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**THE ODD ONE OUT: FELONY
MURDER, THE LAW OF
PARTIES, AND THE EXECUTION
OF NON KILLERS**

Rachael Walsh

Abstract

The focus of this research is in the area of the United States death penalty. More specifically, it examines the use of the felony murder rule and the law of parties at both federal and state level. These areas are considered in light of the 8th Amendment as according to the interpretations of the United States Supreme Court. The approach taken in this article is two dimensional: firstly it considers the theoretical approach to the felony murder rule and the law of parties by way of assessing the legislation and precedents at federal level, secondly it examines the law in practice at state level and compares and contrasts them. This article seeks to establish that the law of parties imposing the death penalty on non-triggerman accomplices is arbitrary, inadequate, unjustified and unconstitutional through its violation of the 8th Amendment.

Keywords: Death penalty, felony murder, law of parties, execution of non-killers, narrowing the class of death eligibility, Furman mission, Tison rule

Introduction

In an attempt to narrow the class of death eligible crimes and defendants the American Federal Supreme Court has examined a number of cases and delivered landmark judgments which have shaped the death penalty as America knows it today. Despite its efforts to date, there are many like McCord who still believe that the current process is severely flawed with 'arbitrariness built into the system'.¹ Regardless of personal beliefs, whether retentionist or abolitionist, it is indisputable that if a citizen is to be executed in the name of the law, it is

¹ McCord, D., 'Lightning Still Strikes: Evidence from the Popular Press That Death Sentencing Continues to be Unconstitutionally Arbitrary More than Three Decades After Furman', (2005) 71 *Brooklyn Law Review* at p.802.

imperative that the law which condemned him is constitutionally sound. One of the ways in which this is achieved is through continuous review by the courts where crimes and defendants are carefully considered and either struck down as death-eligible, or upheld. One category of defendants, however, has been the subject of much debate in light of the proportionality argument arising from the revolutionary case of *Furman*²; these are non-triggerman accomplices. What distinguishes this category from most other death-eligible defendants is that the Supreme Court has erred in overturning their previous decision to eliminate this category from the death-eligible class and eradicate the restrictions previously placed on the felony murder rule to further utilize it as a narrowing device as it is a gross violation of the 8th Amendment.

The United States Constitution was adopted on September 17 1787 and has since been amended 17 times by a total of 27 amendments. The first ten amendments of the US Constitution are known collectively as the Bill of Rights. These stipulate inalienable rights of citizens by means of declaring specific freedoms and prohibiting infringement upon said freedoms. The 8th Amendment states that 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'.³ This is also commonly referred to as the 'cruel and unusual punishment clause'. Each principle outlined in the US constitution is subject to judicial interpretation meaning that it can be elaborated on by the courts to either expand or limit the meanings of words and phrases. The scope of the 8th Amendment was brought under scrutiny in the infamous case of *Furman v Georgia* where the death penalty was suspended for four years due to the Supreme Court's controversial findings.

The obiter dictum of this decision by a 5-4 majority was controversial for a number of reasons. Firstly, the court had previously considered a similar argument in the case of *McGautha v California*⁴ only the year before and rejected the argument by a 6-3 majority. In *Furman v Georgia* Justices Stewart and White concluded that the argument in this case was valid and therefore changed their votes. The argument in both cases was that the death penalty was unconstitutional based on the fact that it violated the 8th and Fourteenth Amendments. The basis for this argument is that it was enforced in an arbitrary way and lacked clarity and solid rules or guidelines. The result of this was a system which effectively put citizens to death based on their ethnicity, background or circumstances rather than a tariff system based on the crimes or culpability of the defendants themselves. Before

² *Furman v. Georgia*, 408 US 238 (1972).

³ US Const. am. 8.

⁴ *McGautha v California*, 402 US 183 (1971).

Furman v Georgia there was no separate phase for punishment and guilt. Furman introduced a bifurcated trial system which deemed certain mitigating evidence to be admissible at the sentencing phase. The decision in *Furman* also meant that the guidance given to juries in capital cases was far greater. The result of the pre-Furman system was that the death sentence was applied randomly for a range of crimes such as murder, rape, kidnap and armed robbery. This case has introduced a new system with the requirement that there be justifiable means for imposing the death penalty. The decision placed an emphasis on the 8th Amendment in particular and gave some clarity as to its importance and role within the application of the death penalty.

The Federal Supreme Court acts where a state's death penalty statute is suggested to violate the constitution. The claim will progress through the state courts until resolved or appear before the Federal Supreme Court to have said allegation upheld or rejected. In *Furman*, the claim was that the Georgian capital punishment statute was unconstitutional essentially because it did not contain enough safeguards or guidelines in it with regard to its enforcement and prevention of miscarriages of justice. The response from the Supreme Court was to initially suspend the death penalty pending reform in a number of statutes across the US.

In 1976 the Supreme Court began its long consideration of what guidelines and judicial decisions would create a system which has a methodical and logical approach to capital punishment. This was the beginning of the *Furman*-mission. The first significant case was *Woodson v North Carolina*⁵ where the issue faced was whether a mandatory death penalty for certain crimes was unconstitutional. After *Furman* many states such as Georgia, North Carolina, Texas, Florida and Louisiana thought that imposing a mandatory death penalty for certain crimes was an effective way of creating a less arbitrary system and thus eliminating the unconstitutional issues that *Furman* raised. The Supreme Court began weaving its own interpretation of what a constitutionally valid death penalty would entail. It set out three basic factors which should affect the applicability of the death penalty. These were the 'character and record of the individual offender and the circumstances of the particular offense'. The later decision in *Payne v Tennessee*⁶ introduced a fourth factor for consideration at the sentencing phase of capital trials, namely victim impact evidence. The justification for these changes was simple; proportionality. The 8th Amendment has been interpreted over the years to mean that it stipulates a requirement for the proportionality between the crime and the sentence. This is an age-old notion most famously phrased as 'an eye for an eye, a tooth

⁵ *Woodson v North Carolina*, 428 US 280, 96 S. Ct. 2978, 49 L. Ed.2d 944 (1976).

