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Cabana v. Bullock: The Proper Tribunal-The Supreme Court Revisits Enmund v. Florida

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CASENOTES

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I. INTRODUCTION

After an evening of drinking at the Town Creek Saloon in Jackson, Mississippi, Crawford Bullock, Jr., and Ricky Tucker accepted a ride home from Mark Dickson.¹ The three men drank heavily as they travelled toward Tucker's home. Bullock requested that Dickson "stop the car so he could answer a call of nature."² Upon returning to the vehicle, Bullock heard Tucker and Dickson arguing.³ The arguing ceased when Bullock reentered the vehicle, and they resumed the trip with Dickson driving.⁴ Dickson eventually stopped the car near a construction site, and he and Tucker started fighting.⁵ At some point, Bullock held Dickson's head while Tucker struck Dickson in the face with a whiskey bottle.⁶ Tucker continued to assault Dickson until he fell to the ground and lay helpless. Tucker then smashed Dickson in the head with a concrete block until he died.⁷ They subsequently disposed of the body, and Bullock kept Dickson's car for him-

1. For the complete factual background, see *Cabana v. Bullock*, 106 S. Ct. 689, 693 (1986); *Bullock v. Lucas*, 743 F.2d 244, 245-46 (5th Cir. 1984).

2. *Bullock v. Lucas*, 743 F.2d 244, 246 (5th Cir. 1984).

3. *Id.* Dickson was apparently indebted to Tucker for illicit drugs and insisted that he had no money. He offered Tucker his auto in satisfaction of the debt.

4. *Id.*

5. *Id.*

6. *Cabana v. Bullock*, 106 S. Ct. 689, 693 (1986).

7. *Id.*

self.⁸ They were arrested the next day and charged with capital murder in violation of a Mississippi statute.⁹ Bullock was charged with Dickson's death in connection with the felonious taking of Dickson's auto and wallet.

Bullock and Tucker had separate trials. The jury found Tucker guilty and sentenced him to life imprisonment. The jury also convicted Bullock, but sentenced him to death.¹⁰ Bullock appealed to the Supreme Court of Mississippi¹¹ arguing that the evidence was insufficient as a matter of law to submit to the jury and that the imposition of the death penalty was so disproportionate to his participation in the crime as to violate the eighth amendment provision against cruel and unusual punishment.¹² The court rejected both of these contentions and affirmed Bullock's conviction.¹³ After Bullock exhausted his state post-conviction remedies, he filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Mississippi.¹⁴ The district court denied the petition. On appeal, however, the Court of Appeals for the Fifth Circuit reversed, holding that Bullock's death sentence was invalid in light of the intervening decision of *Enmund v. Florida*.¹⁵ *Enmund* held that the eighth amend-

8. *Id.*

9. The Mississippi Code provides in pertinent part:

(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:

(e) When done with or without any design to effect death by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery

MISS. CODE ANN. § 97-3-19(2)(e) (Supp. 1985). Under Mississippi law a person who participates in a robbery can be convicted of capital murder if the murder was committed by a co-conspirator in the course of a robbery, even though the defendant did not intend the murder.

10. *Lucas*, 743 F.2d at 246.

11. *Bullock v. State*, 391 So. 2d 601 (Miss. 1980).

12. *Id.* at 604, 606.

13. The court concluded that Bullock's punishment was not disproportionate to his degree of culpability because the law of Mississippi provided that "any person who is present and aiding and abetting another in the commission of a crime, is equally guilty with the principal offender." *Bullock*, 391 So. 2d at 601, 614. The court reasoned further that because Bullock was an "active participant in the assault and homicide committed upon Mark Dickson," his punishment was not disproportionate to his guilt. *Id.*

14. 28 U.S.C. § 2254 (Supp. 1985).

15. *Bullock v. Lucas*, 743 F.2d 244, 246-48 (5th Cir. 1984) (citing *Enmund v. Florida*, 458 U.S. 782 (1982)). The Fifth Circuit held that absent an *Enmund* finding by the jury that the defendant either killed, attempted to kill, intended to kill, or contemplated that lethal force would be used, Bullock's sentence was constitutionally infirm. When Bullock was found guilty and sentenced to death, the then-existing Mississippi death penalty statute did not require an instruction at the sentencing phase requiring the jury to focus on the defendant's personal intent and culpability. The appellate court, therefore, focused on the confusing jury instruction which would have allowed the imposition of the death penalty merely because the defendant participated in the robbery "with or without any design to effect the death of the

ment forbids imposition of the death penalty on one who does not himself kill, attempt to kill, or intend that a killing take place, but who aids and abets a felony in which a co-felon commits murder. The appellate court thus granted the writ of habeas corpus vacating Bullock's sentence.¹⁶ The Supreme Court of the United States granted certiorari because a Fifth Circuit interpretation conflicted with the Eleventh Circuit's interpretation of *Enmund*.¹⁷ The Supreme Court of the United States *held*, modified and remanded: *Enmund v. Florida* does not constitutionally require specific jury findings on a defendant's culpability; at what precise point a state chooses to make the *Enmund* determination is of little concern from the standpoint of the Constitution. *Cabana v. Bullock*, 106 S. Ct. 689 (1986).

