.W.3d 547, 573 (Tex. Crim. App. 1999)). The CCA adopted the trial court's findings of fact and conclusions of law and, based on those findings and its own review, denied Murphy's application. *Ex parte Murphy*, No. 63,549-01, 2009 WL 1900369, at *1 (Tex. Crim. App. July 1, 2009) (per curiam) (unpublished).

Murphy then filed a federal habeas petition raising an *Enmund* claim. ROA.91–100. He alleged that he had been sentenced to death without the *Enmund* and *Tison* findings, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. ROA.91. Murphy specifically argued that this Court's precedent in *Apprendi* and *Ring* required under the Sixth Amendment that the jury make the requisite findings, and Murphy's jury had not done so. ROA.93–100. The district court, adopting the recommendations of the magistrate judge, denied relief, finding in relevant part: 1) Murphy's challenge to his sentence was procedurally barred from review because the state habeas court found that Murphy could have, but did not, raise the claim on direct appeal; 2) alternatively, the CCA's finding that the anti-parties special issue satisfied the requirements of *Enmund* and *Tison* was reasonable. ROA.1119–25, 1187–88. The district court also denied Murphy a COA. ROA.1198.

Murphy then sought a COA from the Fifth Circuit on three claims, including his *Enmund* claim. *See* Pet'r App. A, at 2. After oral argument was held, Judges King, Elrod, and Higginson denied COA on all three claims in a per curiam opinion. Pet'r App. A, at 1–2. Notably, the Fifth Circuit found that Murphy's *Enmund* claim was clearly procedurally

barred. Pet'r App. A, at 10, 13. The court did not reach the merits of the *Enmund* claim. Murphy then filed this petition for writ of certiorari with the Court.

REASONS FOR DENYING THE WRIT

I. Murphy Provides No Compelling Reason to Expend Limited Judicial Resources on This Case.

The question Murphy presents for review is unworthy of the Court's attention. Murphy has failed to provide a single "compelling reason" to grant review. Indeed, no conflict among the circuits has been supplied, no important issue proposed, and no similar pending case has been identified to justify this Court's discretionary review. Murphy contends that the state court unreasonably rejected his claim when it found that Texas's anti-parties statute constitutionally complied with the requirements of *Enmund* and *Tison*. Murphy does not contend that the state court incorrectly identified the appropriate legal standard regarding the imposition of the death penalty for non-triggermen. Rather, he contends that the lower courts correctly identified the standard of review, as explained in *Enmund* and *Tison*, but then misapplied it to the circumstances of his case in finding the jury's answer to the anti-parties special issue constitutionally sufficient. This is, at

best, simply a request for error correction, and this Court's limited resources would be better spent elsewhere. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law."); *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660, 674 (1990) (Rehnquist, C.J., concurring) (questioning why certiorari was granted when the opinion decided "no novel or undecided question of federal law" and merely "recanvasse[d] the same material already canvassed by the Court of Appeals").

Even more importantly, however, this case is a poor vehicle to address the question on which Murphy seeks review because the Fifth Circuit never reached this question—it instead correctly found that Murphy's claim is procedurally barred. Indeed, the state court barred the Eighth Amendment claim he now presents, and the Sixth Amendment portion of his claim was never presented to the state courts for review.

Moreover, this Court should not exercise its discretion to address the merits of the question presented. First, Murphy did not raise an *Apprendi* or *Ring* issue in the Fifth Circuit; therefore, this Court should not consider his Sixth Amendment claim. Second, *Apprendi* and *Ring* are

inapplicable, where this Court has made clear that *any* state court—not just the jury—can make the requisite *Enmund* and *Tison* findings in compliance with the Eighth Amendment; thus, extending *Apprendi* and *Ring* as Murphy seeks would violate *Teague v. Lane*, 489 U.S. 288 (1989). Finally, the CCA did not err in its straightforward application of *Enmund* and *Tison* to the Texas anti-parties special issue, particularly where, as here, it is clear that Murphy's individual conduct was more than sufficient to satisfy the requirements of *Enmund* and *Tison*. Respondent therefore respectfully suggests that certiorari be denied.

