

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK HENRY MURPHY,
Petitioner,

v.

LORIE DAVIS,
Respondent.

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

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
*Member of the Supreme Court Bar

Capital Case

Questions Presented

Does the Sixth or Eighth Amendment require that before a party may be sentenced to death as a conspirator (rather than a trigger-person), the jury must find, at a minimum, that the party participated in a felony?

Does this Sixth Amendment require the findings required by this Court's opinions in *Enmund v. Florida* and *Tison v. Arizona* be made by a jury?

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Introduction

Officer Aubrey Hawkins was killed on December 24, 2000 by one of six men inside a sporting goods store in Irving, Texas after he responded to a robbery in progress. The six men were part of a group who had come to be known as the Texas Seven and had escaped from a South Texas prison eleven days earlier. Petitioner Patrick Henry Murphy was the seventh man of this seven-member group, and he was not inside the store. Instead, he was waiting in a vehicle outside. That he did not fire the fateful shot that killed Officer Hawkins and that he was never inside the store are undisputed.

Murphy and five of the others were eventually apprehended in Colorado. The seventh member of the group killed himself before being captured. The six surviving defendants were all subsequently tried for capital murder, found guilty, and sentenced to death.

At the conclusion of the guilt phase of Murphy's 2003 capital murder trial, Murphy's jurors were instructed they could find Murphy guilty of capital murder under any one of four theories. Three of these four theories allowed the jury to find Murphy guilty of capital murder because Officer Hawkins was killed during the commission of an aggravated robbery. Of these three, one theory required the jury to find Murphy participated in the robbery to be convicted of capital murder. The remaining two theories allowed Murphy's jury to find him guilty of capital murder for simply entering into a conspiracy to commit robbery, during the course of which Officer Hawkins was murdered. While Murphy's jury subsequently convicted him of capital murder, because the jury returned a general verdict, it is impossible to know under which of the four theories he was convicted.

Over thirty years ago, in *Tison v. Arizona*, 481 U.S. 137 (1987), this Court explained what is required for a defendant convicted under a felony-murder theory to be eligible for a death sentence. Specifically, the Court held that the Eighth Amendment will not permit a defendant convicted of capital murder under a felony-murder theory to be sentenced to death unless the defendant was a major participant in the felony committed and displayed a reckless indifference to human life. *Tison v. Arizona*, 481 U.S. 137, 158 (1987). As is discussed further below, this

Court's subsequent decisions have made it clear these findings must be made by a jury, as they are facts essential to sentencing a non-trigger-person to death.

Under Texas law, before a defendant who has been convicted of capital murder and who might not have been the primary actor – i.e., the person who actually killed the victim – can be sentenced to death, his jury must answer a question prescribed by the Texas Code of Criminal Procedure. Specifically, the jury must answer “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 the State presented no evidence suggesting Murphy fired the shot that killed Officer Hawkins, his jury had to answer this question, and had to answer it in the affirmative for Murphy to be sentenced to death. Assuming, *arguendo*, that the jury's affirmative answer to this question (referred to as a “special issue”) constitutes a finding that Murphy displayed a reckless indifference to life, then, if the jury found him guilty under the theory that required it to find he played a role in the robbery, the jury would have arguably made both of the findings required pursuant to this Court's opinion in *Tison*. However, because the jury returned only a general verdict, we do not know whether the jury convicted Murphy under the theory that required it to find he participated in the robbery. It is entirely possible he was convicted under one of the two theories that required the jury only to find Murphy entered into a conspiracy to commit robbery.

Under Texas law, conspiracy does not require any participation at all in the criminal objective of the conspiracy; it is a crime of agreement. *See* Tex. Penal Code § 15.02; *see also McIntosh v. State*, 52 S.W.3d 196, 199 (Tex. Crim. App. 2001).

