No. 19–6927

IN THE

Supreme Court of the United States

TONY EGBUNA FORD,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Following more than a decade of fruitless DNA litigation in the state trial court after his last execution setting, Ford filed a subsequent state habeas application. Ford's application raised the two claims at issue in this certiorari petition—namely, a *Napue*[1] claim now available to Ford for fourteen years (if not longer), and an *Enmund*/*Tison*[2] claim available since trial twenty-six years ago. The Texas Court of Criminal Appeals (CCA) dismissed Ford's application as an abuse of the writ without reaching the merits of his claims. Ford's petition now presents the following question for this Court's consideration:

> Whether the state court's disposition, which relied upon an adequate and independent state procedural ground, forecloses certiorari review?

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1 *Napue v. Illinois*, 360 U.S. 264 (1959).

2 *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987).

LIST OF ALL PROCEEDINGS

The State of Texas v. Tony Egbuna Ford, No. No. 69441–346 (346th District Court of El Paso County July 13, 1993)

Ford v. State, No. AP–71,760 (Tex. Crim. App. Feb. 21, 1996)

Ex parte Ford, No. WR–49,011–01 (Tex. Crim. App. Sept. 12, 2001)

Ex parte Ford, No. WR–49,011–02 (Tex. Crim. App. Dec. 14, 2005)

Ex parte Ford, No. WR–49,011–03 (Tex. Crim. App. Sept. 11, 2019)

Ford v. Cockrell, No. EP–01–CA–0386–DB (W.D. Tex. Apr. 27, 2004)

Ford v. Dretke, No. 04–70018 (5th Cir. Jun. 22, 2005)

Ford v. Dretke, No. 05–6901 (U.S. Jan. 9, 2006)

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INTRODUCTION

In July 1993 Ford was convicted and sentenced to death after a home invasion where he killed a teenager and attempted to kill three of the teenager's family members. Ford now seeks certiorari review of the CCA's decision to dismiss his subsequent state habeas application. *Ex parte Ford*, WR–49,011–03, 2019 WL 4318695 (Tex. Crim. App. Sept. 11, 2019) (per curiam) (not designated for publication). The CCA dismissed Ford's subsequent state habeas application as "an abuse of the writ without addressing the merits of the claims." *Id*. at *1. (citing Tex. Code Crim. Proc. art. 11.071, § 5(a)). This Court is without jurisdiction to review Ford's claims because the state court's disposition relies upon an adequate and independent state-law ground, i.e., the Texas abuse-of-the-writ statute.

In his petition for certiorari (Pet.), Ford argues that the evidence underlying his *Napue* claim could not have been discovered when he filed his initial state habeas application, meaning that his subsequent application is permissible under Tex. Code Crim. Proc. art. 11.071, § 5(a)(1). He also argues that he is categorically ineligible for the death penalty under *Enmund* and *Tison* and should therefore be allowed to present the merits of his claims through an unrecognized expansion of the CCA's holding *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007).

However, this Court is without jurisdiction to micromanage the CCA's case-by-case application of state procedural rules. Besides, Ford's claim that the CCA erred in its application of the Section 5 bar is meritless. Ford has been contesting the Murillo sisters' identification—which undergirds his *Napue* claim—since trial and before. *Ford v. State*, 919 S.W.2d 107, 116–17 (Tex. Crim. App. 1996); 5.RR (pretrial proceeding). Ford thus could have raised claims concerning the identification's validity at the time his initial state habeas application was filed (and in fact did so). SHCR-01.41–80.[3] And Ford offers no precedent stating that *Enmund* and *Tison* create a categorical ineligibility for the death penalty on par with *Atkins*[4] that would enable consideration of his subsequent application under *Ex parte Blue*. This Court should not create an expansion of *Ex parte Blue* that Texas' highest criminal court has itself refused to recognize.

Concerning the underlying claims, Ford argues that his right to due process was violated because the State purportedly suppressed evidence demonstrating the falsity of the Murillo sisters' testimony that Ford was the

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[3] The Respondent uses the following citation conventions: "CR" refers to the clerk's record of trial documents. "RR" refers to the court reporter's trial transcript. "SHCR–01, –02, –03" refer to the clerk's record of documents filed in Ford's state habeas proceedings. All references are preceded by volume number and followed by page number where applicable.

