Journal of Criminal Law and Criminology

Volume 73
Issue 4 *Winter*

Article 11

Winter 1982

Eighth Amendment--The Death Penalty and Vicarious Felony Murder: Nontriggerman May Not Be Executed Absent a Finding of an Intent to Kill

John H. Wickert

Follow this and additional works at: https://scholarlycommons.law.northwestern.edu/jclc

 Part of the Criminal Law Commons, Criminology Commons, and the Criminology and Criminal Justice Commons

Recommended Citation

John H. Wickert, Eighth Amendment--The Death Penalty and Vicarious Felony Murder: Nontriggerman May Not Be Executed Absent a Finding of an Intent to Kill, 73 J. Crim. L. & Criminology 1553 (1982)

This Supreme Court Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

0091-4169/82/7304-1553
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 73, No. 4
Copyright © 1983 by Northwestern University School of Law
Printed in U.S.A.

EIGHTH AMENDMENT—THE DEATH PENALTY AND VICARIOUS FELONY MURDER: NONTRIGGERMAN MAY NOT BE EXECUTED ABSENT A FINDING OF AN INTENT TO KILL

Enmund v. Florida, 102 S. Ct. 3368 (1982).

I. INTRODUCTION

In three cases in the past six years the Supreme Court has specifically avoided reviewing the constitutionality of imposing the death penalty upon a nontriggerman[1] where a killing has occurred during the commission of a felony and the nontriggerman neither intended nor anticipated that death would occur.[2] In *Enmund v. Florida*,[3] however, the Court faced the issue and ruled that the eighth amendment's prohibition against the infliction of cruel and unusual punishment bars the imposition of the death penalty against "one who neither took life, attempted to take life, nor intended to take life."[4]

The Court relied heavily upon the disproportionality analysis it had employed in *Coker v. Georgia*[5] to hold that the imposition of the death penalty on Enmund was unconstitutional. The Court also stressed that Enmund should not be executed since he did not intend to kill. However, the Court's failure to adequately define "intent" will present problems to courts applying *Enmund* in the future.

Enmund also highlights the divergent approaches the Court has taken in deciding constitutional questions concerning the death penalty.

---

[1] A nontriggerman is a co-felon who does not participate in the physical act of killing.

[2] *See* Lockett v. Ohio, 438 U.S. 586, 609 n.16 (1978) (plurality opinion) (Ohio death penalty struck down on the grounds that it did not permit the trial court to weigh all of the mitigating evidence offered by the defendant); Bell v. Ohio, 438 U.S. 637, 642 (1978) (plurality opinion) (decided on the basis of *Lockett*); Woodson v. North Carolina, 428 U.S. 280, 305 n.40 (1976) (plurality opinion) (mandatory death sentence struck down).

[3] 102 S. Ct. 3368 (1982).

[4] *Id.* at 3371 (quoting Brief for Petitioner at i, Enmund v. Florida, 102 S. Ct. 3368 (1982)).

[5] 433 U.S. 584 (1977) (plurality opinion) (holding that it is unconstitutional to apply the death penalty to an individual convicted of rape).

Recent Supreme Court cases have held that trial courts must look at the individual characteristics of the criminal and of the crime before reaching a sentencing decision.[6] *Enmund*, however, reflects Justice White's preference for providing clear and definite guidelines for courts to use in deciding whether to impose the death penalty.

II. FACTS OF *ENMUND V. FLORIDA*

In 1975, Thomas and Eunice Kersey, aged 86 and 74, were robbed and fatally shot at their farmhouse in central Florida. Sampson Armstrong had approached Mr. Kersey at his house, grabbed him, pointed a gun at him, and told his accomplice, Jeanette Armstrong, to take Mr. Kersey's money. Mr. Kersey cried out and Mrs. Kersey came out of the house with a gun. Mrs. Kersey shot Jeanette Armstrong, wounding her. Sampson Armstrong, and perhaps Jeanette Armstrong,[7] shot and killed both Mr. and Mrs. Kersey. Earl Enmund and his common-law wife were waiting for the Armstrongs outside in a car.

Enmund, Sampson Armstrong, and Jeanette Armstrong[8] were indicted for the first degree murder and robbery of the Kerseys.[9] The Florida trial court instructed the jury that,

> In order to obtain a conviction of first degree murder while engaging in the perpetration 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.[10]

Both Sampson Armstrong and Enmund were found guilty of two counts of first degree murder and one court of robbery.[11]

The jury recommended that the death penalty be applied, and the

---

[6] *See infra* text accompanying notes 109-11.

[7] *See infra* text accompanying note 19. Though Jeanette Armstrong was accused of murder, the trial judge never determined that she shot the Kerseys.

[8] Jeanette Armstrong's trial was severed from the main trial and she was convicted of one count of robbery and two counts of second degree murder. She was sentenced to three consecutive life sentences. Enmund v. State, 399 So. 2d 1362, 1371 (Fla. 1981), *rev'd*, Enmund v. Florida, 102 S. Ct. 3368 (1982). Enmund's common-law wife testified at the trial and was given immunity from prosecution. *Id.* at 1367.

[9] FLA. STAT. ANN. § 782.04(1)(a) (West 1976), states:

> 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, involuntary 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 heroin by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

[10] Enmund v. Florida, 102 S. Ct. at 3370 (quoting Florida trial court).

