No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK HENRY MURPHY, JR.,
Petitioner,

v.

TEXAS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

David R. Dow*
Texas Bar No. 06064900
Jeffrey R. Newberry
Texas Bar No. 24060966
University of Houston Law Center
4604 Calhoun Rd.
Houston, Texas 77204-6060
Tel. 713-743-2171
Fax 713-743-2131

Counsel for Patrick Henry Murphy, Jr.
*Member of the Supreme Court Bar

Capital Case

Question Presented

In *Ring v. Arizona*, this Court held: "Capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring v. Arizona*, 536 U.S. 584, 589 (2002). In addition, in the line of cases including *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), this Court held that a non-triggerperson cannot be sentenced to death unless he (a) attempted to kill, or (b) intended that a killing take place, or (c) was a major participant in the crime and acted with reckless indifference. The holdings in these cases give rise to the following question:

Does *Ring* dictate that a jury determine whether a capital murder defendant is eligible for a sentence of death under *Enmund* and *Tison*, and, if so, is a state court decision to the contrary an unreasonable application of federal law under 28 U.S.C. § 2254?

List of Parties and Corporate Disclosure Statement

All parties to the proceeding in the court of appeals are listed in the caption.

Petitioner is not a corporate entity.

List of All Directly Related
Proceedings in State and Federal Courts

State court proceedings:

State v. Murphy,
No. F01-00328-T (283rd Dist. Ct., Dallas County, Tex. November 20, 2003)

Murphy v. State,
No. AP-74,851, 2006 WL 1096924 (Tex. Crim. App. Apr. 26, 2006)

Ex parte Murphy,
No. WR-63,549-01, 2009 WL 1900369 (Tex. Crim. App. July 1, 2009)

Ex parte Murphy,
No. WR-63,549-02 (Tex. Crim. App. Mar. 20, 2019)

Ex parte Murphy,
No. WR-64,549-03, 2019 WL 5589394 (Tex. Crim. App. Oct. 30, 2019)

Federal habeas proceedings:

Murphy v. Texas,
No. 06-6526, 127 S. Ct. 933 (Jan. 8, 2007)

Murphy v. Davis,
No. 3:09-cv-01368-L, 2017 WL 1196855 (N.D. Tex. Mar. 31, 2017)

Murphy v. Davis,
No. 17-70030, 737 F. App'x 693 (5th Cir. June 11, 2018)

Murphy v. Davis,
No. 18-5948, 139 S. Ct. 568 (Nov. 19, 2018)

Murphy v. Collier,
No. 4:19-cv-01106, 376 F. Supp. 3d 734 (S.D. Tex.)
(proceedings in this cause are ongoing)

Murphy v. Collier,
No. 19-70007, 919 F.3d 913 (5th Cir. Mar. 27, 2019)

Murphy v. Collier,
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Introduction

This Court held in *Tison v. Arizona*, 481 U.S. 137 (1987), that the Eighth Amendment does not permit a death sentence to be imposed on a capital murder defendant who was convicted as a party in a felony-murder scheme and who did not actually kill or intend to kill the victim unless two findings are made. A death sentence is permissible under *Tison* only if the defendant: 1) was a major participant in the felony that resulted in a murder and 2) displayed a reckless indifference to human life. *Tison*, 481 U.S. 137 at 158. Unless both of these findings are made, the defendant is ineligible for death.

Prior to this Court's decision in *Tison*, but subsequent to its related decision in *Enmund v. Florida*, 458 U.S. 782 (1982), this Court decided *Cabana v. Bullock*, 474 U.S. 376 (1986), which involved, among other issues, whether a jury was required to determine a capital murder defendant's eligibility for death under *Enmund*. In answering that question in the negative, Justice White's majority opinion observed that "whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury." *Bullock*, 474 U.S. at 385. Therefore, despite the fact that the rule established by *Enmund* represented "a substantive limitation on sentencing," this Court's Eighth Amendment jurisprudence at the time dictated that the limit established by *Enmund*, "like other such limits[,] need not be enforced by the jury." *Bullock*, 474 U.S. at 386. This aspect of *Bullock*, of course, is no longer good law; in *Ring v. Arizona*, 536 U.S. 584 (2002), this Court concluded that "[t]he right to trial by jury guaranteed by the Sixth Amendment" applies to "factfinding necessary to put [a defendant] to death." *Ring*, 536 U.S. at 609.