[4] *Atkins v. Virginia*, 536 U.S. 304 (2002).

shooter. Pet.19–27. Ford also claims that the Eighth Amendment categorically exempts Ford from the death penalty because his participation in the murder was too minimal. *Id*. at 28–32. However, the Murillo sisters' sworn testimony at both pretrial and trial was that Ford was the gunman, and Ford fails to demonstrate that the testimony was wrong or false. 5.RR.22, 25–26, 38–45; 13.RR.75–76, 100, 124. Ford likewise cannot demonstrate that his participation in the murder was minimal when he was the actual triggerman. Finally, Ford's jury also received the Texas anti-parties special issue, thereby alleviating any possible concern under *Enmund*/*Tison*.

In sum, Ford's petition does not demonstrate any special or important reason for this Court to review the CCA's decision. Especially when review is foreclosed by an independent and adequate state bar that deprives this Court of jurisdiction. And even if Ford was correct in his arguments that the CCA misapplied its own state law, this Court typically does not engage in mere error correction. Nor should the Court second-guess the decision of the jury, which heard both the Murillo sisters and Ford testify and clearly resolved the identity issue adversely to Ford. Accordingly, no writ of certiorari should issue.

STATEMENT OF THE CASE

I. Facts of the Crime

The CCA provided the following summary of the facts of the crime:

> On December 18, 1991, the Murillo family attended a Christmas play to see their cousin perform. At the conclusion of the play the family departed to their mother's, Myra Concepcion Murillo's, home for a quick dinner. The mother and her three children, Myra Magdalena, Armando, and Lisa, all planned to do some Christmas shopping later that evening. After dinner, Armando was in the family room watching television, Myra Magdalena was readying herself in her bedroom for her shopping trip, and Lisa was in the kitchen. Their mother called out to her children at some point to inquire if any had heard the two men who had knocked at the door. The two men were apparently looking for "the man of the house" and the mother had refused to permit their entrance. After the children informed her that they had heard nothing, each returned to his or her previous task.
>
> Moments later Myra Magdalena stepped out into the hallway to encourage her family to hurry up. At that moment, she saw her mother and her brother retreating from the doorway. Her mother was backing up as if she was in fear for her life, kind of crouching down, and her brother looked as if he had been hit in the head and just huddled straight into the corner. She testified that within a few seconds, she saw [Ford] standing to her right, next to her at the entry to her bedroom. Subsequently she saw his cohort. She testified that both had guns. Lisa testified that she "heard a barging in, just a lot of noise, racket, like someone kicking wood." She saw two strangers in the hallway with guns. Ford's cohort pointed a gun at Lisa and walked her into the den area.
>
> [Ford] and his cohort ordered the four individuals to kneel on the floor and to be quiet. The Murillos began to pray. [Ford] first

demanded money, then jewelry. Throughout these demands, [Ford] would yell and threaten the family, occasionally pausing to strike Armando with the gun. Recognizing [Ford's] cohort as "a very familiar face in the neighborhood," Myra Magdalena attempted to divert her gaze away from the cohort to prevent being recognized. The four continued to pray as they were asked to remove their jewelry. Finally, [Ford] asked for the keys to the car parked outside. When Myra Magdalena hesitated in releasing her automobile keys, her sister retrieved them and awkwardly threw them towards [Ford]. The keys skinned his face and hit the wall. Myra Magdalena testified that [Ford's] response was, "[F]uck you, just for that, I was just going to blow him. Now I'm just going to fucking blow you all." She testified that [Ford] then began shooting.

[Ford] shot Armando in the back of the head. Myra Concepcion, upon seeing her son shot, jumped up to comfort Armando. [Ford] hooked his arm around her and shot her on the right side of the head. Myra Magdalena testified that [Ford] had to curve his gun around to aim it properly at her mother's head before he shot her. Upon being shot in the head at point blank range, Myra Concepcion fell to floor. Myra Magdalena believed that she would be next. As [Ford] stepped toward her, Myra Magdalena rose and pushed him. The gun discharged and she fell to the ground pretending to be hit. The bullet had missed her. Another shot went off and she heard her sister "gulp." After the robbers left, Myra Magdalena got up and phoned for help. Armando died from the gunshot wound. The others survived. [Ford] was identified as doing the shooting, and as being dominating, doing most of the talking and giving the most orders.