[11] Enmund v. State, 399 So. 2d at 1363.

trial judge sentenced Enmund to death.[12] The judge found that four statutory aggravating circumstances[13] applied to Enmund: the capital felony was committed while Enmund was engaged in or was the accomplice in the commission of an armed robbery,[14] the capital felony was committed for pecuniary gain,[15] the capital felony was especially heinous, atrocious, or cruel,[16] and Enmund had previously been convicted of a felony involving the use or threat of violence.[17] The court also found that no statutory mitigating circumstances applied.[18] Finally, the

---

[12] *Id.* In cases where a capital crime (one in which the death penalty may be imposed) has been committed, Florida requires that a separate sentencing hearing be held to determine whether the accused will be executed or sentenced to life imprisonment. FLA. STAT. ANN. § 921.141(1) (West 1981). In the sentencing portion of the trial, the jury serves only in an advisory capacity, FLA. STAT. ANN. § 921.141(2) (West 1981), with the ultimate decision being in the hands of the trial judge. FLA. STAT. ANN. § 921.141(3) (West 1981). If the judge decides to impose the death penalty, he or she is required to make a written statement regarding his or her findings, and he or she must find that there are insufficient mitigating circumstances to outweigh the aggravating ones. *Id.*

[13] The statutory aggravating circumstances are set out in FLA. STAT. ANN. § 921.141(5) (West 1981):

(a) The capital felony was committed by a person under a sentence of imprisonment.
(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
(c) The defendant knowingly created a great risk of death to many persons.
(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or attempt to commit, of flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
(f) The capital felony was committed for pecuniary gain.
(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
(h) The capital felony was especially heinous, atrocious, or cruel.
(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

[14] FLA. STAT. ANN. § 921.141(5)(d) (West 1981).

[15] FLA. STAT. ANN. § 921.141(5)(f) (West 1981).

[16] FLA. STAT. ANN. § 921.141(5)(h) (West 1981).

[17] FLA. STAT. ANN. § 921.141(5)(b) (West 1981).

[18] The statutory mitigating circumstances are set out in FLA. STAT. ANN. § 921.141(6) (West 1981):

(a) The defendant has no significant history of prior criminal activity.
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(g) The age of the defendant at the time of the crime.

trial judge found that Enmund had participated directly in the murder of the Kerseys, stating:

> Since the defendant Jeanette Armstrong was seriously wounded and since both Mr. and Mrs. Kersey were each shot with the bullets from two (2) different caliber guns . . . it is only reasonable to conclude, and the Court so finds, that the defendant Enmund and the defendant Sampson Armstrong each fired into the bodies of Mr. and Mrs. Kersey.[19]

The decision to sentence Enmund to death was subject to a mandatory review by the Florida Supreme Court.[20] That court noted that "the 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."[21] However, the court rejected Enmund's claim that since he did not shoot the Kerseys, he should be found guilty of only second degree murder under Florida's felony murder rule.[22] The court explained that the "felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felon."[23] Since Enmund was constructively present, aiding and abetting the crime of robbery, he was held responsible under the felony murder rule for the acts of Sampson Armstrong.[24]

The court further held that two of the aggravating circumstances found by the trial court were inapplicable. First, the court said that the trial court's findings that (1) the murder occurred during an armed robbery and (2) the crime was committed for pecuniary gain referred to the same aspect of Enmund's crime. It was, therefore, improper to treat

---

19 Enmund v. State, 399 So. 2d 1362, 1372 (Fla. 1981).

20 FLA. STAT. ANN. § 921.141(4) (West 1981).

21 Enmund v. State, 399 So. 2d at 1370.

22 The Florida Supreme Court has said that:

> The historic felony murder rule mechanically defines as murder any homicide committed while perpetrating or attempting a felony. It stands as an exception to the general rule that murder is homicide with the specific intent of malice aforethought. Under the felony murder rule, state of mind is immaterial. Even an accidental killing during a felony is murder. The malice aforethought is supplied by the felony, and in this manner the rule is regarded as a constructive malice device.

Adams v. State, 341 So. 2d 765, 767-68 (Fla. 1976) (footnotes omitted) *cert. denied*, 434 U.S. 878 (1977).

23 Enmund v. State, 399 So. 2d at 1369 (quoting Adams v. State, 341 So. 2d at 768-69). Enmund is considered to be a principal in the second degree, which is defined as one who aids and abets the commission of a crime. If one is deemed to be a principal in the second degree, the person is penalized as if he or she had committed the crime. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW, § 63, at 495-98 (1972). In *Lockett*, the Court invoked the law of principals to uphold the murder conviction of Sandra Lockett. Before a felon may be convicted of murder in Ohio the prosecution must prove that the murderer intended to kill his or her victim. However, once the killer is convicted of murder, his or her accomplices may also be held responsible without regard to their intent. *See* Comment, *The Felony Murder Rule in Ohio*, 17 OHIO ST. L.J. 130 (1956).

24 Enmund v. State, 399 So. 2d at 1370.

these findings as separate aggravating circumstances.[25] Second, the court found that the evidence did not support the claim that the crime was particularly heinous or cruel.[26] Nevertheless, the court upheld the imposition of the death penalty because two aggravating circumstances still applied and no mitigating circumstances existed.[27]

III. THE SUPREME COURT'S DECISION

A. THE MAJORITY OPINION

The United States Supreme Court was faced with the issue of whether the death penalty may be imposed under the eighth amendment against "one who neither took life, attempted to take life, nor intended to take life."[28] Justice White, writing for the majority,[29] applied the disproportionality analysis the Court had used in *Coker*[30] to test the constitutionality of the punishment imposed against Enmund. As in *Coker*, the Court discussed what it called "objective factors": legislative judgments on the permissibility of the death penalty in vicarious felony murder cases and jury sentencing patterns in vicarious felony murder cases.[31]

In its review of legislative judgments the Court noted that thirty-six state and federal jurisidictions authorize the imposition of the death penalty.[32] The Court said that nine states allow the death penalty to be

---

25 *Id.* at 1373.

