No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JEFFERY LEE WOOD,
Petitioner,
v.

STATE OF TEXAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Jeffery Wood is on death row in Texas despite the fact that he did not kill anyone. Mr. Wood was convicted of capital murder and sentenced to death under Texas's "law of parties." He was held responsible for the actions of another man, who shot a clerk in a Kerrville convenience store in 1996. Mr. Wood was in a truck outside the building when it occurred, without knowledge that his co-defendant was capable of killing or would kill anybody.

At the penalty phase of his trial, the State relied heavily on the testimony from discredited psychiatrist Dr. James Grigson (also known as "Dr. Death") to prove that Mr. Wood, who had no prior criminal, was a future danger. Prior to Mr. Wood's trial, Dr. Grigson had been expelled from the American Psychiatric Association and the Texas Society of Psychiatric Physicians after those entities found it was an ethical violation for him to provide the same type of testimony he provided at Mr. Wood's trial. Mr. Wood's trial attorneys did not cross examine the State's witnesses or present any evidence at the penalty phase. Consequently, the jury made its sentencing determination without the benefit of an adversarial proceeding. The jury instructions at both phases of trial did not require that the jury find Mr. Wood had the requisite level of culpability under either *Enmund v. Florida*, 458 U.S. 782 (1982) or *Tison v. Arizona*, 481 U.S. 137 (1987).

The questions presented are:

1. Whether the petitioner is categorically ineligible for the death penalty because he lacked the requisite minimal culpability under the Eight and Fourteenth Amendments for a death sentence?

2. Have standards of decency evolved such that the Eighth Amendment prohibits imposing a death sentence on a person who did not kill or intend to kill?

3. When a capital judgment has been predicated on an assessment of an individual's likelihood of future dangerousness, does the due process clause require a new judgment after the passage of time causes material changes in the circumstances and evidence on which the original judgment was based?

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Jeffery Lee Wood respectfully petitions for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas ("CCA").

OPINIONS BELOW

The November 21, 2018, unpublished order of the CCA denying the habeas corpus application is attached as Appendix 1. A concurring opinion from Judge Newell is attached as Appendix 2. A dissenting opinion from Judge Alcala, joined by Judge Walker, is attached as Appendix 3. The August 19, 2016, unpublished order of the CCA authorizing certain claims for plenary consideration is attached as Appendix 4. A concurring opinion by Judge Alcala is attached as Appendix 5.

JURISDICTION

On November 21, 2018, the Texas Court of Criminal Appeals denied Mr. Wood's application for a writ of habeas corpus. *Ex parte Wood*, No. WR-45,500-02 (Tex. Crim. App. Nov. 21, 2018) (not designated for publication). On February 12, 2019, Justice Alito extended the time for filing this petition for a writ of certiorari to and including March 21, 2019. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

The questions presented in this petition are based on claims that were dismissed by the CCA because they failed to satisfy the requirements of Texas Code of Criminal Procedure, Article 11.071, § 5(a). Although the reference is to state procedural rules, the state court's interpretation and application of those rules, in

conjunction with the nature of the claims raised, means the state court's decision necessarily rested exclusively on federal grounds, and hence that jurisdiction to review the questions presented exists. *See Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (jurisdiction to review the federal question exists where the State made application of the procedural bar it applied depend on an antecedent ruling on federal law, even if only implicitly). Jurisdiction will be expounded upon further as relevant to each question presented.

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments 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 and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Jeffery Wood is confined and sentenced to death pursuant to the judgment of the 216th District Court of Bandera County, on a transfer of venue. Wood was convicted of capital murder for the January 2, 1996, death of Kriss Keeran. Another man named Daniel Reneau shot Keeran in order to steal a safe from the convenience store at which Keeran worked. Both Keeran and the store's assistant manager had been involved in planning the safe's theft with Reneau and Wood. Wood, unaware

that Reneau would harm anybody, sat in a truck parked outside the store while Reneau entered and, alone, made a decision to shoot Keeran. Wood's intellectual and emotional impairments limited his capacity to understand what Reneau was capable of doing.

Jeffery Lee Wood

Mr. Wood has borderline intellectual functioning, a severe disability.[1] He is described by his step-mother as an "eight-year-old in a man's body."[2] As early as elementary school, the East Central Independent School District in San Antonio identified Wood as being in need of additional services. In sixth grade, at the age of twelve and after a change in schools, Wood was again identified as requiring additional attention. A psychologist who assessed him reported,

> Hygiene and grooming are [] often poor. During an observation, Jeff was very fidgety. He was seldom on task but did volunteer to answer questions and offered to loan another student a pencil. He seemed to want attention from his math teacher, asking her for help on the testing activity. The observer's opinion was that Jeff seemed to want to have his teacher all to himself.[3]

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[1] Wood's IQ has consistently been tested at approximately 80-85, more than one full standard deviation below the mean. There are "marked similarities between the situation of people with intellectual disabilities and those with borderline intellectual functioning." Eric Emerson, et. al., *The Mental Health of Young Children With Intellectual Disabilities or Borderline Intellectual Functioning*, 45 SOC. PSYCHIAT. EPIDEMIOLOGY 579 (2010). These similarities include significantly higher rates of mental health needs, similar patterns of service response to mental health disorders, and increased risk of exposure to socioeconomic disadvantage. Another study found that "[b]oys with externalizing symptoms and a subaverage IQ displayed an impulsive-response style with deficiencies in their information-processing capacity. The authors concluded that children with problems of conduct and BIF [borderline intellectual functioning] belong to one of the most vulnerable groups of youth in Western society." Elisabeth Fernell and Ulla Ek, *Borderline Intellectual Functioning in Children and Adolescents – Insufficiently Recognized Difficulties*, 99 ACTA PAEDIATRICA 748 (2010).

[2] App. 1 to Application below (Affidavit of Mitzie Wood, Mar. 24, 2000).

[3] App. 2 to Application below, at 2 (Comprehensive Psychological Evaluation, Apr. 29, 1987).

The psychologist administered several tests and observed that Wood presented a "challenging" case because his "behavior and attitudes fluctuated rapidly."[4] He "constantly subvocalized self-derogatory statements and complaints usually with great expression and intensity."[5]

Psychomotor testing reflected a visual-motor score "significantly below his chronological age range," which impacted Wood's spelling and written expression.[6] A personality assessment reflected that Wood "demonstrates the impulsivity and disorganization often noted in youngsters with some form of a visual-motor deficit."[7]

> Additionally, excessive anxiety and fear create tension, and lead to faulty reasoning and reality testing. The result is a youngster who exercises exceptionally poor judgement which, along with achievement failures, further results in negative consequences. This, in turn, fosters self-doubt and recrimination. Jeff is not able currently to pull himself out of this dilemma by using productive problem solving strategies since self-introspection is so painful, and an objective wholistic [sic] picture of reality is so difficult for him to attain. His subjective perceptions seem to be fragmented and filled with morbid, threatening elements. He seems to feel a strong drive to retreat from emotional stimuli and emotionally laden thoughts; if unable to do so, perceptions of reality become even more distorted. . . .[8]

The psychologist diagnosed Wood as having severe overanxious disorder with avoidant features and determined him to meet the disability criteria for the category of Emotionally Disturbed.[9] The psychologist recommended that corporal punishment

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[4] *Id.*

[5] *Id.*

[6] *Id.* at 3.

[7] *Id.* at 5.

[8] *Id.* at 5–6.

[9] *Id.* at 6.

not be used against Wood because "this will only make Jeff feel more helpless" and cause reality-distortion.[10] The middle school thereafter placed Wood in special education.