While it is permissible under Texas law for someone to be convicted of capital murder under a felony-murder theory when he simply enters into a conspiracy to commit the underlying felony, this Court's Eighth Amendment jurisprudence establishes that additional findings must be made before such a defendant can be sentenced to death. Specifically, the jury must find that the defendant was a major participant in the underlying felony and that he displayed a reckless indifference to human life. Even if the special issue delineated above requires the jury to make a finding relating to the latter requirement, Texas law does not require any factfinder to answer any question relating to the defendant's degree of participation in the underlying felony.

This Court should therefore grant certiorari and hold that in cases involving non-trigger-persons sentenced to death on the basis of conspirator liability, the Texas death penalty scheme runs afoul of the Eighth Amendment because it allows such a defendant to be sentenced to death notwithstanding that the sentencing jury made no finding relating to his degree of participation in the underlying felony – including, specifically, no finding that the person sentenced to death was a major participant in the crime.

Opinions and Orders Below

The decision of the United States Court of Appeals for the Fifth Circuit was issued on June 11, 2018. *Murphy v. Davis*, No. 17-70030, 2018 WL 2945900 (5th Cir. 2018). The opinion is attached as Appendix A.

The Texas Court of Criminal Appeals issued its opinion affirming Murphy's conviction and sentence in direct appeal proceedings on April 26, 2006. *Murphy v. State*, No. AP-74,851, 2006 WL 1096924 (Tex. Crim. App. Apr. 26, 2006). The opinion is attached as Appendix B.

Statement of Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

The Sixth Amendment to the United States Constitution provides, in pertinent 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.

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. ROA.8033; ROA.8041.¹

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. ROA.8041. Rivas had told the group that no one was to hurt anyone during any of the burglaries. ROA.8044. 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. ROA.8045. 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. ROA.8042 (“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. ROA.8041-42. Murphy did not go into the store and stayed in the vehicle the group had driven to the store. ROA.8042. 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. ROA.8043. Again, Murphy stayed outside in the vehicle. Again, no one was hurt.

¹ Citations to the electronic record on appeal in the court below appear in this petition as ROA.[page number].

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. ROA.8046. 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. ROA.8046. 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. ROA.8046. 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. ROA.6944. 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. ROA.6944-46. After examining the store's security system, Rivas followed the same employee to the front of the store. ROA.6947-48. 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. ROA.6948-49.

The store employee testified that a group of six to eight armed men then surrounded him. ROA.6951. 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. ROA.6976-77. 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. ROA.6952.

The group of six robbers inside the store proceeded to take money and guns from the store. ROA.6959-64. Soon, Murphy let the group know (again through their two-way radios) that they needed to hurry because the police were on their way. ROA.6968. Rivas quickly exited the store through an emergency exit at the back of the store. ROA.8048. 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. ROA.8049.

Officer Aubrey Hawkins was the officer that went to the back of the store. ROA.8075-77. Rivas shot and killed the officer, and Rivas was shot (but not killed). *See id.* Rivas then made his way to the apartment complex where the group had agreed to meet. *See* ROA.8050. 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

² Harper committed suicide before being arrested.

B. Murphy's 2003 capital murder trial

There was no testimony at any point that Mr. Murphy was suspected of having fired a weapon during the robbery. Rather, the government's theory was that Murphy served as the lookout and getaway car driver during the robbery and subsequent shooting. ROA.6906.

The trial court's guilt phase charge presented to the jurors four theories under which they could find Murphy guilty of capital murder. ROA.1752-53. Under two of these four theories – i.e., the second and the fourth theories – the jury could have found Mr. 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 or killing Officer Hawkins. *Id.*

As trial counsel correctly recognized, these four theories involved two different ways by which Murphy could be found guilty of capital murder as a party to the murder. The first way (pertaining to the first and third charge options) the jury could find Murphy guilty would be to find that he aided or assisted in the robbery or murder under Texas Penal Code, section 7.02(a). ROA.7538. The second way (pertaining to the second and fourth charge options) the jury could find Murphy guilty would be to find that he, pursuant to Texas Penal Code, section 7.02(b), entered into a conspiracy to commit a robbery, and it was foreseeable a death would result from the robbery. *Id.* Trial counsel objected to the trial court's use of a

general verdict 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. ROA.7537-38. Trial counsel recognized whether Murphy was convicted under 7.02(a) (which would require the jury to find he assisted in some way) and 7.02(b) (which would only require the jury to be entered into a conspiracy) was crucial to the determination of whether Murphy's sentence would satisfy what is required under this Court's opinion in *Enmund*. *See id.* 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 this Court's rulings in *Enmund* and *Tison* had been adhered to. ROA.7538.

