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Overstepping Precedent? *Tison v. Arizona* Imposes the Death Penalty on Felony Murder Accomplices

In 1910, Justice McKenna, writing for the United States Supreme Court, stated that the eighth amendment's prohibition of cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."¹ The Court has applied this progressive standard to the death penalty only in the last two decades.² During this time the Court has required the nonarbitrary imposition of the death penalty,³ disallowed automatic death sentences,⁴ and categorically prohibited the imposition of the death penalty on those convicted of crimes other than murder.⁵

The Court twice has ruled directly on the constitutionality of the imposition of the death penalty on defendants who were not the actual killers, but were convicted of first degree murder by means of the felony murder doctrine.⁶ In *Enmund v. Florida*⁷ the Court enunciated what was deemed a categorical prohibition of capital punishment of defendants convicted under the felony murder doctrine⁸ who did not "kill, attempt to kill, or intend that a killing take place or that lethal force . . . be employed."⁹ The recent Supreme Court opinion in *Tison v. Arizona*¹⁰ limited the *Enmund* holding by declaring that when the felony murder defendant has actively participated in the underlying felony and has evinced a "reckless indifference towards human life," regardless of whether the defendant possessed an intent to kill, the death penalty is not disproportionate to the crime, and therefore not cruel and unusual under the eighth amendment.¹¹

This Note traces the recent history of the death penalty in the Supreme Court, particularly those cases dealing with the imposition of the death penalty on felony murder defendants. The Note then questions the *Tison* Court's purported consistency with *Enmund* by exposing a stark contrast in the Court's rationales and conclusions in these two cases. Finally, the Note discusses the *mens rea* requirement of "reckless indifference" provided in *Tison*, concluding that because this standard is too broad, it allows the death penalty to be arbitrarily applied to nontriggerman¹² felony murderers.

The recent history of the death penalty begins in 1972, with the landmark

1. *Weems v. United States*, 217 U.S. 349, 378 (1910).

2. The first case to apply this progressive standard to the death penalty was *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

3. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman*, 408 U.S. at 238.

4. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

5. *Coker v. Georgia*, 433 U.S. 534 (1977).

6. *Tison v. Arizona*, 107 S. Ct. 1676 (1987); *Enmund v. Florida*, 458 U.S. 782 (1982).

7. 458 U.S. 782 (1982).

8. See *Cabana v. Bullock*, 106 S. Ct. 689, 697 (1986) (enunciating the *Enmund* rule).

9. *Enmund*, 458 U.S. at 797.

10. 107 S. Ct. 1676 (1987).

11. *Id.* at 1688.

12. "Nontriggerman" is a term used by the courts to denote one convicted of murder under the felony murder doctrine who did not do the actual killing, regardless of the means used to kill.

case of *Furman v. Georgia*,¹³ in which the Court delivered a clear message to the states: the death penalty as applied in 1972 constituted cruel and unusual punishment under the eighth amendment.¹⁴ The lowest common denominator found in the five concurring opinions in *Furman* was the idea that because there was no procedural basis for deciding which capital defendants should receive the death penalty, the penalty was imposed in an arbitrary manner and left too much to the whims and prejudices of the sentencer.¹⁵ Absent a procedural structure, juries were prone to apply the death penalty discriminatorily and excessively.¹⁶

Four years after *Furman*, in *Gregg v. Georgia*,¹⁷ the Supreme Court declared that the death penalty is not unconstitutional per se when applied with procedural safeguards to "the most extreme of crimes."¹⁸ The Court stated, "When a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime."¹⁹ *Gregg* interpreted *Furman* as mandating that the sentencer's discretion must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."²⁰ The *Gregg* Court thus approved a sentencing scheme under which the jury was required to find beyond a reasonable doubt at least one out of ten specified aggravating circumstances.²¹ The Georgia statute also authorized the jury

13. 408 U.S. 238 (1972) (per curiam). Each of the nine justices wrote a separate opinion.

14. *Id.* at 239-40.

15. *Id.* at 310 (Stewart, J., concurring).

16. "[T]here is evidence that the imposition of the death sentence . . . follow[s] discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups." *Id.* at 249-50 (Douglas, J., concurring) (quoting THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967)); see also *id.* at 291 (Brennan, J., concurring) ("The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it."); *id.* at 310 (Stewart, J., concurring) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); *id.* at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."). Justices Brennan and Marshall steadfastly maintained their belief that the death penalty constitutes cruel and unusual punishment under all circumstances. *Id.* at 285-86 (Brennan, J., concurring); *id.* at 359 (Marshall, J., concurring). Brennan noted, "Death, quite simply, does not comport with human dignity." *Id.* at 305. Brennan considered human dignity to be the primary principle underlying the eighth amendment. *Id.* at 281.

17. 428 U.S. 153 (1976). The Court reviewed not only Georgia's imposition of the death penalty pursuant to its revised statute, but that of four other states as well. *Proffitt v. Alabama*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

18. *Gregg*, 428 U.S. at 187.

19. *Id.* (footnote omitted). The *Gregg* Court declined to address the issue whether the death penalty could be imposed constitutionally on one convicted of rape. *Id.* at 187 n.35. That question was addressed one year later in *Coker v. Georgia*, 433 U.S. 584 (1977).

20. *Gregg*, 428 U.S. at 189.

21. The ten aggravating circumstances were as follows:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated bat-

to consider any other appropriate aggravating or mitigating circumstances.²² Thus the jury must consider "the circumstances of the crime and the criminal before it recommends sentence."²³

North Carolina responded to *Furman* by imposing the death penalty on all persons convicted of either first-degree rape or first-degree murder,²⁴ thus eliminating any arbitrariness. In *Woodson v. North Carolina*²⁵ the United States Supreme Court rejected all statutes mandating a death sentence for those convicted of a specified crime. The Court found three "constitutional shortcomings" inherent in a mandatory death sentence scheme.²⁶ First, the Court noted a societal repudiation of automatic death sentences.²⁷ The Court based this conclusion on "two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative

tory, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously and wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

GA. CODE ANN. § 27-2534.1 (1975); see *Gregg*, 428 U.S. at 165 n.9.

22. GA. CODE ANN. § 27-2534.1 (1975). The jury need not find mitigating circumstances in order to recommend a lesser punishment than death. *Id.* § 27-2302.

23. *Gregg*, 428 U.S. at 197. Automatic appeal was also provided for: the state supreme court was required to assess the proportionality of the death penalty by comparing the crime committed to other sentences imposed for the same, greater, and lesser crimes. GA. CODE ANN. § 27-2537(c) (1975); *Gregg*, 428 U.S. at 204. The court similarly affirmed the death penalty and its procedural application in *Proffitt v. Florida*, 428 U.S. 249 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976). Florida used a system similar to that used in Georgia. *Proffitt*, 428 U.S. at 253. The Texas procedure differed in that the jury was required to find that each of three aggravating circumstances existed beyond a reasonable doubt in order to impose the death penalty. *Jurek*, 428 U.S. at 269. Mitigating circumstances could be considered, although none were enumerated. *Id.* at 276.

24. *Woodson v. North Carolina*, 428 U.S. 280, 286-87 (1976). Under North Carolina law, first-degree murder included felony murder. N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975) (current version at N.C. GEN. STAT. § 14-17 (1986)). *Woodson* had been convicted under the felony murder statute, for he was not the actual killer, and had in fact been threatened with death by his accomplices if he failed to participate in the underlying felony, a robbery. *Woodson*, 428 U.S. at 283-84. The Court did not address the felony murder issue.

25. 428 U.S. 280 (1976).

26. *Id.* at 303.