⁶ *Payne v Tennessee*, 501 US 808, 111 S. Ct. 2597, 115 L. Ed.2d 720 (1991).

for a tooth' in the Hebrew bible.⁷ The case of *Zant v Stephens*⁸ emphasised the importance of the concept of 'narrowing the classes' of death-eligible crimes and criminals as a constitutional necessity. The most significant impact of this was that all states with death penalty statutes were forced to reconsider them and ensure that each provision followed the proportionality principle in accordance with the new *Furman*-mission.

It would be logical, therefore, that only crimes resulting in death would warrant the death penalty if the notion of 'an eye for an eye' were to be followed to the letter. This would then seem to leave a clear-cut class of death eligible crimes. However, one class of defendants is left teetering on the fine line between these two categories; non-triggermen accomplices of felonies resulting in death. In layman's terms, where the defendant is a party to a felony and partakes in it significantly but his 'partner in crime' is ultimately the one who directly causes the death of the victim(s), should said defendant be eligible for death even though he was not directly responsible for the murder?

1 The United States Supreme Court – Narrowing the Class of Death-Eligible Crimes and Defendants since 1976.

In order to understand the debate at its current level, a closer look at the US death penalty's more recent history is needed in order to gain a more thorough understanding of its evolution, especially the past efforts of the Supreme Court, particularly since 1972. In its pre-*Furman* state, America applied the death penalty for a broad range of crimes and criminals with little regard to consistency and methodology. Since 1793 there is clear evidence of an abolitionist movement appearing by the 'development of the concept of malice as a dividing line between murder and manslaughter'⁹ and the introduction of different degrees of murder. As Hugo Adam Bedau discusses, this was the first of many reforms from the first abolition of public executions in 1834 in New York to the complete abolition of the death penalty in some states starting in Michigan in 1846¹⁰ to the most recent abolition by Connecticut in April 2012.

Furman was the first of the Supreme Court's significant efforts to narrow the class of death-eligible crimes and defendants and introduce a more systematic approach to applying the death penalty. The significance of the case lies in its landmark nature as noted by Latzer

⁷ Leviticus 24:19–21, Exodus 21:22–25, Deuteronomy 19:16-21.

⁸ *Zant v Stephens*, 462 US 862, 877 (1983).

⁹ Rosen, R., 'Felony Murder and the 8th Amendment Jurisprudence of Death', (1990) 31 *Boston College Law Review* 1103 at p 1114.

¹⁰ Bedau, H., Cassell, P., *Debating the Death Penalty: Should America have Capital Punishment?* (Oxford University Press, 2004).

that prior to *Furman* 'nothing in the history of the Cruel and Unusual Punishment clause suggested that proportionality was related to consistency in the imposition of a sentence'.¹¹ The basis for this was that the proportionality argument overruled the justification for the death penalty for many crimes and that it should be reserved for only the most serious and horrific crimes. This was not the case in *Furman* where the defendant was burglarising a home and, after disturbing the residents and attempting to flee, fell and accidentally discharged his firearm resulting in the death of one of the residents. He was charged with murder and sentenced to death. The case was condensed with the cases of *Branch v Texas*, and *Jackson v Georgia* which all concerned defendants of African-American origin. *Furman* outlined that the 8th Amendment had an implied connotation of proportionality. The death penalty's arbitrary nature was a violation of this based on the fact that:

to apply the death penalty – or any other penalty – selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board...¹²

constitutes cruel and unusual punishment and thus is disproportionate to the crime. Latzer observes that proceedings of cases of 'moral equivalency, i.e. cases... where the crimes and the criminals are equally blameworthy...' or 'death worthy' in these circumstances are carried out in the same way with little differences in their results.¹³ Chief Justice Burger noted in *Furman* that the rate at which statutorily death-eligible defendants were being given the death sentence was less than 20%.¹⁴ According to the court, this was sufficient to deem the death penalty's application across the nation 'so wantonly and freakishly imposed' - much like 'being struck by lightning'.¹⁵ To reflect this and to enforce a more rational and logical approach the Supreme Court decided on a series of cases, which, over time, resulted in the class gradually being reduced and started a movement towards all death penalty statutes in the United States being brought into harmony with each other. The necessity for this narrowing device was that it:

theoretically supplies a rational penological basis for executing one defendant and not another, and thus gives at least one, albeit incomplete, measure of assurance that the court is applying the death penalty proportionately.¹⁶

Essentially, this is a reflection of the proportionality argument and the necessity for justification and logic in a more systematic process.

¹¹Latzer, B., 'The Failure of Comparative Proportionality Review of Capital Cases (With Lessons From New Jersey)', (2001) 64 *Albany Law Review* 1161.

¹² *Furman v. Georgia*, 408 US 238 (1972).as per Justice Douglas

¹³ Latzer, 'The Failure of Comparative Proportionality Review of Capital Cases' at p.1164.

¹⁴ *Furman v. Georgia*, as per Chief Justice Berger

¹⁵ *Furman v. Georgia*, as per Justice Stewart

¹⁶ Rosen, 'Felony Murder and the 8th Amendment Jurisprudence of Death' at p.1121.

The first and the most significant was *Gregg v. Georgia*.¹⁷ Gregg's argument echoed that of *Jurek v. Texas*, *Roberts v. Louisiana*, *Proffitt v. Florida*, and *Woodson v. North Carolina* and was therefore condensed. Here the Supreme Court was asked to consider whether the death penalty was deemed cruel and unusual in *Furman* due to its nature or through its former arbitrary enforcement. In essence the question before the court was to look at the new post-*Furman* laws enacted by Georgia and decide whether the attempt of a significant reduction in the opportunity for such a punishment to be arbitrarily enforced was sufficient to declare it no longer cruel and unusual. However, if the court had found that the death penalty was in fact cruel and unusual due to its very nature, then no amount of amendments to capital punishment statutes would merit the reinstatement of the death penalty - by a 7-2 majority the death penalty was reinstated. The notable differences in the law came from the necessity for two separate phases in capital trials; the guilt phase; and the mitigating/aggravating or sentencing phase. The introduction of this new system meant that additional evidence could be heard at the sentencing phase which was not necessarily directly relevant to guilt, but was relevant to the severity of the punishment that should be assigned. This new system is known as *bifurcated trials* and replaced the old system of *unitary trials*. The idea was that a distinction should be drawn between homicide and aggravated homicide. This would mean that post-Gregg capital punishment was truly only reserved for the most heinous of crimes.

