

No. _____

IN THE
Supreme Court of the United States

TARUS VANDELL SALES,
Petitioner,

v.

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

****CAPITAL CASE****

KENNETH W. MCGUIRE
MCGUIRE LAW FIRM
TEXAS BAR: 00798361
P.O. BOX 79535
HOUSTON, TX 77279
(713) 223-1558
KENNETHMCGUIRE@ATT.NET
Counsel for Petitioner

***** CAPITAL CASE *****

I. QUESTIONS PRESENTED

This postconviction capital case involves the imposition of a death sentence on a non-shooter, Tarus Sales, who was not present at the murder scene when another person, Herschel Ostine, killed the victim by shooting him. Ostine, tried several years after Sales, received a life sentence, while Sales received a death sentence for the murder committed by Ostine. Ostine did not testify at Sales' trial, and no witness testified at Sales' trial directly about any communications between Sales and Ostine concerning carrying out the murder. The evidence was undisputed by the parties at Sales' trial that Sales was not present at the murder scene and that Ostine murdered the victim. Sales was given a death sentence under the Texas law of parties for the murder committed by Ostine, after Sales' indictment had charged that Sales himself killed the victim.

The questions presented are:

1. Whether a death sentence may be constitutionally imposed on a non-shooter such as Sales who was not physically present at the murder scene, under the Eighth Amendment and this Court's precedents in *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) and *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), where the jury found in a general verdict under the Texas law of parties that Mr. Sales had entered into a conspiracy to commit the offense of retaliation against the victim with Mr. Ostine, and Sales should have anticipated that Ostine would murder the victim, and the state courts did not make *Enmund-Tison* findings that Sales

was a major participant in the offense and was reckless indifferent that human life would be taken, and instead found that Sales was not a participant in the murder but anticipated that a life would be taken.

2. Whether this Court's *Sawyer v. Whitely*¹ actual innocence of the death penalty-miscarriage of justice exception excusing procedural default applies to eligibility criteria for imposing the death penalty under the Eighth Amendment, in addition to state statutory eligibility criteria, or is limited to state statutory eligibility criteria only, as found by the federal district court and Court of Appeals in denying Sales' Eighth Amendment *Enmund-Tison* claim.

¹ *Sawyer v. Whitely*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

PARTIES TO THE PROCEEDING

Petitioner (defendant-appellant below) is Tarus Vandell Sales.

Respondent (appellee below) is Eric Guerrero, Director, Texas Department of Criminal Justice, Correctional Institutions Division.

RELATED PROCEEDINGS

Texas Court of Criminal Appeals:

Sales v. State, No. 74594, 2005 WL 8153975 (Tex. Crim. App. Jan. 26, 2005) (affirming Petitioner’s sentence on direct review).

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

Ex parte Sales, Cause No. 893161-B, No. WR-78-131-02 (Tex. Crim. App. July 10, 2017)

Ex parte Sales, Cause No. 893161-B, No. WR-78-131-02 (Tex. Crim. App. Jan. 25, 2023)

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

Sales v. Guerrero, No. H-15-256 (S.D. Tex. Oct. 9, 2025) (unpublished) (denying Petitioner’s federal post-conviction writ of habeas corpus and certificate of appealability).

United States Fifth Circuit Court of Appeals:

Sales v. Guerrero, No. 25-70018 (unpublished) (May 14, 2026) (denying certificate of appealability).

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CAPITAL CASE
PETITION FOR A WRIT OF CERTIORARI

Tarus Vandell Sales respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals and to grant a certificate of appealability.

III. OPINIONS BELOW

The TCCA opinion affirming Mr. Sales’ conviction and death sentence on direct review, is available at *Sales v. State*, No. 74594, 2005 WL 8153975 (Tex. Crim. App. Jan. 26, 2005). The TCCA opinion denying Petitioner’s initial state post-conviction writ of habeas corpus is unpublished. *Ex parte Sales*, No. WR-78,131-01 (Tex. Crim. App. Jan. 14, 2015). The TCCA opinion dismissing Sales’ successor petition *Tison-Enmund* claims but remanding his claim based on previously-unavailable evidence for further proceedings is unpublished. *Ex parte Sales*, Cause No. 893161-B, No. WR-78-131-02 (Tex. Crim. App. July 10, 2017). The TCCA opinion denying Petitioner’s successor state post-conviction writ of habeas corpus is unpublished. *Ex parte Sales*, Cause No. 893161-B, No. WR-78-131-02 (Tex. Crim. App. Jan. 25, 2023). The Memorandum Opinion and Order denying the federal habeas corpus writ and certificate of appealability, Pet. App. at 1a–72a, is unpublished. *Sales v. Guerrero*, No. H-15-256 (S.D. Tex. Oct. 9, 2025). The Fifth Circuit order denying certificate of appealability, Pet. App. at 74a, is unpublished. *Sales v. Guerrero*, No. 25-70018 (5th Cir. May 14, 2026).

IV. JURISDICTION

The Fifth Circuit Court of Appeals entered judgment against Mr. Sales on May 14, 2026. Pet. App. at 74a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

V. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides:

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

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

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

VI. STATEMENT OF THE CASE

I. Introduction

These claims warrant full and thorough debate by reasoned jurists, and a COA should issue after the grant of *certiorari*.

A. Factual Background

Mr. Sales was convicted of capital murder on February 22, 2003, and sentenced to death on March 1, 2003, in Harris County District Court. ROA.1692, 1707, 2003 Trial 1 CR 148, 163.²

Sales's trial began on February 17, 2003. The State did not argue that Sales was the shooter; instead, prosecutors argued that Sales had encouraged Ostine to kill Butler. The State based its prosecution on the Texas law of parties. Under Texas Penal Code §§ 7.01 and 7.02, a jury may convict a person under "party liability" "if . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense" Tex. Penal Code § 7.02(a)(2). A jury may convict a person under "conspiracy liability" if:

. . . . in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, [and thus] all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

Texas Penal Code § 7.02(b). The State's case allowed the jury to convict Sales under

² Citations in this application will be to the Fifth Circuit Electronic Record on Appeal ("ROA") where available. The state trial court record in this case, includes the Clerk's Record [cited herein as "CR"], and the Reporters Record [cited herein as " __ RR __ " where the volume precedes and the page number follows].

either theory in a general verdict, and the jury was not required to and did not indicate which theory it chose, finding “We, the Jury, find the defendant, Tarus Vandell Sales, guilty of capital murder, as charged in the indictment.” Guilt Verdict, ROA.1692.

1. The Guilt/Innocence Testimony

As the federal District Court noted, “The State’s case against Sales was not airtight. ROA.16434.³” As the District Court opinion recounts, Sales never admitted any involvement in the crime. No forensic evidence or eyewitness account pointed to Sales’s participation. The State’s case primarily depended on what Sales had said before and after the murder. ROA.16434.