27. *Id.* at 295.

enactments."²⁸ Second, the Court concluded that, rather than checking unbridled jury discretion in sentencing, mandatory death sentences induced arbitrary conviction of those individuals charged with capital offenses,²⁹ because often juries would be "deterred from rendering guilty verdicts because of the enormity of the sentence automatically imposed."³⁰ Third, the Court discussed the failure of the North Carolina statute to allow the "particularized consideration of relevant aspects of the character and record of each convicted defendant."³¹ The Court deemed this individualized consideration a "constitutionally indispensable part of the process of inflicting the penalty of death."³²

One year after *Gregg*, in *Coker v. Georgia*,³³ the Supreme Court categorically prohibited the use of the death penalty for individuals convicted of rape,³⁴ even when aggravating circumstances are found.³⁵ The Court concluded that American society had largely repudiated the imposition of the death penalty on rapists, for Georgia was the only state at that time permitting the death penalty for rape.³⁶ Also, nine of every ten Georgia juries had rejected the death penalty for that crime.³⁷ The Court further reasoned that, popular sentiment aside, the death penalty is simply excessive for the crime of rape, in which no life is taken.³⁸

In 1978, in *Lockett v. Ohio*,³⁹ the Supreme Court reviewed a case involving the imposition of the death penalty on an individual convicted of felony murder. The Court ultimately rejected Lockett's death sentence because the Ohio death penalty statute failed to permit "the type of individualized consideration of mitigating factors [now held] to be required by the Eighth and Fourteenth Amendments."⁴⁰ In concurring opinions, however, Justices Blackmun and White debated the issue whether specific intent should be required for imposition of a death sentence. The defendant, Sandra Lockett, had acted as driver of the getaway car while her three accomplices robbed a pawnshop, a robbery which she helped plan.⁴¹ During the robbery, the owner of the shop was killed in a scuf-

28. *Id.* at 293.

29. *Id.* at 302.

30. *Id.*

31. *Id.* at 303.

32. *Id.* at 304.

33. 433 U.S. 584 (1977).

34. *Id.* at 598 ("We have the abiding conviction that the death penalty, which is 'unique in its severity and irrevocability,' . . . is an excessive penalty for the rapist who, as such, does not take human life." (quoting *Gregg*, 428 U.S. at 187)).

35. *Coker*, 433 U.S. at 599; see also *id.* at 601 (interpreting the majority as holding "that capital punishment *always*—regardless of the circumstances—is a disproportionate penalty for the crime of rape") (Powell, J., concurring in part and dissenting in part). Justice Powell disagreed with the breadth of the holding, *id.*, as did Chief Justice Burger, *id.* at 606 (Burger, C.J., dissenting).

36. *Id.* at 596. Florida also authorized capital punishment for the rape of children. *Id.*

37. *Id.* at 597.

38. *Id.* at 597-98 ("Rape is without a doubt deserving of serious punishment, but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life.").

39. 438 U.S. 586 (1978).

40. *Id.* at 606.

41. *Id.* at 589-91.

fle.⁴² The Ohio trial court sentenced Lockett to death under the felony murder doctrine as codified in the Ohio statutes.⁴³

Justice White stated in his concurrence, “[I]t 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.”⁴⁴ He sharply questioned the deterrent effect of a penalty inflicted for crimes requiring no intent.⁴⁵ Justice White also statistically reviewed those states that permitted the imposition of the death penalty under circumstances similar to those in *Lockett*, as well as the number of times such a death sentence was actually imposed under similar facts.⁴⁶ He found that although approximately one half of the states had not “legislatively foreclosed the possibility” of the death sentence under such circumstances, in only six cases had a court actually imposed the death penalty under similar circumstances.⁴⁷ Finally, Justice White noted the traditional legal principle that one who acts with a purpose to destroy human life is possessed of a greater degree of culpability than one who does not.⁴⁸

Justice Blackmun agreed with Justice White that the death penalty would have been excessive in *Lockett*'s case because she was convicted on the felony murder theory and nothing more.⁴⁹ Justice Blackmun disagreed with Justice White's reasoning, however, and argued that a lack of intent should not necessarily preclude the imposition of the death penalty.⁵⁰ He stated that the sentencer should evaluate both “the degree of [the] defendant's participation leading to the homicide *and* the character of the defendant's *mens rea*.”⁵¹ Justice

42. *Id.* at 590.

43. *Id.* at 593-94.

44. *Id.* at 624 (White, J., concurring in part and dissenting in part). Justice White sharply disagreed with the plurality's holding, stating, “The Court has now completed its about face since [*Furman*].” *Id.* at 622 (White, J., concurring in part and dissenting in part). He cited two proportionality tests from *Coker*—whether the punishment makes a “measurable contribution towards acceptable goals of punishment,” and whether the punishment is “grossly out of proportion to the severity of the crime.” *Id.* at 624 (White, J., concurring in part and dissenting in part) (quoting *Coker*, 433 U.S. at 592).

45. *Id.* at 625 (White, J., concurring in part and dissenting in part).

46. *Id.* (White, J., concurring in part and dissenting in part).

47. *Id.* (White, J., concurring in part and dissenting in part).

48. *Id.* at 626 (White, J., concurring in part and dissenting in part).

49. *Id.* at 613 (Blackmun, J., concurring).

50. *Id.*

51. *Id.* at 616 (Blackmun, J., concurring) (emphasis added). Justice Blackmun's position was not altogether removed from that of Justice White. Justice Blackmun found Ohio's statutory definition of “purposefulness,” in including reckless endangerment, “allow[ed] for a particularly harsh application of the death penalty to any defendant who has aided or abetted [in a felony,] in the course of which a person is killed, even though accidentally.” *Id.* at 613 (Blackmun, J., concurring). Thus, he did not consider recklessness alone enough to warrant a death sentence. Moreover, his examples of felony murders that may warrant the death penalty despite an absence of intent to kill, consisted of homicides in which, without intending to, the defendant becomes the actual killer:

What if a defendant personally commits the act proximately causing death by pointing a loaded gun at the robbery victim, verbally threatens to use fatal force, admittedly does not intend to cause a death, yet knowingly creates a high probability that the gun will discharge accidentally? What if a robbery participant, in order to avoid capture or even for wanton sport, personally and deliberately uses grave physical force with conscious intent to inflict serious bodily harm, but not to kill, and a death results?

Id. at 614 n.2 (Blackmun, J., concurring).

Blackmun doubted, however, that the Court could apply to felony murder "a convincing bright-line rule such as was used in regard to rape."⁵²

In 1982 the Supreme Court in *Enmund v. Florida*⁵³ confronted the issue "whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life."⁵⁴ The facts of *Enmund* were similar to those in *Lockett*. Enmund acted as getaway driver while his armed accomplices approached a residence and demanded money from an elderly man.⁵⁵ The man called for his wife, who came with a gun and shot one of the accomplices. The accomplices then subdued and killed the couple, took their money, and fled, with Enmund driving the getaway car.⁵⁶

Justice White wrote the opinion for the Court, using many of the same arguments he had in *Lockett*. As in *Lockett*, White found it unnecessary to deal with the issue whether defendant's degree of participation in the murder had been sufficient to warrant the death penalty.⁵⁷ Rather, he focused on the proportionality of the death sentence on one who neither killed nor intended to kill.⁵⁸

The Court's evaluation of proportionality surveyed the number of jurisdictions that permitted the death penalty for a nontrIGGERMAN felony murderer who had not intended the death of the victim. The Court concluded that, of the thirty-six jurisdictions then authorizing the death penalty, only eight allowed the death penalty to be imposed "solely because the defendant somehow participated in a robbery in the course of which a murder was committed."⁵⁹ Nine more states authorized the death penalty for a nontrIGGERMAN felony murderer lacking intent only when sufficient aggravating circumstances outweighed any mitigating circumstances.⁶⁰ The remaining jurisdictions would not permit the imposition of the death penalty upon a nontrIGGERMAN felony murderer who acted without intent that a killing take place. The opinion also discussed the other indicator of societal rejection: the number of times a jury had actually used the power given it by state law to sentence a nontrIGGERMAN defendant to death absent a showing of intent.⁶¹ The Court's survey again revealed only six of 362 cases in which a death sentence had been imposed on a nontrIGGERMAN who had no intent to kill.⁶²

52. *Id.* at 614 (Blackmun, J., concurring).

53. 458 U.S. 782 (1982).

54. *Id.* at 787.

55. *Id.* at 784.