Ford testified at guilt/innocence and at punishment. He steadfastly denied participating in the home invasion and shooting, but rather insisted that he had remained outside, initially sitting in the vehicle, but then getting out, while two

> associates entered the home and committed the offense. He maintained that he did not shoot or kill anybody.

Ford, 919 S.W.2d at 109–10.

Ford's petition offers assorted evidence supporting his alleged innocence[5], Pet., 3–5, 12–19, although he does not appear to present such a claim for this Court's review. Nevertheless, it seems that at least some of Ford's contentions concerning this evidence were not found compelling by the federal district court when presented in the context of *Brady v. Maryland*, 373 U.S. 83 (1963). *Ford v. Cockrell*, 315 F. Supp. 2d 831, 841–45 (W.D. Tex. Apr. 27, 2004) (revised opinion). It is also worth noting that, in addition to the Murillo identifications, fibers from Ford's coat (which he was wearing when he was arrested the day after the offense) matched fibers found on Armando Murillo's body, and—again—Ford himself admitted to being in the car at the scene of the crime. *Id.* at 852.

And while Ford asserts that he was not the gunman, the self-serving version of events that Ford gave at trial must be viewed with skepticism given that Ford's trial counsel submitted an affidavit on state habeas review stating that:

> [a]lthough Mr. Ford and I had discussed his testimony many times prior to trial, the particular version offered under oath, during his trial testimony was neither discussed nor expected. The theory of

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[5] Ford has long claimed that his accomplice's brother was the shooter. Pet.3–5.

> party liability was not discussed with the jury panel during voir dire because it was not anticipated that Mr. Ford's testimony would raise the issue.

SHCR–01.348. Other available evidence shows that Ford's accomplice gave a statement suggesting that Ford was the triggerman (although the accomplice implausibly disclaimed seeing the shooting). SHCR–03.157.

II. Evidence Relating to Punishment

The CCA provided the following summary of the trial's punishment phase:

> At punishment, neither the State nor [Ford] presented any psychiatric or psychological testimony. The State did not present any evidence of prior criminal record, unadjudicated offense, or bad character.[6] The State only presented testimony from the

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[6] The record contains an exhibit marked as Defendant's Exhibit 4, which is a "Stipulation" signed by the two prosecutors, two attorneys representing [Ford], [Ford] himself, and the trial judge. It states:

> Now come the State of Texas, defendant and defense counsel, and agree and stipulate to the following:
>
> The defendant, Tony Ford, has never been convicted of a felony in this State, or any other State, or against the laws of the United States.

Though it does not appear that this exhibit was ever offered or received into evidence, at the conclusion of punishment testimony prior to formally resting, one of [Ford]'s attorneys stated that the defense and the State had entered into an oral stipulation of evidence. That attorney then announced a stipulation which comported with the above-quoted written stipulation. When the trial court asked, one of the prosecutors stated that that stipulation had not yet been reduced to writing, whereupon [Ford]'s attorney agreed. The trial court then informed the jury of the meaning of stipulated evidence, i.e. that which is not contradicted or controverted by either side, and indicated that it would have such reduced to writing and signed by the attorneys for the State and defense and by the defendant, and then it would be approved by the trial court. [footnote in original]

> decedent's father, mother, and two sisters. They testified about the effect that the decedent's death and others' injuries was having on them. The State also presented exhibits, which were medical records of the two survivors.
>
> [Ford's] mother testified that [Ford] was born on June 19, 1973, making him 18-years-old at the time of the offense. [Ford] also presented testimony from his sister, and three family friends who had known him for a number of years. They indicated that [Ford] previously had not exhibited any violence or acts of aggression, and opined that he would follow the rules and regulations of prison society, would take advantage of rehabilitation opportunities, and would not be a future danger if incarcerated for life. [Ford] himself testified at punishment and indicated that he could follow prison rules and regulations if incarcerated for life. He also cried on cross-examination, stating that he would not want what happened to the Murillos to happen to anybody, and acknowledging that he also felt bad that he was facing a possible death penalty. He added that "[e]verybody is a victim in this case[,]" including in some instances himself in that he did not agree with the jury's verdict because he did not do anything wrong besides sitting outside in the truck.

