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Mary v. Mandel, *Disparity in Death Sentencing for Felony Murderers Created by Cabana v. Bullock*, 37 DePaul L. Rev. 289 (1988)
Available at: <https://via.library.depaul.edu/law-review/vol37/iss2/5>

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DISPARITY IN DEATH SENTENCING FOR FELONY MURDERERS CREATED BY *CABANA* v. *BULLOCK*

The eighth amendment protects defendants convicted of a criminal offense from "cruel and unusual punishment."¹ The framers of the Constitution, however, never defined what they meant by "cruel and unusual,"² and the Supreme Court has never delineated an exact list of punishments which would violate the amendment.³ Instead, the Court reviews a punishment alleged to be cruel and unusual against the backdrop of history and current societal and legislative attitudes.⁴

In 1982, the Supreme Court held that the eighth amendment prohibits the imposition of a death sentence on a person convicted of felony murder where there is no finding of personal culpability.⁵ This procedural safeguard followed ten years of Court decisions which upheld the constitutionality of the death penalty⁶ but struck down statutes which did not fulfill the eighth amendment's goal of fundamental respect for humanity.⁷ During those ten

1. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The eighth amendment is made applicable to the states by the due process clause of the fourteenth amendment. *Furman v. Georgia*, 408 U.S. 238, 241 (1972); *Robinson v. California*, 370 U.S. 660, 667 (1962). The eighth amendment also proscribes the judicial imposition of cruel and unusual punishment. *Weems v. United States*, 217 U.S. 349, 378-82 (1910).

2. *Furman*, 408 U.S. at 258-68 (Brennan, J., concurring) (there was little evidence of the framers' intent); *Weems*, 217 U.S. at 368 (cruel and unusual clause received very little debate in Congress); *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1879) (it is difficult to define the cruel and unusual provision).

3. See *Furman*, 408 U.S. at 276 n.20. As of 1958, the Supreme Court had not given the cruel and unusual clause a precise meaning. *Trop v. Dulles*, 356 U.S. 86, 99 (1958). See also *Weems*, 217 U.S. at 368 ("What constitutes cruel and unusual punishment has not been exactly decided."). For a discussion of the Supreme Court's role in shaping the eighth amendment see generally Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1777 (1970) ("both precedent and established principle are somewhat meager . . . [the] cruel and unusual punishment doctrine is not well developed.").

4. See *infra* notes 17-19 and accompanying text.

5. *Enmund v. Florida*, 458 U.S. 782 (1982). See *infra* notes 79-94 and accompanying text.

6. *Gregg v. Georgia*, 428 U.S. 153 (1976) (upheld death penalty as constitutional). *Gregg's* companion cases provided a framework for assessing the constitutionality of a capital punishment statute. Both *Proffitt v. Florida*, 428 U.S. 242 (1976) and *Jurek v. Texas*, 428 U.S. 262 (1976) upheld the statutes because they provided guidelines to aid the jury in its decision of whether or not the convicted murderer and his crime warrant the death penalty. See *infra* notes 39-57 and accompanying text.

7. See, e.g., *Enmund*, 458 U.S. 782 (1982) (prohibits imposition of death penalty on a person convicted of felony murder in absence of finding personal culpability); *Lockett v. Ohio*, 438 U.S. 586 (1978) (prohibits capital punishment when there is no individualized consideration of mitigating factors); *Coker v. Georgia*, 433 U.S. 584 (1977) (death as punishment for rape of adult woman is unconstitutional); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (mandatory

years, the Supreme Court determined that the eighth amendment requires individualized consideration of the defendant and his offense as a constitutionally indispensable part of the sentencing process.⁸ Individualized sentencing requires the sentencer to consider aggravating and mitigating circumstances and, thereby, identify those defendants whose crimes and personal characteristics warrant a sentence of death.⁹

In 1986, the Court determined that individualized consideration of a defendant's personal culpability by the sentencer is not constitutionally mandated for a person convicted of felony murder.¹⁰ The Court in *Cabana v. Bullock* held that a determination that a felony murderer neither killed, attempted to kill, intended that a killing take place, nor intended that lethal force be used, is a sentencing limitation appropriate for a proportionality review.¹¹ The Court decided that a finding of personal culpability is not an aggravating or mitigating circumstance, and such a finding is not necessary to impose the death sentence.¹²

This Note examines the procedural safeguards created by the Supreme Court to protect a person convicted of murder from an unconstitutional sentence of death and argues that the constitutional safeguards which apply to deliberate murderers do not necessarily protect persons convicted of felony murder. Additionally, this Note compares the Court's decision in *Bullock* with past decisions to illustrate the erosion of procedural safeguards in capital cases. Finally, this Note suggests that states must take affirmative action to protect defendants from inequitable death sentencing procedures.

I. BACKGROUND

The death penalty has been used to punish serious offenders since the founding of this country.¹³ However, the procedures surrounding the sentencing and execution of offenders have evolved over the years¹⁴ as the

death sentences are unconstitutional); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (mandatory death sentences are unconstitutional); *Furman*, 408 U.S. 238 (capital punishment statute which left complete discretion with judge or jury is unconstitutional). *But see McGautha v. California*, 402 U.S. 183 (1971) (it was not unconstitutional to leave complete discretion with the jury).

8. See *infra* notes 42-63 and accompanying text.

9. *Id.*

10. *Cabana v. Bullock*, 106 S. Ct. 689 (1986).

11. *Id.* at 697.

12. *Id.*

13. Two Supreme Court decisions trace the history of the death penalty. See *Furman*, 408 U.S. at 242-52 (Douglas, J., concurring); *Id.* at 258-69 (Brennan, J., concurring); *Id.* at 316-40 (Marshall, J., concurring); *Id.* at 376-84 (Burger, C.J., dissenting); *Id.* at 401-10 (Blackmun, J., dissenting); *Id.* at 419-28 (Powell, J., dissenting); *McGautha*, 402 U.S. at 197-203.

14. *Furman*, 408 U.S. at 296-300 (Brennan, J., concurring) (procedures have changed over the years and punishment by death has been restricted). *McGautha* details the history of capital punishment under English law and American statutory developments. 402 U.S. at 197-203. See also *infra* note 42 (listing cases which have modified application of the death penalty).

Supreme Court uses the eighth and fourteenth amendments to modify state death penalty statutes.¹⁵ Although the Court acknowledges the unique character of death as a punishment,¹⁶ analytically it treats it as any other penalty. In its analysis, the Court considers the history of the penalty, legislative intent, international opinion, jury verdicts, and current social attitudes.¹⁷ These factors are important but not conclusive.¹⁸ In the final instance the Supreme Court alone decides whether or not the imposition of death is a constitutional punishment.¹⁹

15. See *infra* note 42.

16. *Furman*, 408 U.S. at 286-93 (Brennan, J., concurring) ("Death is a unique punishment in the United States This Court, too, almost always treats death cases as a class apart.") (footnote omitted); *Id.* at 306 (Stewart, J., concurring) ("death differs from all other forms of criminal punishment"); *Lockett*, 438 U.S. at 605 ("the imposition of death by public authority is so profoundly different from all other penalties"); *Woodson*, 428 U.S. at 305 ("death is qualitatively different from a sentence of imprisonment").

17. See, e.g., *Enmund*, 458 U.S. at 788-89 (before making its finding [the Supreme Court] looks to the "historical development of the punishment . . . , legislative judgments, international opinion, and the sentencing decisions juries have made"); *Coker*, 433 U.S. 584, 593 (1977) (Court looked to history and "the objective evidence of the country's present judgment concerning the acceptability of death"); *Gregg*, 428 U.S. at 175 (contemporary standards and legislative judgments are part of constitutionality test); *Woodson*, 428 U.S. 280, 288 (1976) (to apply the eighth amendment the Court considers contemporary standards and social values evidenced by history and usage of the punishment, legislative enactments, and jury determinations); *McGautha*, 402 U.S. at 198 (American society will not accept common law rule requiring mandatory death sentences for all convicted murders).

18. See Goldberg & Dershowitz, *supra* note 3, at 1780. Goldberg and Dershowitz found three objective indicators emphasized by Supreme Court decisions: "historic usage of particular punishments, statutory authorization in other jurisdictions, and general public opinion." *Id.* (footnotes omitted). They concluded:

Were these three criteria of the prevailing standards of decency the final test of constitutionality under the eighth amendment, the death penalty would probably survive constitutional scrutiny. If long usage of a penalty is determinative of its constitutionality, capital punishment would be permissible because it has been employed in America since the colonial years, although with decreasing frequency. Similarly, if the eighth amendment condemns only punishments which are on the statute books of almost no jurisdiction other than the one before the Court, the death penalty, of course, could not be declared unconstitutional And the American people are still divided on capital punishment. Fewer support the death penalty than in the early 1950's, but about half of the public . . . approve the penalty.

Id. at 1781 (footnotes omitted). However, the authors conclude that these three tests cannot be the final word, but are merely the threshold inquiry. They point out that on three occasions the Court has struck down penalties as unconstitutional which had deep historical roots. In addition the Court has struck down a penalty that was on the books of a number of states and that the public supported. *Id.* at 1782.

19. See *Enmund*, 458 U.S. at 797 ("it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty"); *Coker*, 433 U.S. at 197 ("in the end" the Supreme Court will decide whether the death penalty is acceptable by eighth amendment standards).

However, the Supreme Court has established that federal courts play a "limited role" in applying the eighth amendment. *Gregg*, 428 U.S. at 174 (citing *Furman*, 408 U.S. 238). The

The eighth amendment was adopted in 1791 as a response to pressure from various state representatives called upon to ratify the Federal Constitution.²⁰ Neither the framers of the amendment nor early Supreme Court decisions questioned the constitutionality of capital punishment.²¹ Instead they were concerned with the infliction of torture and "lingering" death.²² The eighth amendment, however, has come to mean more than a proscription of torture and barbarous acts.²³ Recent Supreme Court decisions describe the amendment as "flexible and dynamic"²⁴ and hold that it "draw[s] its meaning from the evolving standards of decency that mark the progress of

eighth amendment often involves a conflict between the legislature and the judiciary as to constitutional requirements. *Furman*, 408 U.S. at 313-14. Federalism concerns require the federal courts to defer to the state legislatures. *Id.* at 465-70. The federal courts have a responsibility to make sure that the Constitution is not violated, but its judges are not "legislators." *Gregg*, 428 U.S. at 175. Federal courts are to "presume" the validity of the punishments chosen by elected state legislators. *Id.*

20. *Gregg*, 428 U.S. at 169 n.17. For an interesting history of the meaning of "cruel and unusual," see generally Granucci, "Nor Cruel and Unusual Punishments Inflicted": *The Original Meaning*, 57 CALIF. L. REV. 839 (1969) (taken from English common law).

