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See No Evil, Hear No Evil, Speak No Evil: An Argument for a Jury Determination of the Enmund/Tison Culpability Factors in Capital Felony Murder Cases

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SEE NO EVIL, HEAR NO EVIL, SPEAK NO EVIL: AN ARGUMENT FOR A JURY DETERMINATION OF THE *ENMUND/TISON* CULPABILITY FACTORS IN CAPITAL FELONY MURDER CASES

INTRODUCTION

"[D]eath is different."[1] When used to punish, death taps society's most primal urges. It is meant to be a deterrent for potential offenders, triggering in them the innate reflex for self-preservation. For society, it is meant to feed the primal desire for retribution. For these very reasons, it is often claimed that death is only reserved for the worst of the worst.

However, in trying to ensure that the above axioms remain true, courts have struggled.[2] Most capital murder prosecutions proceed in at least two phases: a guilt phase and a sentencing/penalty phase.[3] During the guilt phase, the Sixth Amendment entitles a defendant to a jury determination of every fact necessary to establish the elements of the offense with which he is charged.[4] In the sentencing phase, the judge or the jury weighs aggravating factors—facts or circumstances that, if found, militate for a harsher punishment—against mitigating factors—circumstances which call for a more lenient punishment—to determine the appropriate sentence for the defendant.[5] Until recently, the Supreme Court has held that the defendant does not have a constitutional right to a jury determination of sentencing factors in the sentencing phase.[6] In other words, Sixth Amendment rights that applied to factual determinations in the guilt phase had not been constitutionally required for factual determinations traditionally made in the penalty phase.[7] As capital criminal prosecutions developed, a clear line between the fact finding in the guilt phase and the fact finding in the sentencing phase crystallized.[8]

1. Gregg v. Georgia, 428 U.S. 153, 188 (1976).

2. Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 476 (2005).

3. *See e.g.*, *Gregg*, 428 U.S. at 195 (holding that a bifurcated criminal proceeding did satisfy constitutional concerns).

4. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speed and public trial, by an impartial jury . . . . ")

5. Spaziano v. Florida, 468 U.S. 447, 459 (1984).

6. *Id.*; *see also* Cabana v. Bullock, 474 U.S. 376, 385–86 (1986).

7. *Cabana*, 474 U.S. at 385–86.

8. John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1968 (2005).

Today, the border between guilt phase fact finding and penalty phase fact finding no longer exists. In a series of cases, the Supreme Court broadened the scope of a defendant's Sixth Amendment right to a trial by jury and has applied it to facts traditionally considered sentencing factors.[9] In *Apprendi v. New Jersey*, the Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[10] Labeling a fact as a "sentencing factor" no longer determines whether the defendant is entitled to a jury determination of that fact. The Court stated that the relevant inquiry as to whether a fact increases the penalty beyond the statutory maximum "is not one of form, but of effect."[11] If the finding of a fact has the effect of increasing the penalty beyond the statutory maximum, it must be found by a jury beyond a reasonable doubt, regardless of whether it is found in the guilt phase or the sentencing phase.[12]

Soon after the court established the *Apprendi* rule, it applied it to the question of whether statutory aggravating circumstances, which made capital defendants eligible for the death penalty in capital cases and were typically considered as sentencing factors, were required by the Sixth Amendment to be found by a jury beyond a reasonable doubt.[13] Reiterating its holding in *Apprendi*, the Court in *Ring v. Arizona* held that such aggravating factors must be found by a jury beyond a reasonable doubt, regardless of whether the state labeled such factors as sentencing factors or elements of an offense.[14]

But the scope of the holding in *Ring* was unclear. Exactly which facts did it cover? What about facts that proved a defendant's culpability? In *Tison v. Arizona*, the Supreme Court determined that in capital cases where the defendant was not the "triggerman," a finding that the defendant either intended to kill or that the defendant was a major participant in the felony and demonstrated a reckless indifference to human life was required before the death penalty could be imposed upon the defendant.[15] If such a finding was not made, then the imposition of the death penalty violated the Eighth Amendment's prohibition against grossly disproportionate punishment.[16] This

9. Cunningham v. California, 127 S.Ct. 856 (2007); Blakely v. Washington, 542 U.S. 296 (2004); Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000).

10. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

11. *Id*. at 494.

12. *Id.* at 490.

13. Ring v. Arizona, 536 U.S. 584, 597 (2002).

14. *Id*. at 609.

15. Tison v. Arizona, 481 U.S. 137, 157–58 (1986).

16. *Id.*; *see also* Enmund v. Florida, 458 U.S. 782, 788 (1982). "The Cruel and Unusual Punishments Clause of the Eighth Amendment is directed, in part, 'against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.'" *Id.* (quoting Weems v. United States, 217 U.S. 349, 371 (1910)).

holding substantially broadened the Court's previous rule, set forth in *Enmund v. Florida*, that a defendant who was not the actual killer could not be sentenced to death absent a finding that the defendant either attempted to kill, intended that a killing take place, or contemplated that lethal force would be employed.[17] For the purposes of this note, the *Enmund/Tison* culpability factors are the findings that (1) a felony-murder non-triggerman defendant either intended or attempted to kill, or (2) was a major participant in the underlying felony *and* displayed a reckless disregard for human life.

Since the *Ring* decision in 2002, lower courts have ruled that the Sixth Amendment principles established in *Apprendi* and *Ring* do not require that a jury make Eighth Amendment *Enmund/Tison* findings.[18] In making these holdings, the lower courts are mistaken in four respects: 1) the holdings mischaracterize the function of the *Enmund/Tison* findings; 2) the lower courts fail to recognize the vital role of the jury in deciding punishments based on a retributive theory of punishment; 3) the lower courts fail to recognize that the historical rationale on which *Apprendi* and *Ring* are based applies to the *Enmund/Tison* findings; and 4) the support the lower courts draw from the pre-*Apprendi* case, *Cabana v. Bullock*, is misplaced in light of the developments of the *Apprendi* line of cases.

This Comment argues that in light of the Supreme Court decisions in *Apprendi* and its progeny, the *Enmund/Tison* culpability findings for non-triggermen felony murderers must be made by a jury and found beyond a reasonable doubt. To establish this argument, Part I of this Comment examines the Eighth Amendment proportionality analysis in the context of capital punishment and how it serves as the basis for the *Enmund* and *Tison* decisions. Part II then examines the broadening effect the *Apprendi* line of cases had on a defendant's Sixth Amendment right to a trial by jury. Part III examines the lower court opinions which have declined to apply the *Apprendi/Ring* rule to the *Enmund/Tison* findings. Finally, Part IV critiques the lower court opinions and establishes that the Eighth Amendment proportionality analysis and the reasoning in the *Apprendi* line of cases requires that the *Enmund/Tison* findings must be made by a jury and proved beyond a reasonable doubt.

17. *Enmund*, 458 U.S. at 797.

18. Arizona v. Ring, 65 P.3d 915, 944 (Ariz. 2003) (en banc); Brown v. State of Oklahoma, 67 P.3d 917, 920 (Okla. Crim. App. 2003); Harlow v. State of Wyoming, 70 P.3d 179, 204 (Wyo. 2003) (where a jury did not make the requisite *Enmund/Tison* findings, the Wyoming Supreme Court reviewed the case record and found that the defendant was a major participant in the murder and acted with reckless indifference to human life).

I. EIGHTH AMENDMENT CAPITAL JURISPRUDENCE: CULPABILITY AND JUST DESSERTS

Although capital punishment has a long history at common law, modern-day capital punishment jurisprudence began in 1972 with *Furman v. Georgia*.[19] In five separate concurring opinions,[20] the Court struck down Georgia's death penalty law as violating the Eighth Amendment prohibition against cruel and unusual punishment because the decision of who should receive death penalty was left to the unguided discretion of the jury, which created the risk that it was applied in an arbitrary and capricious manner.[21] As a result, the reasoning in *Furman* invalidated all then existing state death penalty statutes.[22]

Cases after *Furman* established two principles as constitutional requirements for the imposition of the death penalty: (1) death penalty statutes must guard against arbitrariness by sufficiently guiding the sentencer's discretion;[23] (2) the death penalty may not be imposed if it is disproportionately excessive in light of the specific circumstances of the crime.[24] The proportionality analysis was clarified in *Coker v. Georgia*.[25] The Court stated that the death penalty is disproportionate, and therefore unconstitutional, if it "(1) makes no measurable contribution to acceptable goals of punishment;[26] . . . or (2) is grossly out of proportion to the severity of the crime."[27] The underlying principle to both inquiries in the proportionality analysis (and the Eighth Amendment generally) is that "the fundamental respect for humanity" must be maintained.[28] The proportionality test is

19. Furman v. Georgia, 408 U.S. 238, 333 (1972) ("Capital punishment has been used to penalize various forms of conduct by members of society since the beginnings of civilization.").