26 *Id.*

27 Justice Overton dissented and would have remanded the case for resentencing in light of the determination that Enmund did not shoot the Kerseys. *Id.*

28 Enmund v. Florida, 102 S. Ct. at 3371 (quoting Brief for Petitioner at i, 102 S. Ct. 3368 (1982)).

29 Justices Brennan, Marshall, Blackmun, and Stevens joined in the opinion. Justice Brennan also filed a concurring opinion.

30 Justice White wrote the plurality opinion in *Coker*.

31 The objective test has its roots in Gregg v. Georgia, 428 U.S. 153 (1976). In *Gregg*, the Court noted:

> Thus, an assessment of contemporary values concerning the infliction of [the death penalty] is relevant to the application of the Eighth Amendment. . . .
>
> . . . [T]his assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.

Id. at 173.

32 In three of these 36 jurisdictions felony murder was not a capital crime. In nine other states the death penalty could be imposed solely for participation in a robbery in which the defendant's co-felon took another's life. Eleven other states required some showing of the defendant's culpable mental state. While eight of these states made intentional, purposeful, knowing or premeditated killing an essential element of the crime, the three other states required a showing of a culpable mental state short of intent, such as recklessness, before the death penalty could be imposed. One other jurisdiction barred the death penalty where the accused was not the one who had actually killed. Two other jurisdictions allowed the co-felon's minor participation in the crime to be used as a defense to preclude the death penalty. One state limited the death penalty to circumstances not involved in the *Enmund* case. Nine other jurisdictions allowed the imposition of the death penalty for felony murder, but re-

imposed solely for participation in a felony where one of the convicted person's co-felons killed a human being.[33] Nine other states allow the death penalty to be imposed in cases where aggravating circumstances in addition to the initial felony existed.[34] None of these eighteen states require a showing of intent before a nontriggerman can be executed. Justice White observed that the legislative judgment on the permissibility of the death penalty for rape, discussed in *Coker*,[35] was more compelling than the legislative judgment discussed in *Enmund*. Nevertheless, the legislative judgment on the permissibility of the death penalty for vicarious felony murder "weighs on the side of rejecting capital punishment for the crime at issue," since the eighteen aforementioned states only constituted about a third of American jurisdictions.[36]

The Court's analysis of jury determinations was more convincing. The Court stated that "[t]he evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioner's."[37] The Court noted that since 1954, there have been only 362 executions for homicide, and of this group only six nontriggermen have been executed. The last execution of a known nontriggerman occurred in 1955.[38] The Court also noted that of the 796 inmates on death row for homicide as of October 1, 1981, only three individuals (including Enmund) were not physically present at the killing or did not participate in a plot to kill.[39]

---

quired that the court find additional aggravating circumstances before the death penalty could be imposed. *Id.* at 3372-74.

33 Florida is included in this group.

34 Enmund v. Florida, 102 S. Ct. at 3374. The aggravating circumstances vary from state to state. Florida's scheme is fairly typical. *See supra* note 18.

35 In *Coker*, only one state allowed the death penalty to be applied in cases of rape. 433 U.S. at 594, 595-96.

36 Enmund v. Florida, 102 S. Ct. at 3374.

37 *Id.* at 3375.

38 *Id.* In *Coker*, the Court noted that between 1973 and 1977, only six people had been sentenced to death in Georgia for rape. 433 U.S. at 597. Ironically, in *Enmund*, the Court noted that between 1955 and 1977, 72 people were executed for rape. Enmund v. Florida, 102 S. Ct. at 3375.

39 Enmund v. Florida, 102 S. Ct. at 3375. Of the 45 felony murderers on death row in Florida at that time there were 36 cases in which the court had found that the defendant had had an intent to kill. In eight of the nine remaining cases the felony murderer was the triggerman. Enmund was the only person on Florida's death row who was a nontriggerman who did not intend to kill. *Id.* at 3376.

The Court also responded to the dissent's charge that the statistics on jury determinations were inadequate because they did not indicate how many times the prosecution had sought the death penalty for vicarious felony murder but was rebuffed by the jury. The Court said that although it doubted such statistics existed, the statistics would be relevant if they showed that prosecutors did not seek the death penalty, for it would indicate a societal unwillingness to use the death penalty in cases such as *Enmund*. The dissent also charged that the statistics were inadequate because they did not show how many felony murderers (both triggermen and nontriggermen) were sentenced to death absent a finding of intent. The

The Court then exercised its own independent judgment concerning the constitutionality of imposing the death penalty upon Enmund, noting, "it is for *us* ultimately to judge whether the Eighth Amendment permits imposition of the death penalty . . . ."[40] The Court said that, "[t]he question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims . . . ."[41] The Court then drew an analogy between the crime of rape and armed robbery. The analysis in *Coker* was based in large part on the fact that the rape victim was not killed. Similarly, the Court in *Enmund* noted, " '[t]he 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.' "[42] The Court stated that although armed robbery is a serious crime, it would be excessive to punish it with death.[43]

The Court added that, "[i]t is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.' "[44] The Court noted that although Enmund's culpability was very different from that of robbers who have killed, both have been sentenced to death. Thus, the Court concluded that it was impermissible for the State to treat Enmund in the same manner as it had treated the triggerman.[45]

Finally, the Court stated that " 'the death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.' "[46] The Court observed that *Coker* established the proposition that unless the death penalty measurably contributes to one or both of these goals it " 'is nothing more than the purposeless and needless imposition of pain and suffering'. . . ."[47] In *Enmund*, the Court said that the imposition of the death penalty for vicarious felony murder would not deter others from committing the crime. First, it cited evidence that only one half of one percent of all robberies

---

Court responded that the statistics were tailored only to prove Enmund's assertion that death is rarely imposed as a penalty against nontriggermen. *Id.*

40 *Id.* (emphasis added).

