Constitutional Law - Eighth Amendment - Death Penalty - Felony Murder - Law of Principals

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CONSTITUTIONAL LAW—EIGHTH AMENDMENT—DEATH PENALTY—
FELONY MURDER—LAW OF PRINCIPALS—The United States Su-
preme Court has held that the death penalty may not be imposed
upon a defendant who did not kill, intend to kill, or attempt to
kill.


On the morning of April 1, 1975, Thomas and Eunice Kersey,
aged 86 and 74, were robbed and shot to death at their farmhouse
in central Florida.\(^1\) According to the evidence, Sampson and
Jeanette Armstrong went to the back door of the Kersey house and
asked for water for their overheated car.\(^2\) When Mr. Kersey came
out of the house, Sampson Armstrong grabbed him, pointed a gun
at him and told Jeanette to take his money.\(^3\) Upon hearing Mr.
Kersey’s cries for help, Mrs. Kersey came to the door with a gun
and wounded Jeanette Armstrong.\(^4\) Sampson Armstrong, and pos-
sibly Jeanette, then shot and killed the Kerseys, and took their
money.\(^5\)

Two witnesses testified that they saw a man in a car, the
description of which fit that of a car owned by Earl Enmund,\(^6\)
parked in front of the Kerseys’ about the time of the murders.\(^7\)
Another witness testified that Enmund was in that car with several
other persons prior to the time of the murders and that after the
time of the murders the car returned at high speed with Enmund
driving and a person lying down in the back seat.\(^8\)

Enmund and the Armstrongs were indicted for the first-degree
murder and robbery of the Kerseys.\(^9\) Defendants Enmund and
Sampson Armstrong were tried together.\(^10\) The judge instructed
the jury that a killing during the perpetration or attempted perpe-
tration of a robbery is first-degree murder and that no premedita-

\(^1\) Enmund v. Florida, 102 S. Ct. 3368, 3370 (1982).
\(^2\) Id. at 3370.
\(^3\) Id.
\(^4\) Id.
\(^5\) Id.
\(^6\) Id.
\(^7\) Id.
\(^8\) Id.
\(^9\) Id.
\(^10\) Id. The prosecutor maintained that “Sampson Armstrong killed the old people.”
Id. (quoting Record at 1577).
tion or intent is necessary.\textsuperscript{11}

The jury found Enmund and Armstrong both guilty of two counts of first-degree murder and one count of robbery and in a separate sentencing hearing recommended the death penalty,\textsuperscript{12} which the trial judge imposed.\textsuperscript{13} Enmund appealed and the Florida Supreme Court remanded for written findings as required by Florida law.\textsuperscript{14} The trial judge found four statutory aggravating circumstances and no applicable mitigating circumstances.\textsuperscript{15} Therefore, the aggravating circumstances outweighed the mitigating circumstances, and Enmund was given the death penalty.\textsuperscript{16}

The Florida Supreme Court affirmed the conviction and sentence, and although the court admitted the facts were unclear as to Enmund's part in the crime, they rejected his argument that he could be found guilty of no more than second-degree murder under Florida's felony murder rule.\textsuperscript{17} The court noted that by combining the felony murder rule and the law of principals, Enmund could be held responsible\textsuperscript{18} and that the evidence was sufficient to allow the jury to find as it did.\textsuperscript{19} The state supreme court altered the aggra-

\textsuperscript{11} 102 S. Ct. at 3370. The judge added that:
In order to obtain a conviction of first degree murder while engaging in the perpetra-
tion of or in the attempted perpetration of the crime of robbery, the evidence must
establish beyond a reasonable doubt that the defendant was actually present and was
actively aiding and abetting the robbery or attempted robbery, and that the unlawful
killing occurred in the perpetration of or in the attempted perpetration of the
robbery.
\textit{Id.}

\textsuperscript{12} \textit{Id.} Under Florida procedure, a separate sentencing hearing is conducted in which
the jury advises the judge as to what sentence should be imposed. \textit{See Fla. Stat. Ann. §
921.141(2) (West Supp. 1982).}

\textsuperscript{13} 102 S. Ct. at 3370.

\textsuperscript{14} \textit{Id. See Fla. Stat. Ann. § 921.141(3) (West Supp. 1982).}

\textsuperscript{15} 102 S. Ct. at 3370. The four aggravating circumstances were:
[T]he capital felony was committed while Enmund was engaged in or was an accom-
Supp. 1982)}]; the capital felony was committed for pecuniary gain, § 921.141(5)(f); it
was especially heinous, atrocious or cruel, § 921.141(5)(h); and Enmund was previ-
ously convicted of a felony involving the use or threat of violence, § 921.141(5)(b).
\textit{Id. See Enmund v. State, 399 So. 2d 1362, 1371-72 (Fla. 1981).}

\textsuperscript{16} 102 S. Ct. at 3370.

\textsuperscript{17} \textit{Id. at 3371.}

\textsuperscript{18} \textit{Id. The Court quoted the Florida Supreme Court as saying that the interaction of
the "felony murder rule and the law of principals combine to make a felon generally respon-
sible for the lethal acts of his co-felon." Id. (quoting 399 So. 2d at 1369). \textit{See Adams v.
State, 341 So. 2d 765, 768-69 (Fla. 1976), cert. denied, 434 U.S. 878 (1977), which held that
second degree felony murder applies only to accessories before the fact, as opposed to prin-
cipals in the second degree. For further explanation, see infra notes 174-180 and accompa-
nying text.}

\textsuperscript{19} 102 S. Ct. at 3371. The Florida Supreme Court held that:
vating circumstances and reduced the number to two, but since there were no mitigating circumstances, the sentence was affirmed. In so doing the court expressly rejected Enmund's argument that in his case the death penalty was barred by the eighth amendment of the United States Constitution, in that the evidence failed to show that he intended to take life.

The United States Supreme Court granted certiorari to decide the question whether death is a valid penalty under the eighth and fourteenth amendments for one who neither took, attempted to take, nor intended to take a life. The Court reversed the lower court, holding that death was an unconstitutional penalty for one who lacked the intent to kill, and remanded Enmund's case for proceedings consistent with that holding.

Justice White, writing the opinion of the Court, first noted that the Florida Supreme Court had held that the record only supported an inference that Enmund had been in the car at the time of the killings, waiting to aid in the killers' escape, and that this was enough under Florida law to make him a principal in the crime. Thus it was irrelevant whether he did the killing himself, or anticipated or intended that any killing be done. The Court concluded that under these circumstances, the death penalty was in-

[T]he only evidence of the degree of [Enmund's] participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money. The evidence, therefore, was sufficient to find that the appellant was a principal of the second degree, constructively present aiding and abetting the commission of the crime of robbery. This conclusion supports the verdicts of murder in the first degree on the basis of the felony murder portion of section 782.04(1)(a).

