Inviting Common Sense Into the Texas Law of Parties Doctrine

Updated May 2021

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Texas Public Policy Foundation

RIGHT ON CRIME

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Introduction

> *Criminal liability requires proof of "an evil-meaning mind with an evil-doing hand."*
>
> —Morissette v. United States, *1952*

In the American justice system, criminal punishments are calibrated according to two factors: the severity of the offender's conduct and the harm it caused, and the level of thought or deliberation behind their actions. However, §7.02 (b) of the Texas Penal Code deviates from both of these criteria and allows courts to convict individuals of an offense that was committed by someone else. Sometimes referred to colloquially as the "conspirator-party rule" or as the "law of parties,"[1] §7.02 (b) bases a defendant's liability on their relationship with the actual perpetrator. It provides that conspirators—individuals who agree to commit a felony—may be convicted of any crime perpetrated by their co-conspirators that is in furtherance of their scheme and *should have been anticipated*, regardless of whether the defendant was, in fact, aware of the possibility.

By definition, individuals who fall within the ambit of the conspirator-party rule are not "innocent" of any and all crimes. They entered a pact to commit a felony offense and should be held accountable for their criminal conduct. They also may have been "ringleaders" who planned a violent crime and were well aware that their scheme risked the lives of others. However, the conspirator-party rule does not contain a safeguard to ensure that such circumstances apply or that convictions are proportionate to the defendants' conduct and intent.

This potential source of injustice is particularly problematic in murder and capital murder cases, where the charged offense often carries a harsher penalty than the crime the conspirators sought to carry out. In this context, the state has obtained life or even death sentences from a mere showing that the defendant was negligent—was not aware but should have been—that one of their co-conspirators would commit a murder. By contrast, prosecutions against principals—individuals who perpetrate an offense—require a showing that the defendants—at a minimum—disregarded known risks associated with their plans. To address such discrepancies across cases, at least five states have abolished this form of vicarious liability in murder cases: California (SB 1437, 2018), Hawaii (HRS §707-701), Michigan (*People v. Aaron*, 1980), Kentucky (KRS §507. 020), and Massachusetts (*Commonwealth v. Brown*, 2017).

This paper explores the conspirator-party rule and how it has allowed Texas courts to hand down convictions and the state's most severe punishments based

Key Points

- A subprovision of the law of parties allows courts to convict individuals of crimes they neither committed nor intended for anyone else to commit.
- The law of parties is problematic in murder and capital murder cases, which require evidence that the actual assailant had a high level of intent, but a conspirator may be convicted with a showing that he should have been aware that his co-conspirator would commit the crime.
- The law of parties undermines the integrity of Texas's capital punishment system, which must reserve executions for the "worst of the worst" offenders, by providing a mechanism under which individuals who did not kill anyone or intend that anyone be killed may be sentenced to death.
- The law of parties is also particularly harsh against juveniles and young adults who are prone to impulsive, reckless behavior in group settings but are unlikely to reoffend.

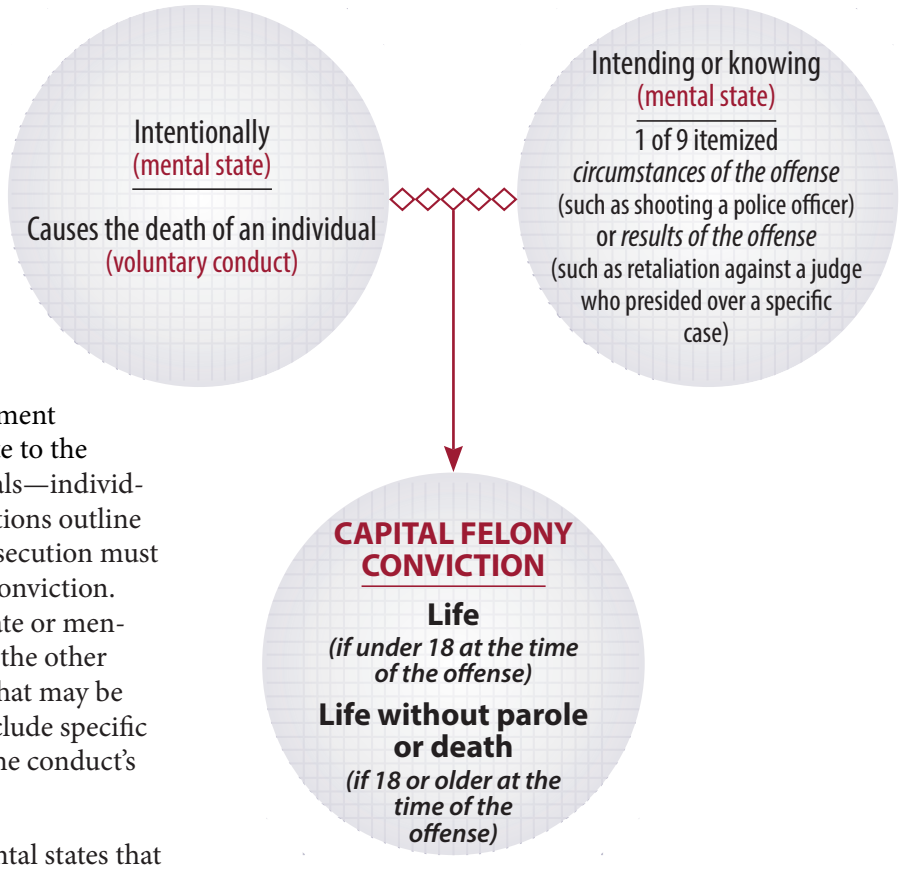
1 Sections 7.01 and 7.02 of the Penal Code—sometimes referred to together and separately as the "Law of Parties"—set out the circumstances in which a defendant is vicariously liable for a crime. Section 7.02's second subsection, the conspirator-party rule, provides that conspirators may be convicted of any acts perpetrated by their co-conspirators in furtherance of their scheme that should have been anticipated, regardless of whether the defendant was, in fact, aware of the possibility. To eliminate confusion, this paper refers to §7.02 (b) as the conspirator-party rule.

on a defendant's tangential connection to a crime. Section I gives an overview of the Texas Penal Code and homicide offenses. Section II explains the conspirator-party rule. Section III summarizes the law's impact in death penalty proceedings and young offenders. Section IV examines justifications for the conspirator-party rule. The last section gives recommendations for instilling fairness into the law.