41 *Id.* at 3377 (emphasis in original).

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

43 In Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974), *aff'd*, Gregg v. Georgia, 428 U.S. 153 (1976), the Georgia Supreme Court declared that the death penalty could not be imposed for armed robbery since it was rarely imposed for that crime.

44 Enmund v. Florida, 102 S. Ct. at 3377 (quoting H. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968)).

45 Enmund v. Florida, 102 S. Ct. at 3377.

46 *Id.* (quoting *Gregg*, 428 U.S. at 183 (footnote omitted)).

47 Enmund v. Florida, 102 S. Ct. at 3377 (quoting *Coker*, 433 U.S. at 592).

resulted in homicide.[48] This fact, coupled with the infrequent imposition of the death penalty for vicarious felony murder, insured that fear of the death penalty did not enter into the " 'cold calculus that precedes the decision to act.' "[49]

The Court also said that retribution could not justify the imposition of the death penalty in *Enmund*. The Court noted that retribution is linked to an individual's culpability, and the American criminal justice system "has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability.' "[50] The Court decided that executing Enmund for a murder which he did not commit and which he had no intention of committing would not "measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."[51] Thus, the Court reversed and remanded the case to the Florida Supreme Court.

B. THE DISSENT

Justice O'Connor in her dissent[52] stated that she too would remand the case for further proceedings. Justice O'Connor's dissent, however, employed a completely different rationale than the majority opinion. Although Justice O'Connor admitted that *Enmund's* statistics concerning jury determinations were impressive on their face, she attacked their adequacy since they did not indicate how often juries have refused to impose the death penalty when it was sought by the prosecution.[53] Second, she claimed that the statistics were incomplete due to the fact that they did not indicate how many felony murderers (triggermen and nontriggermen) were sentenced to death absent a finding of intent.[54]

Justice O'Connor also noted that at least twenty-one states—almost two-thirds of the states which permit the death penalty—allowed the death penalty to be imposed for vicarious felony murder absent a finding of intent.[55] She observed "that the petitioner has failed to meet the standards in *Coker* and *Woodson* that the 'two crucial indicators of evolving standards of decency . . . jury determinations and legislative enact-

---

48 Enmund v. Florida, 102 S. Ct. at 3378.

49 *Id.* at 3377-78 (quoting *Gregg*, 428 U.S. at 186).

50 Enmund v. Florida, 102 S. Ct. at 3378 (quoting Mullaney v. Wilbur, 421 U.S. 684, 698 (1975)).

51 Enmund v. Florida, 102 S. Ct. at 3378.

52 The Chief Justice, Justice Powell, and Justice Rehnquist joined in the opinion.

53 Enmund v. Florida, 102 S. Ct. at 3388 (O'Connor, J., dissenting). If a complete statistical analysis were done, it is unlikely that the study would support Justice O'Connor's argument on this point. Studies indicate that juries are reluctant to impose the death penalty in felony murder cases. Kalven and Zeisel, *The American Jury and the Death Penalty*, 33 U. CHI. L. REV. 769 (1966).

54 Compare with the majority response to these arguments, *supra* note 39.

55 Compare to the majority's figures, *supra* text accompanying notes 32-34.

ments—*both point conclusively* to the repudiation' of capital punishment for felony murder."[56] She concluded that the "objective factors" indicated that "our 'evolving standards of decency' still embrace capital punishment for this crime."[57]

Justice O'Connor next observed that the concept of proportionality requires more than a measurement of "objective factors"; the Court must also determine if "the penalty imposed in a capital case [is] proportional to the harm caused and the defendant's blameworthiness."[58] She argued that the harm in this case was greater than the harm in *Coker*, and that Enmund could not claim "that the penalty imposed is 'grossly out of proportion' to the harm for which he admittedly is at least partly responsible."[59] She disagreed with the Court's characterization of Enmund as a robber, noting that he had been deemed legally responsible for the deaths of both Mr. and Mrs. Kersey.[60]

Finally, Justice O'Connor criticized the Court for injecting the element of intent into federal constitutional law, thereby "requiring this Court both to review highly subjective definitional problems customarily left to state criminal law and to develop an Eighth Amendment meaning of intent."[61] She observed that while the concept of proportionality requires some connection between blameworthiness and punishment, the Court did not adequately explain why the eighth amendment required the finding of an intent to kill.[62] She noted that the intent-to-kill requirement is "crudely crafted," for "it fails 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 contribution to the planning and success of the crime, and the defendant's actual participation during the commission of the crime."[63] Justice O'Connor stated that the Court did not demonstrate why the eighth amendment concept of proportionality would not be satisfied here by a showing of an intent to commit an armed robbery combined with the knowledge that armed robberies present a substantial risk of death.[64] She further noted that notions of guilt are complicated, and that the factfinder, and not the Supreme Court, is in the best position to deal with cases on an individual basis. She concluded, therefore, that the trial

56 Enmund v. Florida, 102 S. Ct. at 3390 (O'Connor, J., dissenting) (quoting Woodson v. North Carolina, 428 U.S. 280, 293 (1976)) (emphasis in *Enmund*).