102 S. Ct. at 3371 (quoting 399 So. 2d at 1370).

20. 102 S. Ct. at 3371. The Court explained that the Florida Supreme Court had held that the findings that the murders were committed during a robbery and that they were done for pecuniary gain referred to the same aspect of the crime and thus could only be treated as one aggravating circumstance. The Court also explained that the Florida court had cited Armstrong v. State, 399 So. 2d 953 (Fla. 1981), in holding that the finding that the murders were especially heinous, atrocious, and cruel could not be approved. The Florida Supreme Court in Armstrong had held that the evidence could only sustain that the shooting was spontaneous, precipitated by the resistance of Mrs. Kersey. Id. n.3.

21. 102 S. Ct. at 3371.
23. 102 S. Ct. at 3379.
25. Id. at 3371.
consistent with the eighth and fourteenth amendments.\textsuperscript{26}

Justice White explained that the cruel and unusual punishment clause of the eighth amendment was directed, in part, at punishments that are disproportionately harsh in comparison to the crime being punished.\textsuperscript{27} The most recent case in which this test of proportionality had been used was \textit{Coker v. Georgia},\textsuperscript{28} in which the Supreme Court held that the death penalty was disproportionate punishment for the crime of rape, and thus unconstitutional under the eighth amendment as cruel and unusual punishment.\textsuperscript{29} Justice White observed that it was stressed in \textit{Coker} that the Court's judgment should be founded on objective factors, including the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made.\textsuperscript{30}

Justice White noted that the \textit{Coker} plurality had found that never, in the past fifty years, had a majority of the states authorized death as a penalty for rape.\textsuperscript{31} The \textit{Coker} Court had also observed that in the reenactment of death penalty statutes to conform to the \textit{Furman v. Georgia}\textsuperscript{32} criteria, only three states had provided the penalty of death for the rape of an adult woman.\textsuperscript{33} Thus the \textit{Coker} plurality held that the legislative judgment weighed heavily against imposing the death sentence for the crime of rape.\textsuperscript{34}

According to Justice White, of the thirty-six state and federal jurisdictions authorizing the death penalty, only nine allow the death penalty for participation in a robbery in which another robber takes life.\textsuperscript{35} Of the remaining twenty-seven jurisdictions, three

\begin{footnotesize}
\begin{enumerate}
\item Id. at 3372.
\item Id. (citing Weems v. United States, 217 U.S. 349 (1910)). See O'Neil v. Vermont, 144 U.S. 323 (1892) (Field, J., dissenting).
\item 433 U.S. 584 (1977).
\item 102 S. Ct. at 3372 (citing Coker v. Georgia, 433 U.S. at 592).
\item 102 S. Ct. at 3372.
\item Id. (quoting Coker v. Georgia, 433 U.S. at 593).
\item 408 U.S. 238 (1972).
\item 102 S. Ct. at 3372. See \textit{Coker v. Georgia}, 433 U.S. at 594.
\item 102 S. Ct. at 3372. See \textit{Coker}, 433 U.S. at 596.
\end{enumerate}
\end{footnotesize}
do not allow the death penalty for felony murder. In eleven states, proof of some sort of mental state is a prerequisite to conviction and without such proof, the actors in a felony murder would not be subject to capital punishment. Four jurisdictions do not allow the death penalty in a situation similar to the present one.

Justice White noted that the nine remaining jurisdictions deal with the vicarious felony murder problem in their capital sentencing statute, none of them allowing capital punishment solely for participation in the life-taking crime if the defendant did not do the killing. In these states, the aggravating circumstances generally must outweigh the mitigating circumstances, although sufficient aggravating circumstances will preclude the necessity for an intent to kill. Six of the nine states make the fact that the defendant was only an accomplice in a crime in which another committed a capital offense a statutory mitigating circumstance, thus lessening the chance that the death penalty will be imposed for a vicarious felony murder conviction.

36. 102 S. Ct. at 3372-73 & n.6. See MO. ANN. STAT. §§ 565.001, .003, .008(2) (Vernon 1979) (death penalty may be imposed only for capital murder; felony murder is first degree murder); N.H. REV. STAT. ANN. §§ 630:1, :1-a(I)(b)(2) (1974 & Supp. 1981) (capital murder includes only killing a law enforcement officer, killing during a kidnapping, and murder for hire); 18 PA. CONS. STAT. ANN. §§ 2502(a)(b), 1102 (Purdon 1982-83) (death penalty may be imposed only for first-degree murder; felony murder is second-degree murder).


38. 102 S. Ct. at 3373 & nn.9-11. One state prohibits the death penalty for an individual who did not commit murder. See MD. ANN. CODE art. 27, §§ 410, 412(b), 413(d)(10), (e)(1) (Supp. 1981). Two jurisdictions prohibit capital punishment where the defendant's participation was minor. See COLO. REV. STAT. § 16-11-103(5)(d) (1978); 49 U.S.C. § 1473(c)(6)(D) (1976). One state limits the death penalty to narrow circumstances not involved here (i.e., the victim was a peace officer or prison official). See VT. STAT. ANN., tit. 13, §§ 2303(b), (c) (Supp. 1981).

39. 102 S. Ct. at 3374.

40. Id.

41. Id. The six states are Arizona, ARIZ. REV. STAT. ANN. § 13-703G(3) (Supp. 1982-83); Connecticut, CONN. GEN. STAT. ANN. § 53a-46a(f)(4) (West Supp. 1982); Indiana, IND. CODE ANN. § 35-50-2-9(c)(4) (Burns 1979); Montana, MONT. CODE ANN. § 46-18-304(6)
exclude felony murder from the list of aggravating circumstances. Justice White observed that in each of these nine states, a non-triggerman guilty of felony murder cannot be sentenced to death for the felony murder absent aggravating circumstances above and beyond the felony murder itself.

Thus, the Court concluded that only a small majority of jurisdictions allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed. The Court noted that even if this small majority of nine states allows the death penalty for vicarious felony murder if sufficient additional aggravating circumstances are present, only about one third of the American jurisdictions authorize death for a defendant who participated in a felony in which a murder took place. In addition, of the eight states enacting death penalty statutes since 1978, only one has allowed the death penalty in such circumstances. In light of these findings, the Court noted that although the weight of legislative judgment is not overwhelmingly against the imposition of death where a defendant did not take life, intend to take life, or attempt to take life, and although the weight is not as great as in the Coker situation, it nevertheless weighs on the side of rejecting capital punishment in a situation similar to Enmund's.