Equally significantly was the Supreme Court's approval of the appellate review provision (also known as the proportionality review). This was a safeguard introduced which stipulated that in the post-conviction phase, the Supreme Court were to consider cases that they deemed factually similar and compare the outcome. This considerably reduces the risk of the death penalty being inconsistently enforced because of aberrant juries. Should the court find that a correlation between a specific crime and a death sentence have been non-existent for a significant period except for one particular case then the court has the power to overturn said anomalous sentence. Whilst academics like Latzer contend that this was a hollow victory for the *Furman* movement in that it only stood as a façade portraying fairness where actually the proportionality review consisted of vital flaws such as ineffective procedure and the cause of unnecessary delays rendering it a redundant process,¹⁸ opponents such as Mandery admit that there is a need for a more 'meaningful commitment' but 'with the objectives of this review properly understood, this development should be

¹⁷ *Gregg v Georgia*, 428 US 153, 96 S. Ct. 2909, 49 L. Ed2d 859 (1976).

¹⁸ Latzer, 'The Failure of Comparative Proportionality Review of Capital Cases'.

welcomed and embraced in the name of fairness'.¹⁹ Mandery further suggests that without the proportionality review 'neither distributive nor retributive justice is achieved'. He asserts that in reality, the process is an important regulatory organ in the body of law and the outcome is irrelevant, the point is that it is there should it be needed as a preventative measure. Furthermore it bestows public confidence and assurance that the system is constantly being examined and analysed to prevent injustice and is therefore effective. Further compelling effectiveness is the report produced by the Constitution Project in 2001 suggesting that *all* death penalty states should be required to adopt some form the proportionality review as it is 'crucial that each state develop an effective method, designed to address and, in the best of circumstances, eradicate arbitrary and discriminatory imposition of death sentences'.²⁰

On the same day, the Supreme Court also ruled in *Woodson v. North Carolina* that mandatory death sentences were unconstitutional and invalid because it contradicted the bifurcated trial system; it undermined the 8th Amendment's regard to human dignity; and it did not reflect and uphold modern civilized standards. This meant that, regardless of state, the death penalty could not automatically be administered for any crimes, even homicide. Justice Stewart outlined the three areas required for consideration before the death penalty can be applied as 'the *character* and *record* of the individual offender and the *circumstances* of the particular offense'. This decision has been criticized for its contradictory nature to *Furman*. Whilst *Furman* suggests that lack of uniform sentencing violated the 8th Amendment, an attempt by states to comply with this by means of mandatory death sentences was struck down by *Woodson*. Latzer argues that by 'choosing individually tailored sentencing over uniform sentencing, *Woodson* undercut *Furman's* concern for consistency', Orem argues contrarily that 'the mandatory nature of the sentencing scheme eliminated individual considerations fundamental to the constitutional imposition of the death penalty'.²¹

Thus whilst it did introduce consistency, it lacked the ability to separate cases with aggravating circumstances and those with mitigating creating a system which contained the potential to condemn to death those who were far less culpable than others. Further guidelines were introduced on the sentencing phase by the cases of *Lockett v. Ohio*²² (overruling the use of definitive lists of permissible evidence for mitigation) and *Jurek v.*

¹⁹ Mandery, E., 'In Defense of Specific Proportionality Review', (2002) 65 Albany Law Review at p.934

²⁰ The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* (2001) <http://www.constitutionproject.org/pdf/31.pdf> at p.28.

²¹ Orem, K., 'Evolution of an 8th Amendment Dichotomy: Substantive and Procedural Protections within the Cruel and Unusual Punishment Clause in Capital Cases', (2000) 12 Washington & Lee University School of Law Capital Defense Journal at p.349.

²² *Lockett v. Ohio*, 438 US 586, 98 S. Ct. 2954, 57 L. Ed.2d 973 (1978).

Texas²³ (allowing the use of 'special issue considerations' instead of the necessity for mitigating evidence to be considered by the jury).

The next significant case to substantially narrow the class of death-eligible crimes was *Coker v. Georgia*.²⁴ Between 1930 and 1967 about 525 of the 3,825 executions in the United States were for non-homicide crimes, 455 were for rape alone.²⁵ *Coker* branded the death penalty grossly disproportionate for the rape of an adult woman. Justice White laid out a two-part cumulative test for the constitutionality of a punishment stemming from *Gregg* stating that a punishment was:

excessive and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment, and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.²⁶

This test contributed substantially to the synchronisation of sentencing in capital cases across America by providing a test which, despite being somewhat vague and ambiguous, created a general test which provided guidance for states as to what factors should be considered before passing sentence. Two other cases with similar implications decided on the same day were *Eberheart v. Georgia*²⁷ and *Hooks v. Georgia*²⁸ which prohibited the application of the death penalty for kidnapping and armed robbery respectively. The effect of these decisions was ultimately a statement by the Supreme Court that the death penalty was disproportionate for any crimes excluding homicide. Whilst there are still slight exceptions to this general rule, for example rape of a child as examined in *Kennedy v. Louisiana*,²⁹ the implied standpoint derived from these decisions was that the court was averse to the death sentence where non-homicide crimes were concerned. Following *Coker*, only one category of non-homicide defendants were left vulnerable to the death sentence; non-triggerman accomplices of a felony murder. This situation normally arises where a murder has been carried out during the course of a felony such as a burglary, robbery, kidnapping, or rape. The federal felony murder rule or the 'law of parties' within a state has been the source of much criticism with 'civil libertarians, trial lawyers and others [having] attacked the felony murder rule as an egregious example of unequal justice – particularly when it involves the ultimate punishment for accomplices'.³⁰

²³ *Jurek v. Texas*, 428 US 262, 96 S. Ct. 2950, 49 L. Ed.2d 929 (1976).

²⁴ *Coker v. Georgia*, 433 US 584, 97 S. Ct. 2861, 53 L. Ed.2d 982 (1977).

²⁵ Latzer, B., and McCord, D., *Death Penalty Cases* (3rd ed. Elsevier, 2011) at p.135.

²⁶ *Coker v. Georgia*.

²⁷ *Eberheart v. Georgia*, 433 US 917 (1977).

²⁸ *Hooks v. Georgia*, 433 US 917 (1977).