II. PERSPECTIVE

A. *Pre-Bullock Death Penalty Jurisprudence: The Supreme Court's Interpretation of the Eighth Amendment*

In *Weems v. United States*,¹⁸ the Supreme Court postulated that cruel and unusual punishment was a flexible concept which should reflect society's changing values. Consequently, in light of the harshness of capital punishment, courts and juries infrequently imposed the death penalty as punishment. There was such a lack of societal acceptance in the 1960's that some commentators maintained that the Supreme Court should find the death penalty unconstitutional.¹⁹

In 1972, the Supreme Court first addressed the constitutionality of the death penalty in *Furman v. Georgia*.²⁰ The *Furman* Court held that statutes which give juries complete discretion to impose the death penalty violate the cruel and unusual punishment clause.²¹ The Court reasoned that giving juries total discretion in sentencing would lead to arbitrary application of the law. The Court did not expressly indicate,

victim," regardless of the defendant's intent. *Bullock*, 743 F.2d at 248. See MISS. CODE ANN. § 99-19-101(7) (Supp. 1985) (In 1983 Mississippi amended its death penalty statute to require a written finding of intent as a prerequisite to imposing the death penalty.).

16. The court permitted the state of Mississippi to either impose a sentence of life imprisonment or, within a reasonable time, conduct a sentencing hearing consistent with its opinion.

17. See *infra* notes 63, 64 and accompanying text.

18. 217 U.S. 349, 378 (1910). The Court opined that the cruel and unusual punishment clause "was not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice." *Id.*

19. See Note, *Capital Punishment: A Review of Recent Supreme Court Decisions*, 52 NOTRE DAME LAW. 261, 268 (1976) (citing Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1818-19 (1970)).

20. 408 U.S. 228 (1972).

21. *Id.*

however, that the death penalty was unconstitutional per se; rather, the Court limited its holding to the facts of the particular case. Nevertheless, the *Furman* Court did conclude that procedural safeguards were necessary for the death penalty to be constitutional.²² Because jury discretion in imposing the death penalty was a nationwide practice, the *Furman* decision precipitated the revision of all existing death penalty statutes.²³

Four years after the *Furman* decision, in *Gregg v. Georgia*,²⁴ a plurality of the Supreme Court²⁵ held that the death penalty was not unconstitutional per se. Although the Court acknowledged that the death penalty was an extreme sanction, it determined that capital punishment was suitable for the extreme crime of deliberate murder.²⁶ The *Gregg* Court employed both a substantive and a procedural analysis to determine whether the death penalty was unconstitutional.²⁷ The Court formulated an excessiveness test,²⁸ which focused on two factors: first, whether the punishment involved "the unnecessary and wanton infliction of pain"; and, second, whether the punishment was "grossly out of proportion to the severity of the crime."²⁹ The *Gregg*

22. The Court, however, failed to enunciate any standards which would satisfy the eighth amendment.

23. See, e.g., *Proffitt v. Florida*, 428 U.S. 242 (1976) (The Supreme Court of the United States held that Florida's new death statute provided sufficient procedural safeguards to satisfy the concerns articulated in *Furman*.).

24. 428 U.S. 153 (1976).

25. Justices Stewart, Powell, and Stevens wrote the plurality opinion in which Justices Blackmun, Burger, Rehnquist and White concurred. Justices Brennan and Marshall dissented. *Id.*

26. *Id.* at 187.

27. After the *Gregg* Court determined that the death penalty was not unconstitutional per se, the Court addressed the procedural requirements of the eighth amendment. The Court upheld bifurcated death penalty statutes which require that a trial judge or jury first determine guilt or innocence and then, in a separate hearing, weigh aggravating and mitigating circumstances to determine whether the state should impose capital punishment. *Id.* at 162-68. Cf. *Proffitt v. Florida*, 428 U.S. at 248-51 (jury sentencing procedure held constitutional because jury was given guidelines on which to base its decision). The Court, however, found mandatory death penalty statutes unconstitutional. See, e.g., *Roberts v. Louisiana*, 428 U.S. 325 (1976) (striking down statute mandating death penalty whenever, with respect to five categories of homicide, the jury found the defendant intended to kill or inflict great bodily harm); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (striking down statute requiring imposition of the death penalty whenever defendant was convicted of first degree murder). The Court held these statutes were unconstitutional because they allowed unbridled jury discretion and failed to consider specific aspects of the defendant or the crime.

28. *Gregg*, 428 U.S. at 173.

29. *Id.* at 173. The Court went on to note that the penological justification for imposing the death penalty encompasses both the theories of retribution and deterrence. Because data on death penalty deterrence was inconclusive, the plurality decided that the Court should defer to legislative judgment on that issue. *Id.* at 184-86. But see Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 U. COLO. L. REV. 17, 39 (1979) (The purpose of the eighth amendment is to protect against legislative misconduct, and courts

decision did not determine whether the death penalty was constitutional for crimes other than murder, but it did conclusively alleviate any doubt that death was a constitutional penalty for deliberate murder.

Applying the excessiveness test formulated in *Gregg*, the Supreme Court in *Coker v. Georgia*³⁰ addressed the issue of whether the death penalty constituted cruel and unusual punishment when imposed for a crime other than murder. The *Coker* Court concluded that the death penalty was an unconstitutional punishment for the rape of an adult woman where the defendant did not take the victim's life.³¹ The Court noted that rape was a terrible crime, second only to murder in its severity; yet, the Court maintained that rape did not compare with the irrevocability of taking a human life.³² Based on the *Coker* and *Gregg* decisions, it is logical to deduce that a death must occur before the death penalty is constitutional. In *Gregg*, however, the Court's holding pertained only to an *intentional* murder and left open the question of whether an unintentional killing constitutionally justifies the imposition of the death penalty.

