

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 Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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CAPITAL CASE
QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the Fifth Circuit's determination that Sales's *Enmund/Tison*¹ claim is procedurally defaulted and that Sales cannot overcome the default because he is not "innocent of the death penalty" under *Sawyer v. Whitley*, 505 U.S. 333 (1992)?
2. Should this Court grant certiorari to review the Fifth Circuit's determination that Sales's *Enmund/Tison* claim is meritless where the evidence shows that Sales directed his friend to murder a witness who was set to testify against him?

¹ *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987).

LIST OF ALL PROCEEDINGS

State v. Sales, No. 893161 (179th Dist. Ct., Harris County, Texas) (judgment entered March 1, 2003)

Sales v. State, No. AP-74,594, 2005 WL 8153975 (Tex. Crim. App. Jan. 26, 2005) (not designated for publication) (direct appeal opinion affirming judgment of conviction)

Ex parte Sales, No. WR-78,131-01, 2015 WL 222162 (Tex. Crim. App. Jan. 14, 2015) (not designated for publication) (order denying state application for habeas corpus relief)

Ex parte Sales, No. WR-78,131-02, 2023 WL 382321 (Tex. Crim. App. Jan. 25, 2023) (not designated for publication) (order dismissing in part and denying in part state application for habeas corpus relief)

Sales v. Texas, 144 S. Ct. 116 (2023) (order denying petition for writ of certiorari)

Sales v. Guerrero, Civ. No. 4:15-cv-256 (S.D. Tex. Oct. 9, 2025) (Docket Entry 61) (unpublished) (memorandum opinion and order dismissing federal habeas petition with prejudice)

Sales v. Guerrero, No. 25-70018, 2026 WL 2439987 (5th Cir. May 14, 2016) (unpublished) (order denying certificate of appealability).

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In 2003, Petitioner Tarus Vandell Sales was convicted for the 2000 capital murder of Tyrone Butler under the law of parties and sentenced to death by a Texas court. It was undisputed that Sales was not the triggerman, and the State's only theory was that Sales directed his friend, Herschel Ostine, to kill Butler. After his direct appeal and state-habeas application were denied, Sales filed a federal petition for habeas corpus relief in 2016. Nine years later, the federal district court denied Sales relief and dismissed his petition with prejudice. Sales sought a certificate of appealability (COA) to appeal the district court's judgement, and, on May 24, 2026, the Fifth Circuit denied COA. Sales now seeks a petition for a writ of certiorari to the Fifth Circuit Court of Appeals, challenging the denial of COA.

STATEMENT OF THE CASE

I. Facts of the Underlying Offense

Respondent relies on the summary of facts provided by the federal district court in the proceedings below:

Around midnight on July 21, 2000, security guard Tyrone Butler headed home from his job at the Sharpstown Mall. A

car pulled up behind him at a red light. A man got out, approached Butler's truck and fired two shots. Butler slumped over as his truck rolled through the intersection, crashing into a telephone pole. The other car sped away. Butler died from gunshot wounds to his neck and arm.

No eyewitness identified the killer. No physical evidence pointed to a suspect. Nothing at the crime scene explained why the shooter had targeted Butler. Houston Police Department Officer Eric Mehl spearheaded an investigation, which soon focused on a threatening anonymous phone call Butler had recently received at work. The police believed that the call related to Butler's upcoming testimony in a criminal trial.

Butler was the primary witness to a February 8, 2000, incident at the Sharpstown Mall. As he sat in his work vehicle, Butler saw a man—later identified as Sales—firing gunshots at a car and then driving away. Butler followed and radioed for help. Marked police vehicles joined the chase. Police eventually arrested the occupants of the fleeing car: Tarus "Bread" Sales, his girlfriend, Cheryl "Jasmine" Kissentaner, and a passenger, Herschel "Little One" Ostine.

