No. 18-5948

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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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

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Introduction

Petitioner Patrick Henry Murphy filed his Petition for a Writ of Ceritorari ("Pet.") on September 10, 2018. Respondent filed her Brief in Opposition ("BIO") on October 12. Petitioner now files this Reply to Respondent's Brief in Opposition.[1]

Texas defendants can be convicted of capital murder and subsequently sentenced to death even if they did not actually kill the victim under one of two theories. Under Section 7.02(a) of the Texas Penal Code, a defendant can be found

[1] In this Reply, Petitioner addresses only those arguments made by Respondent he deems merit a reply.

guilty of capital murder if he aids, assists, solicits, or encourages another person to commit the offense. Tex. Penal Code § 7.02(a). When the jury finds a defendant guilty under this theory, it has made a finding related to the defendant's degree of participation in the offense, which this Court held in *Tison v. Arizona*, 481 U.S. 137 (1987), must be made before he can later be sentenced to death.

The second theory under which Texas defendants can be convicted of capital murder and subsequently sentenced to death is contained in Section 7.02(b). Under this theory, a defendant can be convicted of capital murder for simply entering into a conspiracy. Such a finding would not require the jury to find he participated to any degree in the offense. The Texas legislature could remedy this by enacting a statute that would require jurors to subsequently answer a question concerning the defendant's degree of participation in these cases, but the state's scheme as it now exists requires the jury to answer no such question.

This difference between convictions made pursuant to Section 7.02(a) and those made pursuant to Section 7.02(b) is the crux of both the questions presented in Murphy's Petition. Respondent's Brief makes no attempt to grapple with this distinction or to explain why any of the special issues presented to Texas jurors should be found by this Court as containing the findings required by *Enmund* and *Tison* in cases where the defendant might have been convicted under 7.02(b). Instead, Respondent has: 1) argued the fact that at least twenty-five Texas defendants might have been sentenced to death without any factfinder having made the findings required by *Tison* is not a compelling enough reason for the Court to

grant certiorari; and 2) attempted to obfuscate Murphy's argument by mischaracterizing his claim.

Counsel respectfully suggests this Court should reject Respondent's arguments, find the questions presented in Murphy's petition have been properly preserved for review, grant certiorari, and schedule this case for briefing and oral argument

I. At least eight Texas defendants who might have been sentenced to death as a conspirator under Texas Penal Code Section 7.02(b) have been executed. At least nine of the men currently on Texas' death row might have been sentenced to death as a conspirator.

In Murphy's Petition for a Writ of Certiorari, Counsel presented this Court a list of twenty-four other Texas defendants who were sentenced to death after being found guilty of capital murder as a conspirator. Pet. at 20-21 & n.13. Of these twenty-four, eight have been executed. Pet. at 21 & n.14. Nine remain on death row. Pet. at 21 & n.15. Respondent does not believe the lives of the eight men who have been executed or the nine who likely will be executed constitute "compelling reason[s] to expend limited judicial resources on this case." BIO at 13. Respondent is clearly wrong.

Respondent is also incorrect to suggest that this Court only grants certiorari to address conflicts among the federal courts of appeals. This Court has on multiple occasions granted certiorari to review questions arguably pertaining solely to Texas' death penalty statute. *See, e.g.*, *Moore v. Texas*, 137 S. Ct. 1039 (2017); *Penry v. Johnson*, 532 U.S. 782 (2001); *Penry v. Lynaugh*, 492 U.S. 302 (1989). The Court has done so because in these cases the Texas Court of Criminal Appeals ("CCA")

"decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

In Murphy's direct appeal proceedings, the CCA reaffirmed its decision in *Johnson v. State*, 853 S.W.2d 527 (1992). *Murphy v. State*, No. AP-74,851, 2006 WL 1096924, at *21 n.59 (Tex. Crim. App. Apr. 26, 2006). In *Johnson*, the CCA held that this Court's opinions in *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), present no impediment to a defendant's being sentenced to death when he was convicted of capital murder as a conspirator pursuant to Section 7.02(b) of the Texas Penal Code. *Johnson v. State*, 853 S.W.2d 527 (1992). This decision clearly conflicts with this Court's decision in *Tison*, in which the Court made clear that to be eligible for a death sentence, a defendant convicted under a felony-murder theory must have been a major participant in the felony. *Tison v. Arizona*, 481 U.S. 137, 158 (1987). In Mr. Murphy's case, that would mean to be eligible for death, some factfinder would have had to have found he was a major participant in the robbery at the sporting goods store which culminated in the murder of Officer Hawkins. No factfinder – neither the jury nor any of the courts reviewing Murphy's case – has made such a finding. Finding a defendant guilty of as a conspirator does not require a Texas jury to find he participated at all in the underlying felony. *See* Tex. Penal Code § 15.02. Likewise, none of the special issues Mr. Murphy's jurors had to answer during the punishment stage of his trial required them to make the finding required by *Tison*. *See* Tex. Code Crim. Proc. art.