The District Court found that the State presented its strongest testimony through four witnesses: Officer Mehl, Leon Leshall Hatfield, Kevin Howell, and Martinez Hardnett. Officer Mehl’s testimony set the factual background, explaining how the police investigation connected the Sharpstown Mall shooting to Butler’s death. Officer Mehl told jurors what information led him to contact Sales’s friends, including Leon Hatfield and Kevin Howell. Hatfield provided testimony about Sales’s

³ The prosecutor’s opening statement cautioned jurors:

The evidence in this case is not ever going to be overwhelming evidence. It’s a retaliation of a dead witness. The witnesses will be obviously reluctant to you when you get to judge them and see how they testify. And if you come into this courtroom thinking when you leave you’re going to know all the answers and the puzzle is going to fit perfectly together, you need to go back and finish the John Grisham book you’re reading because it doesn’t work like that way in the real world. But you will believe with all your heart when they’re done testifying and you put it all together, that all those deals that were made and all the dragging out of the witnesses and all the pushing and prodding and all the work by [Houston Police Department Officer] Eric Mehl amounts to one thing. It was all worth it to get to the man that was capable of having a witness executed to save his own life.

involvement in orchestrating the murder. Hatfield testified that Sales bought a .357 pistol after his arrest for the Sharpstown Mall shooting. When Sales and Ostine were arrested after the Sharpstown Mall shooting, police recovered a 9mm pistol and .357 revolver from Ostine. ROA.18093. The murder weapon was identified as a .38 caliber revolver, and was never found. ROA.18205-06. Sales told Hatfield that he would “have to deal with” and “take care of” the Mall security guard because “he didn’t want a felony gun charge on him” or “to go to prison behind this n*****.” Hatfield testified that Sales “wanted [Butler] to be killed.” Sales offered to pay several individuals, including Hatfield, \$5,000 for the murder. Sales told Hatfield said that “he should hire a dopehead” or “get one of his homies” from Tennessee to do it. ROA.16435.

Hatfield testified that Sales worked on finding out “what time [Butler] got off . . . and checking his schedule a lot, like casing the joint.” Sales later told Hatfield that “they k[new] what [Butler’s] schedule [was]” and “they [were] going to handle what they [were] going to handle.” Hatfield knew that Sales “was serious” about having Butler killed. ROA.16435. Hatfield however had first told police that state witness Kevin Howell committed the murder of Butler, which caused Howell to be formally charged and arrested for the capital murder of Butler. The State later dropped their charge against Howell that had been based on Hatfield’s initial false accusation of Howell. Hatfield testified that Sales jointly offered Hatfield and Howell in the presence of accomplice Kevin Howell money to kill the security guard Butler, an event that state witness Howell denied happened.⁴ ROA.16412.

⁴ Q. Did there come a time before the night they all left, you know what time I’m talking about, the time that they all left, Little One and Cheryl and the girlfriend, before that time, did there

Howell's testimony provided additional incriminating information about the shooting. Howell testified that he met Sales and Ostine through his friend, Fleary. The men would travel back and forth to Nashville for drug transactions. In early summer 2000, Sales wanted Fleary and Howell to obtain information about Butler's work schedule. Fleary and Howell visited the Sharpstown Mall one time but they did not see Butler or when Butler got off work. 16 RR 11-12, ROA.18262.

In July 2000, however, Fleary disappeared after taking a large amount of money from Sales and Ostine. Sales had anticipated that Fleary would kill Butler in return for the money. Sales was angry when he realized that Fleary had left without killing. ROA.16436.

Howell testified that Ostine, Kissentaner, and Darfour left together on the night of Butler's murder. When the three returned, Sales asked, "Did you take care of it?" Ostine answered, "Yes."

The morning after Butler's murder, Howell left for the airport with Sales and Ostine. On the way, they stopped in a wooded area where Ostine discarded a small black revolver. At the airport, Sales used Howell's identification to buy plane tickets to Nashville for himself and Ostine. ROA.16436.

B. Procedural History

The District Court in its opinion wrote:

Texas law has not codified the *Enmund/Tison* analysis. Sales has not pointed to any authority requiring a *sua sponte Enmund/Tison* analysis when a non-triggerman receives a death sentence. Because Sales did not raise any *Enmund/Tison* issue until his procedurally

come a time when Bread asked you specifically if you would kill the security guard? A. No. 16 RR 23, ROA.18265.

defective successive habeas application, no state court directly conducted that analysis. The Texas jury and courts did, however, make decisions that functionally correspond to the *Enmund/Tison* analysis. The record contains findings corresponding to *Tison*'s major-participation requirement. The jury instructions allowed for Sales's conviction as either a party or a coconspirator to the murder. While a conviction as a coconspirator may not sufficiently establish a defendant's role as a major participant, a conviction as a party does. *See Clark v. Johnson*, 227 F.3d 273, 280 (5th Cir. 2000). Even though the jury issued a general verdict, the successive state habeas court found that "[t]he trial evidence established [Sales] as both a party to capital murder, and as a coconspirator to capital murder for conspiring to retaliate against [Butler]." (Docket Entry No. 54-21 at 486) (emphasis added). The state court found that the evidence supported Sales's conviction as a party, which satisfies a condition set in the *Enmund/Tison* cases.

As to the reckless-indifference requirement, the jury in the penalty phase answered the special-issue question asking whether Sales "actually caused the death," "intended to kill," or "anticipated that a human life would be taken," Tex. Code Crim. Pro. art. 37.071 § 2(b)(2). Federal and state courts have held that this Texas special-issue question complies with the *Enmund/Tison* requirement of displaying reckless indifference to human life. *See Halprin v. Davis*, 911 F.3d 247, 259 (5th Cir. 2018); *Foster v. Quarterman*, 466 F.3d 359, 370 (5th Cir. 2006); *Alvarez v. Davis*, 2017 WL 4844570, at *23 (S.D. Tex. 2017); *Walker v. Scott*, 123 F. Supp. 2d 1034, 1043 (E.D. Tex. 2000); *see also Leza v. State*, 351 S.W.3d 344, 355 (Tex. Crim. App. 2011); *Ladd v. State*, 3 S.W.3d 547, 573 (Tex. Crim. App. 1999); *but see Gongora v. Quarterman*, 2008 WL 4656992, at *7 (5th Cir. 2008) (granting a certificate of appealability on a similar argument but ultimately deciding the case on other grounds). In answering the special-issue question, the jury made *Tison*'s reckless-indifference finding.

In short, the *Enmund/Tison* analysis was effectively done in this case....Third, Sales's barred claims are based on arguing that the elements of the judicially created *Enmund/Tison* analysis are the same as the elements of capital murder. The *Sawyer* exception, however, focuses on the statutory elements that make a defendant eligible for a death sentence. *See Sawyer*, 505 U.S. at 348; *see also Tong v. Lumpkin*, 90 F.4th 857, 864 (5th Cir. 2024) ("Sawyer limited this exception to situations where alleged constitutional errors only affected the applicant's eligibility for the death penalty under state statutory law") (quotation omitted and cleaned up); *Callins v. Johnson*, 89 F.3d 210, 215 (5th Cir. 1996) ("*Sawyer* does not hold that anyone who is legally ineligible for a particular punishment is 'actually innocent.' *Sawyer* merely likens sentencing criteria to the elements of a crime, focusing on

the factual, not legal, basis for the verdict.”). In other words, innocence claims under *Sawyer* “are limited to arguments that ‘no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law,’ i.e., the elements of the crime itself and the existence of aggravating circumstances.” *Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885, 906 (10th Cir. 2019); *see also Gilbert v. United States*, 640 F.3d 1293, 1320 (11th Cir. 2011); *Sibley v. Culliver*, 377 F.3d 1196, 1205 (11th Cir. 2004). Texas law has not made the *Enmund/Tison* inquiry an element of the crime of capital murder.

Pet. App. at 26a-31a (DE 61, at 26-31), ROA.16456-61.

Ultimately the District Court denied all relief, and declined to issue a COA.

Pet. App. at 72a, ROA.16502. A timely appeal followed.