II. Murphy's Claims are Burdened by Antecedent Issues, Which Make His Claims a Poor Vehicle for Further Review.

Murphy raises two Questions Presented that deal with the underlying merits of his Sixth and Eighth Amendment claims. But before addressing Murphy's explicit criticisms, it is important to address an antecedent issue that bears on whether this Court should exercise its discretion in this case: his claims are procedurally barred. Indeed, Murphy asks this Court to exercise its discretion to address Questions Presented that were not reached in the court below because the Fifth Circuit determined the claims to be barred without addressing the merits.

Regardless, Murphy buries within his Reasons for Granting the Writ his argument that this Court should find his Eighth Amendment claim to be exhausted on direct review, *see* Pet. for Writ of Cert. (Cert.pet.) at 22–23, but Murphy cannot escape that both his Eighth and Sixth Amendment claims are undebatably procedurally barred. That should preclude granting Murphy a writ of certiorari.

A. His Sixth Amendment claim is unexhausted and procedurally barred because it was never presented to the state courts for review.

Murphy only raised a Sixth Amendment claim based on *Enmund* and *Tison* for the first time in federal court—and even then, he did so inconsistently and inadequately, *see* Section III.A, *infra*. Federal habeas relief is therefore precluded absent exception. 28 U.S.C. § 2254(b)(1)(A); *see Harrington v. Richter*, 562 U.S. 86, 103 (2011) ("Under the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court."). Given Texas's postconviction scheme, Murphy's failure to present a Sixth Amendment claim based on *Enmund* and *Tison* in his initial state habeas application makes it likely that it could never be considered in state court, thus procedurally defaulting the claim. *See Coleman v Thompson*, 501 U.S.

722, 735 n.1 (1991); *Woodfox v. Cain*, 609 F.3d 774, 793 (5th Cir. 2010). Murphy does not discuss this issue, as he conflates his Eighth and Sixth Amendment claims into one claim. But this issue would need to be addressed and resolved by the Court before reaching the merits of Murphy's claims. Respectfully, this Court should not pass upon an issue that Murphy finds so insubstantial that he did not even brief it.

B. His Eighth Amendment claim is procedurally barred because it should have been raised on direct appeal.

Even the Eighth Amendment claim that Murphy did raise in the state habeas court presents another hurdle Murphy does not overcome: the Fifth Circuit found that Murphy's Eighth Amendment claim was undebatably procedurally barred without reaching the merits. Pet'r App. A, at 10, 13. Indeed, as detailed extensively in Section II of the Statement of Case, above, Murphy raised an Eighth Amendment challenge based on *Enmund* in his direct appeal, but in support of his claim, he cited only to the portion of the reporter's record in which trial counsel moved for a directed verdict at the conclusion of the *guilt* phase of trial. Pet'r App. C. Noting that Murphy had also made an *Enmund* objection at punishment but had not relied on that objection in his appellate point of error, the CCA properly found that Murphy had only alleged a point of error

regarding his conviction, *not* his sentence.[2] Pet'r App. B, at 1719 n.58. Thus, when he raised two separate *Enmund* claims on state habeas review—one of which was clearly a challenge to his sentence—the state habeas court appropriately found that he could have raised a sentence-related *Enmund* challenge on direct review, but because he did not, his claim was procedurally barred. *See* ROA.1571–72 (citing *Ex parte Ramos*, 977 S.W.2d at 617).

Federal review of a claim is procedurally barred if the last state court to consider the claim expressly and unambiguously based its denial of relief on a state procedural default. *Coleman*, 501 U.S. at 729 (1991); *Harris v. Reed*, 489 U.S. 255, 263 (1989). The Texas rule applied by the state habeas court that the claim should have been, but was not, raised on direct appeal is an adequate state ground to bar federal habeas review. *See Ford v. Georgia*, 498 U.S. 411, 424 (1991); *Aguilar v. Dretke*, 428 F.3d 526, 535 (5th Cir. 2005). The lower federal courts thus correctly found

[2] Murphy conceded in the court below that it was "possible a member of Murphy's trial team *who later represented Murphy in direct appeal proceedings* might have believed the holding of *Enmund* to be instructive on whether Murphy could be *convicted* of capital murder." COA.app.4 (emphasis added).

Murphy's sentence-related *Enmund* challenge to be exhausted, but procedurally barred from federal review.[3]

Murphy complains that his Eighth Amendment claim should not be procedurally barred because: 1) by citing to its opinion in *Johnson v. State*, 853 S.W.2d 527 (Tex. Crim. App. 1992), it is clear that the CCA understood his direct appeal *Enmund* claim to challenge his *sentence*, not his conviction; and 2) even if the CCA did not clearly understand his claim, it was fairly presented to them because he alleged that *Enmund* "has specific requirements not found in the Texas Death Penalty Statute *before death can be imposed as a possible punishment*." Cert.pet.22–23.