I. Overview of Culpability Under the Texas Penal Code

The Texas Penal Code defines each crime that is recognized in the state and assigns a punishment or a range of punishments that is proportionate to the seriousness of the offense (§1.02). For principals—individuals who commit the crime—the code's definitions outline a *prima facie* case or the elements that the prosecution must prove beyond a reasonable doubt to obtain a conviction. A definition must set out a culpable mental state or mental state(s)[2] (*mens rea*) that is or are applied to the other factors, and voluntary conduct (*actus reus*)—that may be an act, omission, or possession. It may also include specific circumstances surrounding the conduct and the conduct's result (Texas Penal Code §§ 6.01 and 6.02).

Figure 1
Capital Murder Elements



Since 1973, Texas has recognized just four mental states that are classified according to degrees—that is, the seriousness of the offense. Sections 6.02(d) and 6.03 of the Texas Penal Code list them from highest (most serious) to lowest (least serious) as follows:

(a) **Intentionally**
Applies "when it is [a person's] conscious objective or desire to engage in the conduct or cause the result" (§6.03(a)), laid out in the crime's definition.

For example, a conviction for capital murder under §19.03(a)(3) requires a showing that the person "intentionally commit[ted] murder in the course of committing" (§19.03(a)(2)) a specified felony such as kidnapping or robbery. These charges are common in robberies where the assailant shoots the victim or a bystander (accidentally).

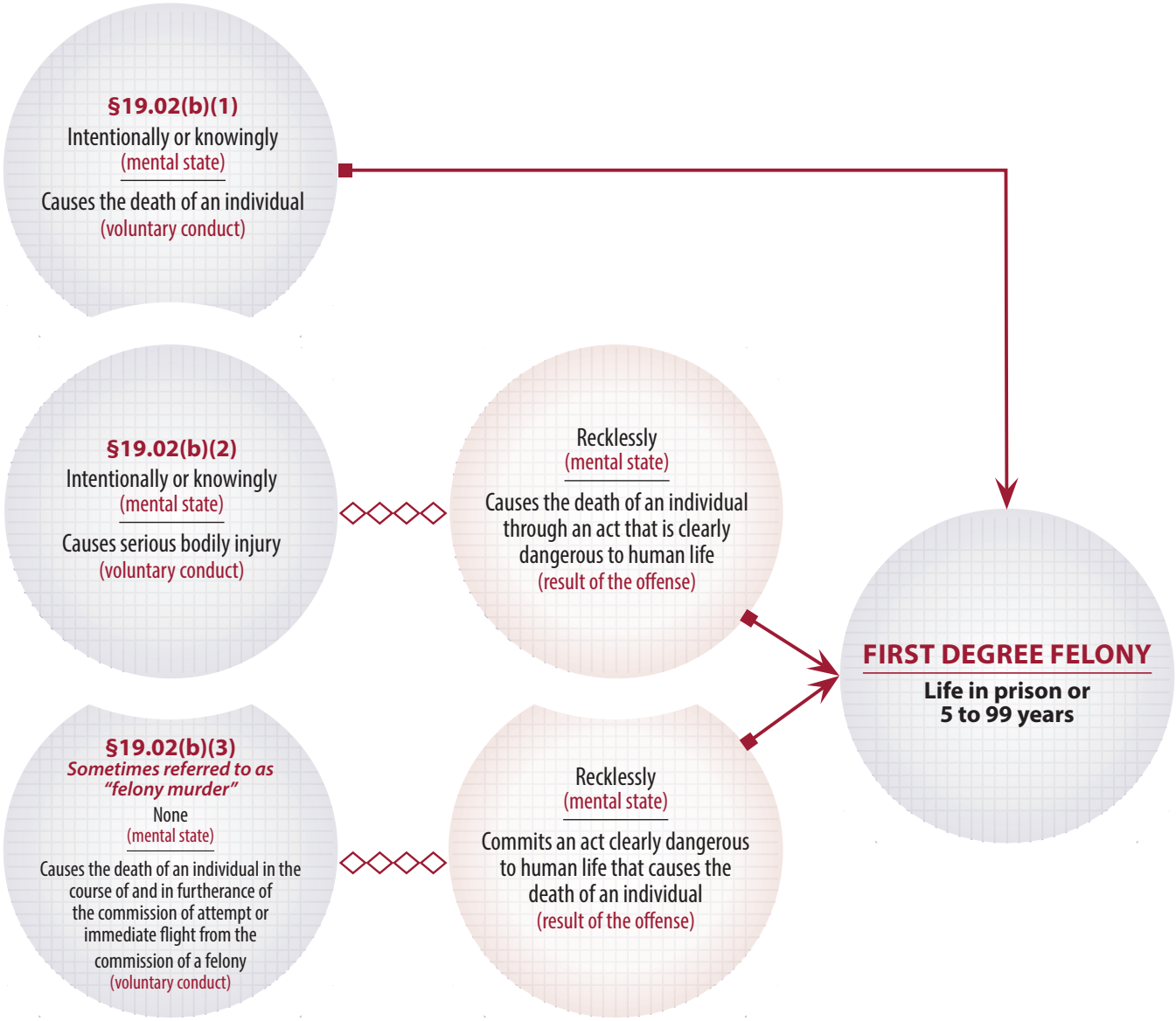
(b) **Knowingly**
Applies in situations where a person is aware "of the nature of his conduct or that certain circumstances exist" or "is aware that his conduct is reasonably certain to cause the result" (§6.03(b)).

The definition of capital murder under §19.03(a)(1) applies this standard by requiring proof that a person murdered "a peace officer or fireman . . . who [sic] the person [*knew to be*; emphasis added] a peace officer or fireman." This crime typically occurs when the peace officer or fireman is in uniform or when an undercover officer's identity has been revealed.

(c) **Recklessly**
Applies to situations where a person "is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint" (§6.03(c)).

2 Typically, a definition contains one *mens rea* that applies to the other elements of an offense. However, there are some exceptions where more than one applies. For example, a person commits the crime of evading arrest if "he *intentionally* [emphasis added] flees from a person [*actus reus*] he *knows* [emphasis added] is a peace officer or federal special investigator attempting lawfully to arrest or detain him [the circumstances surrounding the conduct]" (Texas Penal Code §38.04).