A different school psychologist evaluated Wood in 1990, when he was fifteen.[11] The psychologist reported about Wood's behavior,

> This examiner observed that Jeff looked his age but acted like a middle school boy. . . . During both test sessions Jeff chewed gum so vigorously that his ears wiggled. His facial and body movements were loose. Sometimes he mumbled or distorted his speech. Jeff was anxious about his test performance and frequently he asked how he was doing. He worded it negatively, though, as, "I flunked, didn't I?" On the Rorschach Jeff nervously rotated the cards and took a long time to respond. He was reluctant to risk an initial answer on the Rorschach. Rather, after a minute he asked the examiner, "What do you think it looks like?"[12]

Six years later, at age 21, Wood would be charged with capital murder for Daniel Reneau's decision to murder Kris Keeran. Wood's debilitating emotional and intellectual impairments made him vulnerable to Reneau and severely diminished his capacity to anticipate what Reneau was capable of doing inside the convenience store.

Daniel Earl Reneau

Daniel Reneau was a drifter with an "unstable personality" who wandered into Kerrville, Texas during the summer of 1995. A psychiatrist retained by Reneau's lawyer during his capital murder trial attributed this "unstable personality" to

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[10] *Id*. at 6.

[11] App. 3 to Application below (Comprehensive Individual Assessment and Psychological Evaluation, May 14, 1990).

[12] *Id*.

Reneau's having a "severe personality disorder, which included some, what we call, narcissistic features, borderline features and some antisocial features" with "a history of depression, a history of alcohol abuse, a history of drug abuse."[13] Reneau was twenty years old when he came to Kerrville. He had been confined in a juvenile mental health facility in San Marcos, Texas, until he turned eighteen.[14] Homeless in Kerrville, Reneau was allowed by an employee of the Save Inn Motel to sleep in its office.[15] A man named David Warner subsequently took him in. Warner allowed Reneau to stay in his home from August 1995 until the end of October 1995, when he was asked to leave.[16]

It was in early November 1995 that Reneau met Wood.[17] Wood at the time was living with his long-term girlfriend Nadia Mireles and their daughter in an apartment in Kerrvile.[18] Although Wood had been struggling to hold a job and was unemployed, he had not been engaged in any criminal activity.[19] That was about to change due to Reneau's influence. Reneau first came over to Wood's and Mireles's apartment with Wood's friend Terry.[20]

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[13] Statement of Facts, *State v. Reneau*, No. AP-72,812, at Vol. 21: 177. Wood did not do drugs and did not abuse alcohol. App. 4 at 2 (Affidavit of Nadia Howell, Mar. 25, 2000).

[14] *Id.* at Vol. 21: 176.

[15] *Id.* at Vol. 21: 146–48.

[16] *Id.* at Vol. 21: 130–33.

[17] *Id.* at Vol. 21: 27. Although Wood was one year biologically older than Reneau, Wood was (and remains) mentally far younger than his biological age.

[18] *Id.* at Vol. 19: 143.

[19] *Id.* at Vol. 19: 146; Vol. 21: 27. See *also* App. 4 to Application below at 1.

[20] *Id.*

Around November 1995, Reneau, Wood, Mireles, and Mireles's sister—who had become romantically involved with Reneau—moved into a trailer together.[21] It was at this point that Mireles noticed Reneau's personality began to change. Whereas Mireles initially found Reneau nice and polite, he became increasingly erratic and threatening. Mireles became "worried about [her] safety, as well as [her] daughter's and [her] sister's. [Reneau] became very aggressive, angry all the time."[22] During this period Reneau also began arming himself and committing crimes. On November 30, 1995, Reneau had Wood drop him off at a convenience store in Kerr County, where Reneau used a pellet gun to rob it of approximately $600. In December, Reneau pressured Wood and two juveniles into stealing firearms out of two buildings known to the juveniles to contain guns.[23] Reneau pointed a firearm at each of the juveniles and threatened to kill them if they turned him in.[24] Reneau kept the stolen firearms and stored them at Mireles's trailer, and always insisted on carrying one on him.[25] During this period, Mireles tried to get Reneau to leave the trailer.[26] Reneau pointed a gun at her and told her that if she ever turned him in for his criminal activity, he would kill her and her daughter.[27]

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[21] *Id.*

[22] *Id.* at Vol. 21: 25–26.

[23] *Id.* at Vol. 21: 33–36, 49, 52–53.

[24] *Id.* at Vol. 21: 43, 58.

[25] *Id.* at Vol. 21: 21; 25 RR 84.

[26] *Id.* at Vol. 19: 154.

[27] *Id.* at Vol. 19: 154–55.

"There wasn't really a plan."

Although Reneau and Wood expressed a desire to obtain the thousands of dollars contained a safe at a 24-hour Texaco near their home, there was no plan, in any meaningful sense, to rob the Texaco. The store was within walking distance from the trailer they lived in.[28] Reneau and Wood frequented it and befriended the store's employees, William Bunker and Kris Keeran.[29] Over time all four eventually began to talk about how to defraud the store of money and focused on periods of time when there would be significant money in the safe due to bank holiday closures.

Bunker was the assistant manager of the store. Bunker violated company policy by allowing Reneau and Wood into the store office, including while Bunker counted out the day's money.[30] He participated in discussions with them about a plan to commit theft in which he would leave the back door unlocked and walk outside while Reneau and Wood would slip in and remove the store's safe and security recording.[31] He showed Reneau and Wood where the safe and the recording equipment in the office were located.[32] He told Reneau and Wood approximately how much money would be in the safe after a holiday weekend ("Ten or $20,000"), and when it would be removed for deposit (January 2).[33] He was to be given a cut of the

[28] *Id.* at Vol. 19: 152.

[29] *Id.* at Vol. 19: 57–58.

[30] 24 RR 76–77, 86.

[31] *Id.* at 75, 89.

[32] *Id.* at 76, 86.

[33] *Id.* at 77.

money.[34] There was never mention about violence or anyone getting hurt.[35] Although Bunker would subsequently claim that he never took any of the planning seriously and didn't ultimately participate in the embezzlement scheme, he testified he never told Reneau and Wood that he was abandoning their joint effort to take money from the store's safe.[36]

The morning of January 2, 1996, was the last opportunity to obtain the money which had accumulated in the safe over the holiday period and Keeran was to be on duty at that time. Although Keeran had been involved in discussions about taking the safe, he had conveyed to Reneau and Wood that he would not participate in defrauding the store.[37] Reneau brainstormed ideas about how to get the money.[38] One plan formulated by Reneau before the robbery was for Mireles and her sister to enter the store and distract Keeran while Reneau entered through the back and take the safe.[39] She never agreed to do it.[40]

Wood had borrowed his brother's truck over the holiday. He had to return it early on January 2, so that his brother could drive to work.[41] In the early morning hours of January 2, Wood drove Reneau to the convenience store and parked outside.

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[34] *Id.* at 88.

[35] *Id.* at 90; 25 RR 84.

[36] 24 RR 88.

[37] Statement of Facts, *State v. Reneau*, No. AP-72,812, at Vol. 19: 138.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] 25 RR 87.

Reneau, as usual, carried a gun. Wood, as usual, did not.[42] Reneau first made an attempt to discretely steal the safe. He pried open the office door at the back of the store with the intent to wait until it got busy and then slip inside and take the safe. However, Keeran shut and locked the door before he had the opportunity to do so. Reneau ultimately gave up and the pair returned to the trailer.[43]

At about 5:15 a.m., Reneau and Wood got ready to leave the trailer again.[44] Wood told Mireles that they were going to stop at the Texaco and then go to Devine so Wood could return his brother's truck.[45] When Reneau picked up a gun to take with him, Wood asked him to leave it and said they were not going to try to get the safe.[46] Reneau put the gun under the couch and Wood walked outside to his brother's truck.[47] After Wood left, Reneau picked up the gun, stuck it in his pants, and told Mireles he was "going to get the money, one way or the other, if he had to kill him."[48]

Back at the Texaco, Wood told Reneau he would go inside the store and ask Keeran to let them take the safe like they had all previously talked about. But Wood returned a few minutes later and told Reneau that he did not ask him.[49] Reneau told a detective who interrogated him that, at this point, "there wasn't really a plan."[50]

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[42] Reneau had always insisted that he be armed regardless of what they were doing. *Id.* at 84.

