Redefining a Culpable Mental State for Non-Triggermen Facing the Death Penalty

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Notes

REDEFINING A CULPABLE MENTAL STATE FOR NON-TRIGGERMEN FACING THE DEATH PENALTY

_Tison v. Arizona_

I. INTRODUCTION

On July 30, 1978, three brothers, Donald, Ricky, and Raymond Tison, entered an Arizona prison carrying an ice-chest filled with weapons which they gave to their inmate father Gary Tison and another prisoner. After escaping from the prison without firing a shot, the two fugitives robbed and brutally murdered a family of four while the Tison brothers stood by watching. When their flight was finally ended by a police roadblock, Raymond and Ricky Tison were apprehended and later convicted of felony murder for their participation in the escape and other crimes which preceded their father's lethal acts. Both brothers were sentenced to death.

Twenty-one states, including Arizona, allow trial courts, under certain circumstances, to impose the death penalty on a defendant found guilty of felony murder even though he or she had no intent to kill.

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2. 107 S. Ct. at 1679.

3. _Id._ At the time of the Tisons' convictions, Arizona's felony murder law provided that a defendant whose co-felon commits a killing during the course of a robbery or kidnapping was guilty of capital murder. _Id._ (citing _ARIZ. REV. STAT. ANN._ § 13-452 (1956) (repealed 1978)). The law was later recodified to include killings committed during escapes and in connection with several sex and drug offenses. See _ARIZ. REV. STAT. ANN._ § 13-1105(A)(2), (B) (1978 & Supp. 1987).

4. The Tisons were also charged with the murders, though not with capital murder, under Arizona's accomplice liability statute. 107 S. Ct. at 1679-80 (citing _ARIZ. REV. STAT. ANN._ § 13-139 (1956) (repealed 1978)). Generally speaking, accomplices are liable for the crimes of another if they give assistance or encouragement to that other for the purpose of bringing about the crime. _W. LaFave & A. Scott, Criminal Law_ § 6.7, at 576-86 (2d ed. 1986).


When a state imposes the death penalty on a defendant convicted of felony murder, the controversy surrounding the felony murder doctrine intensifies.\(^9\)

Against the backdrop of the Tison brothers’ convictions, the United States Supreme Court recently considered the problem of imposing the death penalty on felony murderers in *Tison v. Arizona*.\(^{10}\) Since neither brother killed nor specifically intended to kill, their case presented the difficult question of what criteria, if any, must be met regarding a non-triggerman’s\(^{11}\) mental state before a court can constitutionally take his or her life.\(^{12}\) With its decision in *Tison*, the Supreme Court has effectively established “reckless disregard for human life” as the minimum culpable mental state to warrant imposition of the death penalty on non-triggermen who were major participants in a felony during the course of which a killing took place.\(^{13}\)

This Note will first examine significant death penalty and felony murder decisions of the past fifteen years to set up an appropriate framework within which to analyze the *Tison* case. The Note will then focus on *Tison*, emphasizing its importance in relation to other recent Supreme Court opinions addressing the death penalty. Finally, this Note will discuss why the Court seems committed to preserving capital punishment for some felony murderers even without a finding of intent to kill and will offer, in light of the recent United States Supreme Court decision in *Cabana v. Bullock*,\(^{14}\) a critique of the present situation in which a felony murderer can be sentenced to death without a jury ever making a specific finding regarding his or her mental state.

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\(^{9}\) See Comment, The Constitutionality of Imposing the Death Penalty for Felony Murder, 15 Hous. L. Rev. 356, 385-86 (1978) (“[t]he objective indicia of a punishment’s consistency with public standards of decency, acceptance by legislatures and juries, point toward rejection of the death penalty for non-triggermen, whose involvement in the murder is based on vicarious homicidal liability”).

\(^{10}\) 107 S. Ct. 1676 (1987).

\(^{11}\) Throughout this Note, “non-triggermen” will be used to denote felony murder defendants. This name is used by both the Supreme Court and commentators in discussing the felony murderer who does not kill, attempt to kill or intend to kill. See, e.g., Comment, Intent After Enmund v. Florida: Not Just Another Aggravating Circumstance, 65 B.U.L. Rev. 809 (1985); Note, Imposing the Death Sentence for Felony Murder on a Non-Triggerman, 37 Stan. L. Rev. 857 (1985); Case-note, Eighth Amendment—The Death Penalty and Vicarious Felony Murder: Non-Triggermen May Not be Executed Absent a Finding of Intent to Kill, 73 J. Crim. L. & Criminology 1553 (1982).

\(^{12}\) 107 S. Ct. at 1672.

\(^{13}\) Id. at 1688. By setting this standard, the Court altered what many critics thought was an absolute “intent to kill” requirement set forth in *Enmund* v. Florida, 458 U.S. 782 (1982). For a discussion of *Enmund* and its pre-*Tison* implications, see infra notes 61-67 and accompanying text.

\(^{14}\) 474 U.S. 376 (1986).
II. BACKGROUND

A. The United States Supreme Court's Consideration of Major Constitutional Attacks on the Death Penalty


In 1972, the United States Supreme Court considered the constitutionality of capital punishment in Furman v. Georgia.\(^\text{15}\) Although the Furman Court did not find that infliction of the death penalty per se violates the eighth and fourteenth amendments’ ban on cruel and unusual punishment,\(^\text{16}\) it did hold that the death penalty could not be imposed on the petitioners in that case.\(^\text{17}\) In a per curiam decision representing the conclusions of five justices, the Furman court invalidated all state death penalty statutes which gave the finder of fact authority to decide in one proceeding both whether a defendant was guilty or innocent and whether he should be sentenced to death.\(^\text{18}\)

All members of Furman's concurring majority filed separate opinions. Justices Brennan and Marshall each found that the death penalty constituted cruel and unusual punishment, thereby violating the eighth and fourteenth amendments.\(^\text{19}\) Justices Douglas, White, and Stewart, while agreeing that the statutes in question imposed systems of cruel and unusual punishment, refused to condemn the penalty outright and

\(^{15}\) 408 U.S. 238 (1972).
\(^{16}\) U.S. Const. amend. VIII. The eighth amendment states simply that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Id. (emphasis added). The fourteenth amendment operates to make the eighth amendment applicable to the states by providing that no state can “deprive any person of life, liberty or property, without due process of law.” Id. amend. XIV. For a discussion of the interaction between these two amendments within the criminal law context, see S. KADISH, S. SCHULHOFER, & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 17-19 (4th ed. 1983).
\(^{17}\) 408 U.S. at 239-40. In Furman, two petitioners were sentenced to death; one for murder, the other for rape in accordance with Georgia law. Id. at 240. A third was sentenced to die for rape under Texas law. Id. All three petitioners were sentenced by juries who had statutory authority to decide whether or not to impose the death penalty at the same time they determined the defendant’s innocence or guilt. Id. The Court held that to impose the death penalty under these circumstances would constitute cruel and unusual punishment in violation of the eighth and fourteenth amendments. Id. at 239-40.