20. *See generally*, *id.* at 240 (Douglas, J., Brennan, J., Stewart, J., White, J., Marshall, J. concurring)

21. *Id.* at 313 (White, J., concurring) (stating "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."); JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 314-15 (West Group 2d ed. 1999).

22. *Id*.

23. Gregg v. Georgia, 428 U.S. 153, 196–97 (1976) (upholding Georgia's statutory aggravating factors); Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091, 1092 (2003).

24. *Gregg*, 428 U.S. at 187, 206.

25. Coker v. Georgia, 433 U.S. 584, 592 (1977).

26. The two most common goals are retribution, which focuses on the defendant's culpability to determine the severity of the punishment, and deterrence. *See infra* Part IV.2.

27. *Coker*, 433 U.S. at 592 (holding the imposition death penalty as grossly disproportionate to the crime of rape).

28. Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (striking down North Carolina's mandatory death sentencing statute); Lockett v. Ohio, 438 U.S. 586, 604–05 (striking down Ohio's statute which precluded the sentencer from considering mitigating factors at sentencing; because "the imposition of death . . . is so profoundly different from all other penalties[,] . . . [t]he

satisfied when the sentencer properly considers the "particularized nature of the crime and the particularized characteristics of the individual defendant."[29] The rationale underlying both the *Enmund* and *Tison* decisions was based on these proportionality principles.[30]

A. Capital Punishment and Felony Murder

Both *Enmund* and *Tison* were felony murder cases.[31] At common law, the felony murder rule provides that one who kills another during the course of a felony or attempted commission of a felony is guilty of murder.[32] By transferring a defendant's intent to commit the felony to satisfy the malice element of murder, the doctrine creates strict liability for deaths that occur during the course of a felony.[33] Liability also extends to accomplices to the commission of felonies who may have not actually killed the victim.[34] The underlying principle for this broad reach of liability is the fact that the death is directly linked to the felony and would not have occurred without it.[35] Accordingly, because non-triggerman felony murder defendants are held liable for murder, they are exposed to the same punishments as premeditated murders.[36]

B. Enmund v. Florida: *No Intent, No Death*

In 1982, in *Enmund v. Florida*, the Supreme Court addressed whether the Eighth Amendment prohibited imposition of the death penalty on non-triggermen defendants who did not kill, attempt to kill, or intend to kill.[37] The Court held that the Eighth Amendment prohibition against grossly disproportionate punishment precluded imposition of the death penalty on a defendant convicted of first-degree felony murder where no finding was made that the defendant killed or intend to kill.[38]

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need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non capital cases.").

29. *Gregg*, 428 U.S. at 206. The jury could "consider any aggravating or mitigating circumstance, [but it had to] find and identify at least one aggravating factor before it may impose a penalty of death." *Id*.

30. *See infra* Part I. 2–3.

31. *See generally* Enmund v. Florida, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987).

32. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 515 (Lexis Publishing 3d ed. 2001).

33. *Id*.; Lily Kling, *Constitutionalizing the Death Penalty for Accomplices to Felony Murder*, 26 AM. CRIM. L. REV. 463, 464 (1988).

34. DRESSLER, *supra* note 32, at 516.

35. Kling, *supra* note 33, at 464.

36. DRESSLER, *supra* note 32, at 515.

37. Enmund v. Florida, 458 U.S. 782, 787 (1982).

38. *Id*. at 797.

In *Enmund*, the defendant was the getaway driver in a double homicide armed robbery.[39] He was neither present when the plan to rob the victims was hatched nor when the actual killings took place.[40] Nonetheless, the defendant was convicted of first degree felony murder under a Florida statute that required proof beyond a reasonable doubt that the defendant was "actually present and was actively aiding and abetting the robbery or attempted robbery, and that the unlawful killing occurred in the perpetration of or in the attempted perpetration of the robbery."[41]

To determine whether Enmund's death sentence violated the Eighth Amendment, the Court looked at legislative judgments and jury decisions to ascertain the evolving standards of decency that establish what is cruel and unusual punishment.[42] The Court found that only eight of the thirty-eight states that permitted the death penalty allowed for its imposition solely for the defendant's participation in a robbery during which a murder was committed.[43] The Court also found that out of the 362 executions since 1954, only six were non-triggermen felony murderers.[44] A survey of the nation's death row population provided further evidence that juries rejected imposing the death penalty on non-triggerman defendants who did not participate in either the planning of or the actual killings.[45] Looking at this data, the Court found that society had come to reject the imposition of the death penalty for non-triggermen felony murderers who did not kill, attempt to kill, or intend to kill.[46]

The other factor the Court weighed in determining if the imposition of the death penalty was disproportionate for non-triggerman defendants was the individual defendant's culpability or "moral guilt."[47] For the imposition of the death penalty to pass the Eighth Amendment bar, the sentencer must grant individualized consideration to the relevant facts and character of the offender.[48] The Court found that "Enmund did not kill or intend to kill and thus his culpability [was] plainly different from that of the robbers who killed; yet the state treated them alike."[49] The State, through the statute, was not allowed to attribute the culpability of the actual killers to Enmund for the

39. *Id*. at 784.
40. *Id*. at 786.
41. *Id*. at 785.
42. *Id*. at 788–94.
43. *Enmund*, 458 U.S. at 792.
44. *Id.* at 794–95.
45. *Id*. at 795.
46. *Id*. at 794.
47. *Id*. at 798.
48. *Id*.
49. *Enmund*, 458 U.S. at 798.

purpose of implementing the death penalty.[50] Because Enmund lacked the intent to kill and did not consider that lethal force would be used during the crime, the Court found that the threat of the death penalty could not be a proper deterrent if the defendant did not contemplate that it would result from his actions.[51] Likewise, because Enmund did not possess the heightened culpability necessary of one who actually killed or intended to kill, executing Enmund would not have "measurably contribute[d] to the retributive end of ensuring that the criminal gets his just deserts."[52]

In the language of *Corker*, the Court found that putting Enmund to death made no measurable contribution to acceptable goals of punishment and was grossly out of proportion to the severity of the crime.[53] The result was that the death penalty could not be imposed on a non-triggerman felony murder defendant absent a finding that the defendant in fact killed, attempted to kill, or intended that a killing take place.[54]

The Court's ruling in *Enmund* did little in terms of giving guidance to how such findings should be made. A case with an identical fact pattern to *Enmund* would be easily decided, but the question of what facts indicated an intent or knowledge that lethal force would be used remained unanswered. Justice O'Connor's dissent in *Enmund* predicted this confusion because the ruling made "intent a matter of federal constitutional law, requiring [the] Court both to review highly subjective definitional problems customarily left to state criminal law and to develop an Eighth Amendment meaning of intent."[55]

C. Tison v. Arizona: *Recklessness Substitutes for Intent*

Nearly four years later, the Court revisited its ruling in *Enmund* in *Tison v. Arizona*.[56] In *Tison*, the defendants were convicted of first-degree felony murder after aiding family members escape from jail and murdering innocent passers-by during the course of the escape.[57] The Court held that although they did not kill or intend to kill, a finding that the defendants were major participants in the felony *and* that they exhibited a reckless indifference to human life satisfied the *Enmund* culpability requirement.[58]

50. *Id*.

51. *Id*. at 799.

52. *Id*. at 800–01.

53. *See supra* text accompanying notes 27–28.

54. *Enmund*, 458 U.S. at 801.

55. *Id*. at 825 (O'Connor, J., dissenting). This criticism applies equally to her decision in *Tison v. Arizona*, 481 U.S. 137 (1987), where the term "reckless" could be substituted for the term "intent."

56. Tison v. Arizona, 481 U.S. 137, 137 (1987).

57. *Id.* at 141–42.

58. *Id*. at 158.