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[3] Murphy continues in this Court to assert, as he did in the lower courts, that the lower courts found his Eighth Amendment claim to be *unexhausted* and procedurally barred. *See, e.g.*, Cert.pet.15, 22; Br. of Appellant in Supp. of COA at 38–41 (COA.app.), *Murphy*, 737 F. App'x 693 (No. 17-70030). But no court has ever found this claim to be unexhausted and applied a *prospective* procedural bar; rather, the lower courts found that the state habeas court's explicit procedural bar was premised on an independent and adequate state rule. *See* Pet'r App. A, at 13. The Director acknowledged in the court below that, due to the somewhat confusing nature of this claim's history, the Director had characterized Murphy's claim as unexhausted, but also acknowledged that, with the benefit of hindsight, the Director believes that the lower courts correctly interpreted the history of Murphy's Eighth Amendment claim in finding the claim to be exhausted but procedurally barred. *See* Appellee's Opp'n to App. for COA at 27–28 n.3 (Opp'n to COA), *Murphy*, 737 F. App'x 693 (No. 17-70030). Murphy's Sixth Amendment claim, however, *is* unexhausted, as explained previously.

But the argument that the CCA clearly understood his claim as challenging his sentence is belied by the record—the CCA explicitly noted that, although Murphy's trial counsel had made an *Enmund* objection at punishment, Murphy cited and referred only to the objection at guilt, an objection that in actuality was a motion for a directed verdict. *See* Pet'r App. B, at 1719 n.58. And, although the *holding* in *Johnson* might have been that the anti-parties special issue satisfied the requirements of *Enmund* and *Tison* even for people convicted of capital murder as conspirators, *see Johnson*, 853 S.W.2d at 535, the CCA made clear the *principle* for which it was citing to *Johnson*: "that an individual may be found guilty of capital murder based on the law of parties without violating *Enmund*." *See* Pet'r App B, at 1719 n.59. Thus, Murphy's arguments that his claim should not be procedurally barred are unavailing, and this Court should not review the claim any further.

III. Ignoring the Procedural Obstructions to Merits Review, the CCA's Reasonable Application of *Enmund* and *Tison* Does Not Warrant Review.

The thrust of Murphy's argument is that the CCA incorrectly applied *Enmund* and *Tison* when it found that the Texas anti-parties special issue was constitutionally acceptable. Cert.pet.16–21. Murphy's

argument is composed of three parts: 1) under *Apprendi* and *Ring*, the Sixth Amendment requires that the *Enmund* and *Tison* findings be made by a jury; 2) the CCA's alternative merits decision was unreasonable because Texas's anti-parties special issue does not sufficiently encompass the major participation requirement of *Enmund* and *Tison*; and 3) even if the jury were *not* required to make these findings, no court made the requisite findings in Murphy's case. *Id*.

But, assuming *arguendo* that these claims are not procedurally barred, *see* Section II, *supra*, and assuming the Court should reach Questions Presented which were not decided by the Court below, this case presents a poor vehicle for examining the merits of Murphy's Sixth and Eighth Amendment claims. Indeed, apart from oral argument, Murphy never raised a Sixth Amendment claim under *Apprendi* or *Ring* in the Fifth Circuit, and this Court should thus not consider such a claim. Even if a Sixth Amendment claim were properly raised in this Court, neither *Apprendi* nor *Ring* have any bearing on this Court's clear precedent in *Cabana v. Bullock*, 474 U.S. 376 (1996), *overruled in part on other grounds*, *Pope v. Illinois*, 481 U.S. 497 (1987), that the Eighth Amendment allows the factual determinations under *Enmund* and *Tison*

to be made at *any* point in state proceedings. Murphy's arguments under the Sixth Amendment are therefore inapposite and would require a new constitutional rule barred by *Teague*.