Justice White examined the decisions juries have made when deciding the liability of accomplices to felony murder. The Court noted that the evidence was overwhelming that American juries have repudiated imposition of the death penalty in such cases. Justice White first examined all reported appellate court decisions since 1954 in cases where the defendant was executed for homicide.

43. 102 S. Ct. at 3374.
44. Id.
45. Id.
46. Id. The one state allowing for the death penalty in these circumstances is Washington. The other seven noted are Alabama, Colorado, Connecticut, Maryland, Ohio, Pennsylvania, and South Dakota. 102 S. Ct. at 3374 n.14.
47. Id. at 3374.
48. Id. at 3375. Justice White quoted Coker in commenting on the examination of jury verdicts: "As we have previously observed, '[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.' " 102 S. Ct. at 3375 (quoting Coker v. Georgia, 433 U.S. at 596).
49. 102 S. Ct. at 3375.
and found that of 362 executions, only six were of non-triggerman felony murderers, and all six took place in 1955. By contrast, between 1955 and the Coker decision in 1977, seventy-two executions for rape took place.

Secondly, Justice White examined the petitioner's survey of the nation's death-row population and observed that this study showed that juries have rejected the death penalty in cases where the defendant did not commit the homicide, was not present when the killing took place, and did not participate in a plan to murder. Of 796 inmates on death row, only three had been sentenced to die who were not present at the killing and did not hire or solicit the killers to do the killing. The figures for Florida were similar. Of the forty-five felony murderers on death row, only one, Enmund, was sentenced without having been the triggerman and without some showing of intent to kill. These findings were not challenged by the State.

Justice White noted the dissenting Justices' criticism of the statistics. These Justices argued that the numbers did not reveal the percentage of homicides which were charged as felony murder nor the number of times the death penalty was sought for a felony murder accomplice. Justice White explained that this information would probably be impossible to acquire and that, even if it were, it would be relevant to know that prosecutors rarely sought the death penalty for accomplice felony murder, as this would show that prosecutors, as representatives of society's interests in punishing crimes, consider the death penalty excessive for accomplice felony murder. The Court stated that it was not aware of one person who had been executed in the last quarter century for a felony

50. Id. The statistics showed that of the 362 executions, 339 were executions of persons who had personally murdered, two involved persons who had others do the killing, and in 16 cases the facts were insufficient to make any conclusion. Id. The statistics were taken from Brief for Petitioner, app. D, Enmund v. Florida, 102 S. Ct. 3368 (1982).
51. Id. n.18.
52. 102 S. Ct. at 3375.
53. 102 S. Ct. at 3375-76. As of October 1, 1981, there were 796 inmates awaiting execution for homicide, 739 of whom there was sufficient data. Of these, only 41 had not participated in the fatal assault. There was sufficient data on 40 of the 41 to deduce that only 16 were not physically present at the killing. Id. See Brief for Petitioner, app. E, Enmund v. Florida, 102 S. Ct. 3368 (1982).
54. 102 S. Ct. at 3376. In 36 of those cases the courts made some finding that the killer intended to kill, while in eight of the cases no findings were made dealing with intent, but in all eight the defendant was the actual triggerman. Id.
55. Id.
56. Id.
murder in which he did not actually kill, attempt to kill, or intend to kill. Justice White maintained that the statistics likewise could not be discounted by attributing to the petitioner the argument that death is unconstitutional punishment absent intent to kill. He noted that the petitioner was rather arguing that, as applied to him, the death penalty was disproportionate. Justice White concluded that the statistics tended to support that argument.

Justice White next stated that, although the judgments of legislatures and juries weigh heavily, the ultimate question is whether the eighth amendment allows the imposition of death on one who is an accomplice to a felony in which a murder is committed, but who did not actually kill, attempt to kill, or intend to kill. The Court concluded that it did not. Justice White noted that robbery is a serious crime, yet when tested in an analysis such as was used in Coker, the conclusion is reached that the death penalty, being unique in its severity and irrevocability, is too great a penalty for the robber who, as such, does not kill.

The Court found that the defendants here committed murder, but were subject to the death penalty only because they killed as well as robbed. Justice White indicated that the question was not the disproportionality of death as a penalty for murder, but rather the validity of the punishment as it related to Enmund's own conduct. The Court reaffirmed the need for individualized consideration as a constitutional requirement for the imposition of the death penalty. Justice White emphasized that Enmund did not kill, and the record showed no intention on his part to kill, yet Florida law authorized the death penalty because he aided and abetted a rob-

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57. Id.
58. Id.
59. Id.
60. Id. at 3376-77.
61. Id. at 3377.
62. Id. The Court at this point followed the analysis used in Coker, quoting from that case, substituting terms dealing with robbery where the Coker Court had discussed rape: [I]t does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, [robbery] by definition does not include the death of or even the serious injury to another person. The murderer kills; the [robber], if no more than that, does not. Life is over for the victim of the murderer; for the [robbery] victim, life . . . is not over and normally is not beyond repair.

Id. (quoting Coker v. Georgia, 433 U.S. at 598).
63. 102 S. Ct. at 3377.
64. Id.
bery in which a murder was committed. Justice White, noting
that a basic precept of criminal justice is that the intentional in-
fliction of harm must be punished more severely than the uninten-
tional infliction of harm, determined that the similar treatment
of Enmund and his co-felons under Florida law was impermissible
under the eighth amendment.

Justice White stated that the primary purposes of the death
penalty, as the Gregg Court had held, are retribution and deter-
rence. Unless the death penalty, when imposed in Enmund's situa-
tion would contribute to one or both of these goals, its infliction
would constitute unnecessary pain and suffering and would thus be
unconstitutional. Subjecting Enmund's sentence to this criterion,
Justice White concluded that it would not contribute to deterrence
as the death penalty can only deter one who premeditates murder,
and in Enmund's case, the premeditation was absent.

Justice White found that the death penalty would have valid de-
terrent value if the likelihood of a killing during the perpetration
of a felony were much greater. However, he noted that statistics
utilized by the American Law Institute in its formulation of the
Model Penal Code showed that the instances where death occurred
during a robbery were so few that the death penalty could not be
justified as a deterrent for the underlying felony.

