No. 19-7481

IN THE

Supreme Court of the United States

PATRICK HENRY MURPHY, JR.,
Petitioner,

v.

TEXAS,
Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

A Texas jury found Patrick Henry Murphy guilty of capital murder and answered the statutory special issues in a manner that required the trial court to sentence him to death. Murphy presents one question for review:

> Does this Court's holding in *Ring v. Arizona*, 536 U.S. 584, 589 (2002), that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment" require a jury, who convicts a defendant of capital murder under the theory that he was an accomplice to a felony that resulted in a murder, to determine the defendant's eligibility for the death penalty under the Eighth Amendment by making explicit findings under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), that the defendant was a major participant in the underlying felony and displayed a reckless indifference to human life?

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BRIEF IN OPPOSITION

In December 2000, Petitioner Patrick Henry Murphy and six other inmates—collectively dubbed the "Texas Seven"—escaped from a Texas prison and embarked on a crime spree that culminated in the Christmas Eve robbery of an Oshman's sporting-goods store and the shooting death of Irving Police Officer Aubrey Hawkins. During the robbery, Murphy waited in a car outside the store with four loaded weapons, including an AR-15; monitored the police scanner; and communicated with the heavily armed and violent escapees inside the store, ultimately alerting them to Officer Hawkins's arrival. Murphy's role in the robbery was, in his own words, to be "backup and lookout" and to "initiate firefight" if pursued by the police. In 2003, a Dallas County jury convicted Murphy of capital murder and, via the special issues, sentenced him to death.

Murphy has unsuccessfully argued in state and federal courts that he lacked the degree of culpability necessary under *Enmund* and *Tison* for imposition of the death penalty under the Eighth Amendment. But until recently, Murphy has never raised a post-conviction claim in state court that the Sixth Amendment and, in particular, this Court's holding in *Ring*, require *Enmund/Tison* "findings" to be made by a jury. Murphy attempted to raise such a claim in a second, or subsequent, application for a writ of habeas corpus, which the Texas Court of Criminal Appeals (TCCA) dismissed on state-law procedural grounds in a written order that expressly stated the court had not considered the merits of the claim.

Murphy now petitions this Court for a writ of certiorari from the TCCA's order dismissing his subsequent writ application. But this Court does not have jurisdiction to grant review because the TCCA's decision rests exclusively on an independent and adequate state-law procedural ground, namely, Texas's abuse-of-the-writ statute. Moreover, the TCCA did not have to reach the merits of Murphy's Sixth Amendment *Ring* claim in order to conclude that he did not meet the actual-innocence-of-the-death-penalty exception to the subsequent-writ bar.

Finally, this Court has never held that the limitations imposed by *Enmund* and *Tison* on death-penalty eligibility for a non-shooter must be made the subject of explicit findings by the jury. Indeed, this Court has held just the opposite. Accordingly, Murphy's claim has no merit, and this Court should deny certiorari review.

STATEMENT OF THE CASE

I. Facts of the Crime

A. The Oshman's robbery and the murder of Officer Hawkins

In its opinion on direct appeal, the TCCA summarized the events leading to Officer Hawkins's death:

> On December 13, 2000, [Murphy] escaped from the Texas Department of Criminal Justice Connally Unit, along with inmates George Rivas, Larry Harper, Donald Newbury, Randy Halprin, Joseph Garcia, and Michael Rodriguez. They stole firearms and ammunition from the prison and eventually made their way to Irving, Texas, where they planned to commit the robbery of an Oshman's Supersports store on Christmas Eve.
>
> On the evening of December 24, 2000, the group armed themselves with weapons and two-way radios and carried out their plan. Rodriguez, Halprin, Garcia, and Newbury entered Oshman's pretending to be customers, and they were followed by Rivas and Harper, who were

dressed as security guards. [Murphy] stayed behind inside their Suburban in the store parking lot, acting as a lookout and monitoring the Irving Police Department's activity on a radio frequency scanner.

The Oshman's store was scheduled to close at 6:00 p.m. At about 5:45 p.m., Rivas and Harper spoke with store managers Wes Ferris and Tim Moore at the front of the store and stated that they were investigating a shoplifting ring in the area. After they showed employees a photographic lineup and viewed the store's surveillance videotape, Rivas drew his gun and announced the robbery. The rest of the escapees surrounded the employees with their weapons drawn. The employees were told to place their hands on the counter while the escapees searched them. Ferris testified that he heard Rivas talking to someone on a two-way radio. Rivas "asked if everything was okay outside and somebody responded saying everything was fine, the police were involved with an accident on 183."