Figure 2
First Degree Murder Elements



This standard is applied in the definition of first degree murder under §19.02(b)(2), which requires a showing that a person "intend[ed] to cause serious bodily injury and commit[ted] an act *clearly dangerous* [emphasis added] to human life that cause[d] the death of an individual." The crime would apply where two people are in a brawl and one slams the other person to the curb inflicting blunt trauma to the victim's head.

(d) **Criminally negligent**
Applies to situations where a person "ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint" (§6.03(d)).

For example, a criminally negligent homicide occurs when a person "causes the death of an individual" by undertaking a substantial and unjustifiable risk. Such charges would apply where a person hits and kills another person with a car while driving 20 miles per hour above the posted speed limit.

As the above examples demonstrate, all homicide offenses require evidence that the defendant "caused the death of an individual." The gravity of the offense and the prospective sentence range rise with the defendant's mental state.

The two charges that are the subject of this report—capital murder and murder—require a showing that the defendant acted either intentionally, knowingly, or recklessly, depending upon the specific subsection of the Penal Code. (See **Figures 1** and **2**.)

This mental state requirement even applies to felony murder, which is sometimes described as an "unintentional" murder committed in the course of a felony. Although the statute outlining this offense does not include a mental state with respect to the homicide itself, it still requires a showing that the defendant's conduct was knowing or reckless toward the circumstances of the offense, or more succinctly, that the defendant undertook an unreasonable and unjustifiable risk concerning the lives of others.

In *Lomax v. State*, the defendant was convicted of first degree murder when he steered his car into another automobile and a 5-year-old girl was killed in the accident. On appeal he argued that the prosecution failed to prove that he had any intent to commit a homicide and that dispensing with this requirement rendered felony murder—outlined in §19.02(b)(3) of the Penal Code—a strict liability offense. Upon review, the Court of Criminal Appeals rejected this argument. Although the felony murder statute does not specify a mental state with respect to the homicide, the court reasoned that the statute preserves the mental state for the underlying felony—which must be knowing or recklessness depending upon the felony in question—and that the death itself must be caused by conduct that is "clearly dangerous to human life" (*Lomax v. State of Texas*, 2007, para. 12).

It is also important to note that the trial record definitively established that Lomax engaged in reckless behavior behind the wheel of his car. Lomax was severely inebriated at the time of the accident. His blood alcohol level was 3 times the legal limit and he had been tailgating, speeding, and weaving on a crowded public street. Driving in such a manner and in such conditions is indisputably dangerous to human life—thereby satisfying §19.02(b)(3)'s *mens rea* requirement—and Lomax had prior convictions for driving under the influence, making this episode an inherently dangerous felony (Texas Penal Code §§ 49.04(a) and 49.07).[3]

II. The Conspirator-Party Rule

The conspirator-party rule is unique among recognized bases for conviction in that it is premised not on what the defendant did or intended to do with respect to the crime, but on his relationship with the actual perpetrator. It holds that a person is fully accountable for a crime—has the same level of culpability as the person who committed it—if he entered a conspiracy to commit a crime and was negligent—failed to be aware—of a reasonable possibility that one of his co-conspirators would commit another crime in the course of their common purpose. Specifically, Texas Penal Code §7.02(b) states:

> *If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed,* ***though having no intent to commit it*** [emphasis added], *if the offense was committed in furtherance of the unlawful purpose and was one that* ***should have been anticipated*** [emphasis added] *as a result of the carrying out of the conspiracy.*

The key words in this definition are "*should have been* anticipated." These words form the only requirement regarding the defendant's mental state. They equate to criminal negligence—the lowest level of intent recognized in Texas criminal law—but allow someone to be convicted of any offense, including capital murder.

A case in point is that of Ashley Ervin, who was just 17 at the time of her offense. As her trial lawyer said to the jury in her case, the "only thing [she] was guilty of was 'extremely poor judgment'" (Flynn, 2016, para. 41). On May 25, 2006, Ervin slept in the backseat of her car, while her boyfriend Keithron Fields and his friend Dexter Johnson rode around a Houston area neighborhood.

For most of the night, she remained asleep while Fields and Johnson drove her car. At some point in the morning, she heard a car door slam when Fields got into the vehicle and told Johnson that the woman he intended to rob did not have any money. Ervin then moved into the driver's seat and began heading toward Fields's home in Humble, Texas. At one intersection, Johnson and Fields asked to be let out; Ervin complied and then began to drive away when she heard shots fired. She turned her car around and saw Johnson and Fields in the middle of the street wearing black masks and hoodies. She picked them up and went back to Fields's home. Later she would learn that they had killed a man who was washing a barbecue grill at a car wash (*Ervin v. State*, 2010).

About a month later, two plainclothes police officers approached her at the McDonald's where she worked with questions about her boyfriend. She agreed to give them a voluntary statement, was "extremely polite," consented to a search of her car, and came back to the station on two additional occasions to clarify her account. Ultimately, her statement would prove crucial to the investigation of Fields and Johnson, but as the appellate decision that upheld her

3 Driving while intoxicated is a misdemeanor offense. However, it qualifies as a felony upon repeat convictions (§49.07).

THE CASE OF MICHAEL CUCUTA

Michael Cucuta is not innocent in the traditional sense. He conspired with a friend to commit a robbery and attempted to carry it out. Clearly, courts should hold him accountable for this offense, which is punishable by a prison sentence of 2 to 20 years. However, he did not kill anyone, and he explicitly refused to participate in any violence when prompted to do so. The extent to which he is deemed guilty of a homicide offense should reflect those facts.

In 2011, Eduardo Bustos—a childhood friend—burglarized Cucuta's apartment while he was imprisoned for a probation violation. Seeking to recover his belongings, Cucuta agreed to assist a mutual friend—Jose Acosta—in stealing from the apartment Bustos shared with his girlfriend Savana Rodriguez. The pair planned to enter the apartment when Bustos and Rodriguez were out but obtained a gun to brandish and scare away anyone who would see them (*Cucuta v. State, 2018*).

When they arrived, however, Bustos and his girlfriend were unexpectedly at home. Acosta went in first to hang out with the couple and later told Cucuta to join them in the living room. At some point in the evening, Acosta confronted Bustos about snitching and having an affair with his girlfriend. After Bustos admitted to the sexual relationship, Acosta pulled out the gun, pointed it at Bustos's head, and told Cucuta—who was unaware of Acosta's grievances—to hit Bustos with a glass liquor bottle. Cucuta refused (*Cucuta v. State, 2018*).