[43] Statement of Facts, *State v. Reneau*, No. AP-72,812, at Vol. 19: 231–33.

[44] *Id.* at Vol. 19: 139.

[45] *Id.*

[46] *Id.*; 25 RR 88.

[47] Statement of Facts, *State v. Reneau*, No. AP-72,812, at Vol. 19: 139.

[48] *Id.*

[49] *Id.* at Vol. 19: 235–36.

[50] *Id.* at Vol. 19: 236.

Reneau told the detective that when he went back into the store, his intention was simply to scare Keeran into giving him the money.[51] He was not thinking about hurting Keeran.[52]

While Wood sat in the truck, Reneau entered the store, pointed the gun at Keeran, and told him to go to the back room.[53] His finger was on the trigger.[54] Keeran did not respond, but stood motionless.[55] Then, "the gun fired."[56] Reneau told the detective that shooting Keeran was not what he wanted to do.[57] When Reneau shot Keeran, Wood was outside the store, oblivious as to what Reneau was capable of doing and what he would do to Keeran.[58] After the gun fired, Wood entered the store, "confused," with a look of "real shock on his face."[59] After Reneau shot and killed Keeran, he threatened Wood that he would kill Wood's girlfriend and daughter if he did not assist him.[60]

Daniel Reneau's Trial

Reneau was tried first, convicted, and sentenced to death. The State relied heavily on Mireles's testimony about Reneau retrieving his gun again after Wood told

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[51] *Id.*

[52] *Id.* at Vol. 19: 237.

[53] *Id.* at Vol. 19: 239.

[54] *Id.*

[55] *Id.* at Vol. 19: 240.

[56] *Id.*

[57] *Id.* at Vol. 19: 242.

[58] 24 RR 219.

[59] *Id.* at 220.

[60] 25 RR 100.

him to leave it and telling Mireles that he was going to get the money "if he had to kill him" to persuade the jury to find Reneau guilty and sentence him to death. The State told Reneau's jury, "[Reneau] was frustrated, because this planning had been going on for at least a couple of weeks, maybe longer, and he was just tired of all this planning and all of these plans falling through, so he decided that one way or another, even if he had to kill someone, he was going to get that money."[61] The State repeatedly vouched for Mireles's credibility, telling Reneau's jury that "she told the truth. She told exactly what happened."[62]

The State also elicited testimony in Reneau's trial about threats made by Reneau against the lives of Wood's wife and child, as well as against the lives of other people with whom Reneau had committed crimes.[63] The State told Reneau's jury during the sentencing phase of his trial, "[Reneau] knows right from wrong and he knew the consequences of his actions. That's why he threatened several people. He threatened to kill them if they ever turned him into the police."[64] Reneau was convicted and sentenced to death. He was executed in 2002.

Jeffery Wood's Trial

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[61] Statement of Facts, *State v. Reneau*, No. AP-72,812, at Vol. 20: 11–12.

[62] *Id.* at Vol. 20: 44. *See also id.* at Vol. 22: 34 ("She's telling the truth under oath and she has told the truth ….").

[63] *Id.* at Vol. 19: 154 (testimony by Nadia Mireles that Reneau had threatened to kill her and her daughter if she ever told anybody what he was doing).

[64] *Id.* at Vol. 22: 11

At Wood's pre-trial bond hearing, an investigating officer testified that Wood had no prior felonies and no prior history of violent crime. Nevertheless, Wood's bond was set at $350,000. The Fourth Court of Appeals found this to be excessive and reduced it to $50,000, in part on the basis of its finding that Wood was "not a danger to the victim or community." *Ex parte Wood*, 952 S.W.2d 41, 43 (Tex. App.—San Antonio 1997).

Also before trial, the court found sufficient doubt about Wood's competency to stand trial to warrant a jury trial. Evidence from the competency hearing reflected that Wood was functioning academically at an elementary school level in reading and spelling.[65] A neuropsychologist concluded that Wood was unable to appreciate the risks of conviction or rationally aid in his defense due to delusional and paranoid thinking that caused him to reject out of hand the possibility that he could be found guilty of capital murder. The neuropsychologist testified that Wood had "a delusional system" which caused him to be unable to grasp "the reality surrounding the issues specific to this case" and his role in it.[66] Wood's lawyer also testified at the hearing that Wood had "a delusional thought process that affects his ability to appreciate culpability."[67] He perceived his lawyer as part of a conspiracy that was forming against him.[68] The jury found him incompetent to stand trial.

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[65] State's Exhibit No. 1, First Competency Trial.

[66] 5 RR 138–39.

[67] *Id.* at 183.

[68] *Id.* at 187.

After this verdict, Wood was committed to the Texas Department of Mental Health and Mental Retardation at Vernon State Hospital for a period not to exceed 18 months.[69] Although he was immediately flagged by a nurse as having conspiratorially delusional thought processes, and although he did not receive any treatment at the facility, he was deemed competent just 15 days after being admitted.[70] After Wood was discharged, a second competency hearing was held. A neuropsychologist maintained that Wood's delusional thinking and inability to rationally consult with his counsel about his case was unchanged.[71] Moreover, nothing in the Vernon State Hospital records suggested to the neuropsychologist that doctors there had evaluated Wood in any manner that would have brought his delusional system to the fore.[72] Nevertheless, a jury found him competent and his trial began.

Although the State had relied heavily on Wood's girlfriend Mireles to testify about important events leading up to the offense, including Reneau's dominating influence, his frustration and determination to obtain the safe from the Texaco, and threats made to harm her and her child, the State did not call her in its case against Wood.[73] Instead, it relied primarily on Bunker's testimony and Wood's uncounseled custodial statements as evidence of his liability for capital murder as a party.

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[69] 1 CR 80–81.

[70] *Id.* at 86.

[71] 7 RR 195–96.

[72] *Id.* at 203.

[73] During Reneau's trial the prosecutor told the jury during closing argument, "Well, let me tell you, ladies and gentlemen, if Nadia Mireles is lying to help Jeff, as [Reneau's lawyer] infers [sic] here, she didn't do a very good job, because she will be on that stand when we try Jeff Wood, because

Wood's counsel sought to present three witnesses to establish two defenses: (1) that Wood himself backed out of any conspiracy to steal money from the Texaco; and (2) that Wood participated under duress due to threats by Reneau to kill Wood's daughter and girlfriend if he did not help him. First, the defense sought to present the same testimony from Mireles the State had elicited in Reneau's earlier trial: that, before Reneau and Wood left on the morning of the shooting, Wood had told Reneau not to bring any firearms; that Wood had told Reneau they were not going to go through with taking the money but were just going to return the truck to Wood's brother; and that Reneau had pretended to leave the firearm, only retrieving it after Wood had exited the trailer.[74]

Even though it had previously vouched for the veracity and reliability of Mireles's testimony, the State objected to that same testimony on hearsay grounds, and the trial court excluded it from Wood's trial.[75]

Second, the defense sought to present testimony from Linette Esensee. She was at Wood's trailer when Wood and Reneau returned after the robbery and would have testified that Wood told her Reneau had threatened to kill his daughter and girlfriend "if he did not go along with it."[76] Although the State understood Reneau to threaten the people he brought with him to commit crimes, and relied on such

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she puts him right in the middle of the capital murder . . . ." Statement of Facts, *State v. Reneau*, No. AP-72,812, at Vol. 20: 44.