The State charged Sales with deadly conduct, a third-degree felony. The State also charged Ostine with carrying a weapon and Kissentaner with evading arrest in a vehicle. Sales was released on bond with an August 14, 2000, trial date. Butler was to testify in that trial.

The police searched for a connection between Butler's anticipated testimony and his death. Police officers interviewed several individuals, whose information pointed toward the conclusion that Sales had solicited help to silence Butler's testimony. The police arrested Sales, Kissentaner, and Ostine for different roles in Butler's murder.

The State believed that Ostine was the shooter, that Kissentaner was in the car, and that Sales had orchestrated the plot. On July 8, 2001, the State filed capital murder charges against Ostine and retaliation charges against Kissentaner. (Docket Entry No. 52-41 at 37, 38).

The State delayed filing charges against Sales. In late 2001, Officer Mehl prepared an affidavit describing the investigative steps leading to Sales's capital-murder charge. (Docket Entry No. 45-28 at 7-9). Officer Mehl's investigation relied heavily on information from Sales's friends and associates. Officer Mehl had interviewed three men—Daniel “D’Low” Fleary, Kevin Howell and Leon Leshall Hatfield—who each described how Sales had orchestrated Butler's murder. (Docket Entry No. 45-28 at 8-9). On November 7, 2001, the State charged Sales with capital murder “while in the course of committing and attempting to commit the retaliation of Tyron Butler” (Docket Entry No. 53-43 at 6); *see* Tex. Penal Code Ann. § 19.03(a)(2). A grand jury returned a felony indictment against Sales on January 7, 2002. (Docket Entry No. 45-28 at 11).

. . .

The State's case against Sales was not airtight. 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

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 strong testimony about Sales's involvement in orchestrating the murder. Hatfield testified that Sales bought a .357 pistol after his arrest for the Sharpstown Mall shooting. (Docket Entry No. 52-42 at 37). 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*****." (Docket Entry 52-42 at 35-37). Hatfield testified that Sales "wanted [Butler] to be killed." (Docket Entry 52-42 at 36). Sales offered to pay several individuals, including Hatfield, \$5,000 for the murder. (Docket Entry No. 52-42 at 36). Sales told Hatfield said that "he should hire a dopehead" or "get one of his homies" from Tennessee to do it. (Docket Entry 52-42 at 36).

Hatfield testified that Sales worked on finding out "what time [Butler] got off . . . and checking his schedule a lot, like casing the joint." (Docket Entry No. 52-42 at 36). 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." (Docket Entry 52-42 at 38). Hatfield knew that Sales "was serious" about having Butler killed. (Docket Entry No. 52-42 at 38).

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. (Docket Entry No. 52-42 at 18). In early summer 2000, Sales wanted Fleary and Howell to obtain information about Butler's work schedule. (Docket Entry 52-42 at 4). Fleary and Howell visited the Sharpstown Mall and learned when Butler would get off work. (Docket Entry No. 52-42 at 4-5).

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. (Docket Entry No. 52-42 at 7). Sales was angry when

he realized that Fleary had left without killing. (Docket Entry 52-42 at 7-8).

Howell testified that Ostine, Kissentaner, and Darfour left together on the night of Butler's murder. (Docket Entry 52-42 at 8). When the three returned, Sales asked, "Did you take care of it?" Ostine answered, "Yes." (Docket Entry 52-42 at 9).

The morning after Butler's murder, Howell left for the airport with Sales and Ostine. (Docket Entry 52-42 at 9). On the way, they stopped in a wooded area where Ostine discarded a small black revolver. (Docket Entry 52-42 at 10). At the airport, Sales used Howell's identification to buy plane tickets to Nashville for himself and Ostine. (Docket Entry 52-42 at 11).