Most importantly, Murphy cannot demonstrate that the CCA unreasonably applied Supreme Court precedent when it found that the anti-parties special issue satisfied the Eighth Amendment because Murphy cannot point to any clearly established Supreme Court precedent that requires that a *jury* make the *Enmund* and *Tison* findings; indeed, there is none, and Murphy has conceded as much in these federal proceedings. Murphy merely disagrees with the state court's conclusion and asks this Court to correct what he believes to be error. But the CCA did not err—particularly in light of the clear evidence demonstrating that Murphy was a major participant in the offense who exhibited a reckless disregard for human life—and Murphy's request does not warrant review.

A. Murphy's Sixth Amendment claim is not properly before this Court, inapplicable, and barred by *Teague*.

Murphy argues that, under this Court's precedent in *Apprendi* and *Ring*, the Sixth Amendment requires that a jury make all necessary findings that authorize the punishment that the defendant ultimately

receives and that because, functionally, the *Enmund* and *Tison* factors operate as aggravating factors, a jury must find them beyond a reasonable doubt before a death sentence is permissible. Cert.pet.17–20. But Murphy's Sixth Amendment claim fails for two reasons.

First, Murphy did not raise an *Apprendi* or *Ring* issue in the court below. Indeed, Murphy only obliquely cited to the Sixth Amendment under the sections "Statement Regarding Oral Argument"[4] and "Statement of the legal issues," but never again discussed or referenced the Sixth Amendment in his argument section. *Compare* COA.app.iv, 6, *with* COA.app.31–38. And, while he did cite to the Sixth Amendment in his argument in his reply brief, he offered no authority for his argument, and neither *Apprendi* nor *Ring* were cited in his application for COA or in his reply brief before the Fifth Circuit. *See* COA.app.31–38; Appellant's Reply to Resp't's Opp'n to App. for COA at 1–10, *Murphy*, 737 F. App'x 693 (No. 17-70030). Murphy only clearly raised arguments under *Apprendi* and *Ring* for the first time during oral argument.

[4] It is not even clear that the Sixth Amendment reference in the "Statement Regarding Oral Argument" section is to the *Enmund* claim, as Murphy also requested argument on his ineffective assistance of trial counsel claim, which is a claim under the Sixth Amendment.

Murphy's inadequate presentation of his Sixth Amendment claim in the lower court should preclude consideration of his claim in this Court. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206, 212–13 (1998); *Meyer v. Holley*, 537 U.S. 280, 292 (2003) ("But in the absence of consideration of that matter by the Court of Appeals, we shall not consider it."); *Muhammad v. Close*, 540 U.S. 749, 755 (2004). Therefore, this case does not warrant the exercise of the Court's discretion.

Secondly, even if Murphy's Sixth Amendment claim is properly before this Court,[5] *Apprendi* and *Ring* are simply inapplicable here. Specifically, neither *Apprendi* nor *Ring*—which deal explicitly with the Sixth Amendment—purport to overturn this Court's precedent in *Cabana*, in which this Court clearly found that the factual

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[5] To be sure, Murphy has never offered any support under the Eighth Amendment for his proposition that the *jury* must make the *Enmund* and *Tison* findings, and it could therefore be fairly said that the confusing and inconsistent presentation of this claim in federal courts has actually been an attempt to present a Sixth Amendment, rather than an Eighth Amendment, claim all along. However, as explained in Section II.A, *supra*, if the claim *were* to be construed as a Sixth Amendment claim, it would be unexhausted and procedurally barred. In any event, such a Sixth Amendment claim would fail for the reasons that follow.

determinations under *Enmund* and *Tison*—which deal explicitly with the *Eighth* Amendment—may be made at *any* point in the state proceedings, including on appeal. 474 U.S. at 386–87. *Cabana's* holding was later reaffirmed in *Hopkins v. Reeves*, where this Court emphasized that the ruling in *Enmund* did not affect a state's definition of any substantive offense, and a state could comply with *Enmund* at sentencing or even on appeal. 524 U.S. 88, 100 (1998). As Murphy concedes, *see* Cert.pet.19 n.10, *Cabana* therefore clearly establishes that the findings under *Enmund* and *Tison* need *not* be made by a jury to satisfy the Eighth Amendment, and *Apprendi* and *Ring's* Sixth Amendment guidance is inapposite.

Murphy's futile attempt to conflate the jurisprudence of the two amendments is made all the more obvious by looking closely at the holdings of *Apprendi* and *Ring—Apprendi* and *Ring* stand for the proposition that the Sixth Amendment requires that those facts that would increase the maximum punishment applicable to a defendant under the *state statutory scheme* must be found by a jury.[6] *Apprendi*, 530

[6] Murphy admits in this Court that *Ring* "applied the principles and holding of *Apprendi* to findings that make convicted murderers death eligible under *state* laws." Cert.pet.18 (emphasis added).

