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# The Death Penalty and Sixth Amendment Right to a Jury Trial for Accomplices and Individuals Convicted of Felony Murder

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**THE DEATH PENALTY AND SIXTH AMENDMENT RIGHT  
TO A JURY TRIAL FOR ACCOMPLICES AND INDIVIDUALS  
CONVICTED OF FELONY MURDER**

**Courtney Eggleston\***

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## INTRODUCTION

The death penalty is a controversial issue with extensive roots in American history.<sup>1</sup> Some believe it should continue to be used as an effective tool for punishment,<sup>2</sup> while others consider it to be an unjust form of punishment that does little to actually deter murderers.<sup>3</sup> Many predict that the death penalty may soon be abolished, including the late United States Supreme Court Justice Antonin Scalia.<sup>4</sup> However, because the Supreme Court declined to find the death penalty unconstitutional in a recent Supreme Court case,<sup>5</sup> issues surrounding the constitutionality of the implementation of this type of punishment remain both relevant and necessary to continue to explore.

While there are many potential constitutional issues in connection with death penalty sentences, this comment analyzes the Sixth Amendment of the Constitution.<sup>6</sup>

First, a brief history of the death penalty will be examined.<sup>7</sup> Next, both the Sixth Amendment in connection with the death penalty as well as case law pertaining to accomplice and felony murder liability involving the death penalty will be addressed.<sup>8</sup> This section will begin by assessing how much protection the Sixth Amendment provides to defendants concerning their right to a jury trial by examining a range of

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1. See Sheherezade C. Malik & D. Paul Holdsworth, *A Survey of the History of the Death Penalty in the United States*, 49 U. RICH. L. REV. 693, 693–94 (2015).

2. See Symposium, *Be Careful What You Ask For: Lessons From New York's Recent Experience With Capital Punishment*, 32 VT. L. REV. 683, 689–91 (2008) (explaining different reasons behind supporting the death penalty, including what two scholars view as “the most important” contemporary justification: the retribution theory—“those who commit the most premeditated or heinous murders should be executed simply on the grounds that they deserve it”).

3. See John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J. L. & SOC. POL'Y 195, 312–26 (2009). This article argues that the death penalty will soon be abolished. It claims that the death penalty does not deter murderers and cites studies that show no causal relationship between death sentences and murder rates. “The death penalty saps the resources of America's criminal justice system, and at bottom, death sentences are only corrosive of our efforts to build a more just and less violent society.”

4. Martin Kaste, *Justice Scalia: 'Wouldn't Surprise Me' If Supreme Court Strikes Down Death Penalty*, NPR LAW, [www.npr.org/2015/10/21/450611707/justice-scalia-wouldnt-surprise-me-if-supreme-court-strikes-down-death-penalty](http://www.npr.org/2015/10/21/450611707/justice-scalia-wouldnt-surprise-me-if-supreme-court-strikes-down-death-penalty) (last visited December 20, 2015) (stating that Justice Antonin Scalia said “that he would not be surprised if the Supreme Court strikes down the death penalty”); see also Bessler, *supra* note 3, at 312–26 (arguing that the death penalty will soon be abolished).

5. See *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015) (“[W]e have time and again reaffirmed that capital punishment is not *per se* unconstitutional . . . we decline to effectively overrule these decisions.”).

6. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .”).

7. See *infra* Part IA.

8. See *infra* Part IB.

relevant case law and how this right has expanded over the years. This section will then discuss the case law on accomplice and felony murder liability; specifically, when defendants convicted under these laws may be sentenced to death.

Next, the legal problem will be addressed: specifically, the lack of case law on whether an individual who did not commit the underlying murder is entitled to have a jury determine aggravating and mitigating factors when assessing whether or not the death penalty should be implemented.

*Ring v. Arizona* and *Tison v. Arizona* will then be analyzed in depth.<sup>9</sup> *Ring* provides the recent and current approach to Sixth Amendment claims implicating the right to a jury trial brought by defendants who were sentenced to death for committing murder. *Tison* addresses when it is constitutional under the Eighth and Fourteenth Amendments to sentence an accomplice or someone involved in felony murder to death.

Finally, in light of analyzing these two cases, this Comment argues that the holding in *Ring* should extend to *Tison* cases.<sup>10</sup> In other words, accomplices and felony murder participants who face the death penalty should be entitled to the same Sixth Amendment protections as convicted murderers are per *Ring*. Therefore, juries and not judges must assess aggravating and mitigating factors when there is a finding of fact that increases a defendant's maximum punishment regardless of whether or not they were the actual murderer.

## I. BACKGROUND

### A. History of Death Penalty

The death penalty has been utilized as a legitimate form of punishment in the United States since the country's formation.<sup>11</sup> In assessing the constitutionality of the death penalty, it has been argued that the text of the Constitution's Fifth Amendment demonstrates the founders' acceptance of the death penalty.<sup>12</sup> The Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."<sup>13</sup> This Amendment has been construed to imply that "the framers of the Constitution understood and agreed

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9. See *infra* Part III.

10. See *infra* Part IV.

11. See Malik & Holdsworth, *supra* note 1, at 695 ("For better or worse, the death penalty was a staple of criminal justice in early America; it was both widely accepted and largely uncontroversial.")

12. See *id.*

13. US Const. amend. V.

that life could be constitutionally taken assuming there was due process of law.”<sup>14</sup>

The death penalty was originally used as a form of punishment for a range of crimes, including murder, witchcraft, or practicing Quakerism.<sup>15</sup> After this initial widespread use, America began using the death penalty for serious crimes exclusively.<sup>16</sup> There were also movements during the mid- to late 1800s to abolish the death penalty, but no significant traction was made.<sup>17</sup> There was another movement during the 1950s and 1960s, and the use of the death penalty continued to decrease.<sup>18</sup> Although some states have chosen to abolish the death penalty as a form of punishment, it remains a constitutionally permissible sentence to employ if the states or federal government choose to use it.

### *B. Modern Elaboration on Constitutionality of the Death Penalty*

In 1972, the Supreme Court found that a state’s death penalty that gave virtually complete discretion to the jury in implementing the death penalty violated the Eighth Amendment as cruel and unusual punishment.<sup>19</sup> While this case could have marked the end of the death penalty, in a subsequent case, the Court upheld versions of states’ death penalty laws that granted juries some discretion in applying the death penalty;<sup>20</sup> in other words, state laws that gave total discretion to juries as well as state laws that gave juries no discretion in imposing the death penalty were unconstitutional.<sup>21</sup> In order for a state law to be constitutional, it must satisfy the Court’s criteria.