B. *The Felony Murder Rule and the Death Penalty*

The felony murder rule is applicable where two or more people agree to commit a felony and a death occurs during its commission. All co-felons are responsible for the death, even the co-felon who did not directly cause the death.³³ The rationale underlying this formulation is that all participants should be responsible for the acts of their coconspirators because the death would not have occurred but for the underlying agreement to commit the felony.³⁴ The felony murder doctrine retains vitality in most jurisdictions,³⁵ but the doctrine's util-

should ensure that this purpose is fulfilled.). The Court, however, considered retribution a permissible objective. The Court reasoned that if it allowed the public to vent its outrage at offensive conduct, and if the law did not punish the offender, the public would resort to self-help. *Id.* at 183.

30. 433 U.S. 584 (1977).

31. Justice White wrote the plurality opinion which held that even though the death penalty in rape cases might serve a legitimate purpose for punishment, such as deterrence or retribution, it was nevertheless disproportionate to the crime of rape.

32. 433 U.S. at 597-98.

33. See D. JONES, *CRIME AND CRIMINAL RESPONSIBILITY* 132 (1978) (each co-felon is responsible for a death caused by the act of one of them); 2 C. TORCIA, *WHARTON'S CRIMINAL LAW* § 145, at 208 (14th ed. 1979) (Even if the co-felon is not the actual killer, he is responsible for the death.).

34. See Crum, *Casual Relationships and the Felony Murder Rule*, 1952 WASH. U.L.Q. 191, 192-93; see also *State v. Williams*, 254 So. 2d 548, 550 (Fla. 2d DCA 1971) (The purpose of the felony murder doctrine is to prevent the death of innocent persons.).

35. Both Hawaii and Kentucky have abolished the doctrine as a basis for liability.

ity and fairness has been widely criticized.³⁶ Such criticisms include the doctrine's inequitable premise of transferred intent and the unfairness of holding a co-felon responsible for a murder that was an unintended and unlikely consequence of the underlying felony.³⁷

The felony murder rule has its roots in English common law.³⁸ At common law, the definition of murder was the unlawful killing of a person with express or implied malice.³⁹ If an unintentional killing occurred during the course of a felony, the felony murder doctrine supplanted the requisite malice necessary to charge the felon with murder.⁴⁰ The intent to commit the underlying felony transferred to the homicide, thereby satisfying the malice requirement to prove murder.⁴¹ Once the state establishes the intent to commit the felony, it is irrelevant whether the killing was intentional or unintentional.⁴² The doctrine's requirement that the killing take place during the perpetration of a felony is satisfied where the killing and perpetration of the felony comprise one continuous transaction.⁴³ Therefore, it may also

36. See, e.g., Packer, *The Case for Revision of the Penal Code*, 13 STAN. L. REV. 252, 259 (1961) ("The rule is unnecessary in almost all cases in which it is applied . . ."); Note, *Criminal Law—The Felony Murder Doctrine Repudiated*, 36 KY. L.J. 106, 109 (1947) (Punishment for murders occurring in the course of another crime can be imposed without use of the felony murder doctrine.).

37. See Note, *supra* note 36, at 108-09 (1947); Note, *Enmund v. Florida: The Constitutionality of Imposing the Death Penalty Upon a Co-Felon in Felony Murder*, 32 DE PAUL L. REV. 713 (1982) [hereinafter cited as Note, *Constitutionality of Imposing the Death Penalty*].

38. The phraseology of the felony murder rule originally made all killings during the commission of any unlawful act murder. The rule, however, was subsequently narrowed to include only dangerous felonies likely to result in death.

39. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 195 (3d ed. 1884); see also O. HOLMES, THE COMMON LAW 51 (1909) (murder is "unlawful homicide with malice aforethought"); R. PERKINS, CRIMINAL LAW 34 (2d ed. 1969) (murder is "homicide committed with malice aforethought").

40. Lord Coke originally postulated the felony murder concept. See, e.g., 2 C. TORCIA, *supra* note 33, at 204 (attributing responsibility for the felony murder doctrine to Lord Coke). *Contra* M. BASSIOUNI, SUBSTANTIVE CRIMINAL LAW § 2, at 247 (1936) ("The felony-murder-rule has its origin as early as 1256, and appears in Bracton's *De Legibus et Consuetinibus Anglias*.").

41. See R. PERKINS, *supra* note 39, at 45 & n.19; see also *Fleming v. State*, 374 So. 2d 954, 956 (Fla. 1979) (commission of homicide in conjunction with intent to commit felony supplants premeditation or malice aforethought needed for first degree murder). For a discussion on felony murder as a legal fiction, see Comment, *Constitutional Limitations Upon the Use of Statutory Criminal Presumptions and the Felony-Murder Rule*, 46 MISS. L.J. 1021, 1022 (1975) (felony murder is premised on a legal fiction that one who commits felony has intent to commit murder).

42. See *State v. Smith*, 225 Kan. 796, 799-800, 594 P.2d 218, 221 (1979) (The court reasoned that "[t]he participants in the felony must reasonably foresee or expect that a life might be taken in the perpetration of a felony regardless of whether the killing was accidental or intentional.").