56. *Id.*

57. *Id.* at 787 n.4.

58. *Id.* at 787.

59. *Id.* at 792. The states were California, Florida, Georgia, Mississippi, Nevada, South Carolina, Tennessee, and Wyoming. *Id.* at 789 n.5.

60. *Id.* at 791. That list included Arizona, Connecticut, Idaho, Indiana, Montana, Nebraska, North Carolina, Oklahoma, and South Dakota. *Id.* at 792 nn.12-13.

61. *Id.* at 794. This indicator of societal rejection was discussed in *Coker*, 433 U.S. at 594, and *Gregg*, 428 U.S. at 179. See *supra* text accompanying notes 36-37.

62. *Enmund*, 458 U.S. at 794. All six of these executions had taken place in 1955. *Id.* at 794-95. An even smaller number of like defendants was discovered on death row. *Id.* at 795.

The Court next discussed whether the death penalty was excessive for the crime of felony murder absent both an *actus reus* and a *mens rea*. The Court first analyzed the culpability of a robber, noting that Enmund's conduct consisted solely of participation in a robbery.⁶³ The Court then stated that, like rape, "[robbery] by definition does not include the death of . . . another person."⁶⁴

The Court defended this analysis by noting the insistence in *Lockett* on an "individualized consideration [of culpability] as a constitutional requirement in imposing the death sentence."⁶⁵ Such individualized consideration would not permit Enmund to be treated in the same manner as those who actually killed because he was plainly less culpable.⁶⁶

In her dissent, Justice O'Connor⁶⁷ argued that the majority's comparison of rape with robbery-felony murder⁶⁸ failed to take into account the disparate harm caused by each.⁶⁹ She reasoned that "proportionality . . . involves the notion that the magnitude of the punishment must be related to the degree of harm inflicted on the victim, as well as to the degree of defendant's blameworthiness."⁷⁰ In this way, Justice O'Connor distinguished *Coker*, in which life had not been taken, from *Enmund*, in which life had been taken. O'Connor also questioned the statistics the majority used in finding that "society has rejected conclusively the death penalty for felony murderers."⁷¹ She noted that the majority did not have data regarding the percentage of cases in which a jury had refused to impose the death penalty on a nontrigerman felony murderer.⁷² She then stated that even if the majority's statistics were valid, "they may only reflect that sentencers are especially cautious in imposing the death penalty."⁷³

In 1986 the Supreme Court held in five-four decision, *Cabana v. Bullock*⁷⁴ that the required *Enmund* finding that the defendant either intended to kill, attempted to kill, or in fact did kill, need not be made by the jury or other sentencing authority, but may be made at any point in the state's process of

63. *Id.* at 798.

64. *Id.* at 797 (quoting *Coker*, 433 U.S. at 598).

65. *Id.* at 798 (quoting *Lockett*, 438 U.S. at 605); see also *Woodson*, 428 U.S. at 304 (Court must focus on "relevant facets of the character and record of the individual offender").

66. *Enmund*, 458 U.S. at 798.

67. Justice O'Connor was joined by Chief Justice Burger, Justice Powell, and Justice Rehnquist, making *Enmund* a 5-4 decision. See *id.* at 801 (O'Connor, J., dissenting).

68. See *supra* text accompanying notes 63-64.

69. *Enmund*, 458 U.S. at 815 (O'Connor, J., dissenting).

70. *Id.* (O'Connor, J., dissenting); See generally Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors Upon Which Our Criminal Law is Predicated*, 66 N.C.L. REV. 283 (1988) (discussing three potential aspects of any felony—harm, culpability, and dangerousness—and relating them to the goals of legal punishment—retribution, deterrence, restraint, and reformation).

71. *Enmund*, 458 U.S. at 816 (O'Connor, J., dissenting).

72. *Id.* at 818-19 (O'Connor, J., dissenting).

73. *Id.* at 820 (O'Connor, J., dissenting). This argument was rejected in *Furman*. *Furman v. Georgia*, 408 U.S. 238, 300 (1972) (per curiam) (Brennan, J., concurring).

74. 474 U.S. 376 (1986). Bullock was convicted of felony murder. He had held the victim's head while his accomplice beat and killed the victim, then Bullock helped to dispose of the body. *Id.* at 379. The trial court sentenced the defendant to death absent any specific finding that he killed, intended to kill, or attempted to kill. *Id.* at 379-81.

appeal.⁷⁵ Justice White, again writing for the majority, reasoned that *Enmund* had imposed a "categorical rule" on the sentencing power of a state.⁷⁶ Such sentencing limits, stated the Court, "need not be enforced by the jury."⁷⁷ *Bullock*, *Enmund*, and the earlier cases provided the legal context in which to place the bizarre facts of *Tison*.

On July 30, 1978, Gary Tison's three sons, Donald, Ricky, and Raymond, entered the Arizona State Prison at Florence carrying an ice chest filled with guns and broke their father and his cellmate, Randy Greenawalt, out of the prison. No shots were fired throughout this incident.⁷⁸ The Tisons and Greenawalt locked the guards and visitors present in a storage closet and fled in a getaway car. They soon abandoned the getaway car for a second vehicle, a Lincoln, that had been parked nearby prior to the prison break.⁷⁹ The group stopped at a house where they spent two nights, during which time one tire on the Lincoln became flat, and the only spare tire was used to replace it.⁸⁰ The group began traveling towards Flagstaff, Arizona.⁸¹ During the trip a second tire blew out, and the group agreed to flag down the next passing motorists and steal their car.⁸² Raymond stood next to the disabled car as the others hid armed in the bushes. The Lyons family stopped to render aid.⁸³

The Tison group emerged from the bushes and forced the Lyons at gunpoint out of their own car and into the Lincoln. Raymond and Donald drove the Lincoln some distance off the main road, into the desert, with the remaining three men following in the Lyons' car, a Mazda.⁸⁴ When they stopped, the Lyons were ordered to stand in front of the Lincoln's headlights while the Tisons' belongings were transferred from the Lincoln to the Mazda. Money and some guns were taken from the Lyons' possessions, the rest of which were put into the Lincoln.⁸⁵

Under Gary Tison's direction, the Lincoln was driven a short distance further into the desert.⁸⁶ Gary Tison fired his shotgun into the radiator of the

75. *Id.* at 386.

76. *Id.*

77. *Id.* *Cabana* resolved a distinct split between the Courts of Appeals for the Fifth and Eleventh Circuits. The Fifth Circuit had consistently interpreted *Enmund* as requiring a finding by the *fact-finder* that the defendant actually killed, attempted to kill, or intended to kill. *Bullock v. Lucas*, 743 F.2d 244, 247-48 (5th Cir. 1984); *Reddix v. Thigpen*, 732 F.2d 494, 494-95 (5th Cir. 1984) (*per curiam*); *Skillern v. Estelle*, 720 F.2d 839, 843-44 (5th Cir. 1983); *Clark v. Louisiana State Penitentiary*, 694 F.2d 75, 76-77 (5th Cir. 1982). The Eleventh Circuit held, both before and after *Cabana*, that this determination could be made by the state at any level. *White v. Wainwright*, 809 F.2d 1478, 1481 (11th Cir. 1987); *Griffin v. Wainwright*, 760 F.2d 1505, 1519 (11th Cir. 1985); *Fleming v. Kemp*, 748 F.2d 1435, 1453 (11th Cir. 1984).