\(^{18}\) Id. The per curiam decision constitutes a single paragraph in which the Court simply held that the death penalty, when administered under schemes like that of Georgia and Texas, violates the eighth and fourteenth amendments’ ban on cruel and unusual punishment. Id. at 240. Each judge filed a separate concurring or dissenting opinion.

\(^{19}\) Id. at 257 (Brennan, J., concurring) (describing death penalty as “fatally offensive to human dignity” and therefore contrary to requirements of eighth and fourteenth amendments), 306 (Marshall, J., concurring) (eighth and fourteenth amendments cannot tolerate imposition of death penalty since it is so wantonly and freakishly imposed).
directed their criticism to statutes which gave the judge or jury unlimited discretion to impose death on capital defendants.20

Ultimately this problem of uncontrolled discretion in capital sentencing survived as the key to Furman.21 Because almost every state allowing capital punishment had statutes similar to Georgia's at the time of Furman, legislators quickly set to work to bring their newly invalidated laws into line with the Court's holding. Generally, two types of revised statutes emerged. The first type of statute, which imposed mandatory death sentences for particular crimes, was quickly invalidated by the Court.22 The second type provided the sentencer with "guided discretion" by codifying the aggravating circumstances which if found, might

20. Id. at 240 (Douglas, J., concurring) (discretionary statutes are unconstitutional in their operation and their sentences were pregnant with discrimination—an idea not to be tolerated under Equal Protection), 306 (Stewart, J., concurring) (denouncing statute's wanton and freakish imposition of death penalty), 310 (White, J., concurring) (criticizing delegation of sentencing authority to jury which is then free to refuse to impose death penalty despite circumstances of crime).


22. See, e.g., Lockett v. Ohio, 438 U.S. 586 (1978) (invalidating Ohio death penalty statute which imposed mandatory death penalty on defendants guilty of aggravated murder unless sentencing judge finds one of three mitigating factors); Roberts v. Louisiana, 428 U.S. 325 (1976) (invalidating mandatory death sentences for defendants who murder policemen); Woodson v. North Carolina, 428 U.S. 280 (1976) (invalidating mandatory death sentence for first degree murderers). Lockett and Woodson both involved defendants convicted of felony murder and sentenced to death for killings committed by another. Lockett, 438 at 590-91; Woodson, 428 U.S. at 283-84. Though the Court did not address the constitutionality of the death penalty under these circumstances in either case, the Lockett Court implied that insufficient proof as to the defendant's mental state would be relevant as a mitigating factor. Lockett, 438 U.S. at 608.
This second type was sanctioned by the statute.

23. See, e.g., Ga. Code Ann. § 27-2534.1 (1975) (repealed 1982). Georgia’s revised death penalty statute was typical of the post-"Furman" guided discretion statutes:

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.
(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

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

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

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

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

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

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

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

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

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

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

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.

Id.

This statute was affirmed by the Court in Gregg v. Georgia, 428 U.S. 153
tioned by the Court and quickly became the norm for many state death penalty statutes.24

2. Affirming the "Guided Discretion" Model for Capital Sentencing through Eighth Amendment Proportionality Analysis: Gregg v. Georgia

In 1976, the Supreme Court's decision in Gregg v. Georgia25 affirmed Georgia's "guided discretion" death penalty statute and provided important direction to states in the wake of Furman's ambiguous holding.26 After framing the initial issue in the case as whether "the punishment of death for the crime of murder is, under all circumstances, 'cruel and unusual' [punishment] in violation of the Eighth and Fourteenth Amendments,"27 the plurality concluded that "the punishment of death does not invariably violate the constitution."28 Specifically rejecting the petitioner's claim that the death penalty violated his rights under the eighth amendment, the Court applied an imprecise "proportionality" analysis comparing the ultimate harshness of the death penalty to the seriousness of the petitioner's crime.29 Prior to Gregg, the Court had only rarely considered the proportionality question, preferring instead to defer to the judgment of state legislators regarding which punishments were appropriate for particular crimes.30

(1976). The Georgia Code has since been revised and renumbered. The relevant section is now at § 17-10-30 (1982).


25. 428 U.S. 153 (1976). In Gregg, the jury convicted the defendant on two counts of armed robbery and two counts of murder. Id. at 160. In a separate penalty hearing provided for in Georgia's amended (post-Furman) statute, the jury found two statutory aggravating factors, no mitigating factors, and thus sentenced the defendant to death. Id. at 161; see Ga. Code Ann. §§ 26-1101 (1972), 26-1902 (1972) (repealed 1982). On appeal, the Georgia Supreme Court vacated the sentence with regard to the robbery conviction, but upheld imposition of the death penalty for the murder convictions. Gregg v. State, 233 Ga. 117, 210 S.E. 659 (1974).


27. Gregg, 428 U.S. at 168.

28. Id. at 187.

29. Id.

30. See D. FELLMAN, THE DEFENDANT'S RIGHTS TODAY 400-02 (1976) (listing punishments which have not been invalidated as excessive); Note, The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment 36
Addressing the crime of murder, the Court noted three reasons why contemporary society accepts the death penalty as an appropriate punishment for murder: (1) the death penalty for murderers has a long history of acceptance in the United States and Great Britain; (2) 35 states enacted new death penalty statutes after Furman; and (3) the death penalty accomplishes society’s goals of deterrence and retribution. The significance of the proportionality analysis and of these factors.