43. See *People v. Atkins*, 128 Cal. App. 3d 564, 568, 180 Cal. Rptr. 440, 443 (1982);

be irrelevant whether the killing occurs before or after the perpetration of the felony.⁴⁴

The scope of the felony murder rule varies with each jurisdiction.⁴⁵ Where the felony murder statute does not enumerate specific felonies, the potential scope of the rule is broader, but limited by the requirement that the applicable felony be inherently dangerous.⁴⁶

In 1978, the Supreme Court of the United States, in *Lockett v. Ohio*,⁴⁷ cast doubt over the constitutionality of imposing the death

Kochevar v. State, 281 N.W.2d 680, 686 (Minn. 1979); State v. Wayne, 289 S.E.2d 480, 482 (W. Va. 1982).

44. See, e.g., *People v. Salas*, 7 Cal. 3d 812, 823-24, 500 P.2d 7, 15, 103 Cal. Rptr. 431, 439 (1972) (killing while robbery in escape stage); *Jenkins v. State*, 240 A.2d 146, 149 (Del. 1968) (killing during attempt to commit burglary).

45. See, e.g., ALASKA STAT. § 11.41.110(a)(3) (1980) (kidnapping, sexual assault, burglary, escape, robbery); ARIZ. REV. STAT. ANN. § 13.1105(A)(2) (West Supp. 1982) (sexual assault, child molestation, kidnapping, burglary, arson, robbery, escape); CAL. PENAL CODE § 189 (West Supp. 1982) (arson, rape, robbery, burglary, mayhem); COLO. REV. STAT. § 18-3-102(1)(b) (1978) (arson, robbery, burglary, kidnapping, sexual assault); CONN. GEN. STAT. ANN. §§ 53a-54c (West Supp. 1982) (robbery, burglary, kidnapping, sexual assault, escape); FLA. STAT. ANN. § 782.04(1)(a)(2) (West Supp. 1983) (trafficking, arson, sexual battery, robbery, burglary, kidnapping, escape, aggravated child abuse, aircraft piracy, unlawful discharging of a destructive device or bomb); IDAHO CODE § 18-4003(d) (1979) (arson, rape, robbery, burglary, kidnapping, mayhem); IND. CODE ANN. § 35-42-1-1(1) (Burns 1979) (arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, robbery); ME. REV. STAT. ANN. tit. 17A, § 202(1) (1980) (murder, robbery, burglary, kidnapping, arson, rape, gross sexual misconduct, escape); MINN. STAT. ANN. §§ 609-185(2) to (3) (West Supp. 1982) (criminal sexual conduct, burglary, aggravated robbery, kidnapping, arson, tampering with witnesses, escape); MISS. CODE ANN. § 93-3-19(2)(e) (Supp. 1982) (rape, robbery, burglary, kidnapping, arson); MONT. CODE ANN. § 45-5-102(1)(b) (1981) (robbery, sexual intercourse without consent, arson, burglary, kidnapping, felonious escape); NEB. REV. STAT. § 28-303(2) to (3) (1979) (sexual assault, arson, robbery, kidnapping, hijacking, burglary, administration of poison); NEV. REV. STAT. § 200.030(1)(b) (1979) (sexual assault, kidnapping, arson, robbery, burglary, sexual molestation of a child under the age of 14); N.C. GEN. STAT. § 14-17 (1981) (arson, rape, sexual offense, robbery, kidnapping, burglary); N.D. CENT. CODE § 12.1-16-01(1)(c) (Supp. 1981) (treason, robbery, burglary, kidnapping, felonious restraint, arson, gross sexual imposition, escape); OKLA. STAT. ANN. tit. 21, § 701.7(B) (West Supp. 1982) (forcible rape, robbery with a dangerous weapon, kidnapping, escape, burglary, arson); PA. STAT. ANN. tit. 18, § 2502(d) (Purdon Supp. 1981) (robbery, rape, deviate sexual intercourse, arson, burglary, kidnapping); S.D. CODIFIED LAWS ANN. § 22-16-4 (Bobbs-Merrill Supp. 1982) (arson, rape, robbery, burglary, kidnapping, unlawful discharging of destructive device or explosive); WASH. REV. CODE ANN. § 9A.32.030(1)(c) (1977) (robbery, rape, burglary, arson, kidnapping); W. VA. CODE § 61-2-1 (1977) (arson, robbery, rape, burglary); WYO. STAT. § 6-2-101(a) (1983) (rape, sexual assault, arson, robbery, burglary, escape, resisting arrest, kidnapping, administering poison).

46. See *Commonwealth v. Matchett*, 386 Mass. 492, 506, 436 N.E.2d 400, 409 (1982). The court held that although the statutory language made the felony murder rule applicable to any felony, the felony must be inherently dangerous. *Id.* To extend the rule to less serious statutory felonies, such as possession of burglary tools, is unwarranted. It is the inherent danger of the felony which justifies equating the intent to commit the felony with the malice aforethought necessary for murder. *Id.* at 506-07, 436 N.E.2d at 409-10.