The Fifth Circuit declined to issue a certificate of appealability on the District Court’s *Sawyer* procedural ruling. The Fifth Circuit ruled alternatively that

In any event, even if jurists of reason could debate the district court’s procedural ruling, jurists of reason could not debate the district court’s rejection of Sales’s underlying *Enmund-Tison* claim. In Texas, a jury cannot recommend a death sentence without first answering the so-called “antiparties” special issue. That special issue asks the jury to decide 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.” Tex. Code Crim. Proc. art. 37.071 § 2(b)(2); *see also* Tex. Pen. Code §§ 7.01, 7.02. The jury answered this special issue “yes.” ROA.16682. And our precedent holds that answer to the anti-parties special issue meets the “reckless indifference” requirement imposed by *Tison*. *See Foster v. Quarterman*, 466 F.3d 359, 370 (5th Cir. 2006). [*Sales attempts to avoid this result by arguing that Texas Penal Code § 7.02(a) requires the defendant’s physical presence at the crime scene to support a party-liability conviction. Because Sales was not physically present, he reasons that he was not a “major participant” in the murder and hence cannot be sentenced to death under *Enmund* and *Tison*. *See Tison*, 481 U.S. at 158 (holding defendant must be a “major participant”). This contention rests on a misconstruction of state law. Section 7.02(a) does not require the defendant’s physical presence. *See Guevara v. State*, 152 S.W.3d 45, 51–52 (Tex. Crim. App. 2004) (“[T]he Penal Code does not require that the party actually participate in the commission of the offense to be criminally responsible,” and it “also does

not require that a party to the crime be physically present at the commission of the offense.” (emphasis added)). The evidence in the state court record amply shows that Sales was a “major participant” in the murder, and hence jurists of reason could not debate the district court’s rejection of his claims under *Enmund* and *Tison* (even if that claim was not defaulted, which it was).] Thus, jurists of reason could not debate the district court’s resolution of the underlying *Enmund-Tison* claim in any event.

At the end of the day, no one—including our dissenting colleague—can explain how jurists of reason could debate the district court’s procedural default holding. And no one—including our dissenting colleague—can explain how jurists of reason could debate the underlying *Enmund-Tison* claim given the jury’s answer to the anti-parties special issue.

Pet. App. at 77a. The Fifth Circuit denied a certificate of appealability.

VII. REASONS FOR GRANTING THE PETITION

A. This Court Should grant Certiorari and Certificate of Appealability. Reasonable jurists would find debatable or wrong the lower court's assessment of Sales' *Sawyer v. Whitely* Actual Innocence of the Death Penalty-Miscarriage of Justice Exception Claim under the Eighth Amendment Bars to Imposing the Death Penalty in *Enmund v. Florida* and *Tison v. Arizona*.

The governing law provides that:

(c)(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

(c)(3) The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c). A prisoner satisfies this standard by demonstrating that reasonable jurists would find the lower court's assessment of his constitutional claims is debatable or wrong, and that any dispositive procedural ruling by the district court is likewise debatable. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001).

In *Sawyer v. Whitely*⁵ this Court set the requisites of its actual innocence of the death penalty/miscarriage of justice exception excusing the procedural default of federal constitutional claims. To qualify for the exception the petitioner must show, “by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty” meaning “the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty.’ 945 F.2d, at 820 (footnotes omitted)⁶.” *Sawyer*, 505 U.S. at 346 (emphasis added). After this Court adopted the Fifth Circuit decision in *Sawyer*, holding that ineligibility for the death penalty focused on “the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty,” *Id.*, this Court held that “We agree with the Courts of Appeals for the Fifth and Eleventh Circuits that the “actual innocence” requirement must focus on those elements which render a defendant eligible for the death penalty, and not on additional mitigating evidence which was prevented from being introduced as a result of a claimed constitutional error.” *Sawyer*, *Id.* at 347.

The Fifth Circuit’s 1991 opinion in *Sawyer* that this Court expressly agreed with and adopted, citing the Fifth Circuit opinion at page 820, in footnote 14 explicitly cited to *Tison*’s Eighth Amendment requirements as an example of the actual innocence of the death penalty exception:

There are several circumstances under which the death penalty is unavailable as a matter of constitutional law. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 857-78, 108 S.Ct. 2687, 2711, 101 L.Ed.2d 702

⁵ *Sawyer v. Whitely*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

⁶ *Sawyer v. Whitely*, 945 F.2d 812 (5th Cir. 1991).

(1988) (O'Connor, J., concurring) (persons under 16 years of age when they commit capital offense cannot receive death penalty unless legislature clearly includes them by setting a lower minimum age); *Tison v. Arizona*, 481 U.S. 137, 157-58, 107 S.Ct. 1676, 1688, 95 L.Ed.2d 127 (1987) (minor participation in felony underlying felony murder conviction cannot support death penalty absent finding that defendant exhibited at least reckless disregard for human life); *Ford v. Wainwright*, 477 U.S. 399, 409, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986) (Constitution prohibits executing death sentences of insane persons for the duration of their insanity); *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977) (plurality) (rape conviction cannot serve as basis for death sentence).
Sawyer v. Whitley, 945 F.2d 812, 820 at n.14 (5th Cir. 1991).

The Fifth Circuit has in some cases upheld its own *Sawyer v. Whitley* precedent that *Sawyer* actual innocence of the death penalty includes ineligibility based on federal Eighth Amendment requirements for imposing a death sentence.

An actual-innocence claim is not a claim of constitutional error. It is a procedural device that authorizes the adjudication of a federal constitutional claim that would otherwise be procedurally defaulted. However, the *federal constitutional claim of a habeas petitioner who argues that the Constitution renders him ineligible for the death penalty is, in substance, a claim that the petitioner is actually innocent of the death penalty*. In cases presenting such claims, *the gateway issue and the underlying constitutional issue largely merge into a single inquiry*. See *infra* notes 46-51 and accompanying text.”)

Rocha v. Thaler, 626 F.3d 815, 819 at n.3 and n.49 (5th Cir. 2010) (emphasis added).

The *Rocha* panel further explained that

There may well be some exceptions to the rule that a decision on the gateway innocence claim does not constitute a decision on the underlying constitutional claim. As Judge Dennis has previously recognized, an *Atkins* claim⁷ is a claim that the petitioner is ineligible for the death penalty. So too is a claim that the petitioner was under eighteen at the time of his crime,⁸ is insane,⁹ or has some other

⁷ See *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (holding that the Eighth Amendment prohibits the execution of the mentally retarded).

⁸ See *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

⁹ See *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

characteristic that the Supreme Court has held categorically justifies exemption from the death penalty. In such cases, the inquiry into the gateway innocence claim will substantially overlap with the inquiry into the merits of the underlying constitutional claim. Our panel opinion's holding does not implicate this limited class of cases, as Rocha's *Wiggins* claim is not a claim of categorical ineligibility for the death penalty. Finally, it follows that this Court reviews *de novo* the CCA's determination that Rocha cannot establish that he is actually innocent of the death penalty. A gateway claim of actual innocence is not a basis for relief under AEDPA. Such a claim stands outside of AEDPA and offers to open a door into the statute that the petitioner's lack of diligence otherwise would have closed. Gateway claims of innocence are part of the federal common law of procedural default. *De novo* review is the norm in this area. Just as we make *de novo* determinations of whether a state-law ground of decision is independent of federal law or adequate to support the judgment, so too do we decide afresh whether a federal habeas petitioner is actually innocent of the death penalty.

Rocha v. Thaler, 626 F.3d at 826-27.