[74] 25 RR 88.

[75] *Id.* at 89.

[76] *Id.* at 100.

evidence to obtain a death sentence against Reneau, the State again objected on hearsay grounds, and the trial court excluded the evidence.[77]

Finally, the defense also tried to present the testimony of a neuropsychologist that Wood was not a person of reasonable firmness.[78] The court excluded the testimony as not legally relevant.[79] Thus, no defense case was presented to the jury.

The jury was given a charge that instructed them under Texas's law of parties. They were instructed they were required to find Wood guilty of capital murder as a party if (1) acting with intent to promote or assist the commission of the offense, he solicited, encouraged, directed, aided, or attempted to aid Daniel Reneau in the murder; *or* (2) regardless of intent, in the attempt to carry out a conspiracy to commit robbery, the murder was committed by one of the conspirators in furtherance of that conspiracy and should have been anticipated as a result of carrying out the conspiracy. The jury was accordingly not required to find that Wood intended to cause death in order to find him guilty.[80] The jury returned a guilty verdict on the capital murder charge.

Wood was unable to reconcile his delusions that he could not be convicted with the reality of the guilty verdict, causing him to break down. Immediately after the verdict, he asked to discharge his lawyers and proceed pro se at the sentencing phase of trial. When the trial court expressed hesitancy about allowing Wood to proceed

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[77] *Id.* at 105.

[78] *Id.* at 115.

[79] *Id.* at 118.

[80] Texas uses a general verdict and thus no finding on intent was ever made as to Wood's intent to commit murder.

without representation, Wood expressed his desire to cease defending himself: "I ain't going to cross-examine nobody. I'm just going to let them do what they want. They can call anybody they want. I'm not going to ask them any questions."[81] The court denied Wood's request to represent himself because it believed him insufficiently mentally competent to do so.[82] The next day, after Wood filed a formal motion seeking the same, the court again denied it.

Although the trial judge ruled Wood mentally incompetent to represent himself, the court failed to inquire into Wood's broader competency to proceed to sentencing. Instead, the proceeding continued unabated, and although Wood's counsel had not been removed or made stand-by counsel, they followed Wood's irrational requests and refrained from cross-examining any of the State's witnesses and from presenting any evidence on his behalf.

At sentencing, the State relied heavily on the testimony of psychiatrist James Grigson to establish Wood's future dangerousness. Grigson had "earned the nickname of 'Dr. Death' because of the number of times he ha[d] testified on behalf of the State at the punishment stage of a capital murder trial and the number of times the jury has returned affirmative answers to the submitted special issues." *Bennett v. State*, 766 S.W.2d 227, 231–32 (Tex. Crim. App. 1989) (Teague, J., dissenting). When

[81] 26 RR 51.

[82] *Id.* at 52 ("I don't feel comfortable with you understanding all the concepts of what's going on . . . .").

testifying for the State, Grigson always testified that the defendant "certainly" or "absolutely" or "with 100% certainty" would commit future acts of violence.[83]

In 1993, the American Psychiatric Association's (APA) district branch, the Texas Society of Psychiatric Physicians' (TSPP) Ethics Committee conducted an investigation into Grigson's forensic psychiatric practice and determined that Grigson's practice of predicting future dangerousness and testimony in capital cases violated ethical guidelines for psychiatrists. Its report concluded that the Society was required to act against Grigson because "a willfully narrow rendition of psychiatric knowledge misleads and distorts the judicial system's understanding of the substantial, but not absolute, insights a comprehensive medical, psychiatric approach could offer for evaluating the presence of mental illness and it[s] possible future impact [o]n accused defendants."[84] In 1995, as a result of the TSPP's investigation and report, the APA Board of Trustees voted to expel Grigson from the APA and TSPP

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[83] When Grigson died in 2004, the Houston Chronicle wrote about him,

> Nicknamed "Dr. Death" for his willingness to testify against capital murder defendants, Grigson was a witness in hundreds of death penalty cases. His pleasant manner, down-to-earth vocabulary and air of certainty helped persuade juries that the defendant -- just about every defendant -- would kill again if given the chance. That Grigson often had not met with the defendant did not deter him from forming an opinion about him and defending it to the hilt.

Mike Tolson, *Effect of "Dr. Death" and His Testimony Lingers*, HOU. CHRON., June 17, 2004, http://www.chron.com/news/houston-texas/article/Effect-of-Dr-Death-and-his-testimony-lingers-1960299.php (last visited March 21, 2019).

[84] App. 8 to Application below (Summary Report of Ethics Complaint Investigation, Hearing, Deliberation and Decision of the Texas Society of Psychiatric Physicians, Sep. 12, 1993). Specifically, the investigation faulted Grigson "for arriving at a psychiatric diagnosis without first having examined the individuals in question, and for indicating, while testifying in court as an expert witness, he could predict with 100% certainty that the individuals would engage in future violent acts." App. 7. As well, the TSPP Ethics Committee concluded that the hypothetical questions on which Grigson based predictions were "grossly inadequate to elucidate a competent medical, psychiatric differential diagnostic understanding adequate for diagnosing a mental illness according to current standards." *Id*.

in order to help protect psychiatry's perception "as a highly ethical and trustworthy profession."[85]

Grigson did not testify in Daniel Reneau's trial, but the government retained his services in Wood's. The State added Grigson to its witness list well after the date by which the court had ordered the parties to disclose their expert witnesses. It was a last-minute decision, made by the State in view of its otherwise weak case for death against Wood.[86]

Without cross-examination or objection, Grigson testified that Wood would "certainly" be dangerous in the future. Specifically, the prosecutor posed to Grigson a hypothetical that laid out the "facts" of the offense.[87] Following the hypothetical, the prosecutor asked whether the hypothetical was "thorough enough" for him to form an opinion on whether or not the individual would be a future danger to society.[88] Knowing the scientific consensus of his profession in 1998 was that the truthful answer to this question was "no," Grigson answered, simply, "Right, it's sufficient."[89] When asked what his opinion was, Grigson violated his profession's ethics and falsely answered, "That the individual you described will most certainly commit future acts

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[85] App. 9 to Application below. According to psychiatrist James L. Knoll IV, "[Grigson's] example lives on, most notably every year at the American Academy of Psychiatry and the Law Review Course, where videos of his testimony are shown to aspiring forensic psychiatrists to teach them about unethical practices." James L. Knoll IV, *Death's Conviction*, Psychiatric Times, Mar. 12, 2010, http://www.psychiatrictimes.com/forensic-psychiatry/death%E2%80%99s-conviction (last visited March 21, 2019).

[86] Wood's attorneys objected to the late notice, but the trial court nevertheless allowed the State to present his testimony to the jury. 24 RR 20–43.

[87] 30 RR 61–67.

[88] *Id.* at 67–68.

[89] *Id.* at 68.

of violence and does represent a threat to society."[90] The prosecutor next asked Grigson whether it was necessary as an expert testifying on the issue of future dangerousness to examine a defendant personally.[91] Although he had been expelled from professional associations for doing just that, Grigson answered, "No, if you can get sufficient amount of information in a hypothetical, then you can make an opinion."[92] After Grigson's testimony, the State rested. The defense then rested without presenting a case.

At sentencing, Wood's jury was required to answer three special issues which would dictate by law the sentence the court imposed. First, it was required to answer, "Is there a probability that the defendant, JEFFERY LEE WOOD, would commit criminal acts of violence that would constitute a continuing threat to society?"[93] Second, it was required to answer "Do you find from the evidence beyond a reasonable doubt that JEFFERY LEE WOOD, the defendant himself, actually caused the death of Kriss Keeran, the deceased, on the occasion in question, or if he did not actually cause the deceased's death, that he intended to kill the deceased or another, or that he anticipated that a human life would be taken?"[94] Third, it was required to answer, "Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral

[90] *Id.*

[91] 30 RR 71.