47. 438 U.S. 586 (1978). *Lockett* was sentenced to death for her participation in a robbery during which a killing occurred. *Id.* at 594. She had remained in the getaway car during the

penalty on nontriggermen⁴⁸ convicted of felony murder. The Court subsequently clarified the issue in *Enmund v. Florida*,⁴⁹ when it held that the death penalty is a disproportionate sanction for felony murder when the offender is a nontriggerman, unless there is a showing that the co-felon took life, intended to take life, or contemplated taking a life.⁵⁰ Enmund was convicted of two counts of first degree murder under Florida's felony murder statute. Enmund's two cohorts⁵¹ had actually pulled the trigger, and Enmund had driven the getaway car.⁵² Nevertheless, the jury found beyond a reasonable doubt that Enmund was present and had aided and abetted the perpetration of the robbery.⁵³ In a separate sentencing hearing the jury recommended the death sentence, and the trial judge so sentenced him.⁵⁴ The Supreme Court of the United States reversed⁵⁵ and held that the death penalty was a disproportionate punishment for nontriggermen like Enmund.⁵⁶ Because the state had not proven that Enmund had killed, attempted to kill, or intended to kill, the Court concluded that the death penalty was so disproportionate as to be cruel and unusual punishment under the eighth and fourteenth amendments.⁵⁷ The Court further reasoned that putting someone to death who did not kill or intend to kill would not advance the deterrent or retributive goals of capital punishment.⁵⁸

robbery. *Id.* at 590. The Court's plurality opinion reversed the death sentence and held the sentencing statute unconstitutional. The Court employed a procedural mode of analysis, rather than addressing the substantive issue of whether the death penalty was constitutionally disproportionate where the defendant had not killed, attempted to kill, or intended to kill. *Id.* at 609 n.16.

48. The term *nontriggerman* was used in *Enmund v. Florida*, 458 U.S. 782 (1982). Nontriggerman refers to participants in felony murder who did not kill, attempt to kill, or intend to kill. *Id.* at 792-93.

49. 458 U.S. 782 (1982).

50. *Id.* at 798.

51. Sampson and Jeanette Armstrong shot and killed both Thomas and Eunice Kersey, took their money and fled. *Id.* at 783-84.

52. *Id.*

53. The Supreme Court of Florida affirmed Enmund's convictions and sentences. 399 So. 2d 1362 (Fla. 1981). The court relied on *Adams v. State*, which held that the interaction of the "felony murder rule and the laws of principals combine to make a co-felon generally responsible for the lethal acts of his co-felon." *Id.* at 1369 (quoting *Adams v. State*, 341 So. 2d 765, 768-69 (Fla. 1976), *cert. denied*, 434 U.S. 878 (1977)).

54. *Enmund*, 399 So. 2d at 1363.

55. *Enmund*, 458 U.S. at 801.

56. *Id.* at 794-96.

57. *Id.* at 798.

58. *Id.* at 798-801. For an excellent discussion of *Enmund v. Florida*, see Note, *Imposing the Death Sentence for Felony Murder on a Non-Triggerman*, 37 STAN. L. REV. 857 (1985) [hereinafter cited as Note, *Imposing the Death Sentence*]; Comment, *The Felony Murder Rule and the Death Penalty: Enmund v. Florida—Overreaching by the Supreme Court?*, 19 NEW

The *Enmund* decision marked a significant advance in the development of eighth amendment jurisprudence, but it left many questions unanswered. The decision is problematic because the Court neither articulated an explicit standard for the requisite level of intent,⁵⁹ nor clarified whether the death penalty could withstand constitutional scrutiny when applied to a nontriggerman who did not participate in the murder, yet intended the victim's death.⁶⁰ Moreover, *Enmund* did not delineate the appropriate tribunal for determining whether a defendant possesses the requisite degree of culpability required for imposition of the death penalty. The Court subsequently answered this question in *Cabana v. Bullock*.⁶¹

III. *Cabana v. Bullock*: THE PROPER TRIBUNAL

A. *The Majority*

The Supreme Court entertained Bullock's petition for certiorari in light of the conflicting interpretations of *Enmund* adopted by the Fifth and Eleventh Circuits.⁶² The *Bullock* Court adopted the Eleventh Circuit's position that *Enmund* did not constitutionally mandate specific jury findings of a defendant's culpability.⁶³ The majority in *Bullock* held that it was erroneous to conclude that *Enmund* could only be satisfied at a sentencing hearing and by a jury determination based upon proof beyond a reasonable doubt that the defendant possessed the requisite culpability.⁶⁴ The Court⁶⁵ explained that the *Enmund* decision did not concern the guilt or innocence of the

ENG. L. REV. 255 (1984); Note, *Constitutionality of Imposing the Death Penalty*, *supra* note 37, *passim*.

59. The Court never specified whether the level of intent should be (1) specific, where the actor commits an act with the specific objective or knowledge that the act will produce a given result, or (2) general, where the actor deviates from reasonable conduct and the actor's ability to foresee that such deviation might produce harmful results. See M. BASSIOUNI, *supra* note 40, at 177-78; see also Note, *Constitutionality of Imposing the Death Penalty*, *supra* note 37, at 734 (The author's interpretation of *Enmund* requires a new eighth amendment standard: proof of specific intent to kill.).

60. For a discussion of the infirmities of the *Enmund* decision, see Note, *Jurisprudential Confusion in Eighth Amendment Analysis*, 38 U. MIAMI L. REV. 357, 370-71 (1984).

61. 106 S. Ct. 689 (1986).

62. See *Reddix v. Thigpen*, 728 F.2d 705 (5th Cir. 1984) (*Enmund* can be satisfied only by findings made at the guilt or innocence or sentencing phase of a trial.). See also *Ross v. Kemp*, 756 F.2d 1483, 1488 (11th Cir. 1985) ("the question of whether the defendant's culpability satisfies the eighth amendment is sufficiently distinct from the question of the defendant's guilt that a specific jury finding is not constitutionally required").