21. *Gregg*, 428 U.S. at 168-69. Until *Furman*, the Court did not confront directly the claim that death was per se unconstitutional and *Furman* did not resolve the issue. *Id.* See *infra* notes 30-36 and accompanying text.

22. See, e.g., *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (second electrocution attempt did not violate the eighth amendment because there was no intentional infliction of unnecessary pain); *O'Neil v. Vermont*, 144 U.S. 323, 339 (1892) (Field, J., dissenting) (barbaric punishments are condemned by history, i.e., tortures such as the rack, thumb-screw, iron boot, and stretching of limbs); *In re Kemmler*, 136 U.S. 436, 447 (1890) (cruel punishments involve torture or lingering death); *Wilkerson*, 99 U.S. at 136 (upheld shooting as a method of execution because, unlike torture, it did not inflict unnecessary cruelty and was a "traditional punishment").

23. *Gregg*, 428 U.S. at 171. The Supreme Court has held that the eighth amendment draws "its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. This means that the Court will apply eighth amendment principles even where the punishment is not barbarous. See, e.g., *Solem v. Helm*, 463 U.S. 277, 284 (1983) (eighth amendment proscribes "sentences that are disproportionate to the crime committed"); *Furman*, 408 U.S. at 256-57 ("discretionary statutes are unconstitutional"); *Robinson*, 370 U.S. at 667 (law which makes drug addiction a crime inflicts cruel and unusual punishment and violates the fourteenth amendment); *Trop*, 356 U.S. at 101 (denationalization is forbidden by the eighth amendment); *Weems*, 217 U.S. 349 (1910) (the meaning of cruel and unusual takes on new meaning as society becomes enlightened).

O'Neil, 144 U.S. 323 (1892) was the first time a defendant used the argument that a punishment was excessive at oral argument before the Supreme Court. The majority held against the defendant because he had not properly raised the argument in his briefs and because, at that time, the eighth amendment did not apply to the states. *Id.* However, Justice Field argued in dissent that 19,914 days in prison for the conviction of 307 separate offenses of selling intoxicating liquor was excessive in view of the crime and, therefore, unconstitutional. *Id.* at 339-41, 364-65.

24. *Gregg*, 428 U.S. at 171. "[A] principle to be vital, must be capable of wider application than the mischief which gave it birth [The Eighth Amendment] is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* (quoting *Weems*, 217 U.S. at 373, 378).

a maturing society.”²⁵ There are a number of principles that guide the Court in finding a punishment cruel and unusual. A punishment must not be degrading to human dignity,²⁶ inflicted in an arbitrary fashion,²⁷ unacceptable to society,²⁸ nor totally unnecessary.²⁹

In 1972, the Court began struggling with the constitutionality of the death penalty.³⁰ Generally, the debate over the death penalty has two issues. First, is the death penalty cruel and unusual per se?³¹ Second, if it is not cruel and unusual per se, is it cruel and unusual as applied?³²

25. *Trop*, 356 U.S. at 101. See also *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (“Central to the application of the [eighth] Amendment is a determination of contemporary standards regarding the infliction of punishment.”).

26. *Furman*, 408 U.S. at 281. Justice Brennan’s concurring opinion stated that he considered human dignity to be the primary principle which lays the foundation for other principles. *Id.* He explained that more than physical pain must be considered in whether a punishment’s extreme severity is degrading to human dignity. *Id.* at 272.

The *Gregg* majority stated that a penalty must be consistent with the dignity of man, the “basic concept underlying the eighth amendment.” 428 U.S. at 173 (quoting *Trop*, 356 U.S. at 100). The *Gregg* Court found that the “dignity of man” standard requires that the punishment not be excessive. *Id.* The Court broke the excessiveness inquiry into two parts; first, the punishment must not be unnecessary and wanton and, second, the punishment must not be grossly out of proportion to the severity of the crime. *Id.*

Earlier cases held that execution by shooting (*Wilkerson*, 99 U.S. 130 (1879)) or electrocution (*Kemmler*, 136 U.S. 436 (1890)) was not excessive. Even where the first attempt at electrocution was unsuccessful, a second attempt was not excessive. *Resweber*, 329 U.S. 459 (1947).

27. *Gregg*, 428 U.S. at 206. The Court in *Gregg* upheld the capital statute because it allowed for an appellate review to prevent “random or arbitrary imposition of the death penalty.” *Id.* Justice Brennan’s concurrence in *Furman* stated that the words “cruel and unusual” imply the condemnation of arbitrarily imposed punishments. 408 U.S. at 274.

28. *Furman*, 408 U.S. at 277, 281. The *Gregg* majority found that an assessment of current values was relevant to an eighth amendment inquiry. 428 U.S. at 173. But the *Gregg* Court noted that public opinion is not conclusive and that even though society may be willing to accept a certain punishment, the Court must decide whether it accords with the dignity of man. *Id.*

29. *Furman*, 408 U.S. at 281. Justice Brennan equated excessiveness with the needless infliction of suffering. *Id.* at 279.

30. *Furman*, 408 U.S. 238 (1972).

31. This question was resolved in the negative four years later in *Gregg*, 428 U.S. at 170. See *infra* notes 37-41 and accompanying text.

Only three punishments have been declared unconstitutional per se. In 1910 the Court found the Philippine punishment of *cadena temporal* (imprisonment for at least twelve years, in chains, at hard and painful labor, loss of many basic civil rights, and lifetime surveillance) to be unconstitutional because it lacked proportion to the crime of falsifying an official document. *Weems*, 217 U.S. 349 (1910). In 1958 the Court held that a defendant who escaped from a military jail and “deserted for less than a day” could not be divested of his citizenship. *Trop*, 356 U.S. 86 (1958). The Court held that the punishment, while not excessive, was forbidden by the eighth amendment guarantee of humane treatment. *Id.* It is interesting to note that the *Trop* Court, in dicta, reasoned that divestment was not excessive because wartime desertion was punishable by death. *Id.* at 100. The third time the Supreme Court found a punishment cruel and unusual was in 1962 when it struck down a state statute which made drug addiction

When the Supreme Court decided *Furman v. Georgia*, it was presented with an opportunity to decide whether or not capital punishment is cruel and unusual per se. However, it did not resolve this issue.³³ Instead, the Court struck down the Georgia capital punishment statute on the ground that it was unconstitutional as applied. The five to four decision found that the sentencing procedure gave too much unguided discretion to the jury.³⁴ The Court held that this discretion would result in arbitrary sentencing practices which would violate the eighth amendment.³⁵ Because *Furman* did not definitively decide the per se constitutionality issue, there was confusion among the states as to the status of the death penalty.³⁶

Four years later³⁷ the Court relied on two centuries of precedent³⁸ to hold that death is not cruel and unusual as defined by the eighth amendment.³⁹ The Court also determined that Georgia's revised statute was not cruel and unusual as applied because it required the jury to consider aggravating and mitigating circumstances⁴⁰ and provided for a proportionality review by the

a criminal offense. *Robinson*, 370 U.S. 660 (1962). The Court concluded that it was cruel and unusual to impose any punishment at all for the mere status of drug addiction. *Id.* at 667.

32. The *Furman* Court resolved the issue on this ground. 408 U.S. 238 (1972). *See infra* notes 33-36.

33. *See Gregg*, 428 U.S. at 169. Four Justices would have held the death penalty "not unconstitutional" in all cases; two would have reached the opposite conclusion; three left the question unanswered. *Id.* There were nine separate opinions in *Furman* with five opinions supporting the holding. As such, the opinions of Justices White and Stewart, concurring on the narrowest grounds, may be viewed as the position of the Court. *Id.* at 169 n.15.

34. 408 U.S. at 256-57 (Douglas, J., concurring) (discretionary statutes are unconstitutional "in their operation"); *Id.* at 295 (Brennan, J., concurring) (attacked procedures previously held unconstitutional stating that "this Court has held that juries may . . . impose a death sentence wholly unguided by standards governing that decision."); *Id.* at 310 (Stewart, J., concurring) ("the Eighth and Fourteenth Amendments cannot tolerate . . . [the death penalty] to be so wantonly and freakishly imposed."); *Id.* at 314 (White, J., concurring) ("[T]he legislative judgment . . . loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion . . . may refuse to impose the death penalty no matter what the circumstances of the crime.').

35. *Furman*, 408 U.S. at 256-57. Justice Douglas concurred and stated that the discretionary statute was unconstitutional in its operation and was "pregnant with discrimination." He explained that discrimination does not comport with equal protection under the laws and is banned by the cruel and unusual clause. *Id.* *See supra* notes 26-31 and accompanying text.

36. *See Lockett*, 438 U.S. at 599-600 (*Furman* "engendered confusion"). *See, e.g., Woodson*, 428 U.S. at 298 (post-*Furman* statutes reflected states' attempts to retain capital punishment within constitutional boundaries. Differences among statutes are attributable to "diverse readings of this Court's multi-opinioned decision in that case."); *Roberts*, 428 U.S. at 331 (Louisiana responded to *Furman* by removing all jury discretion and mandating death for certain crimes).

37. *Gregg*, 428 U.S. 153 (1976).

38. *Id.* at 177-78.

39. *Id.* at 187. The *Gregg* Court held that "the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it." *Id.*

40. *Id.* at 196-97, 207.