It is apparent that *Ring* necessarily overruled that portion of *Bullock* which had held that it was not necessary for a jury to find the facts required by *Enmund*. Nevertheless, because this Court has not addressed this issue specifically, a number of state courts and lower federal courts have continued to adhere to the pre-*Ring* rule that the factors required by *Enmund* and *Tison* need not be found by a jury. Yet one aspect of *Bullock* has not changed: namely, this Court's recognition that the *Enmund* factors operate as eligibility factors that must necessarily be found before

a capital murder defendant may be sentenced to death. *Bullock*, 474 U.S. at 386-88. Following *Ring*, all such eligibility factors must be found by a jury, but that necessary jury finding did not occur in Petitioner's trial.

Specifically, the record in this case suggests that Petitioner's jury was not required to make a finding related to *Tison*'s second prong – i.e. whether Murphy demonstrated a reckless indifference to human life. And the record indisputably establishes that the jury was not required to make a finding regarding *Tison*'s first prong – i.e. whether Petitioner was a major participant in the robbery that resulted in Officer Hawkins' murder. That finding was made by the Texas Court of Criminal Appeals during state habeas proceedings. Murphy's trial, however, took place in 2003 – a year after this Court's 2002 ruling in *Ring*. Consequenty, the state court decision rejecting Murphy's *Tison*/*Enmund* claim was manifestly wrong and is not entitled to deference under 28 U.S.C. § 2254(d)(1).

Petitioner respectfully requests this Court grant certiorari to address whether *Ring* dictates that a jury determine whether a capital murder defendant is eligible for a sentence of death under *Enmund* and *Tison*, and, if so, whether a state court decision to the contrary an unreasonable application of federal law under 28 U.S.C. § 2254.

Opinions and Orders Below

The decision of the Texas Court of Criminal Appeals was issued on October 30, 2019 and is unpublished; a copy is attached as Appendix A.

Statement of Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Constitutional Provisions and Statutes Involved

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. Const. amend. VI.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Statement of the Case

A. The December 24, 2000 homicide

On December 13, 2000, a group of seven inmates escaped from the John B. Connally Unit in Kenedy, Texas. The escapees, who would come to be known as the Texas Seven, were Patrick Murphy, George Rivas, Donald Newbury, Michael Rodriguez, Larry Harper, Joseph Garcia, and Randy Halprin. Rivas planned the escape and acted as the leader of the group after they escaped. 48 R.R. 7, 15.[1]

[1] Citations to Reporter's Record of Murphy's 2003 capital murder trial appear in this pleading as [volume number] R.R. [page number].

Although the group had taken some weapons from the prison, shortly after the escape, Rivas decided they needed to steal more supplies (including additional weapons) and money from retail stores. 48 R.R. 15. Rivas had told the group that no one was to hurt anyone during any of the burglaries. 48 R.R. 18. He told the group that was not how he handled things and assured them that no one had ever been hurt during the string of robberies for which he had been convicted and for which he, prior to the escape, was serving a life sentence. 48 R.R. 19. Even given this assurance that no one would get hurt, Murphy let Rivas know he did not want to take part in any of the robberies. 48 R.R. 16 ("From day one he let me know he didn't want to take part in the robbery.").

The first store the group burglarized after their escape was a Radio Shack. 48 R.R. 15-16. Murphy did not go into the store and stayed in the vehicle the group had driven to the store. 48 R.R. 16. No one was hurt during this robbery (as Rivas had previously told them would be true of all the robberies).

The second store the group robbed was an Auto Zone. 48 R.R. 17. Again, Murphy stayed outside in the vehicle. Again, no one was hurt.

The next store the group burglarized was an Oshman's sporting goods store in Irving, Texas. Murphy let Rivas know he did not want to go to the Oshman's robbery. 48 R.R. 20. Rivas decided the entire group of seven needed to go. While the other six members of the group of seven went inside the store, Murphy stayed in back of the vehicle, which was parked in front of the store. *Id.* He was supposed to monitor a police scanner and let the group know via their two-way radios if he

learned police officers were being dispatched to the store. *Id.* The plan was for the group to leave before any police officers arrived. *Id.*

Inside the store, Rivas continued to act as the leader of the group. 40 R.R. 53. Dressed as a security guard, Rivas told a store employee (Wesley Ferris) that he (Rivas) was investigating a string of burglaries and needed to see the store's security footage. 40 R.R. 53-55. After examining the store's security system, Rivas followed the same employee to the front of the store. 40 R.R. 56-57. As soon as the employee announced on the store's intercom that the store was closing, Rivas pointed a gun toward the ceiling and announced that a robbery was in progress. 40 R.R. 57-58.