²⁹ *Kennedy v. Louisiana*, 554 US 407, 128 S. Ct. 2641, 171 L. Ed.2d 525 (2008).

³⁰ Gramlich, J., 'Should murder accomplices face execution?', *Stateline*, 13 August 2008.

It has been observed as a ‘categorically harsh common law rule’³¹ and criticised for ‘departing from traditional notions of culpability’.³² Observed often as an anomaly of the proportionality principle, this contradicts the *obiter dicta* of decisions such as *Coker*, *Eberheart*, and *Hooks*. *Tison* was a clear retreat from this standpoint. The court set out that in the specific circumstances where the defendant has not killed or intended to kill but has been a significant participant of a felony murder and has shown a reckless indifference to human life the death penalty may be applicable. This was distinguished from the earlier case of *Enmund v Florida*³³ where the court stipulated that mere participation in a felony murder was insufficient to constitute a death-worthy defendant. The leading judgment in *Enmund* was offered by Justice White who highlighted the importance of considering the culpability of only the defendant before the court and not of the offending group collectively. Whilst *Enmund* was a participant of the robbery which led to the murder in question, he was merely the ‘getaway driver’ and was not even present at the scene of the homicide. Justice White observed that the Florida Supreme court considered the entire group’s culpability when sentencing Enmund as an error in judgment. *Tison* elaborated on this point by laying down a two-part cumulative test for the courts to apply in cases of non-triggerman accomplices of felony murders. The death penalty was only appropriate where the defendant in question was a *major participant in the felony* and displayed a *reckless indifference for human life*.

The implications of this are that by following the minimal requirements established in *Tison* the court allowed a great deal of interpretation on the states’ part and variation between capital punishment statutes with regard to the felony murder rule and the law of parties. The by-product of this decision is quite the opposite of the intention of the decision in *Furman*; inconsistency, ambiguity, and uncertainty. This inevitably leads to, or at least had the potential to lead to, states reverting to the fatally flawed arbitrary capital punishment system the Supreme Court vowed to abolish in *Furman*.

2 The Reality of the Felony Murder Rule as a Narrowing Device

To examine the felony murder rule as a theoretical narrowing device is only half of the investigation into its effectiveness and compatibility with the 8th Amendment. Whilst the rule is not forbidden by federal courts, it is only exploited by a portion of the capital punishment states, and only a select number of those actually use it in practice. The manner in which it is

³¹ Dubber, M., *Criminal Law: Model Penal Code*, (Foundation Press, New York, 2002) at p.115.

³² Mauro, J., ‘Intentional Killing Without Intending To Kill: Knobe’s Theory as a Rational Limit on Felony Murder’ (2012) *Selected Works* 1 at p 6.

³³ *Enmund v. Florida*, 458 US 782, 102 S. Ct. 3368, 73 L. Ed.2d 1140 (1982).

enforced is significant as the implications could lead to a violation of the constitutional requirement to narrow the class of death-eligibility throughout the United States. Furthermore, the vast differences between how states implement it could also lead to a violation of the same nature as outlined in *Furman*. There are a number of versions of the felony murder rule each with different narrowing effects. The fewer restrictions placed on the applicability of the felony murder rule, the less compatible it is with the 8th Amendment.

Of the 50 states 33 retain the death penalty, 26 of these allow capital punishment for non-triggerman accomplices. As thoroughly explored by Trigilio and Casadio,³⁴ there are various levels and forms in which a state can employ the felony murder rule and whilst some do allow it in theory, practically it can never actually be committed or can only be committed in very rare circumstances. The first group of states not only do not permit the death penalty for non-triggerman accomplices but consider all felony murders to be death-ineligible. These include Missouri,³⁵ Pennsylvania³⁶ and Washington.³⁷ Pennsylvania and Missouri classify felony murder as second degree murder thus any persons convicted are only eligible for a term of imprisonment over ten years, but not the death penalty. Whilst Washington actually classifies felony murder as first degree murder, it is ineligible for the death penalty unless it is pre-meditated murder with aggravating circumstances. The felony murder rule is used as an abundantly effective narrowing device as it completely excludes a large class of defendants and crimes; not just non-triggerman accomplices but any felony murderer.

The next group of states allow the death penalty for felony murder but not for non-triggerman accomplices. These include Georgia,³⁸ Maryland,³⁹ Oregon,⁴⁰ and Virginia⁴¹ where felony murder is classed as first degree murder but in order to be death-eligible, the defendant must have actually committed the homicidal act; i.e. must have been the triggerman.⁴² This use of the felony murder rule as a narrowing device is virtually as effective in that it supports the 8th Amendment proportionality requirement and passes Justice White's test as set out in *Coker*. Conversely, it could be argued that allowing the death penalty for felony murder leaves a marginal chance that such a severe punishment could still be enforced where culpability is still significantly lower than most other death-qualified aggravated homicides.

³⁴ Casadio, T., and Trigilio, J., 'Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing', (2011) 48 *American Criminal Law Review* at p.1412.

³⁵ MO. REV. STAT. 565.021 (1)(2).

³⁶ PA. CONS. STAT. ANN. § 2502(b).

³⁷ WASH. REV. CODE ANN. § 9A.32.030(c).

³⁸ GA. CODE ANN. § 16-5-1(c), (d).

³⁹ MD. CODE ANN., CRIM LAW § 2-201(a)(4).

⁴⁰ OR. REV. STAT. ANN. § 163.115(1)(b).

⁴¹ VA. CODE ANN. § 18.2-32.

⁴² *Hulme v. State*, 544 S.E.2d 138 (2001).

