Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
06/16/2016 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-419619-002 DT 06/15/2016

HON. TERESA SANDERS

CLERK OF THE COURT
S. Radwanski
Deputy

STATE OF ARIZONA

MARY-ELLEN WALTER

v.

DARNELL MOSES ALVAREZ (002)

MICHAEL ZIEMBA
ANNA M UNTERBERGER

CAPITAL CASE MANAGER

RULING

The Court has considered the defendant's *Motion to Strike Indictment, in part, or Alternatively, Motion for Pretrial Probable Cause Determination by the Court re Enmund/Tison Issue* filed January 25, 2016, the State's response filed May 20, 2016, and the defendant's reply filed June 9, 2016. The Court does not need oral argument to resolve this issue.

The defendant is charged in Count 1 of the Indictment with felony murder. He asserts that this count should be dismissed because the grand jury did not find probable cause to support the *Enmund/Tison* finding,[1] rendering the count insufficient as a matter of law. Alternatively, he argues that he is entitled to an evidentiary hearing where the State must establish probable cause to support the *Enmund/Tison* finding.

The Court finds that the defendant's argument is based on the faulty premise that the *Enmund/Tison* finding is functionally the same as the finding regarding an aggravating circumstance. The Arizona Supreme Court rejected this contention in *State v. Ring (Ring III)*, 204 Ariz. 534, 65 P.3d 915 (2003). In *Ring III*, the defendants argued that because in *Ring v. Arizona (Ring II)*, 536 U.S. 584 (2002), the United States Supreme Court held that the Sixth

[1] A defendant cannot be sentenced to death for felony murder unless he personally killed, attempted to kill, or intended that lethal force be employed, *Enmund v. Florida*, 458 U.S. 782, 798 (1982), or was a major participant in the underlying felony and acted with reckless indifference to human life, *Tison v. Arizona*, 481 U.S. 137, 157–58 (1987).

Amendment required that aggravating circumstances making a defendant eligible for the death penalty must be found by a jury, so must the *Enmund-Tison* finding be made by a jury. The Arizona Supreme Court held that the two findings were conceptually and constitutionally distinct:

> The difference between aggravating circumstances as substantive elements of a greater offense and the *Enmund-Tison* findings as a restraint on capital sentencing dictates our decision that *Apprendi/Ring* does not require these findings to be made by the jury. *Id.* The Sixth Amendment assigns to the jury responsibility for determining whether all statutory criminal elements exist. Therefore, a defendant cannot receive a particular sentence unless a jury finds all the elements of the offense charged. *Id.* at 384, 106 S.Ct. at 696 (citing *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)). The *Enmund-Tison* findings, on the other hand, operate as a judicially crafted instrument used to measure proportionality between a defendant's criminal culpability and the sentence imposed. These two rules of law are conceptually and constitutionally distinct. We hold that the Sixth Amendment does not require that a jury, rather than a judge, make *Enmund-Tison* findings.
>
> *Ring III*, 204 Ariz. at 564-565 ¶101.

Because the *Enmund/Tison* finding is not the functional equivalent of an aggravating circumstance, the United States Constitution, the Arizona Constitution, and no Arizona statute or rule requires a pretrial determination of probable cause regarding the *Enmund/Tison* finding. *See*, *McKaney v. Foreman*, 209 Ariz. 268, 273 ¶23, 100 P.3d 18 (2004) (holding that aggravating factors essential to the imposition of a capital sentence need not be alleged in the charging document and supported by evidence of probable cause to satisfy constitutional due process).

Defendant's argument that the grand jury must find probable cause to support the *Enmund/Tison* finding also fails because the grand jury's role is limited to inquiring into offenses and returning indictments for public offenses. *Sanchez v. Ainley*, 234 Ariz. 250, 321 P.3d 415 (2014). The *Enmund/Tison* finding is not an element of First Degree Murder but rather, a part of the sentencing determination after a defendant has been convicted of felony murder and the State seeks the death penalty. Just as the grand jury is not authorized to find probable cause to support aggravating circumstances, it also is not authorized to find probable cause respecting *Enmund/Tison*. *Id*. at ¶13.

A pretrial hearing to challenge the "legal sufficiency" of the *Enmund/Tison* facts is not required by the United States Constitution or the Arizona Constitution, statutes or rules. Therefore,

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-419619-002 DT 06/15/2016

IT IS ORDERED denying Defendant's *Motion to Strike Indictment, in part, or Alternatively, Motion for Pretrial Probable Cause Determination by the Court re Enmund/Tison Issue*.