The State also presented testimony from Harris County jail inmate Martinez Hardnett that Sales talked about the murder after his arrest. Hardnett met Sales while in a holding cell together. (Docket Entry No. 52-43 at 7). Sales "at times" talked about "the case he's on trial for." (Docket Entry No. 52-43 at 7). Hardnett did not press Sales for details. (Docket Entry No. 52-43 at 12). Sales described the murder to Hardnett, but he only "vaguely" said why "the security guard was killed." (Docket Entry No. 52-43 at 8, 10). Sales said that the shooter was in Nashville. (Docket Entry No. 52-43 at 8). Sales told Hardnett that "there was a person who was supposed to testify that he tried to hire him to kill the security guard." (Docket Entry No. 52-43 at 11). Hardnett testified that Sales feared that "his shooter had got caught. So he wanted to get out so that he could get money to hire the lawyer for the shooter," hoping that he would not "[t]ell the cops what actually happened." (Docket Entry No. 52-43 at 8).

The defense did not call any witnesses in the guilt/innocence phase. The jury found Sales guilty of capital murder. (Docket Entry No. 53-43 at 154). The jury returned a general verdict, meaning that it did not specify whether it found Sales guilty under the "aider and abettor" or conspiracy theories.

Pet. App. at 1a–7a (internal footnotes omitted).

II. Appellate and Postconviction Proceedings

A. Direct Appeal and initial state postconviction proceedings.

Sales appealed his conviction and the Texas Court of Criminal Appeals (CCA) affirmed the trial court’s judgment. *Sales v. State*, No. AP-74,594, 2005 WL 8153975 (Tex. Crim. App. Jan. 26, 2005). He also filed a state-habeas application, which the CCA denied in 2015. *Ex parte Sales*, No. WR-78,131-01, 2015 WL 222162 (Tex. Crim. App. Jan. 14, 2015). His case then moved to federal court, where he filed a federal habeas petition under 28 U.S.C. § 2254. Petition (ECF No. 8), *Sales v. Lumpkin*, 4:15-cv-00256 (S.D. Tex. Jan. 14, 2016).

B. Federal district court proceedings

Midstream of federal habeas proceedings, Sales was permitted to return to state court for the purpose of exhausting any unexhausted claims. *See* ECF No. 26; *see also Rhines v. Weber*, 544 U.S. 269, 277–79 (2005) (permitting stays of federal proceedings for purpose of exhausting claims in state court). Sales accordingly filed a subsequent state application for habeas corpus relief with the CCA, including a claim that “his death sentence violates the Eighth and Fourteenth Amendments

because the jury failed to make the required *Tison/Enmund* findings.” Pet. App. 136a. The CCA found that this claim was available when Sales filed his first state application for relief, and that it was therefore barred as an abuse of the writ. *Id.* (citing *Ex parte Sales*, No. WR-78,131-02 (Tex. Crim. App. Feb. 14, 2018) (not designated for publication)).

Based on the CCA’s ruling, the federal district court noted that Sales’s *Enmund/Tison* claim was defaulted. Pet. App. 25a. It further rejected Sales’s argument that he could overcome the default by showing that he was “innocent of the death penalty.” Pet. App. 29a–32a. And finally, the district court also noted that any required *Enmund/Tison* analysis was “effectively done in this case,” Pet. App. 28a, because “the state court found that the evidence supported Sales’s conviction as a party” and because the jury found that Sales, at minimum, “anticipated that a human life would be taken.” Pet. App. 27a.

C. Federal appellate proceedings

The Fifth Circuit Court of Appeals denied COA on this claim, finding that reasonable jurists could not debate both the lower court’s rejection of Sales’s innocence argument *and* the lower court’s rejection of the *Enmund/Tison* claim on the merits:

Sales moves for a COA under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). In *Enmund* and *Tison*, the Supreme Court addressed the culpability required for assessing the death penalty for a non-triggerman under the law of parties. The district court rejected this claim because, inter alia, it was procedurally defaulted. ROA.16456. To obtain a COA for his *Enmund-Tison* claim, Sales must show that jurists of reason could debate the district court's procedural ruling *and* that jurists of reason could debate the underlying constitutional claim. See [*Slack v. McDaniel*, 529 U.S. 473, 484 (2000)].