The next group are states which allow the execution of non-triggerman accomplices but the level of burden of proof resting on the state is significantly higher. This is where the serious debates come into play. The non-triggerman defendant must be found to have specifically intended the *murder* and not just the felony although there is no necessity for him to have caused it. This requirement of intent, by definition, would instantly rule out the majority of non-triggerman accomplices but not necessarily all of them. This group includes Alabama⁴³, Indiana⁴⁴, Kansas⁴⁵, Louisiana⁴⁶, Mississippi⁴⁷, Montana⁴⁸, Ohio⁴⁹, Wyoming⁵⁰ and until very recently Connecticut.⁵¹ In Connecticut, *Cobbs*⁵² laid out the rule on non-triggerman accomplices, that it was not necessary for the accomplice to have intended or directly caused the homicidal act but that it was not enough that the defendant merely participated in the underlying felony. The Supreme Court stipulated that the prosecution must prove beyond all reasonable doubt that the defendant committed or attempted to commit the felony, that either the defendant or one of the participants caused the victim's death, and that the death was caused in the course of and furtherance of the felony. The term 'furtherance' utilizes the narrowing quality of the felony murder rule slightly more as it requires that the homicide was not just accidental or incidental but was a key part of the felony itself. The level of culpability required is still significantly low given that there is no requirement for proof of any mens rea at all with regard to the homicide. The case of *Young*⁵³ provided steps towards limiting liability by stating that the killing must be not just a coincidental incident to the felony but that 'in furtherance of'⁵⁴ imposed a 'proximate cause requirement beyond that of mere causation in fact'⁵⁵ The judgment also gave an implication that a non-triggerman accomplice could only be found guilty of felony murder where the victim was killed by one of the party-members carrying out the felony and not necessarily by a police officer or bystander. These judgments clearly placed limits on the level of liability in reflection of the reduced culpability of a non-triggerman accomplice, but there was still some level of disproportionality regarding the maximum punishment and the crime itself. On April 11 2012, 'members of the House

⁴³ ALA. CODE § 13A-5-40(a).

⁴⁴ IND. CODE §§ 35-42-1-1 & (2), 35-50-2-3(b).

⁴⁵ KAN. STAT. ANN. § 21-3439(a)(1),(4).

⁴⁶ LA. REV. STAT. ANN. § 14:30(A)(1).

⁴⁷ MISS. CODE ANN. § 97-3-19(2)(e).

⁴⁸ MONT. CODE ANN. § 45-5-102(1)(b).

⁴⁹ OHIO REV. CODE ANN. § 2903.01(B).

⁵⁰ WYO. STAT. ANN. § 6-2-101(a).

⁵¹ CONN. GEN. STAT. ANN. §§ 53a-54c.

⁵² *State v. Cobbs*, 203 Conn. 4 (1987).

⁵³ *State v. Young*, 191 Conn. 636 (1983).

⁵⁴ CONN. GEN. STAT. ANN. §§ 53a-54c.

⁵⁵ <http://www.cga.ct.gov/2008/rpt/2008-R-0087.htm>

voted 86-62 in favour of the bill⁵⁶ which sought to replace the death penalty with life without parole in Connecticut. Connecticut thus joined Missouri, Pennsylvania and Washington in the first group.

In Mississippi there has been much controversy over Governor Haley Barbour's decision to release triggerman Michael Graham in 2008, the same month that non-triggerman accomplice Dale Bishop was executed. Even more puzzling was the fact that in Bishop's case, the actual killer (or triggerman) was not given the death sentence. The juxtaposition of a non-killer being executed and a killer being spared creates a warped and apparently random effect which is irrefutably not in line with the 8th Amendment or the *Furman*-mission. Just as irrational is the fact that due to plea bargaining, this is not an unusual scenario as in the case of *Jacobs v. State*⁵⁷ and *Tafero v. State*.⁵⁸

The final category consists of those states whose capital punishment statutes echo the decision of *Tison* with minimal further narrowing. This is that a non-triggerman accomplice with no intent to kill is eligible for execution if he played a significant role in the felony and displayed a reckless indifference to human life. This includes Arizona,⁵⁹ Arkansas,⁶⁰ California,⁶¹ Colorado,⁶² Delaware,⁶³ Florida,⁶⁴ Idaho,⁶⁵ Kentucky,⁶⁶ Nebraska,⁶⁷ Nevada,⁶⁸ New Hampshire,⁶⁹ North Carolina,⁷⁰ Oklahoma,⁷¹ South Carolina,⁷² South Dakota,⁷³ Tennessee,⁷⁴ Texas,⁷⁵ and Utah.⁷⁶ Whilst some of these states also employ provisions in their constitutions that in order for a non-triggerman accomplice to qualify as death eligible

⁵⁶ Young, S., 'Connecticut Death Penalty Repeal Approved by State Legislature', *Huffington Post*, 12 April 2012.

⁵⁷ *Jacobs v. State*, 396 So.2d 713 (Fla.1981).

⁵⁸ *Tafero v. State*, 403 So.2d 355 (Fla. 1981).

⁵⁹ ARIZ. REV. STAT. § 13-1105(A)(2).

⁶⁰ ARK. CODE ANN. § 5-10-101(a)(1), (c)(1).

⁶¹ CAL. PENAL CODE §§ 189, 190.2(a).

⁶² COLO. REV. STAT. §§ 18-3-102(1)(b).

⁶³ DEL. CODE ANN. Tit. 11, § 636(a)(2).

⁶⁴ FLA. STAT. ANN. § 782.04(1)(a)(2), (3).

⁶⁵ IDAHO CODE ANN. §§ 18-4003(d), 19-2515(1).

⁶⁶ KY. REV. STAT. ANN. § 507.020.

⁶⁷ NEB. REV. STAT. § 28-303.

⁶⁸ NEV. REV. STAT. § 200.030(1)(b), (4)(a).

⁶⁹ N.H. REV. STAT. ANN. § 630:1(l)(b), (e), (f).

⁷⁰ N.C. GEN. STAT. ANN. § 14-17.

⁷¹ OKLA. STAT. ANN. tit. 21, §§ 701.7(B), 701.9(A).

⁷² S.C. CODE ANN. § 16-3-10.

⁷³ S.D. CODIFIED LAWS § 22-16-4(2).

⁷⁴ TENN. CODE ANN. § 39-13-202(a)(2), (b), (c)(1).

⁷⁵ TEX. PENAL CODE ANN. § 19.03(a)(2).

⁷⁶ UTAH CODE ANN. § 76-5-202(1)(d).

there must be some other aggravating factor, the fundamental implementation of the felony murder rule is the same.