The Court tolerates states’ experimentation with the death penalty, provided that states (1) give juries some criteria—usually in the form of aggravating factors—to determine whether the defendant is eligible for the death penalty, and (2) allow juries the opportunity

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14. See Malik & Holdsworth, *supra* note 1, at 695 (“The Fifth Amendment states, ‘No person shall . . . be deprived of life, liberty, or property’ although with the very important caveat, ‘without due process of law.’ In other words, the framers of the Constitution understood and agreed that life *could* be constitutionally taken assuming there was due process of law.”).

15. *Id.* at 695.

16. See *id.* at 696 (“Many states reduced the list of capital offenses to murder, rape, or treason.”).

17. See, *id.* at 697–99; see also, Lyn Suzanne Entzerth, *The End of the Beginning: The Politics of Death and the American Death Penalty Regime in the Twenty-First Century*, 90 OR. L. REV. 797, 802–03 (2012) (explaining that several states abolished the death penalty from the 1840s to the early 1900s, but some went on to reinstate it).

18. See Entzerth, *supra* note 18, at 803.

19. See *id.* at 804 (describing *Furman v. Georgia*, 408 U.S. 238 (1972)).

20. See *id.* at 807 (describing *Gregg v. Georgia*, 428 U.S. 153 (1976)).

21. *Id.* at 807–08.

to consider mitigating evidence and perform individualized sentencing to impose a sentence less than death, if warranted.<sup>22</sup>

Since this modern elaboration on crafting death penalty laws, the Supreme Court has imposed some additional restrictions. For example, “in 2002 and 2005, the Court restricted the states’ prerogatives in structuring their capital sentencing regimes by forbidding the imposition of the death penalty on mentally retarded offenders and juvenile offenders.”<sup>23</sup> The Court has also held that “the death penalty is an excessive punishment for ordinary crimes in which the victim is not murdered,” including raping a child.<sup>24</sup>

### C. *Constitutional Issues Surrounding the Imposition of the Death Penalty:*

#### 1. *Death Penalty and the Sixth Amendment*

Over the years there have been constitutional challenges to various death penalty laws claiming violations of the Sixth Amendment. Among other things, the Sixth Amendment guarantees that a defendant will be tried before an impartial jury in criminal cases.<sup>25</sup> However, the determination of what the right to a jury trial means has evolved over the years. The following cases illustrate an expansion in terms of the scope of a defendant’s Sixth Amendment right: initially the right was interpreted to allow for judicial override of jury determinations but over time the right has expanded to require a jury to make any findings that increase the statutory maximum punishment, including aggravating factors.<sup>26</sup>

#### *Spaziano v. Florida*

In *Spaziano v. Florida*,<sup>27</sup> the Supreme Court held that it did not violate the Sixth Amendment when a judge overrode the jury’s sentence in imposing the death penalty.<sup>28</sup> In *Spaziano*, the defendant

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22. *Id.* at 809 (referencing *Gregg*, 428 U.S. at 153).

23. *Id.* at 815 (referencing *Atkins v. Virginia*, 536 U.S. 304, 319–21 (2002) in regards to the mentally retarded death penalty limitation and *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) in regards to the juvenile death penalty limitation).

24. See Entzeroth, *supra* note 18, at 815–16 (explaining the holding in *Kennedy v. Louisiana*, 554 U.S. 407, 420–21 (2008)).

25. US Const. Amend. VI.

26. See *Walton v. Arizona*, 497 U.S. 639, 648 (1990) (quoting *Poland v. Arizona*, 476 U.S. 147 (1986)) (“Aggravating circumstances are not separate penalties or offenses, but are ‘standards to guide the making of [the] choice’ between the alternative verdicts of death and life imprisonment.”).

27. *Spaziano v. Florida*, 468 U.S. 447 (1984).

28. *Id.* at 465–66 (“The advice does not become a judgment simply because it comes from the jury.”).

was found guilty of first-degree murder and the jury recommended the defendant serve life in prison.<sup>29</sup> Based on Florida's state laws, the judge conducted his own assessment of the aggravating and mitigating circumstances, overrode the jury's sentence, and imposed the death penalty.<sup>30</sup>

The Supreme Court upheld the judge's conviction holding that: "Regardless of the jury's recommendation, the trial judge is required to conduct an independent review of the evidence and to make his own findings regarding aggravating and mitigating circumstances."<sup>31</sup> They concluded that as long as the judge's override was not based on an arbitrary or discriminatory imposition of the death penalty, it was valid.<sup>32</sup>

*Walton v. Arizona*

Similarly, in *Walton v. Arizona*,<sup>33</sup> the Supreme Court upheld a judge's imposition of the death penalty after he found the requisite aggravating factors.<sup>34</sup> In his appeal, the defendant claimed that this decision was unconstitutional because a judge and not a jury imposed the death penalty.<sup>35</sup> In explaining their decision, the Court relied on *Cabana v. Bullock*,<sup>36</sup> which held that the Sixth Amendment does not provide "a defendant with the right to have a jury consider the appropriateness of a capital sentence."<sup>37</sup> They went on to state that determining "whether a defendant's constitutional rights have been violated, has long been viewed as one that a trial judge or an appellate court is fully competent to make."<sup>38</sup> In *Walton*, the Court also emphasized the difference between finding "elements of an offense" and sentencing "considerations."<sup>39</sup> They argued that balancing aggravating and mitigating factors are different because they do not

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29. *Id.* at 451.

30. *Id.* at 451–52.

31. *Id.* at 466.

32. *Id.*

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

34. *Id.* at 647.

35. *Id.*

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

37. *Id.* at 385–86.

38. *Id.* at 386.

39. *Walton*, 497 U.S. at 648 (quoting *Poland v. Arizona*, 476 U.S. 147 (1986)) ("Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (*i.e.*, require the death penalty), and the failure to find any particular aggravating circumstance does not 'acquit' a defendant (*i.e.*, preclude the death penalty).").

involve elements of the crime itself.<sup>40</sup> In other words, determining a convicted individual's sentence is not protected under the Sixth Amendment and can be done solely by a judge.