N.Y.U.L. Rev. 846, 852 (1961) (documenting general court tendency to avoid invalidating sentences as excessive); see also Weems v. United States, 217 U.S. 349 (1910) (sentence of 15 years hard labor, constant enchaining, permanent loss of property rights and continual surveillance for life, disproportionate to crime of falsifying official record).

31. For a discussion of these reasons within a general discussion of the eighth amendment, see LaFave & Scott, supra note 3, § 2.14, at 178.

32. 428 U.S. at 176-78 (citing acceptance of capital punishment by framers of Constitution as well as nearly two centuries of acceptance of capital punishment for crime of murder).

33. Id. at 179-80. For further discussion of legislative attitudes and their effect on American death penalty jurisprudence after Gregg, see infra notes 44, 58, 101 and accompanying text.

34. 428 U.S. at 183. The opinion of Justices Stewart, Powell and Stevens discusses the retribution justification as follows:

In part, capital punishment is an expression of society’s moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs. “The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve’, then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.”

“Retribution is no longer the dominant objective of the criminal law,” but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

Id. at 183-84 (citations and footnotes omitted).

In the same opinion the Justices discussed the deterrent principle and its operation in the death penalty debate:

Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.

The value of capital punishment as a deterrent of crime is a com-
tors within that analysis would be developed in ensuring death penalty cases. For its purposes, however, the Gregg Court was content to conclude that the death penalty was not a disproportionate penalty to impose on someone who had intentionally taken the life of another.\textsuperscript{35}

The Court also examined the Georgia statute itself to determine whether its capital sentencing provisions violated the eighth and fourteenth amendments.\textsuperscript{36} The Georgia statute provided the following new sentencing procedures: (1) a required jury finding of one of ten aggravating factors before a defendant could receive a death sentence; (2) an unconditional right of the jury to recommend mercy without regard for aggravating circumstances; and (3) an automatic appeal of death sentences to the Georgia Supreme Court for examination of evidence and proportionality.\textsuperscript{37} The Court concluded that the Georgia statute was constitutional and within the spirit of Furman which prohibited only death penalty procedures that allowed the jury to condemn prisoners to death capriciously and arbitrarily.\textsuperscript{38} The Court found that under Georgia's new death penalty statute, the jury could not impose the death sentence "wantonly and freakishly" since it was directed by specific legislative guidelines.\textsuperscript{39} By specifying the concept of proportionality as a crucial factor in analyzing the constitutionality of the death penalty.

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plex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. Indeed, many of the post-Furman statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent.

\textit{Id.} at 185-86 (citations and footnotes omitted).

35. \textit{Id.} at 187. In rejecting the petitioner's claim that the death penalty was disproportionate as applied to him, the Court stated:

There is no question that death as a punishment is unique in its severity and irrevocability. When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed. But we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been deliberately taken by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes.

\textit{Id.} (citations and footnotes omitted).

36. \textit{Id.} at 196-207. The Court examined the new sentencing statute in light of the Furman decision and the eighth and fourteenth amendments' prohibition of cruel and unusual punishment and determined that it was constitutionally sound.\textit{Id.}

37. \textit{Id.} at 196-98. For further discussion of these factors, see LAFAYE & SCOTT, supra note 3, § 2.14, at 178.

38. 428 U.S. at 206. With this statement, the Gregg court effectively set the speculative limits of the Furman decision. \textit{Id.} Furman does not forbid imposition of the death penalty, but rather forbids the imposition of the death penalty under statutes which allow for its arbitrary and capricious infliction. \textit{Id.} For a discussion of Furman, see supra notes 15-24 and accompanying text.

39. 428 U.S. at 206-07. The effect of these new legislative guidelines was to
and capital sentencing statutes under the eighth amendment, the Gregg Court raised what was to become the most serious modern challenge to the whole idea of capital punishment.\textsuperscript{40} Although the Court failed to fully develop the proportionality concept in Gregg, the decision left open the controversial issue of whether capital punishment was appropriate for any crime apart from intentional murder.

3. Using Proportionality Analysis to End Capital Sentencing of Rapists: Coker v. Georgia

The eighth amendment proportionality analysis introduced in Gregg reappeared one year later in Coker v. Georgia.\textsuperscript{41} In Coker, a plurality of the Justices held that the death penalty was disproportionate to the crime of rape, and thus violative of the eighth and fourteenth amendments.\textsuperscript{42} By invalidating an instance of capital punishment solely on grounds of disproportionality under the eighth and fourteenth amendments, the Coker decision firmly established proportionality as a serious challenge to death penalty statutes and a new avenue of attack for critics of capital punishment.\textsuperscript{43} In framing the plurality’s proportionality analysis, Justice White examined the historical, legislative and judicial contexts against which the death penalty for rape existed and concluded that capital punishment was an excessive punishment for that particular crime.\textsuperscript{44}

“focus the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant.” \textit{Id.} at 206.

\textsuperscript{40} For a discussion of the major proportionality cases which followed Gregg, see infra notes 41-114 and accompanying text.

\textsuperscript{41} 433 U.S. 584 (1977). Coker, after escaping from a Georgia prison where he was serving life terms for murder, rape, kidnapping and aggravated assault, raped a woman in the course of burglarizing her house. \textit{Id.} at 587. Coker was sentenced to death according to Georgia law which provided that rape was punishable by death, life imprisonment or imprisonment for between one and twenty years. \textit{Id.} at 586-91 (citing GA. CODE ANN. \S\ 26-2001 (1972) (repealed 1982)).

\textsuperscript{42} For a detailed discussion of Coker and its place in the context of eighth amendment challenges to the death penalty, see Comment, supra note 9, at 356-61.

\textsuperscript{43} See, Radin, The Jurisprudence of Death: Evolving Standard for the Cruel and Unusual Punishment Clause, 126 U. PA. L. REV. 989, 1062 (1978) (analyzing Coker and its contribution to constitutional standards of review and concluding that, if applied rightfully, the Coker standard would invalidate the death penalty in all cases); The Supreme Court, 1976 Term, 91 HARV. L. REV. 70, 128 (1977) (observing Coker raises doubts as to whether death penalty can be imposed for hijacking, treason and other crimes against masses of people).