[92] *Id.*

[93] 2 CR 319.

[94] *Id.* at 320.

culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?"[95] If the jury answered yes to the first two questions and no to the third, then the law required the court to impose a death sentence. Thus, in order for the court to impose death, the jury was not required to make a finding that Wood intended to commit murder, nor was it required to find that he was a major participant in the murder. The jury answered the special issues in the manner that required the court to impose death.

Following an initial round of state and federal habeas corpus proceedings, Mr. Wood on August 2, 2016, filed a subsequent habeas corpus application in state court raising, *inter alia*, claims that (1) his death sentence violates the Eighth and Fourteenth Amendments because his insufficient culpability under this Court's decisions in *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arisona*, 481 U.S. 137 (1987), rendered him categorically ineligible for a death sentence; (2) his death sentence violates the Eighth and Fourteenth Amendments because evolving standards of decency should now categorically exempt those who either did not kill or intend to kill from a death sentence; and (3) his death sentence violates Fourteenth Amendment due process because it was legally predicated on an assessment of his future behavior and circumstances have changed so much from when it was obtained that it no longer empowers his execution.

[95] *Id.* at 321.

The CCA dismissed all three claims, citing a state procedural provision. (As will be explained further, that provision is not an independent ground as to any of these claims that would preclude certiorari review by this Court.[96]) Judge Alcala dissented from the CCA's decision to summarily dismiss Mr. Wood's two Eighth Amendment ineligibility claims. With respect to Wood's claim that he was ineligible for a death sentence under *Enmund-Tison*, Judge Alcala held that the sentencing instructions "likely did not" require the jury to make any finding ensuring the sentence met the minimal culpability requirement under the Eighth Amendment."[97] App. 5 at 6. With respect to Wood's claim that standards of decency have evolved since *Tison*, Judge Alcala believed plenary review was warranted because "societal views about the death penalty appear to have changed considerably during the past several decades." App. 5 at 3.

REASONS FOR GRANTING THE WRIT

The CCA's denial of relief is contrary to long established recognition of the fundamental interests at stake when a person faces the possibility of a death sentence. The decision by the court below leaves Wood's death sentence in place despite his insufficient culpability under the Eighth and Fourteenth Amendments. Further, it renders him eligible for execution despite the CCA's failure to provide for further inquiry into the validity of the jury's prediction regarding Wood's future

[96] The dismissals of the claims are best considered to constitute merits judgments on the ground that the allegations failed to make out a prima facie claim that the federal constitution was violated.

[97] Judge Alcala also held that the claim was not procedurally defaulted under the Court's interpretation and application of the Texas procedural statute, because it was an Eighth Amendment categorical exemption claim. *See* App. 5 at 6-7.

dangerousness, in violation of the Fourteenth Amendment. For these reasons this Court should grant review.

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER WOOD IS CATEGORICALLY INELIGIBLE FOR THE DEATH PENALTY BECAUSE HE LACKED THE REQUISITE MINIMAL CULPABILITY FOR A DEATH SENTENCE UNDER THE EIGHTH AMENDMENT

In a subsequent habeas corpus application, Wood raised a claim that he was categorically ineligible for a death sentence under the Eighth Amendment because the jury did not determine—and the evidence did not establish—that he was a major participant in felonious activity acting with reckless indifference to human life. The CCA dismissed the claim on the ground it failed to meet the requirements of Texas Code of Criminal Procedure Article 11.071, § 5(a), an ostensibly state procedural rule. Fifth Circuit case law, however, deems dismissals of Eighth Amendment categorical ineligibility claims by the Texas court in this posture to constitute adjudications on the merit of the federal claim. *Busby v. Davis*, 892 F.3d 735, 743 (5th Cir. 2018) (CCA decisions make clear that when a defendant raises an Eighth Amendment ineligibility claim like *Atkins* for the first time in a successive habeas application, the Texas court must determine whether the defendant has asserted facts, which if true, would sufficiently state a federal claim to permit consideration of the successive petition); *Blue v. Thaler*, 665 F.3d 647 (5th Cir. 2011) (dismissal of *Atkins* claim under § 5(a)(3) was an adjudication on the merits).

Before dismissing any claim in a subsequent habeas application, the CCA must reject the presence of each exception to the general bar against plenary consideration. *See* Tex. Code Crim. Proc. art. 11.071 § 5(a). Section 5(a)(3) provides that a claim may

receive plenary review when raised in a subsequent habeas corpus application where, "but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues" submitted to it at sentencing in a capital case. Where claims of Eighth Amendment ineligibility are raised, the CCA has interpreted this provision to require it to ascertain whether the application sufficiently states a federal constitutional claim. *See Ex parte Blue*, 230 S.W.3d 151, 163-67 (Tex. Crim. App. 2007) (addressing federal constitutional question to resolve state procedural outcome). Accordingly, to dismiss this claim, the CCA necessarily determined that Mr. Wood's allegations did not state a federal claim under *Enmund-Tison*, and the ruling is not independent of federal law.

This Court should grant *certiorari* and reverse the CCA, because the decision conflicts with *Enmund-Tison* and because leaving the decision in place will permit Texas to execute a citizen it lacks the substantive power to lawfully execute. As the claim is a record-based one, the Court may reach its merits notwithstanding the summary nature of the CCA's disposition of it.

In *Enmund v. Florida*, 458 U.S. 782 (1982), this Court held that the imposition of the death penalty 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" is categorically excessive under the Eighth and Fourteenth Amendments. *Id.* at 797. *See also Graham v. Florida*, 560 U.S. 48, 69 (2010) ("The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less

deserving of the most serious forms of punishment than are murderers.") (citing, *inter alia*, *Enmund*, *supra*). This conclusion was reached in view of the "small minority of jurisdictions" that "allow[ed] the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed;"[98] the rarity of the imposition of death sentences by juries and execution of persons who did not commit the homicide; and the Court's judgment that imposing death 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" does not meaningfully advance the deterrence or retributive goals of capital punishment. *Enmund*, 458 U.S. at 789–801.

In *Tison v. Arizona*, 481 U.S. 137 (1987), the Court characterized *Enmund*'s holding as prohibiting a death sentence for a "minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state" with respect to the homicide. *Id.* at 149. The *Tison* Court considered itself to be addressing a separate question unanswered by *Enmund*: whether a death sentence is disproportionate for one who is a major participant in a felony in which

[98] In *Enmund*, this Court counted Texas as a jurisdiction that "authorize[s] the death penalty only if the defendant had the specific intent (or some rough equivalent) to kill the victim." 458 U.S. at 821 n.38. However, this determination did not account for convictions for capital murder like Wood's, which were obtained pursuant to Texas's law of parties statute. *See* TEX. PENAL CODE §7.02. A conviction for capital murder may be obtained under §7.02(b) without the jury finding that the defendant had the specific intent to kill or even that he anticipated that a death could occur. *See* App. 5 at 6 ("The guilt-innocence jury instructions permitted the jury to convict applicant of capital murder if he acted as a party by aiding or abetting another person to commit the offense, or, alternatively, if he acted with the intent to commit robbery and another person was killed as a result of that robbery under circumstances that showed that applicant *should have* anticipated that a death would result, *even if he had no intent for a death to occur*.") (emphasis added).

death results and who demonstrates reckless indifference to human life. *Id.* at 151. The Court concluded that a death sentence was not disproportionate to culpability under those circumstances. *Id.* at 158. This conclusion was reached in view of "the majority of American jurisdictions" which "clearly authorize[d]" a death sentence "in a felony-murder case where, though the defendant's mental state fell short of intent to kill, the defendant was a major actor in a felony in which he knew death was highly likely to occur," *id.* at 154, 155, and the Court's judgment that the reckless disregard for human life represents a highly culpable mental state, *id.* at 157–58. However, the Court also reasoned that general foreseeability is inadequate for the requisite mens rea because "[p]articipants in violent felonies like armed robberies can frequently anticipate that lethal force might be used in accomplishing the underlying felony." *Id.* at 150-51 (internal quotations omitted). The Court noted that "Enmund himself may well have so anticipated." *Id.* at 151. By contrast, the Tison brothers "both subjectively appreciated that their acts were *likely* to result in the taking of innocent life." *Id.* at 152 (emphasis supplied).