The store employee testified that a group of six to eight armed men then surrounded him. 40 R.R. 60. The employee would later identify these men as Rivas, Rodriguez, Garcia, Newbury, Halprin, and Harper – i.e., every one of the seven escapees but Murphy. 40 R.R. 85-86. Murphy, who was outside in the vehicle, let Rivas know through the radio that the police were, at that time, involved in working an accident on Texas State Highway 183 and were not yet aware of any incident at the sporting goods store. 40 R.R. 61.

The group of six robbers inside the store proceeded to take money and guns from the store. 40 R.R. 68-73. Soon, Murphy let the group know (again through their two-way radios) that they needed to hurry because the police were on their way. 40 R.R. 77. Rivas quickly exited the store through an emergency exit at the back of the store. 48 R.R. 22. Presumably, the other five robbers also exited through

emergency exits located in the rear of the store. *See id.* Murphy, who was still at the front of the store, then radioed Rivas that an officer was heading to the rear of the store. *Id.* Rivas told Murphy to drive to an area at a nearby apartment complex where they had all agreed to meet after the robbery. 48 R.R. 23.

Officer Aubrey Hawkins was the officer who went to the back of the store. 48 R.R. 49-51. Rivas shot and killed the officer, and Rivas was shot (but not killed). *See id.* Fleeing in a stolen vehicle, Rivas and the other robbers ran over the officer's body and then made their way to the apartment complex where the group had agreed to meet. *See* 48 R.R. 24. The group had left a second car at the apartment complex; Rivas and two others got into that vehicle. *Id.* The other three robbers got into the vehicle Murphy was driving. *Id.* Murphy did not learn that there had been a shootout with Officer Hawkins until he was reunited with the group at the apartment complex. *See id.*

The following month, Murphy was arrested in Colorado, along with the surviving members of the group.[2]

B. Murphy's 2003 capital murder trial

At Murphy's trial, there was no testimony at any point that he was suspected of having fired a weapon during the robbery. Rather, the government's theory was that Murphy served as the lookout during the robbery. 40 R.R. 15.

[2] Harper committed suicide before being arrested.

The trial court's guilt phase charge presented to the jurors four theories under which they could find Murphy guilty of capital murder. C.R. 39-42.[3] Under two of these four theories – i.e., the second and the fourth theories – the jury was allowed to find Murphy guilty of capital murder simply by finding he was a conspirator to a robbery during which a death was foreseeable. *Id.* To find Murphy guilty under either of the other two theories – i.e., the first and the third theories – the jury would have had to have found Murphy aided or attempted to aid the others in either robbing Wesley Ferris (the store employee) or killing Officer Hawkins. *Id.*

As trial counsel correctly recognized, these four theories provided the jury with two different ways that it could find Murphy guilty of capital murder as a party. The first way, which implicated the first and third charge options, was for the jury to conclude that Murphy aided or assisted in the robbery or murder under Texas Penal Code, section 7.02(a). 44 R.R. 5. The second way, which implicated the second and fourth charge options, was for the jury to find, pursuant to Texas Penal Code, section 7.02(b), both that Murphy entered into a conspiracy to commit a robbery, and that it was foreseeable a death would result from the robbery. *Id.*

Trial counsel objected to the trial court's use of a general verdict precisely because it would be impossible to know whether the jury unanimously found Murphy guilty as a party under 7.02(a) or 7.02(b) or whether the jury had failed to reach an agreement about Murphy's involvement in the robbery or murder. 44 R.R.

[3] Citations to the single-volume Clerk's Record appear in this pleading as C.R. [page number].