Justice White examined the retributinal character of the death
penalty as imposed in the present situation. He found that retribu-
tion as a justification for this punishment would depend on the
degree of Enmund's culpability and thus his intention. The Court
noted other cases in which a punishment was held to be excessive
in the absence of criminal wrongdoing, and found that Enmund's

66. 102 S. Ct. at 3377.
68. 102 S. Ct. at 3377.
69. Id. See Gregg v. Georgia, 428 U.S. at 183.
70. 102 S. Ct. at 3377. See Coker v. Georgia, 433 U.S. at 592.
71. 102 S. Ct. at 3377-78. Justice White explained that "if a person does not intend
that life be taken or contemplate that lethal force will be employed by others, the possibility
that the death penalty will be imposed for vicarious felony murder will not 'enter into the
cold calculus that precedes the decision to act.'" Id. (quoting Gregg v. Georgia, 428 U.S. at
186).
72. 102 S. Ct. at 3378. The American Law Institute (ALI) statistics showed that in
three locations surveyed, the percentages of robberies that were accompanied by homicides,
as compared to the total number of robberies, were .49%, .59% and .41%. Model Penal
Code § 210.1, comment at 38, n.96 (Official Draft and Revised Comments 1980).
73. 102 S. Ct. at 3378 (quoting Mullaney v. Wilber, 421 U.S. 684 (1975)).
74. 102 S. Ct. at 3378. In Robinson v. California, 370 U.S. 660 (1962), a statute making
narcotics addiction a crime was struck down; in Weems v. United States, 217 U.S. 349
punishment must fit his personal responsibility and moral guilt.\textsuperscript{75} To put Enmund to death for killings he did not commit would not accomplish the purpose of retribution, and legislatures have not found it to do so. Thus, the Court concluded that retribution was not a valid reason for the imposition of the death penalty here.\textsuperscript{76} The Court, therefore, reversed the judgment of the Florida Supreme Court upholding the death penalty and remanded for further proceedings.\textsuperscript{77}

Justice Brennan concurred in the Court’s decision, but stated his view that the death penalty in all situations is cruel and unusual punishment and thus violative of the eighth and fourteenth amendments to the Constitution.\textsuperscript{78}

In a dissenting opinion,\textsuperscript{79} Justice O’Connor stated that the Court’s holding was not supported by the analysis of the previous cases and, by making intent a matter of federal constitutional law, interfered with the states’ criteria for assessing legal guilt.\textsuperscript{80} Justice O’Connor restated the facts of the case, noting some additional testimony given.\textsuperscript{81} These additional facts dealt with the testimony of Ida Jean Shaw, Enmund’s common law wife. Shaw testified that Enmund and the Armstongs were staying at her house the day before the murders and that on the day of the murders the three were gone, as was Shaw’s 1969 yellow Buick.\textsuperscript{82} Some time after eight o’clock she was told that Jeanette had been shot, and upon learning that she had been shot during a robbery, Shaw asked Enmund why he committed the robbery.\textsuperscript{83} According to Shaw, Enmund answered that he had decided to rob Kersey after seeing his money earlier. Shaw also testified that Sampson had volunteered that he had made sure the Kerseys were dead.\textsuperscript{84} Shaw said

\textsuperscript{75} 102 S. Ct. at 3378.
\textsuperscript{76} Id. at 3378-79.
\textsuperscript{77} Id. at 3379.
\textsuperscript{78} Id. (Brennan, J., concurring). Justice Brennan indicated that he had adhered to this view in Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting).
\textsuperscript{79} 102 S. Ct. at 3379 (O’Connor, J., dissenting). Justice O’Connor was joined by Chief Justice Burger, Justice Powell, and Justice Rehnquist. Id.
\textsuperscript{80} Id.
\textsuperscript{81} Id. (citing Record at 1185-1188, 1198-1202, 1205, 1207-1208).
\textsuperscript{82} 102 S. Ct. at 3379 (O’Connor, J., dissenting).
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 3379-80 (O’Connor, J., dissenting).
that she had disposed of two pistols, pursuant to Sampson's instructions.85

Justice O'Connor noted that the prosecutor had not argued that Enmund had killed the Kerseys, but instead maintained that he had planned the robberies and was in the car during the killings.86

Justice O'Connor also looked at the four aggravating circumstances found by the trial court in its sentencing hearing.87 She noted that the trial court had found that the evidence showed that Enmund's involvement was not minor but that in fact he had planned the felony and had actively participated in an attempt to avoid detection.88

Justice O'Connor dealt more extensively with the decision of the Florida Supreme Court, focusing on that court's discussion concerning whether Enmund was a principal or an accessory to the crime.89 Under Florida law, if he were present, aiding and abetting the commission, he was equally guilty. The aider and abettor does not have to be actually present to be considered a principal, as his presence may be constructive.90 The Florida Supreme Court concluded that the evidence was sufficient to find the petitioner a principal under Florida law.91

Justice O'Connor agreed that Enmund's claim was that the death penalty, as applied to him, was unconstitutionally disproportionate to the role he had played in the crime, and because he had no actual intent to kill the victims, capital punishment was too extreme a penalty.92 She noted that in Gregg v. Georgia, a majority of the Court had held that the death penalty does not invariably violate the cruel and unusual punishment clause of the eighth amendment.93 The Justice emphasized that in no case since Gregg has the Court retreated from this position, but explained that recognition of the constitutionality of the death penalty was only the

85. Id. at 3380 (O'Connor, J., dissenting).
86. Id.
87. Id. See supra note 15.
88. Id. at 3381 (O'Connor, J., dissenting).
89. Id. at 3382 (O'Connor, J., dissenting).
90. Id. According to the Florida court "if the accused was present aiding and abetting the commission or attempt of one of the violent felonies listed in the first-degree murder statute, he is equally guilty, with the actual perpetrator of the underlying felony, of first-degree murder." 399 So. 2d at 1370. The Florida court also referred to Pope v. State, 84 Fla. 428, 94 So. 865 (1922), noting that presence at a crime may be either actual or constructive.
102 S. Ct. at 3382 (O'Connor, J., dissenting).
91. 102 S. Ct. at 3382 (O'Connor, J., dissenting).
92. 102 S. Ct. at 3383 (O'Connor, J., dissenting).
93. Id.
first part of the Enmund inquiry. She observed that Enmund was not convicted of a deliberate killing, but was convicted through the doctrine of accessorial liability of two murders that he did not intend to commit. Thus, the concept of proportionality had to be applied to Enmund to determine if his punishment was disproportionate to his crime.

Justice O'Connor noted that the concept of proportionality was first fully expressed in Weems v. United States. Not until two-thirds of a century later was a punishment declared unconstitutionally disproportionate. The Court in Coker v. Georgia concluded that rape, although a heinous crime, did not warrant the severity of the death penalty. The plurality was careful to use objective factors to reach its decision so as to derive, from evolving societal standards, the meaning of the requirement of proportionality which is within the eighth amendment.