The Court reiterated their rationale from *Spaziano*, as well as many other cases, in holding that it did not violate the Sixth Amendment for a judge to impose a death penalty sentence: "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court."<sup>41</sup>

#### *Apprendi v. New Jersey*

Although not involving the death penalty, in *Apprendi v. New Jersey*,<sup>42</sup> the Supreme Court made a decision regarding the jury's role in criminal cases that appeared to contradict *Walton*: "Other than the fact of a prior conviction, 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."<sup>43</sup> The Court went on to explain that this finding did not invalidate *Walton*, but instead is distinguishable because in *Walton* the jury already declared the defendant guilty of murder, a crime that "carries as its maximum penalty the sentence of death."<sup>44</sup>

However, the dissent in *Apprendi* argued that the majority's decision effectively overruled *Walton*: "If the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today."<sup>45</sup> In other words, the dissent argued that because the majority held that a jury needed to decide any fact that increased the statutory maximum sentence, if a jury imposed a sentence of life in prison based on their findings of fact and a judge then overrode this sentence and imposed death, he or she is making a factual decision that an aggravating factor exists and there is a lack of sufficient mitigating factors, which, in effect, increases the maximum sentence to death.<sup>46</sup> This scenario would be unconstitutional under *Apprendi* but was upheld in *Walton*.

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40. *See id.*

41. *Id.* at 647–48 (citing *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990)).

42. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

43. *Id.* at 490.

44. *Id.* at 496–97 (citing Justice Scalia's dissent in *Almendarez-Torres*, 523 U.S. at 257, n. 2 and Justice Thomas' concurrence in *Jones*, 526 U.S. at 250–51).

45. *Id.* at 538.

46. *See id.*

2. *Modern Interpretation of Death Penalty and Sixth Amendment:*

*Ring v. Arizona*

The Supreme Court needed to address the seemingly contradictory holdings in the wake of the *Walton* and *Apprendi* decisions. They chose to tackle this conflict in *Ring v. Arizona*.<sup>47</sup> In *Ring*, the jury found the defendant guilty of felony murder due to his apparent involvement with a murder that occurred during the course of a robbery.<sup>48</sup> Based on Arizona law involving first-degree murder, in order for Ring to be sentenced to death the court had to make further findings.<sup>49</sup>

Under Arizona law, the judge who presided at trial conducts a sentencing hearing and the judge could only sentence Ring to death if he found at least one aggravating circumstance and no sufficient mitigating circumstances.<sup>50</sup> At the sentencing hearing, one of Ring's co-defendants testified that Ring had been the leader and was the one who actually shot the victim.<sup>51</sup> The judge entered a "Special Verdict" sentencing Ring to death based on the finding that Ring was the actual killer, and he also found that Ring was a major participant in the robbery and armed robbery "is unquestionably a crime that carries with it a grave risk of death."<sup>52</sup>

The judge also found two aggravating factors associated with Ring's offense.<sup>53</sup> First, Ring "committed the offense in expectation of receiving something of 'pecuniary value,'"<sup>54</sup> and second, the crime was committed "in an especially heinous, cruel, or depraved manner."<sup>55</sup> The judge found one mitigating factor that was not in the statute, Ring's "minimal criminal record."<sup>56</sup> However, he found that this factor

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47. *Ring v. Arizona*, 536 U.S. 584 (2002).

48. *Id.* at 591.

49. *Id.* at 592.

50. *Id.* at 592–93.

51. *Id.* at 593.

52. *Id.* at 594 (citing the holding from *Enmund v. Florida*, 458 U.S. 782, 797 (1982) that the Eighth Amendment requires finding that defendants convicted of felony murder killed or attempted to kill and the holding from *Tison v. Arizona*, 481 U.S. 137, 158 (1987) that qualifies *Enmund* by saying the Eighth Amendment allows for the execution of a felony-murder defendant "who did not kill or attempt to kill, but who was a 'major participat[ant] in the felony committed' and who demonstrated 'reckless indifference to human life'").

53. *Ring v. Arizona*, 536 U.S. 584, 594 (2002).

54. *Id.* at 594–95. Specifically, the judge found that "[t]aking the cash from the armored car was the motive and reason for Mr. Magoch's murder and not just the result."

55. *Id.* at 595. "In support of this finding, he cited Ring's comment, as reported by Greenham at the sentencing hearing, expressing pride in his marksmanship."

56. *Id.*

did not “call for leniency,” and Ring was sentenced to death.<sup>57</sup>

Ring appealed his sentence and one of his arguments was that Arizona’s sentencing requirements violate the Sixth Amendment because “it entrusts to a judge the finding of a fact raising the defendant’s maximum penalty.”<sup>58</sup>

After granting review, the Supreme Court began its opinion by explaining the Arizona Supreme Court’s opinion. That court agreed with the dissent in *Apprendi*, but at the same time *Walton* bound them, as it had not been overruled:<sup>59</sup> “[i]t therefore rejected Ring’s constitutional attack on the State’s capital murder judicial sentencing system.”<sup>60</sup> Ring also challenged the validity of the assessment of the aggravating and mitigating factors.<sup>61</sup> The Arizona Supreme Court agreed that the depravity factor had not been proven, but upheld the pecuniary gain as an aggravating factor and affirmed the death penalty sentence.<sup>62</sup>

The issue that the Supreme Court had to address in *Ring* was whether, under the Sixth Amendment applicable to the states through the Fourteenth Amendment, a judge rather than a jury could find an aggravating factor that increased the statutory maximum penalty a defendant faced.<sup>63</sup>

The Supreme Court summarized much of the case law on the topic of a defendant’s right to a jury trial under the Sixth Amendment and ultimately concluded that *Walton*, in relevant part, cannot survive *Apprendi*.<sup>64</sup> The Court explained Ring was exposed to a more severe sentence—death—based on the judge’s finding of an aggravating circumstance, and this contradicts *Apprendi*.<sup>65</sup> They also concluded that attempting to distinguish “sentencing factors” from “elements of an offense” is ineffective because *Apprendi* holds that it is the effect of the finding that matters, not the label it is given.<sup>66</sup> The pertinent question is whether the finding at issue increases the statutory maximum punishment; if it does, then the finding must be made by a jury to be constitutional.<sup>67</sup>

The Court also explained that the fact that the death penalty is at

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57. *Id.*

58. *Id.* at 595.

59. *Ring v. Arizona*, 536 U.S. 584, 596 (2002).

60. *Id.*

61. *See id.*

62. *Id.*

63. *Id.* at 597.

64. *Id.* at 603.

65. *Ring v. Arizona*, 536 U.S. 584, 604 (2002).

66. *Id.* at 604–06.

67. *See id.* at 604–05.

issue does not mean that the rules are different regarding a defendant's constitutional rights.<sup>68</sup> Determinations about aggravating factors must be left to a jury rather than a judge in all criminal cases where the defendant elects to have a jury as the finder of fact because this finding has severe ramifications for the defendant's sentence; in Arizona's statute, it was literally the difference between life and death.