Fearing that Acosta would direct his anger at him, Cucuta went into the apartment's bedroom to search for his stolen property. While Cucuta was out of the room, Bustos tackled Acosta, and at least four shots were fired while they struggled. When Cucuta came back into the living room where the men had their guns drawn, he saw that Bustos and Acosta were shot and that Acosta was attempting to pistol-whip Bustos while he laid on the floor. Cucuta grabbed Acosta, stopped the assault, and fled the scene. Bustos died from three gunshot wounds shortly after the botched robbery (*Cucuta v. State, 2018*).

Despite evidence of his lack of intent, a jury convicted Cucuta of murder and attempted capital murder and sentenced him to 45 years in prison. These convictions and punishments conflict with his culpability. Instead, the state should prosecute individuals in his situation for their substantive crimes—in this case robbery—and a lesser included homicide offense that reflects their level of culpability such as criminally negligent homicide, which is punishable by 2 to 10 years in prison when the crime involves a deadly weapon (Texas Penal Code §§ 19.05 & 12.5(c)). As in any case involving multiple counts, courts would then have the discretion to have the sentences run consecutively—one after the other—or at the same time.

conviction noted, Ervin's own words provided a basis for her conviction. She drove Fields and Johnson to the car wash; she knew they were armed; she knew they intended to rob someone, and the murder was committed in furtherance of this robbery. Those facts alone, despite evidence that Fields and Johnson had not used their guns earlier in the evening, were enough to convict her of capital murder. Ervin was sentenced to life without parole, and the sentence was converted to life in 2018.

By contrast, principals who actually kill another person through their failure to understand the risks they undertake are guilty of negligent homicide. This is a state jail felony (punishable by 180 days to 2 years in prison) or a third degree felony (punishable by 2 to 10 years in prison) if an enhancement applies.[4] For example, according to trial records, Ben Chambless's wife woke him up one night after hearing a noise outside their bedroom window. Believing that their neighbor's dog was the source of the sound, Chambless retrieved his .22 caliber rifle and fired a few rounds of his rifle from his porch, intending to scare the dog off. Yet, tragically, his shots hit Brian Berg in the head, chest, shoulder, and leg; Berg was pronounced dead at the scene (*Chambless v. State*, 2013). Although Chambless was unaware that Berg was potentially in his line of fire, a jury found that Chambless *should have* been aware of the risks associated with firing his gun and was thus guilty of criminally negligent homicide; the jury sentenced him to 8 years' imprisonment.

4 Texas Penal Code §12.35(c) provides that "an individual adjudged guilty of a state jail felony shall be punished for a third degree felony if it is shown on the trial of the offense that: (1) a deadly weapon . . . was used or exhibited during the commission of the offense or during immediate flight following the commission of the offense . . . (2) the individual has previously been finally convicted of any felony [involving the trafficking of persons or sexual abuse of a child] . . . or for which the judgment contains an affirmative finding [regarding the use or exhibition of a deadly weapon or firearm]."

Obviously, Ervin has a higher degree of culpability than Chambless due to her knowing involvement in an attempted robbery. However, this can be addressed simply through her prosecution for this offense (punishable by 2 to 20 years in prison) in addition to her prosecution for a homicide offense that corresponds with her culpability under the conspirator-party rule.

III. The Conspirator-Party Rule's Impact

It is impossible to fully and accurately assess the conspirator-party rule's impact on Texas's criminal justice system, because information about its use is unavailable. Prosecutors are not required to specify a theory of how the defendant participated in an offense in an indictment, and the issue may not be determined at trial. A jury may issue a conviction even when its members disagree on whether the defendant acted as a principal or is vicariously responsible for the acts of another person—so long as each juryman is convinced beyond a reasonable doubt that the defendant falls within either category. In addition, the vast majority of cases (99%) are resolved by a plea resolution without any finding of *how* the defendant was involved in the crime (Texas Judiciary et al., 2019).

However, case examples from death row demonstrate that the law can produce disproportionate capital sentences, and neuroscience research indicates that the rule has special implications for juveniles and emerging adults.

Disproportionate Death Sentences

Simply put, the conspirator-party rule undermines the integrity of Texas's capital punishment system. Death penalty states are subject to a constitutional mandate to reserve this punishment "to those offenders *who commit* [emphasis added] 'a narrow category of the most serious crimes' and *whose extreme culpability* [emphasis added] makes them 'the most deserving of execution'" (*Roper v. Simmons*, 2005, p. 568[5]). The conspirator-party rule imposes criminal liability by an entirely different set of criteria: the defendant's relationship to the actual perpetrator and participation in an underlying offense. Employing this standard to convict individuals of capital murder—the state's only death-eligible offense—increases the possibility that a death sentence is excessive in light of a defendant's conduct and mental state.

Further, the fact that courts can and have handed down death sentences against individuals who did not kill anyone or intend that someone else commit an act of murder suggests that the Code of Criminal Procedure's safeguards against arbitrary death sentences are inadequate (Texas Code Criminal procedure art. 37.071). Texas is an outlier among death penalty states in its execution of non-perpetrators. According to the Death Penalty Information Center (n.d.), states have executed 11 people who did not perpetrate, aid, or solicit an act of murder since capital punishment was reinstated in 1976. Six of these executions were carried out in Texas.

Jeff Wood

Jeff Wood's case captured national attention when he was scheduled for execution in the summer of 2016. Wood did not kill anyone. He was convicted of capital murder and sentenced to death based on his participation in a convenience store robbery that resulted in the shooting death of his friend Kris Keeran. But another man, Daniel Reneau, who was armed without Wood's knowledge,[6] pulled the trigger.

On the morning of the robbery, Wood sat in a pickup truck that was parked outside a Texaco gas station, while Reneau went into the station's store to convince the cashier Kris Keeran to turn over the store's safe and split the proceeds (Michels, 2009). Keeran refused; Reneau fired, and Wood ran into the store when he heard the shots. Stunned upon seeing Keeran's body, Wood helped Reneau remove the safe and flee the scene after Reneau threatened to kill Wood's girlfriend and daughter if he refused to cooperate (Application for Writ of Habeas Corpus, 2016, p. 13). The pair was eventually arrested and separately tried, convicted of capital murder, and sentenced to death.