Rivas then made the employees walk single file to the breakroom at the back of the store, where he ordered them to face the wall and remain silent. Rodriguez and Garcia remained in the breakroom with the employees, while Rivas escorted Ferris back through the store. Rivas took a tote bag off the wall on their way to the customer service area, where he had Ferris open the registers and place the money in the bag. He also made Ferris give him the keys to his car, a white Ford Explorer parked outside. Rivas took the store surveillance tape from the video room and had Ferris empty the cash from the office safe into the bag. They then went to the gun department, and Ferris gave Newbury the key to unlock the case where the shotguns and rifles were kept. Ferris retrieved handguns from a safe, then they went back to the employee breakroom. Rivas said that he was going outside to get the vehicle and directed Rodriguez and Garcia to tie up the employees and meet him behind the store.

When Rivas went outside, he encountered Misty Wright, who had arrived earlier to pick up her boyfriend, Oshman's employee Michael Simpson. Wright testified that while waiting in her car in the parking lot, she saw the employees being patted down and walking to the back of the store in a single-file line. She became concerned and called her friend Sheila, who quickly drove to the store, parked her car, and got into Wright's car with her. Wright testified that a man wearing a black hat and a black security jacket exited the store and walked toward a white Ford Explorer, but started walking in their direction when he heard Sheila activate her car alarm. Wright drove away and parked at a nearby restaurant, and Sheila called 911 on her cell phone. As they

watched the Oshman's store and waited for police to arrive, Wright saw the man get into the Explorer and drive around to the back of the store.

Inside the store, Ferris heard someone on the radio telling Rodriguez and Garcia to hurry up and get out of the store because they "had company." Michael Simpson testified that he heard, "Come on, we got to go. We got to go. We got company." Rodriguez and Garcia quickly left the breakroom and told the employees not to move for ten minutes.

Irving Police Officer Aubrey Hawkins was dispatched to Oshman's on a suspicious persons call. He was the first officer to arrive on the scene. When he drove around to the loading dock area at the back of the building, the escapees shot him multiple times. Rivas and Halprin were also shot during the incident. One of the escapees pulled Hawkins out of his vehicle, and another took his handgun. As the escapees fled the scene in the Explorer, they ran over Hawkins and dragged him several feet. They then drove to a nearby apartment complex, where they met [Murphy] and abandoned the Explorer. When other officers arrived at Oshman's, they found Hawkins lying face down on the ground without a pulse. The medical examiner testified that Hawkins suffered eleven gunshot wounds, some of which caused fatal injuries to his brain, lungs, and aorta, and he had other injuries that were consistent with being run over and dragged by a vehicle.

Murphy v. State, No. AP-74,851, 2006 WL 1096924, at *1–2 (Tex. Crim. App. Apr. 26, 2006) (not designated for publication).

B. Murphy's capture

The TCCA also summarized the events leading to Murphy's arrest:

Oshman's employees identified the escapees in a photographic lineup, and the Irving police prepared warrants for the seven suspects and sent the information to law enforcement agencies throughout the nation. On December 31, 2000, the escapees checked into the Coachlight Motel and RV Park in Woodland Park, Colorado, where they lived in their RV for several weeks and claimed to be traveling missionaries. They eventually aroused the suspicions of other people staying at the RV park, who contacted the Teller County Sheriff's Department on January 21, 2001. On January 22, local law enforcement officers and the FBI apprehended five of the escapees. When they surrounded the RV, Halprin surrendered and Harper committed suicide. Officers found firearms, cash, ammunition, two-way radios, an emergency frequency guide and scanners, a smoke grenade, and a security hat inside the RV. A bag

> outside the RV contained gun parts and electronic communication devices. Rivas, Rodriguez, and Garcia were captured in their Jeep at an area convenience store. Officers searched the Jeep and found firearms, cash, a two-way radio, a nightvision scope, a police scanner, and police radio frequency lists for Colorado Springs and Pueblo.
>
> [Murphy] and Newbury were apprehended after a standoff with police at a Holiday Inn in Colorado Springs on January 23. Officers recovered cash, firearms, ammunition, and ski masks from their hotel room. Colorado Springs police officer Matt Harrell testified that he spoke to [Murphy] on the telephone during the standoff at the hotel. Harrell testified [Murphy] told him that during the Oshman's robbery he "was in a truck with radio contact, with an AR–15, and he was set up to do damage from behind in a stand-off situation."