\textsuperscript{44} 433 U.S. at 592-99. Writing for a plurality of the Court, Justice White observed:

\begin{quote}
Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the
\end{quote}
B. The Death Penalty and the Felony Murderer

1. Narrowing Application of the Death Penalty to Felony Murderers through Specific Mental State Requirements: Enmund v. Florida

In Enmund v. Florida, the United States Supreme Court first applied its post-Furman jurisprudence specifically to defendants sentenced to die for participation in felonies in which a felon other than the defendant takes life. According to the Court, Earl Enmund waited in a getaway car outside the home of Thomas and Eunice Kersey while Sampson and Jeanette Armstrong, Enmund’s accomplices, carried out the plan to rob the elderly residents. During the robbery, Sampson Armstrong killed the Kerseys and fled with Jeanette in the getaway car driven by Enmund.

Enmund was tried along with Sampson Armstrong and convicted under Florida’s felony murder statute. At a separate sentencing hearing, the jury, without written findings, advised the judge to seek the death penalty. On appeal, the Florida Supreme Court remanded the case for written findings as required by Florida’s death penalty statute. On remand, the trial judge found four statutory aggravating circumstances and no mitigating circumstances. Enmund was sentenced to

rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which “is unique in its severity and irrevocability,” is an excessive penalty for the rapist who, as such, does not take human life.

Id. at 598 (footnote and citation omitted).


46. This class of felons includes many of those convicted under state felony murder statutes. For a discussion of the felony murder doctrine, see supra notes 5-9 and accompanying text. For a general discussion of Enmund and its holding, see Comment, supra note 11; Note, supra note 11; Casenote, supra note 11; Case-note, Constitutional Law—The Eighth Amendment Prohibits the Penalty of Death for One Who Neither Took Life, Attempted or Intended to Take Life, Nor Contemplated that Life Would be Taken, 28 VILL. L. REV. 173 (1982).

47. 458 U.S. at 784. When Thomas Kersey answered the Armstrongs’ knock, Sampson Armstrong grabbed the elderly man who immediately cried out for help. Id. Responding to her husband’s call, Eunice Kersey shot and wounded Jeanette Armstrong. Id. Sampson, and perhaps Jeanette, then shot and killed both Kerseys, dragged them into the kitchen, and fled with their money. Id. Enmund drove the getaway car. Id.

48. Id. at 784-85. It is unclear whether Jeanette Armstrong also shot at the Kerseys. Id. at 784.

49. Id. at 785 (citing FLA. STAT. ANN. § 782.04(1)(a) (1976)).

50. Id. Florida’s post-Furman death penalty statute provided for a bifurcated trial of the type sanctioned by the Court in Gregg. Id. Under the statute, Enmund was convicted of two counts of first-degree murder and, at a separate hearing, the jury recommended the death penalty. Id. For a discussion of the Gregg case, see supra notes 24-40 and accompanying text.

51. 458 U.S. at 785 (citing FLA. STAT. ANN. § 921.141(3) (1981)).

52. Id. The trial judge found the following aggravating circumstances: (1) that the murder was committed while Enmund was an accomplice in an
death on two counts of first degree murder.\(^5\) Although the Florida Supreme Court rejected two of the trial court's aggravating circumstances, it finally affirmed Enmund's death sentence based on the remaining aggravating circumstances.\(^5\) In doing so, the Florida court stated that "the felony murder rule and the law of principles combine to make a defendant generally responsible for the lethal acts of his felon."\(^5\) The United States Supreme Court granted Enmund's writ of certiorari to consider "whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life."\(^5\)

In its majority decision, the Supreme Court reversed Enmund's capital sentence after applying a proportionality analysis which incorporated the criteria set forth in Gregg and Coker.\(^5\) After a survey of state statutes, the Court found that only eight allowed capital punishment "solely because the defendant somehow participated in a robbery in the

armed robbery; (2) that the capital felony was committed for pecuniary gain; (3) that the murder was especially heinous, atrocious or cruel; and (4) that Enmund had a previous conviction for a felony involving violence. \textit{Id.} (citing FLA. STAT. ANN. § 921.141(b), (d), (f) & (h) (1981)).

53. \textit{Id.} Under the Florida Statute, first degree murder is defined as follows: (1)(a) The unlawful killing of a human being:
   1. When perpetrated from a premeditated design to effect the death of the person killed or any human being; or
   2. When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any:
      a. Trafficking offense prohibited by § 893.155(1),
      b. Arson,
      c. Sexual battery,
      d. Robbery,
      e. Burglary,
      f. Kidnapping,
      g. Escape,
      h. Aggravated child abuse,
      i. Aircraft piracy, or
      j. Unlawful throwing, placing, or discharging of a destructive device or bomb; or
   3. Which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user, is murder in the first degree and constitutes a capital felony, punishable as provided in § 775.082.

FLA. STAT. ANN. § 782.04 (1976).

54. 458 U.S. at 787.


56. 458 U.S. at 787.