Advocates maintain that Wood's sentence resulted from a trial that was infected with false or misleading evidence and the poor handling of Wood's cognitive deficits and mental health challenges. Lucy Wilke, the prosecutor who made the decision to seek the death penalty against Wood, had just 13 months of experience at the time of his trial, relied on Dr. James P. Grigson's assessment of Wood's purported "future dangerousness," and was unaware that Grigson had been expelled from the American Psychiatric Association and the Texas Society of Psychiatric Physicians for presenting scientifically unreliable testimony in death penalty cases (L. Wilke, personal communication, 2017).[7]

In addition, Wood has a sub-average IQ of 80, attended special education classes in high school, and suffers from a

5 The quote appears on page 14 of the source the paper links to.

6 During Reneau's trial, the prosecution relied heavily on testimony from Wood's girlfriend Nadia Mirele to establish that Reneau acted unilaterally in bringing a gun to the store. She told the jury that as they were departing, Reneau "was going to take the gun with him and [Wood] told him to leave it there, and [Reneau] put it under the couch and [Wood] walked out and Danny picked up the gun and stuck it in his pants" (Application for a Writ of Habeas Corpus, 2016, p.14). They also elicited testimony about threats Reneau made against Wood's girlfriend and even vouched for Mirele's credibility. But they objected to the presentation of the same testimony in Wood's defense on hearsay grounds (Application for a Writ of Habeas Corpus, 2016, pp.14-15). The court excluded Ms. Mirele's testimony from Wood's trial.

7 Letter from Lucy Wilke, district attorney to Texas Board of Pardons & Paroles, recommending clemency for Jeff Wood. The Foundation has access to this letter.

severe mental illness. He was found incompetent to stand trial and committed to a psychiatric institution until a physician deemed him mentally competent less than 3 weeks later (Heinlein, 2016).

Since the Texas Court of Criminal Appeals issued an order canceling Wood's execution in 2016, nearly every official who is familiar with the facts of his case has agreed that his death sentence is excessive. This group includes Lucy Wilke, who is now the sitting district attorney with jurisdiction over the city of Kerrville, where the crime occurred; David Knight, Kerrville's chief of police; and the Honorable N. Keith Williams, the trial judge who reviewed his latest appeal (L. Wilke, personal communication, 2017). Yet Wood remains on death row and eligible for execution.

Inadequate Constitutional Safeguards

Texas's capital sentencing procedures are confusing and out of step with constitutional requirements. If a defendant is convicted of capital murder and the state seeks the death penalty, the case proceeds to a punishment trial to determine whether the defendant should be sentenced to death or life without parole.[8] At the end of these proceedings, the judge submits a series of questions to the jury to guide its verdict.[9] In cases where the jury received an instruction that it could convict the defendant of capital murder as a party, the jury must answer the second question determining

> *whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or* **anticipated** [emphasis added] *that human life would be taken.* (Texas Code of Criminal Procedure art. 37.071(b)(2))

A death sentence may not be imposed unless the jury answers "yes" to this question by finding that one of its three options applies. This special issue question is intended to ensure that death sentences comply with case law on constitutionality of executing individuals who did not commit a murder but does not give full effect to the protections laid out in court decisions.

In a pair of cases from the 1980s, *Enmund v. Florida* (1982) and *Tison v. Arizona* (1987), the U.S. Supreme Court ruled that the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments bars states from executing a non-triggerman unless there is evidence that he intended to kill the complainant or there is evidence of his "major participation in the felony committed, combined with reckless indifference to human life" (*Tison v. Arizona*, 1987, p. 158).

In *Enmund v. Florida* (1982), the defendant sat in a getaway car parked on the side of the road while his co-defendants killed an elderly couple in a fumbled attempt to rob them. Enmund was subsequently convicted of two counts of first degree murder and sentenced to death. On appeal, the Florida Supreme Court upheld his death sentence, but the U.S. Supreme Court reversed on the grounds it was unconstitutional to execute Enmund absent evidence that he "killed or attempted to kill, [or] . . . intended or contemplated that life would be taken" (p. 801).

The Court clarified in *Tison* that *Enmund*'s culpability requirement is satisfied in cases where the defendant was substantially involved in the underlying felony and that his actions supported a mental state of reckless indifference to human life. A key component in the Court's reasoning was the foreseeability that violence would ensue in the course of the felony. The defendants in *Tison,* three brothers, orchestrated the prison break of two convicted murderers, entered the prison with an ice chest full of guns, armed the escaping prisoners, actively participated in the kidnapping and robbery that culminated in the murders in question, and stood by while the victims were shot. Based on these facts, the Court reasoned that their conduct equated to "major participation" in the underlying felony, that they were aware of the dangerous nature of their plan, and therefore a death sentence was permissible under the Eighth and Fourteenth Amendments.

In light of these holdings, the Texas "law of parties" special issue question is inconsistent with the Eighth and Fourteenth Amendments. Its only clause pertaining to non-principal conduct merely requires a finding that the defendant "anticipated that human life would be taken." The Court of Criminal Appeals has upheld the constitutionality of this question, reasoning that "anticipating that a human life will be taken is a highly culpable mental state, at least as culpable as the one [in *Tison*]" (*Ladd v. State*, 1999, pp. 59-60). And while the word "anticipate" may be similar to recklessness as a standard for intent, the question itself does not ensure that the defendant was a major participant in the predicate offense, made a determination that human life would be taken at the time he engaged in the conspiracy, nor was in a position to accurately assess the risks associated with his conduct.

8 In Texas, a defendant can request a sentencing trial before the jury in non-capital cases. Jury sentencing is automatic in death penalty cases. See Texas Code of Criminal Procedure arts. 37.07 and 37.071.

9 In responding to all of these questions, the jury must be unanimous in answers that would result in a death sentence and instructed that at least 10 jury members must agree to a response that results in a sentence of life without parole. The law explicitly forbids any attorney in the courtroom, including the judge, from informing the jury that the court will sentence the defendant to life without parole if they fail to reach this level of consensus (Texas Code of Criminal Procedure art. 37.071(c)-(f)).

This weak standard increases the likelihood that death sentences will be disproportionate both in relation to the defendant and in relation to other murder cases. By way of example, a jury sentenced Jeff Wood to death under Article 37.071, despite evidence that Wood did not perpetrate any acts of murder or intend to engage in violent conduct. Yet, another Texas jury sentenced Levi King to life in prison without parole. At the commencement of his trial, King pleaded guilty to three counts of capital murder for killing a pregnant woman, her husband, and her son at their West Texas farmhouse (*Levi King Gets Life for Killing 3*, 2009). A system that creates such disparities in punishment runs the risk of a constitutional challenge.