The Court also dismissed Arizona's assertion that judicial findings of fact regarding aggravating factors are more accurate and should therefore be utilized for this purpose.<sup>69</sup>

The Court concluded their opinion by overruling "*Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."<sup>70</sup> This is due to the fact that in this case, aggravating factors serve as "the functional equivalent of an element of a greater offense," the Sixth Amendment requires that they be found by a jury.<sup>71</sup> This holding established the expansion of a convicted murderer's Sixth Amendment right,<sup>72</sup> but left open the question of whether this expansion extends to individuals who face the death penalty due to their role in the offense—without having committed the underlying murder.

### 3. Vicarious Liability and Constitutional Challenges to Death Penalty Sentences

Most of the individuals who have been executed under death penalty laws were found guilty of committing the underlying murder at issue.<sup>73</sup> Other than the actual killer, another group of individuals who

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68. *See id.* at 606–07.

69. *Id.* at 607–09. The Court explained that "[t]he founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free." (citing Justice Scalia's concurrence in *Apprendi*, 530 U.S. at 498). The Court also argued that it is not evident that a judge's assessment is more reliable than a jury's, and that many other states leave the finding of aggravating factors to juries.

70. *Id.* at 609.

71. *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (quoting *Apprendi*, 530 U.S. at 494, n. 19).

72. Alabama remains the only state to permit a judge to override a jury's life verdict and impose the death penalty. Kent Faulk, *In Alabama, You Can Be Sentenced to Death Even if Jurors Don't Agree*, THE MARSHALL PROJECT: NONPROFIT JOURNALISM ABOUT CRIMINAL JUSTICE (Dec. 7, 2016, 7:00 AM), <https://www.themarshallproject.org/2016/12/07/in-alabama-you-can-be-sentenced-to-death-even-if-jurors-don-t-agree#.DKxCTfoVi>; *see also The Death Penalty in Alabama: Judge Override: Executive Summary and Major Findings*, EQUAL JUSTICE INITIATIVE, <http://eji.org/reports/death-penalty-alabama-judge-override>.

73. *Those Executed Who did not Directly Kill the Victim*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/those-executed-who-did-not>

may be eligible for the death penalty include individuals accused of felony murder, or individuals who “participated in a felony during which a victim died at the hands of another participant in the felony.”<sup>74</sup> Many states have such felony murder laws or variations thereof and have carried out executions based on these convictions.<sup>75</sup> Defendants convicted of felony murder have successfully challenged their convictions under the Eighth and Fourteenth Amendments.<sup>76</sup> Some examples of such cases are described below.

*Lockett v. Ohio*

In *Lockett*,<sup>77</sup> the defendant was convicted of aggravated murder and sentenced to death under an Ohio statute after she waited in the getaway car while a robbery-murder took place.<sup>78</sup> The Supreme Court reversed the defendant’s death sentence, holding that Ohio’s death penalty statute violated the Eighth and Fourteenth Amendment’s protections against cruel and unusual punishment because it did not allow the sentencer to consider certain mitigating factors.<sup>79</sup> In their decision, the Court made clear that it remains constitutional for states to impose the death penalty against aiders and abettors or accomplices: “States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes beyond constitutional challenge.”<sup>80</sup>

*Enmund v. Florida*

Later, in *Enmund*,<sup>81</sup> the Court examined whether the death penalty could be imposed on a defendant, Enmund, who did not take or attempt to take life.<sup>82</sup> The defendant at issue was waiting in the getaway car while two others shot and killed two individuals during the course of a robbery.<sup>83</sup> Enmund was convicted of first-degree murder and robbery

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directly-kill-victim.

74. *Id.*

75. *Id.* States that have executed defendants convicted of felony murder include Texas, Florida, Utah, Indiana, Oklahoma, and Missouri.

76. *See Lockett v. Ohio*, 438 U.S. 586 (1978); *see also Enmund v. Florida*, 458 U.S. 782 (1982).

77. *Lockett*, 438 U.S. at 586.

78. *Id.* at 589-91.

79. *Id.* at 604-06. Specifically, the Ohio statute at issue did not allow the sentencer to consider the character and record of the individual and the circumstances of the offense. In *Lockett*, the Court held that these mitigating factors were constitutionally required to be considered in most capital cases.

80. *See id.* at 602.

81. *Enmund*, 458 U.S. at 782.

82. *Id.* at 787.

83. *Id.* at 784-86.

under a Florida felony murder statute which held aiders and abettors liable for any murder that took place during the course of a robbery or attempted robbery.<sup>84</sup> He was sentenced to death based on the finding of various aggravating factors and no mitigating factors.<sup>85</sup>

The Supreme Court of the United States reversed Florida's Supreme Court verdict and held that imposing the death penalty on a defendant who "neither took life, attempted to take life, nor intended to take life . . . is inconsistent with the Eighth and Fourteenth Amendments."<sup>86</sup> In coming to this decision, the Court took a number of factors into consideration.

First, the Court looked at various state laws concerning when the death penalty is imposed against a defendant for "participation in a robbery in which another robber takes life."<sup>87</sup> The Court went through every states' approach and found that: "only a small minority of jurisdictions—eight—allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed."<sup>88</sup> The Court concluded, in regard to this factor, that because the majority of states would not authorize the death penalty in a case like *Enmund*, it weighed in favor of "rejecting capital punishment for the crime at issue."<sup>89</sup>

The Court also found support for rejecting *Enmund*'s sentence based on society's apparent rejection of felony murder liability for individuals who did not themselves kill, based on jury sentencing statistics.<sup>90</sup>

The Court concluded that because there was no indication that *Enmund* intended to kill, or for anyone to be killed, his actions did not merit the death penalty and he should have been treated differently than his co-defendants who actually committed murder.<sup>91</sup>

#### *Tison v. Arizona*

In *Tison*,<sup>92</sup> the Supreme Court was tasked with determining whether two defendants' death penalty sentences violated the Eighth

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84. *Id.* at 785.

85. *Id.* The aggravating factors that Florida's Supreme Court found included the fact that *Enmund* was an "accomplice in the commission of an armed robbery" and that *Enmund* was "previously convicted of a felony involving the use or threat of violence."

86. *Id.* at 787–88.

87. *Enmund v. Florida*, 458 U.S. 782, 789–92 (1982).

88. *Id.* at 792.

89. *Id.* at 793.

90. *Id.* at 794. The Court relied on the results of a survey to support their conclusion: "The survey revealed only 6 cases out of 362 where a nontriggerman felony murderer was executed."

91. *Id.* at 798.