Justice O'Connor noted that the Coker plurality had shown that in fifty years a majority of the states had never authorized death as a punishment for rape, that only three of the thirty-five states that reinstituted the death penalty after Furman v. Georgia defined rape as a capital offense, and that in at least ninety percent of the rape convictions since 1973, juries in Georgia had not imposed the death sentence. According to Justice O'Connor, the conclusion reached in Coker rested, at least in part, on the conclusion, backed by observation of facts, that both legislatures and juries had finally rejected the death sentence for rape cases.

Justice O'Connor then stated that the Coker plurality had also considered certain qualitative factors bearing on whether the death

94. Id. at 3384 (O'Connor, J., dissenting).
95. Id.
96. Id. at 3385 (O'Connor, J., dissenting).
97. Id. See Weems v. United States, 217 U.S. 349 (1910). Justice O'Connor explained: [D]efendant Weems was sentenced to fifteen years at hard labor for falsifying a public document. After remarking that 'it is a precept of justice that punishment for crime should be graduated and proportioned to offense,' and after comparing Weems' punishment to the punishments for other crimes, the Court concluded that the sentence was cruel and unusual.
100. 102 S. Ct. at 3385 (O'Connor, J., dissenting) (citation omitted).
98. 102 S. Ct. 3385 (O'Connor, J., dissenting).
100. 102 S. Ct. at 3385 (O'Connor, J., dissenting). See 433 U.S. at 592; Trop v. Dulles, 356 U.S. 86 (1958) (opinion of Warren, C.J.). In Trop, the Court discussed the eighth amendment in terms of the standards of a civilized society. Id. at 99.
102. 102 S. Ct. at 3386 (O'Connor, J., dissenting).
penalty was disproportionate, including the heinousness of the crime of rape, and noted that although the Coker plurality admitted that rape was quite a heinous crime, they felt that death was a grossly disproportionate punishment.\textsuperscript{103} Thus, Justice O'Connor concluded that Coker showed that the determination of proportionality requires not only a study of contemporary standards, but also the notion that the magnitude of the punishment must be related to the harm done the victim and the degree of blameworthiness of the defendant, bringing into play the individualized consideration enunciated in Lockett v. Ohio.\textsuperscript{104}

In sum, Justice O'Connor found that the Court should not decide only if the death penalty as imposed here offended contemporary standards as reflected in the responses of legislatures and juries, but also whether it was disproportionate as to this particular defendant's crime and whether the sentencing procedures satisfied the constitutional requirement of individualized consideration set forth in Lockett.\textsuperscript{105}

Justice O'Connor then looked at the historical development of the felony murder rule. First, she commented that the data provided by the petitioner relating to the historical analysis of the death sentence and felony murder failed to show that society has rejected such punishment.\textsuperscript{106} Justice O'Connor noted the common law origins of the felony murder rule, and its transplantation to the American colonies.\textsuperscript{107} She explained that the use of the felony murder rule continued largely unabated until legislative reforms restricted its use in the twentieth century.\textsuperscript{108}

Justice O'Connor discounted the petitioner's argument that juries and judges had virtually nullified the use of the rule by acquitting defendants in felony murder cases, or convicting them of non-capital crimes.\textsuperscript{109} She found the argument merely speculative, and concluded that jury nullification was due in large part to jury dissatisfaction with mandatory death sentences.\textsuperscript{110} Thus, she deter-

\textsuperscript{103} Id. Although the Coker Court felt rape was a heinous and reprehensible crime, almost equal to murder, the differentiating factor was that a rape did not involve the taking of human life and thus the death penalty was disproportionate for that crime. 433 U.S. at 597-98.

\textsuperscript{104} 102 S. Ct. at 3386 (O'Connor, J., dissenting) (citing 438 U.S. 586).
\textsuperscript{105} 102 S. Ct. at 3386 (O'Connor, J., dissenting).
\textsuperscript{106} Id. at 3386-87 (O'Connor, J., dissenting).
\textsuperscript{107} Id. at 3387 (O'Connor, J., dissenting).
\textsuperscript{108} Id.
\textsuperscript{109} Id. at 3387-88 (O'Connor, J., dissenting).
\textsuperscript{110} Id. at 3388 (O'Connor, J., dissenting).
mined that it was impossible to conclude that the country has historically rejected the death penalty for felony murder.\textsuperscript{111}

Justice O’Connor looked critically at the petitioner’s use of the statistics on jury verdicts and insisted that because these figures did not reveal the number or percentage of homicides which were charged as felony murders, they failed to prove the petitioner’s point.\textsuperscript{112} Since the petitioner must have been arguing that the penalty is unconstitutional absent an intent to kill (otherwise the defendants who hire killers would escape the death penalty), the data were not entirely relevant. At best, Justice O’Connor allowed, the figures showed that sentencers were especially cautious when imposing the death sentence.\textsuperscript{113}

Justice O’Connor then examined the statistics offered by the petitioner to show legislative judgment on this issue and noted that of the thirty-five states which have the death penalty, thirty-two of them authorize a sentencer to impose the death penalty for a death which occurs during the course of a robbery.\textsuperscript{114} She explained that each one of those thirty-two can be classified as one of three types.\textsuperscript{115} The first category contains twenty-one statutes which allow the death penalty for felony murder, even though the particular defendant did not kill or have intent to kill.\textsuperscript{116} Three more require a finding of intent, but not the type of intent that this petitioner claimed was constitutionally mandated.\textsuperscript{117} The second category contains seven statutes which only allow the death penalty if the defendant had the specific intent to kill the victim.\textsuperscript{118} The third class is made up of those statutes which restrict the death penalty in felony murder to the one who actually committed the killing.\textsuperscript{119} Justice O’Connor explained that this showed that in

\textsuperscript{111} Id.
\textsuperscript{112} Id. See supra notes 39-43 and accompanying text.
\textsuperscript{113} Id. at 3388 (O’Connor, J., dissenting) “[S]entencers . . . reserve that punishment for those . . . who are sufficiently involved in the homicide, whether or not there was specific intent to kill.” Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id. These states are Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Vermont, Washington, and Wyoming. For the statutes involved see supra notes 35-37.
\textsuperscript{117} 102 S. Ct. at 3389 (O’Connor, J., dissenting). These three states are Arkansas, Delaware, and Kentucky. See supra note 37.
\textsuperscript{118} 102 S. Ct. at 3389 (O’Connor, J., dissenting). The states are Alabama, Illinois, Louisiana, Ohio, Texas, Utah, and Virginia. See supra notes 35-37.
\textsuperscript{119} 102 S. Ct. at 3390 (O’Connor, J., dissenting). These three states are Illinois, Maryland, and Virginia. See supra notes 35-37. Justice O’Connor classified Illinois and Virginia
nearly half of the states (two-thirds of those that permit the death penalty for murder) a defendant may be sentenced to death without having killed the victim and without having specifically intended that the victim die. Justice O'Connor concluded that the petitioner failed to meet the standards of Coker and that thus it was not shown that the death penalty for felony murder fell short of the national "standards of decency."