Georgia Supreme Court.⁴¹ In the four companion cases to *Gregg v. Georgia*,⁴² the Court explained what is constitutionally required of a capital punishment statute.⁴³ *Jurek v. Texas*⁴⁴ and *Proffitt v. Florida*⁴⁵ upheld as constitutional two capital statutes which required that the jury consider mitigating factors. The Florida statute required the trial judge to weigh eight aggravating circumstances against seven mitigating circumstances before sentencing the defendant to death.⁴⁶ The Texas statute did not make explicit reference to mitigating factors but it required the jury to consider three questions in the sentencing process.⁴⁷ The statute was upheld because the Texas Court of Criminal Appeals had broadly interpreted it as permitting the sentencer to consider any mitigating factors the defendant presented through the evaluation of the three questions.⁴⁸

On the other hand, the Court found statutes that mandated death for certain crimes, as in Louisiana⁴⁹ and North Carolina,⁵⁰ to be in violation of the eighth amendment because they lacked standards to guide the jury in its decision of which defendants will live and which will die.⁵¹ Louisiana and

41. *Id.* at 198, 207.

42. *Jurek*, 428 U.S. at 274-75 (capital statute upheld because it guided jury in selection of which defendants were capable of being put to death); *Proffitt*, 428 U.S. at 260 (capital statute upheld because its procedures assure death will not "be 'wantonly' or 'freakishly' imposed"); *Roberts*, 428 U.S. at 335-36 (mandatory death penalty struck down because it did not guide jury in selection of which defendants were capable of being put to death and did not provide any meaningful appellate review); *Woodson*, 428 U.S. at 302-04 (mandatory death sentence struck down because it gave the jury standardless sentencing power).

43. It should be noted that only Justices Stevens, Powell, and Stewart joined in all four of these plurality opinions. Justices Brennan and Marshall concurred in *Roberts* and *Woodson* which struck down the capital statutes, while Justices White, Blackmun, Rehnquist, and Chief Justice Burger dissented. In *Jurek* and *Proffitt*, each a seven to two decision to uphold the capital statutes, only Justices Brennan and Marshall dissented.

44. *Jurek*, 428 U.S. 262 (1976).

45. *Proffitt*, 428 U.S. 242 (1976).

46. *Id.* at 248 n.6.

47. *Jurek*, 428 U.S. at 269. The three considerations were:

- (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
- (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
- (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id. (quoting TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon Supp. 1975-1976)).

48. *Id.*

49. *Roberts*, 428 U.S. 325 (1976). Louisiana's statute replaced jury discretion with mandatory death sentences for all persons convicted of first degree murder, aggravated rape, aggravated kidnapping, or treason. *Id.* at 331.

50. *Woodson*, 428 U.S. 280 (1976). North Carolina's statute defined first degree murder as a deliberate murder or a murder committed or attempted during the commission of arson, rape, robbery, burglary, or other felony. *Id.* at 285 n.4. It required the death penalty for anyone found guilty of one of those crimes. *Id.*

51. *Id.* at 303.

North Carolina had revised their capital statutes in response to *Furman*.⁵² Because each state legislature interpreted *Furman* as prohibiting any discretion in the sentencing process, they required the sentencer to impose death if the defendant was found guilty of first degree murder, without any consideration of aggravating or mitigating factors.⁵³

Taken together, *Gregg* and its companion cases reveal that a slim majority of the Court⁵⁴ is concerned with the procedural aspects of a death sentence.⁵⁵ The *Woodson v. North Carolina* majority acknowledged that the Constitution does not require an individualized sentencing policy.⁵⁶ However, it concluded that the eighth amendment's goal of fundamental respect for humanity requires individualized consideration of the defendant and the offense "as a constitutionally indispensable part of the process" of imposing death as a punishment.⁵⁷

The Court reinforced this concern of fundamental respect for humanity in *Lockett v. Ohio*⁵⁸ and *Bell v. Ohio*⁵⁹ when it struck down a capital punishment statute which restricted the sentencer's consideration to three mitigating circumstances.⁶⁰ The Court considered this a violation of the

52. *Roberts*, 428 U.S. at 331; *Woodson*, 428 U.S. at 285-86.

53. *Roberts*, 428 U.S. at 331; *Woodson*, 428 U.S. at 285-86.

54. See *supra* note 43.

55. This concern is due to the perception that the death penalty is "qualitatively different" from imprisonment and, therefore, requires a "corresponding difference" in the need for reliability in the decision making process. *Woodson*, 428 U.S. at 304.

The dissenting Justices, Blackmun, White, Rehnquist, and Chief Justice Burger, do not believe that a consideration of aggravating and mitigating factors is ever needed once a defendant is properly found guilty. *Id.* at 321-24; *Roberts*, 428 U.S. at 354-58. See *supra* note 46.

56. *Woodson*, 428 U.S. at 304.

57. *Id.* The Court based this conclusion on the predicate that death is qualitatively different from imprisonment, and as a result, there is a corresponding difference in the need for reliability in the decision that death is the appropriate punishment. *Id.* But see *Woodson*, 428 U.S. at 322-23 (Rehnquist, J., dissenting). Justice Rehnquist's dissent stated that individualized sentencing is not constitutionally required. *Id.* He explained that once the defendant is found guilty of first degree murder the inquiry into the cruel and unusual clause should cease because the punishment of death has been found constitutional. *Id.* at 323-24. Justice Rehnquist would not bring "desirable procedural guarantees" into the due process clause of the fourteenth amendment. *Id.* at 324. He agreed with the plurality that death is not cruel and unusual for the crime committed by these defendants and would affirm the sentence because there was no indication that the trial procedure fell short of constitutional standards. *Id.*

58. 438 U.S. 586 (1978). In *Lockett*, a felony murder defendant's participation in a robbery during which someone was killed, was limited to driving the getaway car. *Id.* She was convicted of aggravated murder and sentenced to death. *Id.* The Court could have treated this case as it did *Enmund* and refused to sentence someone to death where there was no finding of personal culpability. However, it instead found the statute unconstitutional because it did not allow the jury to consider all mitigating circumstances. *Id.* See *infra* notes 79-86 and accompanying text.

59. 438 U.S. 637 (1978). Bell was convicted of aggravated murder because a murder was committed during the course of a kidnapping perpetrated by Bell and a co-defendant. *Id.*

60. The Ohio capital statute required the trial judge to impose the death sentence if the jury returned a verdict of aggravated murder without specifications, unless he found one of three mitigating factors. 438 U.S. at 593. The three mitigating factors were: did the victim

eightth amendment because it did not provide for broad individualized consideration.⁶¹ The majority acknowledged that the Constitution does not require an individualized sentence but concluded that, since public policy created acceptance of individualized sentencing in noncapital cases, individualized consideration is "essential in capital cases."⁶² The Court distinguished the statutes in *Jurek* and *Proffitt* as containing nonexclusive lists of mitigating factors, while the Ohio statute presented an exclusive list of factors.⁶³

In 1977 the Court considered the constitutionality of a Georgia statute which allowed a state court to sentence a defendant to death for the crime of aggravated rape.⁶⁴ The *Coker v. Georgia* Court held that death was completely disproportionate to the crime of rape because the victim was not deprived of life.⁶⁵ In reaching this decision, the Court examined public opinion, as expressed through the state legislature, and concluded that the general populace did not approve of death as a penalty for rape.⁶⁶ The Court also found that the vast majority of juries were not willing to sentence someone convicted of rape to death.⁶⁷

Until 1982 the Court did not consider specifically the constitutionality of a death sentence imposed on a person convicted of felony murder under the theory of accomplice liability.⁶⁸ Because the purpose of the felony murder

induce or facilitate the offense; was the defendant coerced or under duress or strong provocation; or was the offense the result of the defendant's psychosis or mental deficiency. *Id.*

61. 438 U.S. at 604 ("[W]e conclude that the eighth and fourteenth amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense . . .") (emphasis in original).

62. *Lockett*, 438 U.S. at 594-605. ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.").

63. *Id.* at 606-07.

64. *Coker*, 433 U.S. 584 (1977).

65. *Id.* at 598.

66. 433 U.S. at 594. After the states redrafted their statutes to conform with *Furman*, "none of the States that had not previously authorized death for rape chose to include rape among capital felonies." *Id.* There were sixteen states that had included rape as a capital felony before *Furman*, but only three states (Georgia, North Carolina, and Louisiana) included the rape of an adult woman in their revised statutes. *Id.* In North Carolina and Louisiana the death penalty was mandatory and the statutes were invalidated by *Woodson*, 428 U.S. 280 (1976) and *Roberts*, 428 U.S. 325 (1976). When Louisiana and North Carolina revised their capital statutes for the second time, they did not include rape. *Coker*, 433 U.S. at 594. When the *Coker* case was before the Supreme Court, Georgia was the only state authorizing the death penalty for the rape of an adult woman. *Id.* at 595. Mississippi and Florida included rape as a capital crime where the victim was a child. *Id.* at 595-96.

67. *Coker*, 433 U.S. at 596-97 (in nine out of ten cases the jury has not imposed the death sentence on a defendant convicted of rape).

68. The crime of felony murder does not include intent to kill or cause great bodily harm as an element as do other crimes of murder. See M. CHERIF BASSIOUNI, *SUBSTANTIVE CRIMINAL LAW* 247 (1978). When a person commits a violent felony, the intent to commit the felony supplies the intent for any resulting murder. *Id.* The law operates to impute malice or intent to the felon. *Id.* The intent from one felon is imputed to all of his co-defendants. *Cabana v. Bullock*, 106 S. Ct. 689, 695 (1986).

doctrine is to impute intent from one defendant to his co-defendant, it presents the possibility that a defendant will be sentenced to death on the basis of his co-defendant's intent.⁶⁹ In *Lockett*⁷⁰ the Court dealt with a felony murder defendant whose level of participation in the robbery was limited to planning the robbery and waiting in the getaway car.⁷¹ The Court decided *Lockett* without considering the issue of imputed culpability.⁷² Rather, the Supreme Court concluded that the Ohio statute, which limited the consideration of mitigating factors to three, did not provide the required eighth amendment safeguard of an individualized sentencing procedure.⁷³ Several Justices, however, did discuss a finding of culpability as a prerequisite for a death sentence.⁷⁴ For example, although Justice White dissented, consistent with his belief that mandatory death sentences do not violate the eighth amendment, he concurred in the judgment to invalidate the statute and argued that the imposition of the death penalty where there is no finding that "the defendant possessed a purpose to cause the death of a victim" violates the eighth amendment.⁷⁵ The Court later explained⁷⁶ that the *Lockett* decision "envisioned" that the sentencer, who heard the testimony and saw the witnesses, would consider the mitigating factors.⁷⁷ Furthermore, the Court decided that the sentencer is "responsible for weighing the specific aggravating and mitigating circumstances" necessary to make a life-or-death decision.⁷⁸

69. *Bullock*, 106 S. Ct. at 696 ("[T]he jury may well have sentenced Bullock to death despite concluding that he had neither killed nor intended to kill . . .").