The strictest states are those that follow the precedent of *Tison* to the letter and employ no further restrictions on the law of parties including Arizona, California, Colorado, Delaware, Florida, Idaho, Kentucky, South Carolina, and Texas. This is the most limited application of the felony murder rule as a narrowing device in practice. The arbitrary interpretations of these statutes warrant serious questioning of the constitutionality of the felony murder rule. For example, as Crump criticises, California's interpretation of what is inherently dangerous such as manufacturing methamphetamine, kidnapping and reckless or malicious possession of a destructive device, compared with what is not, such as practising medicine without a licence under conditions creating a risk of great bodily harm, serious physical or mental illness, or death, suggests an extremely random and inconsistent formulation of felony murder statutes.

Texas illustrates an example of the narrowing device in its simplest and least effective form as is evident in the case of *Green*.⁷⁷ The Texas rule only requires that the defendant be a participant in the felony in which the homicide was carried out as per the 'law of parties' statute.⁷⁸ In California, however, the case of *Stamp*⁷⁹ found that where the victim suffered a fatal heart attack *after* the defendants had burglarized his premises it was held to be felony murder and therefore death-eligible because the fatal heart attack was caused by the defendants carrying out the felony. *Green* was executed in 1991 and is one of only three non-triggerman accomplices to be executed since *Tison*. There are currently five more non-triggerman accomplices sentenced to death who have not yet received post-conviction relief.⁸⁰ As Casadio and Trigilio suggest, the alarmingly low 'rate of just 0.51%, the execution of this category of defendants risks being both arbitrary and capricious'.⁸¹ Additionally the wide interpretation and differences in its application in various states also amounts to an 8th Amendment violation. They argue that one factor when considering the possibility of excluding a category of defendants from the class of death-eligibility is the rate of executions of that particular category. When the figures above are compared with the rate of execution

⁷⁷ *Green v. State*, 682 S.W.2d at 271.

⁷⁸ *Whitmire v. State*, 183 S.W.3d 522, 526-27 (Tex. Ap. 2006).

⁷⁹ *People v. Stamp*, 2 Cal. App. 3d 203; 82 Cal. Rptr. 598; 1969 Cal. App. LEXIS 1403.

⁸⁰ *State v. Dickens*, 926 P.2d 468 (Ariz. 1996) (en banc); *State v. Miles*, 918 P.2d 1028 (Ariz. 1996); *Cave v. State*, 727 So.2d 227 (Fla. 1999); *Wilson v. State*, 983 P.2d 448 (Okla. Crim. App. 1998); *Garza v. State*, 2008 WL 1914673 (Tex. Crim. App. Apr. 30, 2008).

⁸¹ 'Executing those who do not kill', at pp.1404-5.

of other categories of defendants 'the numbers support raising the constitutional standard for felony murder non-triggerman'.⁸²

Despite the lack of enthusiasm displayed by some states to embrace the felony murder rule and law of parties concept as a narrowing device, there is still evidence since *Tison* of a movement towards utilizing these tools as narrowing devices. For example Connecticut, Indiana, Montana, North Carolina, Tennessee, and Wyoming have 'altered their capital sentencing regimes since [*Tison*], each in the directions that narrowed the use of capital punishment for felony murder'.⁸³ Furthermore, the state of Massachusetts produced a report in 2005 recommending that the law on capital murder be changed to exclude 'mere accomplices'.⁸⁴ Similarly, before Illinois abolished the death penalty altogether in 2011, a report was produced also recommending that non-triggerman accomplices be excluded from the class of death-eligibility.⁸⁵ One interpretation of these actions is that it is a sign that some states are ahead of the Supreme Court in terms of narrowing the class, starting a trend for the rest of the states follow suit and alter their capital punishment regimes

The party in the strongest position to correct this anomaly is the Supreme Court, just as they were when they passed the judgment on *Enmund* and *Tison*. The minimal guidance given in *Tison* is less than adequate for such an important principle in law and much more extensive direction is needed in this area in order to raise the standards of the death penalty. As noted by The Constitution Project;

such guidance is best provided by a categorical rule excluding felony murder defendants from eligibility for capital punishment. Anything less than categorical exclusion provides too great an opportunity for the unconstitutionally overbroad, random, arbitrary, and capricious application of the death penalty.⁸⁶

3 The Death Penalty Debate in Light of the Non-Triggerman Accomplice

The death penalty is one of the most debated topics worldwide with strong arguments for and against. Its moral implications and very purpose has been the subject of much scrutiny. Whilst most of the arguments for the death penalty in general can be justified in some way or another or at least are valid to an impartial party, they do not and cannot serve as valid

⁸² Ibid p. 1403.

⁸³ Ibid p. 1402.

⁸⁴ Hoffman, J., Bieber, F., Barton, R., Boyd, R., and Cruz, T., 'Report of the Governor's Council on Capital Punishment', (2005) 80 *Indiana Law Journal* at p.6.

⁸⁵ Ryan, G., 'Report of the Governor's Commission on Capital Punishment', (2002) - http://www.law.northwestern.edu/wrongfulconvictions/issues/deathpenalty/clemency/complete_report.pdf

⁸⁶ *Constitution Project* at p.15.

justification to the category of non-triggerman accomplices. This lack of justification deems the death penalty a disproportionate punishment and therefore only amounts to cruel and unusual punishment. The 'an eye for an eye, a tooth for a tooth' and 'Who so sheddeth man's blood, by man shall his blood be shed'⁸⁷ *lex talionis* or 'the law of retaliation' derived from biblical times is supported by philosophers such as Plato, Thomas Aquinas, Thomas Hobbes and C. S. Lewis.⁸⁸ 'An eye for an eye leaves the whole world blind' is the famous epigram thought to have come from Mohandas Karamchand Ghandi but is a sentiment expressed by many famous rights activists. Applied to this scenario it essentially means that reciprocal justice accomplishes nothing except more lives being lost - the basic concept of the argument surrounding the proportionality principle. Whether one is in agreement with this line of argument or not, the deeper issue to be determined is level of culpability. Whilst in theory it might seem logical to take the life of someone who has taken the life of another, there is still a significant level of ambiguity for the appropriate punishment for those who have not actually killed but were in some way involved in the circumstances which lead to the life in question being taken. As pointed out by Professor Robert C. Owen, to apply the death penalty to a non-triggerman accomplice produces extraordinarily severe consequences about what was at best, a guess about what was in [the defendant's] mind.⁸⁹

Fundamentally, when applying the proportionality principle, two factors need to be taken into consideration. First, the outcome of the crime in question, prima facie this is a relatively simple question, particularly as the outcome of homicide is death. For some crimes the answer is less straight-forward, for example fraud or rape. Second, the level of culpability of the offender. Culpability or blameworthiness is not necessarily dependent on the category of the crime or the crime itself but the level of involvement by the offender and mental 'fault' is judged on a case-by-case basis. To complicate the issue further, each person will have a different opinion of culpability as they would, for example, about the subjective reasonableness test commonly used in UK criminal and civil law. When these two factors are considered in the light of non-triggerman accomplices there is a great deal of grey area and many variables to consider. A strong argument in favour of the death penalty for this group of offenders is that if they had knowledge of what the crime would entail, i.e. homicide, then their mens rea is the same as the person who physically carried out the killing. In May 2003 37% of respondents supported the death penalty because they felt it was proportionate and only 3% said that it depends on the type of crime.⁹⁰ The main difficulty with upholding

⁸⁷ Genesis 9:6.