Conspirator-Party Rule and Juveniles/Emerging Adults

The use of the conspirator-party rule for homicide cases is particularly problematic with respect to juveniles and young or emerging adults. A mounting body of research has found that their criminal behavior is "fundamentally different than mature adults' criminal behavior in both cause and nature" due to the immaturity of their brains (Siringil Perker & Chester, 2017, p. 3). Individuals who are aged 21 or younger are prone to impulsive behavior, especially in emotionally charged situations and group contexts, but this predisposition diminishes over time. "Most adolescents, even those who commit serious crimes, will age out of offending and will not become career criminals" (Casey et al., 2017, p. 2).

Throughout adolescence and young adulthood, different regions of the brain and the connections between them develop on separate schedules—creating unevenness between systems that sense emotions and those that regulate impulse control (Casey et al., 2017, p. 2).

> *The most recent studies indicate that the riskiest behaviors arise from a mismatch between the maturation of networks in the limbic system, which drives emotions and becomes turbo boosted in puberty, and the maturation of networks in the prefrontal cortex, which occurs later and promotes sound judgment and the control of impulses. Indeed, we now know that the prefrontal cortex continues to change prominently until well into a person's 20s. And yet puberty seems to be starting earlier, extending the "mismatch years."* (Giedd, 2015, p. 34)

Neuroimaging evidence suggests that peer presence alone can aggravate this imbalance by activating the brain regions related to reward seeking (Chein et al., 2010), further increasing a juvenile's or young adult's propensity to engage in risky, potentially criminal behavior in a group setting.

Given this context, Ashley Ervin's life sentence is not only disproportionate but serves little (if any) public safety purpose. By all accounts, she was a "good kid." She was "geeky." At the time of her late night ride with Fields and Johnson, she was college-bound with aspirations of becoming a pediatric nurse and had been handpicked to join Forest Brook High School's accelerated Health Science Technology program (Flynn, 2016, para. 5). Since her incarceration, she has obtained a GED and maintains hopes of being a nurse should she ever be released (Flynn, 2016, para. 31). Her conduct was aberrant even at the time of the offense and not indicative of an ongoing threat to society.

Yet, individuals like Ervin who are aged 21 or younger are over-represented in the subset of offenders who are convicted of murder and capital murder under the conspirator-party rule. According to a dataset posted on the Texas Department of Criminal Justice's (TDCJ) website in December 2020, the institution had—as of December 1, 2020, 13,853 inmates in its custody who were serving sentences for murder, capital murder, or attempted capital murder.[10] Over a third of these prisoners—34% (4,750)—were between the ages of 13 and 21 at the time of their offense (TDCJ, 2020). The U.S. Census Bureau estimates that Texans between the ages of 10 and 24—a demographic that is obviously much broader than the 13 to 21 age group—account for just 20% of the state's residents (2019). Assuming that prosecutors invoke the conspirator-party rule at a similar rate across all age demographics, the rule unevenly affects this group—despite evidence that they are less culpable for their behavior, and that it is not indicative of their threat to society.

IV. Justifications for the Conspirator-Party Rule

Prosecutors and other law enforcement officials typically offer two arguments in support of Texas's conspirator-party rule. The first is that this law allows them to pursue charges against dangerous individuals who fit a crime boss archetype. They direct other individuals in their criminal endeavors but may not make an explicit command to kill or be present when a criminal scheme is carried out. The second is that it provides a mechanism for obtaining death sentences against inmates who commit violent acts after escaping from prison and pose an ongoing threat to society.

Prosecuting Ringleaders

Assuming that this hypothetical crime boss does not issue a command to commit an act of murder—in which case he would be guilty of capital murder under §7.02(a) of the

10 This figure was calculated using TDCJ's high value data set, which includes all inmates. The number of inmates serving sentences for murder, capital murder, attempted murder, or attempted capital murder, was calculated by filtering for "murder" in the TDCJ offense column. The inmates' ages at the time of offense was calculated by first subtracting their offense dates from the date of analysis (January 7, 2021) and then subtracting these figures from the inmates' age.

Penal Code[11]—this argument has some merit. For example, Darrell Bell's capital murder conviction is based on §7.02(b) despite his status as a ringleader in a conspiracy to commit robbery. According to the prosecution, Bell did not pull the trigger, but he did plan the robbery by recruiting his friends to participate, supplied them with a gun, tried to find a second gun for them to use, and (by his own words) got them "all pumped up to go" before they went inside (*Bell v. State*, 2008). Eyewitnesses testified at trial that Bell's friends announced, "This is a robbery, fools!" upon entering the store, and shot the clerk after he surrendered the cash register and begged for his life (p. 2).

Based on this evidence, it is unlikely that the state could obtain a murder conviction against Bell using a theory of aiding and abetting under §7.02(a). His motive in coordinating the robbery was to get his hands on some cash; he did not instruct his friends to shoot anyone. However, these facts also establish that Bell's culpability exceeds the conspirator-party rule's requirements. It is not a case where he merely *should have* anticipated that his plan posed a risk to human life but did not. There are grounds for the jury to conclude that Bell was substantially involved in planning the robbery, aware of the risks it entailed, exacerbated the risk of violence by "pumping" his friends up, and proceeded with it anyway. The fact that he searched for a second gun in and of itself demonstrates his consciousness that shots may be fired during the robbery.

The law should distinguish the culpability of defendants like Bell, who are clearly aware of the implications of their actions from individuals like Wood, Cucuta, and Ervin, who may have been negligent about the risks they undertook but were clearly unaware of them.

Protecting the Public From Violent Offenders Who Have Escaped From Prison

The second argument in support of Texas's conspirator-party law is that it allows prosecutors to pursue the death penalty against individuals who escape from prison and pose a continuing threat to public safety. Section 7.02(b) played a significant role in obtaining death sentences against each of the Texas Seven. This group escaped from the Connally Unit in Kenedy, Texas, in December 2000. On Christmas Eve, the group murdered law enforcement officer Aubrey Hawkins during a robbery of a sporting goods store for supplies. Ultimately, six of the seven were apprehended in a Colorado trailer park, where they had been impersonating devout Christian conventioneers (Wiley, 2018).[12]

Individual members of the Texas Seven had varying levels of involvement in the murder of Officer Hawkins, who was shot 11 times before he could exit his squad car. Although they were armed during the retail robberies which they used to finance their flight from law enforcement, they had agreed that no one would be harmed as they gathered money and supplies. On the night of the sporting goods robbery, the group had five guns on the premises, and officials have not definitively established which firearms were discharged and who was present for the shooting (*Ex parte Garcia*, 2018, p. 4). However, testimony indicates that Rivas shot Hawkins without consulting the other members; at least four others opened fire in a chaotic scene; and the lookout was not present for the shooting and did not learn of it until after the group left the facility (Blakinger, 2018).