Sales cannot meet this standard. It appears undisputed that Sales defaulted his *Enmund-Tison* claim and thus no state court has passed on it. See ROA.16456. Sales's only contention is that he has cause to excuse that default because he's innocent of the death penalty under *Sawyer v. Whitley*, 505 U.S. 333 (1992). The state court made extensive factual findings on Sales's innocence claims. ROA.32048–81 (state court findings of fact and conclusions of law); ROA.16447–54 (district court's discussion of state court's findings and conclusions). And the Texas Court of Criminal Appeals adopted the lower court's findings "as being supported by the record," and denied habeas relief. *Ex parte Sales*, No. WR-78,131-02, 2023 WL 382321, at *3 (Tex. Crim. App. Jan. 25, 2023) (per curiam). The federal district court relied on these state court decisions to hold that Sales failed to show that he's innocent of the death penalty, and hence his innocence claim cannot be used to excuse the default of his *Enmund-Tison* claim. ROA.16452–54. Sales cannot show that jurists of reason would debate this procedural ruling. That alone justifies denial of a COA. See *Slack*, 529 U.S. at 484.

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 "anti-

parties” 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). Thus, jurists of reason could not debate the district court’s resolution of the underlying *Enmund-Tison* claim in any event.

Pet. App. 75a–77a (internal footnote omitted).

III. Pertinent Law

In his petition, Sales only argues the merits of one constitutional issue: whether *Enmund/Tison* preclude his capital murder conviction and sentence of death. Pet. at i–ii (questions presented). In *Enmund* and *Tison*, this Court addressed the culpability required for assessing the death penalty in cases where a non-triggerman is sentenced to death on a theory that he only aided and abetted the murder. In *Enmund*, this Court applied a proportionality measurement under the Eighth Amendment, which prohibits “punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.” *Enmund*, 458 U.S. at 788 (citations omitted). In doing so, this Court held

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.” *Id.* at 797. In *Tison*, however, the Court created an exception, holding that the Eighth Amendment is not violated under *Enmund* where a death-sentenced accomplice: 1) was a major participant in the felony; and 2) displayed a “reckless indifference to human life.” 481 U.S. at 158.

It is worth noting that the *Enmund/Tison* findings may be made by the jury *or* any reviewing court. In *Cabana v. Bullock*, this Court held that *Enmund/Tison* *did not* establish a new element of the crime of murder to be found by the jury, nor did it impose a particular procedure on the states for imposing the death penalty. *Cabana v. Bullock*, 474 U.S. 376, 385–86 (1986). Thus, *Cabana* forecloses any argument that the *Enmund/Tison* findings operate as such elements that must be proven to a jury beyond a reasonable doubt.

REASONS FOR DENYING THE WRIT

Sales raises three arguments to support his petition: First, he claims that he could not have been convicted as a party under Texas law because he was not present at the crime scene, and therefore he also was not a “major participant” in Butler’s murder. Pet. at 17–26, 32–33. Second, he claims that the Fifth Circuit erred in finding that the jury entered *Tison*’s “reckless indifference” finding by relying on its precedent in *Foster v. Quarterman*, 466 F.3d 359, 370 (5th Cir. 2006).² Pet. at 28–31. And third, he argues that his *Enmund/Tison* claim renders him “innocent of the death penalty” under *Sawyer*, and therefore the claim can be considered even though it is defaulted. Pet. at 9–16.

None of these arguments warrants review.

² *Foster* holds that an affirmative answer to Texas’s anti-parties special issue is a jury determination that the defendant showed a “reckless indifference” to human life under *Tison*. 466 F.3d at 370. In Texas, a capital defendant who is convicted under party or coconspirator liability is entitled to this “anti-parties” special issue, which is submitted to the jury at sentencing. That special issue asks 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).