4-5. It appears trial counsel recognized whether Murphy was convicted under 7.02(a) (which would require the jury to find he assisted in some way) or 7.02(b) (which would only require the jury to he entered into a conspiracy) was crucial to the determination of whether Murphy's sentence would satisfy what is required under this Court's opinions in *Enmund* and *Tison*. Trial counsel therefore argued the jury charge was not sufficient to protect Murphy's rights under the Sixth and Fourteenth Amendments to the United States Constitution because it would not be clear whether the jury had made the findings necessary under this Court's rulings in *Enmund* and *Tison* for Murphy to be sentenced to death. 44 R.R. 5.

The trial court overruled trial counsel's objection, 44 R.R. 5, and submitted a general verdict form to the jury, C.R. 45. Murphy's jury found him "guilty of capital murder, as charged in the indictment" on November 13, 2003. C.R. 45; 44 R.R. 41. ROA. Given the general verdict, it is impossible to know whether the jury found Murphy engaged in any criminal activity that demonstrated a reckless indifference to life or that he was a major participant in any crime. If the jury found Murphy guilty under either of the theories grounded in section 7.02(b), it did not have to find he participated at all in the robbery. *See* Tex. Penal Code § 15.02 (explaining to be found guilty of a conspiracy, one need only enter into an agreement with others, one of whom performs an overt act in pursuance of the agreement).

During the conference on the punishment phase charge, Murphy's trial counsel argued that none of the special issues the jury would answer during punishment would ask the jury to make the findings required by this Court's

opinions handed down in *Enmund* and *Tison*; consequently, during the punishment charge conference, trial counsel asked for an additional instruction that clarified Murphy needed to do more than just anticipate a life would be taken to be sentenced to death. That request was denied. 49 R.R. 10-12.

The jury subsequently answered the future dangerousness special issue[4] in the affirmative. C.R. 54; 49 R.R. 80. The jury also answered the special issue that is required in cases where the defendants might have been convicted as a party[5] in the affirmative. C.R. 55; 49 R.R. 80. Finally, the jury answered the mitigation special issue[6] in the negative. C.R. 56; 49 R.R. 80-81. By operation of law, Murphy was sentenced to death. Tex. Code Crim. Proc. art. 37.071, § 2(g).

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[4] This special issue asks the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071, § 2(b)(1).

[5] This special issue, often referred to as the "anti-parties" special issue, asks the jury to determine "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). Because no evidence presented to the jury would support a finding that Murphy actually killed Officer Hawkins, the trial court did not include the words "actually cause the death" in the version of the question presented to Murphy's jury. C.R. 55; 49 R.R. 13; 49 R.R. 80.

[6] This special issue asks the jury to determine "whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment . . . rather than a death sentence be imposed." Tex. Code Crim. Proc. art. 37.071, § 2(e)(1). (Because Officer Hawkins was murdered before September 1, 2005, had Murphy been sentenced to life in prison, it would be with the possibility that he could later be released on parole.)

C. Direct appeal proceeding

Murphy's brief on direct appeal was filed on September 20, 2004, and raised forty-two points of error. Three of these claims alleged error with respect to the possibility Murphy had been convicted of capital murder as a conspirator (which would thereby implicate the principles enunciated in *Enmund* and *Tison*). Br. for Appellant 71-75, *Murphy v. State*, No. AP-74,851 (Tex. Crim. App. Sept. 22, 2004). Specifically, the eighteenth issue raised on direct appeal was that the trial court erred in overruling Murphy's objection to the jury charge because this Court's jurisprudence requires more than is required by section 7.02(b) of the Texas Penal Code for a defendant to be sentenced to death. *Id.* at 71. (As noted above, section 7.02(b) addresses potential liability as a party for merely entering into a conspiracy.) In its 2006 opinion affirming Murphy's sentence and conviction, the Texas Court of Criminal Appeals (CCA) wrote that *Enmund* "does not prohibit a capital murder conviction for a non-triggerman under the law of parties." *Murphy v. State*, No. AP-74,851, 2006 WL 1096924, at *21 (Tex. Crim. App. Apr. 26, 2006). By its terms, the CCA's statement is correct; the problem, however, is that the statement addresses an argument other than the one Murphy made. Specifically, the CCA interpreted trial counsel's objection as pertaining to Murphy's *conviction*, when in fact it is apparent counsel's concern lay with Murphy's eligibility for a death sentence. And it is the issue of the permissibility of Murphy's sentence that is before this Court.