U.S. at 490; *Ring*, 536 U.S. at 589 ("Capital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which *the legislature conditions an increase in their maximum punishment*."). Neither *Apprendi* nor *Ring* purported to provide any instruction as to *constitutional*—as opposed to statutory—determinations. And, under Texas law, the "aggravating factors" sufficient to increase the maximum possible punishment a defendant can receive to "death" are established when the jury finds a defendant guilty of capital murder. Tex. Penal Code §§ 12.31(a) (a defendant found guilty of a capital felony can be punished by life imprisonment or by death), 19.03(a)–(b) (enumerating ten specific circumstances which constitute a capital felony). Thus, any concerns under *Apprendi* and *Ring* are disposed of under Texas law at the guilt phase of trial.

Murphy merely attempts to manufacture a Question Presented by extending the principles of *Apprendi* and *Ring* beyond the requirements of a state statutory scheme to encompass constitutional requirements in a manner that this Court has explicitly declined to engage in. But Murphy conceded in oral argument in the Fifth Circuit that this Court has never held that the Eighth Amendment requires the *jury* to make the

Enmund findings. He instead asks this Court to extend the Court's Sixth Amendment jurisprudence to require what the Eighth Amendment does not. In short, he asks this Court to create a new rule of constitutional law, but this Court cannot do so under the non-retroactivity principle announced in *Teague*, 489 U.S. at 288. Review is therefore not warranted.

B. The CCA reasonably applied this Court's Eighth Amendment precedent in determining that the anti-parties special issue satisfied *Enmund* and *Tison*.

At bottom, Murphy argues in the only complaint properly before this Court that the CCA unreasonably applied this Court's precedent when it found that the anti-parties special issue complied with *Enmund* and *Tison*. But whether or not the Eighth Amendment requires that the *jury must* make the *Enmund* and *Tison* findings—and it does not—the CCA's decision that the jury's answer to the anti-parties special issue in this case *did* meet *Enmund* and *Tison* was reasonable.

In *Enmund* and *Tison*, this Court addressed the culpability required for assessing the death penalty in felony-murder convictions. In both cases, the Court 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 a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U.S. at 790–91. However, in *Tison*, the Court created an exception, expressly holding that the concerns of *Enmund* are *not* implicated where an accomplice: 1) was a major participant in the felony; and 2) displayed a "reckless indifference to human life." 481 U.S at 158. Underlying both holdings is the idea that "[f]or the purposes of imposing the death penalty, [a defendant's] criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt." *Enmund,* 458 U.S. at 801.

Critically, however, this Court did not establish a new element of the crime of murder to be found by the jury, nor did it impose a particular procedure on the states for imposing the death penalty. *Cabana,* 474 U.S. at 385–86. Rather, "[t]he Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under *Enmund* for such punishment." *Id.* at 386. The factual determination that a defendant

possessed the requisite culpability necessary for the imposition of the death penalty under *Enmund* and *Tison* can be made at any point in the state proceedings, including on appeal. *Cabana,* 474 U.S. at 386–87; *Hopkins,* 524 U.S. at 99–100; *see also Foster v. Quarterman,* 466 F.3d 359, 370 (5th Cir. 2006) (district court should have examined entire record of state court proceedings to determine whether any state court made *Tison* and *Enmund* findings).

In this case, because the jury was permitted to find Murphy guilty of capital murder 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. *See* ROA.1756; Tex. Code Crim. Proc. art. 37.071 § 2(b)(2). The CCA has found that the inquiry presented in that issue—whether the defendant "anticipated that a human life would be taken"—is indicative of "a highly culpable mental state, at least as culpable as the one involved in *Tison v. Arizona*" 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).