Ford, 919 S.W.2d at 110–11.

III. Conviction and Postconviction Proceedings

Ford was convicted of capital murder and sentenced to death in July 1993. CR.94–97; *State v. Ford*, 1993 WL 13633841 (Tex. Dist.). He also was convicted of three counts of attempted capital murder and received three sentences of life imprisonment. CR.98–106.

The CCA affirmed. *Ford*, 919 S.W.2d 107. The CCA also denied Ford's initial state habeas application based on the trial court's findings of fact and conclusions of law and its own review. *Ex parte Ford*, WR–49,011–01 (Tex. Crim. App. Sept. 12, 2001) (per curiam) (not designated for publication).

The United States District Court for the Western District of Texas, El Paso Division, denied federal habeas relief. *Ford*, 315 F. Supp. 2d at 834. The district court also denied any certificate of appealability (COA). *Id.* at 865–67. The United States Court of Appeals for the Fifth Circuit granted COA in part and denied COA in part. *Ford v. Dretke*, 121 F. App'x 554, 555 (5th Cir. 2005) (unpublished). The Fifth Circuit ultimately affirmed the district court's decision. *Ford v. Dretke*, 135 F. App'x 769, 770 (5th Cir. 2005) (unpublished). This Court denied certiorari review. *Ford v. Dretke*, 126 S. Ct. 1026 (2006).

The trial court set an execution date of December 7, 2005. *Ex parte Ford*, WR–49,011–02, 2005 WL 3429243, at *1 (Tex. Crim. App. Dec. 14, 2005) (per curiam) (not designated for publication). Ford filed a subsequent state habeas application with the CCA asserting actual innocence. *Id.* The CCA later granted Ford's motion to dismiss his subsequent habeas application without prejudice, noting that the convicting court had authorized DNA testing of biological material under Texas Code of Criminal Procedure Chapter 64 and had moved the execution date (which was later withdrawn). *Id.* Ford admits

that the following DNA testing did not connect his accomplice's brother, Victor Belton, to the crime. Pet.6–7.

Ford filed another subsequent state habeas application that was received by the CCA on September 25, 2018. *Ex parte Ford*, WR–49,011–03, 2019 WL 4318695, at *1. On September 11, 2019, the CCA dismissed Ford's application as an abuse of the writ. *Id*. The instant petition followed.

REASONS FOR DENYING THE WRIT

The question that Ford presents for review is unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id*.

Here, Ford advances no compelling reason to review his case, and none exists. Indeed, the issue in this case involves only the lower court's proper application of state procedural rules for collateral review of death sentences. Specifically, Ford was cited for abuse of the writ because he did not meet the subsequent application requirements of Texas Code of Criminal Procedure Article 11.071, Section 5. The state court's disposition, which relied upon an adequate and independent state procedural ground and did not reach the merits of Ford's claim, forecloses certiorari review.

Additionally, as Justice Stevens noted, concurring in the denial of an application for a stay in *Kyles v. Whitley*, 498 U.S. 931, 932 (1990):

> This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Ford's petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction, and certiorari should be denied.

I. Certiorari Review Is Foreclosed by an Independent and Adequate State Procedural Bar.

Article 11.071 Section 5(a) of the Texas Code of Criminal Procedure forbids state courts to consider a prisoner's successive state habeas petitions unless:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in 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 or 37.0711.

This statute, like the federal habeas "second or successive" writ prohibition, works to limit the number of attempts an inmate may seek to collaterally attack a conviction, subject to certain, limited exceptions. *Compare* Tex. Code Crim. Pro. art. 11.071 § 5(a), *with* 28 U.S.C. § 2244(b); *see also Beard v. Kindler*, 558 U.S. 53, 62 (2009) (noting that federal courts should not "disregard state procedural rules that are substantially similar to those to which we give full force in our own courts.").