Id. at *2–3.

C. Murphy's confession

After his arrest, Murphy gave a written statement to police detailing his involvement in the Oshman's robbery. The TCCA provided the following summary of Murphy's statement:

> He stated that he and the other escapees planned to rob Oshman's "to increase [their] arsenal and to get rid of the weapons [they] stole from the prison." Prior to the robbery, they determined the layout of the store and the number of employees and decided the roles each of the escapees would play. [Murphy] acted as "backup and lookout." He programmed Irving police frequencies into a radio scanner and waited in the Suburban in the Oshman's parking lot. The Suburban was loaded with weapons, including "2 357's with magnums loads, revolvers ... [an] R 15 with approximately 60 rounds of ammunition, and a twelve gauge pump with 10 rounds." The escapees communicated with each other over walkie-talkies, and, once inside, Harper or Rivas radioed [Murphy] to let him know "it was going down." They occasionally radioed [Murphy] to "see if all was o.k. out front," and [Murphy] radioed them a few times to let them know there were some vehicles outside "apparently waiting on someone." After Rivas went outside, got into an employee vehicle, and drove around the back of the store, [Murphy] heard on the scanner, "Suspicious activity at the Oshman[']s." [Murphy] "got on the walkie-talkie and [told] them to abort[;] the police were here." He gave them the precise location of the patrol car and the direction it was traveling. When the patrol car drove around to the back of Oshman's, [Murphy] radioed,

> "He's coming around the corner, leave, leave." Shortly thereafter, Harper radioed [Murphy] and told him to go to the "pickup point." [Murphy] secured the weapons in the Suburban and drove to the apartment complex where he met the rest of the escapees. He stated that if he were pursued by police, his purpose "was to initiate firefight with the AR 15."

Id. at *3.

II. State and Federal Proceedings Related to Murphy's *Enmund/Tison* and *Ring* Claims

A. Murphy's claims at trial

The indictment charged Murphy with committing capital murder in one of two ways: (1) by intentionally or knowingly murdering a peace officer acting in the lawful discharge of an official duty, with knowledge that the victim was a peace officer; or (2) by intentionally committing murder in the course of committing or attempting to commit robbery. (C.R.: 2).[1] *See* Tex. Penal Code Ann. § 19.03(a)(1)–(2). By applying Texas's law of parties to the allegations in the indictment, the trial court's charge at the guilt phase of the trial authorized the jury to convict Murphy of capital murder under any one of four theories: (1) as a party to the murder of a peace officer; (2) as a conspirator to a robbery that resulted in the murder of a peace officer; (3) as a party to an intentional murder committed in the course of a robbery; or (4) as a conspirator to a robbery that resulted in an intentional murder. (C.R.: 39–41). *See* Tex. Penal Code Ann. § 7.02(a)(3), (b).

[1] Throughout this brief, Respondent will refer to the Clerk's Record from Murphy's trial as "C.R.: [page number]"; to the Clerk's Record from Murphy's initial state habeas proceedings as "C.R.H.: [page number]"; and to the multi-volume Reporter's Record from Murphy's trial as R.R. [volume number]: [page number]."

Before the trial court instructed the jury at the guilt phase, 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 Officer Hawkins. (R.R. 44: 4). The trial court denied Murphy's motion. (R.R. 44: 4). Trial counsel then objected to the general-verdict form as violating a constitutional principle of jury unanimity, as embodied in the Sixth Amendment and the Texas Constitution. (C.R.: 45; R.R. 44: 4–5). The trial court also overruled these objections. (R.R. 44: 4–5).

At the punishment phase, the trial court instructed the jury on Texas's death-penalty scheme. (C.R.: 54–56). *See* Tex. Code Crim. Proc. Ann. art. 37.071, § 2. The jury received the statutorily mandated future-dangerousness and mitigating-circumstances special issues. *See id.* § 2(b)(1), (e)(1). But because Murphy's jury could have found him guilty of capital murder as a party or a conspirator, the jury also received the "anti-parties" special issue, which requires the jury to consider "whether 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." (C.R.: 55). *Id.* § 2(b)(2).