78. *Tison v. Arizona*, 107 S. Ct. 1676, 1678 (1987).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1679. The family consisted of John and Donnelda Lyons, their two-year-old son and their fifteen-year-old niece, Theresa Tyson. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

Lincoln, completely disabling it. The Lyons were then brought again to stand in front of the Lincoln's headlights, where John Lyons pleaded for his life and asked for water.⁸⁷ Gary Tison then told his sons to go back to the Mazda and get some water, while he and Greenawalt guarded the family. All three sons went to get water. Either while they were filling a jug at the car, or after they had handed the water to Gary Tison,⁸⁸ Gary Tison and Greenawalt raised their guns and repeatedly shot the victims, killing all of them.⁸⁹ Raymond Tison later testified:

Well, I just think you should know when we first came into this we had an agreement with my dad that nobody would get hurt because we [the brothers] wanted no one hurt. And when this [killing] came about we were not expecting it. And it took us by surprise as much as it took the family by surprise because we were not expecting this to happen. I wish we could [have done] something to stop it, but by the time it happened it was too late to stop it. And it's just something we are going to live with the rest of our lives. It will always be there.⁹⁰

After the killings, the group continued together into the desert. Raymond and Ricky Tison and Randy Greenawalt were apprehended several days later.⁹¹ Gary Tison escaped into the desert, where he died of exposure.⁹²

Raymond and Ricky Tison were tried under Arizona's felony murder⁹³ and

87. *Id.*

88. The stories of Randy and Raymond Tison, petitioners, conflicted on this point. *Id.*

89. The Lyons family died instantly. Theresa Tyson, the Lyons' niece, died after crawling a short distance in the desert. *Id.*

90. *State v. (Raymond) Tison*, 142 Ariz. 454, 462, 690 P.2d 755, 763 (1984) (Feldman, J., concurring in part and dissenting in part) (en banc) (brackets original), *vacated*, 107 S. Ct. 1676 (1987).

91. *Tison*, 107 S. Ct. at 1679. Donald Tison was shot while attempting to drive through a police roadblock, and later died. *Id.* Donald was driving a stolen van when the group approached a police roadblock. A. DERSHOWITZ, *THE BEST DEFENSE* 298-99 (1982). Allan Dershowitz represented the Tison brothers in the Arizona Supreme Court and the United States Supreme Court. According to Raymond and Ricky, Donald attempted to crash through the roadblock, but was shot four times by police. *Id.* at 298. The van came to rest, and Gary Tison yelled, "Every man for himself!" as he ran into the desert. *Id.* Ricky and Raymond Tison and Randy Greenawalt threw themselves on the ground. *Id.* at 198-99. The police approached the van to find Donald unconscious but still breathing. *Id.* at 299. An ambulance was called, and arrived in half an hour, but the medics were not allowed to approach Donald for five and a half hours, at which time he was dead. *Id.* When the police approached the petitioners, the following allegedly occurred:

A shotgun was shoved against the back of Ricky's head. A pistol barrel was put in his mouth. His clothes—all of them—were cut off his body with a Buck knife. He was pulled by his hair into a police car surrounded by three officers and interrogated—naked and shivering—for five hours. When he expressed reluctance to talk, he was asked, "Do you want to see your dying brother?" The implication was clear: he would be shot and left to die if he did not confess. "I don't want to make a statement," he said. The police continued the interrogation. Donald, bleeding and unconscious, would receive no medical attention until his brothers confessed. Finally, Ricky confessed to his role in the events following the break out. Raymond was treated the same.

Id. Randy Greenawalt was later sentenced to death for the four murders. *State v. Greenawalt*, 128 Ariz. 388, 626 P.2d 118, *cert. denied*, 454 U.S. 848 (1981).

92. *Tison*, 107 S. Ct. at 1679.

93. The statute provided that a killing occurring during the perpetration of a robbery is capital murder. ARIZ. REV. STAT. ANN. § 13-452 (1956), *repealed by* Act of May 31, 1977, ch. 142, § 15, 1977 Ariz. Sess. Laws 687 (effective Oct. 1, 1978).

accomplice liability statutes.⁹⁴ They were found guilty of the four murders, and in a separate sentencing proceeding, without a jury,⁹⁵ they were sentenced to death. The trial judge found three statutory aggravating circumstances—that the Tisons had created a grave risk of death to others (not the victims), that the murders had been committed for pecuniary gain, and that the murders were especially heinous.⁹⁶ The trial judge did not find the statutory mitigating circumstance that the petitioner's "participation was relatively minor."⁹⁷ The judge also found three nonstatutory mitigating circumstances—petitioners' youth, their lack of prior felony records, and their conviction under the felony murder rule.⁹⁸

The Arizona Supreme Court affirmed the death sentences, reasoning that [t]he deaths would not have occurred but for [Ricky and Raymond's] assistance. That they did not specifically intend [the deaths], that they did not plot in advance that these homicides would take place, or that they did not actually pull the triggers . . . is of little significance.⁹⁹

After the *Enmund* decision of 1982,¹⁰⁰ the Tison brothers collaterally attacked their death sentences based on the *Enmund* requirement that specific intent be found before the death penalty can be imposed.¹⁰¹ The Arizona Supreme Court agreed that "*Enmund* . . . prohibits imposition of the death penalty absent a showing that the defendant killed, attempted to kill, or intended to kill."¹⁰² Rather than remanding to the trial court for a finding of intent, however, the Arizona Supreme Court made a finding of intent on its own,¹⁰³ despite language in its prior opinion that no intent existed.¹⁰⁴ The court stated, "Intend

94. *Id.* § 13-139, repealed by Act of May 31, 1977, ch. 142, § 2, 1977 Ariz. Sess. Laws 687. This statute provided that each participant in a robbery or kidnapping is legally responsible for the acts of his accomplices. It is unlikely that revised statutes would have had an impact on the Tisons' case. See *id.* § 13-1105(A)(2), (B) (Supp. 1987) (felony murder includes killings occurring during sex and narcotics offenses and escape); *id.* §§ 13-301, -303(A)(3), -303(B)(2) (1978 & Supp. 1987).

95. Arizona law provided for a hearing without a jury. *Id.* § 13-454(A) (1973) (now codified at *id.* § 13-703(B) (Supp. 1987)). *Spaziano v. Florida*, 468 U.S. 447 (1984), held that the United States Constitution does not require that a capital punishment decision be made by a jury.

96. *Tison*, 107 S. Ct. at 1680. For a general discussion of the last aggravating circumstance, see Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L. REV. 941 (1986).

97. ARIZ. REV. STAT. ANN. § 13-454(f)(3) (1973) (repealed 1978).

98. *Tison*, 107 S. Ct. at 1680.

99. *State v. (Ricky) Tison*, 129 Ariz. 526, 545, 633 P.2d 335, 354 (1981), *vacated*, 107 S. Ct. 1676 (1987). The court did not uphold, however, the aggravating circumstance that the defendants had endangered the lives of people other than the victims, finding this circumstance unsupported by the evidence. *Id.*

100. *Enmund v. Florida*, 458 U.S. 782 (1982). See *supra* notes 53-73 and accompanying text.

101. *State v. (Raymond) Tison*, 142 Ariz. 454, 690 P.2d 755 (1984) (en banc), *vacated*, 107 S. Ct. 1676 (1987); *State v. (Ricky) Tison*, 142 Ariz. 446, 690 P.2d 747 (1984) (en banc), *vacated*, 107 S. Ct. 1676 (1987).

102. (*Raymond*) *Tison*, 142 Ariz. at 456, 690 P.2d at 757.

103. *Id.* The Supreme Court described the intent found by the Arizona Supreme Court as "a species of foreseeability." *Tison*, 107 S. Ct. at 1684.