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

Amendment.<sup>93</sup> The primary issue was whether they possessed the requisite intent, because they were involved with a felony murder but neither of them intended to kill the victim nor actually pulled the triggers.<sup>94</sup>

The defendants, two brothers, along with a third brother, helped their father Gary Tison and his cellmate escape prison by bringing a chest full of guns into the prison they were housed at.<sup>95</sup> Both men were convicted murderers.<sup>96</sup> While on the run, the two convicts along with the three Tison boys carjacked a family, and Gary Tison and his cellmate shot and killed the family.<sup>97</sup>

The police eventually located the Tison boys, their father, and his cellmate, but during the course of their apprehension one Tison son was killed and their father escaped into the desert, where he subsequently died.<sup>98</sup> The two remaining Tison boys, Raymond and Ricky, along with their father's cellmate, were then tried for their various crimes.<sup>99</sup> Among their charges, each defendant was tried for four counts of capital murder based on Arizona's felony murder and accomplice liability laws.<sup>100</sup> Each defendant was convicted under these laws.<sup>101</sup>

Under Arizona law, in capital cases a judge conducts a sentencing proceeding to determine "whether the crime was sufficiently aggravated to warrant the death sentence."<sup>102</sup> The judge found three aggravating factors and no statutory mitigating factors.<sup>103</sup>

The judge found that the defendant's participation "in the crimes giving rise to the application of the felony murder rule was very substantial."<sup>104</sup> The trial judge also found that each defendant "could reasonably have foreseen that his conduct . . . would cause or create a

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93. *Id.* at 138.

94. *See id.*

95. *Id.* at 139.

96. *Id.*

97. *Id.* at 139–41.

98. *Tison v. Arizona*, 481 U.S. 137, 141 (1987).

99. *Id.*

100. *Id.* Arizona's felony murder law was as follows: "providing that a killing occurring during the perpetration of robbery or kidnapping is capital murder." Ariz. Rev. Stat. Ann. § 13-452 (1956) (repealed 1978). Arizona's accomplice liability law stated "that each participant in the kidnaping or robbery is legally responsible for the acts of his accomplices." Ariz. Rev. Stat. Ann. § 13-139 (1956) (repealed 1978).

101. *Id.* at 141–42.

102. *Id.* at 142 (citing Ariz. Rev. Stat. Ann. § 13-454(A) (Supp. 1973) (repealed 1978)).

103. *Id.* at 142. The three aggravating factors that the judge found included that "the Tisons had created a grave risk of death to others (not the victims); the murders had been committed for pecuniary gain; the murders were especially heinous."

104. *Tison v. Arizona*, 481 U.S. 137, 142 (1987) (citing Ariz. Rev. Stat. Ann. § 13-454(F)(3) (Supp. 1973) (repealed 1978)).

grave risk of . . . death.”<sup>105</sup>

The judge also found numerous non-statutory mitigating factors, including: “the petitioners’ youth—Ricky was 20 and Raymond was 19; neither had prior felony records; each had been convicted of the murders under the felony murder rule.”<sup>106</sup> However, the defendants were sentenced to death.<sup>107</sup> The Arizona Supreme Court affirmed the brothers’ sentences;<sup>108</sup> they reached this conclusion based on the following rationale:

The record establishes that both Ricky and Raymond Tison were present when the homicides took place and that they occurred as part of and in the course of the escape and continuous attempt to prevent recapture. The deaths would not have occurred but for their assistance. That they did not specifically intend that the Lyonses and Theresa Tyson die, that they did not plot in advance that these homicides would take place, or that they did not actually pull the triggers on the guns which inflicted the fatal wounds is of little significance.<sup>109</sup>

In evaluating the trial court’s findings, the Arizona Supreme Court upheld the pecuniary gain and heinousness aggravating factors as well as the death sentences.<sup>110</sup> The United States Supreme Court denied the Tisons’ petition for certiorari.<sup>111</sup>

*Enmund* was decided in the interim, which held that in order to impose the death penalty on a defendant accused of felony murder, it must be proven that the defendant intended to kill.<sup>112</sup> In light of *Enmund*, the Tisons’ again appealed their case to the Arizona Supreme Court.<sup>113</sup> In each brother’s case, the Arizona Supreme Court found that there was evidence beyond a reasonable doubt demonstrating both brothers’ intent to kill.<sup>114</sup>

In Raymond Tison’s appeal, the court relied on various incidents that took place during the prison breakout and during the incidents leading up to and after the murders.<sup>115</sup> During the breakout, the court found that because Raymond assisted with his father’s breakout, which included holding a gun to prison guards, knew that his father was

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105. *Id.* (citing Ariz. Rev. Stat. Ann. § 13-454(F)(4) (Supp. 1973) (repealed 1978)).

106. *Id.* at 142–43.

107. *Id.* at 143.

108. *Id.*

109. *See* Tison v. Arizona, 481 U.S. 137, 143 (1987) (citing State v. (Ricky Wayne) Tison, 129 Ariz. 526, 545 (1981)).

110. *Id.* at 143.

111. *Id.*

112. *Id.* at 143–44.

113. *See id.*

114. *Id.* at 143–46.

115. *See* Tison, v. Arizona, 481 U.S. 137, 143–45 (1987).

servicing a life sentence for murder, and later told police that he would have killed in a “very close life or death situation,”<sup>116</sup> these facts showed that Raymond “could anticipate the use of lethal force” during the breakout.<sup>117</sup>

The court also found that he possessed the requisite intent during the carjacking and murders.<sup>118</sup> The facts that he provided the murder weapons, actively participated in the carjacking, and watched as four people were murdered and did nothing, all showed the court that he intended to kill.<sup>119</sup> The court distinguished the *Tison* cases from *Enmund* because in *Enmund*, the defendant was not at the location where the victims were killed and he did not “actively participate in the events leading to death.”<sup>120</sup> The court applied a similar rationale in finding that Ricky Tison also possessed the necessary intent and denied his appeal as well.<sup>121</sup>

The Supreme Court granted certiorari to determine if the Arizona Supreme Court correctly applied *Enmund*.<sup>122</sup> The Court first went through the facts of *Enmund*.<sup>123</sup> Next, it turned to the rationale the Court employed in *Enmund*, which included examining various states’ laws as well as juries’ views on liability for felony murder and assessing how the law in question compared to the majority of states’ approaches.<sup>124</sup> This allowed it to come to the conclusion that being convicted of felony murder was not enough to sentence a defendant to the death penalty.<sup>125</sup> The Court then reiterated its analysis from *Enmund*.<sup>126</sup> As an initial matter, the Court stated that imposing the death penalty for armed robbery is excessive and violates the Eighth and Fourteenth Amendments as cruel and unusual punishment.<sup>127</sup> It also found that *Enmund*’s “tangential” role in the murders paired the lack of evidence of a culpable mental state weighed in favor of the death penalty being an improper punishment in that case.<sup>128</sup>

The Court went on to distinguish the types of cases that *Enmund* addressed from the case presented in *Tison*. Unlike *Enmund*, *Tison*

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116. *See id.* at 144.