Justice O'Connor noted that the concept of proportionality of the death penalty involves more than a mere measurement of contemporary standards of decency. It requires also that the penalty imposed be proportional to the harm caused and the defendant's blameworthiness, factors critical to Coker. Justice O'Connor criticized the Court for characterizing Enmund as only a "robber" and stressed that lives were unjustifiably taken. She maintained that Enmund was legally responsible, as an accomplice, and therefore he could not claim that the penalty was grossly disproportionate to the harm done.

Justice O'Connor then stated that the majority's holding was especially disturbing because the effect was to make intent a matter of federal constitutional law, requiring review of highly subjective definitional problems which are customarily left to state criminal law. She argued that the Court had erred in the sense of suggesting that intent can be ascertained readily, when in fact intent is a legal concept not easily defined. Justice O'Connor expressed dissatisfaction with the Court's failure to explain why the concept of proportionality requires rejection of blameworthiness based on other levels of intent, such as the intent to commit an armed robbery coupled with the knowledge of the risk involved. She explained that the majority's intent-to-kill requirement failed to take into account the complex picture of the defendant's knowledge of his accomplice's intent and whether he was armed, the defendant's part in the planning, and the level of the defendant's actual partic-

in both the second and third categories.

120. 102 S. Ct. at 3390 (O'Connor, J., dissenting).
121. Id.
122. Id. at 3390-91 (O'Connor, J., dissenting). In Coker, the Court had stressed that "in terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder, which . . . involve[s] the unjustified taking of human life." 433 U.S. at 598.
123. 102 S. Ct. at 3391 (O'Connor, J., dissenting).
124. Id.
125. Id.
126. Id.
ipation.\textsuperscript{127} She insisted that the determination of the degree of blameworthiness is best left to the sentencer who can examine the unique facts of each case.\textsuperscript{128} Justice O'Connor argued that, although the type of mens rea is an important factor in assessing the proper penalty, it is not so critical as to require a finding of intent before imposing the death penalty.\textsuperscript{129}

Justice O'Connor came to the conclusion that the petitioner and the Court had failed to prove that contemporary standards precluded the imposition of the death penalty for accomplice felony murder. She found that examination of the qualitative factors underlying the concept of proportionality had not shown the death penalty to be disproportionate to Enmund's culpability.\textsuperscript{130} Finally, she found that due to the unique and complex mixture of facts involving a defendant's actions, knowledge, and motive in a felony murder, the fact finder is in the best position to determine the defendant's blameworthiness. Thus, Justice O'Connor concluded that the death penalty was not disproportionate even though no intent to kill was shown on the part of Enmund.\textsuperscript{131}

Justice O'Connor next observed that, although she would hold this sentence constitutional, she would remand for a new sentencing hearing, stressing the need for focus on the individual character of the defendant.\textsuperscript{132} Because of this need for individualized treatment, the sentencer may not be precluded from considering any mitigating circumstances the defendant might proffer.\textsuperscript{133} Thus, the sentencer could consider any lack of intent on the part of the defendant and, particularly, in this case, could give consideration

\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 3392 (O'Connor, J., dissenting). Justice O'Connor noted that in contrast to the crime in Coker, Enmund's crime involved the very type of harm the Court had held justified the death penalty. \textit{Id}. \textsuperscript{131}

\textsuperscript{131} Id.
\textsuperscript{132} Id. Justice O'Connor cited Proffit \textit{v. Florida, 428 U.S. 242 (1976)}, noting that the Court had held that there must be consideration of individual defendants when making capital sentencing decisions. 102 S. Ct. at 3392 (O'Connor, J., dissenting). Justice O'Connor also referred to Woodson \textit{v. North Carolina, 428 U.S. 280 (1976)}, in which the Court, in a plurality decision, struck down a mandatory capital punishment statute, saying that, to give the fundamental respect for humanity underlying the eighth amendment any form, capital sentencers must consider relevant factors of the character and record of the individual defendant and the diverse frailties of human beings. 102 S. Ct. at 3392-93 (O'Connor, J., dissenting). Justice O'Connor then noted that in Lockett \textit{v. Ohio, 438 U.S. 586}, the Court held that because the death penalty is so profoundly different from other forms of punishment, individualized decisions are essential. 102 S. Ct. at 3393 (O'Connor, J., dissenting).

\textsuperscript{133} 102 S. Ct. at 3393 (O'Connor, J., dissenting).
to the defendant's minor role in the felony.  

Justice O'Connor then examined the procedure in the Florida courts in which the trial court found four aggravating circumstances. She reviewed the aggravating circumstances and noted that the court had expressly found no statutory mitigating circumstances, and had rejected Enmund's claim of relatively minor participation in the crimes. She noted also that the Florida Supreme Court had altered the conclusions of the trial court, but concluded that since the trial judge had erroneously believed the petitioner had shot the victims while they lay prone, in order to eliminate them as witnesses, the trial judge eliminated any opportunity for individualized consideration of the petitioner's minor role in the slayings. Because this misinterpretation of the facts precluded any consideration of the petitioner's major mitigating circumstance, Justice O'Connor concluded that the case should have been remanded for reconsideration, although the death penalty should have been affirmed.