57 *Id.*

58 Enmund v. Florida, 102 S. Ct. at 3390-91 (O'Connor, J., dissenting).

59 *Id.* at 3391.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

judge's decision to impose the death penalty was not disproportional to the crime.[65]

Justice O'Connor stated, however, that she would remand the case. She cited *Lockett v. Ohio*, in which the Court noted that " 'the sentencer, in all but the rarest kind of capital case, [may] not be precluded from considering, *as a mitigating factor*, any . . . circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' "[66] Justice O'Connor concluded that the trial judge's misunderstanding of Enmund's role in the killing prevented the trial court from properly deciding whether he should be executed.[67]

IV. ANALYSIS

A. *ENMUND* AND PRIOR SUPREME COURT CASES

In *Enmund v. Florida*, the Court reached the proper decision in a slightly unsatisfactory manner. The Court unnecessarily confused the *Coker* test, which had established that a punishment is excessive if it:

> (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment [may] fail the test on either ground.[68]

In *Enmund*, however, the two tests became blended together. In *Coker*, the Court never answered the question of whether the death penalty for rape contributed to the acceptable goals of punishment.[69] The Court in *Enmund* determined that the death penalty did not contribute to the acceptable goals of punishment.[70] However, the Court made this determination in the context of its discussion of disproportionality.[71] Although a penalty can clearly fail both prongs of the *Coker* test, the Court, for the sake of clarity, should have indicated that the punishment failed the *Coker* test on both grounds.

The Court's approach to the disporportionality analysis is unique in other ways. The history of the disproportionality analysis can be traced back to *Weems v. United States*,[72] in which the Court first recog-

---

65 *Id.* at 3392.

66 *Id.* at 3393 (quoting Lockett v. Ohio, 438 U.S. at 604) (footnotes omitted).

67 *Id.* at 3394.

68 Coker v. Georgia, 433 U.S. 584, 592 (1977).

69 *Id.* at 592 n.4.

70 *See infra* text accompanying notes 46-51.

71 The dissent never discussed the majority's contention that the penalty did not serve the acceptable goals of punishment.

72 217 U.S. 349 (1910). In *Weems*, the Court addressed the constitutionality of the Phillipine punishment of *cadena temporal* for the crime of falsifying public documents. This punishment included imprisonment and hard labor for a minimum of 12 years and one day in chains, the loss of certain civil liberties and lifetime surveillance of the individual.

nized that the cruel and unusual punishment clause prohibited not only punishments which are inhumane, such as torture, but also punishments which are excessive in light of the seriousness of the offense. The Court in *Weems* also recognized that the constitutional concept of cruel and unusual punishment is not static. Instead, the cruel and unusual punishment clause "may acquire meaning as public opinion becomes enlightened by a humane justice."[73] In *Trop v. Dulles*,[74] the plurality observed that the content of the eighth amendment is determined by the "evolving standards of decency that mark the progress of a maturing society."[75] The "evolving standards of decency" test was given a structural framework in *Gregg v. Georgia*,[76] in which the Court examined both legislative judgments and jury sentencing patterns before deciding that the eighth amendment does not bar the imposition of the death penalty for deliberate murder.

Coker was the first case in which the disproportionality analysis was applied to strike down the imposition of the death penalty for a particular crime. In *Coker*, the delineation between the "objective factors" and the Court's independent eighth amendment analysis became sharp. The Court stressed the importance of the independent analysis, stating, "we seek guidance in history and . . . [other] objective evidence . . ."[77] to "confirm . . . our own judgment."[78]

In *Enmund*, the Court noted that although objective factors "weigh heavily in the balance,"[79] the ultimate decision concerning the constitutionality of the death penalty for vicarious felony murder rested with the Court. The Court's emphasis on its independent analysis is important, since *Enmund* raises the question of just how strong the "objective factors" must be before a penalty is impermissible. The dissent, in contrast, viewed the objective analysis in extremely rigid terms; Justice O'Connor would be unwilling to find that the death penalty for a particular crime violates our national "standards of decency" unless *both* legislative judgments and jury sentencing patterns indicated conclusively that society is opposed to the imposition of the death penalty.[80] The majority in *Enmund*, on the other hand, seems to ratify the *Coker* approach, which considers "objective factors" to be important, but not dispositive. As discussed above, the Court's conclusion in *Enmund* was weakly supported by the legislative judgments on the applicability of

---

73 *Id.* at 378.

74 356 U.S. 86 (1958) (plurality opinion).

75 *Id.* at 101.

76 428 U.S. 153 (1976). *See supra* note 43.

77 *Coker*, 433 U.S. at 593.

78 *Id.* at 597.

79 Enmund v. Florida, 102 S. Ct. at 3376.

80 *See supra* text accompanying note 56.

the death penalty for vicarious felony murder. Even Justice White's figures indicate that about half of the jurisdictions which permit the death penalty would probably have allowed the imposition of the death penalty in *Enmund*.[81] The Court's decision, however, was strongly supported by jury sentencing patterns.[82]

Enmund altered the disproportionality analysis used in *Coker* in another important way. In *Coker*, the Court emphasized that the death penalty is an excessive punishment for rape since rape does not involve the death of another person.[83] In *Enmund*, however, the emphasis was not on the harm caused by felony murder, but on Enmund's moral responsibility for the death of the Kerseys. The Court characterized Enmund as an armed robber. Paraphrasing *Coker*, the Court said that it would be excessive to execute Enmund for the crime of armed robbery since armed robbery does not involve the death of another person.[84] In *Enmund*, however, two people did die. Perhaps, then, before the Court could classify Enmund as only an armed robber it was necessary for the Court impliedly to assume that Enmund's responsibility for the Kersey's deaths was not great enough to justify the imposition of the death penalty. Thus, *Enmund* is significant because the Court appears to base its decision not on the actual harm caused, but on its perception of Enmund's moral responsibility for the harm.