The Court noted that *Enmund* dealt only with two distinct poles in the spectrum of felony murder cases.[59] On one end were those defendants who were only minor actors and not on the scene and who did not intend to kill and to whom no culpable mental state could be imputed.[60] On the opposite extreme were the felony murderers; those who actually killed, attempted to kill, or intended to kill.[61] In *Tison*, the Court narrowed the Eighth Amendment prohibition on the imposition of the death penalty by expanding the scope of the *Enmund* culpability factors to include a fourth category of defendants—those who were *major* participants in the underlying felony *and* manifested a reckless indifference to human life.[62]

The Court performed a similar analysis to that in *Enmund* and found that only eleven states did not allow the imposition of the death penalty for a defendant who was a major participant in the underlying felony and exhibited extreme recklessness.[63] More importantly, the Court reaffirmed the importance of an individualized determination of culpability by determining the severity of the punishment to be imposed on an offender. [64] In discussing the individualized determination of the defendants in *Tison*, the Court nodded to the trial court's determination that the defendants' participation in the crimes was "substantial."[65] The Court pointed out that the defendants were actively involved in the elements of the kidnapping and robbery and that they were both present when the victims were killed.[66]

This time, as opposed to *Edmund*, the individualized examination of the defendants' culpability resulted in a different conclusion as to whether putting the defendants to death contributed to an acceptable goal of punishment. The Court found that executing a defendant who manifested a reckless disregard for human life, a highly culpable mental state, did contribute to the retributive goal of "ensuring that a criminal gets his just deserts."[67]

Enmund and *Tison* established the required findings that a state must make before imposing death penalty on a non-triggerman felony murder defendant.[68] The Eighth Amendment does not bar the imposition of the death penalty on non-triggermen felony murder defendants who actually killed, attempted to kill, or intended to kill, or on those who were major participants in the

59. *Id*. at 149.
60. *Id*.
61. *Id*. at 150.
62. *Tison*, 481 U.S. at 158.
63. *Id*. at 154.
64. *Id*. at 156.
65. *Id*. at 158.
66. *Id*.
67. *See id.* at 149, 157.
68. *See generally* Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458, U.S. 782 (1982).

underlying felony and whose conduct exhibited reckless indifference to human life. [69] However, in neither case did the Court establish exactly who must make the findings. Was a defendant entitled to a jury to make these findings? Could the trial court make these findings?

II. SIXTH AMENDMENT CAPITAL JURISPRUDENCE: ELEMENTS OF THE OFFENSE VS. SENTENCING FACTORS

The Sixth Amendment right to a trial by jury in conjunction with the Due Process Clause "entitle[s] a criminal defendant 'to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'"[70] Before the decisions in *Apprendi* and *Ring*, this constitutional protection was confined to the guilt phase of capital prosecutions. Despite recognizing that capital sentencing resembles the guilt phase of a trial in some respects,[71] the Court held that the Sixth Amendment right to a trial by jury did not extend into the capital sentencing phase of a prosecution.[72] Thus, this distinction between the guilt phase and sentencing phase had significant consequences as to what facts a legislature designated as elements of the offense and which were merely sentencing factors. Elements of the offense had to be proved to a jury beyond a reasonable doubt; sentencing factors did not.[73] Moreover, the Court recognized that states had the power and the right to define those substantive elements of the offense which had to be proved beyond a reasonable doubt.[74] In the capital criminal proceeding *Walton v. Arizona*, the Court demonstrated the same deference to the states' power to define elements of an offense by concluding that the Constitution did not require that the State denominate aggravating circumstances as elements of a capital murder offense.[75] *Apprendi*, however, ushered in a new era where the

69. *Tison*, 481 U.S. at 158; *Enmund*, 458 U.S. at 801.

70. Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)).

71. Spaziano v. Florida, 468 U.S. 447, 458 (1984) ("'[E]mbarrassment, expense and ordeal' . . . faced by a defendant at the penalty phase of a . . . capital murder trial . . . are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial . . . .") (quoting Green v. United States, 355 U.S. 184, 187 (1957)).

72. *Id*. at 459 ("[A] capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the appropriate punishment to be imposed on an individual. The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.").

73. *Id.*

74. McMillan v. Pennsylvania, 477 US. 79, 85 (1986) ("[I]n determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive . . . .").

75. Walton v. Arizona, 497 U.S. 639, 649 (1990) (holding that as sentencing factors, the aggravating circumstances had to be found by a jury).

traditional distinction between the guilt phase and the sentencing phase is no longer valid.

A. Apprendi v. New Jersey: *Facts Without Borders*

In 2000, the ground shifted. The Supreme Court's decision in *Apprendi v. New Jersey*[76] held "that any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum *must be submitted to a jury*, and proved beyond a reasonable doubt."[77] In *Apprendi*, the defendant pled guilty to two counts of second degree possession of a firearm and one count of third degree possession of an antipersonnel explosive.[78] During a post conviction hearing, the prosecutor moved to increase Apprendi's sentence based on New Jersey's statutory hate crime sentence enhancer.[79] The statute defined a hate crime as one where the "defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race . . . ."[80]

The State argued that the judge could impose the increased sentence because the hate crime enhancement was a sentencing factor, not an element of the underlying offense[81] and that the Sixth Amendment only applied to the facts necessary to establish guilt.[82] Thus, once the jury returned a verdict of guilt beyond a reasonable doubt, the judge could then impose a sentence according to his discretion.[83]

Writing for the majority, Justice Stevens rejected the State's argument by examining the historical context out of which the Sixth Amendment arose.[84] The principle that a criminal defendant is entitled to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt" reaches back centuries into the common law.[85] Citing Justice Story, Justice Stevens paid homage to the right to a trial by jury as a "'guard against a spirit of oppression and tyranny on the part of rulers,' and 'the great bulwark of [our] civil and political liberties.'"[86]

Additionally, Justice Stevens noted that at the founding of the nation there was no distinction between an "element" of an offense and a "sentencing

76. Apprendi v. New Jersey, 530 U.S. 466 (2000).
77. *Id*. at 490.
78. *Id*. at 469–70.
79. *Id.* at 470.
80. *Id*. at 468–69.
81. *Id*. at 471–72.
82. *Apprendi*, 530 U.S. at 466.
83. *Id*. at 481.
84. *Id.* at 476–85.
85. *Id*. at 477 (quoting U.S. v. Gaudin, 515 U.S. 506, 519 (1995)).
86. *Id*. (quoting J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 540–41 (4th ed. 1873)).

factor."[87] The jury was charged with finding "all of the facts and circumstances which constitute the offense."[88] Because "[t]he substantive criminal law tended to be sanction-specific," once the verdict was entered, the judge had little discretion in imposing the sentence required by law.[89]

Due process cases that preceded and presaged *Apprendi* were also essential to the rationale underlying the *Apprendi* rule.[90] The Court stated that the due process "proof beyond a reasonable doubt" protections established in *In re Winship*[91] extended, "to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence."[92] A state could not avoid such protections by "redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment."[93]

Turning to the New Jersey Statute, the Court found that the hate-crime statute exposed a defendant convicted of a second degree weapons offense, to the same punishment as a first-degree weapons offense.[94] The decision to trigger the New Jersey statutory hate crime sentence enhancer was made by a judge after he found, by a preponderance of the evidence, that Apprendi unlawfully possessed a weapon for the purpose of intimidating the victim based on the victim's race.[95]

Because the hate crime statute called for an inquiry into Apprendi's mens rea in order to justify sentence enhancement, the Court noted that a "defendant's intent in committing a crime is . . . as close as one might hope to come to a core criminal offense 'element.'"[96] To determine whether a fact fell within the traditional jurisdiction of a jury, the question "is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[97] If yes, then such a finding must be made by a jury and proved beyond a reasonable doubt.[98]

87. *Id*. at 478.

88. *Apprendi*, 530 U.S. at 478 (quoting JOHN FREDERICK ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 44 (15th ed. 1862)).

89. *Id*. at 479.

90. *Id.* at 484–87.

91. *In re* Winship, 397 U.S. 358, 364 (1970) (holding "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

92. *Apprendi*, 530 U.S. at 484 (citing Alamendarez-Torres v. U.S., 523 U.S. 224, 251 (1998)(Scalia, J., dissenting)).

93. *Id*. at 485 (citing Mullaney v. Wilbur, 421 U.S. 579, 698 (1976)).

94. *Id*. at 491.

95. *Id*.

96. *Id*. at 493.

97. *Id*. at 494.