Given that the Texas Seven escaped from a prison facility, it is understandable that law enforcement would want assurances that former fugitives do not pose an ongoing threat to the public. However, other provisions of the Texas Penal Code provide a basis for convicting the most culpable and dangerous members of this group. The five who opened fire on the officer could be convicted as principals or principal-parties under §7.02(a). And those who did not participate in the shootout may still be convicted of capital murder as principal-party and sentenced to death depending on the jury's findings about their mental state. For example, even the lookout could be convicted of capital murder under a theory of aiding and abetting if the jury found that he gave warning to the other members with an intent that they prepare to fire on Officer Hawkins.

Finally, if a defendant did not kill anyone or intend to do so, it does not make sense to infer that they are a threat to the public, especially when they are in custody. A review of inmate prison records indicates that the TDCJ is able to manage even the most hardened offenders without incident. According to a study that reviewed the prison records of 155 Texas death row inmates, none had committed an act of murder while in TDCJ's custody, just two were prosecuted for crimes committed while on death row, and just eight (5%) of the inmates engaged in assaultive behavior that resulted in medical attention (Texas Defender Service, 2004, p. 23).

V. Recommendations

1. ***Limit murder and capital murder convictions under the conspirator-party rule to cases where the defendant was a major participant in the conspiracy and displayed reckless indifference to human life.***

11 Section 7.02(a) of the Texas Penal Code is sometimes referred to as the "principal-party rule" and applies to circumstances where the non-perpetrator solicited the crime, provided intentional assistance, or acted with the mental state necessary for the offense.

12 The seventh escapee committed suicide before capture.

This rule change will ensure that murder convictions are reserved for individuals who either intended to commit the crime or engaged in conduct that is so inherently dangerous that it is likely to result in death. Individuals like Wood, Cucuta, and Ervin would still be liable for the underlying offenses they agreed to carry out and for their negligent role in a homicide—but the new law would recognize the distinction between their culpability and the culpability of their counterparts who committed the murder.

This change will also preserve the prosecution's ability to seek and obtain convictions in cases where the defendants conspired to commit murder. Acts in furtherance of a conspiracy to commit murder also encourage, aid, or assist in the homicide—establishing liability for co-defendants under the principal-party rule and under the revised conspiracy-party rule. For example, Erin Caffey conspired with her boyfriend and two others to kill her parents (Harvey, n.d.).

On March 1, 2008, Charlie Wilkinson and Charles Waid entered the Caffey family home in Alba, Texas, shot Mr. and Mrs. Caffey and their two sons, and set the home on fire. Erin, who had suggested the crime as a solution to her parents' decision to forbid her from seeing Wilkinson, waited in a car nearby with Waid's girlfriend Bobbi Johnson. Prosecutors obtained capital murder convictions against Wilkinson and Waid and held Caffey and Johnson accountable for the crimes under the law of parties. Caffey and Johnson would still be held accountable for their crimes under the new rule (Harvey, n.d.).

The new rule will also allow prosecutors to obtain murder convictions where the parties engaged in activities that clearly endanger human life. On October 19, 2008, Tracie Alphin and her friend David Hickman received rides from Jason Herrington. After making an unsuccessful attempt to sell a laptop at a pawn store and stopping for gas, Alphin and Hickman conspired to steal Herrington's car. Alphin then asked to make a detour to her father's house where she stole a gun and hid it in her purse. From that point on, Alphin and Hickman disagree as to the facts (*Alphin v. State*, 2012).

According to Alphin, Hickman asked to stop so he could smoke methamphetamine as they drove through country roads outside Quinlan. At some point after the three emerged from the car, Herrington ran away, and Alphin shot three or four rounds in his direction before he fell into a ditch. As they approached, Hickman told Alphin to hand him the gun. She did and walked away while Hickman shot Herrington in the head, killing him. By her own account of the events, Alphin devised a plan to steal Herrington's car, obtained a gun, fired it upon Herrington, and handed it to Hickman knowing that he would use it to kill Herrington or, at the very least, place his life in danger (*Alphin v, State*, 2012). Alphin's actions unequivocally satisfy the new test in that she was a major participant in a plan to commit a robbery and was reckless with human life when she fired a gun at the decedent.

It will also allow prosecutors to obtain murder convictions against defendants who did not "pull the trigger." On November 11, 2011, Tyler Crutcher asked Giovanni Mora and his friends Bobby Jones and Bruce Taylor to leave his home after Mora brandished a gun, waved it about, and pulled a clip in and out, demonstrating that the firearm was loaded. In response, Mora stood and suggested that they "go hit a lick"—slang for robbing someone. According to Crutcher and his roommate Dillon Garrison, Mora appeared to be "in charge" of the group (*Mora v. State*, 2014).

During a police interrogation, Mora eventually admitted that after leaving Crutcher and Garrison's, he and his friends saw Donald Frye driving a BMW and followed him to his home. Before Frye exited his vehicle, Jones approached the driver's side, tapped a handgun on the BMW's window, and pointed the gun at Frye. Mora went to the passenger's side of the car and said, "I want the car. Give me the keys" (*Mora v. State*, 2014, p. 7). Mora then put his hand on the passenger side door handle; Frye moved toward Jones, and Jones shot Frye as he tried to get out of the car. Mora and Jones then ran to Taylor, who was waiting in his car nearby.

Later that night, they returned to Crutcher and Garrison's apartment. Mora admitted that they had shot someone, pulled out a handgun from his waistband, and cleaned it (*Mora v. State*, 2014). Here, Mora was clearly a major participant in the conspiracy to commit a robbery (it was his idea), and he was reckless with human life when he and Jones surrounded Frye, giving him no means of escape.

