No. 20-

IN THE

Supreme Court of the United States

JOHN MICHAEL ALLEN,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arizona

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the Eighth Amendment prohibits capital punishment for a "nontriggerman" accomplice to a felony that is not likely to result in the loss of innocent life?

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The Supreme Court of Arizona's opinion is reported at 248 Ariz. 352 (2020). App. A. The trial court's order is unreported but is reproduced in Appendix B.

JURISDICTION

The Supreme Court of Arizona issued its decision on April 14, 2020. Petitioner filed the petition for writ of certiorari within 150 days of that decision. Order 3/19/20. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Arizona Revised Statute, section 13-1105 attached as Appendix C.

Arizona Revised Statute, section 13-3623 attached as Appendix C.

STATEMENT OF THE CASE

John Allen, and his codefendant Sammantha Allen, were convicted after separate jury trials of felony-murder and child abuse. In Mr. Allen's case, the jury returned a split *Enmund/Tison* degree of participation verdict with 11 jurors finding that Mr. Allen actually killed the victim and 11 jurors finding that Mr. Allen was a major participant in the commission of child abuse and was recklessly indifferent regarding the victim's life.[1] The jury in Sammantha's case also returned a split *Enmund/Tison* verdict with 8 jurors finding that Sammantha actually killed the victim and 4 jurors finding she was a major participant in the commission of child abuse and recklessly indifferent regarding the victim's life.

The jury in Mr. Allen's case found the existence of three aggravating circumstances: that Mr. Allen had been convicted of a prior serious offense; the victim was under the age of 15; and the murder was committed in an especially cruel, heinous or depraved manner. The jury sentenced Mr. Allen to death. Prior to Mr. Allen's trial, a separate jury sentenced Sammantha Allen to death.

The evidence presented at trial showed that Mr. Allen and his purported wife, Sammantha, shared a home with Sammantha's mother, grandmother, and uncle. Also present in the home were several children, including the victim A.D.

[1] The jurors were permitted to vote for either theory or both.

The adult members of the family used various methods to discipline A.D., including confining her in a plastic footlocker. A.D. had been confined to the footlocker on several occasions for approximately an hour, but sometimes longer.

On July 11, 2011, Mr. Allen and Sammantha, the only adults present in the home at that time, were supervising the children. Later that night, Mr. Allen and Sammantha believed A.D. had stolen an Otter Pop and began disciplining her. Initially, the victim was made to perform calisthenics for hours. At approximately 1 a.m. the next morning, Mr. Allen and Sammantha decided to place the victim in the footlocker. After placing the victim in the footlocker, Sammantha told Mr. Allen to secure the locker with a padlock, which he did.

Mr. Allen and Sammantha returned to bed. Mr. Allen intended to check on the victim in an hour or so, but fell asleep.

The next morning, Mr. Allen was awoken by someone requesting the key to the footlocker. The locker was opened, the victim was removed, and police were contacted. The victim was pronounced dead at the scene.

The medical examiner testified that the victim had died from positional asphyxiation while in the box. The medical examiner could not pinpoint the victim's time of death, but stated that the victim could have asphyxiated within minutes.

On direct appeal, Mr. Allen argued that the jury's *Enmund/Tison* findings were not supported by sufficient evidence. Specifically, Mr. Allen argued that the jury's *Enmund* verdict was not supported by sufficient evidence because Mr. Allen had not killed the victim as contemplated by this Court's decision in *Enmund v. Florida*, 458, U.S. 782, 102 S. Ct. 3368 (1982). Mr. Allen also argued that the jury's *Tison* verdict was not supported by sufficient evidence because Mr. Allen had not acted with reckless indifference to human life as contemplated by this Court's decision in *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676 (1987).

The Supreme Court of Arizona affirmed the jury's *Enmund/Tison* findings. The court also affirmed Mr. Allen's convictions and death sentence.

This petition followed.

REASONS FOR GRANTING THE WRIT

The Eighth Amendment prohibits the imposition of the death penalty for a "nontriggerman" accomplice to a felony that is not likely to result in the taking of innocent life.

The Eighth Amendment to the United States constitution prohibits the imposition of cruel and unusual punishment. Although the Eighth Amendment does not prohibit capital punishment, the death penalty must be limited to defendants "who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 568, 125 S. Ct. 1183 (2005) (quoting *Atkins v. Virginia*, 536 U. S. 304, 319, 112 S. Ct. 2242 (2002)). Further, the Eighth Amendment prohibits the execution of certain categories of offenders, regardless of how heinous the defendant or the crime might be. *Id.* at 572, 125 S. Ct. 1183; *Atkins*, 543 U.S. at 321; 112 S. Ct. 2242; *Kennedy v. Louisiana*, 554 U.S. 407, 446-67, 128 S. Ct. 2641 (2008).

In the context of felony murder, this Court held in *Enmund v. Florida* that the Eighth Amendment categorically prohibits the imposition of the death penalty for an accomplice who does not kill, attempt to kill or intend to kill. 458 U.S. at 801, 102 S. Ct. 3368. Enmund was sentenced to death for his participation in a felony murder. *Id.* at 785, 102 S. Ct. 3368. The actual murders were committed by Enmund's accomplices, who shot and killed an elderly couple when they resisted efforts to rob them. *Id.* at 784, 102 S. Ct. 3368.