During the charge conference, Murphy's trial counsel argued that the anti-parties special issue was contrary to *Enmund* and *Tison* because it allowed the jury to sentence him to death based on a finding that he only anticipated a human life would be taken. (R.R. 49: 10). This, 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." (R.R. 49: 10). Counsel asked the trial

court to instruct the jury that Murphy was "not eligible for the death penalty if he did not kill, attempt to kill, intend to kill, or intend to use lethal force against the deceased, Aubrey Hawkins." (R.R. 49: 10–11). Counsel also requested a jury finding on the issue, arguing that, otherwise, Texas's death-penalty scheme violated the Eighth Amendment and this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). (R.R. 49: 11). The trial court denied Murphy's requests. (R.R. 49: 11).

B. Murphy's claims on direct appeal

In his brief on direct appeal, Murphy raised forty-two issues, which he divided into four sections: (1) "Issues on Voir Dire"; (2) "Issues on Trial"; (3) "Issues on Punishment"; and (4) "Constitutional Issues." Brief for Appellant at xvii–xxvi, *Murphy*, No. AP-74,851, 2006 WL 1096924. Under the "Issues on Trial" section, Murphy alleged in issue number eighteen that the trial court erred by overruling his objection to the guilt-phase jury charge concerning the applicability of the law of parties to *Enmund*. Brief for Appellant at 71. But at trial, Murphy did not raise an objection to the guilt-phase jury charge based on *Enmund*; the only discussion of *Enmund* at the guilt phase occurred in the context of Murphy's request for a directed verdict. (R.R. 44: 4). Murphy did object to the punishment-phase jury charge based on both *Enmund* and *Tison*, but he did not cite to or otherwise reference this objection in his brief. (R.R. 49: 10–11). Brief for Appellant at 71.

Accordingly, in its opinion on direct appeal, the TCCA properly interpreted Murphy's *Enmund* claim in his eighteenth issue as only raising a challenge to the

constitutionality of his conviction, not his sentence.[2] *Murphy*, 2006 WL 1096924, at *21 & n.58. The TCCA held 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." *Id.* at *21. The TCCA therefore overruled issue eighteen and ultimately affirmed Murphy's conviction and sentence. *Id.* at *21, 25. This Court denied Murphy's petition for a writ of certiorari to review the TCCA's decision. *Murphy v. Texas,* 549 U.S. 1119 (2007).

C. Murphy's claims on initial state habeas

While his direct appeal was still pending, Murphy filed his first application for state habeas relief, raising eight grounds. (C.R.H.: 2–41). In his seventh and eighth grounds, Murphy raised *Enmund*-based challenges to his conviction and sentence. (C.R.H.: 37–41). Specifically, he asserted that his conviction and death sentence violated the Eighth Amendment because the State did not have to prove that he committed an act resulting in death or that he had the specific intent to kill. (C.R.H.: 38–41).

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[2] Murphy complains in his instant petition that the TCCA misconstrued his eighteenth issue as challenging only his conviction and not his eligibility for a death sentence. (Cert. Pet. at 11). It seems scarcely possible that the court misinterpreted Murphy's one-paragraph argument, contained in the portion of his brief dedicated to trial issues, in which he specifically directed the court's attention to the precise pages of the reporter's record on which trial counsel's motion for a directed verdict and objections to the guilt-phase jury charge appeared, and to no other portion of the record. Brief for Appellant at 71; *see Murphy*, 2006 WL 1096924, at *21 n.58. The TCCA had no obligation to expand Murphy's argument for him in order to address a claim he chose not to raise.