98. Ring v. Arizona, 536 U.S. 584, 609 (2002).

B. Ring v. Arizona: The Eighth Amendment and Sixth Amendment Confluence

The ruling in *Apprendi* was no minor shift in preserving the role of the jury in criminal procedure. In *Ring v. Arizona*,[99] the Court applied the new *Apprendi* rule to capital crimes. The Court overruled *Walton v. Arizona*[100] and held that Arizona's capital sentencing scheme, which required a judge determine the existence of aggravating factors required to impose the death sentence, violated the defendant's Sixth Amendment right that any fact increasing the penalty beyond the statutory maximum be found by jury beyond a reasonable doubt.[101]

On November 28, 1994, Timothy Ring and two other co-defendants robbed a Wells Fargo armored van and killed the driver.[102] Upon a search of Ring's house, the police found a duffel bag containing more than $271,000 in cash.[103]

At trial, the prosecutor submitted alternative theories of premeditated murder and felony murder.[104] However, the evidence was insufficient "to prove beyond a reasonable doubt that [Ring] was a major participant in the robbery or that he actually murdered [the victim]."[105] The jury was unable to convict Ring on the theory of premeditated murder but convicted him of first degree felony murder under the theory that the murder occurred during the course of an armed robbery (a felony).[106]

Under Arizona's sentencing scheme, the jury's verdict subjected Ring to a maximum punishment of life imprisonment unless a judge made additional findings of aggravating circumstances in a separate sentencing hearing.[107] The Arizona statute allowed the judge to determine at the end of the hearing whether any enumerated aggravating or mitigating circumstances were present.[108] If the judge determined that at least one aggravating circumstance was present and not outweighed by any mitigating circumstances that would call for leniency, the judge could sentence the defendant to death.[109]

Prior to Ring's sentencing hearing, one of his co-defendants struck a deal with prosecutors in exchange for testimony in which he would name Ring as

99. *Id.* (holding that the Sixth Amendment did not require a jury to find statutory aggravating factors that rendered a capital defendant eligible for the death penalty).

100. Walton v. Arizona, 497 U.S. 639 (1990).

101. *Ring*, 536 U.S. at 589.

102. *Id*.

103. *Id*. at 590.

104. *Id*. at 591.

105. *Id*. (quoting State v. Ring, 25 P.3d 1139, 1152 (2001) (first alteration in original)).

106. *Id*.

107. *Ring*, 536 U.S. at 592.

108. *Id*. at 592–93.

109. *Id*. at 593.

the leader of the group and as the one who shot and killed the victim.[110] The co-defendant testified at Ring's sentencing hearing accordingly.[111]

Because Ring was convicted under the felony murder theory and not premeditated murder, Ring was only eligible for the death penalty if *Enmund/Tison* findings were made.[112] The judge found that Ring was the actual killer, that Ring was a major participant in the armed robbery, and that Ring exhibited a reckless disregard or indifference to human life.[113] In making these findings, the judge cited the co-defendant's testimony at the sentencing hearing.[114]After finding two aggravating factors and determining that Ring's minimal criminal record did not call for leniency, the judge sentenced Ring to death.[115]

In considering whether Arizona's statute violated Ring's Sixth Amendment right as set forth in *Apprendi*, the Court began its discussion with a telling statement: "Based *solely on the jury's verdict* finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment."[116] Arizona required that in order for the death penalty to be legally imposed, at least one aggravating factor needed to be found by a judge beyond a reasonable doubt.[117] The rule in *Apprendi* specifically dealt with such schemes, did it not? The answer, even to the most casual observer, would have to be, yes.

Before answering the above question affirmatively, the Court had to deal with its prior ruling in *Walton*, which upheld the Arizona sentencing scheme at issue in *Ring*.[118] The reasoning in *Walton* was based on the pre-*Apprendi* notion that because an aggravator was not an element of the crime of capital murder and merely placed a "substantive limit on sentencing," such an aggravator or sentencing factor was not required to be found by a jury beyond a reasonable doubt.[119]

The Court's rationale for overruling *Walton* started with a historical analysis. Picking up where *Apprendi* left off, the Court looked to Justice Stevens's dissent in *Walton* for the historical context of the Sixth Amendment

110. *Id*.
111. *Id*.
112. *Id*. at 594.
113. *Ring*, 536 U.S. at 594.
114. *Id*.
115. *Id*. at 594–95.
116. *Id*. at 597 (emphasis added).
117. *Id*.
118. Walton v. Arizona, 497 U.S. 639, 649 (1990).
119. *Id*. The *Walton* Court relied on the ruling in *Cabana v. Bullock* which stated that because the *Enmund* findings entailed no "element of the crime of capital murder" and only "place[d] a substantive limitation on sentencing" such findings were not required to be made by a jury. *Id*.

right to a jury trial. Justice Stevens argued that the "Sixth Amendment requires a jury determination of facts that must be established before the death penalty may be imposed. Aggravators operate as statutory elements of capital murder under Arizona law because in their absence, [the death] sentence is unavailable."[120] Stevens pointed out that a jury in 1791 "had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense."[121] The jury's right to determine issues such as the defendant's eligibility for capital punishment and "which homicide defendants would be subject to capital punishment by making factual determinations . . . related to . . . assessments of the defendant's state of mind" was unquestioned by the time of the adoption of the Bill of Rights.[122]

The Court moved on to the *Apprendi* ruling, reasserting the Court's rationale that "the dispositive question is not one of form but of effect."[123] If a fact exposes the defendant to a "penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone," that fact, no matter how the state labeled it, must be found by a jury beyond a reasonable doubt.[124] The Court concluded, "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury."[125]

C. Blakely v. Washington:[126] *Apprendi's Rule Solidified*

Shortly after the Supreme Court reaffirmed *Apprendi*'s rule in *Ring*, the Court's decision in *Blakely v. Washington* expressed the Court's commitment to *Apprendi* and "the need to give intelligible content to the right of jury trial."[127] Although *Blakely* was not a capital felony murder case, its strong endorsement for the rule in *Apprendi* and *Ring* make it significant to this Comment's discussion.

The defendant in *Blakely* pled guilty to kidnapping his estranged wife.[128] The facts set forth in the plea exposed the defendant to a maximum sentence of fifty-three months.[129] In compliance with Washington state law, a judge,

120. *Ring*, 536 U.S. at 599 (citing Walton v. Arizona, 497 U.S. 639, 709 (1990) (Stevens, J., dissenting)).

121. *Id*. (quoting Walton v. Arizona, 497 U.S. 639, 710–11 (1990)).

122. *Id*.

123. *Id*. at 602 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 (2000)).

124. *Id*. (quoting *Apprendi*, 530 U.S. at 483).

125. *Id.* at 609 (*Apprendi*, 530 U.S. at 494).

126. Blakely v. Washington, 542 U.S. 296 (2004).

127. *Id*. at 305.

128. *Id*. at 298.

129. *Id*.

sitting without a jury, imposed an "exceptional sentence of 90 months after determining that the defendant acted with deliberate cruelty."[130]

Justice Scalia, relying on the rule set forth in *Apprendi*, added language that clarified what the rule meant by "statutory maximum."[131] He wrote that the "statutory maximum . . . is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"[132] This bright line characterization of the maximum sentence a judge may impose ensures that "the judge's authority to sentence derives wholly from the jury's verdict."[133] Given that the historical context of the rule in *Apprendi* went back to common law at the time of the birth of our Nation, Justice Scalia's subtle, yet important, assertion "ensure[s] the [jury's] control in the judiciary" which the Founders envisioned.[134]

D. Cunningham v. California: *Apprendi's Reach Grows*

Recently, the Court added to the "intelligible content" of the Sixth Amendment by striking down California's determinate sentencing law in *Cunningham v. California*.[135] The Court held that because the law assigned the trial judge, and not the jury, the authority to find the facts that expose a defendant to an elevated "upper term sentence," the determinate sentencing law violated the rule established in *Apprendi*.[136]

California's determinate sentencing law provided that a statute defining the criminal offense allowed for three terms of imprisonment: a lower, middle, and upper term. [137] The middle term was the default term the judge must impose unless aggravating or mitigating factors called for the upper or lower term to be imposed.[138] The statute called for the trial judge to make the findings of aggravation or mitigation through a review of, among other things, the trial record, statements submitted by the parties, and additional evidence introduced at the sentencing hearing.[139] California's Judicial Counsel defined the phrase "circumstances in aggravation" to mean "*facts* which *justify the imposition* of the upper prison term."[140] Additionally, the statute prohibited the use of a "fact that is an element of the crime," to impose the upper term.[141]

130. *Id*.
131. *Id*. at 303.
132. *Blakely*, 542 U.S. at 303.
133. *Id*. at 306.
134. *Id*.
135. Cunningham v. California, 127 S.Ct. 856, 860 (2007).
136. *Id*.
137. *Id*. at 861.
138. *Id*.
139. *Id*. at 861-62.
140. *Id*. at 862 (emphasis added).
141. *Cunningham*, 127 S.Ct. at 862.