A review of the categories delineated in *Enmund* and *Tison* demonstrates that Wood falls within the class of people for whom the death penalty is categorically unconstitutional as defined in *Enmund* and not the class of people for whom this Court held the death penalty is constitutional as defined in *Tison*. In *Enmund*, the defendant was at least as culpable as Wood, if not more so. Earl Enmund had previously been convicted of a violent felony (armed robbery). *Enmund* 458 U.S. at 805 (O'Connor, J., dissenting). The trial court had found that Enmund was the one

who planned the robbery. *Id.* at 806. As Enmund stood by a few hundred feet from the crime scene, his accomplice robbed, shot, and killed an 86-year-old man and a 74-year-old woman. *Id.* at 784-86. After the murders, Enmund personally disposed of the murder weapon. *Id.* at 806 (O'Connor, J., dissenting).

In *Tison*, this Court's explanation of why it had found the death penalty categorically excessive in light of Enmund's level of culpability and participation had direct bearing on the constitutionality of Wood's death sentence. First, while "[a]rmed robbery is a serious offense," it is "one for which the penalty of death is plainly excessive . . . ." *Tison*, 481 U.S. at 148. Furthermore, "Enmund's degree of participation in *the murders* was so tangential that it could not be said to justify a sentence of death." *Id.* Thus "neither the deterrent nor the retributive purposes of the death penalty were advanced by imposing the death penalty upon Enmund." *Id.* Finally, "[i]n reaching this conclusion, the Court relied upon the fact that killing only rarely occurred during the course of robberies and such killing as did occur even more rarely resulted in death sentences if the evidence did not support an inference that the defendant intended to kill." *Tison*, 481 U.S. at 148–49. As in *Enmund*, Wood's degree of participation in *the murder* was too tangential to justify a sentence of death. Indeed, he instructed Reneau to not bring his gun with him when the two men left their trailer prior to the murder. As such, his death sentence is "plainly excessive."

On the other hand, Wood's conduct is vastly different from the conduct of the defendants in *Tison*, where the Supreme Court held the defendants were not categorically ineligible for a death sentence. Ricky and Raymond Tison were two

brothers who helped their father, a convicted murderer, and his cellmate, another convicted murder, escape from prison. Even though neither brother had personally killed any of the victims, the Court held both were eligible for the death penalty:

> Raymond Tison brought an arsenal of lethal weapons into the Arizona State Prison which he then handed over to two convicted murderers, one of whom he knew had killed a prison guard in the course of a previous escape attempt. By his own admission he was prepared to kill in furtherance of the prison break. He performed the crucial role of flagging down a passing car occupied by an innocent family whose fate was then entrusted to the known killers he had previously armed. He robbed these people at their direction and then guarded the victims at gunpoint while they considered what next to do. He stood by and watched the killing, making no effort to assist the victims before, during, or after the shooting. Instead, he chose to assist the killers in their continuing criminal endeavors, ending in a gun battle with the police in the final showdown.
>
> Ricky Tison's behavior differs in slight details only. Like Raymond, he intentionally brought the guns into the prison to arm the murderers. He could have foreseen that lethal force might be used, particularly since he knew that his father's previous escape attempt had resulted in murder. He, too, participated fully in the kidnaping and robbery and watched the killing after which he chose to aid those whom he had placed in the position to kill rather than their victims.

Id. at 151–52.

The *Tison* Court further described by way of example what it meant by "major participation" and "reckless indifference to human life," which permitted a death sentence, and contrasted it with a situation which did not:

> ***Far from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery***, each petitioner 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.

Id. at 158 (emphasis added). *See also People v. Banks*, 61 Cal. 4th 788, 809, 351 P.3d 330, 343 (2015) ("The Supreme Court . . . made clear felony murderers . . . who simply had awareness their confederates were armed and armed robberies carried a risk of death[] lack the requisite reckless indifference to human life.").

Like the contrasting case offered by this Court in *Tison*, Wood, unarmed, "merely s[at] in a car away from the actual scene of the murder." *Tison*, 481 U.S. at 158. His role in the murder cannot be characterized as "major participation." *Id.* Moreover, no reliable evidence reflects that Wood acted with reckless indifference to human life or that he ever thought anything more—given his well-documented impairments and the employees' prior participation in the scheme—than that Keeran would simply allow Reneau to take the safe. As Reneau told investigating officers, there was not any "plan" before Reneau went into the store and shot Keeran.[99]

Enmund's reasoning—which *Tison* did not overrule—applies with equal force to Wood:

> The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on

[99] The jury instructions at both the guilt/innocence and penalty phase of trial failed to ensure that the jury's verdict reflected a finding both that Wood was a major participant in the murder *and* that he acted with reckless indifference to human life as required to fit within the category of culpability defined by *Tison*. At the guilt phase, the jury was instructed that it could find Wood guilty of capital murder if it found that Reneau's shooting Keeran "*should have* been anticipated as a result of carrying out the conspiracy [to commit robbery]." *Wood*, 498 S.W.3d at 927 n.1 (Alcala, J., concurring) (emphasis added). Therefore, "the guilt-phase instructions permitted [Wood] to be found guilty of capital murder for a death that he may not have actually anticipated." *Id.* at 928. Further, while the penalty phase instructions did require the jury to make a finding that Wood actually anticipated that human life would be taken, these instructions did not require the jury to make "the additional requirement that there be evidence of 'major participation in the felony committed.'" *Id.* at 928 ("[I]t is arguable that the jury instructions in this case failed to comport with the *Tison* standard because they failed to require that [Wood's] participation in the offense be more than minor.)".

> "individualized consideration as a constitutional requirement in imposing the death sentence," *Lockett v. Ohio*, 438 U. S. 586, 605 (1978) (footnote omitted), which means that we must focus on "relevant facets of the character and record of the individual offender." *Woodson v. North Carolina*, 428 U. S. 280, 304 (1976). Enmund himself did not kill or attempt to kill; and, as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which murder was committed. It is fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." H. Hart, Punishment and Responsibility 162 (1968). Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.

Enmund, 458 U.S. at 798. Indeed, the conflating of Wood's and Reneau's culpability was palpable throughout Wood's trial.[100]

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[100] During the sentencing phase of Wood's trial in which Wood's *individual* moral culpability was to be judged, the State and its witnesses repeatedly conflated Wood's and Reneau's acts by referencing what "they"—not Jeffery Wood—had done. Grigson, in opining about Wood's purported future dangerousness, conflated Wood's and Reneau's acts. When asked by the prosecutor whether the "fact" that the individual in the hypothetical returned home to get a quieter gun—despite the fact that *Reneau*, not Wood, had done this—factored into his opinion, Grigson responded, "Well, it only adds to the fact that ***they*** knew ***they*** were going to be shooting the gun and that the clerk was going to be dead, so, you know, ***they*** didn't want to draw attention by a loud gun going off, apparently." 30 RR 70. During the State's closing argument, the shooter, Reneau, was ever present. The State concluded its closing:

> You know, if someone can kill a friend, you know, I submit to you ***they*** can kill anyone. If ***they*** can plan the murder of a friend, ***they*** can kill someone else just spur of the moment.
>
> And this is a heinous crime, because it involved premeditated, planned-out murder of a good friend. You know, one minute he's taking drinks from him and the next he's laughing, the fact that ***they*** have killed him.