D. Initial state habeas proceeding

Murphy's initial state habeas attorney attempted to raise eight claims, all of which were subsequently found to be either not cognizable in habeas proceedings or procedurally barred. The eighth claim pertained to whether Murphy's death sentence satisfied the requirements of this Court's holdings in *Enmund* and *Tison*. Writ of Habeas Corpus Pursuant to 11.071 at 38-40, *Ex parte Murphy*, No. W01-00328-T(A) (283rd Dist. Ct., Dallas County, Tex. Sept. 20, 2005). The state habeas court understood the claim to allege that Murphy's death sentence is infirm because his jury did not determine (contrary to the requirement of *Tison)* whether he displayed a reckless indifference to life. Findings of Fact & Conclusions of Law at paras. 93-96, *Ex parte Murphy*, No. W01-00328-T(A) (283rd Dist. Ct., Dallas County, Tex. Apr. 10, 2009). In other words, the state habeas court at last correctly apprehended the nature of Murphy's *Tison* claim; however, the court deemed the claim procedurally barred, ruling it should have been, but was not, raised on direct appeal. *Id.* at paras. 87-89. In the alternative, the court held that by answering the anti-parties special issue, the jury *had* made the finding relevant to *Tison* (i.e., that Murphy's conduct displayed reckless indifference).[7] *Id*. at paras. 93-96.

The CCA subsequently adopted these findings in its order denying Murphy relief. *Ex parte Murphy*, No. WR-63,549-01 (Tex. Crim. App. July 1, 2009).

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[7] As explained above, *see supra* note 5, this was the second special issue Murphy jury had to answer, which asked the jury to determine whether he intended to kill Officer Hawkins or someone else or anticipated that a human life would be taken. *See* Tex. Code Crim. Proc. art. 37.071, § 2(b)(2); C.R. 55; 49 R.R. 13; 49 R.R. 80.

E. Federal habeas proceedings

Murphy filed his habeas petition in the district court on June 30, 2010. Its first claim alleged his sentence is unconstitutional, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, because the jury did not have to find that he either had the purpose to commit murder or was recklessly indifferent to life while being a major participant in the murder. The claim alleged this finding is required by *Enmund v. Florida*, as that case was clarified by *Tison v. Arizona*. The claim explained that the disjunctive guilt phase charge – the one trial counsel complained about at trial – made it impossible to know whether the jury's verdict complied with *Tison*.

The Magistrate issued his findings and recommendations on November 29, 2016. With respect to Murphy's first claim (i.e. his *Enmund*/*Tison* claim), the Magistrate concluded the claim was unexhausted and procedurally barred. The district court judge adopted the Magistrate's finding and denied Murphy relief on the claims raised in his petition on March 31, 2017. The district court also denied Murphy a certificate of appealability on all claims.

On February 12, 2018, Counsel filed Murphy's application for a certificate of appealability in the court of appeals. The Court heard argument on May 4, 2018. With respect to Murphy's claim pursuant to *Enmund* and *Tison*, the Court focused

almost exclusively on the merits of the claim and not the erroneous finding from the district court that the claim was unexhausted and procedurally barred.[8]

The first question asked by the Panel during argument was whether this Court has ever required the jury to make the findings required by its rulings in *Enmund* and *Tison*. Oral Argument at 1:43, *Murphy v. Davis*, 737 F. App'x 693 (5th Cir. 2018) (No. 17-70030), http://www.ca5.uscourts.gov/OralArgRecordings/17/17-70030_5-4-2018.mp3. The answer, of course, is no; this Court has not so held, but neither has this Court addressed the issue in the time since it issued its opinion in *Ring*. Two members of the three-judge panel thereafter expressed their belief that the CCA's findings, made during state habeas proceedings, were satisfactory to find that Murphy was a major participant in the robbery. *Id.* at 4:30 (Judge Elrod); *id.* at 18:53, 23:20 (Judge Higginson). Judges Elrod and Higginson expressed precisely the view. in other words, that *Ring* does not require that the *Enmund*/*Tison* factors be found by a jury.

Notwithstanding the Panel's focus on the merits of Petitioner's claim during argument, on June 11, 2018, the court of appeals subsequently issued an opinion denying Murphy a certificate of appealabilty on the claim, believing the claim to be "undebatably procedurally barred." *Murphy v. Davis*, 737 F. App'x 693, 702 (2018).