The trial court overruled trial counsel's objection, ROA.7538, and submitted a general verdict form to the jury, ROA.1754. Murphy's jury found him "guilty of capital murder, as charged in the indictment" on November 13, 2003. ROA.1754; ROA.7574. 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.

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 (the special issue delineated above was the second of three the jury answered) would ask the jury to make the findings required by this Court's opinions

handed down in *Tison* and *Enmund v. Florida*, 458 U.S. 782 (1982); 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. ROA.8270-72.

The jury subsequently answered future dangerousness special issue³ in the affirmative. ROA.1756; ROA.8340. The jury also answered the special issue delineated above that is required in cases where the defendant might have been convicted as a party⁴ in the affirmative. ROA.1756; ROA.8340. Finally, the jury answered the mitigation special issue⁵ in the negative. ROA.1756; ROA.8340-41. By operation of law, Murphy was sentenced to death. Tex. Code Crim. Proc. art. 37.071, § 2(g); ROA.8341.

³ 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).

⁴ Again, this special issue asks the jury to determine “whether the defendant actually caused the death of the deceased or did not actually cause the death or 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. ROA.1756; ROA.8273; ROA.8340.

⁵ 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 and state habeas proceedings

Murphy's brief on direct appeal was filed on September 20, 2004 and raised forty-two points of error. ROA.2371. Three of these claims alleged error with respect to the possibility Murphy had been convicted of capital murder as a conspirator. ROA.2468-72. Specifically, the eighteenth issue raised in 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. ROA.2468 (attached as Appendix C). (As noted above, section 7.02(b) addresses potential liability as a party for merely entering into a conspiracy.) Counsel's briefing in support of this claim appropriately directed the CCA's attention to the guilt phase charge conference. ROA.2468 (citing ROA.7537-38). That is the place where trial counsel argued that it made a difference whether Murphy was convicted under 7.02(a) or 7.02(b). Trial counsel's objections during the guilt phase charge conference were almost entirely focused on arguments that, in light of the fact that the jury could convict Murphy as a conspirator, a guilty verdict would not encompass the factual findings required by this Court's jurisprudence for Murphy to subsequently be sentenced to death. *See* ROA.7536-40.

The language used by the CCA in its opinion denying relief on the claim gives the appearance the court misapprehended the claim. The state court wrote that *Enmund* "does not prohibit a capital murder conviction for a non-triggerman under the law of parties." ROA.1719. The CCA observation that *Enmund* does not prohibit

a capital murder *conviction* is correct, but Murphy’s claim was that his *sentence* was unconstitutional. ROA.2468. And while the court wrote “conviction,” it is clear it understood Murphy’s claim related to his sentence. We can know this because the CCA cited its opinion in *Johnson v. State*, 853 S.W.2d 527 (Tex. Crim. App. 1992) (attached as Appendix D), in denying Murphy relief on this claim. ROA.1719. In *Johnson*, the CCA held that even a defendant convicted of capital murder for simply entering into a conspiracy can be sentenced to death because the special issue jury answer includes the findings required by both *Enmund* and *Tison*.⁶ *Johnson v. State*, 853 S.W.2d 527, 535 (Tex. Crim. App. 1992) (“*Therefore, the first special issue of Article 37.071(b) includes the Enmund and Tison findings.*”) (emphasis in original). (The Legislature amended the special issues in the time between the date the CCA issued its opinion in *Johnson* and the date it issued its opinion in *Murphy*, but the special issue at issue in *Johnson* was similar to the one Murphy’s jury had to answer⁷ in that both asked the jury to assess whether the defendant should have expected his actions would have led to the defendant’s death, and the CCA’s citing

⁶ The deliberateness special issue at issue in *Johnson* was asked in both law of parties cases and in cases where the State alleged the defendant was the primary actor. At the time of Johnson’s trial, juries had to decide “whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death would result.” *Johnson*, 853 S.W.2d at 535. Under current law, no question like this is asked unless the defendant is charged as a party. In those cases, a similar question is asked. *See infra* note 7.