70. 438 U.S. 586 (1978).

71. *Id.*

72. See *supra* notes 58-63 and accompanying text.

73. 438 U.S. at 608.

74. Chief Justice Burger's majority opinion stated:

The absence of direct proof that the defendant intended to cause the death of the victim is relevant for mitigating purposes only if it is determined that it sheds some light on one of [Ohio's] . . . three statutory mitigating factors. Similarly, consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such to affect the sentencing decision.

The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

438 U.S. at 608.

Chief Justice Burger considered the felony murder defendant's intent to be a mitigating factor in the same way a defendant's age is a mitigating factor. Therefore, flexible, broad mitigating factors must be included in the death penalty statute to meet constitutional standards.

75. 438 U.S. at 623-24.

76. *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985).

77. *Id.*

78. *Spaziano v. Florida*, 468 U.S. 447, 462 (1984). In *Spaziano*, the Court held that a state may give the sentencing decision to the trial judge rather than to the jury. The Court acknowledged that the majority of the states (thirty out of the thirty-seven states that allowed the death penalty) give the life-death decision to the jury, but found that the trial judge could be given that decision as well. *Id.*

The Supreme Court first considered the sentencing problem created by inferred intent in *Enmund v. Florida*.⁷⁹ Justice White's majority opinion held that the eighth amendment does not permit the "imposition" of the death penalty on a defendant who aids and abets in a felony which results in a murder, unless the defendant himself kills, attempts to kill, intends that a killing take place, or intends that lethal force be used.⁸⁰ The majority concluded that, although death is an appropriate punishment for some felony murderers, intent merely imputed from a co-defendant is not a sufficient basis for imposing the death penalty.⁸¹ The Court refused to uphold *Enmund's* death sentence because there was no proof that he killed, attempted to kill, intended that a life be taken, or intended that lethal force be used.⁸²

In *Enmund*, as in *Coker*,⁸³ the Court's holding was based on a proportionality argument. The Court reasoned that without some "intent" to deprive the victim of life, the sentence of death was disproportionate to the defendant's intent to commit the related felony.⁸⁴ Referring to its decision in *Lockett*,⁸⁵ the Court concluded that the individualized sentence, required by the eighth amendment, was missing where there was no finding on the defendant's culpability.⁸⁶

Enmund did not explicitly state who was to make this determination or at what point in the process it was to be made.⁸⁷ As a result, different

79. 458 U.S. 782 (1982).

80. *Id.* at 797. The majority concluded that, while inferred intent is sufficient to find a defendant guilty of murder, it is not sufficient for a sentence of death. *Id.* at 798. The Court stated that the focus must be on the defendant's culpability, not on that of his co-defendant. *Id.* at 798, 801. The majority found that most legislatures refuse to impose a death sentence where there is no personal responsibility and noted that it has no reason to disagree with the states' judgment. *Id.* at 801. Pointing to robbery statistics, the Court noted that only one half of one percent of all robberies end in homicide and that the death penalty is seldom imposed on "one only vicariously guilty of the murder." *Id.* at 800.

The Court decided that *Enmund* did not kill or intend to kill and that, because his culpability was different from the robbers who killed, the state could not treat him in the same manner. *Id.* at 798. The Court further found that the eighth amendment prohibits attributing to *Enmund* the intent of his co-defendants. *Id.* at 801.

81. 458 U.S. at 798.

82. *Id.* at 797. On remand the Florida Supreme Court vacated *Enmund's* death sentence in accordance with the United States Supreme Court decision. *Enmund v. State*, 439 So. 2d 1383 (Fla. 1983). The Florida Supreme Court remanded the case to the trial court with directions to impose two life sentences without eligibility of parole for twenty-five years. *Id.* The only discretion given the trial court was whether the sentences should run consecutively or concurrently. *Id.* See *infra* notes 194-99 and accompanying text.

83. 433 U.S. 584 (1977). See *supra* notes 64-67 and accompanying text.

84. 458 U.S. at 797. The Court concluded that death is an excessive penalty for a robber who does not take a human life. *Id.* The Supreme Court found that the record in *Enmund* did not warrant a finding that he had any intention of "participating in or facilitating a murder." *Id.* at 798.

85. 438 U.S. 586 (1978). See *supra* notes 58-63 and accompanying text.

86. 458 U.S. at 798.

87. The wording of the *Enmund* opinion leads to the conclusion that the sentencer is to

interpretations of the decision by lower courts led to different conclusions. The Eleventh Circuit held, in *Ross v. Kemp*,⁸⁸ that *Enmund* did not require that the jury make the culpability findings.⁸⁹ The *Ross* court examined the record and found that the defendant had the requisite intent to be sentenced to death.⁹⁰ It determined that the eighth amendment requires no more than a federal habeas corpus court's independent review of the record to insure that the defendant's participation in the crime warrants the punishment of death.⁹¹

Other courts construed *Enmund* as requiring that the trier of fact determine a defendant's level of culpability.⁹² The Court settled this debate in favor of the Eleventh Circuit in *Cabana v. Bullock*.⁹³ The Court held that any court capable of reviewing a criminal sentence may determine whether the defendant had the level of intent required by *Enmund*.⁹⁴

II. THE BULLOCK CASE

In the early morning hours of September 22, 1978, Crawford Bullock and his friend, Ricky Tucker, accepted a ride home from a bar with Mark Dickson.⁹⁵ During the trip, Dickson and Tucker argued about some money that Dickson allegedly owed to Tucker.⁹⁶ The argument escalated into a fight and Dickson stopped the car and began exchanging blows with Tucker.⁹⁷ Bullock attempted to grab Dickson, but Dickson quickly fled from the car

determine whether or not the defendant possessed the required culpability to warrant a punishment of death. For example, the opinion states, "For purposes of imposing the death penalty, . . . culpability must be limited to his participation . . . and his punishment must be tailored to his personal responsibility and moral guilt." 458 U.S. at 801. The opinion further states that "it is for us [the Supreme Court] ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as *Enmund* . . ." *Id.* at 797 (emphasis added).

This conclusion is supported by the Court's earlier decisions in *Lockett* and *Caldwell*. In *Enmund* the Court quoted from *Lockett* to explain that the "focus must be on his culpability, . . . for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" *Enmund*, 458 U.S. at 798 (quoting *Lockett*, 438 U.S. at 605). The opinion in *Caldwell*, stated that the individualized consideration required by *Lockett* should be made by the sentencers "who were present to hear the evidence and arguments and see the witnesses." 472 U.S. at 327.

88. 756 F.2d 1483 (1985).

89. *Id.* at 1486.

90. *Id.* at 1489.

91. *Id.* The *Bullock* Court agreed with this interpretation but stated that state courts should consider the culpability question first. *Bullock*, 106 S. Ct. at 695 n.1.

92. *Bullock v. Lucas*, 743 F.2d 244 (5th Cir. 1984); *Hyman v. Aiken*, 777 F.2d 938 (4th Cir. 1985) (vacated in light of *Bullock*).

93. 106 S. Ct. 689 (1986).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

with Tucker giving chase.⁹⁸ Bullock, wearing a leg cast, followed more slowly.⁹⁹

When Bullock caught up, the men were struggling and Bullock held Dickson's head as Tucker struck Dickson's face with a whiskey bottle.¹⁰⁰ Tucker then beat Dickson with his fists until Dickson fell helplessly to the ground.¹⁰¹ Tucker then killed Dickson by repeatedly smashing his head with a concrete block.¹⁰² Bullock and Tucker disposed of the body and Bullock kept Dickson's car.¹⁰³ The next day, Bullock was arrested when the police spotted him in the car.¹⁰⁴ He confessed during interrogation at the police station.¹⁰⁵

After a bifurcated trial,¹⁰⁶ Bullock was convicted of murder under a Mississippi statute which defined felony murder as a capital offense.¹⁰⁷ After the guilt phase, the court instructed the jury on the doctrine of accomplice liability. This instruction permitted the jury to find Bullock guilty of capital murder if it found that he participated in the robbery of Dickson and did any affirmative act in connection with the robbery regardless of whether or not he had any desire to cause the death of Dickson.¹⁰⁸ The jury found Bullock guilty of capital murder.¹⁰⁹ In sentencing him, the jury found two aggravating circumstances, no mitigating circumstances, and sentenced Bullock to death.¹¹⁰

Bullock presented the Mississippi Supreme Court with two major arguments.¹¹¹ First, the evidence was insufficient as a matter of law to convict him of capital murder and, therefore, the jury should not have been allowed

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. In a bifurcated trial the jury first determines whether the defendant is guilty. Then a sentencing hearing is conducted after which the same jury, a different jury, or the trial judge determines what sentence the defendant should receive. The purpose of the sentencing hearing is to determine "the appropriate choice of applicable punishment. Since this type of hearing does not bear on the issue of guilt and innocence which has already been determined, the rules of evidence are relaxed and all evidence bearing on the mitigation and aggravation of the crime and the offender is admissible." M. CHERIF BASSIOUNI, *SUBSTANTIVE CRIMINAL LAW* 130 (1978).

107. 106 S. Ct. at 693-94. The Mississippi statute provided that a capital murder is the killing of a human being without authority of law by any means or in any manner. It also defined capital murder as a killing which occurred during the commission of a violent felony with or without any intent to cause death. MISS. CODE ANN. § 97-3-19(2)(e) (Supp. 1985).

108. 106 S. Ct. at 694.

109. *Id.*

110. *Id.* Bullock's co-defendant Tucker was tried in a separate proceeding. He was found guilty and sentenced to life in prison. *Bullock v. Lucas*, 743 F.2d 244, 246 (5th Cir. 1984).