117. *See id.*

118. *See id.* at 144–45.

119. *See id.*

120. *Id.* at 145 (citing *State v. Tison*, 142 Ariz. 454, 456–57 (1984)).

121. *See Tison v. Arizona*, 481 U.S. 137, 145 (1987).

122. *See id.* at 145–46.

123. *See id.* at 146.

124. *See id.* at 146–48.

125. *See id.* at 148.

126. *See id.* at 148–58.

127. *See Tison v. Arizona*, 481 U.S. 137, 148 (1987) (quoting *Weems v. United States*, 217 U.S. 349, 371 (1910)).

128. *See id.* at 148–49.

involved accomplices who were at the scene where the murder took place and played a major role in the crime; however, they did not clearly kill, attempt to kill, or intend to kill the victims.<sup>129</sup> In explaining the intent issue, the Court agreed with petitioners in that they did not intend to kill in the traditional sense of the word: “Traditionally, one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts.”<sup>130</sup> In the decision below, the Arizona Supreme Court “attempted to reformulate ‘intent to kill’ as a species of foreseeability.”<sup>131</sup> Specifically, the Arizona Supreme Court defined intent as follows:

Intend [sic] to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony.<sup>132</sup>

The Court initially acknowledged that this definition was broader than the definition utilized in *Enmund* and would render most armed robbers liable.<sup>133</sup> Conversely, the Tison brothers’ behavior was more culpable than the defendant in *Enmund* and may render them liable under state laws that allow intent to be shown through reckless indifference to human life.<sup>134</sup> The main issue addressed in *Tison* was whether there is an Eighth Amendment violation when a defendant who was a major participant in a felony murder and demonstrated reckless indifference to human life is sentenced to death.<sup>135</sup>

In making their determination, the Court employed a similar strategy as utilized in *Enmund*: they concluded that a majority of American legislatures allowed the death penalty to be applied to defendants who played a major role in a felony murder,<sup>136</sup> and that acting with reckless indifference to human life was a sufficiently culpable mental state.<sup>137</sup> Here, the first issue—that the petitioners played a major role in the crime—was proven as explained above, but the Court remanded the case so it could be determined whether the Tison brothers acted with reckless disregard for human life.<sup>138</sup>

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129. *See id.* at 149–51.

130. *Id.* at 150 (quoting W. LaFare & A. Scott, *Criminal Law* § 28, p. 196 (1972)).

131. *Id.* at 150.

132. *Id.* (quoting *State v. Tison*, 142 Ariz., 454, 456 (1984)).

133. *See Tison v. Arizona*, 481 U.S. 137, 150–51 (1987).

134. *See id.* at 151.

135. *See id.* at 152.

136. *See id.* at 152–55.

137. *See id.* at 157–58.

138. *See id.* at 158.

## II. LEGAL PROBLEM: PROPER ANALYSIS OF SIXTH AMENDMENT CLAIMS FOR ACCOMPLICES TO FELONY MURDER SENTENCED TO DEATH

The cases discussed in previous sections illustrate how the Supreme Court would likely rule if a convicted murderer were to make a Sixth Amendment challenge, as well as how the Court would rule on an Eighth or Fourteenth Amendment challenge to a death penalty under a felony murder conviction. However, there is a paucity of case law, and thus the question has been left open, as to how the Court would rule if a defendant who was charged as an accomplice or for felony murder brought a Sixth Amendment challenge.

In attempting to predict how such cases would be decided if presented before the Court, this Comment will examine the approach utilized in *Ring* to address how *Tison* cases with defendants bringing Sixth Amendment claims should be addressed.

## III. ANALYSIS: *RING* & *TISON*

The relevant aspects of *Ring* and *Tison* will be discussed to highlight the current question of how the Court would assess a case that presents overlapping issues. Specifically, this Comment analyzes the issue presented in *Ring*, a Sixth Amendment claim that a jury should make a mitigating or aggravating factor determination, if brought by a defendant who is being charged as an accomplice or for felony murder, as in *Tison*.

### A. Current Approach to Sixth Amendment Claims: *Ring v. Arizona*

In *Ring*, the Supreme Court held that juries must make findings of fact that increase the statutory maximum sentence a defendant faces in order to comply with the Sixth Amendment.<sup>139</sup> While this is an important finding, it only addresses the constitutional rights of a defendant who actually committed the underlying murder.

In *Ring*, the defendant was found guilty of felony murder based on his involvement with a murder that transpired during the course of a robbery.<sup>140</sup> The only way that *Ring* could be sentenced to death based on this verdict was if the judge made further findings.<sup>141</sup> Specifically, the judge had to find one aggravating factor and no sufficient mitigating factors.<sup>142</sup> At *Ring*'s sentencing hearing, the judge found

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139. See *supra* notes 68–69 and accompanying text.

140. See *supra* note 49 and accompanying text.

141. See *supra* note 50 and accompanying text.

142. See *supra* note 51 and accompanying text.

that Ring had been the actual killer as well as a major participant based on testimony from Ring's co-defendant.<sup>143</sup> He also found two aggravating circumstances associated with Ring's offense: pecuniary gain and heinousness of the crime.<sup>144</sup> Based on the judge's findings, Ring was sentenced to death.<sup>145</sup>

Ring appealed his sentence, claiming, among other things, that his sentence violated his Sixth Amendment right to a jury trial because Arizona's sentencing law entrusts a judge with making factual determinations that increase a defendant's maximum penalty.<sup>146</sup>

The Supreme Court of the United States reversed Ring's sentence upon determining that Arizona's sentencing laws violated the recently decided *Apprendi* case.<sup>147</sup> In coming to this conclusion, the Court addressed several conceivable arguments that opponents might assert and why the opinion it reached is the correct application of *Apprendi*.<sup>148</sup> The first potential argument the Court responded to was whether "sentencing factors" should be treated differently than "elements of an offense."<sup>149</sup> It responded to this possibility by restating the rationale employed in *Apprendi*: it is the effect that matters, not the label.<sup>150</sup> If a defendant's statutory maximum penalty is increased by a fact found by the judge, then this violates the Sixth Amendment.<sup>151</sup>

The Court also found that the argument that defendants facing the death penalty should be given less constitutional protection than other criminal defendants is without merit: "Arizona presents 'no specific reason for excepting capital defendants from the constitutional protections . . . extended to defendants generally, and none is readily apparent.'"<sup>152</sup>

Finally, the Court dismissed the argument that judges are better able to make these kinds of fact-finding determinations.<sup>153</sup> The Court stated that this was not evident<sup>154</sup> and also emphasized that juries are trusted with making such aggravating and mitigating factor

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143. See *supra* notes 52 and accompanying text.