The trial court found both of Murphy's *Enmund* claims to be procedurally barred from habeas review, since he raised the challenge to his conviction on direct appeal, and the TCCA rejected it; and since he could have raised the challenge to his punishment on direct appeal, but he did not. (C.R.H.: 90–91). *See Ex parte Ramos*, 977 S.W.2d 616, 617 (Tex. Crim. App. 1998) (holding that claims that were raised and rejected on direct appeal or that could have been raised, but were not, will not be addressed on habeas). Alternatively, the trial court found both claims to be without merit. Specifically, the court found that *Enmund* was irrelevant to the constitutionality of Murphy's conviction and that submission of the anti-parties special issue to the jury at the punishment phase of the trial accorded with the requirements of *Enmund* and *Tison*. (C.R.H.: 91–92). *See Ladd v. State*, 3 S.W.3d 547, 573 (Tex. Crim. App. 1999) ("*Anticipating that a human life will be taken* is a highly culpable mental state, at least as culpable as the one involved in *Tison v. Arizona,* and we hold that, according to contemporary social standards, the death penalty is not disproportionate for defendants with such a mental state.").

The TCCA adopted the trial court's findings of fact and conclusions of law and, based on those findings and conclusions as well as its own review of the record, denied Murphy's application for a writ of habeas corpus. *Ex parte Murphy*, No. WR-63,549-01, 2009 WL 1900369, at *1 (Tex. Crim. App. July 1, 2009) (per curiam) (not designated for publication). Murphy did not file a petition for certiorari review of the TCCA's decision.

D. Murphy's claims on federal habeas

In 2010, Murphy sought federal habeas relief, filing a petition in which he alleged as one of four grounds for relief that he had been sentenced to death without *Enmund/Tison* findings, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. Petition for Writ of Habeas Corpus at 17–26, *Murphy v. Davis*, No. 3:09-CV-1368-L, 2017 WL 1196855 (N.D. Tex. Mar. 31, 2017), ECF No. 18. Changing course slightly from his prior state-court claims and relying on this Court's precedent in *Apprendi* and *Ring*, Murphy argued that the Sixth Amendment entitled him to jury findings on his eligibility for the death penalty under *Enmund* and *Tison*. Petition for Writ of Habeas Corpus at 23–26. The district court adopted the findings and recommendations of the magistrate judge and denied relief, finding in relevant part that (1) Murphy's challenge to his sentence was procedurally barred from habeas review because the state habeas court found that he could have, but did not, raise this claim on direct appeal; and (2) in any event, the TCCA's finding that the anti-parties special issue satisfied the requirements of *Enmund* and *Tison* was reasonable. *Murphy*, 2017 WL 1196855, at *2.

Murphy sought a Certificate of Appealability (COA) from the Fifth Circuit on three claims, including his claim that he was sentenced to death without proper *Enmund/Tison* culpability findings. *Murphy v. Davis*, 737 F. App'x 693, 700 (5th Cir. 2018) (not designated for publication). The Fifth Circuit denied Murphy's request for a COA on all claims in a per curiam opinion. *Id.* The court concluded that Murphy's *Enmund/Tison* claim was clearly procedurally barred because the state habeas court's finding of procedural default based on Murphy's failure to raise the claim on

direct appeal was an adequate state ground foreclosing federal habeas review *Id.* at 702. The Fifth Circuit did not reach the merits of Murphy's claim. *Id.* This Court denied Murphy's petition for a writ of certiorari. *Murphy v. Davis*, 139 S. Ct. 568 (2018).

E. Murphy's claims on subsequent state habeas

Murphy then returned to state court and filed a second application for habeas relief—his first subsequent application. In it, he raised two claims, including a claim that he is ineligible for a death sentence because the jury did not make explicit, *Enmund/Tison*-based death-eligibility findings. Subsequent Application for Post-Conviction Writ of Habeas Corpus at 17, *Ex parte Murphy*, No. WR-63,549-03, 2019 WL 5589394 (Tex. Crim. App. Oct. 30, 2019) (per curiam) (not designated for publication). Murphy argued that this Court's Sixth Amendment precedent in *Apprendi* and *Ring* required the jury to find, in accordance with this Court's Eighth Amendment precedent in *Enmund* and *Tison,* that he was both a major participant in the robbery that resulted in Officer Hawkins's murder and recklessly indifferent to human life. Since the jury did not make an explicit finding on the major-participant prong of *Enmund/Tison*, Murphy's argument continued, he is ineligible for execution. Subsequent Application for Post-Conviction Writ of Habeas Corpus at 17–23.