111. *Id.* *Bullock v. State*, 391 So. 2d 601 (Miss. 1980), *cert. denied*, 452 U.S. 931 (1981) (defendant alleged twenty-eight errors in trial court proceedings).

to consider the death penalty.¹¹² Second, the imposition of the death penalty would be disproportionate to his level of involvement in the crime and, therefore, a violation of the eighth amendment.¹¹³ Both of these arguments were rejected. The Mississippi Supreme Court found the evidence that Bullock aided and assisted Tucker in the robbery, assault, and slaying of Dickson "overwhelming" and, therefore, concluded that the punishment was not disproportionate to his guilt.¹¹⁴

Bullock exhausted his state postconviction remedies and was denied federal habeas corpus relief at the district court level.¹¹⁵ The Court of Appeals for the Fifth Circuit reversed the district court and held that Bullock's death sentence was invalid under the Supreme Court's intervening decision in *Enmund*.¹¹⁶ The Fifth Circuit rested its decision upon the jury instructions given at both the guilt and sentencing phases of Bullock's trial. It reasoned that the jury could have convicted and sentenced Bullock without a finding of intent.¹¹⁷ The court interpreted *Enmund* as prohibiting the execution of Bullock unless such findings were made by the trier of fact.¹¹⁸ It granted the writ, vacated his sentence, and instructed the state to either give Bullock a life sentence or to conduct a new sentencing hearing.¹¹⁹ It then instructed that, if the proper findings were made during the sentencing hearing, the state court could reimpose the death sentence.¹²⁰

The Supreme Court granted certiorari because of a conflict between the Fifth Circuit's opinion in *Bullock* and the Eleventh Circuit's holding in *Ross v. Kemp*.¹²¹ The *Bullock* majority concluded that the *Enmund* findings are part of the sentencing process and not the guilt process and, therefore, are not required to be made by the trier of fact.¹²² The Court acknowledged that the jury was never instructed to find any intent on the part of Bullock.¹²³ However, it concluded that *Enmund* did not impose any specific procedures

112. 391 So. 2d at 604, 606.

113. *Id.*

114. *Id.* at 614.

115. *Cabana v. Bullock*, 106 S. Ct. 689, 694 (1986).

116. *Bullock v. Lucas*, 743 F.2d 244 (5th Cir. 1984).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Ross v. Kemp*, 756 F.2d 1483 (1985). The eighth amendment does not require that the state prove the *Enmund* findings to the jury beyond a reasonable doubt at the guilt or sentencing phase before death lawfully can be imposed. *Id.* at 1488. All that is required is that a reviewing court determine from the record whether or not the eighth amendment has been satisfied. *Id.*

122. 106 S. Ct. at 696-97 (the ruling in *Enmund* does not concern guilt or innocence; "it establishes no new elements of the crime of murder that must be found by the jury"). See also *Spaziano v. Florida*, 468 U.S. 447 (1984) (whether the death penalty is appropriate is not a decision which a jury is required to make).

123. 106 S. Ct. at 696 ("the jury may well have sentenced Bullock to death despite concluding that he had neither killed nor intended to kill; or it may have reached its decision without ever coming to any conclusion whatever on those questions.').

upon the states and that the eighth amendment is satisfied so long as "any court that has the power to find the facts and vacate the sentence" determines the "requisite culpability."¹²⁴

The majority found that the Fifth Circuit erred in limiting its review to the jury instructions and findings.¹²⁵ Instead, the Court explained, a federal habeas corpus court should consider the record as a whole and determine whether or not the culpability finding was made at any point in the process.¹²⁶ The *Bullock* Court noted that, if the findings have been made, the federal habeas corpus court must presume them to be correct.¹²⁷ Unless the petitioner can overcome this presumption, the habeas corpus court must hold that the eighth amendment is not violated.¹²⁸ The Court determined that a federal habeas corpus court could itself make the *Enmund* findings, however, it stated that it is sounder policy to leave the factual findings to the state's judicial system.¹²⁹ Applying this analysis to *Bullock*, the Court held that the district court should issue the writ of habeas corpus vacating Bullock's death sentence but leave Mississippi free to determine in its own courts whether or not Bullock possessed the requisite culpability. If the Mississippi courts determined that Bullock was culpable, then it could reimpose the death sentence.¹³⁰

The dissent, written by Justice Blackmun and joined by Justices Brennan and Marshall, argued that the *Enmund* findings should be made at the trial court level prior to sentencing.¹³¹ They cited *Caldwell v. Mississippi*,¹³² to point out that there are limits on an appellate court's ability to determine whether a defendant should be sentenced to death.¹³³ The dissent interpreted *Enmund* as "establishing a constitutionally required factual predicate for the valid imposition of the death penalty."¹³⁴ The dissent argued that the culpability determination should be made prior to any sentence of death.¹³⁵ It

124. *Id.* at 697. The majority opinion gives special deference to the states. It quoted *Spaziano*, 468 U.S. at 464, stating that the Supreme Court is "unwilling to say that there is any one right way for a State to set up its capital sentencing scheme." *Id.* However, Justice Blackmun dissented and stressed that to say there is no "one right way to set up its capital-sentencing scheme . . . does not mean that there are no wrong ways." *Id.* at 705.

125. 106 S. Ct. at 696.

126. *Id.* at 697-98.

127. *Id.* Trial court findings are presumed correct under 28 U.S.C. § 2254(d) (1982). *Id.* See also *Sumner v. Mata*, 449 U.S. 539, 545-47 (1981) (presumption of correctness applies to facts found by appellate courts as well as trial courts).

128. 106 S. Ct. at 698.

129. *Id.* at 699.

130. *Id.* at 700.

131. *Id.* at 701.

132. 472 U.S. 320, 327 (1985) (Court "envisioned" that a defendant has a constitutional right to have sentencer, who was present to hear and see the witnesses, consider mitigating circumstances).

133. 106 S. Ct. at 701.

134. *Id.* at 702.

135. *Id.* at 701.

found that the majority position collapsed the fact finding and review processes into one proceeding and abandoned a critical protection provided by capital sentencing systems.¹³⁶

III. ANALYSIS

The *Bullock* opinion¹³⁷ held that any court with power to hear facts and vacate a sentence can cure an eighth amendment violation caused by sen-

136. *Id.* at 706.

137. Justice White's earlier opinions laid the foundation for the decision in *Bullock*. He filed a concurring opinion in the *Furman* per curiam decision and stated that the constitutionality of the death penalty was not at issue. 408 U.S. at 312. Rather, he believed the issue was the manner in which death as a punishment was imposed. In *Furman*, Justice White concluded that the death sentence could be imposed so infrequently that it would "cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system." *Id.*

In *Gregg*, Justice White concurred and upheld death as a punishment asserting that the death penalty is not cruel and unusual in all circumstances. 428 U.S. at 226. He noted that Georgia's statute required jury consideration of aggravating circumstances and also required the Georgia Supreme Court to review the decision to insure that the sentence was not imposed in a discriminatory, standardless, or rare fashion. Thus, he found the statute valid under *Furman*. *Id.* at 221-23.

In each of the four *Gregg* companion cases, Justice White wrote separately to explain why each capital statute should survive a *Furman* analysis and, therefore, be upheld. He concluded that mandatory death sentences are not unconstitutional per se. According to his procedural analysis, so long as a state takes steps to prevent the infrequent and arbitrary imposition of the death penalty, it meets eighth amendment standards. In *Roberts* and *Woodson*, he dissented and would have upheld the death penalty statutes because he believes that it is not the role of the judiciary to strike down state statutes which conform with the constitution. He further believes that mandatory death sentences for certain crimes are not unconstitutional. See *Roberts v. Louisiana*, 428 U.S. at 261-62 (White, J., dissenting) and *Woodson v. North Carolina*, 428 U.S. at 306-07 (White, J., dissenting). In *Proffitt* and *Jurek*, Justice White concurred in upholding the capital statutes because they provided for consideration of aggravating and mitigating factors which serve to insure that death is not imposed "freakishly or rarely but will be imposed with regularity." *Proffitt v. Florida*, 428 U.S. at 260-61 (White, J., concurring); *Jurek v. Texas*, 428 U.S. at 279 (White, J., concurring). In addition, he observed that since the Texas statute had been enacted, thirty-three persons were sentenced to die which showed that the penalty would not be "imposed so seldom and arbitrarily as to serve no useful penological function . . ." *Jurek*, 428 U.S. at 279 (White, J., concurring).

However, in *Coker v. Georgia*, Justice White wrote the majority opinion and held that death as a punishment for the crime of rape of an adult woman is cruel and unusual because it is grossly disproportionate to the crime. 433 U.S. at 592. Justice White noted that in Georgia, even the crime of deliberate murder was not punished by death unless there was proof of aggravating circumstances. He reasoned that a rapist should not be punished more severely than a deliberate murderer as long as the victim is not killed. *Id.* at 600.

In *Lockett v. Ohio*, Justice White dissented from the majority position that capital cases require individualized sentences. 438 U.S. at 621-22. However, he concurred in the decision to reverse the death penalty for a reason not addressed by the plurality. Justice White stated that the eighth amendment required a finding that the defendant intended to cause the death of the victim. *Id.* at 624. He explained, "It is clear from recent history that the infliction of death under circumstances where there is no purpose to take life has been widely rejected as grossly

tencing a defendant to death without a finding of culpability.¹³⁸ In essence, the Court stated that a state may violate the eighth amendment by sentencing a convicted person to death so long as the violation is remedied before the person is actually put to death.¹³⁹ The majority reached this unsettling result by viewing the culpability determination as a "categorical rule" which is a "substantive limitation" on sentencing procedures.¹⁴⁰ Justice White, writing for the majority, explained that this limitation, like other sentencing limits, does not need to be enforced by a jury but can be enforced by any court capable of reviewing a criminal sentence.¹⁴¹

The Court acknowledged that the jury may have sentenced Bullock to death despite finding that he never killed nor intended a killing take place.¹⁴² In fact, Bullock's sentencing could have taken place without the jury ever considering his personal culpability.¹⁴³ However, the Supreme Court held that a review of the jury instructions is just the first step in the *Enmund* inquiry.¹⁴⁴ The majority's holding concluded that a felony murder defendant's level of personal intent need not be considered as a statutory aggravating or mitigating circumstance.¹⁴⁵ The Court instead regarded the level of culpability

out of proportion to the seriousness of the crime." *Id.* at 625.