For a discussion of \textit{Gregg}, see \textit{supra} notes 25-40 and accompanying text. For a discussion of \textit{Coker} and its proportionality analysis, see \textit{supra} notes 41-44 and accompanying text.
were to changing to a point in which the death penalty for felons who neither kill, attempt to kill nor intend to kill was disproportionate and violated the requisite standards of individual culpability set forth in previous cases. Finally, the Court concluded that giving Enmund the same punishment as Sampson Armstrong, who in fact killed the Kerseys, frustrated any legitimate retributive or deterrent interest society might have in punishing criminal offenders. Summarizing the Court's analysis, Justice White reasoned that "the Eighth Amendment prohibits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Unhappy with what she thought was the Court's imposition of an intent requirement on the states before they could sentence felony murderers to death, Justice O'Connor led the dissenters. She attacked the course of which a murder was committed." Beyond this, the Court noted that society's standards, as reflected in jury decisions, were evolving to a point where the death penalty for felons who neither kill, attempt to kill nor intend to kill was disproportionate and violated the requisite standards of individual culpability set forth in previous cases. Finally, the Court concluded that giving Enmund the same punishment as Sampson Armstrong, who in fact killed the Kerseys, frustrated any legitimate retributive or deterrent interest society might have in punishing criminal offenders. Summarizing the Court's analysis, Justice White reasoned that "the Eighth Amendment prohibits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Unhappy with what she thought was the Court's imposition of an intent requirement on the states before they could sentence felony murderers to death, Justice O'Connor led the dissenters. She attacked
failure of the plurality to consider the harm caused by the defendant's criminal action along with his mens rea in determining whether capital punishment was appropriate.\textsuperscript{63} Such an intent requirement, she reasoned, "not only interferes with state criteria for assessing legal guilt," but also interferes with the sentencer's own unique ability to assess the individual circumstances of each defendant.\textsuperscript{64} Although Justice O'Connor saw the defendant's mental state as essential to determining the proper punishment, it was not, for her, "so critical a factor in determining blameworthiness as to require a finding of intent to kill in order to impose the death penalty for felony murder."\textsuperscript{65}

Whatever significance the \textit{Enmund} holding was meant to have, state courts and commentators differ dramatically in their views as to what effect the decision ought to have on courts dealing with felony murderers.\textsuperscript{66} Despite its unclear language, however, the \textit{Enmund} majority, as several commentators suggest, seems concerned with two problems over which the state courts differ: (1) the importance of individual culpability for the imposition of capital punishment on convicted felony murderers, and (2) the importance of the jury's role in determining whether a culpable mental state is factually present for one convicted and otherwise deserving of a capital sentence.\textsuperscript{67}

\textsuperscript{63} 458 U.S. at 823 (O'Connor, J., dissenting). Justice O'Connor criticized the majority's failure to explain why the eighth amendment concept of proportionality requires rejection of standards of blameworthiness based on levels of intent, other than intent to kill. \textit{Id.} (O'Connor, J., dissenting). Specifically, Justice O'Connor pointed to the intent to commit an armed robbery, coupled with the knowledge that armed robberies involved substantial risk of death to others, as a level of intent sufficient to impose the death penalty. \textit{Id.} (O'Connor, J., dissenting).

\textsuperscript{64} \textit{Id.} (O'Connor, J., dissenting).

\textsuperscript{65} \textit{Id.} at 825 (O'Connor, J., dissenting). Justice O'Connor did, however, agree that the case should be remanded for a new sentencing hearing since the Florida Supreme Court rejected factual findings critical to the trial court's death penalty verdict. \textit{Id.} at 827-31 (O'Connor, J., dissenting).

\textsuperscript{66} For a discussion of the diverse state court interpretations of \textit{Enmund}'s mental state requirement, see supra note 57 and accompanying text.

\textsuperscript{67} See Comment, supra note 11 (noting dual proposition suggested in text and offering thoughtful proposals for clarification of problem areas); Note, supra note 11, at 869-83 (same).
2. Limiting the Jury’s Role in Determining the Non-Triggerman’s Mental State: Cabana v. Bullock

Clarification of the jury’s role, the second of the Enmund Court’s two concerns, came quite recently with the Court’s decision in Cabana v. Bullock. Writing for the Cabana majority, Justice White concluded that the eighth amendment does not require the jury to make a specific determination of a felony murderer’s mental state as long as the determination is made at some point in the state’s procedural process. According to Cabana, when confronted with a petition for habeas corpus, in a case for which the jury has not considered the defendant’s mental state, a federal district court should remand the case to the state courts for this determination, but the jury need never become involved. Thereafter, if the mental state determination is made by an appellate court, a judge, or a jury, the federal court must accept that determination as a matter of federal law.

68. 474 U.S. 376 (1986). Respondent Crawford Bullock was found guilty of capital murder under a Mississippi law which made killings during the course of robbery or attempted robbery capital murder. Id. at 381. According to the Court, Bullock assisted his friend, Ricky Tucker, while Tucker repeatedly beat Mark Dickson about the head after an argument. Id. at 379. Bullock helped Tucker dispose of Dickson’s body and kept Dickson’s car for his own use. Id. The jury recommended the death sentence for Bullock, finding two statutory aggravating circumstances and no mitigating circumstances. Id. at 381. On appeal, the Mississippi Supreme Court rejected Bullock’s argument that his limited involvement in the murder made the death penalty disproportionate. Id. The United States Court of Appeals for the Fifth Circuit, assuming that Enmund required a jury finding of “intent to kill” before imposing capital punishment, reversed Bullock’s death sentence finding that the jury might never have considered Bullock’s mental state. Id. at 382. The Supreme Court granted certiorari to resolve a conflict among the circuit courts as to which point during a state’s procedural system the requirements of Enmund must be satisfied. Id.

69. Id. at 392. Justice White concluded:

The proceeding that the state courts must provide Bullock need not take the form of a new sentencing hearing before a jury. As indicated above, the Eighth Amendment does not require that a jury make the findings required by Enmund. Moreover, the sentence currently in force may stand provided only that the requisite findings are made in an adequate proceeding before some appropriate tribunal—be it an appellate court, a trial judge, or a jury. A new hearing devoted to the identification and weighing of aggravating and mitigating factors is thus, as far as we are concerned, unnecessary.

Id. (footnotes omitted).