I. Sales’s *Enmund/Tison* Claim is Unworthy of this Court’s Review under Rule 10 of the United States Supreme Court.

The questions Sales presents for review are unworthy of the Court’s attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for “compelling reasons.” Sup. Ct. R. 10. Such reasons usually include resolving splits in authority or novel and undecided questions of federal law. *See Citibank, N.A. v. Wells Fargo Asia Ltd.*, 495 U.S. 660, 674 (1990) (Rehnquist, C.J., concurring) (questioning why certiorari was granted when the opinion decided “no novel or undecided question of federal law” and merely “recanvasse[d] the same material already canvassed by the Court of Appeals”). As such, “[a] Petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Sup. Ct. R. 10.

A. Sales’s “major participant” argument concerns only state law.

The district court held that, through the jury’s general verdict, the anti-parties instruction, and the state court findings, “the

Enmund/Tison analysis was effectively done in this case.”³ Pet. App. 27a–28a. In denying Sales a motion for certificate of appealability, the Fifth Circuit rejected Sales’s argument that because he was not present at the crime scene, he was not a party to Butler’s murder under Texas law. In fact, the Fifth Circuit dispatched this argument by quoting directly from the CCA itself:

“[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).

Pet. App. 77a (quoting *Guevara v. State*, 152 S.W.3d 45, 51–52 (Tex. Crim. App. 2004)).

In arguing that the Fifth Circuit erred in this interpretation of Texas law, Sales’s challenge to the “major participant” finding effectively fails to invoke *any* federal question.

³ Sales’s argument in the district court was that, under *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), the State was required to prove the *Enmund/Tison* findings to the jury, beyond a reasonable doubt. Pet. App. 28a. Sales abandoned this *Apprendi* argument on appeal, and he does not raise it here.

B. Sales’s “reckless indifference” argument amounts to nothing more than error correction.

Under Texas law, a party convicted under a theory of party liability who did not “actually cause the death of the deceased,” may only be sentenced to death if he “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). Thus, an answer to this special issue in the affirmative constitutes a jury finding that—at the very least—the defendant “anticipated that a human life would be taken.” In *Foster*, the Fifth Circuit held that such a determination made by the jury was effectively a jury determination that the defendant displayed a “reckless indifference to human life.” 466 F.3d at 370. The Fifth Circuit accordingly held that, in answering the anti-parties special issue affirmatively, the jury had already determined that Sales showed a “reckless indifference” to human life. Pet. App. 77.

Sales quarrels with this reasoning. In particular, he points to this Court’s opinion in *Tison*, which found that the Arizona Supreme Court’s finding was too broad to comply with the “reckless indifference” requirement. *Tison*, 481 U.S. at 150–51. Sales argues that Texas’s anti-

parties special issue was also too broad to constitute a reckless-indifference finding. Pet. at 29–30.

Even accepting Sales’s argument, it smacks of error correction, and is not worthy of certiorari review. Sales does not point to any circuit split or federal question that needs to be resolved. *See* Sup. Ct. R. 10(a),(c). In fact, as *Foster* is predicated on a Texas-specific statute, it seems quite unlikely that any opinion regarding *Foster* would be of much jurisprudential benefit. Sales’s request for this Court to correct, what he seems to think, is a misapplication of *Tison* is explicitly disfavored under this Court’s rules. Sup. Ct. R. 10 (stating that a “petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law”).

C. Sales’s *Sawyer* claim fails to identify any circuit split.

As mentioned above, Sales’s *Enmund/Tison* claim is procedurally defaulted. *See supra* Statement of Case (SOC) Part II. A petitioner sentenced to death can overcome the procedural default of a punishment-based claim by showing he is “innocent of the death penalty.” *Sawyer*, 505 U.S. at 345. A petitioner establishes this kind of “innocence” by showing that he is ineligible for a sentence of death. *Id.* Sales argued in

the courts below, as he does now, that his *Enmund/Tison* claim meets that exception by showing he is ineligible for the death penalty. Pet. at 9–16.