Here, the CCA dismissed Ford's application as "an abuse of the writ without addressing the merits of the claims." *Ex parte Ford*, WR–49,011–03, 2019 WL 4318695, *1 (citing Tex. Code Crim. Proc. art. 11.071, § 5(a)). Ford's claims are therefore unequivocally procedurally barred because the state court's disposition of the claims relies upon an adequate and independent state-law ground, i.e., the Texas abuse-of-the-writ statute. *See*, *e.g.*, *Moore v. Texas*, 122 S. Ct. 2350, 2352–53 (2002) (Scalia, J., dissenting); *Balentine v. Thaler*, 626 F.3d 842, 857 (5th Cir. 2010) (recognizing that Section 5 is an adequate state law ground for rejecting a claim); *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) ("Texas' abuse-of-the-writ rule is ordinarily an 'adequate and independent' procedural ground on which to base a procedural default ruling."); *Busby v. Dretke*, 359 F.3d 708, 724 (5th Cir. 2004) ("the Texas

abuse of the writ doctrine is an adequate ground for considering a claim procedurally defaulted."); *Barrientes v. Johnson*, 221 F.3d 741, 758–59 (5th Cir. 2000); *Fuller v. Johnson*, 158 F.3d 903, 906 (5th Cir. 1998); *Emery v. Johnson*, 139 F.3d 191, 195–96 (5th Cir. 1997). This Court has held on numerous occasions that it "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment" because "[the Court] in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

Ford argues that the CCA misapplied its own law and Texas statute by refusing to permit his subsequent application. But this Court should not second-guess a decision of the highest court of a state on a matter of pure state law. *See Charles v. Thaler*, 629 F.3d 494, 500–01 (5th Cir. 2011) ("A federal court lacks authority to rule that a state court incorrectly interpreted its own law."); *Seaton v. Procunier*, 750 F.2d 366, 368 (5th Cir. 1985) ("We will take the word of the highest court on criminal matters of Texas as to the interpretation of its law, and we do not sit to review that state's interpretation of its own law."). To allow Ford to circumvent this jurisdictional bar, the Court would

have to construe Texas precedent in a way that "contradict[s] a recent decision of the highest state court," *i.e.*, the decision in Ford's own case. *Cf. Lords Landing Village Condominium Council of Unit Owners v. Continental Insurance Co.*, 520 U.S. 893, 896 (1997) (noting the Court's "'longstanding practice' of vacating a court of appeals' decision based on a construction of state law that appears to contradict a recent decision of the highest state court"). Ford had the opportunity to make his arguments concerning his view of the proper implementation of Section 5 during the proceedings on his subsequent state habeas application. The CCA did not agree with his view, and it dismissed Ford's claims as an abuse of the writ. The CCA's decision on this Texas state procedural matter should be final.

Ford asserts that he has a liberty interest in filing a subsequent state habeas application under Section 5, and he maintains that liberty interest is protected by the Fourteenth Amendment's Due Process Clause against arbitrary deprivation. Pet.20–21. In support, he cites to *Kentucky Dept. Of Corrections v. Thompson*, 490 U.S. 454 (1989). However, that case—which held that Kentucky prison regulations did not give state inmates a liberty interest in receiving visitors that was entitled to the protections of the Due Process Clause— has absolutely nothing to do with Section 5, procedural default, Texas, or even habeas corpus. It appears wholly irrelevant to the case-at-bar.

In any event, Ford was not arbitrarily denied his right to file a subsequent state habeas application under Section 5. Rather, it was simply the judgment of the CCA that, on these facts, Ford failed to show that he was entitled to additional proceedings. Ford asserts that he could not have discovered the facts underlying his *Napue* claim until his investigator had a happenstance encounter with court reporter Robert Thomas in late 2002. Pet.19, 23–24, 26–27. Thomas subsequently related that on the morning of voir dire, he overheard the sisters hesitate when asked if Ford was the shooter and one said that he "kind of" looks like the shooter. *Id*. Ford contends that he could not have included a claim based on this information in his original state habeas application because that application was filed on February 2, 1998. *Id*.