70. Id. at 392.

71. Id. at 390-92 (citing 28 U.S.C. § 2254(d) (1948)). Section 2254(d) provides:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be
3. Readdressing Minimum Mental State Requirements in the Sentencing of Non-Triggerman to Death: Tison v. Arizona

_Tison v. Arizona_ 72 presented the Court with its first opportunity to examine and clarify the minimum culpable mental state required for imposition of the death penalty on non-triggermen. On July 30, 1978, the three Tison brothers, Donald, Ricky, and Raymond, entered the Arizona State Prison at Florence and gave weapons to their convict father, Gary, and his co-inmate, Randy Greenwalt. 73 After fleeing the prison without exchanging fire, the five headed toward Flagstaff, Arizona. 74 Along the way, the group flagged down a passing motorist to replace

presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

1. that the merits of the factual dispute were not resolved in the State court hearing;
2. that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
3. that the material facts were not adequately developed at the State court hearing;
4. that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
5. that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
6. that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
7. that the applicant was otherwise denied due process of law in the State court proceeding;
8. or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall vest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

73. _Id._ at 1678. Gary Tison was serving a life sentence for a previous escape attempt during the course of which he killed a prison guard. _Id._ Randy Greenwalt was also a convicted murderer. _Id._ The Tison family, including Gary's wife Dorothy, brother Joe, and three sons, Ricky, Raymond, and Donald, had planned the escape and had collected the arsenal of weapons which the three brothers took into the prison. _Id._
74. _Id._
their broken-down automobile.\textsuperscript{75} Gary Tison held the driver, John Lyons, and his family at gunpoint and then ordered his sons to get the captives some water from the Lyons' car.\textsuperscript{76} Despite some discrepancy in the brothers' testimony, the trial court found that Ricky and Raymond Tison watched their father and Greenwalt murder the family with repeated shotgun blasts, and that neither brother attempted to help the victims.\textsuperscript{77}

After fleeing the bloodbath, the fugitives were finally stopped at a police roadblock several days later.\textsuperscript{78} Donald Tison was killed in a shootout with the police and Gary Tison fled into the desert where he subsequently died of exposure.\textsuperscript{79} Raymond and Ricky Tison, as well as Randy Greenwalt, were jointly tried and convicted for the crimes surrounding the prison break and final shootout.\textsuperscript{80} Each was tried separately for the four murders, armed robbery, kidnapping, and car theft.\textsuperscript{81}

Raymond and Ricky Tison were charged with capital murder in accordance with Arizona's felony murder\textsuperscript{82} and accomplice liability\textsuperscript{83} statutes. Both were convicted and later sentenced by a procedure which provided for the consideration of various aggravating and mitigating circumstances delineated in the Arizona death penalty statute.\textsuperscript{84} The sentencing judge found three statutory aggravating circumstances: (1) the

\textsuperscript{75} Id. Randy Tison stood by the broken-down car to flag down a motorist while the other men lay hidden by the side of the road. Id. at 1678-79.

\textsuperscript{76} Id. at 1679. John Lyons was travelling with his wife, Donnelda, his two year old son, Christopher, and fifteen year old niece, Theresa. Id. The four armed men emerged from the side of the road and forced the family into the back of the Lincoln. Id. After driving both cars off the main road, Gary Tison ordered the family to stand in the headlights of the Lincoln while the other men transferred their belongings from their Lincoln to the Lyons' Mazda. Id. Gary Tison then directed Raymond to drive the Lincoln further into the desert after which he fired his shotgun into the car's radiator. Id. The Lyons family was then conducted to the new sight and again forced to stand in the Lincoln's headlights. Id. Throughout this time, John Lyons pleaded with his captors to leave him and his family unharmed. Id.

\textsuperscript{77} Id. Raymond Tison reported being at the Mazda getting water when the first shots were fired. Id. Ricky Tison stated that he and Raymond had already returned with the water jug and given it to their father when the first shots were fired. Id.

\textsuperscript{78} Id.

\textsuperscript{79} Id.

\textsuperscript{80} Id.

\textsuperscript{81} Id.

\textsuperscript{82} Id. (citing \textsc{Ariz. Rev. Stat. Ann.} § 13-452 (1956) (repealed 1978)). For a brief discussion of Arizona's felony murder law, see \textit{supra} note 3 and accompanying text.

\textsuperscript{83} 107 S. Ct. at 1679 (citing \textsc{Ariz. Rev. Stat. Ann.} § 13-139 (1956) (repealed 1978)). For a discussion of Arizona's accomplice liability statute and accomplice liability generally, see \textit{supra} note 3 and accompanying text.

brothers created a grave risk of death to others; (2) the murders were committed for pecuniary gain; and (3) the murders were especially heinous. The judge also found that the “participation of each [petitioner] in the crimes giving rise to application of the felony murder rule was very substantial.” Based on these findings, Raymond and Ricky Tison were sentenced to death.

The Arizona Supreme Court on automatic appeal rejected the “grave risk of death” findings, but affirmed the death penalty on the “pecuniary gain” and “heinousness” factors alone. Significantly, the Arizona Supreme Court also found that the brothers had not specifically intended to kill, but that their continued participation in the prison break and the crimes incident to the prison break were actions culpable enough to justify the death sentence. The Supreme Court denied the Tisons’ petition for certiorari in 1982.

After the Supreme Court’s decision in Enmund v. Florida, the petitioners again attacked their death sentences by arguing in post-conviction proceedings that Enmund required a finding of intent to kill—a mental state specifically found lacking on their first appeal. The Arizona Supreme Court, despite its earlier finding of no intent, nonetheless affirmed the Tisons’ death sentence, holding that the Enmund intent requirement was satisfied since each Tison “could anticipate the use of lethal force during [the] attempt to flee confinement.” The United States Supreme Court granted certiorari in order to examine the Arizona Supreme Court’s application of Enmund and to clarify the Enmund holding in the face of varying state interpretations.

With an analysis closely tracing that of Coker, Cabana and Enmund, Justice O’Connor’s majority opinion vacated the judgments of the lower court and remanded the case. After outlining the facts of the Tison