Rocha v. Thaler, Id. at 826 footnote 49 cited Judge Dennis' concurrence in *Nelson v. Quarterman*, 472 F.3d 287, 318-19 (5th Cir.2006) (en banc), cataloguing the various Eighth Amendment categorical exemptions from death-penalty eligibility recognized by the Supreme Court, including *Roper v. Simmons*, 543 U.S. 551, 569-75, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (persons under the age of 18 at the time of their crime are categorically ineligible for the death penalty); *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)(imposing death sentence on the mentally retarded violates the Eighth Amendment), *Coker v. Georgia*, 433 U.S. 584, 598, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (death penalty imposed for rape of adult woman violates Eighth Amendment); and *Enmund v. Florida*, 458 U.S. 782, 798, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (imposing death penalty on non-shooter who did not kill, attempt to kill or intend to kill violates Eighth Amendment).

The District Court here, however, denied Sales’ *Tison-Enmund* actual innocence of the death penalty-miscarriage of justice exception claim on the basis that the *Sawyer* exception *applies only to state statutory law* setting eligibility for the death penalty. “The *Sawyer* exception, however, focuses on the statutory elements that make a defendant eligible for a death sentence. *See Sawyer*, 505 U.S. at 348; *see also Tong v. Lumpkin*, 90 F.4th 857, 864 (5th Cir. 2024) (“*Sawyer* limited this exception to situations where alleged constitutional errors only affected the applicant’s eligibility for the death penalty under state statutory law. In other words, innocence claims under *Sawyer* ‘are limited to arguments that ‘no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law,’ i.e., the elements of the crime itself and the existence of aggravating circumstances.”). Memorandum Opinion, D.E. 61, at 30-31, Pet. App. at 30a-31a, ROA.16460-16461.

Numerous federal and state courts also hold that innocence claims under *Sawyer* “are limited to arguments that ‘no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law,’ i.e., the elements of the crime itself and the existence of aggravating circumstances.” *Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885, 906 (10th Cir. 2019); *see also Gilbert v. United States*, 640 F.3d 1293, 1320 (11th Cir. 2011); *Sibley v. Culliver*, 377 F.3d 1196, 1205 (11th Cir. 2004); *Tong v. Lumpkin*, 90 F.4th 857, 864 (5th Cir. 2024) (“According to the TCCA, § 5(a)(3) ‘more or less’ adopted the Supreme Court’s actual innocence of the death penalty rule in *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d

269 (1992). *Ex parte Blue*, 230 S.W.3d 151, 159-60 (Tex. Crim. App. 2007). *Sawyer* limited this exception to situations where alleged constitutional errors only ‘affect[ed] the applicant's eligibility for the death penalty under state statutory law.’ *Blue*, 230 S.W.3d at 161.”)

The Texas Court of Criminal Appeals does not afford the Eighth Amendment *Tison* and *Enmund* prohibitions on imposition of the death penalty the same protections under state law as they do this Court’s *Atkins* and *Roper* Eighth Amendment prohibitions, as stated in *Ex Parte Blue*, 230 S.W.3d at 161-62. In a concurring opinion in another Texas capital case, Texas Court of Criminal Appeals Justice Alcala noted that the Texas capital murder special issue jury findings made there, the same made in a general verdict in Sales’ case, that the defendant “anticipated that a human life would be taken,” does not meet the requirements of *Tison* and *Enmund*:

At first blush, the jury's finding in this case appears to have met the *Tison* requirements, but it likely did not. The jury instructions did comport with *Tison*'s requirement that a death sentence may be appropriate when the defendant exhibits a subjective reckless indifference to human life, but it failed to include the additional requirement that there be evidence of “major participation in the felony committed.” *Id.* at 158, 107 S.Ct. 1676. As described above, the guilt-innocence instructions permitted the jury to convict applicant as a party even if the evidence showed much less than “major participation” in the robbery. See *id.* More specifically, the jury instructions permitted the jury to convict applicant even for minimal participation in the robbery based on evidence that (1) he intended to promote and assist his codefendant to commit robbery, and (2) he “was acting with and aiding, or attempting to aid” his co-defendant. Thus, it is arguable that the jury instructions in this case failed to comport with the *Tison* standard because they failed to require that applicant's participation in the offense be more than minor.

Perhaps one might suggest that I should not concern myself with

the fact that applicant's death sentence appears to be unconstitutional under *Tison* because applicant should have raised this claim at some earlier stage of his post-conviction challenges and he is now procedurally barred from raising this challenge. I, however, would disagree with that suggestion. I would hold that *Tison* spells out the same type of categorical ban on the death penalty for certain individuals much in the same way as *Atkins* has for intellectually disabled offenders. See *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Applying the same reasoning that applies in the *Atkins* context, *applicant may be actually innocent of the death penalty because he may be categorically ineligible for that punishment under the particular facts of this case*. I would consider treating *Tison* claims much like this Court has treated intellectual disability claims that should have been raised in earlier proceedings by permitting relief on those claims when they are proven by clear and convincing evidence. See *Ex parte Blue*, 230 S.W.3d 151, 163 (Tex.Crim.App.2007) (permitting consideration of otherwise procedurally barred *Atkins* claim if applicant could make “threshold showing” of evidence that would be “at least sufficient to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder would fail to find mental retardation”).

Ex parte Wood, 498 S.W.3d 926, 928-29 (Tex. Crim. App. 2016) (Alcala, J., concurring) (emphasis added).

These conflicts among the State and federal courts in applying this Court’s *Sawyer* actual innocence of the death penalty exception justify this Court granting *certiorari* to settle this conflict among the lower state and federal courts, in the most serious cases under the Eighth Amendment where capital punishment is implicated. The ongoing conflict now existing among state and federal courts on whether *Sawyer*’s actual innocence exception is limited solely to state law grounds for eligibility for a death sentence, or includes some, or all, of the federal Eighth Amendment limitations on imposing the death penalty, such as that found in *Enmund* and *Tison* implicated here, are further exposed by this Court’s application of the *Sawyer* actual innocence exception to guilt of a federal criminal statute, use a

firearm under 18 U.S.C. § 924(c)(1). *Bousley v. United States*, 523 U.S. 614, 624, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (citing *Sawyer v. Whitley*, 505 U. S. 333, 339 (1992)).

B. Reasonable Jurists Could Debate Whether the *Sawyer v. Whitley* Actual Innocence-Miscarriage of Justice Exception Applies Here.

In *Sawyer v. Whitley*¹⁰ this Court established its actual innocence of the death penalty/miscarriage of justice exception excusing the procedural default of federal constitutional claims, which the Fifth Circuit held Sales did not meet. To qualify for the exception the petitioner must show, “by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty” meaning “the existence of those facts which are prerequisites under state *or federal law* for the imposition of the death penalty.’ 945 F.2d, at 820 (footnotes omitted) ¹¹.” *Sawyer*, 505 U.S. at 346 (emphasis added). The *Sawyer* opinion clarified that “We agree with the Courts of Appeals for the Fifth and Eleventh Circuits that the “actual innocence” requirement must focus on those elements which render a defendant eligible for the death penalty, and not on additional mitigating evidence which was prevented from being introduced as a result of a claimed constitutional error.” *Sawyer*, 505 U.S. at 347. The Fifth Circuit’s *Sawyer* decision, at 945 F.2d, at 820, which this Court adopted in *Sawyer v. Whitley*, contains at footnote 14, a list of some of the then-existing federal Eighth Amendment eligibility requirements barring imposition of a death sentence, specifically citing to among others *Tison* and *Enmund*,

¹⁰ *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

¹¹ *Sawyer v. Whitley*, 945 F.2d 812 (5th Cir. 1991).

and that would qualify for the actual innocence of the death penalty exception adopted by this Court in *Sawyer*. The Fifth Circuit's *Sawyer* footnote 14 held

There are several circumstances under which the death penalty is unavailable as a matter of constitutional law. See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 857-78, 108 S.Ct. 2687, 2711, 101 L.Ed.2d 702 (1988) (O'Connor, J., concurring) (persons under 16 years of age when they commit capital offense cannot receive death penalty unless legislature clearly includes them by setting a lower minimum age); *Tison v. Arizona*, 481 U.S. 137, 157-58, 107 S.Ct. 1676, 1688, 95 L.Ed.2d 127 (1987) (minor participation in felony underlying felony murder conviction cannot support death penalty absent finding that defendant exhibited at least reckless disregard for human life); *Ford v. Wainwright*, 477 U.S. 399, 409, 106 S.Ct. 2595, 2602, 91 L.Ed.2d 335 (1986) (Constitution prohibits executing death sentences of insane persons for the duration of their insanity); *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977) (plurality) (rape conviction cannot serve as basis for death sentence).