⁷ I.e., “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).

Johnson in Murphy's direct appeal proceeding demonstrates the court confirmed this continues to be its position during Murphy's state habeas proceedings.⁸

ROA.1476-77.)

D. Federal habeas proceedings

Murphy filed his habeas petition in the district court on June 30, 2010.

ROA.65. The 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. ROA.91. The claim alleged this finding is required by *Enmund v. Florida*, as that case was clarified by *Tison v. Arizona*. ROA.92-93. 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*. ROA.93-95.

The Magistrate issued his findings and recommendations on November 29, 2016. The Magistrate misconstrued Murphy's claim pursuant to *Enmund* and *Tison* as having two parts: the first being that his conviction is unconstitutional under *Enmund* and *Tison* and the second being that his sentence is unconstitutional.

⁸ The court similarly explained in *Valle v. State*, 109 S.W.3d 500 (Tex. Crim. App. 2003), that it continues to believe that the rule from *Johnson* – i.e., that the special issues include the required findings not made during the guilt phase when a defendant is convicted as a conspirator – applies even after the wording of the special issues changed in 1991. See *Valle v. State*, 109 S.W.3d 500, 503-04 (Tex. Crim. App. 2003); see also ROA.1572 (Murphy's state habeas court's finding the special issues encompass the required findings).

ROA.1124-25. Of course, Murphy did not claim in the district court that the holdings in *Enmund* and *Tison* have any bearing on whether he could be convicted of capital murder. With respect to Murphy's actual claim (that his sentence was unconstitutional because the jury never had to find that he was a major part of the burglary and exhibited a reckless indifference to life), the Magistrate concluded the claim was unexhausted and procedurally barred. ROA.1125. In so doing, the Magistrate misconstrued Murphy's direct appeal claim and misunderstood the CCA's opinion denying relief on the claim. Alternatively, the Magistrate found, as had the state habeas court, that the claim lacked merit because the special issue that the jury had to answer before sentencing Murphy to death satisfied the dictates of *Enmund*. *Id.*

The district court judge adopted the Magistrate's finding and denied Murphy relief on the claims raised in his petition on March 31, 2017. ROA.1198-1200. The district court also denied Murphy a certificate of appealability on all claims. *Id.* On April 27, 2017, Counsel filed a motion that asked the district court to withdraw its March 31, 2017 opinion. The district court denied the motion on November 15.

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.⁹

Notwithstanding that fact, on June 11, 2018, the court of appeals issued an opinion denying Murphy a certificate of appealability on the claim, believing the claim to be “undebatably procedurally barred.” Appendix A at 10. As did the district court, the court of appeals failed to acknowledge the holding of *Johnson* – the case relied upon by the CCA in denying Murphy relief on his claim – is that the special issues are sufficient to insure that the sentencing jury makes the findings required by *Enmund* and *Tison*. See Appendix A at 12-13.

Reasons for Granting the Writ

- I. This Court has held that to be eligible for a death sentence under a felony-murder theory, the defendant must be found to have been a major participant in the felony. When a defendant is convicted of capital murder as a conspirator in Texas, the State’s death penalty scheme does not require any factfinder to make any finding related to the degree to which the defendant participated in the felony.**

In *Enmund v. Florida*, this Court held that, where a non-trigger person faces a death sentence, the Constitution requires that the jury consider both his degree of participation in the crime and his mental state regarding the possibility that the loss of life could occur. *Enmund v. Florida*, 458 U.S. 782, 788, 801 (1982). In *Tison v. Arizona*, the Court refined *Enmund*’s personal culpability requirement, holding the Eighth Amendment will not permit a defendant convicted of capital murder under a felony-murder theory to be sentenced to death unless the defendant was a