63. *Kemp*, 756 F.2d at 1488. The *Kemp* Court stated: "We decline to transform . . . into a constitutional requirement that the trier of fact make specific *Enmund* findings, such that every defendant sentenced to death without express jury findings on culpability is entitled to a new sentencing hearing." *Id.*

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

defendant;⁶⁶ rather, the *Enmund* ruling was based on principles of proportionality.⁶⁷

Notwithstanding the traditional role of the jury in capital sentencing, Justice White relied on the controversial case of *Spaziano v. Florida*,⁶⁸ which held that the Constitution does not require that a jury's recommendation of life imprisonment be binding in capital cases.⁶⁹ The Court deduced from *Spaziano* that *Enmund* did not require a jury finding that a nontriggerman, like Bullock, possess the requisite culpability because "the decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury."⁷⁰ The Court buttressed this position further by citing *Solem v. Helm*⁷¹ for the proposition that throughout eighth amendment jurisprudence, a trial judge or an appellate court is fully competent to determine whether a sentence is so disproportionate as to violate a defendant's constitutional rights.

The majority explained that *Enmund* did not impose any specific procedure upon the states. The Court reasoned that if a person sentenced to death was found to have killed, attempted to kill, or intended to kill, regardless of who made that determination, his or her execution would not violate the eighth amendment.⁷² Likewise, if a person sentenced to death lacked the requisite culpability, any court could remedy the situation.⁷³ The Court maintained that, from a constitutional standpoint, it was irrelevant at which particular time a

65. Justice White delivered the opinion of the Court, in which Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor joined.

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

67. *Id.* See *Solem v. Helm*, 463 U.S. 277 (1983) (eighth amendment prohibits not only barbaric punishments, but also those disproportionate to the crime committed). It is apparent that the *Solem* Court viewed *Enmund* as a proportionality case because it described *Enmund* as a case in which "the Court has applied the principle of proportionality to hold capital punishment excessive . . ." *Id.* at 288.

68. 104 S. Ct. 3154 (1984).

69. *Id.* at 3165. See generally Mello & Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31 (1985) (exploring whether, as a matter of wise public policy, Florida should repeal its jury override); Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C.D. L. REV. 1409 (1985) (a focus on Florida's override provision and data on those who have been sentenced to death under Florida law); Note, *Eighth Amendment—Trial Court May Impose Death Sentence Despite Jury's Recommendation of Life Imprisonment*, 75 J. CRIM. L. & CRIMINOLOGY 813 (1984) (examines the Supreme Court's departure from established method of analyzing capital punishment statutes—the question of life or death must be left to the jury).

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

71. *Id.* (citing *Solem v. Helm*, 463 U.S. 277 (1983)).

72. *Id.*

73. *Id.*

state chose to make the *Enmund* determination.⁷⁴

The Court, however, took a strong stance when a federal court reviews, under a writ of habeas corpus, a claim that the death penalty had been imposed on one who had neither killed, attempted to kill, or intended that a killing occur.⁷⁵ The Court emphasized that the inquiry should not be restricted to an examination of the jury instructions, but should extend to the entire course of the state proceeding to discern whether the requisite factual finding was made regarding the defendant's culpability.⁷⁶ Furthermore, if the reviewing court finds the court below had made the requisite factual finding, then it must presume that the finding is correct by virtue of the federal habeas corpus statute, 28 U.S.C. 2254(d).⁷⁷ The habeas petitioner bears the burden of overcoming this presumption and, unless he or she can do so, there is no eighth amendment violation.⁷⁸

Justice White next considered the proper cause of action for a federal court faced with a habeas corpus petition raising an *Enmund* claim. The Court entertained two possibilities: the federal court itself could make the factual finding of culpability, or the federal court could require the state judicial system to make the factual findings.⁷⁹ Justice White opted for the latter, although he advocated that either alternative would remedy an eighth amendment violation because either choice would prohibit the execution of any defendant who had not killed, attempted to kill, or intended to kill.⁸⁰ In choosing the second course of action, it is evident that Justice White balanced underlying federalism concerns. He emphasized the respect which federal courts owe state courts as the primary protectors of defend-

74. *Id.*

75. *Id.*

76. *Id.* at 697-98.

77. 28 U.S.C. § 2254(d) (Supp. 1985). See *Sumner v. Mata*, 449 U.S. 539 (1981) (presumption of correctness applies to factual findings by both appellate and trial courts). *But see* 28 U.S.C. § 2254(d)(2) (requisite factual findings as to the defendant's culpability is presumed correct unless the respondent shall admit "that the fact finding procedure employed by the state courts was not *adequate* to afford a full and fair hearing" (emphasis added)). There might be instances, therefore, where the presumption would not apply to appellate fact-finding where such procedures were not adequate.

The *Bullock* Court conceded that the section 2254(d)(2) exception might exist, and attempted to cure this flaw in its argument by stating "it is by no means apparent that appellate fact finding will always be inadequate." See *infra* notes 90-94 and accompanying text. See generally Project, *Fourteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1983-84*, 73 GEO. L.J. 789 (1984) (examining the constitutional dimensions of habeas corpus relief).

78. *Bullock*, 106 S. Ct. at 698.

79. *Id.* at 699.