104. See text accompanying note 99. In a sharply worded dissent, Justice Feldman asked, "Does the record today support what it could not support in 1981—that defendants either killed, attempted to kill or intended that the victims be killed?" (*Ricky*) *Tison*, 142 Ariz. at 450-51, 690 P.2d at 751-52 (Feldman, J., concurring in part and dissenting in part) (citing *State v. Tison*, 129 Ariz. 526, 633 P.2d 335 (1981), *vacated*, 107 S. Ct. 1676 (1987)). Justice Feldman went on to state, "Even if we

[sic] to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony."¹⁰⁵ The Arizona Supreme Court also characterized the Tisons' involvement in the underlying felony as more substantial than that of the defendant in *Enmund*.¹⁰⁶

On review the United States Supreme Court vacated the Arizona Supreme Court's finding of intent, stating, "The Arizona Supreme Court's attempted reformulation of intent to kill amounts to little more than a restatement of the felony murder rule itself."¹⁰⁷ Despite this, the Supreme Court upheld the imposition of the death penalty on the Tison brothers, declaring the *Enmund* culpability requirement could be met with a showing of reckless indifference to human life when coupled with major participation in the underlying felony.¹⁰⁸ The Court stated that major participation had already been determined by the Arizona courts.¹⁰⁹ Although the case was remanded for a determination of whether the defendants had acted with reckless indifference, the Court stated that such a finding was supported by the record.¹¹⁰

In reaching this conclusion, the Court first discussed *Enmund*, arguing that the holding in *Enmund* was very fact specific.¹¹¹ The Court stated, "The [*Enmund*] Court noted that . . . Florida was one of only eight jurisdictions that authorized the death penalty 'solely for participation in a robbery in which another robber takes life.'¹¹² On that basis the Court concluded *Enmund* was applicable only to "a distinct minority regime."¹¹³ In contrast, the Court explained that "eight States required a finding of intent to kill . . . and one State required actual participation in the killing" before a death sentence could be imposed for felony murder.¹¹⁴ The Court stated that *Tison* fell into a mid-range of cases, "outside the category of felony murderers for whom *Enmund* explicitly held the death penalty disproportional."¹¹⁵ The *Enmund* decision, the Court implied, ignored this entire mid-range of cases in which the defendant's "degree of participation in the crimes was major rather than minor, and the record would support a finding of the culpable mental state of reckless indifference to human life."¹¹⁶ Thus, the Court stated that the true *Tison* issue was whether the

ignore the previous contrary conclusion, today's holding is remarkable because there is no direct evidence that either of the brothers intended to kill . . ." *Id.* at 451, 690 P.2d at 752 (Feldman, J., concurring in part and dissenting in part). He concluded, "I would obey the dictate of *Enmund* and require an 'individualized consideration' of . . . intent to kill as a constitutional requirement in imposing the death sentence." *Id.* at 454, 690 P.2d at 755 (Feldman, J., concurring in part and dissenting in part) (quoting *Enmund* 458 U.S. at 798).

105. (*Ricky*) *Tison*, 142 Ariz. at 456, 690 P.2d at 748 (citing *Enmund*, 458 U.S. 782).

106. *Id.* at 456, 690 P.2d. at 748-49.

107. *Tison*, 107 S. Ct. at 1684.

108. *Id.*

109. *Id.* at 1684-85.

110. *Id.* at 1684.

111. *Id.*

112. *Id.* at 1682 (quoting *Enmund*, 458 U.S. at 789).

113. *Id.*

114. *Id.*

115. *Id.* at 1684.

116. *Id.*

death penalty was constitutional for this mid-range of cases.¹¹⁷

The Court concluded that in this mid-range, not only did "the majority of American jurisdictions clearly authorize capital punishment," but that American courts were not "nearly so reluctant to impose death" as they had been in cases like *Enmund*.¹¹⁸ The Court then described an "apparent consensus" in actual court decisions since *Enmund* that "substantial participation in a violent felony under circumstances likely to result in . . . loss of . . . life may justify the death penalty even absent an 'intent to kill.'"¹¹⁹ In support of this consensus the Court cited six state decisions.¹²⁰

The Court next evaluated the proportionality of the death penalty for this new category of cases.¹²¹ The Court's proportionality review considered the culpability of one exhibiting "extreme indifference to human life."¹²² While noting the traditional legal theory that culpability is proportionately related to intent or purposefulness, the Court adopted the stance that "some nonintentional murderers may be among the most dangerous and inhumane of all."¹²³ The Court concluded that because culpability for reckless indifference was equal to culpability for intent to kill, inflicting the death penalty on these mid-range felony murderers was not beyond the bounds of the constitution.¹²⁴ The Court again characterized the prohibition of capital punishment absent an intent to kill as the "minority position," not one that is constitutionally required.¹²⁵

The *Tison* Court premised its holding on the conclusion that the *Enmund* rule was limited to that minority of jurisdictions authorizing the imposition of the death penalty on those convicted of capital murder on the felony murder doctrine alone, without any showing of substantial participation in the underlying felony or of any culpable mental state.¹²⁶ The Court based this conclusion on the language of *Enmund* and the Court's own survey of state statutes regarding death penalty and felony murder.¹²⁷ The Court also noted six cases since *Enmund* in which juries had actually imposed the death penalty on felony murder defendants who actively participated in the underlying felony—regardless of a showing of intent.¹²⁸ Examined individually, however, all three of these bases are faulty.

The *Enmund* opinion specifically phrased the issue it sought to address as

117. *Id.* at 1685 ("Enmund does not specifically address this point.").

118. *Id.* at 1687.

119. *Id.* at 1686.

120. *Id.* at 1686-87 (citing *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), *cert. denied*, 465 U.S. 1051 (1984); *Deputy v. State*, 500 A.2d 581 (Del. 1985), *cert. denied*, 107 S. Ct. 1589 (1987); *Ruffin v. State*, 420 So. 2d 591 (Fla. 1982); *Allen v. State*, 253 Ga. 390, 321 S.E.2d 710 (1984), *cert. denied*, 470 U.S. 1059 (1985); *People v. Davis*, 95 Ill. 2d 1, 447 N.E.2d 353, *cert. denied*, 464 U.S. 1001 (1983); *Selvage v. State*, 680 S.W.2d 17 (Tex. Crim. App. 1984) (en banc)).

121. *Tison*, 107 S. Ct. at 1687.

122. *Id.* at 1688.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 1684.

127. *Id.* at 1683-84.

128. *Id.* at 1686-87; see cases cited *supra* note 120.

“whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life.”¹²⁹ The Court stated that it was unnecessary to deal with the question whether the “degree of Enmund’s participation in the killings was given the consideration required by the Eighth and Fourteenth Amendments.”¹³⁰ Dismissing the issue of degree of participation summarily implied that *Enmund*’s prohibition was not limited, as the *Tison* Court stated, to only those cases in which the defendant is a “minor actor” in the felony. Rather, the *Enmund* Court’s sole focus on the defendant’s intent implied that without intent, even a high degree of participation in the underlying felony would be insufficient to warrant the death penalty.¹³¹

Another indicator that the *Enmund* Court had no intention to restrict its ruling to felony murder alone was the resurrection in its discussion of *Coker*,¹³² which categorically prohibited the death penalty for the crime of rape.¹³³ Comparing *Enmund* to *Coker*, the *Enmund* Court stated, “In reaching this conclusion . . . the [*Coker*] Court looked to the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made. . . . We proceed to analyze the punishment at issue in this case in a similar manner.”¹³⁴ The *Enmund* Court then set out its own statistical analysis, finding that “only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery in which a killing occurred to be sentenced to die.”¹³⁵ Comparing its survey of state statutes with that in *Coker*, the *Enmund* Court concluded:

While the current legislative judgment with respect to the imposition of the death penalty where a defendant did not take life, attempt to take it, or intend to take life is neither “wholly unanimous . . .” nor as compelling as the legislative judgments considered in *Coker*, it nevertheless weighs on the side of rejecting capital punishment for the crime at issue.¹³⁶

The *Enmund* Court’s marked reliance on *Coker* implies a similarity of purpose for the *Enmund* Court: it meant to categorically prohibit the death penalty for those defendants who neither “killed, attempted to kill, nor intended to kill.”¹³⁷

129. *Enmund*, 458 U.S. at 787. Not only did the Court phrase the issue broadly at the outset, but it continued to use similarly broad language throughout the opinion.

130. *Id.* at 787 n.4.

131. The issue of Enmund’s participation was not as settled as the *Tison* opinion suggests. In the *Tison* opinion Justice O’Connor describes Enmund’s participation as “attenuated,” *Tison*, 107 S. Ct. at 1683, while in her dissent in *Enmund*, the Justice stated that “[Enmund’s] participation had not been ‘relatively minor,’ but had been major in that he ‘planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons.’” *Enmund*, 458 U.S. at 806 (quoting *Enmund v. State*, 399 So.2d 1362, 1373 (Fla. 1981) (O’Connor, J., dissenting)).