Justice White's reasoning in *Lockett* made him the logical choice to author the majority opinion in *Enmund v. Florida*, 458 U.S. 782 (1982). *Enmund* was convicted of felony murder and sentenced to death under a Florida statute which did not require a finding of culpability. In striking down the death sentence, Justice White continued the line of reasoning he began in *Lockett*. He explained that "[f]or purposes of imposing the death penalty, *Enmund's* criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt." *Id.* at 801.

When *Cabana v. Bullock* raised the issue of who was to make the culpability determination, Justice White again was chosen to write for the majority. 106 S. Ct. 689 (1986). In *Bullock* he held that the trier of fact need not find the *Enmund* intent. Rather, he decided an appellate or collateral court is capable of determining whether or not the record supports a finding of intent. *Id.*

138. 106 S. Ct. at 697. "The Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence." *Id.*

139. *Id.* "[A]t what precise point in its criminal process a State chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution." *Id.* See also Justice Blackmun's dissent which describes the majority position as allowing the states to tell a defendant he may die without first considering his personal culpability. *Id.* at 703.

140. 106 S. Ct. at 697.

141. *Id.*

142. *Id.* at 696. See *supra* note 123 and accompanying text.

143. 106 S. Ct. at 696. The jury instructions were confusing and would have allowed the jury to convict Bullock of capital murder on the basis of his participation in a robbery during which another person killed the victim. *Id.* at 695. In addition, the jury was not instructed that a finding of culpability was a prerequisite to sentencing Bullock to death. *Id.* This is why the Fifth Circuit remanded the case to the state court. *Bullock v. Lucas*, 743 F.2d 244 (5th Cir. 1984). The Court told the state to conduct another sentencing hearing or to sentence Bullock to life in prison. *Id.*

144. 106 S. Ct. at 696.

145. *Id.* at 697. However, a defendant's intent, when not an element of the substantive crime, should be part of the sentencing consideration of aggravating factors. In *Lockett*, the

to be a limitation on the sentencing process which can be made on direct appeal or collateral review.¹⁴⁶

The *Bullock* Court held that a federal habeas corpus court must review the record as a whole to determine whether at any point in the proceeding the *Enmund* findings were made.¹⁴⁷ If the findings were made, the federal habeas corpus court must presume that they are correct.¹⁴⁸ The eighth amendment is not violated unless the petitioner can overcome the heavy burden of this presumption.¹⁴⁹

The *Bullock* Court based its analysis on three premises: *Enmund* did not impose a form of procedure on the states; *Enmund* did not add to a state's definition of any substantive offense; and *Enmund* is merely a substantive limitation on the sentencing procedure and, therefore, amenable to the usual proportionality review.¹⁵⁰

In claiming that *Enmund* does not impose a procedure on the states, the Court recognized that a state is free to set up its criminal justice system with minimal interference from the federal government or courts.¹⁵¹ However, the Court's assumption that a new procedure would be necessary, overlooks the fact that these procedures are already in place. The Court's past decisions have held that the eighth and fourteenth amendments require individualized sentencing procedures in capital cases.¹⁵² Individualized sentencing requires

Court stated that although states may "make aiders and abettors equally responsible, as a matter of law, with principals, . . . the definition of crimes generally has not been thought automatically to dictate what should be the proper penalty." 438 U.S. at 602. The Court further said that where there is sentencing discretion, the sentencer should have all the information "concerning the defendant's life and characteristics" because it is "highly relevant—if not essential" to the imposition of a punishment. 438 U.S. at 602-03 (citations omitted). The *Lockett* Court cited *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959), to emphasize that a sentencer is "authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime."

146. 106 S. Ct. at 697.

147. *Id.*

148. 28 U.S.C. § 2254(d) (1982). *See also* *Sumner v. Mata*, 449 U.S. 539 (1981) (appellate court findings presumed correct).

149. 106 S. Ct. at 698.

150. *Id.* at 705 (Blackmun, J., dissenting). The dissent finds that none of these propositions justify the holding. *Id.*

151. *See Lockett*, 438 U.S. at 602-03. "That States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge." *Id.*

152. *See, e.g., Lockett*, 438 U.S. at 604-05. The *Lockett* Court held that though individualized sentencing is not constitutionally required in noncapital cases, it has long been accepted in this country; because executed capital sentences cannot be corrected, individualized sentencing is essential; the eighth and fourteenth amendments require that all mitigating factors offered by the capital defendant be considered. *Id.*

The Supreme Court has imposed procedural guidelines on the states' capital statutes. The Court has held that state sentencing procedures must allow the sentencer to consider aggravating and mitigating circumstances. *See supra* note 145. In *Woodson* the Court held that the North Carolina's mandatory death sentencing procedure was inadequate because it did not provide an

the jury to consider aggravating and mitigating factors before passing sentence.¹⁵³ *Enmund* findings should be one of the aggravating circumstances written into the states' statutes. The *Bullock* holding, however, concludes that *Enmund* findings are not part of this individualized sentencing procedure. This treats felony murderers differently from deliberate murderers and creates an arbitrary distinction between classes of defendants which should not be allowed.¹⁵⁴

Intent is an element of the crime of deliberate murder.¹⁵⁵ Therefore, a person convicted of deliberate murder will never be sentenced to death without a finding of personal responsibility. Intent is not an element of the crime of felony murder¹⁵⁶ and there is no reason to make it an element. However, unless the *Enmund* finding is considered by the sentencer, the felony murderer is subject to a death sentence without any finding of personal responsibility for the killing. Then the findings supporting the imposed death sentence will be presumed correct by the appellate court and the felony murderer will have a heavy burden in overcoming this presumption.¹⁵⁷ The result is that the appellate court will make culpability findings on a paper record without ever having seen the witnesses or heard the testimony.¹⁵⁸ Moreover, the appellate court's determination will be presumed correct by the collateral court.¹⁵⁹ If *Enmund* findings were not made at the state trial court or appellate court levels, the federal habeas corpus court is invited to make the findings. This sequence of events treats felony murderers differently from deliberate murderers. It allows an eighth amendment violation to be made in the sentencing of a felony murderer that would not be tolerated in the sentencing of a deliberate murderer.

Woodson, *Roberts*, and *Lockett* held that mandatory death penalties are unconstitutional in their application and that the sentencer must be allowed to consider mitigating as well as aggravating factors.¹⁶⁰ A finding that *Bullock* did not intend that a killing take place is certainly a factor which, if found, would mitigate against the imposition of the death penalty. More impor-

adequate means of identifying those defendants capable of being put to death. 428 U.S. at 290. In *Roberts* the Court found that Louisiana's mandatory capital statute did not comport with *Furman's* directive that "standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences." 428 U.S. at 334.

153. See *supra* note 152.

154. The crime of deliberate murder has intent as one of its elements. Therefore, a person convicted of deliberate murder will be sentenced to death only after a finding has been made that he had some level of intent in the commission of the crime. The crime of felony murder does not have personal intent as an element of the crime. See *supra* notes 68-82 and accompanying text. Unless the *Enmund* findings are made a statutorily aggravating circumstance, the felony murderer will be sentenced to death without any finding of personal culpability.

155. See *supra* notes 68-82 and accompanying text.

156. *Id.*

157. See *supra* notes 127-29 and accompanying text.

158. See *infra* notes 175-82 and accompanying text.

159. See *Sumner v. Mata*, 449 U.S. 539 (1981).

160. See *supra* notes 42-53 and accompanying text.

tantly, a finding that Bullock did intend that a killing take place or that lethal force be used would be an appropriate circumstance in aggravation which would place him into the category of person who could be executed.

When a deliberate murderer is sentenced to death, the sentencer must consider *all* relevant aggravating and mitigating factors. A defendant convicted of felony murder should be afforded the same sentencing protection before being told that he must die. If a felony murderer cannot be executed without a determination of personal responsibility¹⁶¹ and statutory aggravating circumstances are a way of determining who can be sentenced to die,¹⁶² it follows that *Enmund* findings are an aggravating circumstance which narrows the class of offenders who can be executed.¹⁶³ As the Court explained in *Zant v. Stephens*, “[w]hat is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.”¹⁶⁴ Indeed, the sentencer should exercise additional care in sentencing a person to die when he is found guilty on an accomplice liability theory.¹⁶⁵ The Supreme Court has concluded that inferred intent, while sufficient for the substantive crime of felony murder, is not sufficient for the imposition of the death sentence.¹⁶⁶

The Court’s second premise, that *Enmund* does not add any new element to the substantive offense, is not disputed.¹⁶⁷ However, the majority assumes that requiring the sentencer to make a culpability determination will effect the guilt phase of the trial. This is not true. The required intent finding is simply one of aggravation and has nothing to do with the jury’s verdict on guilt. The substantive offense of felony murder will continue to be based on inferred intent regardless of whether the defendant’s lack of culpability

161. *Enmund*, 458 U.S. 782 (1982).

162. *Zant v. Stephens*, 462 U.S. 862 (1983). To avoid arbitrary and capricious sentencing “an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Id.* at 877 (footnotes omitted).

163. *Id.* at 878. The *Zant* Court concluded that past cases found statutory aggravating circumstances “play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.” *Id.*

164. *Id.* (emphasis in original).

165. See *supra* notes 79-82 and accompanying text.

166. *Enmund*, 458 U.S. at 801. The Court explained that a defendant’s intent is critical to his degree of culpability and criminal penalties are unconstitutionally excessive in the absence of wrongdoing. *Id.* at 800. The Court further stated that the defendant’s culpability should be limited to his participation in the crime and the punishment should be “tailored to his personal responsibility and moral guilt.” *Id.* at 801.

167. *Bullock*, 106 S. Ct. at 696. *Enmund* does not establish any new element of the crime. *Id.* In his dissent, Justice Blackmun agrees that no new elements are created but he claims that the majority does not recognize the distinction between defining the offense and executing the defendant. *Id.* at 706. He further explained that the jury need not be instructed on intent to find the felony murder defendant guilty, but that *Enmund* will bar the death penalty if the instruction was not given to the sentencer. *Id.* (citing *Skillern v. Estelle*, 720 F.2d 839 (1983), *reh’g denied*, 724 F.2d 127 (5th Cir. 1984)).

prevents him from being sentenced to death once he is found guilty.