30 RR 83–84 (emphasis supplied). No similar collective culpability arguments were made by the State during Daniel Reneau's trial. (Importantly, there was no evidence before Wood's jury that this was a "premeditated, planned-out murder." Additionally, there was no evidence that Wood ever laughed at "the fact that they have killed him.")

As in *Enmund*, "[p]utting [Wood] to death to avenge [a] killing[] that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts." 458 U.S. at 801. Due to his minor participation in the homicide and his lack of the requisite mental state under *Enmund* or *Tison*, the Court should grant certiorari to decide whether Wood's death sentence is unconstitutional under the Eighth and Fourteenth Amendments.

II. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER EVOLVING STANDARDS OF DECENCY RENDER THE DEATH PENALY UNCONSTITUTIONAL WHERE A PERSON DID NOT KILL OR INTEND TO KILL.

In light of the evidence at trial, and changes in state law since the Court last addressed the issue over 30 years ago in *Tison*, the Court should grant certiorari to decide whether standards of decency have evolved to prohibit the death penalty for a person who did not either kill or intend to kill. The CCA dismissed this claim, but in a manner that constitutes a rejection that Wood's allegations stated a prima facie federal claim. Thus, this petition raises the question of whether the allegations made in his application did state a claim that evolving standards of decency prohibit a death sentence for a person who neither killed nor intended to kill and, if so, whether Wood is ineligible for execution under that standard.

Jurisdiction to reach this claim exists because, as with the *Enmund-Tison* claim, the claim raises categorical ineligibility under the Eighth Amendment, requiring the CCA per its own interpretation of state law to answer whether the

allegations sufficiently stated a federal constitutional claim for relief before dismissing it.

A. The Allegations Below Made a Prima Facie Claim That Standards of Decency Have Evolved to Preclude the Execution of a Person Who Neither Killed Nor Intended to Kill.

Notwithstanding whether *Enmund* and *Tison* themselves preclude Wood's execution, standards of decency have evolved in the thirty years since *Tison* such that the execution of a person who did not kill or intend to kill should now be categorically precluded by the Eighth Amendment. In 1987, when *Tison* was decided, the Court concluded that "the majority of American jurisdictions clearly authorize[d] capital punishment" for accomplices who were major participants and who exhibited a reckless disregard for life, even if they did not have an intent to kill themselves. The allegations in the application below reflected that the opposite is currently true.

The allegations below reflected that 35 jurisdictions (of 52, counting the federal government and Washington, D.C.) have made legislative or judicial decisions against the use of the death penalty for non-triggermen who lack an intent to kill.[101]

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[101] *See* Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 AM. CRIM. L. REV. 1371, 1374 (2011), n.280, at 1401 (identifying thirty-three jurisdictions in 2011 as Pennsylvania, 18 PA. CONS. STAT. § 2502(b); Missouri, MO. STAT. § 565.021; Washington, WASH. REV. CODE §§ 9A.32.030(1)(a) & (c), 10.95.020; Maryland, MD. CODE CRIM. LAW §§ 2-201(a)(4); Oregon, OR. REV. STAT. §§ 163.115(1)(b) & 5(a), 163.095(2)(d); Georgia, *Hulme v. State*, 544 S.E.2d 138, 141 (Ga. 2001); Virginia, *Briley v. Commonwealth*, 273 S.E.2d 57, 63 (Va. 1980); Alabama, *Ex parte Woodall*, 730 So. 2d 652, 657 (Ala. 1998); Connecticut, *State v. Johnson*, 699 A.2d 57 (1997); Indiana, *Ajabu v. State*, 693 N.E.2d 921, 935 (Ind. 1998); Kansas, KAN. STAT. § 21-3439; Louisiana, *State v. Bridgewater*, 823 So.2d 877, 890-91 (La. 2002); Mississippi, *Randall v. State*, 806 So.2d 185, 233-34 (Miss. 2001); Montana, *Vernon Kills on Top v. State*, 928 P.2d 182, 200-07 (Mont. 1996); Ohio, *State v. Taylor*, 612 N.E.2d 316, 325 (Ohio 1993); Wyoming, *Engberg v. Meyer*, 820 P.2d 70, 87-91 (Wyo. 1991); and, according to the Death Penalty Information Center ("DPIC"), seventeen jurisdictions that have banned the death penalty for everybody: Alaska, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, Washington, D.C., West Virginia, and Wisconsin). States With and Without the Death Penalty, Death Penalty Information Center (Mar. 13, 2019)

At least two high state courts declined to follow *Tison* on state law grounds, including Montana's, which *Tison* had counted in its favor at the time.[102] Moreover, the application alleged that death sentences against and executions of such people are exceedingly rare, and are becoming even rarer since the growth of life-without-parole sentences, an option that Wood's sentencing jury did not have.[103]

B. Executing a Person Who Did Not Kill Nor Intend to Kill Does Not Serve the Social Purposes of the Death Penalty

Additionally, executing those who did not kill or intend to kill does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes. *See Gregg v. Georgia*, 428 U.S. 153, 173, 183, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (capital punishment is excessive when it is grossly out of proportion to the crime or does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes); *see also Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) ("A punishment might fail the test on either ground"). "Unless the death penalty when

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https://deathpenaltyinfo.org/states-and-without-death-penalty (last visited March 21, 2019.) The application below alleged that, since publication of the article 2011, Connecticut, Maryland, Nebraska, and Delaware banned the death penalty for everybody. *Id.* Connecticut and Maryland were included in the jurisdictions which prohibit execution of persons who did not kill or intend to kill. Nebraska and Delaware were not previously in that category. Nebraska, however, has since reinstated the use of the death penalty, *id.*, bringing the current the number of jurisdictions which do not permit executions of persons who did not kill or intend to kill to 34.

[102] *See Vernon Kills on Top v. State*, 928 P.2d 182 (Mont. 1996); *State v. Gerald*, 549 A.2d 792 (N.J. 1988) (*Gerald* was subsequently overturned by constitutional amendment; however, New Jersey ultimately abolished the death penalty entirely.)

[103] At the time *Tison* was decided, of the 739 people on death row at the time, only 3 had been sentenced to death "absent an intent to kill, physical presence, or direct participation in the fatal assault." *Tison*, 481 U.S. at 148. Since *Tison*, only eleven non-triggermen have been executed after a conviction for felony murder or finding of guilt under the law of parties. An execution is currently scheduled for Patrick Henry Murphy, Jr. on March 28, 2019. Murphy was also convicted of capital murder and sentenced to death under Texas's law of parties as a non-triggerman accomplice.

applied to those in [the defendant's] position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Enmund*, 458 U.S. at 798 (quoting *Coker*, *supra*, at 592).

In *Enmund*, this Court rejected the notion that the threat the death penalty will be imposed for murder measurably deters one who does not kill and has no intention or purpose that life will be taken. 458 U.S. at 798–99.

> As for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability—what Enmund's intentions, expectations, and actions were. American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to "the degree of [his] criminal culpability . . . "

Id. at 800 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)).

Mr. Wood did not have any active participation in the robbery; indeed, store personnel played an active role in encouraging the activity that culminated in the homicide. Mr. Wood did not arm himself. He did not arm Reneau; in fact, he asked Reneau *not* to arm himself. He did not accompany Reneau into the store. He did not physically harm anybody or commit any other felonies. And his intellectual and emotional impairments made him vulnerable to the influence of an anti-social drifter and made it difficult for him to comprehend what Reneau was even capable of doing.