B. *ENMUND* AND THE ISSUE OF INTENT

The Court's discussion in *Enmund* of the issue of criminal intent is confusing. Throughout its history, the Court has failed to approach questions of criminal intent in a systematic and consistent manner. One commentator has characterized the Court's approach to issues of criminal intent by saying that, "*Mens rea* is an important requirement, but it is not a constitutional requirement, except sometimes."[85] This criticism is supported by analyzing a number of Supreme Court cases. For instance, the Court in *Robinson v. California*,[86] ruled that a law which made drug addiction a criminal offense, regardless of whether the person became voluntarily addicted, violated the eighth amendment prohibition against cruel and unusual punishment. Noting that narcotics addiction is an illness, the Court stated, "in the light of contemporary human

---

81 *See supra* notes 32-36 and accompanying text.

82 *See supra* note 37-39 and accompanying text.

83 Although the Court did mention that the "moral depravity" of the rapist is not as great as the depravity of the murderer, the opinion stressed the fact that no one died. 433 U.S. at 598.

84 Enmund v. Florida, 102 S. Ct. at 3377.

85 Packer, *Mens Rea and the Supreme Court*, SUP. CT. REV. 107 (1962).

86 370 U.S. 660 (1962).

knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[87]

In *Powell v. Texas*,[88] however, the Court greatly limited the application of *Robinson*. In *Powell*, the Court decided that a state could constitutionally punish a chronic alcoholic for public intoxication. The Court distinguished *Robinson* by claiming that the decision only applied to cases where the state punished people for the "status" of addiction.[89] Moreover, *Powell* held that the public acts of addicts and alcoholics could be punished.[90] Thus, although one could not be punished for being an alcoholic, an alcoholic could be punished for being drunk in public. The Court further observed that:

> [T]his Court has never articulated a general constitutional doctrine of *mens rea*. . . . The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.[91]

Cases such as *Powell* and *Robinson* demonstrate the Court's schizophrenic approach to questions of criminal responsibility. The Court, however, has occasionally required a showing of criminal intent in cases where it found that an important constitutional right was at stake.[92] In *Enmund*, where the life and death of a human being was at issue, it seems particularly appropriate for the Court to hold that the Constitution mandates a finding of intent. The Court has often spoken of the unique nature of the death penalty, stating that it differs from other permissible punishments "in both its severity and its finality."[93] Because of its severity and finality, it seems excessive to punish an individual with death

---

87 *Id.* at 666.

88 392 U.S. 514 (1968) (plurality opinion).

89 *Id.* at 532.

90 *Id.* at 532-33.

91 *Id.* at 535-36 (footnotes omitted).

92 *See* Smith v. California, 361 U.S. 147 (1959), in which the Court, in protecting first amendment rights, struck down an obscenity ordinance which did not have a scienter requirement. *See also* Lambert v. California, 355 U.S. 225 (1957), in which the Court struck down a Los Angeles Municipal Code ordinance which made it a crime for people previously convicted of a felony to fail to register with the police. The Court ruled that a registration act of this character violates due process when it is applied to people who have no knowledge of their duty to register. Although the rights of free speech and due process, at issue in *Smith* and *Lambert*, are important, the need for judicial scrutiny is perhaps at its greatest in cases involving the imposition of the death penalty. As the Court has stated, "the action of the sovereign in taking the life of one of its citizens . . . differs dramatically from any other legitimate state action." Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion).

93 *Gardner*, 430 U.S. at 357.

when the individual did not intend to kill another person but only intended to commit an armed robbery.

There are also policy reasons for requiring a showing of intent in vicarious felony murder cases. The American Law Institute has suggested that the felony murder rule should be abolished (in both capital and noncapital cases) because it is at variance with the general principle of American criminal justice that the "[p]unishment for homicide obtains only when the deed is done with a state of mind that makes it reprehensible as well as unfortunate."[94] Of course, the Court in *Enmund* did not conclude that the felony murder rule is always unconstitutional; it held only that the death penalty is an inappropriate punishment for vicarious felony murder absent a showing of intent. Yet, the death penalty should only be imposed, if ever, to punish the most heinous crimes. Armed robbery is committed every day, and to apply the death penalty in the unusual case where deadly violence erupts,[95] particularly where the accused did not commit the physical act of killing, seems overly harsh.[96]

The Court's failure, however, to define "intent" will undoubtedly cause confusion in the future. The word "intent" is hardly capable of simple definition. For example, suppose that an individual aided and abetted an arson in which a number of people died. The arsonists may not have "intended" to kill anyone. However, if the arsonists knew that others were in the building, it is difficult to argue that they are not responsible for the deaths.

There are a number of possible interpretations of the word "intent." LaFave and Scott have identified four basic categories of murder recognized in the United States: "(1) [i]ntent-to-kill murder; (2) intent-to-do-serious-bodily-injury murder; (3) depraved-heart murder; and (4) felony murder."[97] Obviously, under *Enmund* the death penalty cannot be imposed for felony murder where a nontriggerman did not intend to

---

[94] MODEL PENAL CODE § 210.2 comment 6, at 36 (1980). In discussing the felony murder rule the American Law Institute stated:

> This doctrine aside, the criminal law does not predicate liability simply on conduct causing the death of another. . . .
>
> The felony-murder rule contradicts this scheme. It bases conviction of murder not on any proven culpability with respect to homicide but on liability for another crime. The underlying felony carries its own penalty and the additional punishment for murder is therefore gratuitous—gratuitous, at least, in terms of what must have been proved at trial in a court of law.