The Court's reasoning in Enmund follows what has now become a standard analysis for examining death penalty questions. The method used - that of examining legislative decisions, jury findings, and historical developments - to determine the extent to which the punishment is "cruel and unusual," is the standard litany established in preceding death penalty decisions, most notably Coker v. Georgia. In Coker, the Court explained that punishments would be unconstitutional not only if found to be "barbaric" in nature, but also if "excessive in relation to the crime committed." In Gregg v. Georgia, the Court also addressed the issue of excessive punishments and found that a punishment would be considered
excessive if it (1) made no contribution to the goals of punishment, or (2) was disproportionate to the crime.\textsuperscript{141} The Gregg Court outlined the present concept of proportionality by setting forth the objective factors to be addressed when making a judgment as to the excessiveness of a punishment.\textsuperscript{142} These objective factors include the history and precedent of the death penalty, legislative attitudes toward the death penalty, and the responses of juries as reflected in their sentencing decisions.\textsuperscript{143}

The issue of the death penalty's proportionality for felony murder had been available for discussion by the Court once prior to Enmund, in the case of Lockett v. Ohio,\textsuperscript{144} which followed Gregg by two years. In Lockett, the Court was presented with a fact situation similar to Enmund. The driver of a getaway car had been sentenced to death after having been convicted vicariously for the murders committed by her partners. The Court held that death was an unconstitutional penalty for Lockett, based on the inadequacies of the Ohio sentencing statute, and did not address the felony murder aspect. Justice White concurred in the decision, but asserted that due to Lockett's lack of intent to kill, the death penalty, as applied to her, was automatically unconstitutional.\textsuperscript{145}

Justice White's position in Lockett, focusing on the issue of intent or the lack thereof in imposing the death penalty, appears to have become the rule in Enmund. The intent issue is apparent in Enmund's actual holding: that death is an unconstitutional punishment when the defendant does not intend to kill, attempt to kill, or actually kill. Because of the felony murder aspects of the case, however, there may be a tendency to interpret Enmund more broadly, i.e., that felony murder may not be punished by death. Such an interpretation would ignore the critical factor of Enmund, the accessorial element.\textsuperscript{146}

Under the common law, the felony murder rule provided that if, in the perpetration of a felony, the conduct of the felon brought about an unintended death, the felon was guilty of murder.\textsuperscript{147} The

\begin{footnotes}
\item[141] Id. at 173, 183-87.
\item[142] Id. at 175-83.
\item[143] Id. See Coker v. Georgia, 433 U.S. at 592.
\item[145] Id. at 624 (White, J., concurring). Justice White declared "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." Id.
\item[146] See infra notes 161-180 and accompanying text.
\end{footnotes}
rule allows for the imputation of intent to a felon who otherwise lacks the mens rea necessary for an intentional killing.\textsuperscript{148} Without the felony murder rule, the intent which is generally necessary for murder would not be present. The felony murder rule takes the intent to do the underlying felony, and imputes it to the killing, thus allowing a finding of murder.\textsuperscript{149}

As noted by Justice O'Connor in \textit{Enmund},\textsuperscript{150} the felony murder rule was effectively abolished in England when Parliament declared that an unintentional killing during a felony would be classified as manslaughter.\textsuperscript{151} However, the rule continued relatively unhindered in the United States, although legislatively altered, well into the twentieth century.\textsuperscript{152}

The felony murder rule is limited in its application in that it merely increases the severity of punishment applicable, and does not make a crime that which is not otherwise criminal. Nevertheless, the rule has been criticized.\textsuperscript{153} One criticism of the rule is that it bases criminal responsibility on an unexpected result.\textsuperscript{154} Other criticisms are that the rule allows absurd results in situations where some statutory felonies are less serious than some common law misdemeanors\textsuperscript{155} and that it is merely technical and arbitrary.\textsuperscript{156} It has also been found to be difficult to enforce due to the

\textsuperscript{148} R. Perkins, \textit{supra} note 147, at 61.
\textsuperscript{149} Id. at 62. Perkins described the early doctrinal history of the rule as follows: An ancient writer spoke of death resulting from any unlawful act as murder. 'If the act be unlawful,' said Coke, writing in the early 1600's, 'it is murder.' Lord Hale, writing not long after, was unwilling to speak in such sweeping terms and gave illustrations of killings resulting from unlawful acts, some of which he said were murder and others manslaughter. This was given more definite form by Foster, about a century and a half later, to this effect: An accidental homicide resulting from an unlawful act (with the qualification "if it be \textit{malum in se}") is murder if the crime is of the grade of felony, but otherwise it is manslaughter.

\textit{Id.} This seems to have been the view accepted by Blackstone, when his works were published just prior to the Revolution. See R. Perkins, \textit{supra} note 147, at 62. But about a century later, Judge Stephen, in Regina v. Whitmarsh, 62 J.P. 711 (1898), commented that he doubted that the rule was actually the law. See R. Perkins, \textit{supra} note 147, at 63.

\textsuperscript{150} See 102 S. Ct. at 3387 (O'Connor, J., dissenting).
\textsuperscript{151} Id. at 3387 nn.28-29. See English Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11.


\textsuperscript{154} Id. (citing \textit{Fourth Report of the Commissioners on Criminal Law} at xxviii-xxix (1839)).
\textsuperscript{155} Ludwig, \textit{supra} note 153, at 52.
\textsuperscript{156} Id. at 53.
fact that juries, rather than applying what they feel is an overly harsh rule, acquit.\textsuperscript{157}

For whatever reasons, the courts and legislatures in the United States, although not entirely eliminating the felony murder rule, have moved away from the notion that a death occurring during any felony is murder.\textsuperscript{158} The rule has been limited to felonies which exhibit substantial human risk,\textsuperscript{159} or "inherently dangerous felonies" such as arson, rape, robbery, and burglary.\textsuperscript{160}

Florida has a statutory version of the felony murder rule in which imposition of a first degree murder conviction using the felony murder concept is restricted to eight distinct crimes.\textsuperscript{161} The Florida statute also allows for second and third degree felony murder, neither of which is subject to the death penalty.\textsuperscript{162} Enmund was convicted of first degree felony murder under section 782.04(1).\textsuperscript{163}

\begin{footnotesize}
\begin{itemize}
\item[157.] Id.\textsuperscript{157}
\item[158.] See R. Perkins, \textit{supra} note 147, at 64, discussing Powers v. Commonwealth, 110 Ky. 386, 61 S.W. 735 (1901) (removal of a cornerstone was a felony, but death occurring from the accidental dropping of the stone was not felony murder); People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924) (although liquor was sold in a manner amounting to a felony, the purchaser's death by drunkenness and exposure was not felony murder).
\item[159.] See R. Perkins, \textit{supra} note 147, at 63.
\item[161.] The Florida statute reads, in pertinent part:
\begin{quote}
The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb; or which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, by a person 18 years of age or older . . . shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.
\end{quote}
\item[162.] Subsections three and four of § 782.04 provide for the second and third degrees of murder:
\begin{itemize}
\item[(3)] When a person is killed in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree. . . .
\item[(4)] The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, [or attempt of one of the seven felonies enumerated in (3)], shall be murder in the third degree. . . .
\end{itemize}
\item[163.] See FLA. STAT. ANN. § 782.04(1) (West Supp. 1982). Enmund argued that the most serious crime he could be convicted of was second degree felony murder, under the
\end{itemize}
\end{footnotesize}
The other concept used in *Enmund*, which is crucial to a proper interpretation of the case, is the common law concept of principals. In dealing with felonies, the common law categorized the guilty actors as principals and accessories. Originally, the actual perpetrator of a crime was characterized as a principal, and all other actors were categorized as either accessories before the fact, at the fact, or after the fact. Eventually the “at the fact” distinction was dropped and any actor who would have been so classified was considered a principal in the second degree. The other two accessory distinctions - “before the fact” and “after the fact” - remained. Thus, there are four categories of involvement in a crime (two principals and two accessories). Corresponding to these are four levels of culpability: (1) perpetrators; (2) abettors; (3) inciters; and (4) criminal protectors.