However, Ford has, in one form or another, repeatedly contested issues related to the validity of the Murillo sisters' identification for decades now. He did so in pretrial. *See generally* 5.RR. He did so at trial. *Ford*, 135 F. App'x 774–75 (summary of cross-examinations). He did so on direct appeal. *Ford*, 919 S.W.2d at 117. He did so during initial state habeas review. SHCR–01.41–80, 380, 382–84. He did so during federal habeas review. *Ford*, 315 F. Supp. 2d at 849–59. Ford's ability to file a new state habeas application is not refreshed every time that he gathers another scrap of evidence in support of his identity

claim or repackages it in a new legal framework.[7] This is especially true in view of the weakness of his instant evidence, as shown below in Section II.

As for Ford's contention that he is entitled to dilatorily bring his *Enmund*/*Tison* claim under *Ex parte Blue*, Ford offers no CCA precedent that recognizes extending the holding of *Ex parte Blue* beyond *Atkins* to *Enmund*/*Tison* claims.[8] Pet.32. Without that extension, Ford merely has a claim that there was error in his case that entitles him to relief. If that is all that is required to file a subsequent state habeas application, then Section 5 is no limit at all. The CCA obviously did not err in refusing to countenance this claim, which has been available to Ford since trial—over twenty-six years ago.

Finally, Ford asks that this Court force the CCA to further explain its ruling, which he considers inadequate. Pet.34. However, Ford fails to produce any precedent dictating the amount of detail that the CCA must put in its Section 5 orders. This Court should refuse to direct the form of the state court's orders. *Cf. Smith v. Lucas*, 9 F.3d 359, 367 (5th Cir. 1993) (federal courts may

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[7] Although there is no statute of limitations for Texas state habeas applications, the CCA recognizes the common law doctrine of laches should prohibit relief where an applicant has unreasonably "slept on his rights." *Ex parte Perez,* 398 S.W.3d 206, 218–19 (Tex. Crim. App. 2013). Presumably, the CCA did not look favorably on Ford waiting well over a decade after acquiring the courts reporter's information to pursue final resolution of an attendant claim.

[8] It appears that the CCA has previously declined to find that another capital inmate could circumvent the Section 5 bar on this basis. *See Ex parte Wood*, 498 S.W.3d 926. 926–29 (Tex. Crim. App. 2016) (Alcala, J., concurring).

only "suggest a corrective procedure in broad terms," but may not compel the state court to *sua sponte* reopen a postconviction proceeding). Compelling the state court to do so would constitute an "impermissible interference with the state court's autonomy in applying its own criminal procedures." *Smith*, 9 F.3d at 367; *see also Harrington v. Richter*, 562 U.S. 86, 99 (2011) ("[o]pinion-writing practices in state courts are influenced by considerations other than avoiding scrutiny by collateral attack in federal court" and "[t]he issuance of summary dispositions in many collateral attack cases can enable a state judiciary to concentrate its resources on the cases where opinions are most needed"). Moreover, the CCA's succinct reference to Section 5 and its explanation that Ford's claims should thus be dismissed as "an abuse of the writ without considering the merits" is a plain statement that clearly and expressly indicates that the CCA's disposition relied upon the adequate and independent abuse-of-the-writ statute. *See Long*, 463 U.S. at 1041 ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."); *see also Harris v. Reed*, 489 U.S. 255, 263 (1989) (holding that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar"). There is no jurisdictional basis for granting

certiorari review in this case. Accordingly, Ford's petition presents nothing for this Court to consider.

II. Ford's False Evidence Claim Is Meritless.

In any event, Ford's false evidence claim is without merit. He argues that the Murillo sisters presented false evidence when they said they were sure Ford was the shooter because, more than twelve years after trial, court reporter Thomas attested in a sworn affidavit that, on the morning of voir dire, the sisters hesitated when was asked if Ford was the shooter and one sister said that Ford "kind of" looks like the shooter. Pet.26–27; SHCR–03.249. Ford's investigator encountered court reporter Thomas in relation to this case in 2002 and obtained information from him pertinent to the *Brady* claim rejected during federal habeas review. Pet.26–27; SHCR–03.96; *Ford*, 315 F. Supp. 2d at 842. However, Thomas' affidavit—describing the Murillo sisters' hesitation and statement—is dated October 28, 2005, and is apparently based on information discovered by federal counsel in a follow-up encounter. Pet.26–27; SHCR–03.249. Thomas' affidavit was submitted to the CCA in conjunction with Ford's subsequent state habeas application in September 2018. Here, Ford fails to show any false testimony was presented through this twenty-six-year-old hearsay.