The goals of retribution and deterrence are simply not served by executing Mr. Wood. This Court should grant certiorari to decide whether a death sentence where a person neither killed nor intended to kill serves the purposes of capital punishment

and reserves the death penalty for "for 'the worst of the worst.'" *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting).

III. THE COURT SHOULD GRANT CERTIORARI TO DECIDE THE IMPORTANT QUESTION OF WHETHER THE DUE PROCESS CLAUSE REQUIRES THAT THE STATE OBTAIN A NEW VERDICT, BECAUSE ITS PRIOR VERDICT, WHICH WAS PREDICATED ON AN ASSESSMENT OF FUTURE THREAT, NO LONGER PERMITS EXECUTION OF THE SENTENCE DUE TO THE PASSAGE OF TIME AND MATERIALLY CHANGED CIRCUMSTANCES

In his habeas corpus application below, Mr. Wood alleged that the 1998 judgment the State procured sentencing Mr. Wood to death could no longer be relied upon to carry out his execution consistent with due process because it was predicated on an assessment of future threat that required reassessment after 20 years and material changes in circumstances. Although this claim does not implicate categorical ineligibility under the Eighth Amendment, the CCA's dismissal of the claim on a state procedural ground is nevertheless not independent of federal law, but for a different reason than the preceding claims.

As discussed, *supra*, before dismissing any claim in a subsequent habeas application, the CCA must reject the presence of each exception to the general bar against plenary consideration. One of those bars is contained in § 5(a)(1). To satisfy § 5(a)(1), a subsequent application must show that (1) the factual or legal basis for the claims was unavailable as to all the applicant's previous applications; *and* (2) the specific facts alleged, if established, would constitute a violation of the United States Constitution that would likely require relief from either the conviction or sentence. *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007).

The temporal nature of the due process claim Mr. Wood raised necessarily precluded the CCA from finding that the factual allegations could have been presented in an earlier application. This is because only two years had elapsed from the time the judgment was issued and when Mr. Wood filed his initial—and only prior—habeas application in state court. Mr. Wood's claim is predicated on material post-judgment and post-initial-state-habeas changes in circumstances occasioned by the passage of 20 years since Texas obtained its capital judgment. The only ground on which the CCA could have disposed of this claim under state law is its view of the underlying federal question, *i.e.*, whether due process required the State to obtain a new judgment because of the changed circumstances, which it answered in the negative. The Court therefore has jurisdiction to, and should, reach it.

A. Whether the Constitution Permits a State to Execute a Judgment Based on a Prediction of Future Behavior After Two Decades Have Passed and After Circumstances Underlying the Prediction Have Materially Changed Is an Important Federal Question That This Court Has Never Decided

It is a fundamental precept of due process that hearings must occur at a meaningful time and in a meaningful manner before life or liberty interests are deprived. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Texas is one of only two states that require that a capital judgment authorizing the State to execute an individual be predicated on a prediction of how the defendant will behave in the future.[104] As such, Texas does not assess death strictly based on factual

[104] Oregon is the other. *See* American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report* at 307 n.97 (2013), http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf (last visited March 21, 2019).

determinations about a defendant's past actions, behavior, and background. This conditioning of a capital judgment on a prediction about future behavior is not required by either the Texas or federal constitutions. Most states have backwards-looking capital sentencing statutes that condition death sentences on the past behavior of the defendant.[105]

When a decision authorizing state action negatively impacting an individual's liberty or life interests is predicated upon a prediction of future behavior, due process generally requires that it be periodically reassessed. *Mathews*, 424 U.S. at 333. *See also Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) (upholding civil commitment scheme predicated on prediction of individual's future dangerousness in part on basis of mandatory periodic review); *In re Blodgett*, 50 N.W.2d 910, 916 (Minn. 1994) (state civil commitment statute predicated on prediction of future dangerousness consistent with due process "[s]o long as [it] is programmed to provide . . . periodic review"); *In re Young*, 857 P.2d 989, 1008 (Wash. 1993) (sex predator statute that predicated commitment on prediction of future dangerousness beyond a reasonable doubt consistent with due process in part because it "provide[d] the opportunity for periodic review of the committed individual's . . . continuing dangerousness to the community"); *Kelly v. Brewer*, 525 F.2d 394, 399–400 (8th Cir. 1975) (where inmate is held in administrative segregation for prolonged or indefinite period, due process requires that his situation be reviewed periodically in meaningful way;

[105] In some states, the prosecution may—but need not—put predictions of a defendant's future conduct in issue. *See, e.g.*, VA. CODE § 19.2-264.4(C); OKLA. STAT. ANN. tit. 21, § 701.12(7); WYO. STAT. ANN. § 6-2- 102(h)(xi).

administrative segregation looks to present and future rather than to past, and it involves prediction of what inmate will probably do or have done to him if he is permitted to return to population after period of segregation; reason for segregation must not only be valid at outset but must also continue to subsist during period of segregation).

Given this Court's case law on the process due for death sentenced individuals and the availability of ongoing review in cases with much less at stake, the question of how this general rule of due process applies to judgments sentencing an individual to death that are predicated on an assessment of future threat is an important one that the Court has never decided.

B. A Person Sentenced to Death Retains an Interest in His Life Until Execution

Although criminal judgments procured in accordance with due process are said to extinguish liberty interests of defendants, a person who has been sentenced to death nevertheless retains some interest in his life until his execution. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 288 (1998) (O'Connor, J., concurring in part and concurring in the judgment, joined by Souter, J., Ginsburg, J., and Breyer, J.) (death-sentenced prisoners retain life interest); *id.* at 291 (Stevens, J., dissenting) (same). Where a state has conditioned its power to execute on a judgment based on an assessment of an individual's future dangerousness, then if circumstances relevant to the verdict materially change between the time the verdict is rendered and the time when the State tries to enforce the capital judgment against the individual, due process prevents the execution in the absence of a reassessment of

future dangerousness that is predicated on the current circumstances and known information.

Texas's judgment sentencing Wood to death was predicated on the jury's assessment of whether "there a probability that the defendant, JEFFERY LEE WOOD, would commit criminal acts of violence that would constitute a continuing threat to society?"[106] At the time the jury answered this question in 1998, Wood was 23 years old. To meet its burden of proving future danger, the State relied heavily on evidence provided by Dr. Grigson, who was given a hypothetical about a 21-year-old actor in a non-custodial environment and at a time when death row inmates were not kept in 23-hour-per-day/7-days-per-week isolation.

More than 20 years have elapsed since a jury assessed that Wood would commit criminal acts of violence constituting a continuing threat to society, a period of time during which Texas has successfully incarcerated Wood and during which no criminal acts of violence have been committed by him. Mr. Wood has now been confined, almost exclusively in administrative segregation conditions (isolation), during that time. Mr. Wood has no disciplinary violations during that period that have been of a character to present a risk of physical injury to a correctional officer or another prisoner.[107]

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[106] 2 CR 319.

[107] Moreover, the State's future dangerousness case against Mr. Wood was weak even twenty years ago. Mr. Wood had no criminal history, and the State relied on a discredited psychiatrist's opinion based on a hypothetical. Because of Mr. Wood's refusal to participate, cross-examine, or present evidence, the verdict was rendered in a non-adversarial proceeding.

In light of the life interest that Mr. Wood still has and the changed circumstances since imposing the sentence, the Court should decide whether the due process clause requires Texas to reassess Wood's future dangerousness—and obtain a new jury verdict—before it may execute him.

CONCLUSION

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

Respectfully Submitted,

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