In an unpublished, per curiam order, the TCCA found that Murphy's claims did not satisfy the requirements of article 11.071, section 5, of the Texas Code of Criminal Procedure and dismissed the application as an abuse of the writ "without reviewing the merits of the claims raised." *Ex parte Murphy*, 2019 WL 5589394, at *1

(citing Tex. Code Crim. Proc. Ann. art. 11.071, § 5(c)). Murphy then filed this petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

The question Murphy presents for review is unworthy of this Court's attention. As a threshold matter, this Court does not have jurisdiction to review the TCCA's dismissal of Murphy's subsequent writ application because that dismissal rests on an independent and adequate state-law ground—Texas's abuse-of-the-writ statute—and was expressly not a decision on the merits of the claims raised. Moreover, Murphy has not provided a single "compelling reason" to grant review in this case, and his assertion that only a jury can determine whether a defendant is eligible for the death penalty under the *Enmund*/*Tison* criteria is contrary to this Court's precedent. Sup. Ct. R. 10.

I. This Court Lacks Jurisdiction to Grant Review Because the TCCA's Decision Rests Exclusively on State-Law Procedural Grounds.

Murphy's Sixth Amendment claim implicates nothing more than the TCCA's proper application of state procedural rules for consideration of subsequent habeas applications in death-penalty cases. Under article 11.071, section 5, of the Texas Code of Criminal Procedure, the TCCA must dismiss a subsequent habeas application as an abuse of the writ unless one of three requirements for merits review has been met. Tex. Code Crim. Proc. Ann. art. 11.071, § 5(c). Under this provision, succinctly stated, the TCCA must determine whether the application contains sufficient facts establishing that: (1) the factual or legal basis for the claim was unavailable at the time the previous application was filed; (2) but for a violation of the Constitution, no

rational juror could have found the applicant guilty; or (3) but for a violation of the Constitution, no rational juror could have voted in favor of a death sentence. *Id.* § 5(a)(1)–(3).

Here, after setting out a brief procedural history of the case, the TCCA's order states that the court has "reviewed the application and found that the allegations do not satisfy the requirements of Article 11.071 § 5. Accordingly, we dismiss the application as an abuse of the writ *without reviewing the merits of the claims raised* . . . ." *Ex parte Murphy*, 2019 WL 5589394, at *1 (emphasis added).

This Court has consistently held 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." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *see Lambrix v. Singletary*, 520 U.S. 518, 522–23 (1997). This rule applies whether the state-law ground is substantive or procedural, and its application means this Court lacks jurisdiction to review the federal claim. *Coleman*, 501 U.S. at 729. "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Id.*

The TCCA dismissed Murphy's subsequent writ application after the court determined that his claims did not meet the requirements of article 11.071, section 5. *Ex parte Murphy*, 2019 WL 5589394, at *1. Thus, the court's disposition of Murphy's claims rested on a state procedural ground that was both independent of the federal

issues raised and adequate to support the judgment. *See Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008). And by explicitly stating that it had not considered the merits of the claims, the TCCA left no doubt as to the independent, state-law character of its dismissal.

Nevertheless, Murphy argues that the TCCA's dismissal order constitutes a decision on the merits of his Sixth Amendment *Ring* claim because, as he contended in his application, the claim satisfies the "actual-innocence-of-the-death-penalty" exception to the general prohibition against subsequent writ applications. (Cert. Pet. at 21). *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(3); *Ex parte Blue*, 230 S.W.3d 151, 160 (Tex. Crim. App. 2007). This exception permits merits review of a subsequent writ claim if the applicant can show by clear and convincing evidence that but for a violation of the United States Constitution, no rational juror would have answered in the State's favor at least one of the statutory special punishment issues. *Ex parte Blue*, 230 S.W.3d at 161. The TCCA has interpreted this provision "to embrace constitutional as well as statutory ineligibility for the death penalty." *Id.* Thus, when an applicant presents sufficient facts in a subsequent habeas application to show that he is categorically exempt from execution under the Constitution—because, for instance, he is intellectually disabled or was a minor at the time of the offense—the TCCA will allow the application to proceed to the merits under section 5(a)(3). *Id.* at 161–62.