The district court found that Sales could not show *Sawyer* innocence through *Enmund/Tison* for multiple reasons. First, *Sawyer* applies to showings of “factual” innocence, not legal innocence. Pet. App. 29a–30a. Second, *Sawyer* is premised on “new evidence”, as opposed to a record-based *Enmund/Tison* claim. Pet. App. 30a. And third, *Sawyer* only applies to the “*statutory* elements that make a defendant eligible for a death sentence” and not a “judicially created” federal rule such as *Enmund/Tison*. Pet. App. 30a–31a. The Fifth Circuit held that reasonable jurists could not debate the district court’s conclusion that Sales failed to prove he was innocent under *Sawyer*. Pet. App. 76a.

Sales now argues that the lower courts erred. In particular, he claims that *Sawyer* innocence does not only apply to innocence of statutory elements of capital murder, but rather also extends to judicially created rules of federal law, such as the *Enmund/Tison* requirement. Pet. at 9–16. But far from showing a split in authority, Sales fails to point to any court that has taken up a defaulted *Enmund/Tison* claim by

finding the claim met the *Sawyer* innocence exception. *See generally id.* In fact, he admits that the courts are largely in agreement 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.” Pet. at 13. And he offers no substantive holding that conflicts with this interpretation of *Sawyer*.

At most Sales only points to dicta from the Fifth Circuit, indicating that *Enmund/Tison* might implicate *Sawyer* innocence. Pet. at 10–12 (citing *Sawyer v. Whitley*, 945 F.2d 812, 820 n.14 (5th Cir. 1991) and *Rocha v. Thaler*, 626 F.3d 815, 826–27 (5th Cir. 2010)). But even then, the Fifth Circuit later suggested the opposite—that *Sawyer* is “limited . . . to situations where alleged constitutional errors only affected the applicant’s eligibility for the death penalty *under state statutory law*.” *Tong v. Lumpkin* 90 F.4th 857, 864 (5th Cir. 2024) (emphasis added). The only other authority cited by Sales in support of his proposed rule is a concurrence from the Texas Court of Criminal Appeals. Pet. at 14–15 (quoting *Ex parte Wood*, 498 S.W.3d 926, 928–29 (Tex. Crim. App. 2016) (Alcala, J., concurring)). Sales asks this Court to resolve a conflict that doesn’t seem to exist.

II. Sales's Petition Is a Poor Vehicle for His *Sawyer* Claim.

Sales asks this Court to take up the issue of whether the *Sawyer* exception to procedural default can be applied to an *Enmund/Tison* claim. Pet. at 9–16. But whether a meritorious *Enmund/Tison* claim can meet the *Sawyer* innocence exception is not a prudent question for this Court to take up because the Fifth Circuit already held that Sales could not show innocence of the death penalty. As this Court has explained, “[o]rdinarily an appellate court does not give consideration to issues not raised below.” *Sims v. Apfel*, 530 U.S. 103, 109 (2000) (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). But the rule in this Court is “prudential only” in cases arising from federal courts. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992). “It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.” *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

Here, the district court correctly noted that to prevail on a *Sawyer* claim, Sales must show that, “but for” the constitutional violation, “no reasonable juror would have found him eligible for a death sentence.” Pet. App. 31a. And the court further held that “Sales does not show how the jury in his case would have responded differently based on any

Enmund/Tison violation.” Pet. App. 32a. The Fifth Circuit found that reasonable jurists could not debate this ruling, citing to the state-court findings that Sales was convicted under the theory that he directed his friend Herschel Ostine to shoot Butler. Pet. App. 76a.