80. *Id.*

ants' rights.⁸¹

The *Bullock* Court, relying on its earlier position that the eighth amendment did not mandate a jury finding (as required in *Enmund*), explained that a new sentencing hearing before a jury would also be unnecessary in the state court proceedings.⁸² The Court, therefore, concluded that *Bullock's* sentence would stand, provided that the requisite findings were made in an "adequate proceeding before some appropriate tribunal—be it an appellate court, a trial judge, or a jury."⁸³

B. *The Dissent*

Justice Blackmun's dissent in *Bullock*⁸⁴ proposed that *Enmund* established a constitutionally required factual predicate for the imposition of the death penalty.⁸⁵ He asserted that *Enmund* focused on the individual defendant and his personal culpability⁸⁶ and that, before a sentencer can condemn a defendant to death, an *Enmund* finding must be made at the trial court level.⁸⁷ Justice Blackmun explained that *Bullock* was sentenced to die before the sentencer considered the fundamental issue of *Bullock's* culpability, which *Enmund* required. Justice Blackmun maintained that the only way to cure this violation was by providing a new sentencing hearing before a jury.⁸⁸

Justice Blackmun launched a magnificent attack upon the majority's refusal to acknowledge the institutional limits placed upon appellate courts. The dissent correctly cited *Caldwell v. Mississippi*⁸⁹ for the proposition that certain institutional limits restrain an appellate court's ability to determine whether a defendant should be sentenced to death.⁹⁰ *Caldwell* emphasized the significant factors that a jury might consider in its sentencing determination, and the defendant's constitutional right to consideration of such factors by sentencers who

81. See *Younger v. Harris*, 401 U.S. 37 (1971); *Jackson v. Denno*, 378 U.S. 368 (1964); *Rogers v. Richmond*, 365 U.S. 534 (1961).

82. *Bullock*, 106 S. Ct. at 700.

83. *Id.*

84. Justice Brennan and Justice Marshall joined Justice Blackmun's dissenting opinion.

85. *Bullock*, 106 S. Ct. at 702.

86. See *Enmund*, 458 U.S. at 801.

87. *Bullock*, 106 S. Ct. at 701.

88. *Id.* at 703. The dissent charged that the majority had misconstrued *Enmund* because it held that the death penalty would not be *carried out* before someone made an *Enmund* finding. In contrast, the dissent maintained that *Enmund* established a clear constitutional imperative that a sentencer who failed to make an *Enmund* determination could not impose the death penalty.

89. 105 S. Ct. 2633 (1985).

90. *Bullock*, 106 S. Ct. at 701.

are present to hear the evidence and see the witnesses.⁹¹ The majority failed to address the *Caldwell* decision, but nevertheless concluded that the Supreme Court of Mississippi was competent to make an *Enmund* finding based on the cold appellate record.⁹² Justice Blackmun was particularly disturbed by the majority's acknowledgment that the defendant's culpability could turn on credibility determinations that an appellate court could not accurately make.⁹³

In contrast to Justice White's reliance on *Spaziano v. Florida*⁹⁴ as binding precedent supporting the majority opinion, Justice Blackmun relied on *Spaziano* to support his dissenting opinion. Justice Blackmun explained that *Spaziano* concerned a Florida statute which made the trial judge responsible for imposing the sentence in a capital case. He concluded that a trial judge was more like a jury than an appellate court, and therefore was in a better position to ascertain a witness's demeanor and credibility.⁹⁵ The dissent asserted that mere appellate review of the sentence was inadequate, and it was imperative that each defendant receive individual consideration. Justice Blackmun concluded that the eighth amendment requires that the *Enmund* fact finder be present at the trial to see and hear the witnesses.⁹⁶ Moreover, it requires that the sentencer make the *Enmund* finding before it decides that a defendant must die.⁹⁷

IV. COMMENT

Throughout a long line of death penalty cases, the Supreme Court has emphasized the jury's function as the "guardian and articulator of society's moral code and conscience in the criminal trial."⁹⁸

91. *Caldwell*, 105 S. Ct. at 2640.

92. *Bullock*, 106 S. Ct. at 700-01. The Supreme Court of Mississippi examined the record below to determine "whether a reasonable jury *could* have concluded that Bullock killed, attempted to kill, or intended to kill," rather than whether Bullock actually did any of those things. *Id.* at 707.

The dissent asserted that merely saying Bullock might have acted with the requisite culpability did not satisfy *Enmund*. *Id.* at 708.

93. *Bullock*, 106 S. Ct. at 707-08. Cf. *Anderson v. Bessemer*, 105 S. Ct. 1504, 1512 (1985) (regarding credibility of witnesses, the trial judge is aware of variations in demeanor and tone of voice which has a great impact on the listener's understanding and belief in what is said).

94. See *supra* text accompanying note 68.

95. *Bullock*, 106 S. Ct. at 705.

96. *Id.* at 704.

97. *Id.*

98. Note, *Imposing the Death Sentence*, *supra* note 58, at 867; see, e.g., *Williams v. Florida*, 399 U.S. 78, 100 (1970) (essential feature of jury is the "interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence"); *Witherspoon v. Illinois*, 391 U.S. 510, 519-20, *reh'g denied*, 393 U.S. 898 (1968) (jury that must choose between life imprisonment and capital punishment must "express the

Recently, however, the Supreme Court has taken a step backward by deemphasizing this role.⁹⁹ *Cabana v. Bullock* illustrates the Supreme Court's willingness to further condone the diminishing role of the jury as sentencers in capital cases.