Consequently, when considering Murphy's Eighth Amendment *Enmund* complaints, the state habeas court alternatively found that the submission of the anti-parties special issue to the jury accorded with the requirements of *Enmund* and *Tison*. ROA.1572–73 (citing *Ladd*, 3 S.W.3d at 573). The CCA adopted this finding and denied Murphy's Eighth Amendment claim based on both that finding and based on its own review. *Ex parte Murphy*, 2009 WL 1900369, at *1. Murphy fails to demonstrate that the state court's finding was contrary to, or an unreasonable application of, clear Supreme Court precedent. 28 U.S.C. § 2254(d); *see Richter*, 562 U.S. at 98–99. Indeed, as noted above, Murphy has conceded that there is no Supreme Court precedent requiring that the jury make the *Enmund* and *Tison* findings, nor is there clearly established Supreme Court law requiring that any particular formulation of the *Enmund* and *Tison* requirements be employed.[7] And in the absence of that, Murphy certainly cannot demonstrate that the CCA's determination that the jury *did* make those findings here, through the anti-parties special issue, is unreasonable. *See Richter*, 562 U.S. at

[7] Indeed, as noted above, *Cabana* makes clear that it was *not* intending to impose any particular procedure on the state courts. *See* 474 U.S. at 385–86.

101 ("[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.").

Further, not only was the submission of the anti-parties special issue itself sufficient under *Enmund*, but implicit in this determination by the CCA is the determination that the jury's affirmative answer to the anti-parties special issue constitutionally complied with the requirements of *Enmund* and *Tison*. *See Richter*, 562 U.S. at 98–100; *cf. White v. Wheeler*, 136 S. Ct. 456, 460 (2015) (finding that reviewing courts owe deference to a trial court's ruling on whether to strike a particular juror "regardless of whether the trial court engages in explicit analysis regarding substantial impairment; even the granting of a motion to excuse for cause constitutes an implicit finding of bias."). Indeed, the state habeas court made several key explicit findings, when it addressed Murphy's claims that the evidence was insufficient to support his conviction and sentence, to support that implicit determination.[8] *See* ROA.1557–70.

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[5] The Director argued that these findings were entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1) in the court below. Opp'n to COA, at 42. But whether § 2254(e)(1) or §2254(d)(1) applies, Murphy still cannot

With regard to his participation in the robbery and murder, the state court found that, "although [Murphy] did not personally shoot Officer Hawkins, he acted as lookout during the robbery—watching the parking lot, monitoring the radio frequencies used by the Irving Police Department, and keeping his codefendants apprised of police activity in the area." ROA.1560. Murphy notified his codefendants regarding the suspicious persons call, informed them of Officer Hawkins's arrival, and, moments before the shooting, warned his codefendants of Hawkins's location in relation to them. *Id.* "By warning his codefendants, [Murphy] afforded them the advantage over Hawkins and gave them the opportunity to prepare for his arrival at the back of the store." *Id.* And, the state court found that Murphy had admitted that his job was to initiate firefight if necessary, thus indicating that Murphy himself had "clearly contemplated the use of lethal force against Officer Hawkins, even before his arrival at the store." ROA.1561.

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demonstrate entitlement to relief for the reasons that follow. *See, e.g.*, *Miller-El v. Cockrell*, 537 U.S. 322, 324 (2003) (unless the state court's factual determinations are shown to be clearly wrong and objectively unreasonable, this Court may not overturn them on federal habeas review).

Similarly, Murphy clearly exhibited a reckless disregard for human life: the state court found that Murphy's guilt as a party to the offense can be "inferred from the events occurring before, during, and after the murder of Officer Hawkins" and "deduced from [Murphy]'s actions that show an understanding and common design to commit murder." ROA.1559. The state court found that Murphy and his six codefendants "plotted the Oshman's store robbery contemplating the use of deadly force." *Id*. And, not only were all seven codefendants armed with loaded guns during the robbery, Murphy was well aware that all of his codefendants "had prior convictions for crimes of violence." *Id*. Additionally, the robbery was committed in a large store on Christmas Eve, "a time and place guaranteed to provide a larger number of potential victims." *Id*. Thus, the state court found that Murphy "should have anticipated the possibility that someone would be killed during the robbery," and that, in fact, "the evidence of [Murphy]'s *actual* anticipation is strong." ROA.1559, 1562 (emphasis added).

These explicit findings by the state habeas court support the implicit determination by the CCA that the evidence sufficiently met the *Enmund* and *Tison* requirements. Thus, Murphy's argument that no

court has ever made these findings is unavailing. *See* Cert.pet.19–20. And Murphy fails to demonstrate that the state court's determination was unreasonable because he cannot. This Court should thus not exercise its discretion to review Murphy's Eighth Amendment claim.

CONCLUSION

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

Respectfully submitted,

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