The State denies a criminal defendant due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected.

Giglio v. United States, 405 U.S. 150 (1972); *Napue*, 360 U.S. at 264; *Faulder v. Johnson*, 81 F.3d 515, 519 (5th Cir. 1996). However, to obtain relief on such a claim, a petitioner must show the following: (1) the testimony was actually false, (2) the prosecutor knew it was false, and (3) the testimony was material. *Kirkpatrick v. Whitley*, 992 F.2d 491, 497 (5th Cir. 1993). That is, "[c]onflicting or inconsistent testimony is insufficient to establish perjury." *Kutzner v. Johnson*, 242 F.3d 605, 609 (5th Cir. 2001). And further, the perjured testimony is only material if it is also shown that there was any reasonable likelihood that it affected the jury's verdict. *Giglio*, 405 U.S. at 153–154; *see also Barrientes*, 221 F.3d at 753, 756.

Ford fails to establish that the Murillo sisters testified falsely through Thomas' hearsay statement. Thomas' declaration that, on the first day of voir dire, one of the sisters said Ford "kind of looks like" the shooter is not credible given a previous proceeding in which the sisters unequivocally stated that Ford was the shooter. In a May 14, 1993 motion to suppress hearing, before the first day of voir dire, Myra Murillo testified that there was no doubt in her mind that Ford killed her brother. 5.RR.22, 25–26, 38. Lisa Murillo similarly testified with no equivocation that Ford killed her brother at that pretrial hearing. *Id*. at 39–45. Therefore, Ford's argument that the sisters subsequently voiced hesitation as to the killer's identity right before voir dire is belied by

their consistent averments that Ford was the killer, both before and during trial.

Moreover, even if Thomas' declaration were factually accurate, his perception that the sisters hesitated, and one said Ford "kind of" looked like the shooter hardly establishes that their testimony was false. It is also entirely possible that the sister was merely using a colloquialism and did not intend to express uncertainty or that Thomas simply misheard or misremembered the event. Indeed, the pure length of time that elapsed between voir dire and Thomas' hearsay recounting strongly calls into question this story's veracity.

Nevertheless, even if the Murillo sisters had doubts about their identification of Ford as the shooter, such doubts would have been largely cumulative of trial counsel's effective cross-examination. As Ford himself notes, the Murillo sisters were cross-examined by trial counsel such that their identification of Ford as the shooter was already effectively questioned in front of the jury. Pet. at 13–14 (citing *Ford*, 135 F. App'x. at 774). Trial counsel pointed out that Myra Murillo "avoided looking at the intruders . . . [and] looked down much of the time the men were in the house." *Ford*, 135 F. App'x. at 774. Trial counsel also noted the discrepancies between Myra's description of the shooter and Ford's actual appearance, including discrepancies in height and facial complexion. *Id*. Myra Murillo also admitted that she never told the

police she saw the shooter shoot anyone and that she only viewed the shooter "for a very short period of time." *Id*.

Lisa Murillo's testimony was also questioned on cross-examination. Trial counsel established that Lisa Murillo "buried her face in a pillow" and "simply heard the gunshots." *Id*. Like Myra Murillo, Lisa Murillo's testimony also contained discrepancies that were revealed to the jury, and she also admitted she viewed the shooter for a short period of time. *Id*.

Given such an effective cross-examination, Ford fails to show what Thomas' declaration would have added in impeaching the credibility of the Murillo sisters. The mere fact that Thomas perceived *one of the sisters* as saying Ford "kind of" looks like the shooter is hardly more damaging to the positive identification than the cross-examination conducted by trial counsel. As the jury already heard this damaging impeachment evidence, there is not a reasonable likelihood that the jury would have acquitted Ford even if it were aware of Thomas' declaration of events.