The imposition of the death penalty should reflect the will of the community.¹⁰⁰ Instead of reinforcing community values, however, *Bullock* poses a threat to the longstanding role that the jury has played in sentencing a defendant to death. The *Bullock* decision clearly presented two divergent interpretations of *Enmund*. The majority opined that the controversial decision did not concern the defendant's innocence or guilt.¹⁰¹ The dissent, on the other hand, asserted that *Enmund* mandated that the trial court consider the defendant's personal culpability before the sentencer condemned him or her to death.¹⁰²

Justice Blackmun primarily disagreed with the majority which allowed appellate courts to determine that a defendant possessed the requisite culpability.¹⁰³ Justice Blackmun further suggested the majority ignored the inherent institutional limits placed upon appellate courts.¹⁰⁴ Is the dissent's denouncement of the *Bullock* decision substantiated? A close reading of *Bullock* reveals that the majority explicitly stated that the sounder course of action would be for the

conscience of the community on the ultimate question of life or death" and "speak for the community"); cf. *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985) (defendant's death sentence vacated because prosecutor told jury that it need not bear final responsibility for sentencing defendant to death, because the state supreme court would review the sentence); *Coker v. Georgia*, 433 U.S. 584, 596-97 (1977) (demonstrating the use of jury behavior to explore contemporary community values).

99. See, e.g., *Spaziano v. Florida*, 104 S. Ct. 3154 (1984) (Constitution does not require that a jury's recommendation of life imprisonment be binding in capital cases).

100. For a discussion on the representativeness and competence of the jury, see Radelet, *supra* note 69, at 1424-27.

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

102. *Id.* at 707-08.

103. *Id.* at 701. The Court in *Caldwell v. Mississippi* closely mirrored Justice Blackmun's dissent. 105 S. Ct. 2633 (1985). Justice Marshall, writing for the majority in *Caldwell*, discussed the restraints on an appellate court's ability to determine whether defendants should be sentenced to death:

Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what the Court has termed [those] compassionate or mitigating factors stemming from the diverse frailties of humankind. When we held that a defendant has a constitutional right to the consideration of such factors, we clearly envisioned that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses.

Id. at 2640.

104. *Bullock*, 106 S. Ct. at 700.

state's own judicial system to make the factual findings in the first instance.¹⁰⁵ The majority's problem is not alleviated, however, because the judge is still making the factual determination, instead of the jury.

The dissent's reasoning becomes problematic when Justice Blackmun attempted to distinguish *Spaziano v. Florida*. He asserted that in *Spaziano* the trial judge was responsible for imposing the sentence in a capital case,¹⁰⁶ and that he was more like a jury than an appellate court in terms of viewing a witness's demeanor and credibility. Thus, the dissent conceded that a trial judge is capable of making the requisite factual determination as well as the jury could.

Which is the correct interpretation of *Enmund*? Prior to the *Bullock* decision, seven of the states that had addressed the *Enmund* issue concluded that the sentencer had to make *Enmund* findings *before* imposing the death sentence.¹⁰⁷ It is apparent that the various state supreme court interpretations were consistent with the *Bullock* dissent. It is interesting to note, however, that Justice White, who wrote the majority in *Bullock*, also wrote the majority opinion in *Enmund*. Thus, it is reasonable that the *Bullock* opinion represents the underlying intent of *Enmund*.¹⁰⁸

V. CONCLUSION

Does *Cabana v. Bullock* truly pose a serious threat to the jury's role in capital sentencing? Subsequent to *Bullock*'s trial, Mississippi passed legislation¹⁰⁹ delegating the task of determining a defendant's culpability to the jury. If every state enacts legislation providing for a jury determination regarding a defendant's culpability, the impact of *Bullock* will be minimal. Is the significance of the *Bullock* decision merely to send a message to state legislatures to enact statutes delegating the culpability determination to the jury? As a result of *Cabana v.*

105. *Id.* at 699.

106. See text accompanying notes 94 and 95.

107. *State v. McDaniel*, 136 Ariz. 188, 199, 665 P.2d 70, 81 (1983); *People v. Garcia*, 36 Cal. 3d 539, 556-57, 684 P.2d 826, 835-37, 205 Cal. Rptr. 265, 274-76 (1984); *Allen v. State*, 253 Ga. 390, 395 n.3, 321 S.E.2d 710, 715 n.3 (1984); *State v. Stokes*, 308 N.C. 634, 651-52, 304 S.E.2d 184, 195 (1983); *Hatch v. Oklahoma*, 662 P.2d 1377, 1382-83 (Okla. Crim. App. 1983); *State v. Peterson*, — S.C. —, —, 335 S.E.2d 800, 802 (1985); Miss. CODE ANN. § 99-19-191(7) (Supp. 1985).

108. *But cf.* *Lockett v. Ohio*, 438 U.S. 586 (1978) (requirements of "individualized consideration" as defined by *Lockett* were meant to apply at sentencing stage). The *Enmund* Court relied on its decision in *Lockett*, but nevertheless chose to interpret *Lockett*'s requirement as applicable at the guilt stage. See Comment, *supra* note 58, at 277-78.

109. See Miss. CODE ANN. § 99-19-101(7) (Supp. 1985).

Bullock, the states must take the step forward to reemphasize the jury's essential role in the death sentencing process.

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* Dedicated to my parents for their love and support. Without you, I never would have reached my academic goals.