37.071. The same is true for the other twenty-four defendants identified in Murphy's petition.

Respondent seems to believe that a state court can insulate its decisions from this Court's review by simply citing the relevant opinion or opinions from this Court. BIO at 13. This is, of course, incorrect in cases such as this, where the state court names the correct case but ignores the central holding of the case and does so as a matter of its regular practice. By holding that a person can be sentenced to death when no finding has been made as to the degree of his participation in the underlying felony, the CCA has misstated and repeatedly misapplied the rule of *Tison*.

II. Respondent's dividing the claim Murphy presented to the district court into two claims – one pursuant to the Sixth Amendment and one pursuant to the Eighth Amendment – is nothing more than another attempt to obfuscate Murphy's argument.

Murphy's trial counsel objected during the guilt phase charge conference to the trial court's decision to allow Murphy to be sentenced to death after possibly being convicted for entering into a conspiracy to commit the robbery that culminated in Officer Hawkins' murder. ROA.7537. Counsel argued the trial court's decision violated the Sixth and Eighth Amendments. ROA.7538. Murphy exhausted this claim in direct appeal proceedings by way of his eighteenth claim. Pet. at 12; Pet. App'x C. While the claim does not cite to the Sixth or Eighth Amendments, it cites to the pages of the record in which defense counsel made clear his objection was pursuant to both the Sixth and Eighth Amendments. ROA.2468 (citing ROA.7537-38). Respondent has not provided this Court with any reason to find the

portion of Murphy's claim related to the Sixth Amendment has not been exhausted. Respondent has instead argued this Court should find the Sixth Amendment argument constitutes a separate claim and thatthe claim is unexhausted and procedurally barred because it was not presented in state habeas proceedings. BIO at 16. A claim that was properly raised in direct appeal proceedings is not procedurally barred.

Only one claim raised in Murphy's petition in the district court is relevant to the questions presented in his Petition to this Court. 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 robbery. ROA.91. The Sixth Amendment is implicated by Murphy's claim because Counsel argued that pursuant to this Court's holding in *Ring v. Arizona*, 536 U.S. 582 (2002), such a finding must be made by the jury. ROA.97-100. The Sixth Amendment argument is, though, only a part of his Murphy's claim and not a separate claim. Moreover, the claim – including the portion implicating the Sixth Amendment – is consistent with Murphy's direct appeal claim that his jury did not have to make the findings required *Tison*.

While Respondent has relied extensively in her Brief on this Court's opinion in *Cabana v. Bullock*, 474 U.S. 376 (1986) to support her argument that these findings need not be made by a jury, as Murphy argued to the district court, *Bullock*

did not address the Sixth Amendment issue. ROA.100 n.8.[2] This Court has, in fact, not explained what impact *Ring* had on *Bullock* and should grant certiorari to address the issue.

To the extent Respondent's argument is that for the Sixth Amendment portion of Murphy's claim to be properly presented to this Court, Murphy had to argue to the state courts that it was not sufficient for a court, on review, to make the determinations required by *Tison* if they were not made by the jury, it is unclear how Respondent believes Murphy could have made this argument before federal habeas proceedings. Had the CCA, on direct review, issued an opinion in which it made the findings required by *Tison*, then Murphy could have addressed this in his state habeas application. The CCA made no such finding in its direct appeal opinion. Respondent's argument is that the state habeas court made the findings required by *Enmund* and *Tison*. BIO at 33. First, while the state habeas court made findings related to Murphy's involvement in the robbery, *see* BIO at 32, at no point did that court determine whether his involvement constituted the *major* participation required by *Tison*. Second, even if the state habeas court had made such a finding, there would have been no proceeding for Murphy to address that finding prior to his federal habeas proceedings. Finally and more importantly to the question of whether the argument was exhausted, if the state habeas court made the required findings as Respondent has argued, the state court clearly had an

[2] It is unclear how Respondent believes this Court's opinion in *Hopkins v. Reeves*, 524 U.S. 88 (1998), addresses *Ring*'s applicability to *Bullock* when it was handed down four years before *Ring*. See BIO at 25.

opportunity to answer the question of whether the Sixth Amendment dictates the required findings be made by the jury and answered the question in the negative, which is all that is required for the exhaustion doctrine to be satisfied. *See Picard v. Connor*, 404 U.S. 270, 275 (1971).

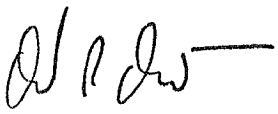
Furthermore, that Murphy's application for a certificate of appealability filed in the court of appeals does not contain his argument pursuant to *Ring* and *Apprendi*, does not mean his questions are not properly before this Court. The district court did not address whether the findings required by *Tison* must be made by the jury. The only issue relevant for Murphy's application for a certificate of appealability was whether reasonable jurists could disagree with the district court's opinion. Counsel was therefore restrained to the arguments addressed in the district court's opinion denying Murphy relief. Had the court of appeals granted Murphy a certificate of appealability, his subsequent briefing would have made the same argument pursuant to *Ring* contained in his petition filed in the district court. Moreover, as Counsel for Respondent is well aware, during oral argument convened in the court of appeals, the panel questioned Counsel extensively regarding whether the *Tison* findings must be made by the jury. *See* BIO at 26-27.

The question of whether the findings required by *Tison* must be made by the jury is properly before this Court. Respondent's attempt to divide Murphy's claim into two claims is nothing more than an attempt to obfuscate.

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