⁸⁸ Bedau, *Debating the Death Penalty* at p.54.

⁸⁹ Marra, W., 'He Didn't Kill, but he Will Be Executed', *ABC News*, 14 August 2007

⁹⁰ <http://www.gallup.com/poll/1606/death-penalty.aspx>

this notion is the necessity to prove that the non-triggerman accomplice had full knowledge of an intention for the homicide on the part of his accomplices from the outset, or 'malice aforethought'⁹¹ which means:

an intent, at the time of a killing, wilfully to take the life of a human being, or an intent wilfully to act in callous and wanton disregard of the consequences to human life; but malice aforethought does not necessarily imply any ill will, spite or hatred towards the individual killed.⁹²

Therefore the burden of proof is a cumbersome one resting on the prosecution. The ambiguity of mens rea in non-triggerman accomplices gives rise to the line of argument that where there is doubt, there should be no execution. Whilst it may be easy to prove that a non-triggerman had the highest level of intent to partake in the felony which led to the murder, it is an entirely different matter to prove the intent of the murderer. In United States law proof that a non-triggerman accomplice is guilty in aspects of the felony which led to the murder is sufficient to prove that he intended murder in the first degree as well in some states, therefore making him eligible for a death sentence. As Rosen observes, the 'felony murder rule disregards the normal rules of criminal culpability and provides homicide liability equally' for those who have killed, and those who have not. He notes that this could impose guilt on a defendant 'of a murder when an officer or victim mistakenly kills a third party' or death results in some other means during the course of a felony.⁹³ Evidence of similar relaxation of rules can be found in just about any legal system, for example the constructive act manslaughter principle in the UK; but it is quite a significant contradiction when the implications of such an anomalous rule are potentially death. Lack of consistency in applying the death penalty is exactly what led to the decision in *Furman* which sparked so many reforms in 35 death penalty statutes. Yet 40 years later there are still arguably major flaws in its application. The culpability of each individual on death row needs to be undoubtedly above a standardized minimum level as set out in *Furman*. Whilst the courts have 'chiselled' away at death penalty statutes over the years to narrow the class of death eligible defendants and increase the threshold for death-eligibility in order to ensure a fair and less arbitrary enforcement of the death penalty, it seems to have either omitted this class in the process or deliberately left it as death eligible. The lack of logic in this decision could seemingly violate the Cruel and Unusual Punishment clause in the 8th Amendment. In the same way that attitudes evolved towards homosexuality and race, society is shifting towards a disapproving stance on capital punishment and it is the legislature's obligation to not only lead the moral standards of civilization but reflect them as they change. The courts already

⁹¹ 18 USC § 1111 – MURDER.

⁹² West's Encyclopaedia of American Law, edition 2. Copyright 2008 The Gale Group, Inc.

⁹³ Rosen, 'Felony Murder' at p.1115. and see *People v. Hickman*, 56 Ill. 2d 175; 306 N.E.2d 32; 1973 Ill. LEXIS 220; *People v. Washington*; *State v Hacker*.

do this as is evident from the *obiter dicta* in *Gregg, Coker* and *Enmund*. In *Enmund* not only did the court look to past similar case law and the current standards of its citizens but it also looked to international law for guidance finding that:

the doctrine of felony murder [had] been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.⁹⁴

Whether this is a failure of the American justice system to uphold its duty or it is fulfilling its duty to uphold tradition, the decision in *Furman* stipulated the necessity to move with the standards of society and reflect modern morals. The most compelling evidence stands in favour of the former in that the efforts of the Supreme Court over the past four decades have suggested a slow movement towards complete abolition by gradually narrowing the class. If this is in fact the case, then it is clear that the next area for reform will be eliminating the category of non-triggerman accomplices from the death eligible class in line with the widely supported proportionality principle introduced 40 years ago.

At a stretch it could be argued that preserving its death-eligibility serves as a deterrent to committing felonies as the possibility of an accomplice killing could result in the death penalty, but this could be equally countered by pointing out that it is unlikely that a felon would consider this possibility in depth or even see it as a possibility at all. The point of a deterrent is that it acts as a tool to prevent a person from acting in a certain way. A compelling argument for the death penalty lies in incapacitation, where the defendant is a clear threat to society the death penalty is the only punishment which can ensure his inability to reoffend. In a November 2011 survey⁹⁵ 5% of people who supported the death penalty did so because they believed it to be the most effective form of incapacitation as compared to 19% in 2009. Whilst life imprisonment will protect society in general, 'lifers' still pose a threat to their fellow inmates and prison personnel not to mention the possibility of escape or parole. In this way the death penalty presents a permanent solution, however, where a non-triggerman accomplice is sentenced to death, the argument is rather feeble given that the defendant in question is not necessarily a murder-risk. In some cases, a significantly higher level of culpability is conferred onto the defendant even where the victim just happened to have a heart condition and the defendant was not even armed.

One significantly flawed pro-death penalty argument in light of non-triggerman accomplices is that of rehabilitation. It might be the case that some of the defendants of particularly gruesome aggravated first degree murders are highly unlikely to ever be rehabilitated due to

⁹⁴ See *Enmund v. Florida*, 458 US 782.