By focusing on this red herring, the majority ignored the distinction that this decision makes between persons convicted of felony murder and persons convicted of deliberate murder. The *Bullock* Court noted the differences between the guilt and sentencing phases of a criminal trial and explained that while a defendant has a constitutional right to a jury determination in the guilt phase, he does not have a corresponding right during the sentencing phase.¹⁶⁸ The Court recognized that a jury verdict cannot stand unless the jury was instructed to find each element of the crime under the proper standard of proof.¹⁶⁹ Furthermore, the majority acknowledged that failure to instruct the jury on each element of the crime cannot be cured by findings made by a judge at trial or on appeal.¹⁷⁰

The Court concluded, however, that any error made concerning the *Enmund* findings can be cured by the trial judge, the state appellate court, or the federal habeas corpus court.¹⁷¹ The Court ignored its position in *Woodson* that the eighth amendment's respect for humanity requires that the character and record of the offender and the "circumstances of the particular offense" be considered, even though individualized sentencing is not a constitutional requirement.¹⁷² The culpability determination required by *Enmund* should be an aggravating circumstance of the offense considered by the sentencer before death is imposed.¹⁷³ Supreme Court decisions have never allowed an appellate or habeas corpus court to make findings of aggravating and mitigating factors; this obligation belongs to the sentencer.¹⁷⁴

The Court's third premise, that *Enmund* is merely a substantive limitation on the sentencing procedure and, therefore, amenable to the usual proportionality review,¹⁷⁵ is never clearly stated in *Enmund*.¹⁷⁶ The *Enmund* decision

168. 106 S. Ct. at 696-97. The jury has never been required to decide whether or not a punishment is appropriate. *Id.* at 697 (citing *Spaziano v. Florida*, 468 U.S. 447, 462 (1984)). The *Bullock* Court explained that, whether or not a sentence is disproportionate and violates the eighth amendment, like other questions concerning a criminal defendant's constitutional rights, is an appropriate decision for a trial judge or an appellate court. 106 S. Ct. at 696-97.

169. *Bullock*, 106 S. Ct. at 696.

170. *Id.*

171. *Id.* at 697-98. The *Enmund* findings are part of the sentencing phase. *Id.*

172. *Woodson*, 428 U.S. at 304.

173. See *supra* notes 42-94, 160-66 and accompanying text.

174. See, e.g., *Lockett*, 438 U.S. at 608 (limited range of mitigating circumstances considered by the sentencer is incompatible with eighth and fourteenth amendments); *Woodson*, 428 U.S. at 304 (North Carolina's capital statute was unconstitutional because it did not allow individualized consideration before imposition of death penalty); *Roberts*, 428 U.S. at 335 (Louisiana's statute provided no standards to guide the sentencer "in the exercise of its power to select those first-degree murderers who will receive the death sentence"); *Proffitt*, 428 U.S. at 258 (*Furman* is satisfied when "the sentencing authority's discretion is guided and channeled by requiring examination" of aggravating and mitigating circumstances); *Jurek*, 428 U.S. at 271 (jury should be allowed to consider aggravating and mitigating factors).

175. *Bullock*, 106 S. Ct. at 697.

176. 458 U.S. 782 (1982).

held that a sentence of death is disproportionate to the crime of felony murder when the defendant is found guilty on the theory of accomplice liability but not found to have had the requisite intent.¹⁷⁷ However, *Enmund* does not clearly state that the requisite culpability may be found after sentencing by an appellate or collateral court which neither saw the witnesses nor heard the testimony.¹⁷⁸ Rather, it holds that a defendant must have had the required intent "to be sentenced to death."¹⁷⁹ Although the normal meaning of these words would indicate that intent must be considered before sentencing, the *Bullock* decision interprets them to mean that intent must be considered before the person is actually executed.¹⁸⁰ The *Bullock* Court did not acknowledge that *Enmund* paid particular attention to the number of juries which have rejected the death penalty in cases factually similar to *Bullock*,¹⁸¹ and that *Enmund* used these sentencing statistics to show that society does not accept the punishment of death for accomplice liability in felony murder.¹⁸²

An appellate court may decide, based upon the evidence adduced at trial, that the sentence of death for a particular defendant is unwarranted.¹⁸³ However, the *Bullock* decision is the first time an appellate court has been given carte blanche to make a de novo finding of fact.¹⁸⁴ *Bullock* does not merely restate the role of the appellate court in conducting a sufficiency review of the evidence.¹⁸⁵ Instead it permits appellate and collateral courts to make findings of fact in the first instance.

Although *Enmund* can be read to support *Bullock*,¹⁸⁶ *Enmund* read in light of *Lockett* and *Caldwell* will not support the *Bullock* holding. The

177. *Id.*

178. The *Bullock* majority briefly mentions in a footnote that there may be times when appellate fact finding will not be adequate because the *Enmund* finding may turn on credibility determinations which an appellate court is not equipped to make. 106 S. Ct. at 698 n.5. The dissent recognizes that *Bullock* itself turns on credibility and is, therefore, not an appropriate case for appellate fact finding. *Id.* at 707.

179. *Enmund*, 458 U.S. at 788, 801. "Imposition of the death penalty in these circumstances is inconsistent with the eighth and fourteenth amendments." *Id.* at 788. "For purposes of imposing the death penalty" these findings must be made. *Id.* at 801.

180. *Bullock*, 106 S. Ct. at 697 ("the eighth amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence").

181. 458 U.S. at 794-96. See Kalven & Zeisel, *The American Jury and the Death Penalty*, 33 U. CHI. L. REV. 769, 779 (1966) (juries do not impose death penalty for vicarious liability).

182. 458 U.S. at 794. "The evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as [Enmund's]." *Id.*

183. See, e.g., *Enmund*, 458 U.S. 782 (1982) (death penalty wrongly imposed on felony murder defendant in absence of finding personal culpability); *Coker*, 433 U.S. 584 (1977) (death penalty for rape of adult woman is unconstitutional).

184. 106 S. Ct. at 703 (Blackmun, J., dissenting). The dissent claims the majority ignores the proper roles of the trial and appellate courts. *Id.*

185. See LARRY W. YACKLE, *POSTCONVICTION REMEDIES* 490 (1981) ("Judicial review of factual findings always involves some degree of speculation . . . Courts tend to avoid the problem by finding fair support in the state court record.").

186. See *infra* notes 194-99 and accompanying text.

Enmund majority relied on *Lockett*¹⁸⁷ to hold that the constitutional requirement of individualized consideration in "imposing" the death penalty must be honored.¹⁸⁸ Since the Supreme Court's decision in *Caldwell* "envisioned" that *Lockett*'s individualized consideration would be made by the sentencer,¹⁸⁹ it follows that the sentencer should also make the *Enmund* findings. Both *Lockett* and *Enmund* were felony murderers facing a death sentence. In each case the Supreme Court majority found that there was no finding that the defendant was one of the class of offenders that deserved to be executed. Further, in *Caldwell* the Court held that the prosecutor could not minimize the role of the jury and allow the jury to think that it did not have the last word on the fate of the capital defendant.¹⁹⁰ In fact, the *Caldwell* Court determined that an appellate court is not to evaluate the appropriateness of the death penalty in the first instance.¹⁹¹ Most importantly, the *Caldwell* Court stated that the fact that there will be an appellate review is irrelevant to the sentencing procedure and is not a valid basis for allowing a jury to return a sentence that it might not otherwise return.¹⁹² In addition, the *Enmund* decision contains many references to the culpability determination being made before sentence is passed.¹⁹³

The result in *Enmund* allowed the sentencing disparity now caused by *Bullock*. In *Enmund* the Supreme Court made its own determination that the petitioner did not have the requisite culpability for the imposition of a death sentence. The Supreme Court of Florida had specifically rejected the trial court's finding that *Enmund* had personally committed the murders, but found that his level of participation was sufficient for the imposition of the death penalty.¹⁹⁴ The trial court had rejected *Enmund*'s claim that his participation was limited because it believed that *Enmund* actually killed the victims.¹⁹⁵ As the *Enmund* dissent pointed out, this "fundamental misunderstanding" of his participation in the crime prevented the trial court from considering the individual circumstances of his particular offense when it imposed the sentence.¹⁹⁶ The dissent would have remanded the case for a

187. 438 U.S. at 605.

188. 458 U.S. at 798. Florida treated *Enmund* the same as the robber who killed, by attributing the killer's intent to *Enmund*. This was found impermissible under the eighth amendment. *Id.*

189. See *supra* note 87 and accompanying text.

190. 472 U.S. 320 (1985).

191. *Id.* at 327. The Court pointed out that even inexperienced attorneys know that an appellate court is not to impose a death sentence in the first instance, but only to review the jury's decision with a presumption of correctness. *Id.* at 328.

192. *Id.* at 330.

193. See *supra* note 179 and accompanying text.

194. *Enmund*, 458 U.S. at 788. The Florida Supreme Court concluded that the record showed no more than an inference that *Enmund* was the getaway driver but that this was sufficient under Florida law to make him an aider and abetter and, therefore, a principal in first degree murder who could be sentenced to death. *Id.*

195. *Id.* at 785 n.2.

196. *Id.* at 830.

new sentencing hearing.¹⁹⁷ In its argument, the *Enmund* dissenters quoted *Lockett* and *Woodson* to emphasize that the eighth amendment requires that the "sentencer" consider the character and record of the individual and the particular offense as part of the process of inflicting the death penalty.¹⁹⁸ Unfortunately, the *Enmund* majority made the intent findings itself and remanded the case for further proceedings consistent with its opinion.¹⁹⁹

The *Bullock* Court did not fully consider the issue of credibility and the fact that many times fact finders rely on the demeanor of the witnesses in reaching their decisions. The credibility issue is not even addressed in the main opinion. Instead it is relegated to a footnote which indicates that there "might" be some situations where an *Enmund* determination will turn on credibility and, therefore, is unsuitable for appellate review.²⁰⁰ As the dissent emphasized, the majority ignored the fact that the *Bullock* case itself revolved around the credibility of the defendant.²⁰¹ Justice Blackmun noted that Bullock took the stand during the guilt and sentencing phases of his trial and denied any intent to see the victim killed.²⁰² As Justice Blackmun explained, the trial judge or jury who saw Bullock testify may have believed that he lied. But it is difficult to see how an appellate court, "without any indication from anyone who actually saw him testify," could conclude with confidence that he lied.²⁰³ The fact that one feels little compassion for a criminal who takes an innocent life, does not justify discarding the principles which are the foundation of the criminal justice system.