⁹ 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.

major participant in the felony and displayed a reckless indifference to human life. *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

During Murphy's trial, because of the instructions given to the jury, the jury did not have to find Murphy participated at all in the robbery. 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 a finding that he either intended to commit murder or was recklessly indifferent to human life *while being a major participant* in the robbery. The jury did not make findings regarding the level of Murphy's participation in the robbery or his mental state because State law did not require that it do so, and the trial court rejected defense counsel's request for an additional instruction that would have made clear whether the *Tison-Enmund* criteria were satisfied. In addition, the jury was also not required to assess Murphy's level of participation in the robbery. The second special issue asked the jury at the punishment phase to find whether Murphy "intended to kill the deceased or another or anticipated that human life would be taken." It did not address at all his level of participation in the robbery. The Texas scheme simply does not require the jury to make this finding.

This Court has clearly established the principle that a criminal defendant is entitled to a jury finding beyond a reasonable doubt of all facts exposing him to his punishment. "[U]nder 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 v. United States*, 526 U.S. 227, 243 n.6 (1999). Through the Fourteenth Amendment, this Court applied this rule to state crimes in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* holds that the jury must make all necessary findings that authorize the punishment that the defendant ultimately receives. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

Two years after *Apprendi*, in *Ring v. Arizona*, this Court applied the principles and holding of *Apprendi* to findings that make convicted murderers death eligible under state laws. The *Ring* Court held 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. We hold that the Sixth Amendment applies to both.” *Ring v. Arizona*, 536 U.S. 584, 609 (2002). The aggravating factors were “the functional equivalent of an element of a greater offense” and must be submitted to a jury. *Id.*

Only certain murders can lead to a sentence of death. And even among people found guilty of such a murder, under *Enmund* and *Tison*, only certain defendants are eligible for a death sentence. Functionally, the *Enmund* and *Tison* factors operate as aggravating factors that must be found beyond a reasonable doubt by a jury before a death sentence is permissible. The law threatens all those who conspire to commit a felony where death is a foreseeable result with time in jail, but

it threatens additional pains – death – only to those who intend to kill or those who, recklessly indifferent to human life, participate substantially in carrying out the felony. *Apprendi* and *Tison* make clear that these additional factors are the facts that make a person death-eligible. As such, they are functionally elements of the offense. Mr. Murphy is entitled to a jury finding that his conduct makes him death eligible.¹⁰

Further, regardless of whether this Court believes its holding in *Ring* requires the findings required by *Enmund* and *Tison* to be made by a jury, the Court should grant certiorari because, under Texas law, when a defendant is convicted of capital murder as a conspirator to a related felony, no factfinder has to make *any* finding regarding a defendant's degree of participation in the crime. Indeed, neither Murphy's jury, the trial court, nor any of the courts that have reviewed his case have made any findings regarding his degree of participation in the robbery.¹¹ The Court of Criminal Appeals could have done so, but that court

¹⁰ Although it is true that, several years before *Apprendi* and *Ring* were decided, this Court held in *Cabana v. Bullock*, 474 U.S. 376 (1986), that the *Enmund* findings need not be made by a jury, this holding entirely avoids the Sixth Amendment issue later addressed by *Ring*. The Sixth Amendment is only mentioned once in *Bullock*, for the proposition that the Sixth Amendment does not require jury sentencing, which is true, but not relevant to this claim. *See Bullock*, 474 U.S. at 375. Nothing in *Bullock* contradicts applying the Sixth Amendment holding of *Ring* to *Tison*, both decided after *Bullock*.