⁹⁵ <http://www.people-press.org/2012/01/06/continued-majority-support-for-death-penalty/>

their unpredictability and questionable mental soundness, this is not necessarily the case with non-triggerman accomplices. In the November 2011 poll, of those in support 1% said they believed that those sentenced to death should never be released and 1% said they believed that the defendant could never be rehabilitated. Some murderers such as Gary Ridgeway and Ted Bundy are perhaps in the category of offenders whose crimes are so horrific and perverse spanning over such a period of time that to even try and argue that they could be rehabilitated would be a near-impossible task. Despite this, to try and justify placing non-triggerman accomplices in the same class as these men is equally as absurd based on the level of culpability. As Lane and Tabak suggest:

Support for the death penalty apparently rests on the assumption that the worst murderers are the ones selected to be executed. However ... people who never killed at all are sometimes sentenced to death and executed.⁹⁶

One of the criticisms of replacing the death penalty with life without parole as outlined in a 2002 Illinois report on Capital Punishment⁹⁷ is that it holds less value as a form of closure for the families and loved ones of the victims of the crime. 3% of those polled who supported the death penalty said they did so because they sympathised with the victims and/or their families. An execution is argued to have a positive effect on the 'secondary victims' of homicide and allow them to finally feel at peace that the murderer has received his 'just deserts'. Regardless of the general opposition to this standpoint, in light of non-triggerman accomplices, whilst there may be some ill-feeling from secondary victims, it is much less likely that an execution of an accomplice would ever be necessary for them to achieve closure over an execution of the actual triggerman.

Crump notes that the argument is somewhat dubious in consideration of the felony murder rule in general with regard to accidental killings. Finally, the weakest line of argument is that the felony murder rule is riddled with exceptions and limitations so that it undermines its very purpose. Whilst this is in fact the weakest argument as also noted by Crump, it has nonetheless been accepted by one court in the case of *Aaron*.⁹⁸ In some states the number and extent of the limitations and restrictions placed on the rule itself make it virtually inapplicable to any situation or set of circumstances and therefore a nullified point. Its very existence is so ultimately pointless and almost never exercised as a means of prosecution that it serves no purpose in the modern legal system.

⁹⁶ Lane, J., and Tabak, R., 'The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty' (1989) 23 *Loyola of Los Angeles Law Review* 59 at p.96.

⁹⁷ Ryan, *Report of the Governors's Commission on Capital Punishment* at p. 9.

⁹⁸ *People v. Aaron*, 299 N.W.2d 304, 312-16 (Mich. 1980).

Whether any of the pro-death penalty arguments and pro-felony murder rule arguments are agreeable in general or not, when measured against a non-triggerman accomplice, none are justifiable. In a poll taken in 1996 67% of Americans asked agreed with the death penalty in principle, when asked about non-triggerman accomplices only 25%⁹⁹ agreed. With statistics like this rapidly decreasing, a more recent poll would be sure to reveal an even lower number in support. In fact, almost all of the arguments for the death penalty are defeated when examined in this light. These arguments put forward collectively constitute a violation of the 8th Amendment based on the cruel and unusual punishment clause. The lack of justification for such a severe punishment with its disproportionality compels one to arrive at the only logical conclusion that this is in fact a violation of the 8th Amendment

Conclusion

A comparison of the operation of the death penalty in the United States in the present day as compared to its first documented uses marks the evolution of a growing civilized society. Nevertheless any idea, theory, or system which survives the thousands of years that capital punishment has is undoubtedly not without its inherent flaws its history. Despite monumental attempts to develop the death penalty at the same rate as society, areas of the system have been neglected and become grossly incompatible with the modern view of Human Rights. One resounding failure has haunted the process and so hindered the *Furman*-mission since the anomalous outcome of *Tison* in 1987 which evidently retreated from the court's earlier stance on the 8th Amendment. The implications of this decision have confused the laws on capital punishment further rather than providing clarity and guidance in accordance with the intended role of the Supreme Court. This contradictory outcome has damaged the credibility of the Supreme Court's *Furman* mission and allowed the desire for retributive justice to prevail over fundamental constitutional provisions being interpreted correctly in the interests of an effective and fair legal system.

Furthermore, when considered at state level, the imposition of the death penalty on non-triggerman accomplices in such an erratic and varied way across the country is indisputably a violation of the 8th Amendment as the *Furman* criticisms highlighted. The vast differences between the two ends of the spectrum of capital punishment statutes at state level with regard to felony murder and the law of parties range from those states which do not allow the imposition of the death penalty for non-triggerman accomplices, through those which place various restrictions on its use, to those whose statute barely complies with the minimal standards set out in *Tison*. The obvious discrepancies with the uses of the felony murder

⁹⁹ <http://www.deathpenaltyinfo.org/node/1957>

rule and the law of parties result in such a fundamental error that it affects the very sovereignty of the Supreme Court and even the Constitution. Where the Supreme Court interprets areas of the constitution and ascribes such landmark aspirational principles to it and begins to reconstruct the law based on these decisions in the way that it has with *Furman*, a major contradictive decision such as *Tison* can have grave implications leading to the undoing of all that has been done in effort to create the idealistic capital punishment system described in *Furman*. One simple and seemingly minor divergence such as that in *Tison* paves the way for future discrepancies to find their way into an already highly flawed legal system.

Additionally, such decisions leading to such ambiguity allows states the opportunity to further interpret and therefore further distort the law as has already been done with the felony murder law and the law of parties. Whilst in some cases it may seem feasible to project a higher level of culpability onto those who commit a felony which results in death/homicide, to convey the same level of culpability onto them as aggravated murder defendants such as Ted Bundy or Gary Ridgeway and thus worthy of the death penalty is undoubtedly disproportionate. Where there may be some valid justifications for the death penalty in general, when considered in the light of non-triggerman accomplices as a category of death-eligible defendants the same justifications simply do not apply.

Conclusively, the very sovereignty and value of the Constitution rests on the ability of the Supreme Court to not just operate but bestow consistency onto both federal and state legal systems. The implications of the decision in *Tison* stretch beyond executing those with disproportionate culpability into the very core and basis of the Constitution and the Supreme Court. The only way to restore credibility to the '*Furman* mission' of narrowing the class of death-eligibility is to disallow the death penalty for non-triggerman accomplices entirely and introduce consistency for their prosecution by means of establishing more concreted guidelines on the definition of 'felony' and better means of grading the levels of culpability in such cases.