85. 107 S. Ct. at 1680.
86. Id. (quoting App. 284-85). The judge also found three non-statutory mitigating circumstances: (1) the age of the defendants (Raymond, 19; Ricky, 20); (2) neither had prior felony records; and (3) each had been convicted under the felony murder rule. Id.
87. Id.
89. Id. at 1681.
90. Id. at 1680 (citing Tison v. Arizona, 459 U.S. 882 (1982)).
91. For a discussion of Enmund, see supra notes 45-67 and accompanying text.
92. Tison, 107 S. Ct. at 1680.
94. Id. at 1681-82. For a discussion of the various state court interpretations of Enmund, see supra note 62 and accompanying text.
95. 107 S. Ct. at 1688. The case was remanded in order to determine whether the defendants acted with reckless indifference to human life—the second part of the Tison test, to determine if a non-triggerman may be sentenced to
case, Justice O'Connor immediately qualified the Court's holding in Enmund. She stated that the Enmund holding applied only to "two distinct subsets of all felony murders": (1) those in which the defendant was a minor participant in an armed robbery, and for whom the death penalty was inappropriate, and (2) those in which the felony murderer actually killed, attempted to kill, or intended to kill, and for whom the death penalty was appropriate. Having set the parameters of its decision in Enmund, the Court then noted its dissatisfaction with the Arizona Supreme Court's interpretation of the Enmund intent requirement as satisfied merely if the defendant intends, contemplates, or anticipates that "lethal force would or might be used, or that life would or might be taken in accomplishing the underlying felony." The Tison case, the Court reasoned, fell into neither of Enmund's two distinct categories since the record supported a finding that neither brother specifically intended to kill, although both were major participants in the escape and other crimes surrounding the murder of the Lyons family. Categorizing Tison as a middle case, falling somewhere between the categories discussed in Enmund, the Court formulated the issue as "whether the Eighth Amendment prohibits the death penalty in the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life."

The Tison Court began its proportionality analysis with a survey of state legislatures and their judgments on defendants who do not intend to kill, but who act with reckless indifference to human life during the course of a felony in which another felon takes life. Of the states which allowed the death penalty for felony murder, the Court found four which required a showing of "recklessness or extreme indifference to human life" before the death penalty could be imposed on felony murderers, two which required "substantial participation" in the fel-
mony by the defendant,103 and six, including Arizona, which took "minor participation" in the felony into account as a mitigating factor.104 In addition to these, the Court found that six states allowed the death penalty for felony murder simpliciter,105 and three required an additional aggravating factor beyond mere participation in the felony before capital punishment could be imposed.106 Finally, the Court noted that only eleven states which authorized capital punishment in some instances forbid its imposition when the defendant acted with reckless disregard for human life.107 Having completed its survey, the Court concluded that "our society does not reject the death penalty as grossly excessive under these circumstances."108

The Tison majority next reviewed state judicial interpretations and noted "an apparent consensus that substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an intent to kill."109 Additionally, the Court considered the facts of Tison against its survey of state legislative and judicial judgments first by emphasizing the importance of mental state in determining the culpability of criminal defendants generally.110 Despite its reverence for mens rea with regard to criminal sentencing, however, the Court noted that an intent requirement was "a highly unsatisfactory means of definitely distinguishing the most culpable and dangerous murderers."111 In passages which largely echo her

ware, Kentucky, and Illinois. For a discussion of these statutes, see supra note 5 and accompanying text.

103. 107 S. Ct. at 1685 n.6. The relevant jurisdictions are Connecticut and the federal courts. For a discussion of these statutes, see supra note 5 and accompanying text.

104. 107 S. Ct. at 1685 n.7. The relevant states are Arizona, Colorado, Indiana, Montana, Nebraska, and North Carolina. For a discussion of these statutes, see supra note 5 and accompanying text.

105. 107 S. Ct. at 1685-86 n.8. The relevant states are California, Florida, Georgia, South Carolina, Tennessee, and Wyoming. For a discussion of these statutes, see supra note 5 and accompanying text.

106. 107 S. Ct. at 1686 n.9. The relevant states are Idaho, Oklahoma, and South Dakota. For a discussion of these statutes, see supra note 5 and accompanying text.

107. 107 S. Ct. at 1686 n.10. The relevant states are Alabama, Louisiana, Mississippi, Nevada, New Mexico, New Jersey, Ohio, Oregon, Texas, Utah, and Virginia. For a discussion of these statutes, see supra note 5 and accompanying text.

108. 107 S. Ct. at 1686 (emphasis supplied by the Court) (citing substantial and recent authorization of death penalty for crime of felony murder regardless of absence of finding of intent to kill).

109. Id.

110. Id. at 1687. The Court cited Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), to point out the importance of mental state in assessing culpability under guided discretion statutes. Id. For a discussion of Lockett, see supra note 22.

111. 107 S. Ct. at 1687. Justice O'Connor noted that some nonintentional murderers may be among the most dangerous and

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dissent in Enmund, Justice O'Conor pointed to the common law and modern criminal codes, which equate reckless killing with intentional murders, to support her proposition that felons who act with reckless disregard for human life are, in at least some circumstances, deserving of death.\textsuperscript{112} Summing up her Tison analysis, Justice O'Connor concluded "that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state [that] may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result."\textsuperscript{113} Deriving each brother's "major participation" from the lower court record, the Court remanded the case for a determination of whether Raymond or Ricky Tison acted with reckless disregard for human life in the felonies which culminated in the death of the Lyons family.\textsuperscript{114}

III. Analysis

The most immediate and far-reaching effect of the Court's decision in Tison is its impact on the mental state findings required before a state can sentence a felony murderer to death.\textsuperscript{115} Previously, the Court had attempted to define the requisite mental state in Enmund v. Florida by holding that a participant in a felony during the course of which a murderer takes place could not be sentenced to death unless he killed, attempted to kill, or intended to kill or use lethal force.\textsuperscript{116} However, the Enmund majority did not set forth the mental state requirement for situations in which "the likelihood of killing...[was] so substantial that [the felon] should share the blame for the killing."\textsuperscript{117} In the wake of Enmund's ambiguous holding, the states' interpretations of Enmund varied, inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the intent to rob may have the unintended consequence of killing the victim.

\textit{Id.} at 1688.

\textsuperscript{112} Id. at 1688. Justice O'Connor cites the Model Penal Code as an example of one modern criminal code which equates reckless killing with intentional killing. \textit{Id.} (citing A.L.I., MODEL PENAL CODE § 210.2, 13).

In his dissent, Justice Brennan points out that the Model Penal Code advocates abolishing the felony murder rule in its entirety. \textit{Id.} at 1689 (Brennan, J., dissenting).

\textsuperscript{113} Id. at 1688.

\textsuperscript{114} Id. For a discussion of the procedural posture of the Tison case, as well as a presumption not explicitly contained in the record that both brothers did act with reckless disregard for human life, see supra notes 91-94.