¹¹ Counsel is aware of only one other case in which a judge of the court of appeals addressed the questions presented in this petition. In the case of Nelson Gongora, Judge Owens found that the jury did not have to make the required findings after he was convicted of capital murder possibly as a conspirator and then sentenced to death. *Gongora v. Thaler*, 710 F.3d 267, 293 (5th Cir. 2013) (Owens, J., dissenting). Judge Owens believed the CCA made the required findings in direct

instead doubled down on its holding from thirteen years earlier in *Johnson* and held that the jury itself had already made the required findings when it answered the special issue. (As explained above, *Johnson* is the case upon which the CCA relied in denying Murphy relief and in which that court held that, even in cases where the defendant was convicted pursuant to Section 7.02(b), a Texas jury makes the findings required by *Enmund* and *Tison* when it answers the special issues. *Johnson*, 853 S.W.2d at 535.) Similarly, the district court and the court of appeals had the opportunity to make findings related to Murphy's degree of participation in the robbery, but neither addressed the merits of the claim.¹²

II. At least twenty-five Texas defendants have been sentenced to death after being convicted of capital murder under a theory that allowed the jury to find them guilty by simply finding they entered into a conspiracy to commit a felony that resulted in a death.

Petitioner is far from the only Texas defendant to have been sentenced to death after the jury that convicted him was able to find him guilty of capital murder simply because the jury found he entered into a conspiracy to commit a felony that resulted in a death. Counsel have identified twenty-four other cases similar to

appeal proceedings. *Id.* The other members of the *Gongora* panel did not address the issue because they found *Gongora* was entitled to relief on another claim. *Gongora*, 710 F.3d at 282.

¹² The state habeas court issued findings about Murphy's participation in the robbery but did not evaluate whether he was a major participant. ROA.1560.

Murphy's.¹³ Of these defendants, eight have been executed.¹⁴ Nine remain on death row.¹⁵

¹³ These defendants include: Kenneth Foster, see *Foster v. Quarterman*, 466 F.3d 359, 370 (5th Cir. 2006); Robert Thompson, see *Ex parte Thompson*, 179 S.W.3d 549, 552 (Tex. Crim. App. 2005); Rodolfo Medrano, see *Medrano v. State*, No. AP-75,320, 2008 WL 5050076, at *12 (Tex. Crim. App. Nov. 26, 2008); Jesse Jacobs, see *Jacobs v. Scott*, 31 F.3d 1319, 1322 (5th Cir. 1994); Kwame Rockwell, see *Rockwell v. Davis*, No. 4:14-cv-1055-O, 2016 WL 4398378, at *21 (N.D. Tex. Aug. 18, 2016); Sammie English, see *English v. State*, 592 S.W.2d 949, 953 (Tex. Crim. App. 1980); Irineo Montoya, see *Montoya v. State*, 810 S.W.2d 160, 165 (Tex. Crim. App. 1989); Miguel Paredes, see *Paredes v. State*, 129 S.W.3d 530, 538 (Tex. Crim. App. 2004); Christopher Solomon, see *Solomon v. State*, 49 S.W.3d 356, 367 (Tex. Crim. App. 2001); Nelson Gongora, see *Gongora v. Thaler*, 710 F.3d 267, 291 & n.27 (5th Cir. 2013); James Simmons, see *Simmons v. State*, 594 S.W.2d 760, 763 (Tex. Crim. App. 1980); James Clark, see *Clark v. Johnson*, 227 F.3d 273, 280 (5th Cir. 2000); Randy Arroyo, see *Arroyo v. Dretke*, 362 F. Supp. 2d 859, 877-78 (W.D. Tex. 2005); Edgardo Cubas, see *Cubas v. Thaler*, No. CIV.A. H-10-604, 2011 WL 4373196, at *1 n.3 (S.D. Tex. Sept. 16, 2011); John Falk, see *In re State ex rel. Weeks*, 391 S.W.3d 117, 126 (Tex. Crim. App. 2013); Humberto Garza, see *Garza v. State*, No. AP-75,217, 2008 WL 1914673, at *5 (Tex. Crim. App. Apr. 30, 2008); John Selvage, see *Selvage v. State*, 680 S.W.2d 17, 20 (Tex. Crim. App. 1984); G.W. Green, see *Green v. State*, 682 S.W.2d 271, 285 (Tex. Crim. App. 1984); Joseph Garcia, see *Garcia v. Davis*, 704 F. App'x 316, 320 n.1 (5th Cir. 2017); Ramon Hernandez, see *Hernandez v. State*, No. AP-74,451, 2005 WL 8154081, at *1 n.9 (Tex. Crim. App. Mar. 23, 2005); Walter Sorto, see *Sorto v. State*, 173 S.W.3d 469, 472 (Tex. Crim. App. 2005); Clinton Young, see *Young v. State*, No. AP-74643, 2005 WL 2374669, at *1 (Tex. Crim. App. Sept. 28, 2005); George Rivas, see *Rivas v. Thaler*, 432 F. App'x 395, 401 (5th Cir. 2011); and Santos Minjarez, see *Minjarez v. State*, No. AP-74,592, 2005 WL 3061981, at *1 (Tex. Crim. App. Nov. 16, 2005).