As Murphy points out, the Fifth Circuit has held that when an applicant raises in a subsequent state writ a claim that he is intellectually disabled and therefore

ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), the TCCA necessarily reaches the merits of the applicant's claim when it concludes that the claim does not meet the requirements of section 5(a)(3) and dismisses the application as an abuse of the writ. (Cert. Pet. at 22). *See Busby v. Davis*, 925 F.3d 699, 709–10 (5th Cir. 2019). Thus, according to the Fifth Circuit, such a claim is not procedurally defaulted on federal habeas review since the TCCA's disposition of the claim did not rest on a state-law ground independent of the federal question. *Id.* at 710.

Murphy contends that he raised a claim of constitutional ineligibility for the death penalty, similar to an *Atkins* claim, when he asserted in his subsequent writ application that he is not eligible for a death sentence because he was not a major participant in the robbery. (Cert. Pet. at 21–23). But despite his attempt to couch his claim as one of "ineligibility" for the death penalty—an obvious attempt to fit his claim under section 5(a)(3) and thus avoid the procedural bar—the substance of the claim Murphy presented before the TCCA was that *Apprendi* and *Ring* require a jury to make the death-eligibility findings of major participation and reckless disregard for human life. This is a Sixth Amendment claim of sentencing error, however, and not a claim of categorical, constitutional ineligibility for the death penalty comparable to an *Atkins* claim.[3] *See Schriro v. Summerlin*, 542 U.S. 348, 353–54 (2004) (holding that "*Ring* altered the range of permissible methods for determining whether a

[3] Indeed, the TCCA rejected on initial state habeas review Murphy's claim that his death sentence violates the Eighth Amendment because his participation in the offense did not meet the personal-culpability standards of *Enmund* and *Tison*. (C.R.H.: 76–83, 91–92). *See Ex parte Murphy*, 2009 WL 1900369, at *1. Murphy did not seek certiorari review of that decision.

defendant's conduct is punishable by death" and therefore its holding was procedural rather than substantive). Such a claim does not meet the requirements of section 5(a)(3) since the TCCA did not have to consider the merits of the claim in order to conclude that it did not even assert, much less establish, actual innocence of the death penalty.[4] *See, e.g.*, *Rocha v. Thaler*, 619 F.3d 387, 405 (5th Cir. 2010) (noting that a habeas petitioner who is unquestionably eligible for a death sentence can never be actually innocent of the death penalty under section 5(a)(3)).

Because the TCCA's decision to dismiss Murphy's subsequent state habeas application rests on an independent state-law procedural ground, certiorari review is foreclosed. This Court should deny Murphy's petition.

II. Murphy's Claim Has No Merit.

Murphy's argument that *Ring* requires a jury to make explicit *Enmund/Tison* findings ignores a key distinction between the findings at issue in *Ring* and the Eighth Amendment proportionality inquiry that was the focus of *Enmund* and *Tison*. This Court's precedent dictates that *Ring* does not apply to a determination of constitutional—as opposed to statutory—eligibility for the death penalty.

In *Enmund* and *Tison*, this Court addressed the culpability required for assessing the death penalty in felony-murder convictions. In both cases, the Court

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[4] Murphy attempts to overcome this obvious jurisdictional bar by inviting this Court to dissect the TCCA's order to contain (1) a ruling that he was, in fact, a major participant in the robbery; and (2) a decision—derived from the aforementioned ruling—that "it is permissible for a reviewing court, and not the jury, to make that finding." (Cert. Pet. at 23). Given that the order explicitly states the court did not conduct a merits review of Murphy's claims, this tortured attempt to extract a federal question worthy of this Court's consideration from the otherwise straightforward order is unavailing.

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. This 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. In *Tison*, however, this Court created an exception to the *Enmund* rule, expressly holding that the concerns of *Enmund* are not implicated where an accomplice (1) was a major participant in the felony committed; and (2) displayed a "reckless indifference to human life." *Tison*, 481 U.S. at 158. Underlying both holdings is the notion that "[f]or 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.

Murphy concedes that the jury's affirmative answer to the "anti-parties" special issue at the punishment phase of his trial likely suffices as a finding that he displayed reckless indifference to human life. (Cert. Pet. at 20). He further concedes that the state habeas court has previously found that he was, in fact, a major participant in the robbery that resulted in Officer Hawkins's murder. (Cert. Pet. at 3; *see* C.R.H.: 79–80). Thus, his death sentence is unquestionably not disproportionate under the Eighth Amendment as interpreted in *Enmund* and *Tison*. Nevertheless, he

argues that because the *jury* did not decide both culpability factors, his sentence violated his Sixth Amendment right to a jury trial.