Sawyer v. Whitley, 945 F.2d at 820 at n.14.

Sales' jury was instructed at his guilt trial on the Texas law of parties as follows:

All persons are parties to an offense who are guilty of acting together in the commission of the offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.¹²

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. Mere presence alone will not constitute one a party to an offense.

If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.¹³

ROA.1675.

¹² Tex. Penal Code § 7.01.

¹³ Tex. Penal Code § 7.02.

In *Salinas v. State*,¹⁴ the Texas Court of Criminal Appeals stated the elements for criminal liability for the acts of others under the Texas law of party liability:

“Evidence is sufficient to convict under the law of parties where the defendant is physically present at the commission of the offense and encourages its commission by words or other agreement.” *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994). Party participation may be shown by events occurring before, during, and after the commission of the offense, and may be demonstrated by actions showing an understanding and common design to do the prohibited act. *Id.*

In *Gross v. State*,¹⁵ the Texas Court of Criminal Appeals found the evidence insufficient to sustain the defendant's conviction for murder under the law of parties where the defendant was physically present at the murder scene and driving when he engaged in a roadside verbal altercation with the murder victim, had parked his car when his brother-in-law grabbed a shotgun inside defendant's car, and intervened in the continuing roadside verbal altercation by shooting the victim with the defendant's shotgun while defendant was present. After the shooting the defendant fled the scene with his brother-in-law the shooter, and allowed the brother-in-law to leave with the murder weapon. Appellant was later arrested, denied involvement when questioned, and failed to mention the involvement of his brother-in-law. The Court of Criminal Appeals held that

Here, like the defendant in *Ransom*,¹⁶ Appellant was present at the scene and the weapon was in his possession. On the other hand, in *Ransom* there was considerably more circumstantial evidence indicating a prior or contemporaneous plan to rob the victim; the defendant agreed

¹⁴ *Salinas v. State*, 163 S.W.3d 734, 739-40 (Tex. 2005).

¹⁵ *Gross v. State*, 380 S.W.3d 181, 187 (Tex. Crim. App. 2012)

¹⁶ *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1996).

to join the robbery scheme, and he recruited a friend to assist in the crime. Although it was probable that the defendant was the primary actor, the evidence that he participated in the crime was substantial enough to support the jury's inference of guilt as a party to the offense.

In *Guevara*,¹⁷ the defendant lied to the police about his knowledge of the crime, and he concealed evidence. Here, Appellant initially denied involvement, and he served as a getaway driver for Jones as Jones took the gun away from the scene. However, the evidence against Guevara was much stronger than that against Appellant. For example, Guevara had both financial and personal motives to have his wife killed. He provided the weapon, an alibi, and access to the home. After the offense, he lied to the police and attempted to conceal evidence. The jury could reasonably conclude, based on Guevara's actions prior to and after the shooting, that he was involved with the murder of his wife.¹⁸

The Fifth Circuit's decision denying Sales a certificate of appealability for his *Sawyer* actual innocence of the death penalty claim under *Tison* and *Enmund* cited *Guevara v. State*¹⁹ as authority that Texas law allows conviction for Section 7.02(a) party liability for crimes committed by others, even where the defendant is not physically present at the commission of the offense and acting to encourage its commission by words or other agreement. A close reading of the *Guevara* case, and the TCCA's subsequent interpretation of its holding in *Guevara*, shows that the TCCA did not deviate from its consistent holdings in *Salinas* and *Ransom*, decided both before and after *Guevara*, that "Evidence is sufficient to convict under the law of parties where the defendant is physically present at the commission of the offense and encourages its commission by words or other agreement." *Ransom*, 920 S.W.2d at 302. In *Guevara*, the evidence showed that the defendant Guevara drove his mistress the morning of the murder to the apartment Guevara shared with his wife,

¹⁷ *Guevara v. State*, 152 S.W.3d 45, 49 (Tex.Crim.App.2004).

¹⁸ *Gross v.*, 380 S.W.3d at 187-88.

¹⁹ *Guevara v. State*, 152 S.W.3d at 51-51.

and provided access to the apartment so that his mistress could lie in wait and later murder Guevara's wife inside the apartment, while Guevara was away from the apartment playing golf in order to create an alibi. *Guevara*, 152 S.W.3d at 50-51.

By providing his mistress the weapon, an alibi, and access to the home by giving her a key and driving her the morning of the murder so that the mistress could enter the Guevara family apartment and lie in wait before murdering his wife, Guevara was physically present at the scene and acting in assisting his mistress in committing the murder. "During the trial, the State claimed that Velia had been lured from her apartment with a phone call so Salinas could surreptitiously enter the Guevara's apartment using a key from the appellant. There was no sign of forced entry into the apartment, nor was anything stolen, despite the obvious presence of valuables. The lack of evidence of burglary suggested that the murder was pre-meditated, not a robbery gone bad." *Guevara*, 152 S.W.3d at 51. As the TCCA in *Gross* found, Guevara "provided the weapon, an alibi, and access to the home," 380 S.W.3d at 187-88.

Although Gross was present at the murder scene, the TCCA found the evidence insufficient under the law of parties to sustain the murder conviction because there was no evidence that Gross assisted or encouraged the shooter to kill the victim while Gross was also present at the crime scene: "the very least that is required is encouragement of the commission of the offense by words or by agreement made prior to or contemporaneous with the act." *Gross*, Id. at 188. "Although Appellant's presence at the scene may contribute to a finding of guilt, mere presence, even when

coupled with flight from the scene, is insufficient to support a conviction as a party to the murder. There must be other facts to show that the accused participated in the offense” for the defendant to be liable as a party under Texas law for the criminal acts of others, and thus the TCCA found the evidence “legally insufficient to support Appellant’s conviction for murder as a party.” *Gross*, Id. at 188. *See also Ex Parte Thompson*, 179 S.W.3d 549, 552 and n. 7 (Tex. Crim. App. 2005) (“Thus, applicant could be found guilty of capital murder under Section 7.02(a) if he had the intent to kill someone during this aggravated robbery, and (1) he caused or aided a totally innocent person to shoot and kill Mr. Rahim, or (2) he solicited, encouraged, directed, or aided Sammy Butler to commit capital murder. Put another way, the *evidence must show that, at the time of the offense, the parties were acting together, each contributing some part toward the execution of their common purpose. Ransom v. State*, 920 S.W.2d 288, 302 (Tex.Crim.App.1994).”) (emphasis added). *Salinas*, *Gross*, and *Ex Parte Thompson* all post-date *Guevara*, and each apply the holding of *Ransom v. State* that the “evidence must show that, *at the time of the offense, the parties were acting together*, each contributing some part toward the execution of their common purpose.” *Ransom*, Id. at 302 (emphasis added). In *Ransom*, the Court of Criminal Appeals found that a law of parties jury charge was appropriate only because “the evidence was sufficient to show that appellant was present at the crime scene and aided the commission of the robbery-murder. The trial court was justified in submitting a parties instruction.” *Ransom*, Id. at 302.