¹⁴ These include Robert Thompson, Jesse Jacobs, Irineo Montoya, Miguel Paredes, James Clark, G.W. Green, Ramon Hernandez, George Rivas. See https://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html.

¹⁵ These include Rodolfo Medrano, Kwame Rockwell (Mr. Rockwell is scheduled to be executed on October 24, 2018), Edgardo Cubas, John Falk, Humberto Garza, Joseph Garcia, Walter Sorto, Clinton Young. See https://www.tdcj.state.tx.us/death_row/dr_offenders_on_dr.html.

III. This Court should find the issue was exhausted in direct appeal proceedings.

The district court and the court of appeals deemed this issue unexhausted, but that conclusion is clearly erroneous, and consequently, there is no procedural impediment to this Court's using Murphy's case as the vehicle by which to address this deficiency in the Texas death-penalty scheme. The exhaustion doctrine requires that "a petitioner 'must have fairly presented the substance of his claim to the state courts.'" *Wilder v. Cockrell*, 274 F.3d 255, 259 (5th Cir. 2001) (quoting *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997)). A state court should be allowed the first opportunity to correct any constitutional violations arising from cases tried in its courts. *Rose v. Lundy*, 455 U.S. 509, 518 (1982). Murphy properly raised his *Enmund*-based claim in direct appeal proceedings before the CCA.

As explained above, the CCA's opinion indicates it understood precisely the nature of Murphy's claim – i.e., that his *sentence* is unconstitutional because he might have been convicted under section 7.02(b) and the Texas scheme does not require juries to make any finding related to a defendant's degree of participation in the felony in such cases. Indeed, there is no explanation for that court's citation to its opinion in *Johnson* in denying Murphy relief other than that it clearly apprehended the claim. However, even if the members of this Court are uncertain whether the CCA understood the claim, the Court should nonetheless find the claim was exhausted in direct appeal proceedings. Murphy's direct appeal claim could not have been clearer: it alleged the error pertained to his sentence, not conviction.

ROA.2468 (“Appellant directs this Honorable Court’s attention to Rep. R. Vol. 44 pp. 4-5 at which Appellant objected to the jury submission dealing with the law of parties as applied by the trial court in this case as it violated the holding of the United States Supreme Court in *Enmund v. Florida*, supra, which has specific requirements not found in the Texas Death Penalty Statute *before death can be imposed as a possible punishment.*”) (emphasis added). To be sure, direct appeal counsel cited the guilt-phase charge in the course of articulating this claim, but the reason counsel did so is because that is the location in the record where trial counsel argued that whether Murphy was convicted under 7.02(a) or 7.02(b) made a difference when considering whether any subsequent death sentence would run afoul of this Court’s Eighth Amendment jurisprudence. The exhaustion requirement requires that the claim be fairly presented to the state court, and Murphy’s claim was.

Conclusion and Prayer for Relief

This Court should grant certiorari and schedule this case for briefing and oral argument.

Respectfully submitted,



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

Counsel for Petitioner, Patrick Henry Murphy
*Member, Supreme Court Bar