California argued that because the sentence enhancers were not essential to the determination of guilt, and that an aggravating circumstance need not be a fact, its determinate sentencing law did not violate the rule in *Apprendi*.[142] However, the Court rightly recognized California's first argument as proving the opposite conclusion.[143] The statute specifically did not allow elements of the charged offense to be used as aggravating circumstances. Therefore, the judge could only consider facts that were not found by a jury beyond a reasonable doubt as aggravating circumstances.[144] "Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, [California's determinate sentencing law] violates *Apprendi's bright line rule*."[145]

Blakely and *Cunningham* established two basic principles which further support the argument that *Apprendi* applies to *Enmund/Tison* findings. First, *Apprendi* established a "bright line rule."[146] Once it is determined that a fact exposes a defendant to a penalty beyond the statutory maximum, "that should be the end of the matter."[147] Second, "the constitutionality of a state's sentencing scheme [does not] turn on whether . . . it involves the type of fact finding 'that traditionally has been performed by a judge.'"[148]

III. THE LOWER COURTS DO NOT OBLIGE: *ENMUND* AND *TISON* ARE LEFT OUT

After the Court's decision in *Ring*, the scope of its application was unclear. Questions about the *Ring* decision's effect on a defendant's right to a jury determination of the *Enmund/Tison* findings, however, did not linger long. Two lower court cases, *State v. Ring* ("Ring III") and *Brown v. State*, are illustrative of the rationale used in holding that the rule in *Apprendi* and *Ring* does not apply to the *Enmund/Tison* findings.[149]

To properly understand the rationale behind the lower courts' denial to extend *Ring* to the *Enmund/Tison* findings, it is first necessary to examine the case on which their holdings rested, *Cabana v. Bullock*.[150] Four years after the Court decided *Enmund*, it directly addressed whether an *Enmund* finding was

142. *See id.* at 868.

143. *Id.* at 868.

144. *Id.*

145. *Id*. (emphasis added).

146. *Id.* (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

147. *Cunningham*, 127 S.Ct. at 868 (quoting Blakely v. Washington, 542 U.S. 296, 313 (2003)).

148. *Id.* (quoting People v. Black, 113 P.3d 354, 542 (Cal. 2005)).

149. State v. Ring, 65 P.3d 915 (Ariz. 2003) (en banc) (*Ring III*); Brown v. State, 67 P.3d 917 (Okla. Crim. App. 2003).

150. Cabana v. Bullock, 474 U.S. 376 (1986).

required by the Sixth Amendment to be found by a jury beyond a reasonable doubt.[151]

A. Cabana v. Bullock: *The Precedent*

In *Cabana*, the defendant was convicted of first degree capital murder based on a felony murder theory and sentenced to death as permitted by Mississippi statute.[152] The trial record indicated that Bullock was not the actual killer and that the jury may have sentenced him to death without ever having considered whether he killed or intended to kill (findings required by *Enmund*).[153]

However, the Court held that the Eighth Amendment did not require that the jury make the *Enmund* finding so long as it was made "by any court that has the power to find the facts and vacate the sentence."[154] The Court's rationale was two pronged.

First, it distinguished the *Enmund* finding as one of culpability and not an element of the offense.[155] Because the finding concerned the level of culpability of the defendant and did not go to his guilt or innocence, the Court found the *Enmund* findings fundamentally different than those which are required by the Sixth Amendment to be found beyond a reasonable doubt.[156] To support its distinction, the Court noted that *Enmund* findings did not affect the "definition of any substantive offense, even a capital offense."[157] Based on this distinction, the Court placed the *Enmund* findings in a general class that goes to the decision as to whether a particular sentence is appropriate, also known as sentencing factors.[158] The Sixth Amendment had not been held to encompass these types of findings.[159]

Secondly, because *Enmund* did not "impose any particular form of procedure on the states[,] [a]t what precise point . . . a state chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution."[160] The Court reasoned that if a defendant who actually killed, intended to kill, or attempted to kill during the commission of a felony was sentenced to death and executed, his execution would not violate the Eighth Amendment no matter who made the requisite culpability determination.

151. *Id*.

152. *Id*. at 381.

153. *Id*. at 379, 384. Because the jury did not make the requisite findings required by *Enmund*, the Fifth Circuit reversed Bullock's death sentence. *Id.* at 384.

154. *Id*. at 386.

155. *Id*. at 385.

156. *Cabana*, 474 U.S. at 385.

157. *Id*.

158. *Id*.

159. *Id*. at 385–86.

160. *Id*. at 386.

Therefore, it would likewise not matter who made the determination that the defendant lacked the requisite culpability.[161]

While the *Cabana* decision only contemplated the requisite culpability determination as set forth in *Enmund*, the decision in *Tison* did not fundamentally alter the rationale of the arguments in *Cabana*. Although the holding in *Tison* broadened the class of persons eligible for the death penalty, it was a direct descendant of *Enmund*.[162] After the decision in *Ring*, *Cabana* was dusted off and trotted out.

B. State v. Ring (Ring III): *Dusting Cabana Off*

By April 2003, Ring's case, consolidated with all capital cases, was on direct appeal from Superior Court to the Supreme Court of Arizona.[163] The court addressed whether the *Apprendi/Ring* Sixth Amendment principles required a jury to make the *Enmund/Tison* findings.[164] The Arizona Supreme Court held that the principles in *Apprendi/Ring* did not apply to findings.[165] The court relied on the Supreme Court's 1986 decision in *Cabana v. Bullock*.[166] The *Cabana* Court held that the Constitution did not require that a jury make a determination of the defendant's level of culpability in capital felony murder cases.[167] The Arizona court was particularly taken with the language in *Cabana* that the ruling in *Enmund* did not establish any "new elements of the crime that must be found by a jury."[168] Rejecting *Ring's* applicability to the *Enmund/Tison* findings, the Arizona court reformulated the determinative question in *Apprendi* and *Ring*.[169] The question, as it applies to the *Enmund/Tison* elements is not whether the state met its burden with regard to the defendant's culpable mental state, but whether the defendant's culpable mental state is such that the government can administer the death penalty consistently with the Eighth Amendment.[170] The Arizona Supreme Court distinguished the *Enmund/Tison* findings from substantive elements of a greater offense by characterizing the *Enmund/Tison* findings as a "judicially crafted instrument used to measure proportionality between a defendant's criminal culpability and the sentence imposed."[171]

161. *Id*.
162. *See supra* text accompanying notes 64–65.
163. State v. Ring (*Ring III)*, 65 P.3d 915, 916 (Ariz. 2003) (en banc).
164. *Id*. at 944.
165. *Id*.
166. *Id*. at 945.
167. *Id*.
168. *Id*.
169. *Ring III*, 65 P.3d at 945.
170. *Id*.
171. *Id*. at 945–46.

C. Brown v. State: *A Different Take, the Same Result*

In another 2003 case, *Brown v. State*,[172] the Oklahoma Court of Criminal Appeals issued a similar holding to *Ring.* The court held that "[a]fter *Ring*, the *Enmund/Tison* determination may still be made by a court, even though a jury must make the factual finding of aggravating circumstances."[173] The court reasoned that the "*Enmund/Tison* determination does not make a murderer eligible for the death penalty. It is a limiting factor, not an enhancing factor."[174] The court concluded that once a defendant is eligible for the death penalty, the *Enmund/Tison* findings can be made by any tribunal.[175]

IV. ANALYZING WHAT THE LOWER COURTS HAVE WRONG

In holding that the Sixth Amendment does not require a jury to make the *Enmund/Tison* findings, the lower courts are mistaken in four important respects. First, the holdings in each case mischaracterize the function of the *Enmund/Tison* factors. Second, the holdings fail to consider the vital role of the jury in imposing punishments based on a retributive justification.[176] Third, the holdings ignore the historical rationale and purpose on which the *Apprendi*, *Ring*, *Blakely*, and *Cunningham* courts based the rule. Finally, the support the lower courts draw from *Cabana* is misplaced in light of the opinion in *Ring*.

A. Enmund/Tison Factors at Work

An examination of how the *Enmund/Tison* factors actually function is essential to the argument that they, like the aggravating circumstances in *Apprendi*, *Ring*, and *Blakely*, be found by a jury beyond a reasonable doubt as required by the reasoning in *Apprendi*. This examination must first be put in the context of the facts that the Court has already ruled facts which subject a defendant to a punishment beyond the statutory maximum.