Texas case law on the law of parties before *Guevara* held the same. “Evidence

is sufficient to convict the defendant under the law of parties where he is *physically present at the commission of the offense*, and *encourages the commission of the offense either by words or other agreement*. *Tarpley v. State*, 565 S.W.2d 525 (Tex.Cr.App.1978.) The agreement, if any, must be before or contemporaneous with the criminal event. *Urtado v. State*, 605 S.W.2d 907 (Tex.Cr.App.1980). To convict someone as a party to an offense, the evidence must show that *at the time of the offense the parties were acting together, each doing some part of the execution of the common purpose*. *Brooks v. State*, 580 S.W.2d 825 (Tex.Cr.App.1979).” *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985) (emphasis added).

Sales was convicted in a general verdict that allowed his conviction under § 7.02(a) party liability, and 7.02(b) conspiracy liability. “A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one. *See Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931); *Yates v. United States*, 354 U.S. 298, 77 S.Ct.1064, 1 L.Ed.2d 1356 (1957).” *Hedgpeth v. Pulido*, 555 U.S. 57, 58, 129 S. Ct. 530, 172 L.Ed.2d 388 (2008). Because Sales’ jury instructions allowed Sales to be convicted of capital murder as a party for the undisputed murder personally committed by Ostine when Sales was not present at the murder scene, and neither did the undisputed facts show that “*at the time of the offense, the parties were acting together, each contributing some part toward the execution of their common purpose*” because Sales was not “physically present at the commission of the offense and encourages its commission by words or other agreement”, *Ransom*, 920 S.W.2d at 302,

Sales' guilt for capital murder was rendered in a general verdict where the "jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Hedgpeth v. Pulido*, 555 U.S. at 58.

The only valid theory of guilt under Sales' general verdict was for § 7.02(b) conspiracy liability. Sales' jury, to find Sales guilty under Penal Code § 7.02(b) "conspiracy liability", was instructed that if "in the attempt to carry out a conspiracy to commit one felony [the retaliation of Butler], another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, *though having no intent to commit it* [the felony actually committed by Ostine of murder] if the offense was committed in furtherance of the unlawful purpose and was one that *should have been anticipated* as a result of the carrying out of the conspiracy." Guilt phase jury instructions, at p. 3, ROA.1675 (emphasis added). Thus, Sales' guilt jury necessarily only lawfully found under the jury instructions given them and under controlling Texas law that Sales had no intent to commit the murder Ostine committed, but that Ostine's murder of Butler *should have been anticipated* as a result of the carrying out of the retaliation conspiracy charged in the jury instructions. Sales' indictment had charged that Sales himself personally killed the victim Butler by shooting him, Indictment, ROA.1549,²⁰ a fact that no party claimed

²⁰ "The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, TARUS VANDELL SALES, hereafter styled the Defendant, heretofore on or about JULY 21, 2000, did then and there unlawfully, while in the course of committing and attempting to commit the RETALIATION of TYRON BUTLER, intentionally cause the death of TYRON BUTLER by SHOOTING TYRON BUTLER WITH A DEADLY WEAPON, NAMELY A FIREARM." Indictment, ROA.1549.

to be the evidence at trial, where it was undisputed by the parties that Ostine personally murdered Butler, and that Sales was not physically present at the murder scene.

A later state appellate or trial court finding cannot contradict this mental state finding necessarily made by Sales' jury under the instructions they were given without violating the right to trial by jury.

As we held in *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), a criminal defendant is constitutionally entitled to a jury verdict that he is guilty of the crime, and absent such a verdict the conviction must be reversed, "no matter how inescapable the findings to support that verdict might be." *Id.*, at 279, 113 S.Ct., at 2082. A jury verdict that he is guilty of the crime means, of course, a verdict that he is guilty of each necessary element of the crime. *United States v. Gaudin*, 515 U.S. ----, ---- - ----, 115 S.Ct. 2310, 2319-20, 132 L.Ed.2d 444 (1995).

The absence of a formal verdict on this point cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would be to dispense with trial by jury. "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty." *Sullivan, supra*, at 280, 113 S.Ct., at 2082.

California v. Roy, 519 U.S. 2, 6-7, 117 S.Ct. 337, 136 L.Ed.2d 266 (1996) (Scalia, Ginsburg, J., concurring). In *Cole v. Arkansas*, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948), this Court held that the inadequacy of a jury's findings on the issue of guilt or innocence may not be corrected by an appellate court.

The jury's central obligation under the Due Process Clause is to determine whether the State has proved each element of the offense charged beyond a reasonable doubt. See *Sandstrom v. Montana, supra*; *In re Winship, supra*. The Constitution assigns this function "solely to the jury." *Sandstrom*, 442 U.S., at 523, 99 S.Ct., at 2459. This duty cannot be interfered with, see *Ulster County Court v. Allen*, 442 U.S. 140, 169, 99 S.Ct. 2213, 2231, 60 L.Ed.2d 777 (1979) (POWELL, J.,

dissenting), nor delegated to another entity. “Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime. See *Connecticut v. Johnson*, 460 U.S. 73, 95, and n. 3 [103 S.Ct. 969, 982, and n. 3, 74 L.Ed.2d 823] (1983) (POWELL, J., dissenting).” *Cabana v. Bullock*, 474 U.S. 376, 384-385, 106 S.Ct. 689, 696, 88 L.Ed.2d 704; see also *Cole v. Arkansas*, 333 U.S., at 202, 68 S.Ct., at 517. The Constitution does not allow an appellate court to arrogate to itself a function that the defendant, under the Sixth Amendment, can demand be performed by a jury.

Rose v. Clark, 478 U.S. 570, 593, 106 S.Ct. 3101, 3105, 92 L.Ed.2d 460 (1986) (BLACKMUN, J., dissenting), adopted in *Sullivan v. Louisiana*, 508 U.S. 275, 279-80, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). This is the case unless “a reviewing court concludes beyond a reasonable doubt that the omitted elements were uncontested and supported by overwhelming evidence.” *Neder v. United States*, 527 U.S. 1, 17, 119 S.Ct. 1827 (1999). Here, as argued, the general verdict is inadequate under state law for § 7.02(a) party liability, and the jury made affirmative and not omitted findings under § 7.02(b) conspiracy liability, so this Court’s *Neder* holding is not implicated, and could not be harmless regardless because the evidence was both contested and was not overwhelming.

While this Court in *Cabana v. Bullock*²¹ allowed state courts to make the Eighth Amendment factual findings required by *Enmund* and *Tison*,²² for imposition of a death sentence, where state law itself does not require that juries make the factual findings, *Cabana* itself recognized that where state law allows for jury factual findings on mental states or other necessary facts under state law, state appellate

²¹ *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).

²² *Tison*, 481 U.S. at 158.

courts may not thereafter find facts the jury was entitled to make but did not, nor make contrary factual findings that contravene factual findings the jury did make. *Cabana*, 474 U.S. at 385 and n.3, at 387 and n.4; accord, *Sullivan*, 508 U.S. at 279-80, *supra* (adopting Justice Blackmun's dissent in *Rose v. Clark*). "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole v. Arkansas*, 333 U.S. at 201-02. *Cabana* footnote Four recognized Justice Blackmun's concerns in his *Cabana* dissent that where state law creates for the defendant a liberty interest in having the jury make particular fact findings, the Due Process Clause implies that appellate court findings do not suffice to protect that entitlement.