III. Ford's Claim That He Is Categorically Exempted from the Death Penalty Is Inapplicable Under the Facts.

In his second claim Ford argues that he is categorically exempt from the death penalty under *Enmund* and *Tison*. In *Enmund* and *Tison*, the Court addressed the culpability required for assessing the death penalty in felony-murder convictions. The Court held in *Enmund* that the death penalty may

not be imposed on one who "aids and abets a felony in the course of which murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that a level of lethal force will be employed." 458 U.S. at 797. But the Court created an exception in *Tison*, when it was faced with two brothers who assisted their father in an armed prison escape and went on to commit robberies to further that escape. It held that the concerns of *Enmund* are not implicated where an accomplice was a major participant in the felony and displayed a "reckless indifference to human life." 481 U.S. at 158. It explained that reckless disregard for human life is "implicit in knowingly engaging in criminal activities known to carry a grave risk of death" and represents a highly culpable mental state when that conduct "causes its natural, though also not inevitable, lethal result." *Id*. at 157–58. Critically, the Court did not establish any procedural guidelines or instructions on how to implement *Enmund*. Later, the Court expressly left discretion to the states: "*Enmund* does not impose any particular form of procedure upon the States." *Cabana v. Bullock*, 474 U.S. 376, 386 (1986). A determination of requisite culpability, then, can be made at any point in the proceedings—and it can be made by a jury, a judge, or an appellate court. *Id*. at 386–87; *see also Hopkins v. Reeves*, 524 U.S. 88, 99–100 (1998) (states can comply with *Enmund* requirement at sentencing or on appeal).

Ford's assertion that he is entitled to relief under these cases is meritless. First, the evidence clearly established that Ford was a major participant in the murder because he was identified as the actual killer. On initial state habeas review, the state court rejected Ford's theory that the actual killer was his accomplice's brother, Victor Belton. SHCR–01.380, 382–83. The state court found no misidentification and found the evidence supported the State's theory that Ford was the shooter (although it also supported a theory of party liability). *Id*. The CCA's direct appeal opinion, in its discussion of the future dangerousness likewise reflects its view that Ford was the killer, summarizing that:

> the record reflects that on the evening of December 18, 1991, [Ford] and a cohort forced their way into the home of a mother with three of her adult children and proceeded to rob them. The decedent, his mother, and one sister were shot. Another sister was shot at, but missed. The decedent died from the gunshot wound to the back of his head.

Ford, 919 S.W.2d at 109. The CCA's opinion also notes, among other things, that:

> the evidence of [Ford]'s lack of remorse, refusal to accept responsibility for his actions, attempt to place the blame upon others, and specific actions at the Murillo home were sufficient for a rational jury to determine that there was a probability that he would commit criminal acts of violence that would constitute a continuing threat to society.

Id. at 112.

Second, it is true that Ford's jury was permitted to find him guilty of capital murder as a party. CR.45, 54; Tex. Penal Code § 7.02(a)(2). But because the charge permitted the jury to find Ford guilty as a party to the murder, the jury was given the Texas anti-parties special issue. CR.72. The Texas anti-parties special issue required the jury to find beyond a reasonable doubt that Ford actually committed the murder, or that he intended to kill the deceased or another, or that he anticipated that a human life would be taken. Tex. Code Crim. Pro. art. 37.071 § 2(b)(2). The CCA has found such inquiry indicative of "a highly culpable mental state, at least as culpable as the one involved in *Tison*" and 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); *see also Halprin v. Davis*, 911 F.3d 247, 259 (5th Cir. 2018), *cert. denied*, 140 S. Ct. 167 (2019). Thus, even assuming the jury found only "anticipation," this culpable mental state satisfies *Tison*.

In sum, in *Cabana*, the Court gave states discretion to implement *Enmund* and has yet to provide any specific procedures or language to guide states in so doing. Texas' implementation of *Enmund* through the jury's consideration of the anti-parties special issue is consistent with this Court's precedent. But even if the anti-parties special issue could theoretically allow an individual to be convicted who had not displayed a reckless indifference to

human life, any error in Ford's case was obviously harmless since the evidence showed that he was the actual triggerman.

CONCLUSION

For the reasons set forth above, Ford's petition for a writ of certiorari should be denied.

Respectfully submitted,

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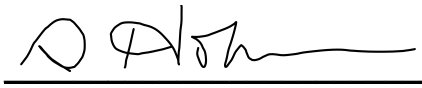

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