In *Apprendi*, the Court found that a fact which related to the defendant's particular intent in committing the crime and exposed the defendant to a punishment that exceeded the statutory maximum must be found by a jury beyond a reasonable doubt.[177] To do so, the Court introduced the instrumental test in determining which facts the Sixth Amendment requires be found by a

172. Brown v. State, 67 P.3d 917 (Okla. Crim. App. 2003). Although the defendant in *Brown v. State* was not a "non-triggerman" defendant, the court's discussion and rationale for the *Enmund/Tison* factors applied to non-triggermen defendants as well.

173. *Id*. at 920.

174. *Id*.

175. *Id*.

176. The retributive theory is the only justification offered in either *Enmund* or *Tison* for imposing the death penalty on felony-murder defendants who did not actually kill. *See infra* Part IV.2.

177. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

jury beyond a reasonable doubt. The question was "one not of form but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[178] The Court found that the trial judge's determination that Apprendi's crime was motivated by racial bias and that his actions were intended to intimidate failed the newly created standard.[179] The Court reasoned that in order to make the finding that Apprendi committed his crime with the purpose to intimidate the trial judge had to make a particular factual finding regarding Apprendi's mens rea.[180] Because the New Jersey hate crime statute targeted a particular mens rea, "the defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'"[181]

Similarly, the *Blakely* trial court found, after the defendant pled guilty to second degree kidnapping, that the defendant acted with deliberate cruelty, a statutory aggravating factor, and sentenced the defendant to thirty-seven months beyond the statutory maximum allowed by the defendant's guilty plea.[182] This aggravating circumstance required the judge to consider the surrounding circumstances of the offense and make a determination as to the mens rea of the defendant when he committed the crime, namely that the defendant acted with deliberate or intentional cruelty. This factual determination, the Court held, violated the rule in *Apprendi*.[183]

The *Enmund/Tison* findings require a similar inquiry into the defendant's mens rea. For a non-triggerman capital murder defendant to be sentenced to death, he or she must have been a major participant in the crime *and* exhibited a reckless disregard for human life.[184] Thus, these factual inquiries expose a defendant to a greater sentence than constitutionally allowed in their absence. Although the *Enmund/Tison* determination is required by a constitutional proportionality requirement, and not by statute, it hardly seems logical that because the *Enmund/Tison* findings go to a constitutional limit, and not a statutory limit, they should be analyzed differently. Those states permitting capital punishment for non-triggermen felony murder defendants may only target those defendants who exhibit a particular mens rea. For defendants who did not kill but are charged with first degree murder based on the felony murder theory, the death penalty cannot be imposed unless they are found to have been a major participant in the crime and to have exhibited a reckless indifference to human life.

178. Apprendi v. New Jersey, 530 U.S. 466, 494 (2000).
179. *Id.* at 492.
180. *Id*. at 492–93.
181. *Id*.
182. Blakely v. Washington, 542 U.S. 296, 299–300 (2004).
183. *Id*. at 305.
184. *See supra* text accompanying note 69.

The Court in *Ring* applied the *Apprendi* rule to aggravating circumstances that exposed defendants found guilty of first degree murder to the death penalty.[185] Ring was convicted of first degree murder. After the verdict, the judge found two statutory aggravating circumstances which exposed Ring to the death penalty.[186] Because the Arizona statute required a judge make these findings before a defendant could be sentenced to death, the Court held the scheme violated the rule in *Apprendi* and the Sixth Amendment.[187] Arizona's statutory aggravating circumstances were created in response to the Supreme Court's holdings in *Furman* and *Gregg* that the Constitution requires the death penalty be administered in a way that is not capricious.[188] The aggravating factors had to narrow the class of persons subject to imposition of the death penalty.[189] The Court cited Thomas's concurring opinion in *Apprendi* to explain the function of the aggravators: "If the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] . . . the core crime and the aggravating fact together constitute an aggravated crime."[190]

It is difficult to see how the *Enmund/Tison* findings function differently than the aggravating circumstances in *Ring*. The findings narrow the class of citizens (felony murder defendants who did not kill) who may be subjected to the death penalty. Unless found to be a major participant in the crime and to have exhibited a reckless disregard for human life, a defendant who did not kill or intend to kill cannot sentenced to death.[191] If a state legislature defines first degree murder to include felony murder, but does not require a finding of the *Enmund/Tison* elements, these elements still must be found in order to sentence the defendant to death.[192] A first degree murder verdict does not expose a non-triggerman felony murder defendant to the death penalty just as a first degree murder conviction does not expose the defendant to the death penalty absent a finding of aggravating circumstances. Simply because aggravators are not enumerated in a statute does not take away from the role they play in a capital sentence for a non-triggerman defendant.

185. *See generally* Ring v. Arizona, 536 U.S. 584 (2002).

186. *Id.* at 594–95.

187. *Id.* at 589.

188. Ring v. Arizona, 536 U.S. 584, 606 (2002).

189. Zant v. Stephens, U.S. 862, 877 (1983).

190. *Ring*, 536 U.S. at 605 (quoting Apprendi v. New Jersey, 530 U.S. 466, 501 (2000) (Thomas, J. concurring)).

191. *See supra* text accompanying note 69.

192. *Id.*

B. Theories of Punishment: Felony Murder and the Jury

Although theories of punishment do not occupy an expressly stated role in the reasoning of the *Apprendi*, *Ring*, *Blakely*, or *Cunningham* opinions, consideration of the role these theories play does have an impact of the question of whom should make the *Enmund/Tison* determination. While the utilitarian principle of deterrence is often cited as a justification for the death penalty,[193] it has little to do with the decisions in *Enmund* and *Tison*. The rationale for both decisions was based on an Eighth Amendment proportionality analysis, which cited retribution as "acceptable goal of punishment."[194] Moreover, Justice Breyer argued in his concurring opinion in *Ring* that the Eighth Amendment requires jury sentencing in capital cases because the only justification for the imposition of the death penalty is retributive and that the jury is unique in its advantage "in determining, in a particular case, whether capital punishment will serve that end."[195]

The retributive theory of punishment is often criticized as a sort of raw vengeance masked by philosophy.[196] The underlying tenet to the theory is that "punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime."[197] The retributive theory is founded in natural and moral law dating back to the Bible, which viewed any injustice caused by another as an upset to the natural order.[198] Punishment, therefore, arises out of the need to restore that natural order, and "only the Law of retribution can determine exactly the kind and degree of punishment."[199]

Punishment based on retributive principles must be carefully calibrated to the offender's moral culpability. An offender's mental state is an essential element in determining the seriousness of an offense.[200] A criminal act that is

193. David Crump & Susan Waite Crump, *In Defense of Felony Murder*, 8 HARV. J.L. & P. POL'Y 359, 369 (1985).

194. *See generally* Tison v. Arizona, 481 U.S. 137 (1987). In fact, Justice O'Connor's opinion in *Tison* is devoid of any discussion of the utilitarian principle of deterrence as a justification for imposing the death penalty on a non-triggerman capital defendant.

195. Ring v. Arizona, 536 U.S. 584, 614 (2002) (Breyer, J., concurring) (dismissing the deterrence effect of the death penalty based on several empirical studies which show little to no deterrent effect resulting from the death penalty).

196. George Fletcher, *Reflections on Felony-Murder*, 12 SW. U. L. REV. 413, 426–28 (1981).

197. Immanuel Kant, *The Philosophy of Law*, *in* CASES AND MATERIALS ON CRIMINAL LAW 37–38 (West Group 2d ed., 1999).

198. Fletcher, *supra* note 205, at 426.

199. Immanuel Kant, *The Metaphysical Elements of Justice*, *in* CRIMES AND PUNISHMENT: CASES, MATERIALS, AND READINGS IN CRIMINAL LAW 188 (Matthew Bender, 3d ed., 2001).

200. Tison v. Arizona, 481 U.S. 137, 156 (2002) (referencing Locket v. Ohio, 438 U.S. 586 (1978)).

done more purposefully is more serious and therefore deserves a more serious punishment.[201]

In the context of the death penalty, and in particular felony murder defendants who did not actually kill the victim, retributive punishment is imposed by the jury acting as the moral compass of the community.[202] The jury is "more attuned to 'the community's moral sensibility.'"[203] The decision that a defendant be sentenced to death is an "expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."[204]

If it is the jury's role to mete out retributive justice, it can only perform its function if allowed to consider all facts and circumstances that are required to expose the defendant to the ultimate punishment. If a single government official makes any necessary factual determination whether an aggravating circumstance, or a constitutionally required factual determination such as the *Enmund/Tison* findings, the mechanism of justice is short-circuited. A jury that does not take into consideration the culpability of the defendant, which is the exact purpose of the *Enmund/Tison* findings, cannot make a proper determination as to whether the only adequate response to the defendant's conduct is the penalty of death.