In *Presnell*, the defendant was convicted on charges of murder and kidnaping with bodily injury, and was sentenced to death by the jury. The sole aggravating factor supporting the death penalty for murder was that the defendant was also guilty of kidnaping with bodily injury. The Georgia Supreme Court found that the jury had been wrongly instructed on the elements of kidnaping with bodily injury, but affirmed both the conviction for that crime and the use of the crime as an aggravating factor on the ground that the evidence was sufficient to support the jury's findings under a theory on which the jury had not been instructed. We set aside both the conviction and the death sentence on the authority of *Cole v. Arkansas*, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948), which held that it was constitutional error for a state court to affirm a conviction for one offense on the basis of evidence in the record indicating that the defendant had committed another offense on which the jury had not been instructed.

Cabana, 474 U.S. at 387 n.4; *Id.* at 385 n.3 ("[S]uch cases as *Cole v. Arkansas*, 333

U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948), hold that the inadequacy of a jury's findings on the issue of guilt or innocence may not be corrected by an appellate court" but finding that the *Enmund* facts do "not supply a new element of the crime of capital murder that must be found by the jury".)

The retaliation conspiracy theory for capital murder that Sales' guilt jury was charged with under the Texas law of parties stated:

A person commits the offense of retaliation if he *intentionally or knowingly harms or threatens to harm another by an unlawful act* in retaliation for or on account of the service or status of another as a witness or prospective witness; or a person who has reported, or who the actor knows intends to report the occurrence of a crime.

1 CR 129, ROA.1673

Or;

If find from the evidence beyond a reasonable doubt that on the occasion in question the defendant entered into an agreement with Herschel Ostine to commit the felony offense of retaliation of Tyron Butler, as alleged in this charge, and pursuant to that agreement they did carry out their conspiracy, and while in the course of committing said conspiracy, Herschel Ostine intentionally caused the death of Tyron Butler by shooting Tyron Butler with a deadly weapon, namely a firearm, *and the death of Tyron Butler was an offense that should have been anticipated by the defendant as a result of carrying out the conspiracy*, and unless you so find, then you cannot convict the defendant of the offense of capital murder. 1 CR 132, ROA.1676 (emphasis added).

Sales' jury was asked to answer Special Issue No. 2 in a general verdict.

SPECIAL ISSUE NO.2

Do you find from the evidence beyond a reasonable doubt that Tarus Vandell Sales, the defendant himself, actually caused the death of Tyron Butler, on the occasion in question, or if he did not actually cause the death of Tyron Butler, that he intended to kill Tyron Butler, or that he anticipated that a human life would be taken?

ANSWER

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "YES."
ROA.1708

Reasonable jurists could debate the Fifth Circuit’s decision finding that jurists of reason could not debate the district court’s rejection of Sales’s underlying *Enmund-Tison* claim. The Fifth Circuit in this case held

In any event, even if jurists of reason could debate the district court’s procedural ruling, jurists of reason could not debate the district court’s rejection of Sales’s underlying *Enmund-Tison* claim. In Texas, a jury cannot recommend a death sentence without first answering the so-called “antiparties” special issue. That special issue asks the jury to decide 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.” Tex. Code Crim. Proc. art. 37.071 § 2(b)(2); see also Tex. Pen. Code §§ 7.01, 7.02. The jury answered this special issue “yes.” ROA.16682. And our precedent holds that answer to the antiparties special issue meets the “reckless indifference” requirement imposed by *Tison*. See *Foster v. Quarterman*, 466 F.3d 359, 370 (5th Cir. 2006).^{*} Thus, jurists of reason could not debate the district court’s resolution of the underlying *Enmund-Tison* claim in any event.

Sales v. Guerrero, No. 25-70018 (Fifth Cir. May 14, 2026), at *3-4.

Reasonable jurists could debate both the Fifth Circuit and the district court’s rejection of Sales’ *Enmund-Tison* claim because this Court itself rejected in *Tison* the Fifth Circuit’s analysis in *Foster v. Quarterman* used to deny Sales’ claim.

The *Foster v. Quarterman* holding underlying the Fifth Circuit’s decision denying Sales’ claim stated:

[I]t appears the Court of Criminal Appeals upheld Foster's death-sentence on a flawed legal theory, based on its 1995 decision in *Lawton*. As noted supra, the Court of Criminal Appeals held that, before convicting Foster, the jury had to determine he specifically intended either to murder Michael LaHood or promote or assist in that murder. The cases *Lawton* cites (for example, *Tucker v. State*, 771 S.W.2d 523, 530 (Tex. Crim. App. 1988)) discuss the § 7.02(a) instruction, which states a defendant tried for capital murder as an accomplice is death-penalty eligible only if he intended to promote or assist in the commission of a capital murder. Tex. Penal Code § 7.02(a).

Foster's jury was instructed pursuant to both §§ 7.02(a) and (b). Section 7.02(b) does not require the same level of intent. It allowed the jury to convict Foster if it found he should have *anticipated* a coconspirator might commit murder, even if Foster did not intend for that murder to occur. Tex. Penal Code § 7.02(b). Therefore, the Court of Criminal Appeals erred by relying on *Lawton*²³ to uphold Foster's death sentence.

As discussed, our review does not end merely because the state court's decision was based on flawed reasoning. *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (federal habeas court reviews only a state court's decision, not the reasoning behind that decision), cert. denied, 537 U.S. 1104, 123 S.Ct. 963, 154 L.Ed.2d 772 (2003). Therefore, as in *Clark*, we examine the entire state-court record to determine whether any state court made the requisite *Enmund/Tison* findings: (1) that Foster played a major role in the criminal activities leading to Michael LaHood's death; and (2) that he displayed reckless indifference to human life.

Addressing the second required finding first, and as the district court held, Foster obviously displayed reckless indifference to human life. The jury found as much when it answered the earlier described special issue in the affirmative (the jury could not answer that issue in the affirmative unless it found, at a minimum, Foster anticipated a life would be taken).

Foster v. Quarterman, 466 F.3d at 370 (emphasis in original).

The Fifth Circuit's *Foster v. Quarterman* precedent therefore equates the jury finding in the punishment special issues that Sales "anticipated" a life would be taken as equivalent to displaying "reckless indifference to human life." But *Tison* itself explicitly rejected this equivalence, finding that the Arizona jury instruction requiring a finding of "anticipating" a life would be taken was instead "a species of foreseeability" that was not equivalent to intent to kill or reckless indifference to human life. The Arizona death penalty statute at issue in *Tison* required a jury finding of "anticipated a life would be taken" just as Sales' Texas jury was instructed and found.

²³ *Lawton v. State*, 913 S.W.2d 542, 555 (Tex. Crim. App. 1995).

The Arizona Supreme Court did not attempt to argue that the facts of this case supported an inference of “intent” in the traditional sense. Instead, the Arizona Supreme Court attempted to reformulate “intent to kill” as a species of foreseeability. The Arizona Supreme Court wrote:

“Intend [sic] to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony.”
142 Ariz., at 456, 690 P.2d, at 757.

This definition of intent is broader than that described by the *Enmund* Court. Participants in violent felonies like armed robberies can frequently “anticipat[e] that lethal force . . . might be used . . . in accomplishing the underlying felony.” *Enmund* himself may well have so anticipated. Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves. The Arizona Supreme Court's attempted reformulation of intent to kill amounts to little more than a restatement of the felony-murder rule itself. Petitioners do not fall within the “intent to kill” category of felony murderers for which *Enmund* explicitly finds the death penalty permissible under the Eighth Amendment.