132. 433 U.S. 584 (1977); see *supra* notes 33-38 and accompanying text.

133. See *supra* text accompanying notes 63-64.

134. *Enmund*, 458 U.S. at 788-89.

135. *Id.* at 793.

136. *Id.* at 792-93 (quoting *Coker*, 433 U.S. at 596).

137. The *Enmund* opinion did use other phrases to describe this class of defendants, thus causing potential confusion. Note, *Imposing the Death Sentence for Felony Murder on a Non-Triggerman*, 37 STAN. L. REV. 857, 859 (1985). The Court described the class of defendants at issue as

Enmund also mirrored *Coker* when evaluating the proportionality of the crime of felony murder and the "enormity" of the death penalty. The *Enmund* Court stated, "The murderer kills, the robber, if no more than that, does not. . . . As was said of the crime of rape in *Coker*, we have the abiding conviction that the death penalty . . . is an excessive penalty for the robber who, as such, does not take human life."¹³⁸ Justice White's own description of *Enmund* in the majority opinion in *Cabana v. Bullock* shows it is not the narrow rule described by the *Tison* Court. Justice White stated: "*Enmund* imposes a *categorical* rule: a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death."¹³⁹

The *Tison* Court also based its narrow construction of *Enmund* on its own statistical survey of which state legislatures have permitted the death penalty in felony murder cases in which the defendant actively participated in the underlying felony. The Court found that four states authorized the death penalty in felony murder cases on a showing of recklessness or extreme indifference to human life.¹⁴⁰ Two more allowed the death penalty when the defendant's participation had been substantial.¹⁴¹ Six states, including Arizona, allowed the death penalty for felony murder but counted as a mitigating circumstance minor participation in the felony.¹⁴² Three additional states permitted the death penalty for felony murder when an aggravating circumstance had been found.¹⁴³ To these fifteen jurisdictions the Court added six jurisdictions that still permitted the death penalty in violation of the Court's own reading of *Enmund*; that is, based on felony murder simpliciter.¹⁴⁴ With these twenty-one jurisdictions the *Tison* Court concluded that the majority of American jurisdictions clearly authorize capital punishment for these mid-range felony murders.¹⁴⁵ In concluding that twenty-one jurisdictions constituted a majority, the Court apparently considered only those states which permit the penalty of death in any case.

"defendant[s] who somehow participated in a robbery where a murder occurred." *Enmund*, 458 U.S. at 792. The Court also cited statistics regarding defendants "who did not participate in a plot or scheme to murder." *Id.* at 795. The Court once described the defendant with which it dealt as "one . . . who aids and abets a felony in the course of which a murder is committed by others, but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force be employed." *Id.* at 797. The court five times specified the class of defendants at issue simply as those who have neither killed, attempted to kill, nor intended that a killing take place. *Id.* at 787, 793, 797, 798, 800. This repetition demonstrates the Court's consistency in defining the class of defendants for which it has prohibited the death penalty.

138. *Id.* at 797. The *Coker* Court had stated, "The murderer kills, the rapist, if no more than that, does not." *Coker*, 433 U.S. at 598.

139. *Cabana v. Bullock*, 474 U.S. 376, 386 (1986) (emphasis added). Intending that lethal force be employed, while vague, must mean more than the threat of force or the brandishing of a weapon, because certainly those elements were present in *Enmund*. Moreover, the words chosen by the *Enmund* Court indicate that it contemplated the opposite of a threat. "That lethal force be employed" provokes the image of one actively inflicting physical harm on another. Note, *supra* note 137, at 870.

140. *Tison*, 107 S. Ct. at 1685.

141. *Id.*

142. *Id.* at 1685-86.

143. *Id.* at 1686.

144. *Id.* at 1685-86.

145. *Id.* at 1687.

The Court included in this "majority" two states, California and Arizona, whose courts, if not legislatures, had clearly interpreted *Enmund* to require a finding of intent when imposing the death penalty on nontriggerman felony murderers.¹⁴⁶ The Court dismissed these cases, claiming the decisions to be the result of "perceived federal constitutional limitations stemming from our then recent decision in *Edmund* [sic]."¹⁴⁷ The Court also listed Kentucky as one of the states "authoriz[ing] the death penalty in felony murder cases upon a showing of culpable mental state such as recklessness or extreme indifference to human life."¹⁴⁸ This statement is questionable, however, because Kentucky has abolished the felony murder rule.¹⁴⁹ Justice Brennan's dissent pointed out that "the Court exclude[d] from its survey those jurisdictions that have abolished the death penalty and those that have authorized it only in circumstances different from those presented here."¹⁵⁰ With these jurisdictions included, Brennan argued, "three-fifths of American jurisdictions do not authorize the death penalty for a nontriggerman absent a finding that he intended to kill."¹⁵¹

The third part of the *Tison* Court's analysis was a survey, as in *Coker* and *Enmund*, of how often courts had actually imposed a death sentence in cases similar to *Tison*. The Court cited six cases in support of its reading of *Enmund* and concluded that portion of its opinion.¹⁵² The *Tison* Court largely ignored *Enmund*'s statistical analysis in this area. As of 1982 only six executions out of the 362 since 1954 involved a nontriggerman felony murderer.¹⁵³ Of the 739 inmates on death row in 1982, only forty-one had not participated in the fatal assault.¹⁵⁴ Justice Brennan noted that the failure to treat this aspect of the available facts was "troubling not simply because of what that examination would have revealed, but because until today such an examination has been treated as constitutionally required" by *Coker* and *Enmund*.¹⁵⁵

The Court also failed to refute or distinguish any of the decisions interpreting *Enmund* as a prohibition of the death penalty when the defendant had not exhibited an intent to kill and had not killed, regardless of his or her level of

146. (*Raymond*) *Tison*, 142 Ariz. at 456, 690 P.2d at 758; *Carlos v. Superior Court*, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

147. *Tison*, 107 S. Ct. at 1686 n.8.

148. *Id.* at 1685 n.5.

149. See KY. REV. STAT. ANN. § 507.020(1)(a) (Michie/Bobbs-Merrill 1984). Kentucky does have a statute under which reckless conduct, "[i]ncluding, but not limited to the operation of a motor vehicle under circumstances manifesting extreme indifference to human life," may be punishable with death. *Id.* § 507.020 (1)(b)-(c). This crime is quite different from that in the *Tison* case, under which a jury may convict a defendant of first degree murder on the felony murder rule alone, and a higher level state court may find the requisite level of intent for inflicting the death penalty. In Kentucky the finding of recklessness necessary for a conviction would have to be made by the jury as an element of the offense.

150. *Tison*, 107 S. Ct. at 1697 (Brennan, J., dissenting). (Justice Brennan was joined by Justices Blackmun, Marshall and Stevens in this dissent).

151. *Id.* (Brennan, J., dissenting).

152. See *id.* at 1686-87; cases cited *supra* note 120.

153. *Enmund*, 458 U.S. at 794. Sixty-five executions took place between *Enmund* and *Tison*. None of those executed were nontriggerman felony murderers. *Tison*, 107 S. Ct. at 1698 (Brennan, J., dissenting).

154. *Enmund*, 458 U.S. at 796.