144. See *supra* notes 54–55 and accompanying text.

145. See *supra* note 58 and accompanying text.

146. See *supra* note 59 and accompanying text.

147. See *supra* note 65 and accompanying text.

148. See *supra* notes 65–68 and accompanying text; see also *Ring v. Arizona*, 536 U.S. 584, 604–09 (2002).

149. See *supra* notes 67 and accompanying text.

150. See *supra* note 68 and accompanying text.

151. See *supra* note 68 and accompanying text.

152. *Ring*, 536 U.S. at 606 (quoting Justice O'Connor's dissent in *Apprendi*, 530 U.S. at 539); see also *supra* note 69 and accompanying text.

153. See *supra* note 70 and accompanying text.

154. See *Ring*, 536 U.S. at 607.

determinations in a majority of other jurisdictions.<sup>155</sup> It also drew upon the rationale that criminal defendants have a constitutional right to a jury trial if they so desire:

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered . . . If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.<sup>156</sup>

After dismissing all of the potential arguments described above, the Court concluded that “[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”<sup>157</sup> However, as previously stated, the *Ring* decision was limited in scope as to applying to cases where the defendant was found to be the actual killer.

#### *B. Death Penalty Imposed on Non-Murderers: Tison v. Arizona*

In *Tison*, the Supreme Court ruled on the constitutionality of Arizona’s felony murder law.<sup>158</sup> The defendants and petitioners, Raymond and Ricky Tison, helped two convicted murderers, their father and his cellmate, escape from prison<sup>159</sup> and subsequently were involved with a carjacking that resulted in the murder of four individuals.<sup>160</sup> Although their father and his cellmate were the ones who actually committed the four murders,<sup>161</sup> Raymond and Ricky were also convicted of the four murders based on Arizona’s accomplice liability and felony murder statutes.<sup>162</sup> The brothers were sentenced to death.<sup>163</sup>

The Tison brothers appealed their death sentences numerous times<sup>164</sup> and eventually the Supreme Court reviewed their case to see if it was consistent with *Enmund*, a recently decided Supreme Court case.<sup>165</sup> Ultimately the Court remanded the Tison brothers’ cases so the defendants’ levels of culpability could be determined.<sup>166</sup>

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155. *See id.* at 607–08.

156. *Id.* at 609 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968)).

157. *Id.* at 589.

158. *See supra* notes 92–93 and accompanying text.

159. *See supra* notes 95–96 and accompanying text.

160. *See supra* note 97 and accompanying text.

161. *See supra* note 97 and accompanying text.

162. *See supra* notes 99–100 and accompanying text.

163. *See supra* note 109 and accompanying text.

164. *See supra* notes 110–113 and accompanying text.

165. *See supra* note 114 and accompanying text.

166. *See supra* note 115 and accompanying text.

*Tison* is relevant to this Comment because the case demonstrates that it remains constitutional to sentence an individual to death who did not commit the underlying murder at issue.<sup>167</sup> *Tison* is also important because it illustrates the analysis utilized by the Court in reaching their opinion regarding other constitutional amendments.<sup>168</sup>

*Tison* holds that it is constitutional to sentence an individual to death who did not actually commit murder when certain factors are met.<sup>169</sup> Specifically, the defendant must have played a substantial role in the crime and their level of culpability must meet a certain level: “substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an “intent to kill.”<sup>170</sup> The Court listed a number of scenarios where they did not overturn such types of death penalty convictions.<sup>171</sup>

The Court expanded upon the notion that the level of culpability a defendant had in the crime plays an important role in sentencing:

A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.<sup>172</sup>

The Court concluded that in addition to “intending to kill,” “the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state”<sup>173</sup> and suggested that this level of

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167. See *supra* note 138 and accompanying text.

168. See *supra* notes 136–138 and accompanying text.

169. See *supra* note 138 and accompanying text.

170. *Tison v. Arizona*, 481 U.S. 137, 154 (1987) (citing *Clines v. State*, 280 Ark. 77, 84 (1983)).

171. See *id.* at 154–55 (citing *Clines*, 280 Ark. at 84 (armed, forced entry, nighttime robbery of private dwelling known to be occupied plus evidence that killing contemplated), *cert. denied*, 465 U.S. 1051 (1984); *Deputy v. State*, 500 A. 2d 581, 599–600 (Del. 1985) (defendant present at scene; robbed victims; conflicting evidence as to participation in killing), *cert. pending*, No. 85-6272; *Ruffin v. State*, 420 So. 2d 591, 594 (Fla. 1982) (defendant present, assisted codefendant in kidnaping, raped victim, made no effort to interfere with codefendant’s killing victim and continued on the joint venture); *People v. Davis*, 95 Ill. 2d 1, 52, (defendant present at the scene and had participated in other crimes with Holman, the triggerman, during which Holman had killed under similar circumstances), *cert. denied*, 464 U.S. 1001 (1983); *Selvage v. State*, 680 S. W. 2d 17, 22 (Tex. Cr. App. 1984) (participant in jewelry store robbery during the course of which a security guard was killed; no evidence that defendant himself shot the guard but he did fire a weapon at those who gave chase); see also *Allen v. State*, 253 Ga. 390, 395, n. 3 (1984)).

172. *Id.* at 156.

173. *Id.* at 157.

culpability might be enough to warrant a death sentence.<sup>174</sup>

In coming to the above determinations, the Court employed a similar strategy as that utilized in *Enmund*.<sup>175</sup> It looked at numerous state laws on felony murder and accomplice liability.<sup>176</sup> It also looked at overall trends and the majority view on this subject.<sup>177</sup> Because a majority of the states allow defendants convicted of felony murder to be sentenced to death (under various standards and upon finding differing levels of culpability)<sup>178</sup> the Court determined that the death penalty could be instituted upon defendants who played a major role and exhibited a reckless disregard for human life.<sup>179</sup>

*Tison* presented the type of defendant that is the focus of this Comment in terms of assessing whether the Sixth Amendment should apply. In other words, whether juries need to make aggravating and mitigating factor determinations when it increases the maximum statutory penalty to death for defendants who were convicted under accomplice or felony murder laws.