Tison v. Arizona, 481 U.S. 137, 150-151.

This Court then vacated the Tison brothers' death sentences and remanded for a factual determination by the Arizona state courts of whether the Tison brothers exhibited “reckless indifference to human life”, despite the jury's finding in a general verdict that the Tison brothers “anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony.” *Tison*, *Id.* This Court held that the Arizona state courts had already factually found in their written opinions that the Tison brothers had been major participants in the felony committed (the kidnapping that ended in the murder of the four family members

killed by their father Gary Tison²⁴).

Rather, we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement. The Arizona courts have clearly found that the former [major participation in the felony committed] exists; we now vacate the judgments below and remand for determination of the latter [reckless indifference to human life] in further proceedings not inconsistent with this opinion. *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). *Tison*, 481 U.S. at 158.

The Fifth Circuit’s decision in Sales’ case that Sales’ jury finding that Sales “‘anticipated that a human life would be taken.’ Tex. Code Crim. Proc. art. 37.071 § 2(b)(2); *see also* Tex. Pen. Code §§ 7.01, 7.02.”, and that Fifth Circuit “precedent holds that answer to the anti-parties special issue meets the ‘reckless indifference’ requirement imposed by *Tison*. *See Foster v. Quarterman*, 466 F.3d 359, 370 (5th Cir. 2006)” is directly contrary to this Court’s holding in *Tison*, that “anticipat[ing] life would or might be taken in accomplishing the underlying felony” “do[es] do not fall within the ‘intent to kill’ category of felony murderers for which *Enmund* explicitly finds the death penalty permissible under the Eighth Amendment,” *Tison*, Id. at 150-51, and neither is it equivalent to “reckless indifference to human life.” *Tison*, Id. at 158. This Court vacated the judgments and remanded to the Arizona state courts for determination of “reckless indifference to human life” in further proceedings under *Cabana*. *Tison*, Id. at 158.

Reasonable jurists could thus debate this part of the Fifth Circuit’s decision,

²⁴ “Gary Tison, the central figure in this tragedy, the man who had his family arrange his and Greenawalt’s escape from prison, and the man who chose, with Greenawalt, to murder this family while his sons stood by.” *Tison*, 481 U.S. at 159 (Brennan, J., dissenting).

as this Court did in *Tison*.

Reasonable jurists could also debate the Fifth Circuit's decision stated in a footnote on page four of its decision denying Sales a certificate of appealability, where it held:

Sales attempts to avoid this result by arguing that Texas Penal Code § 7.02(a) requires the defendant's physical presence at the crime scene to support a party-liability conviction. Because Sales was not physically present, he reasons that he was not a "major participant" in the murder and hence cannot be sentenced to death under *Enmund* and *Tison*. See *Tison*, 481 U.S. at 158 (holding defendant must be a "major participant"). This contention rests on a misconstruction of state law. Section 7.02(a) does not require the defendant's physical presence. See *Guevara v. State*, 152 S.W.3d 45, 51–52 (Tex. Crim. App. 2004) ("[T]he Penal Code does not require that the party actually participate in the commission of the offense to be criminally responsible," and it "also does not require that a party to the crime be physically present at the commission of the offense." (emphasis added)). The evidence in the state court record amply shows that Sales was a "major participant" in the murder, and hence jurists of reason could not debate the district court's rejection of his claims under *Enmund* and *Tison* (even if that claim was not defaulted, which it was).

The Fifth Circuit misconstrued Sales' argument and the state court findings. The state habeas court factually found that Sales was not a participant in the murder, naming the direct participants: "112. Of all the direct participants in the complainant's murder (i.e., Ostine, Darfour, Kissentaner)." Pet. App. at 97a; ROA.32066. The state habeas court also found

Conclusion of Law 8. The trial evidence established the applicant as both a party to capital murder, and as a coconspirator to capital murder for conspiring to retaliate against the complainant. Similarly, Ostine was guilty as a direct actor, a party, and a co-conspirator. Tex. Penal Code § 7.02. Pet. App. at 110a; ROA.32079.

The state habeas court's conclusion of law that the trial evidence established

Sales as both a party and a co-conspirator to capital murder suffers from the problem that the jury made findings on a general verdict, answering “We, the Jury, find the defendant, Tarus Vandell Sales, guilty of capital murder, as charged in the indictment” to the guilt question. ROA.1692, and that § 7.02(a) party liability and § 7.02(b) conspiracy liability have differing mental states for guilt, and it is not established which mental state the jury agreed defendant had.

In addition, § 7.02(a) party liability requires that “*at the time of the offense, the parties were acting together, each contributing some part toward the execution of their common purpose*” and the defendant be “physically present at the commission of the offense and encourages its commission by words or other agreement”. *Ransom*, 920 S.W.2d at 302; *Thompson*, 179 S.W.3d at 552 and n. 7 (“Thus, applicant could be found guilty of capital murder under Section 7.02(a) if he had the intent to kill someone during this aggravated robbery, and (1) he caused or aided a totally innocent person to shoot and kill Mr. Rahim, or (2) he solicited, encouraged, directed, or aided Sammy Butler to commit capital murder. Put another way, the *evidence must show that, at the time of the offense, the parties were acting together, each contributing some part toward the execution of their common purpose*. *Ransom v. State*, 920 S.W.2d 288, 302 (Tex.Crim.App.1994).”) (emphasis added). *Salinas*, *Gross*, and *Ex Parte Thompson* all post-date *Guevara*, and each apply the holding of *Ransom v. State* that the defendant must be “physically present at the commission of the offense and encourages its commission by words or other agreement”. *Ransom*, Id.

Sales was convicted in a general verdict, just like the Tison brothers were under Arizona law, and where as shown above the only valid verdict under state law was for § 7.02(b) conspiracy liability, and where the jury found a mental state that Sales “should have anticipated” Ostine would murder the victim. “Anticipate that life would or might be taken” is “a definition of intent broader than that described by the *Enmund* Court,” however, as found by *Tison*, Id. at 150, and “do[es] not fall within the “intent to kill” category of felony murderers for which *Enmund* explicitly finds the death penalty permissible under the Eighth Amendment.” *Tison*, Id. at 151. A jury mental state finding of “anticipated life would be taken” is also not equivalent to reckless indifference that life would be taken. *Tison*, Id. at 151. This Court in *Tison* found that “each [Tison brother] was actively involved in every element of the kidnaping-robbery and *was physically present during the entire sequence of criminal activity* culminating in the murder of the Lyons family and the subsequent flight. The Tisons’ high level of participation in these crimes... fall well within..major participation in the felony committed,” *Tison*, Id. at 158. The state habeas court in Sales’ case in contrast found that Sales was not a direct participant in the murder of Butler, much less that he was a major participant in the murder, and the trial evidence was undisputed that Sales was not physically present during the victim’s murder, unlike the Tison brothers. *Supra*.

VIII. CONCLUSION

For the foregoing reasons, Mr. Sales respectfully requests this Court grant *certiorari*, and then find after full briefing that reasonable jurists can debate the

lower courts' resolution of Mr. Sales' *Sawyer* actual innocence of the death penalty claim, based on his Eighth Amendment *Tison-Enmund* claim.

Respectfully Submitted,

/s/ Kenneth McGuire

KENNETH W. MCGUIRE

MCGUIRE LAW FIRM

TEXAS BAR: 00798361

P.O. BOX 79535

HOUSTON, TX 77279

(713) 223-1558

KENNETHMCGUIRE@ATT.NET

Counsel for Petitioner

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