Thus, the Fifth Circuit did not even take up the question that Sales presents here, as it assumed *arguendo* that *Sawyer* applied to *Enmund/Tison* and rejected the argument, nonetheless. Given that the Fifth Circuit did not pass on this argument, this case presents a poor vehicle for taking up this issue. It is undisputed that the only theory Sales was convicted under was that he directed Ostine to kill Butler. *See* SOC Part I. And so it follows that Sales cannot show that, but for alleged *Enmund/Tison* error, no rational jury would have found him eligible for a death sentence. No matter what this Court might say about *Sawyer*’s application to *Enmund/Tison*, Sales cannot prove himself “innocent” of the death penalty.

III. Sales Fails to Show any Error Below.

A. The Fifth Circuit did not misapply Texas law on party liability.

As mentioned above, the Fifth Circuit rejected Sales’s “not guilty as a party” argument by quoting the CCA’s case law verbatim. Pet. App.

77a. But, if there were still any doubts of the correctness of this ruling, the CCA’s findings put them to rest; the CCA itself already entered a finding that the evidence in this case was sufficient to convict Sales as a party, notwithstanding the fact that he was not present at the murder that he directed. Pet. App. 110a (“The trial evidence established [Sales] as both a party to capital murder, and as a coconspirator to capital murder for conspiring to retaliate against the complainant.”).

This Court, of course, does not tell state courts how to interpret state law. *See Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (“Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”). The CCA’s finding on this matter is dispositive of the issue.⁴ The evidence establishes that Sales was guilty as a party and that he was a major participant in Butler’s murder.

⁴ It is also worth noting that, while the Fifth Circuit disposed of this argument as meritless, Sales never raised this “not at the crime scene” argument in the district court. *See* Pet. App. 25a–37a (summarizing and disposing of Sales’s arguments). This Court “normally decline[s] to entertain such forfeited arguments” that were not raised “in the courts below.” *Kingdonware Technologies, Inc. v. United States*, 579 U.S. 162, 173 (2016).

B. Fifth Circuit precedent is consistent with *Tison*.

As mentioned above, Sales takes issue with the Fifth Circuit's precedent in *Foster* holding that Texas's anti-parties special issue meets *Tison*'s "reckless indifference towards human life" requirement. See *supra* Part I.B. But Sales is incorrect in claiming that *Foster* conflicts with *Tison*. He states that "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." Pet. at 29. But that is not true. The finding entered by the Arizona Supreme Court in *Tison* was broader than the mens rea described in Texas's anti-parties special issue:

Inten[t] 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.

Tison, 481 U.S. at 150 (emphasis added).

In fact, this Court seemed far more troubled with the fact that the Arizona Supreme Court opinion included those who "anticipate that lethal force . . . might be used . . . in accomplishing the underlying felony" as those who might be sentenced to death under Arizona law. *Id.* at 150–51. As this Court noted, such a determination was indistinguishable from nearly every person who commits felony murder. *Id.* at 151. That is not

the case for the Texas anti-parties' special issue, which ensures that a death sentence is reserved only for those parties or conspirators who "anticipate that a *human life would be* taken." Tex. Code Crim. Proc. art. 37.071 § 2(b)(2) (emphasis added).

C. Sales's *Enmund/Tison* claim is frivolous even under de novo review.

Finally, even if Sales could show *Enmund/Tison* was not complied with, and that he could overcome the default of his claim, the remedy would be a de novo review of his claims by the district court. *See Workman v. Mullin*, 342 F.3d 1100, 1106 (10th Cir. 2003) (noting that, because the state court declined to rule on petitioner's *Enmund/Tison* claim, the district court made the *Enmund/Tison* findings based on the trial record). Sales's claim would easily be rejected on such an analysis, as the evidence presented at trial shows that he directed Herschel Ostine to kill Butler. *See supra* SOC Part I. Thus, there is no dispute that he was a major participant who intended to kill.

CONCLUSION

For these reasons, Respondent asks that this Court deny Sales's petition for a writ of certiorari.

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