155. *Tison*, 107 S. Ct. at 1699 (Brennan, J., dissenting).

participation in the underlying felony or presence during the killing. A number of both state and federal courts have interpreted *Enmund* as mandating that the defendant either participate directly in the killing or personally have an intent to commit murder before the death penalty can be imposed.¹⁵⁶ Many of these cases involved defendants who had more fully participated in the underlying felony than did *Enmund*. In *Hyman v. Aiken*,¹⁵⁷ for example, the defendant conceived the robbery, laid in wait for the victims, mounted an assault on the victim's trailerhouse, and terrorized the victims.¹⁵⁸ Whether the defendant or his accomplices actually delivered the fatal blow was unclear.¹⁵⁹ The United States Court of Appeals for the Fourth Circuit held that because the jury could have sentenced the defendant to death absent the required finding that "he killed, attempted to kill, or intended to kill the robbery victim," the death penalty must be reversed despite the defendant's high level of participation.¹⁶⁰

In death penalty cases the United States Supreme Court has routinely made its own analysis of the proportionality of the death penalty to the crime at issue, independent of state legislatures and state court holdings.¹⁶¹ In capital cases, the individual's culpability is given especially close attention.¹⁶² The *Enmund*

156. *E.g.*, *Hyman v. Aiken*, 777 F.2d 938, 940 (4th Cir. 1985) (incorrect jury instruction allowed jury to sentence defendant to death "whether or not he killed, attempted to kill, or intended to kill"); *Fleming v. Kemp*, 748 F.2d 1435, 1453-54 (11th Cir. 1984) (Georgia statute requiring a finding of malice complied with *Enmund*); *Chaney v. Brown*, 730 F.2d 1334, 1356 n.29 (10th Cir.) ("Before a death penalty can be imposed it must be proven beyond a reasonable doubt that [the defendant] killed or attempted to kill the victim, or himself intended or contemplated that the victim's life would be taken."), *cert. denied*, 469 U.S. 1090 (1984); *Bell v. Watkins*, 692 F.2d 999, 1012 (5th Cir. 1982) ("In *Enmund*, the Supreme Court held that under the eighth amendment a death sentence may not be imposed on someone who neither committed the homicide, attempted to commit the homicide, nor participated in the plot to kill the victim."); *Hall v. State*, 420 So. 2d 872, 874 (Fla. 1982) ("Enmund was an aider and abettor only to the underlying felony. Hall, on the other hand, was an aider and abettor to the homicide as well as the underlying felony."); *People v. Tiller*, 94 Ill. 2d 303, 323-24, 447 N.E.2d 174, 185 (1982) ("[D]efendant was not shown to have planned or in any manner participated in the killings, and under the authority of *Enmund* the death sentences must be vacated."), *cert. denied*, 461 U.S. 944 (1983). The United States Court of Appeals for the Fifth Circuit refuted the argument that the *Enmund* rule was fact-specific, stating:

The State would . . . distinguish *Enmund* on its facts. *Enmund* drove a get-away car . . . [The present defendant] was . . . physically present at the scene of the killing. The distinction is without a difference, however, for like *Enmund*, [the defendant] himself has not been shown to have killed or intended to kill. His presence at the scene supports no such inference.

Jones v. Thigpen, 741 F.2d 805, 812 n.8 (5th Cir. 1984).

157. 777 F.2d 938 (4th Cir. 1985).

158. *Hyman v. Aiken*, 606 F. Supp. 1046, 1049-50 (D.S.C.), *rev'd*, 777 F.2d 938 (4th Cir. 1985).

159. *Id.* at 1049-50.

160. *Hyman*, 777 F.2d at 940.

161. *E.g.*, *Enmund*, 458 U.S. at 797 ("[I]t is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as *Enmund* . . . who does not . . . kill, attempt to kill, or intend that a killing take place or that lethal force . . . be employed."); *Coker*, 433 U.S. at 597 ("[R]ecent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) ("[P]ublic perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'") (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

162. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is reserved.")

Court, however, noted that the felony murder doctrine allowed conviction without a finding of intent, and thus without any individualized jury determination regarding the defendant's mental state. Because it considered such a determination essential to capital sentencing, the *Enmund* Court ruled that in order to sentence the felony murder defendant to death the sentencer must make a finding of nontriggerman intent, focusing on the defendant's "personal responsibility and moral guilt."¹⁶³

Relying on *Gregg*, the *Enmund* Court noted two acceptable goals of capital punishment—deterrence and retribution.¹⁶⁴ If neither of these goals is realized then the penalty is "nothing more than the purposeless and needless imposition of pain and suffering."¹⁶⁵ Without intent to kill, which is commonly considered to establish the highest degree of culpability, it is questionable that the death penalty, the most extreme form of retribution, is proportionate.¹⁶⁶ As for deterrence, the *Enmund* Court made clear that only those who premeditate and deliberate can be deterred.¹⁶⁷ The Court stated "if a person does not intend that life will be taken, or 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.'"¹⁶⁸

The *Tison* Court did not consider the relationship of the death penalty imposed in *Tison* to the goals of deterrence and retribution. The *Tison* Court's entire proportionality analysis centered on the relative culpability of one exhibiting reckless indifference towards life.¹⁶⁹ In its analysis the Court recognized the traditional principle that the more purposeful an individual's conduct, the greater her culpability.¹⁷⁰ The Court adopted the stance, however, that "some nonintentional murders may be among the most dangerous and inhumane of all."¹⁷¹ The Court exemplified this principle with

the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property.¹⁷²

Justice Brennan's dissent points out the attenuated nature of this discussion with regard to the facts at hand. First, both examples provided by the majority describe one who actually inflicted the fatal blow on the victim.¹⁷³ Using exam-

163. *Enmund*, 458 U.S. at 801. *Cabana* modified this rule, and allows an appellate court to make a finding of intent. *Cabana v. Bullock*, 474 U.S. 376, 386-89 (1986).

164. *Enmund*, 458 U.S. at 799 (citing *Gregg*, 428 U.S. at 187).

165. *Coker*, 433 U.S. at 592.

166. Loewy, *supra* note 70, at 312-14.

167. *Enmund*, 458 U.S. at 798-99 (citing *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)).

168. *Id.* at 799 (quoting *Gregg*, 428 U.S. at 186).

169. *See Tison*, 107 S. Ct. at 1688.

170. *Id.* at 1687-88.

171. *Id.* at 1688.

172. *Id.*

173. *Id.* at 1694 (Brennan, J., dissenting).

ples so easily distinguishable from the case at hand hardly comports with the requirement that the proportionality test in a capital case reflect the individual culpability of the defendant, given the circumstances of the crime and the criminal. The Court offered no particularized analysis of the culpability of one who neither inflicts death on another nor intends the victim's death, but who nevertheless may have acted recklessly. "It is precisely in this context—where the defendant has not killed—that a finding that he or she nevertheless intended to kill seems indispensable to establishing capital culpability."¹⁷⁴

The *Tison* Court entirely omitted analysis of whether the individuals in question, the Tison brothers, deserved the death penalty. The Court simply concluded that the record supported a finding of reckless indifference due to the brothers' participation in the escape and kidnapping.¹⁷⁵ Justice Brennan contended that even accepting the reckless indifference standard, evidence in the record was insufficient to establish that the Tisons exhibited this mental state, and in fact, positive evidence contradicted such a finding.¹⁷⁶ The brothers had conditioned their participation in the prison escape on their father's promise that no one would be hurt.¹⁷⁷ No one was hurt at the prison breakout, indicating the promise would be kept.¹⁷⁸ Both the act of shooting out the radiator and procuring water for the Lyons family indicated that the Tison brothers reasonably expected that the Lyons family would merely be left immobilized, with water, to give the group time to escape. In that light the defendants' claim that the killings were surprising is plausible, and no evidence refuted this story. Instead, the fact the murders were not necessary to the overall escape was considered by the trial court as an aggravating factor against the Tisons.¹⁷⁹ Experts testified that the brothers were "over their heads" in the venture, strengthening the implication that they did not appreciate the consequences of their act.¹⁸⁰

In her dissent in *Enmund* Justice O'Connor criticized the majority's intent requirement as "crudely crafted."¹⁸¹ The requirement that the defendant act with "reckless indifference" towards human life is equally crude. It is entirely unclear what exactly is meant by this standard, and as a result, wide latitude has been given to the states in this area. "Reckless indifference," for example, might be used to denote a depraved heart, as in depraved heart murder. Several states also have "depraved indifference" statutes, which often concern beating or starving deaths. However, this offense commonly constitutes only second-degree murder or some other lesser offense.¹⁸² The Model Penal Code uses the phrase "under circumstances manifesting *extreme* indifference to the value of human

174. *Id.*

175. *Id.* at 1684 (Brennan, J., dissenting).

176. *Id.* at 1692 (Brennan, J., dissenting).

177. *Id.* at 1692-93 (Brennan, J., dissenting).