[8] The audio recording of the oral argument in the court of appeals is available at http://www.ca5.uscourts.gov/OralArgRecordings/17/17-70030_5-4-2018.mp3.

F. Subsequent state habeas proceeding

On October 12, 2019, Counsel filed a subsequent state habeas application in the CCA, which raised two claims. The first of these two claims was that "Murphy is ineligible for a death sentence because he was not a major participant in the felony that resulted in Officer Hawkins' murder." On October 30, 2019, the CCA issued an order dismissing the application. *Ex parte Murphy*, No. WR-63,549-03 (Tex. Crim. App. Oct. 30, 2019). The CCA, as is its ordinary practice, included language in its dismissal order designed to insulate its decision from review by this Court by implying the dismissal is not an adjudication of the merits. In point of fact, however, as discussed below in Part III, and as the Fifth Circuit has recognized, the CCA's dismissal is incontestably an adjudication of the merits. Petitioner's case therefore provides this Court with an appropriate vehicle to hold that *Ring* and the Sixth Amendment require that the sentencing jury make the findings that render a capital murder defendant eligible for death under *Enmund* and *Tison*.

Murphy now files this Petition for a Writ of Certiorari asking this Court to review the CCA's October 30, 2019 decision.

Reasons for Granting the Petition

I. Because the factors identified by this Court in *Enmund* and *Tison* are factors that determine whether a capital murder defendant is eligible to be sentenced to death, *Ring* requires that the presence of these factors be found by a jury.

Enmund holds that the Eighth Amendment allows the imposition of the death penalty only when that sentence is a proportionate response to the defendant's personal culpability. *Enmund*, 458 U.S. at 801 ("[C]riminal culpability

must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt."). The Constitution precludes imposition of the death penalty for mere accomplice liability. *Enmund* itself involved a driver, like Murphy, who was not present at the immediate scene where a murder occurred during the course of a robbery. Because Enmund himself neither intended that the victims be killed nor "anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape," the Eighth Amendment precluded the state from sentencing him to death. *Enmund*, 458 U.S. at 788; *see also id*. at 801.

In *Tison*, this Court elaborated on the personal culpability component identified as critical in *Enmund*. Two brothers had facilitated a prison escape, after which the escapees (who included Tison's father) committed a double murder with weapons supplied by the brothers. Although the state did not offer evidence that Tison either intended for or expected the murders to occur, this Court noted that intent alone is an unsatisfactory criterion for assessing a capital murder defendant's moral culpability and consequent eligibility for execution. *Tison*, 481 U.S. at 157. Consequently, without endeavoring to define moral culpability at an especially granular level of detail, this Court did hold that the *Enmund* culpability threshold was not satisfied unless the capital murder defendant was a "major participa[nt] in the felony [who exhibited] reckless indifference to human life." *Tison*, 481 U.S. at 158.

Notably, the Court in *Tison* remanded the case to the Arizona courts to

ascertain whether the culpability standard had been met. It was the state court, therefore that determined whether the facts establishing death eligibility were present. In issuing the remand, this Court cited a single decision: *Cabana v. Bullock*, 474 U.S. 376 (1986). *Tison*, 481 U.S. at 158. But *Bullock* has been superseded by this Court's recent Sixth Amendment jurisprudence, and it can no longer support the proposition that a court, rather than a jury, may constitutionally find facts that make a defendant eligible for execution.

This recent Sixth Amendment jurisprudence begins with *Jones v. United States*, 526 U.S. 227 (1999), where this Court explained that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones*, 526 U.S. at 243 n.6. A year later, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court applied *Jones* to state convictions and held that the jury must make all necessary findings that authorize the punishment that the defendant ultimately receives. *Apprendi*, 530 U.S. at 490. Application of this developed Sixth Amendment doctrine reached death penalty jurisprudence when the Court decided *Ring v. Arizona*, 536 U.S. 584 (2002). The *Ring* Court observed that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death" and held "that the Sixth Amendment applies to

both." *Ring v. Arizona*, 536 U.S. 584, 609 (2002). Murphy's capital murder trial occurred the year after *Ring* was decided.