C. The Historical Rationale and Purpose of Apprendi, Ring *and* Blakely

The historical role of the jury in criminal prosecutions provided the foundation for the holdings in the *Apprendi/Ring/Blakely* line of cases. When the same analysis of the jury's traditional role is applied to the *Enmund/Tison* findings, the same conclusion emerges: because *Enmund/Tison* findings are facts which expose a non-triggerman to the death penalty, the jury, not the judge, must find them beyond a reasonable doubt.

The Court in *Apprendi* anchored its extension of the Sixth Amendment right to a trial by jury in the role that the jury played in criminal proceedings historically.[205] Traditionally, the jury made a determination of all facts relevant to the guilt of the defendant. Once the guilty verdict was reached, the judge had little sentencing discretion.[206] "The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the

201. *Id.*

202. Ring v. Arizona, 536 U.S. 584, 615–16 (2002) (Breyer, J., concurring).

203. *Id.* at 615 (Breyer, J., concurring) (quoting Spaziano v. Florida, 468 U.S. 447, 481 (1984) (Stevens, J., concurring in part and dissenting in part)).

204. *Id.* at 616 (quoting Gregg v. Georgia, 428 U.S. 153 (1976) (Stewart, Powell, and Stevens, J. joint opinion)).

205. Apprendi v. New Jersey 530 U.S. 466, 478 (2000).

206. *Id.* at 479.

determination and sentence of the law."[207] Most importantly, at the time of the Nation's founding, the conceptual distinction between an element of the offense and a sentencing factor did not exist.[208] The jury was charged with finding "all the facts and *circumstances* which constitute the offense."[209] Therefore, those facts that later became known as sentencing factors, such as New Jersey's hate crime statute in *Apprendi* or statutory aggravating circumstances in *Ring*, were committed to the jury to find beyond a reasonable doubt.[210] The Court ruled as much two years after *Apprendi*.[211] Citing Justice Stevens's dissent in *Walton v. Arizona*, the Court in *Ring* acknowledged that if the question of whether aggravators operated as statutory elements of capital murder "had been posed in 1791, when the Sixth Amendment became law, the answer would have been clear [because] by that time . . . the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established."[212]

The reasoning in *Blakely* places the capstone on the revival of the historical right to a jury trial. The Court referenced several sources from the Nation's founding to place the role of the jury in its proper context.[213] Just as the founders sought to protect the peoples' control in the executive and legislative branches, they envisioned the jury as representing the peoples' "rightful controul in the judicial department."[214]

Against this historical backdrop, the assertion in *Cabana* that because an "Eighth Amendment violation can be adequately remedied by any court that has the power to find facts and vacate the sentence[,] [a]t what precise point . . . a State chooses to make the *Enmund*[/*Tison*] determination is of little

207. *Id.* at 479–80 (quoting WILLIAM BLACKSTONE, 3 COMMENTARIES 396).

208. *Id*. at 478.

209. *Id.* (quoting JOHN FREDERICK ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 44 (15th ed. 1862) (emphasis added).

210.

> Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, . . . the indictment . . . must expressly charge [the offence] to have been committed under those circumstances, and must state the circumstances with certainty and precision. [If] the prosecutor prove [sic] the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only.

Id. at 480–81 (quoting JOHN FREDERICK ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 51 (15th ed. 1862)).

211. *See* Ring v. Arizona, 536 U.S. 584, 609 (2002).

212. *Id*. at 599 (quoting Walton v. Arizona, 497 U.S. 639, 709–10 (1990) (Stevens, J. dissenting)).

213. Blakely v. Washington, 542 U.S. 296, 306 (2004).

214. *Id.* at 306 (quoting LETTER XV BY THE FEDERAL FARMER (Jan. 18, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 320 (H. Storing ed. 1981)).

concern from the standpoint of the Constitution" does not pass muster.[215] The precise point at which the *Enmund/Tison* determination is made may be of little concern as far as the Eighth Amendment goes;[216] however, it is crucial to whether the defendant's Sixth Amendment right to a trial by jury has been violated. Justice Blackmun's dissent in *Cabana* touches on this point. "*Enmund*[/*Tison* factors establish] a constitutionally required factual predicate for the valid imposition of the death penalty;" without these findings "a case may not pass into that area in which the death penalty is authorized by the Eighth Amendment."[217] This is a factual determination which increases a defendant's maximum punishment from life to death. Based on the Supreme Court's decisions and reasoning in *Apprendi*, *Ring*, and *Blakely*, the answer can only be that the jury alone has the power to make this determination. The Sixth Amendment right to a jury trial is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure" that ensures the people's "control in the judiciary."[218]

D. Retiring Cabana v. Bullock

Neither of the opinions in *Ring III* or *Brown* devotes much analysis to the question of whether the *Enmund/Tison* elements need to be found by a jury beyond a reasonable doubt as required by the Sixth Amendment.[219] The Court in each case was content to invoke principles asserted in *Cabana* and move on to hold that the Sixth Amendment holding of *Ring* does not extend to the Eighth Amendment *Enmund/Tison* factors.[220] If these Courts were to consider the question thoroughly, they would be obligated to come out differently.

The Court in *Ring III* relied directly on *Cabana's* holding that the "federal constitution does not require a jury to determine a defendant's level of culpability in capital felony murder cases."[221] The Court quoted *Cabana*'s reasoning that "'*Enmund*[*/Tison*] does not affect the state's definition of any substantive offense'" but only prohibits capital punishment on a class of persons who are guilty of capital murder under the state's definition of the

215. Cabana v. Bullock, 474 U.S. 376, 386 (1986).

216. However, this statement may not be entirely accurate. In both *Enmund v. Florida* and *Tison v. Arizona*, the Court closely examined jury verdicts and the reluctance of jurors to sentence homicide defendants who did not kill or intend to kill to death in its analysis as to whether the imposition of death penalty on such defendants violated the Eighth Amendment. *See supra* text accompanying notes 42–44, 63.

217. *Cabana*, 474 U.S. at 396 (Blackmun, J., dissenting).

218. *Blakely*, 542 U.S. at 305–06.

219. State v. Ring (*Ring III*), 65 P.3d 915, 944-45 (Ariz. 2003) (en banc)*;* Brown v. State, 67 P.3d 917, 920 (Okla. Crim. App. 2003).

220. *Ring III*, 65 P.3d at 945; *Brown*, 67 P.3d at 920.

221. *Ring III*, 65 P.3d at 945.

crime.[222] Because the *Enmund/Tison* findings do not go to the question of "whether the state has met its burden but whether, given a defendant's culpable mental state, the government can impose capital punishment consistent with the Eighth Amendment[]," the Court held, the distinction created in *Cabana* "[withstood] *Apprendi* and *Ring*."[223]

This "distinction" that *Cabana* created between elements of the offense[224] and the *Enmund/Tison* findings, however, is no longer intelligible. In 1986, when *Cabana* was decided, the Court subscribed to the understanding that a state's labeling a fact a sentencing factor rather than a substantive element of the offense controlled whether the Sixth Amendment right to a trial by jury attached to such a fact.[225]

Apprendi shifted this understanding, and since its decision has been handed down, the Court has been endeavoring to "give intelligible content to the Sixth Amendment right of jury trial."[226] This "intelligible content" began with *Apprendi*'s holding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[227] Central to the Court's reasoning in *Apprendi* was a desire to reign in a state's ability to define away constitutionally required facts.[228] The Court clarified this goal four years later, stating that "the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."[229]

Ring III was decided before *Blakely* clarified *Apprendi* and *Ring*. So, at the time, the superficial distinction between the substantive elements of a crime, which must be proved to a jury beyond a reasonable doubt, and the *Enmund/Tison* findings, which are sentencing considerations, was plausible.[230]

222. *Id*. (quoting Cabana v. Bullock, 474 U.S. 376, 385 (1986)).

223. *Id*.