#### IV. PROPOSAL

If the Supreme Court was presented with and granted certiorari to a case similar to *Tison v. Arizona*, with the exception that the defendant brought a Sixth Amendment claim, the Supreme Court should extend the holding of *Ring v. Arizona* to these types of cases.

In light of the Supreme Court's holding in *Ring* that the Sixth Amendment to the United States Constitution requires a jury to make findings of fact when a defendant's maximum statutory punishment is increased by finding aggravating and a lack of substantial mitigating factors,<sup>180</sup> the Court should find that this logic also applies to *Tison*-type cases.

All of the Court's reasons for their holding in *Ring* are also applicable to defendants who have been convicted as accomplices or under felony murder laws and face the death penalty. As previously discussed by the Supreme Court in *Ring*, the protection of a jury trial extends to all criminal defendants.<sup>181</sup> *Ring* specifically held that it would not make sense for this right and protection not to apply to death

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174. See *id.* at 157–58.

175. See *id.* at 152–55; see also *supra* notes 138–39 and accompanying text.

176. *Tison v. Arizona*, 481 U.S. 137, 152–54 (1987); see also *supra* notes 138–39 and accompanying text.

177. See *Tison*, 481 U.S. at 152–54.;

178. See *id.*

179. See *id.* at 158.

180. See *supra* notes 71–72 and accompanying text.

181. See *supra* note 69.

penalty cases.<sup>182</sup> Because the Court has held that it is constitutional for accomplices and those convicted of felony murder to be sentenced to death under certain circumstances they should also be given the same constitutional protections.

The Court also stated in *Ring* that it is not clear that judges are better situated than a jury to make findings of fact regarding aggravating and mitigating factors.<sup>183</sup> This conclusion does not differ for judges or juries presiding over cases involving fact finding where the defendant is convicted under accomplice or felony murder laws. Additionally, the Court found that many states rely on juries to make such findings.<sup>184</sup> It follows that juries would similarly be able to make such determinations involving individuals who did not commit the murder at issue. Finally, they stressed that criminal defendants have the right to decide if they want a judge or jury to make the factual findings in their case.<sup>185</sup> This should not change simply because the defendant did not actually commit the underlying murder.

Because in *Ring* the defendant was ultimately found to have committed the murder that made him eligible for the death penalty,<sup>186</sup> the Court did not specifically address what standard applies to accomplices or felony murder convicts. However, the rationale that was utilized in *Ring*, that all defendants should be entitled to have the ability to have a jury make findings of fact that could increase the statutory maximum penalty,<sup>187</sup> logically extends to defendants convicted as accomplices or for felony murder who would similarly face the death penalty upon such factual findings.

When an individual convicted as an accomplice or for felony murder is being sentenced and the death penalty is at issue, a jury should be required to make findings of fact in terms of aggravating and mitigating circumstances, or lack thereof, that would make the defendant eligible for the death penalty. In *Tison* the defendants' Eighth and Fourteenth Amendment rights were at issue,<sup>188</sup> but it would make little sense for these individuals not to similarly be given the protections of the Sixth Amendment right to an impartial jury trial.

#### CONCLUSION

The death penalty is a provocative issue that has spurred debate in

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182. See *supra* note 69 and accompanying text.

183. See *supra* note 70 and accompanying text.

184. See *supra* note 155 and accompanying text.

185. See *supra* note 156 and accompanying text.

186. See *supra* note 53 and accompanying text.

187. See *supra* notes 71–72 and accompanying text.

188. See *Tison v. Arizona*, 481 U.S. 137, 152 (1987).

the United States since its inception.<sup>189</sup> Because the death penalty has yet to be deemed unconstitutional by the Supreme Court,<sup>190</sup> it remains vital to continue these debates as well as postulate how the Supreme Court might analyze various cases involving the death penalty in an upcoming term.

The Supreme Court has changed its stance on the constitutionality of various aspects of the death penalty over the years.<sup>191</sup> Overall, the Court has limited the use of the death penalty by making various decisions that narrowed the scope in terms of who this form of punishment may be applied to,<sup>192</sup> as well as what types of crimes are eligible for this sentence.<sup>193</sup>

The Supreme Court has also changed its view on what the Sixth Amendment to the United States Constitution means in terms of right to a jury trial.<sup>194</sup> Originally, the Court held that this right only extends to “elements of an offense” and not “sentencing factors.”<sup>195</sup> However, in a subsequent case, *Ring v. Arizona*, the Court determined that the Sixth Amendment right is not limited by the label that the legislature uses, in terms of “elements of an offense” or “sentencing factors,”<sup>196</sup> but extends to whenever there is a fact that would mean a defendant faces a punishment that exceeds the statutory maximum.<sup>197</sup>

The Supreme Court also held in *Tison v. Arizona* that it is constitutional to sentence a defendant to death who did not commit murder but was convicted as an accomplice or found guilty of felony murder under certain circumstances.<sup>198</sup> Specifically, the defendant had to be a major participant in the felony<sup>199</sup> that a murder occurred during the course of, and the defendant also had to either intend for the death to occur or exhibit a reckless disregard for human life.<sup>200</sup>

Cases like *Tison*, but that involve defendants bringing Sixth Amendment right to jury trial claims, should be decided similarly to *Ring*. That is, accomplices or individuals convicted for felony murder have the same constitutional rights as other criminal defendants and are entitled to have a jury determine findings of fact that may increase the

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189. See *supra* note 1 and accompanying text.

190. See *supra* note 5 and accompanying text.

191. See *supra* Parts IA–IB and accompanying text.

192. See *supra* note 24 and accompanying text.

193. See *supra* note 25 and accompanying text.

194. See *supra* notes 26–72 and accompanying text.

195. See *supra* notes 40–42 and accompanying text.

196. See *supra* note 67 and accompanying text.

197. See *supra* note 68 and accompanying text.

198. See *supra* notes 138–39 and accompanying text.

199. See *supra* note 138 and accompanying text.

200. See *supra* note 139 and accompanying text.

statutory maximum penalty they face including aggravating and mitigating factors. If a criminal defendant chooses to have a jury trial a jury should be entrusted with making fact finding determinations surrounding aggravating and mitigating circumstances when assessing whether the death penalty should be applied to accomplices or those convicted for felony murder who are major participants in the crime and who display a reckless disregard for human life.