Finally, the Court did not subject this decision to the same analysis it has subjected most earlier death penalty cases. It is understandable that the Court did not detail the history, international opinion, current mores, or legislative intent of the death penalty in general as they are fully addressed in past decisions. However, the Court should have looked to current state statutes regarding the sentencing of felony murder defendants as an indication of contemporary society's mores. Most states²⁰⁴ that designated felony murder

197. *Id.* at 827 (O'Connor, J., dissenting). Because the Florida Supreme Court rejected critical factual findings, the dissent argued that previous Supreme Court opinions require the case be remanded for a new sentencing hearing. *Id.* The dissent noted that the Court has emphasized that death sentencing decisions must focus "on the circumstances of each individual homicide and individual defendant." *Id.* (quoting *Proffitt*, 428 U.S. at 258).

198. *Enmund*, 458 U.S. at 827-28.

199. *Id.* at 801. See *supra* note 82 and accompanying text.

200. 106 S. Ct. at 698 n.5. The Court basically concludes that, although there might be some instances when state appellate fact finding should not be presumed correct because the determination turned on credibility, it does not mean that the federal habeas corpus court must find all appellate fact finding inadequate. *Id.*

201. 106 S. Ct. at 707 (Blackman, J., dissenting).

202. *Id.*

203. *Id.* at 707-08.

204. Of the seventeen states identified in *Enmund* as potentially authorizing unconstitutional death penalties, seven have taken steps to require *Enmund* findings before a death sentence can be imposed. Defendant's Supplemental Brief, at 2 n.1, *Cabana v. Bullock*, 106 S. Ct. 689

as a capital crime require the jury to find requisite intent prior to sentencing. Even Mississippi, after *Enmund* and before the Court's decision in *Bullock*, changed its statute to require the jury to make the requisite findings.²⁰⁵

In *Coker*, the Court looked to state legislation to see how many states would sentence a defendant to death for aggravated rape.²⁰⁶ It found that the vast majority of states did not allow death as a punishment where the victim of a rape was not killed.²⁰⁷ And in *Enmund*, the majority examined state statutes and concluded that the number of states which will not allow the death penalty to be imposed on a felony murderer who did not have the requisite intent, "weighs on the side of rejecting capital punishment" for *Enmund*.²⁰⁸ The *Bullock* majority should have examined state legislation to see who is charged with the culpability findings and at what point in the process they are made.

IV. IMPACT

The *Bullock* decision is problematic in two ways. First, it allows sentencing procedures which do not afford felony murderers the same protection as deliberate murderers. Second, it weakens the traditional role of the jury in sentencing procedures.

Unlike the procedural safeguards it provides deliberate murderers, the Court now permits states to maintain sentencing procedures which may violate the eighth amendment so long as any violation is cured on appeal. Since an appellate court, however, merely reviews the jury's decision with a

(1986) (No. 84-1236). Six states require such findings by the jury: Mississippi, South Carolina, Georgia, North Carolina, California, and (presumably) Oklahoma. *Id.* One state, Arizona, requires the trial judge to make the culpability determination. *Id.* Five states took the position that evidence in the record is sufficient and that specific *Enmund* findings need not be made by the judge nor jury: Indiana, Wyoming, Tennessee, Idaho, and Florida (although Florida has on occasion remanded a case to the trial court for culpability determinations). *Id.* (See *Brumbley v. State*, 453 So. 2d 381 (Fla. 1984)). The remaining five states have not addressed the issue: Nevada, Montana, Nebraska, South Dakota, and Connecticut. *Id.* See NAACP Legal Defense and Education Fund, *Death Row, U.S.A.* (Aug. 1985).

This means that of the thirty-seven states with capital punishment statutes, at most eleven, and perhaps as few as six, will allow the death penalty to be imposed where the sentencer has not made the *Enmund* findings.

205. *Bullock v. Lucas*, 743 F.2d 244, 248 n.1 (5th Cir. 1984). According to the Mississippi statute:

In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:

- (a) The defendant actually killed;
- (b) The defendant attempted to kill;
- (c) The defendant intended that a killing take place;
- (d) The defendant contemplated that lethal force would be employed.

MISS. CODE ANN. § 99-19-101(7) (1972).

206. 433 U.S. at 593-97.

207. *Id.* at 598.

208. 458 U.S. at 792-93.

presumption of correctness,²⁰⁹ there is no certainty that an eighth amendment violation will be cured. If the violation is not corrected, the system has failed. Since *Gregg*, the Court has maintained that execution, in and of itself, does not violate the eighth amendment. However, the Court has repeatedly found that the eighth amendment recognizes a qualitative difference between the punishment of death and other types of punishments. As a result, the Court has used a greater degree of scrutiny to review the procedures a state uses to identify capital offenders.²¹⁰

The Court has set up procedural safeguards for the sentencing of a deliberate murderer. It requires a state to find circumstances in aggravation and weigh them against circumstances in mitigation. If the aggravating circumstances, mandated by statute, are not outweighed by the mitigating circumstances, then the murderer is determined to fit within the class of offenders which is deserving of execution. But, before reaching the sentencing phase of the trial, the jury has already determined that the deliberate murderer intended to kill, attempted to kill, or intended that lethal force be used. The deliberate murderer has already been found morally responsible for the victim's death. The felony murderer has not.

When the Court decided that aggravating and mitigating circumstances were necessary to narrow the class of murderers capable of being put to death, the Court did not add to the elements of the substantive offense of deliberate murder. Had the *Bullock* Court decided, as part of this narrowing process, that the jury must find some level of personal responsibility before pronouncing the death sentence, it would not be adding an element to the substantive offense of felony murder. It would simply be instructing the jury that the United States does not execute people who have not been found morally responsible for their crime. Instead, *Bullock* allows the state to keep this information from the jury at the time the felony murder defendant is sentenced to death. The Supreme Court expects that an appellate or collateral court, who neither saw the witnesses nor heard the testimony, will be able to discern the defendant's level of culpability at a later time and on a paper record. However, there is no reason to think that this can be done in every case. Therefore, rather than tolerate the risk that a defendant will be executed without the protection of the eighth amendment safeguards, the Court should insist that the *Enmund* findings be made at the trial level and by the sentencer in all cases. The *Bullock* decision weakens the effect of *Enmund* and treats felony murderers differently than deliberate murderers. In so doing, it provides less constitutional protection for this class of offenders. Arguably, felony murderers should be treated less harshly than deliberate murderers.

Bullock itself is an example of the result of a discriminatory sentencing procedure. *Bullock*, an accomplice to a robbery-murder, was sentenced to

209. See *Caldwell*, 472 U.S. at 328. See *supra* notes 127-29, 200-03 and accompanying text.

210. See *Caldwell*, 472 U.S. at 327 (quoting *California v. Ramos*, 463 U.S. 992 (1983)).

death without a finding of intent while his co-defendant Tucker, the actual murderer, was sentenced to life in prison.²¹¹ Indeed, more felony murderers could be selected to receive death as a punishment because the constitutional safeguard mandated by *Enmund* is moved to a later time in the criminal justice system. As the case proceeds within the system, each succeeding court presumes the correctness of the court below. This presumption, in the absence of a finding that the defendant is morally culpable, is a tremendous burden. This burden is placed on a felony murder defendant but not on a deliberate murder defendant.

The second problem that *Bullock* creates is the weakening of the traditional role of the jury in the sentencing process. The Court's decision in *Spaziano v. Florida*²¹² allowed the trial judge to override the jury's recommendation for life imprisonment. Justice Blackmun, dissenting in *Bullock*, distinguished *Spaziano* because the Florida statute gave the ultimate sentencing decision to the trial judge who saw all the witnesses and heard all the testimony.²¹³ The *Bullock* majority, however, relied on *Spaziano* to assert the proposition that a defendant never has a constitutional right to a jury sentencing determination.²¹⁴ While this may be true, it does not follow that a state, which gives a defendant the right to a jury sentencing determination, may withhold a constitutional sentencing limitation from jury consideration just because an appellate court is there to prevent any resulting constitutional violation. This is exactly the type of situation that *Caldwell* opposed.²¹⁵

Bullock signals a decline in the traditional view that a jury plays a significant role in capital sentencing procedures. The jury has been found to be a true indicator of society's current values and an expression of society's outrage toward certain unlawful behavior. If this is the beginning of such a decline, the procedural safeguards created by *Gregg* and the later cases may well be diluted. If an appellate or collateral court may find the sentencing limitation required by *Enmund*, it is possible that reviewing courts may someday be allowed to find other aggravating or mitigating circumstances.

For this decision to have little detrimental effect, state sentencing statutes must require the intent determination be made at the trial court level by the sentencer. Once the finding is made, the appellate or collateral court may assume its proper role and determine whether or not the finding is supported by substantial evidence.

V. CONCLUSION

Bullock combines fact finding with appellate review in the same proceeding for felony murderers. This creates a distinction between felony murderers

211. See *supra* note 110.

212. 468 U.S. 447, 463 n.8 (1984) (Constitution does not give defendant right to have jury consider appropriateness of death as punishment). See *Bullock*, 106 S. Ct. at 697.

213. 106 S. Ct. at 705.

214. *Id.* at 697.

215. See *supra* notes 76-77 and accompanying text.

and deliberate murderers. A deliberate murderer is assured complete consideration of aggravating and mitigating circumstances while a felony murderer is not. As a result, felony murderers will face the possibility of a death sentence without a finding of intent. State appellate courts will find this intent on a paper record which is presumed correct. Federal habeas corpus courts will then review the appellate findings, again presuming they are correct. As a result, the felony murderer is more likely to be executed without the constitutional guarantees afforded by *Gregg* and its companion cases.

The conservative composition of the Court makes it very unlikely that *Bullock* will be modified any time soon. Therefore, each state must take the initiative to insure that all defendants subject to the death penalty are treated equally. It is now the responsibility of the state to insist that the sentencer consider a felony murderer's intent as an aggravating factor. This is the only way in which the circumstances of the felony murder and the offender will receive proper consideration as mandated by the Court's decisions from *Gregg* to *Enmund*.

Mary von Mandel