However, many cases will require a trial to determine whether the defendant was reckless with human life. Nuanced facts such as how the co-conspirators planned to carry out their conspiracy will determine whether the prosecution can obtain a capital murder or murder conviction for all parties to a conspiracy. ***This should be the case****. Our justice system's main function is to resolve factual disputes.* Obtaining a conviction for offenses that carry the state's harshest penalties should require a

substantial showing of the defendant's culpable mental state.

For example, in the case of the Texas Seven, some or all of the members could be convicted under the proposed changes to the statute. The different outcome will turn on the jury's findings about each member's intent and their level of involvement in the murder of Officer Aubrey Hawkins. George Rivas, who organized the group's flight from prison and shot Officer Hawkins, would be eligible for a death sentence as a principal and as a principal-party. Members of the Texas Seven who were present for Hawkins's murder and who fired shots would also be eligible for a death sentence as principal-parties and potentially as principals. Yet, the lookout's sentence would turn on the jury's findings of whether he alerted the group to Hawkins's arrival so they could prepare to ambush him, and in light of any statements he may have made within the group as they planned the robbery. This nuance is important, not for the Texas Seven, but for Texas and the integrity of its justice system.

This change is also consistent with prior drafts of Section 7.02 and the murder statute,[13] which sought to limit the circumstances under which an individual can be convicted of this offense. In the late 1960s, the Texas Bar Association and the Texas Legislative Council created the Texas Penal Code Revision Project, a collective of academics and criminal justice practitioners who were tasked with researching and drafting an updated Penal Code (Texas Legislative Reference Library, n.d.). The first draft, which was considered by the Legislature in 1971, provided that co-conspirators could be convicted only of the offenses they intentionally assist and set out further restrictions on when a party to a homicide could be convicted of murder.

Specifically, §19.02 of the Revision Project recommended that party liability for murder be limited to circumstances where the defendant acts with intent to assist in the murder—as required under the principal-party rule or:

A. Solicits, directs, aids, or attempts to aid the homicidal act; or

B. Is armed with a deadly weapon; or

C. Is reckless with regard to whether the other party is armed with a deadly weapon; or

D. Is reckless with regard to whether the other party intends to commit an act clearly dangerous to human life.

The revision project comment to this section explains that it was intended to narrow the felony-murder rule as it existed at the time (State Bar Committee on Revision of the Penal Code, 1970, pp. 147-150). Recent rulings from the Court of Criminal Appeals upheld murder convictions on the theory that all parties to a felony are responsible for conduct that was or *ought* to have been foreseen as a consequence of the prior felony. However, members of the committee rejected the negligence standard employed by the court and substituted it for a recklessness standard whereby only obvious risks would trigger liability (pp. 147-149).

This approach is practical in that it assigns blame only to defendants who are aware of potential dangers to human life and not for some factor that is clear with the benefit of hindsight. Individuals like Jeff Wood would not be liable for the acts of a codefendant whom they did not know was armed. However, subsections (B) & (C) should be withheld from future proposals. These provisions are predicated on the rationale that possession of a firearm or another deadly weapon in and of itself poses a risk to human life. Such a supposition is both untrue and erodes constitutional protections for the right to bear arms. A more pragmatic approach would allow juries to consider possession of a deadly weapon in the context of the offense and the relationships among the parties. Possession of a weapon in and of itself is not a crime, but it may demonstrate a willingness to use deadly force in certain circumstances.

2. *The law of parties special issue question in death penalty sentencing trials should be revised to require a finding of the defendant's intent to kill.*

This change in the law would revert to the question's original goal: to distinguish intentional murderers from those who did not intentionally take part in a killing and to ensure that our use of the ultimate penalty is consistent with our justice system's founding principles. Previously, Texas capital procedures required that juries find that the defendant intended for a murder to occur. As originally enacted in 1973, the first special issue question in Texas capital murder cases was:

> *Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result.* (Murder:

13 All murders were considered eligible for the death penalty at the time of the statute's enactment.

Punishment under certain conditions, 1973, p. 1125)

In an era where capital cases are fewer and fewer, employing this commonsense standard would ensure that the death penalty is imposed only in those cases where the defendant had a culpable mental state, and it would safeguard the integrity of the state's capital punishment system.

3. ***Create a parole commission to commute the sentences of individuals who were convicted of capital murder and sentenced to life without parole.***

   Currently, there are thousands of individuals in TDCJ's custody who are serving life sentences with no prospect for parole. Many of these individuals killed no one, did not intend to kill anyone, and posed no threat to society. The Texas Legislature should create a special parole commission dedicated to recommending conspirator-party cases for clemency.

4. ***Empower courts to vacate convictions that were entered under the conspirator-party rule.***

   Despite years of litigation, individuals like Jeff Wood and Ashley Ervin remain in TDCJ custody and have no prospects for release. In the rare instance where a defendant can make a substantial showing that they would not have been convicted of capital murder under the new statute, courts should be able to apply to vacate the sentence and grant release. These cases are likely to be few and far between and would be ultimately determined by the Court of Criminal Appeals, which issues the final ruling in most habeas cases.

Conclusion

Texas's conspirator-party statute creates an end-run around the culpability requirement that is the foundation of Texas criminal sentencing. Measures should be undertaken to limit its application, particularly in murder cases and capital murder cases where the rule allows juries to convict an individual of a crime that is more serious than they contemplated and carries the state's severest punishments.

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In 2014, Levin was named one of the *Politico 50* in the magazine's annual "list of thinkers, doers, and dreamers who really matter in this age of gridlock and dysfunction."

Marc has testified on criminal justice policy on four occasions before Congress and has testified before legislatures in states including Texas, Nevada, Kansas, Wisconsin, and California. He also has met personally with leaders such as U.S. Presidents, Speakers of the House, and the Justice Commtitee of the United Kingdom Parliament to share his ideas on criminal justice reform. In 2007, he was honored in a resolution unanimously passed by the Texas House of Representatives that stated, "Mr. Levin's intellect is unparalleled and his research is impeccable."

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About Right on Crime

Right on Crime is a national campaign of the Texas Public Policy Foundation, in partnership with the American Conservative Union Foundation and Prison Fellowship, that supports conservative solutions for reducing crime, restoring victims, reforming offenders, and lowering taxpayer costs. The movement was born in Texas in 2007, and in recent years, dozens of states such as Georgia, Ohio, Kentucky, Mississippi, Oklahoma, and Louisiana, have led the way in implementing conservative criminal justice reforms.

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