Justice Alito's dissenting opinion in *Hurst v. Florida* strongly implies that the factors deemed crucial by *Enmund* and *Tison* are encompassed by *Ring,* and must therefore be found by a jury. *See Hurst v. Florida*, 136 S. Ct. 616, 625 (2016) (Alito, J., dissenting). Yet this Court as a whole has not addressed the question explicitly, and in the absence of guidance from this Court, the lower courts have been left to themselves to examine how *Ring* and *Enmund*/*Tison* operate together. *See, e.g.*, *Workman v. Mullin*, 342 F.3d 1100, 1115 (10th Cir. 2003) (pretermitting question of whether *Ring* requires that jury find *Enmund*/*Tison* factors because record showed jury did find those factors in the case at bar); *Gongora v. Thaler*, 710 F.3d 267, 290-91 & n.25 (5th Cir. 2013) (Owen, J., dissenting) (observing that, despite *Ring*, this Court had yet to rule that *Bullock* no longer applied to *Enmund*/*Tison* determinations); *see also State v. Ring*, 65 P.3d 915, 945 (Ariz. 2003) (holding *Ring* does not apply to finding of *Enmund*/*Tison* factors); *Brown v. State*, 67 P.3d 917, 919-20 (Okla. Crim. App. 2003); *People v. Skinner*, 917 N.W.3d 292, 309 n.17 (Mich. 2018) (same, collecting cases); *but see Hall v. Quarterman*, 534 F.3d 365, 385-86 (5th Cir. 2008) (Higginbotham, J., concurring and dissenting) (noting that "*Cabana*'s core holding that an element of a death-eligible offense may be determined by a judge has since been eroded").

As this Court emphasized in *Tison*, whether a defendant may constitutionally be sentenced to death is fundamentally a question of the defendant's moral

culpability. And time and again, the Court has stressed that the determination of moral culpability is one the jury must arrive at for itself. *See, e.g.*, *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263 (2007) ("Our line of cases in this area has long recognized that before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment for that individual"); *Smith v. Texas*, 550 U.S. 297, 303, 316 (2007). It follows that a jury must answer whether a capital murder defendant is eligible for execution under *Enmund* and *Tison*. This Court's Sixth and Eighth Amendment jurisprudence do not permit a state to hand this task to a judge.

II. Murphy's jury was not required to find he was a major participant in the robbery that resulted in Officer Hawkins' murder.

Despite trial counsel's objections to the state court's jury charge, the judge at Murphy's trial instructed the jury it could find Murphy guilty of capital murder without finding that he participated at all in the robbery that resulted in Officer Hawkins' murder. (See supra, explaining that finding Murphy guilty under section 7.02(b) of the Texas Penal Code did not require a finding that Murphy participated at all in the robbery.) To be sure, although Murphy's degree of participation in the robbery was irrelevant to the guilt-innocence verdict (because he could be found guilty of capital murder if he merely agreed to the robbery), *Enmund* and *Tison* require – in order for him to be constitutionally sentenced to death – a finding that he either intended to commit murder or was recklessly indifferent to human life *while being a major participant* in the robbery.

If read generously, it is possible to view the second special issue the jury addressed during the punishment phase of the trial as finding that Murphy's conduct was reckless. That issue concerned whether Murphy "intended to kill the deceased or another or anticipated that human life would be taken" (see *supra* notes 5, 7).[9] Yet even read generously, this question did not address Murphy's level of participation in the robbery. The Texas scheme simply does not require the jury to make this finding when a defendant is found guilty of capital murder as a conspirator. The jury therefore never found a factor deemed by this Court in *Tison* to be indispensable if a non-triggerperson is to be constitutionally sentenced to death.

Because Murphy's death sentence would be unconstitutional if the findings required by *Enmund*/*Tison* had never been made, the CCA's October 30, 2019 decision indicates that Court believes the findings have been made. *See infra* Part III. Because the jury was not required to find Murphy was a major participant in the robbery, the CCA's decision necessarily indicates that it believes either its findings from Murphy's initial state habeas proceeding sufficiently made this finding (which aligns with the views of at least two of the judges on the Panel in the

[9] An earlier version of the Texas death penalty statute did give the jury the opportunity to assess the moral culpability factors identified in *Enmund* and *Tison*. In *Johnson v. State*, 853 S.W.2d 527, 535 (1992), the CCA noted that the jury found the factors relevant to *Enmund*/*Tison* when it addressed whether "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result." Tex. Code Crim. Proc. art. 37.0711, § 3(b)(1). Murphy's jury did not answer that question, because Murphy was tried under a newer statutory scheme.

court of appeals as expressed during oral argument) or that it made these findings during his subsequent habeas proceeding.