In *Cabana v. Bullock*, 474 U.S. 376 (1986), *overruled in part on other grounds by Pope v. Illinois*, 481 U.S. 497 (1987), this Court directly addressed the issue of whether the Eighth Amendment proportionality considerations identified in *Enmund* can only be satisfied by jury findings that the defendant possessed the requisite degree of culpability. In answering this question in the negative, this Court explained that its decision in *Enmund* "establish[ed] no new elements of the crime of murder that must be found by a jury" but simply imposed a "substantive limitation on sentencing, [which] like other such limits . . . need not be enforced by the jury." *Id.* at 385–86. The Court reasoned that because the execution of a person who, in fact, meets the death-eligibility criteria of *Enmund* does not offend the Eighth Amendment, any court with factfinding power, including the trial court or a state appellate court, may make the requisite factual findings as to the defendant's culpability. *Id.* at 388. In *Hopkins v. Reeves*, 524 U.S. 88, 100 (1998), this Court reaffirmed its holding in *Cabana*, emphasizing that the ruling in *Enmund* did not affect a state's definition of any substantive offense and that a state could comply with *Enmund* at sentencing or even on appeal.

Murphy contends that this Court's decisions in *Apprendi* and *Ring* have superseded its decision in *Cabana*. (Cert. Pet. at 16–18). In *Apprendi*, this Court held that under the Sixth Amendment, any fact, other than the fact of a prior conviction, that "expose[s] the defendant to a greater punishment than that authorized by the

jury's guilty verdict" is an "element" of the crime that must be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. at 490, 494. In *Ring*, this Court applied *Apprendi* to the capital-punishment context, holding that Arizona's capital-sentencing scheme violated *Apprendi*'s rule because it allowed a judge to find the aggravating facts necessary under state law to sentence a defendant to death. *Ring*, 536 U.S. at 609. Because, under state law, "Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made," the aggravating factors operated as elements of a greater offense, and the Sixth Amendment required that they be found by a jury. *Id.* at 592, 609.

Murphy argues that *Ring* requires a jury to determine a capital defendant's constitutional eligibility for the death penalty under *Enmund* and *Tison*. But both *Ring* and *Apprendi* stand for the proposition that a jury must determine any fact that *increases* a defendant's authorized punishment. The *Enmund/Tison* proportionality considerations are *limitations* on death-penalty eligibility, not enhancements or aggravators, and as such may be enforced "by any court that has the power to find the facts and vacate the sentence." *Cabana*, 474 U.S. at 386. Furthermore, neither *Apprendi* nor *Ring* purport to provide any instruction as to constitutional determinations of death eligibility. Indeed, the core holding of *Apprendi* and *Ring* is that a defendant is entitled to a jury determination of every element defining an offense. Defining offenses is the province of legislatures, not the Constitution. And Texas's statutory scheme already requires that a jury determine the existence of "aggravating factors" necessary to sentence a defendant to death. *See* Tex. Penal Code

Ann. §§ 12.31(a), 19.03(a)–(b). Thus, any concerns under *Apprendi* and *Ring* are disposed of under Texas law at the guilt phase of trial.

Moreover, nothing in *Ring* supports equating the *Enmund/Tison* considerations with functional elements of a greater offense.[5] Notably, *Ring* itself was a felony-murder case, and as this Court pointed out in its opinion, the sentencing judge made findings in accordance with *Enmund* and *Tison*. *Ring*, 536 U.S. at 594. But this Court did not hold that such findings by the judge violated Ring's Sixth Amendment rights. *Id.* Instead, this Court held only that the *statutory* aggravating factors—those that under state law raised the maximum penalty for first-degree murder to death—were elements of the offense that had to be found by the jury. *Id.* at 606–09.

Murphy's Sixth Amendment *Ring* claim is meritless and therefore unworthy of this Court's attention. The petition for certiorari review should be denied.

CONCLUSION

Respondent respectfully asks this Court to deny Murphy's petition for a writ of certiorari.

Respectfully submitted,

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[5] Even Murphy's characterization of the *Tison* culpability considerations as "factors" that must be affirmatively "found" by a jury seems at odds with this Court's expressly declining in that case to "precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty." *Tison*, 481 U.S. at 158.

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