Perpetrators are those actors who, with mens rea, caused the crime, either by their hands, or through some instrument which they put in motion. Abettors (also known as “aiders and abettors”) also have mens rea, but do not cause the actual harm. They are, however, present, either actually or constructively, ready and willing to give aid to the perpetrator if necessary. Abettors are principals in the second degree. Inciters are similar to abettors in that they have mens rea and render aid, counsel, or encouragement to the perpetrator. But they differ in that they are not actually or constructively present at the scene. Inciters are accessories before the fact. The fourth level of culpability is that of the criminal protector. These are the actors who know nothing of the crime when perpetrated, but who in some way aid the perpetrator after the crime is committed, being fully aware that a crime has been com-

former § 782.04(2), the applicable part of which is now codified at § 782.04(3) (West Supp. 1982). See Act of Dec. 8, 1972, ch. 72-724, § 3, 1972 Fla. Laws 15, 17-18. See supra note 161. Under this section, Enmund could have been subject, at most, to life imprisonment. See Enmund v. State, 399 So. 2d at 1368, 1370. See also Historical Note, FLA. STAT. ANN. § 782.04 (West 1976).

164. R. PERKINS, supra note 147, at 727.
165. Id.
166. Id.
167. Id. at 723.
168. Id. at 724.
169. Id. at 726.
170. Id. at 724.
171. Id. at 726.
172. Id. at 725.
173. Id. at 726.
Criminal protectors are considered accessories after the fact. Generally, principals of the second degree are equally responsible for any action taken by principals in the first degree, as long as the action can be considered to have been done in the furtherance of the crime. In other words, any participant in a crime who can be classified as an abettor, and yet does not reach the level of involvement of a perpetrator, will nonetheless be responsible for any actions taken by a perpetrator.

Through the combination of the law of principals and the felony murder rule, a participant in an "inherently dangerous felony" would be responsible for any death which occurred due to the action of a co-felon, even if the death was accidental. When a death occurs during an "inherently dangerous felony," the felony murder rule imputes the murderous intent to the killing, making the killing murder. The law of principals allows the responsibility for that murder to flow to all abettors, or second degree participants. In a state that would allow the death penalty for a felony murder, therefore, it is conceivable that the death penalty could be imposed upon someone who did not in fact commit a killing. This is exactly what occurred in Enmund.

In Enmund, the Florida Supreme Court explained that under Florida law, participants in a crime are either principals of the first or second degree, and both are equally guilty of the crime committed. In 1957, the Florida legislature eliminated any distinction between principals in the first or second degree, and accessories before the fact. In 1972, the Florida murder statute was revised, and the Florida Supreme Court in State v. Dixon construed the revision to mean that the distinction between principals in the first or second degree and accessories before the fact was revived. According to the court in Dixon, the statute set up two

174. Id. at 725.
175. Id. at 726.
176. Id. at 738.
177. 399 So. 2d 1362 (Fla. 1981).
178. Id. at 1369. See Lake v. State, 100 Fla. 373, 129 So. 827 (1930).
179. 399 So. 2d at 1369.
180. Id. at 1368-69. See supra note 161.
181. 283 So. 2d 1 (Fla. 1973).
182. Id. at 11. The Florida Supreme Court held that the revised legislation showed a desire on the part of the legislature to revive the distinction between principals and accessories and to create "two separate and easily distinguishable degrees of crime, depending upon the presence of the defendant as a principal in the first or second degree." Id.
degrees of murder, depending on the presence of the defendant as a principal in the first or second degree. In *Adams v. State*,\(^{183}\) the Florida Supreme Court explained that through the construction allowed in *Dixon*, second degree felony murder is limited only to accessories before the fact. Thus, according to *Adams*, if a killing occurs during one of the felonies enumerated in the Florida statute,\(^ {184}\) the perpetrator is guilty of first degree murder and that guilt flows to all co-felons personally present. This comes about because the co-felons personally present, are, by their presence, principals in the underlying felony and liable for any crime committed by all other principals. This is how the law of felony murder (imputing a murderous intent to the person who kills) and the law of principals (making a principal liable for all crimes committed by his cohorts) combine to make a person who did not in fact kill, liable for murder. Therefore, under Florida law the only way the second degree murder statute can apply in a felony murder situation, and the only way Enmund might have escaped imposition of the death penalty, is if the felon to whom it applies is an accessory before the fact and not actually present at the crime. By treating all principals alike, the Florida laws make the death penalty available without regard to intent, allowing it for the second degree principal who may not have intended to kill, but who was responsible for the killing done by his co-felon.

Justice White showed a desire in his concurring opinion in *Lockett* to address the issue of intent with respect to the death penalty, and he seems to have grasped that opportunity in *Enmund*.\(^ {185}\) The case was a perfect one for his notions on intent, as it dealt with a defendant who did not kill, intend to kill, or attempt to kill. The problem with *Enmund* is its potential for misinterpretation. Conceivably, the case could be seen as prohibiting the death penalty for felony murder. Enmund was indeed charged with, and convicted of, first degree felony murder. But to read the opinion this broadly would be to ignore the Court's specifically expressed three part "test": whether the defendant killed, intended to kill, or attempted to kill.\(^ {186}\) Such an interpretation would also ignore the critical distinguishing factor in this case, that is, the extension of criminal culpability via the common law concept of prin-

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183. 341 So. 2d 765 (Fla. 1976).
184. See supra note 161.
185. See supra notes 145-46 and accompanying text.
186. See 102 S. Ct. at 3371, where the Court explained its reason for the grant of certiorari.
cipals. After this decision, the law of principals is still available for the imputation of culpability in the conviction stage of the criminal justice process, but its use becomes restricted in the sentencing stage.

Douglas R. Nolin