III. The CCA's October 30, 2019 decision constituted a decision on the merits of Murphy's claim.

In order to have his claim, which is raised in a subsequent state habeas application, authorized by the CCA, a death-sentence Texas defendant must demonstrate that his claim satisfies one of the criteria contained in section 5 of Article 11.071 of the Texas Code of Criminal Procedure. Murphy's application argued his claim satisfied section 5(a)(3) of Article 11.071.[10] As the CCA has recognized, "Section 5(a)(3) of Article 11.071 represents the Legislature's attempt to codify something very much like [the] doctrine of 'actual innocence of the death penalty' for purposes of subsequent state writs." *Ex parte Blue*, 230 S.W.3d 151, 160 (Tex. Crim. App. 2007). While Section 5(a)(3), on its face, appears to be limited to "constitutional errors that affect the applicant's *eligibility* for the death penalty *under statutory law*," the CCA has construed the statute to "embrace constitutional as well as statutory ineligibility for the death penalty." *Id.* at 160-61.

Accordingly, when a state habeas applicant alleges he is ineligible for execution pursuant to this Court's decision in *Atkins v. Virginia*, 536 U.S. 304

[10] "If a subsequent application for a writ of habeas corpus is filed after an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that . . . by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072." Tex. Code Crim. Proc. art. 11.071, § 5(a)(3).

(2002), because he is intellectually disabled, the CCA has held that his claim can proceed in a subsequent habeas application pursuant to Section 5(a)(3). Just as a defendant who is intellectually disabled is ineligible for execution, a person who neither killed the victim and nor was a major participant in the felony that resulted in the victim's death is ineligible for execution and his claim should be allowed to proceed in a subsequent application pursuant to Section 5(a)(3).

In the *Atkins* context, the United States Court of Appeals for the Fifth Circuit has recognized that a dismissal by the CCA pursuant to Section 5(a)(3) constitutes a decision on the merits of the applicant's claim notwithstanding the CCA's writing it did not consider the merits of the claim. *Busby v. Davis*, 925 F.3d 699, 709-10 (5th Cir. 2019). If an applicant has presented a claim that he is ineligible for execution, the question the CCA answers before deciding whether to authorize the claim is whether the applicant has made a threshold showing that he is, in fact, ineligible for execution. *Id.* In the *Atkins* context, the applicant must make "a *threshold* showing of evidence that would be at least *sufficient* to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder would fail to find" intellectual disability. *Id.* at 709. The decision of whether the applicant has made the required showing is necessarily one that involves the merits of his *Atkins* claim.

Just as someone who is intellectually disabled is ineligible for execution, so is someone who did not actually cause the death of the victim and who was not a major participant in the felony that resulted in the victim's death. The question

before the CCA in Murphy's case, therefore, was whether he had made a threshold showing that he was not a major participant in the robbery. The CCA's October 30 decision dismissing his subsequent habeas application indicates that court believed he had not made that showing. That decision necessarily involves the merits of his federal claim.

The jury was not required to find Murphy was a major participant in the robbery. *See supra* Part II. The only explanation for the CCA's unreasoned opinion is that it found either during these proceedings or in Murphy's initial state habeas proceedings that Murphy was a major participant in the robbery. Contained within that decision is the belief that it is permissible for a reviewing court, and not the jury, to make that finding. That decision is an unreasonable application of federal law.

Conclusion and Prayer for Relief

In view of the foregoing, Petitioner requests this Court grant *certiorari* and schedule the case for briefing and oral argument.

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Respectfully submitted,

/s/ David R. Dow

David R. Dow*
Texas Bar No. 06064900
Jeffrey R. Newberry
Texas Bar No. 24060966
University of Houston Law Center
4604 Calhoun Rd.
Houston, Texas 77204-6060
Tel. (713) 743-2171
Fax (713) 743-2131

Counsel for Patrick Henry Murphy, Jr.
*Member of the Supreme Court Bar