224. The Court viewed aggravating factors as "substantive elements of the offense." *Ring III*, 65 P.3d at 945.

225. *Apprendi v. New Jersey* was a marked departure from previous Sixth Amendment jurisprudence. Prior cases allowed the states much latitude in defining what elements of an offense were and what were sentencing factors that justified either a more lenient or harsher punishment. *See supra* text accompanying notes 71–74.

226. Blakely v. Washington, 542 U.S. 296, 305 (2004).

227. Apprendi v. New Jersey, 530 U.S. 466, 489–90. *Ring v. Arizona* extended this exact holding to aggravating factors for capital murder cases. *Id.* at 490, 494.

228. *Apprendi*, 530 U.S. at 486.

229. *Blakely*, 542 U.S. at 303.

230. However, the Arizona Court could have come to the same conclusion based on the wording of the controlling question in *Apprendi*—"does the required finding expose the defendant to a greater punishment than that *authorized by the jury's guilty verdict*?" *Apprendi*, 530 U.S. at 494. The Court in *Blakely* held the same, only more emphatically. *Blakely*, 542 U.S. at 296, 303.

However, if the *Enmund/Tison* findings are placed into the intelligible content of the Sixth Amendment as described in *Blakely*, it is clear that the "distinction" that *Cabana* and *Ring III* contemplate disappears. If a jury finds a non-triggerman defendant guilty of first degree murder, without finding that the defendant intended to kill or was recklessly indifferent to human life and was a major participant in the murder, then presumably the judge would have to make the *Enmund/Tison* findings before the death penalty could be imposed.[231] Quite simply, this scenario would violate the defendant's Sixth Amendment right to a jury determination beyond a reasonable doubt of all essential facts for the imposition of a punishment under the *Apprendi/Ring/Blakely* analysis. In fact, until *Ring*, statutory aggravating factors were treated in the same manner as the *Enmund/Tison* findings.[232] It does not matter whether the *Enmund/Tison* findings are labeled as substantive elements because the controlling question is "not one of form, but of effect."[233]

Another troubling aspect of *Cabana*'s reasoning is its assertion that an "Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence. At what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the stand point of the Constitution."[234] This, indeed, is a puzzling statement. Essentially, the Court did not see a problem with allowing a jury to deliver a guilty verdict and declare that the defendant is unfit to live "without first considering his personal responsibility and moral guilt."[235] It hardly seems logical or judicially efficient to allow a jury to return a verdict for death without informing that jury of all constitutionally required facts necessary to impose the death penalty on a defendant. Allowing a judge or appellate court to make the requisite *Enmund/Tison* findings pushes these constitutionally required determinations as to whether a person may live or die to the position of a "judicial afterthought."[236]

The court in *Brown v. State* took a slightly different path to holding that the Sixth Amendment does not require that the *Enmund/Tison* elements be found by a jury.[237] However, as in *Ring III*, the court's reasoning was based on an untenable distinction between the function of aggravating circumstances and

231. As was the case in *Ring v. Arizona*, "The judge recognized that Ring was eligible for the death penalty only if he was [the] actual killer or if he was major participant in the armed robbery that led to the killing and exhibited a reckless disregard or indifference to human life." 536 U.S. 584, 594 (2002). The judge concluded that Ring was the actual killer and a major participant in the armed robbery "which carries with it a grave risk of death." *Id.*

232. *See generally* Walton v. Arizona, 497 U.S. 639 (1990).

233. *Apprendi*, 530 U.S. at 494.

234. Cabana v. Bullock, 474 U.S. 376, 386 (1986).

235. *Id.* at 397 (Blackmun, J., dissenting).

236. *Id.* at 394.

237. Brown v. State, 67 P.3d 917, 920 (Okla. Crim. App. 2003).

the *Enmund/Tison* findings. The main difference between the two, the court reasoned, was that the "*Enmund/Tison* determination does not make a murder eligible for the death penalty," but that it only serves as a limiting factor, not an enhancing factor such as aggravating circumstances.[238] The court went on to state that only after the defendant has been found eligible for the death penalty is the *Enmund/Tison* finding relevant.[239]

This distinction, too, can no longer said to be true, if it ever was at all. The court could have easily said that a defendant is not eligible for the death penalty unless the *Enmund/Tison* findings are made.[240] In fact, when the Court in *Ring* described the Arizona trial court's findings after Ring was found guilty of first degree murder by a jury, it stated that "the judge recognized that Ring was *eligible* for the death penalty only if" the *Enmund/Tison* findings were made.[241] The language the court in *Brown* uses seems more appropriate for a discussion weighing aggravating and mitigating circumstances in the sentencing phase.[242] However, the *Enmund/Tison* factors are not mitigators; they are findings of fact that are constitutionally required before a capital defendant who did not kill may be put to death.[243]

Additionally, strict adherence to the distinction that the court in *Brown* announced allows form to take precedence over effect, which is exactly what the Courts in *Apprendi*, *Ring*, and *Blakely* were trying to avoid. Because a non-triggerman defendant cannot be sentenced to death unless found to be recklessly indifferent to human life and a major participant in the felony, this factual determination is one that increases the maximum penalty that may be imposed. If a jury does not make this determination in its verdict, a judge must make this finding before imposing the death sentence, which, as stated before, is not permitted under *Apprendi/Ring/Blakely*. The labeling of the *Enmund/Tison* finding as one of limitation and not enhancement has no bearing on its actual function.

One last concern that both the *Ring III* court (indirectly) and the *Brown* court addressed is the fact that the *Ring* holding only extended *Apprendi*'s holding to *statutory* aggravating factors.[244] How, then, can the holding in *Ring*

238. *Id*.

239. *Id*.

240. In *Zant v. Stephens*, the Court noted that absent the finding of a statutory aggravating circumstance, "[a] case may not pass . . . into that area in which the death penalty is authorized." 462 U.S. 862, 872 (1983).

241. Ring v. Arizona, 536 U.S. 584, 594 (2002) (emphasis added).

242. Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) (stating that it is permissible "for judges . . . taking into consideration various factors relating both to offense and offender—in imposing a judgment with the range prescribe by the statute.").

243. *See supra* text accompanying note 68.

244. *See* State v. Ring, 65 P.3d 915, 945-46 (Ariz. 2003) (en banc); Brown v. State, 67 P.3d 917, 919-20 (Okla. Crim. App. 2003).

be said to encompass *Enmund/Tison* findings, which are required by the Eighth Amendment proportionality principles? Perhaps the main (and not so glamorous) reason is that the claim in *Ring* was narrowly crafted and it simply did not include the *Enmund/Tison* determination. This explanation, however, should not be dispositive of the issue. Justice Scalia gave some insight into the true nature of the inquiry in his concurring opinion in *Ring.* He wrote, "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the *imposition of the level of punishment* that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt."[245] This formulation of the Sixth Amendment right begs the question: what if the legislature does not include the essential fact in the statute at all, but the finding of the fact is required by the Eighth Amendment? Does the Sixth Amendment right vanish as to this fact? Hardly. In its capital punishment jurisprudence, the Supreme Court has deemed as an Eighth Amendment constitutional requirement a channeling and limiting of the sentencer's discretion in imposing the death penalty.[246] Legislatures responded to these limitations by incorporating aggravating factors that sufficiently narrow the class of eligible defendants, which *Ring* required to be found by a jury beyond a reasonable doubt.[247] As discussed earlier, the *Enmund/Tison* determination functions in the same way as the statutory aggravating factors.[248] A state legislature can no more avoid the Sixth Amendment jury trial guarantee by naming an aggravating factor "Mary Jane" than it can by simply omitting it from the statute.

CONCLUSION

A truism passes into the realm of meaningless cliché when it is repeated without one's giving thought to its significance or meaning. When it comes to a non-triggerman defendant's Sixth Amendment right to a jury determination beyond a reasonable doubt of *any* fact that exposes him or her to a sentence that exceeds the statutory maximum, how different is death? If and when the Supreme Court revisits this issue, it should apply *Apprendi's* bright line rule and that should be the end of the matter. The *Enmund/Tison* culpability findings function much like the facts in *Apprendi* and *Blakely* and the aggravating circumstances in *Ring* and *Cunningham*–they increase the maximum penalty a non-triggerman felony murder defendant could receive in their absence. *Apprendi* and *Ring* started the Sixth Amendment revival. Cases

245. Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) (emphasis added).
246. *Id.* at 606 (majority opinion).
247. *Id.* at 606–07.
248. *Supra* Part VI.1.

such as *Blakely* and *Cunningham* have strengthened it. All that is left is for the Court to bring the *Enmund/Tison* findings under the tent.

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