Id.

[95] *See* Enmund v. Florida, 102 S. Ct. at 3378 n.24.

[96] *See* MODEL PENAL CODE § 210.2 comment 6, at 36 (1980). The American Law Institute stated: "Murder is invariably punished as a heinous offense and is the principal crime for which the death penalty is authorized. Sanctions of such gravity demand justification, and their imposition must be premised on the confluence of conduct and culpability." *Id.* at 36.

[97] W. LAFAVE & A. SCOTT, *supra* note 23, at 528.

kill. LaFave and Scott define intent-to-kill murder as "[c]onduct, accompanied by an intent to kill, which legally causes another's death. . . ."[98] This type of murder would probably be included under the *Enmund* definition of intent.

The other two categories of murder present problems in determining what type of intent is required before the death penalty may be imposed. Intent-to-do-serious-bodily-injury murder is defined as "[c]onduct . . . accompanied by an intent to do serious bodily injury but without an intent to kill, which legally causes another's death. . . ."[99] It is unclear whether this type of murder would be included in the Court's definition of "intent."

The same uncertainty is presented by depraved-heart murder, defined as:

> Extremely negligent conduct, which creates what a reasonable man would realize to be not only an unjustifiable but also a very high degree of risk of death or serious bodily injury to another or to others—though unaccompanied by an intent to kill or do serious bodily injury—and which actually causes the death of another. . . .[100]

Would the *Enmund* requirement of "intent" include criminal activity such as the arson example mentioned earlier which threatens the lives of others, but where the arsonists have no specific design to kill?

Although Justice White does not address this issue, his concurrence in *Lockett* may provide some insight into his meaning of "intent."[101] His concurrence in *Lockett* is similar to his majority opinion in *Enmund* since in both cases he claimed that it constitutes cruel and unusual punishment to impose the death penalty absent a finding of intent. He noted in *Lockett*, that "the type of conduct which Ohio would punish by death requires at most the degree of *mens rea* defined by the American Law Institute Model Penal Code as recklessness: conduct undertaken with knowledge that death is likely to follow."[102] Justice White argued that where the death penalty is to be imposed, the Constitution requires more than a showing of recklessness, because of the

> vast difference between permitting a factfinder to consider a defendant's willingness to engage in criminal conduct which poses a substantial risk of death in deciding whether to infer that he acted with a purpose to take life, and defining such conduct as an ultimate fact equivalent to possessing a purpose to kill as Ohio has done.[103]

---

98 *Id.* at 535.

99 *Id.* at 540.

100 *Id.* at 541.

101 Lockett v. Ohio, 438 U.S. 586, 621 (1978) (White J., concurring in part and dissenting in part).

102 *Id.* at 627-28 (footnote omitted).

103 *Id.* at 627.

Justice White, then, appears to have a narrow definition of "intent". Thus he would not likely include depraved-heart murder and intent-to-do-serious-bodily-injury murder as crimes for which the death penalty could be imposed. It is unfortunate that the Court in *Enmund* did not define "intent" with more precision.

C. IMPLICATIONS OF *ENMUND*

The Court's careful phrasing of the issue in *Enmund* limits the decision to nontriggermen. The Court states a number of times that Enmund could not be sentenced to death since he *did not kill*, attempt to kill, or intend to kill.[104] Yet, the Court may one day be confronted with the related issue of whether the death penalty can be imposed on a *triggerman* who accidentally kills another person during the commission of a felony. One would hope that the Court would find that the death penalty may not be applied in this situation. It seems artificial to distinguish between nontriggermen and triggermen. The moral culpability of the triggerman who accidentally kills during the commission of a felony is essentially no different from the moral guilt of the nontriggerman who does not intend to kill.[105] The difference between the triggerman who kills without intent and the nontriggerman who kills without intent, is that the triggerman committed the physical act of killing. The felon who drops his or her gun during the commission of a felony, thereby causing the death of another person, does not intend the death of the victim any more than the nontriggerman who does not take part in the actual killing or who does not intend the death to occur. Since the Court in *Enmund* stated that the factfinder must delve into the intent of those who aid the triggerman, it seems equitable to delve into the intent of the triggerman as well.[106]

It may be argued that if the state is forced to prove intent in every case of felony murder there will probably be a great number of instances where even intentional killers will not be subject to the death penalty.[107]

---

[104] *See supra* note 39.

[105] The Supreme Court in *Enmund* stated that "[i]t is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.' " Enmund v. Florida, 102 S. Ct. at 3377 (quoting H. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968)). However, if triggermen are sentenced to death for accidental killings, they will be punished as severely as intentional killers. Although the triggerman, unlike the nontriggerman, is physically responsible for the death of another human being, some commentators argue that criminal law should not consider the causing of the death of another to be murder if the intent to kill is absent. *See supra* note 94.

[106] The Court noted that the evidence of jury sentencing patterns was tailored to prove that society has rejected the death penalty for those who did not kill, intend to kill, or attempt to kill. It is unclear, however, whether the "objective factors" would support the conclusion that it is unconstitutional to execute triggermen absent a finding of intent.