178. *Id.* at 1678.

179. *Id.* at 1691 n.4 (Brennan, J., dissenting).

180. *Id.* at 1693 n.7 (Brennan, J., dissenting).

181. *Enmund*, 458 U.S. at 825 (O'Connor, J., dissenting).

182. DEL. CODE ANN. tit. 11, § 635 (1987); ME. REV. STAT. ANN. tit. 17-A, § 201 (Cum. Supp. 1987); N.Y. PENAL LAW § 125.25 (McKinney 1987); UTAH CODE ANN. § 76-5-203 (1978).

life" in describing depraved heart murder.¹⁸³ Other questions arise in applying the Court's standard: Must the defendant be subjectively aware of the risk that is being created? How high must the risk be? Must the defendant risk more than one life?¹⁸⁴

If depraved heart murder is not what the *Tison* Court alludes to, more confusion exists. The term "recklessness" is fraught with a variety of meanings. At one level, it simply means that "the defendant's conduct must involve a greater risk of harm to others than tort negligence requires."¹⁸⁵ The term also can mean that, although the same risk of harm as in tort is involved, the defendant must subjectively realize the risk of harm. In contrast, tort liability can be based on objective expectation.¹⁸⁶ The term "recklessness" has also been used to denote the inadvertent creation of a high degree of risk.¹⁸⁷

Not only is the Court's new language likely to lead to disparate applications among the states, but the standard also is inconsistent with a major principle of *Furman* and recognized in *Enmund*. Inherent in *Enmund*'s requirement of an individualized consideration of culpability is the idea that the death penalty, typically a punishment reserved for first-degree murder, should not be inflicted on one whose level of culpability is not equivalent to that of other death penalty recipients. Thus, *Enmund* prohibited using the element of participation in the felony to supply the intent requirement for first-degree murder at the sentencing stage. *Tison* again makes possible the disparity in culpability between capitally sentenced murderers and capitally sentenced felony murderers. In most jurisdictions one who commits a depraved heart murder is not considered to have committed a crime for which the death penalty may be imposed.¹⁸⁸ Yet with *Tison*'s new standard, one who actively participates in a felony with a mind state similar to that of the depraved heart murderer, but who does not actually kill, may receive the death penalty. This result is what *Enmund* sought to avoid—the defendant's participation in the felony supplying the intent requirement, and thus the requisite culpability, for first-degree murder at the sentencing stage.

The *Tison* Court further confuses the issue by collapsing the element of a high level of participation in the underlying felony into the reckless indifference element. The Court does this by stating, "These requirements significantly overlap . . . , for the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life."¹⁸⁹ The Model Penal Code similarly states that, for an ordinary finding of reckless indif-

183. MODEL PENAL CODE § 210.2(1)(b) (1980) (emphasis added). A significant minority of modern codes do not recognize depraved heart murder. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 7.4, at 618 (2d ed. 1986).

184. The Model Penal Code requires subjective realization of the risk being created. MODEL PENAL CODE §§ 2.02(2)(c), 210.2 (1980). The term "indifference" connotes a subjective disregard of the risk.

185. W. LAFAVE & A. SCOTT, *supra* note 183, § 3.7, at 232.

186. W. LAFAVE & A. SCOTT, *supra* note 183, § 3.7, at 232.

187. Commonwealth v. Welansky, 316 Mass. 383, 399, 55 N.E.2d 902, 910 (1944).

188. W. LAFAVE & A. SCOTT, *supra* note 183, § 7.7(d), at 648. "Less defensible is placing even depraved heart murder into [the first-degree murder] category, as a few states have done." *Id.*

189. *Tison*, 107 S. Ct. at 1685.

ference, the prosecution must prove that the defendant consciously created a risk that was substantial and unjustifiable. When felony murder is concerned, however, "[s]uch recklessness and indifference are presumed" when the actor is a party to a dangerous felony.¹⁹⁰ Collapsing the issues in this way endangers the individualized consideration of culpability required in death penalty cases. If a jury or a court is told that a high level of participation indicates "reckless indifference," the two issues become one. Thus, the factfinder is relieved of the burden of making the more difficult, and usually more crucial, determination of mind state or subjective awareness, and thus culpability. This aggravates the problem of disparity in culpability between capitally sentenced murderers and capitally sentenced felony murderers. The danger of letting a high degree of participation supply the requisite culpability results in what *Enmund* denounced—making it a capital crime to participate actively in a felony in which a homicide occurs, regardless of individual culpability.

Whether one accepts the penalty of death as a valid punishment for this nation's courts to impose, its application in the *Tison* case presents several logical difficulties. Not only is the standard "reckless indifference towards human life" vague and difficult to apply with consistency, but it does not square with the careful precedent provided in *Coker*, *Woodson*, *Lockett*, and, most notably, *Enmund*. Those cases mandated that a careful proportionality analysis be conducted by the Supreme Court when permitting the death penalty for a category of crime, as well as an individualized proportionality analysis in any given imposition of the death penalty. That *Tison* fell short of both these requirements is demonstrated in Justice Scalia's dissent in *Maryland v. Booth*,¹⁹¹ decided a short time after *Tison*. In *Booth* the Supreme Court held unconstitutional the introduction of victim impact statements at the sentencing stage in those jurisdictions authorizing the death penalty.¹⁹² The Court stated that these statements interfered with the jury's individualized determination of the defendant's "personal responsibility and moral guilt" which is necessary before imposing the death penalty.¹⁹³ Because many of the victims are unknown to their assailants, the Court declared victim impact statements " 'constitutionally impermissible or totally irrelevant to the sentencing process.' "¹⁹⁴

190. MODEL PENAL CODE § 210.2(b) (1980). This presumption can be rebutted, and the prosecution still bears "the burden of persuasion beyond a reasonable doubt that the defendant acted recklessly and with extreme indifference." *Id.* § 210.2(b) Comment 6, at 30. The Model Penal Code further states that:

the jury may . . . regard the facts giving rise to the presumption as sufficient evidence of the required culpability unless the court determines that the evidence as a whole clearly negatives that conclusion. The presumption may, of course, be rebutted by the defendant or may simply not be followed by the jury.

Id.

That the presumption may be rebutted is not effective in keeping the issue of participation separate from that of recklessness in felony murder sentencing. The requisite finding of recklessness can be made by an upper level court, as per *Cabana*, and is thus less likely to be given the high level of scrutiny required for an element of an offense.

191. 107 S. Ct. 2529 (1987).

192. *Id.* at 2536.

193. *Id.* at 2532-33 (quoting *Enmund*, 458 U.S. at 801).

194. *Id.* at 2533 (quoting *Zant v. Stephens*, 462 U.S. 862, 885 (1983)).

Justice Scalia's dissent argued that the amount of harm caused by a defendant should be considered in the sentencing phase of capital murder.¹⁹⁵ He also argued that this is often done.¹⁹⁶ Scalia wrote:

Less than two months ago, we held that two brothers who planned and assisted in their father's escape from prison could be sentenced to death because in the course of the escape the father and an accomplice murdered a married couple and two children Had their father allowed the victims to live, the brothers could not be put to death; but because he decided to kill, the brothers may. The difference between the life and death for these two defendants was thus a matter "wholly unrelated to the[ir] blameworthiness."¹⁹⁷

Honesty like Scalia's was lacking in the *Tison* opinion. Rather than admit that the Court focused on the *harm* committed by Gary Tison, the father of the defendants, the Court invoked a contrived distinction between *Enmund* and *Tison*. The distinction between minor and major participation melts when one examines Justice O'Connor's detailed account of Enmund's active involvement in his crime. The purported consistency between the two cases ignores the plain meaning of the *Enmund* Court's rule that condemning to death the defendant who "neither took life, attempted to take life, nor intended to take life" violates the eighth and fourteenth amendments.¹⁹⁸

LYNN D. WITTENBRINK

195. *Id.* at 2541 (Scalia, J., dissenting).

196. *Id.* at 2541-42 (Scalia, J., dissenting).

197. *Id.*

198. *Enmund*, 458 U.S. at 787, 801.