This Court vacated Enmund's death sentences because he did not kill, attempt to kill or intend to kill. *Id.* at 801, 102 S. Ct. 3368. This Court reasoned that the death penalty for defendants in Enmund's position was cruel and unusual punishment because such an extreme sanction would not measurably further the two principal social purposes of capital punishment: retribution and deterrence of capital crimes by prospective offenders. *Id.* at 798-801, 102 S. Ct. 3368.

Later, this Court further analyzed the spectrum of felony murderers in *Tison v. Arizona*. Like the defendant in Enmund, the defendants in *Tison*, Ricky and Raymond, were accomplices to a robbery, which resulted in intentional killings that were not intended or committed by Ricky or Raymond. 481 U.S. at 140-41, 107 S. Ct. 1676. Nevertheless, both were sentenced to death. *Id.* at 142, 107 S. Ct. 1676.

In permitting the death penalty for defendants like the Tisons, this Court examined the two subsets of felony murderers discussed in *Enmund*: the felony murderer who kills and can receive the death penalty and the felony murderer who does not kill or intend to kill and cannot receive the death penalty. *Id.* at 149-50, 107 S. Ct. 1676. The Court noted that the subsets discussed in *Enmund* represented the two poles of felony murder, but explained that defendants like the Tisons represented a third subset: a felony murder accomplice who is a major participant and is recklessly indifferent to human life. *Id.* at 150-151, 107 S. Ct. 1676. This Court further held that capital punishment for these "midrange felony-murder cases" was permissible. *Id.* at 155-58, 107 S. Ct. 1676.

The three subsets of felony murderers identified in *Enmund/Tison* were based on accomplices to violent felonies that resulted in an accomplice committing intentional murders. Consequently, this Court has not addressed the imposition of the death penalty for a defendant who is an accomplice to a nonviolent felony that is not likely to result in the taking of innocent life but results in an inadvertent killing that no actor intended.

Under Arizona law, a felony murder conviction can be based on nonviolent conduct that is not likely to result in the loss of innocent life. Pursuant to A.R.S. § 13-3623(A)(1), child abuse is committed when an adult intentionally or knowingly permits the health of a child to be endangered under circumstances likely to result in death or serious physical injury. Arizona law has interpreted a serious physical injury to include a scar that will fade. *State v. Pena*, 209 Ariz. 503, 505, 104 P.3d 873, 875 (App. 2005).

Further, pursuant to § 13-3623(C), an individual commits child abuse if they permit a child to "enter or remain in any structure or vehicle in which volatile, toxic or flammable chemicals are found or equipment is possessed by any person for the purpose of manufacturing dangerous drugs in violation of § 13-3407, subsection A, paragraph 3 or 4." Consequently, a person who knowingly allows a child to ride in a car that contains glassware for the production of methamphetamine is guilty of child abuse. And if that car is involved in an accident that results in the death of the child, and the child is under 15 years of age, the person who permitted the child to ride in the car is guilty of felony murder and eligible for the death penalty. §§ 13-1105, -751(F)(7).

But the death penalty for such conduct is prohibited by the Eighth Amendment because executing a defendant who is an accomplice to a felony that is not likely to result in the loss of innocent life is disproportional to the defendant's culpability and does not serve the death penalty's deterrent function.

In *Gregg v. Georgia*, this Court identified the two principal social purposes served by the death penalty: "retribution and deterrence of capital crimes by prospective offenders." 428 U.S. 153, 183, 96 S. Ct. 2909 (1976). And unless the death penalty serves one or both of those goals, executing defendants who are accomplices to a felony offense that results in an inadvertent killing "'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Atkins*, 536 U.S. at 319, 122 S. Ct. 2242 (quoting *Enmund*, 458 U.S. at 798, 102 S. Ct. 3368.).

The death penalty as retribution requires that "the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Id.* Further, the Eight Amendment requires that the death penalty be reserved for a narrow category of the most serious crimes and cannot be imposed based on the culpability of the average murderer. *Id.* A defendant who is an accomplice to a felony offense not likely to result in the loss of innocent life does not have the culpability of the average murderer. Accordingly, capital punishment is not permissible for such defendants.

As to deterrent function of the death penalty, the death penalty is only a deterrent when the murder is the result of premeditation and deliberation. *Id.* Accordingly,

because you cannot deter an inadvertent murder that no actor intended, executing an accomplice to such a crime does not further the goal of deterrence.

The Eight Amendment requires that a defendant be punished in accordance with their individual culpability. A defendant who is an accomplice to a felony offense that results in an inadvertent killing does not have the culpability for the imposition of the death penalty. Further the execution of such defendants does not further either societal goal of the death penalty. Consequently, executing an accomplice to a felony offense that results in an inadvertent killing violates the Eighth Amendment.

Here too, Mr. Allen's death sentence must be vacated. Mr. Allen committed a terrible crime, but his culpability does not permit the imposition of the death penalty. The jury was unable to unanimously find that Mr. Allen had actually killed the victim. Mr. Allen's culpability as an accomplice to a felony offense not likely to result in the loss of innocent life, is far less than the culpability of the average murderer. Further, executing Mr. Allen does not serve either societal purpose of the death penalty.

Accordingly, this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

RESPECTFULLY SUBMITTED, this 15th day of June, 2020.

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