[107] Since the state of mind of the felony murderer was immaterial under the traditional

However, these triggermen will still be subject to every appropriate penalty short of death which may be imposed for murder. They will not go unpunished. It is not unreasonable to require the state to prove an additional element of the offense—the intent of the individual—when it wishes to impose the death penalty.[108]

Another important implication of *Enmund* is that it highlights the divergent approaches the Court has taken in death penalty cases. Justice O'Connor correctly concludes that the case could have been decided under *Lockett* and *Eddings v. Oklahoma*.[109] As mentioned above, *Lockett* requires the trial court to consider any mitigating circumstance as a possible justification for not executing the defendant.[110] In *Eddings*, the Court ruled that "[j]ust as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, *as a matter of law*, any relevant mitigating evidence."[111] Florida courts recognize that the trial court must consider every mitigating circumstance proffered by the defendant.[112] However, the trial judge's misunderstanding of Enmund's role in the crime prevented him from deciding whether Enmund's limited participation in the murder of the Kerseys rendered the imposition of the death penalty inappropriate.[113]

This misunderstanding was not corrected by the Florida Supreme Court's acknowledgement that Enmund was not present when the murders occurred, since the court never discussed whether Enmund's lack of participation in the killings would have justified the overturning of his death sentence. The cursory review of Enmund's death sentence by the Florida Supreme Court does not appear to meet the requirements of *Lockett* and *Eddings*.[114]

---

felony murder rule, *see supra* note 22, the state was not required to prove that the felony murderer intended to kill. However, under *Enmund* it will be harder to sentence a nontriggerman to death since the state must now demonstrate that the nontriggerman intended the victim to die. Considering the difficulties presented by having to prove intent, the chance that intentional killers will avoid the death penalty is increased.

108 This approach would not change the elements of felony murder where the death penalty will not be imposed. The Court has recognized the inapplicability of death penalty decisions to questions concerning non-capital crimes. *See* Rummel v. Estelle, 445 U.S. 263 (1980).

109 102 S. Ct. 869 (1982). For further discussion of *Eddings*, see Note, *Eighth Amendment—Minors and the Death Penalty: Decision and Avoidance*, 73 J. CRIM. L. & CRIMINOLOGY 1525 (1982).

110 *See supra* text accompanying note 66.

111 *Eddings*, 102 S. Ct. at 875-76 (emphasis in original).

112 Songer v. State, 365 So. 2d 696, 700 (Fla. 1978).

113 *See supra* text accompanying note 19.

114 Justice O'Connor observed that:

> The Florida Supreme Court's opinion fails to correct this error either by remanding for new sentencing or by evaluating the impact of the trial court's fundamental misperception of the petitioner's role in the killings. Rather, the court simply repeats three times, without any discussion of the evidence, that there are "no mitigating circum-

The Court did not, however, follow this straightforward analysis.[115] Instead, Justice White's opinion clearly establishes him as the champion of the disproportionality approach. Both *Coker* and *Enmund* reflect Justice White's belief in the need for strict guidelines to aid the sentencer in determining whether the death penalty should be imposed.

Furthermore, Justice White's preference for strict guidelines can be seen in his concurrence in *Lockett*. He stated:

> By requiring as a matter of constitutional law that sentencing authorities be permitted to consider and in their discretion to act upon any and all mitigating circumstances, the Court permits them to refuse to impose the death penalty no matter what the circumstances of the crime. This invites a return to the pre-*Furman* days when the death penalty was generally reserved for those very few for whom society has least consideration.[116]

Justice White has consistently attack the problem of inconsistent application of the death penalty since his concurring opinion in *Furman v. Georgia*,[117] in which he stated that it is unconstitutional to impose the death penalty in an infrequent and arbitrary manner. He noted in *Furman*, that if the death penalty is imposed infrequently, its imposition "will make little contribution to deterring those crimes for which it may be exacted."[118]

If the object of sentencing is to reach fair and consistent decisions, the open-ended approach advocated by the Court in recent decisions such as *Eddings* will not help the sentencing authority reach that goal. If lack of intent may be viewed only as a mitigating factor, and not as an absolute bar to imposition of the death penalty, courts will not be able to apply the death penalty for vicarious felony murder in an even-handed manner. The statistics the Court relied on in *Enmund* demonstrate that the death penalty has been infrequently imposed for vicarious felony murder. If the sentencing authority is allowed to treat

---

stances." 399 So. 2d at 1373. In light of the court's dramatically different factual findings, this review is inadequate to satisfy the *Lockett* principle.

Enmund v. Florida, 102 S. Ct. at 3394 n.46 (O'Connor, J., dissenting).

115 The Florida Supreme Court's decision was deficient in another manner. In Proffitt v. Florida, 428 U.S. 242 (1976), where the Court upheld the constitutionality of Florida's death sentencing scheme, the United States Supreme Court noted with approval that the Florida Supreme Court would review the decisions of trial judges to "ensure that they are consistent with other sentences imposed in similar circumstances." *Id.* at 253. An examination of the number of nontriggermen on death row would have probably led the Florida Supreme Court to overturn Enmund's death sentence. *See supra* note 39. In *Enmund*, however, the Florida Supreme Court never discussed the number of times Florida has imposed the death penalty for vicarious felony murder.

116 Lockett v. Ohio, 438 U.S. 586, 623 (1978) (White, J., concurring and dissenting in part).

117 408 U.S. 238 (1972) (White, J., concurring).

118 *Id.* at 312.

the lack of intent as a mitigating circumstance, the death penalty may be imposed in an even more infrequent and arbitrary manner.

V. CONCLUSION

In light of past confusion concerning death penalty cases, the Court was justified in its attempt in *Enmund* to provide the courts with clear and definitive sentencing guidelines. Considering Enmund's limited participation in the killing of the Kerseys and the infrequent infliction of the death penalty in cases such as *Enmund*, the Court reached a just decision. It remains to be seen if the Court will take the same approach if it addresses the question of whether it is constitutional to execute triggermen who do not intend to kill.

JOHN H. WICKERT