\textsuperscript{115} For a discussion of the mental state requirements imposed by the Court prior to Tison, see the discussion of Enmund v. Florida, supra notes 45-67 and accompanying text.

\textsuperscript{116} Enmund, 458 U.S. at 797. For further discussion of the Court's holding in Enmund, see supra notes 45-67 and accompanying text.

\textsuperscript{117} 458 U.S. at 799.
yet no state which had sentenced a nontriggerman to death after Enmund actually carried out the punishment.118

In response to the confusion created by Enmund, the Tison majority narrowed the scope of Enmund by applying the Enmund mens rea standard only to defendants who were minor participants in the felony which led to murder.119 However, for major felony participants like the Tison brothers, the Court held that a lower mental state, one of "reckless indifference to human life," was sufficiently grave to justify capital punishment.120

The Court's new recklessness standard provides an easily applied and highly culpable mental state against which to measure those nontriggermen whose criminal acts end in death.121 Assuming the validity of the majority's analysis discussed below, this new standard is an important step toward a more workable and consistent death penalty jurisprudence which will, in addition to avoiding arbitrary infliction of capital punishment on felony murderers,122 protect society's legitimate interest in deterrence and retribution by embracing only the "most culpable and dangerous of murderers."123 Lending credence to the majority's opinion, Justice White, who wrote the Court's opinion in Enmund, approved the major/minor participant distinction by joining the Court in Tison.124

Despite the majority's apparent comfort with the major/minor participant distinction, Tison is arguably an unjustified departure from En-

118. Tison, 107 S. Ct. at 1698 (Brennan, J., dissenting). In his dissenting opinion, Justice Brennan argued that the state courts' reluctance to impose the death penalty on felony murderers was a sure indication of its unconstitutionality. Id.

For a discussion of the diverse state interpretations of Enmund, see supra note 62 and accompanying text.

119. 107 S. Ct. at 1684. For a discussion of the confusion resulting from the Court's holding in Enmund, see supra note 62 and accompanying text.

120. 107 S. Ct. at 1688.

121. Id. In articulating the Court's holding, Justice O'Connor remarked on the superiority of the new recklessness standard in dealing with nontriggermen: "The reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, that may be taken into account in making a capital sentencing judgment, when that conduct causes its natural, though also not inevitable, lethal result."

Id.

122. Justice Brennan argued in dissent that the reluctance of the states to execute non-triggermen who did not intend to kill makes any instance of capital punishment under these circumstances arbitrary and capricious. Id. at 1701 (Brennan, J., dissenting).

123. Id. at 1687. Justice O'Connor's opinion emphasized the harm caused by the criminal's action as vital to assessing his individual culpability. Id. at 1687-88.

For a discussion of the Court's view of the deterrence and retribution rationales for capital punishment, see supra note 34.

124. 107 S. Ct. at 1678.
Holman: Redefining a Culpable Mental State for Non-Triggermen Facing the

1988] Note 389

mund. 125 Justice Brennan persuasively characterized the death penalty as inappropriate in the felony murder context where a homicidal mental state is imputed from participation in a crime separate from the murder. 126 Pointing to evidence in the record which he felt suggested that the Tison brothers were more victims of their parents’ conditioning than conscious criminals, Justice Brennan also challenged the majority’s assumption that the facts supported a finding that the brothers acted with reckless disregard for human life. 127

In the wake of Tison, Justice Brennan’s imputed mental state criticism has been displaced by a new dilemma. On the one hand, cases like Tison and Enmund eliminate the controversial imputed mental state element with which Justice Brennan is concerned by requiring specific mental state findings before a felony murderer can be sentenced to death. On the other hand, however, the Court’s decision in Cabana v. Bullock alters the effectiveness of these safeguards by allowing non-juries to make the required mental state findings often far removed from the trial situation. 128

As some commentators have suggested, Enmund represents two significant aspects of death sentencing requirements: (1) the central importance of mental state to an individual defendant’s culpability, and (2) the importance of the jury’s role in determining whether a culpable mental state is factually present. 129 Decidedly, Tison preserved and clarified the mental state concern by requiring mere recklessness (and not always intent) on the part of some felony murderers before the death penalty could be imposed. 130 However, Cabana seriously altered Enmund’s concern with maintaining the jury’s role by holding that “the Eighth Amendment does not require that a jury make the findings required by Enmund.” 131 By allowing the jury to by-pass the mental state question before sentencing and accepting a mental state determination made at practically any point in the state’s appellate process, the Cabana Court abandoned a significant safeguard for felony murder defendants.

125. Id. at 1698 (Brennan, J., dissenting).
126. Id. at 1689 (Brennan, J., dissenting). For a general discussion of the controversy surrounding the felony murder doctrine, see supra notes 6-9 and accompanying text.
127. 107 S. Ct. at 1691 (Brennan, J., dissenting). Justice Brennan noted the majority’s anomalous behavior in assuming, allegedly based on the record, that the defendant’s actions represented a mental state or reckless disregard for human life. Id. at 1696 (Brennan, J., dissenting). This finding was never explicitly found in the lower court. It was, therefore, necessary to remand the case for a finding as to whether the mental state of recklessness existed. Id. at 1692-93 (Brennan, J., dissenting).
129. For a discussion of these commentators’ views, see supra note 67 and accompanying text.
130. Tison, 107 S. Ct. at 1688.
131. Cabana, 474 U.S. at 392.
facing capital punishment. In Cabana, the Court simply failed to give sufficient recognition to the jury as the essential voice of community values in the criminal law.\textsuperscript{132}

In reaching its conclusion on the mental state necessary to sentence a felony murderer to death, the Court in Tison engaged in an eighth amendment proportionality analysis now firmly established in the area of capital punishment.\textsuperscript{133} Justice O'Connor's survey of twenty-two state legislatures which permit the death penalty for felony murderers is persuasive in support of her conclusion that "society does not reject the death penalty as grossly excessive under these circumstances."\textsuperscript{134} Further bolstering her conclusion is her observation that a number of state courts have interpreted Enmund to allow the death penalty in cases where the felons have acted with reckless disregard for human life.\textsuperscript{135}

As illustrated by Justice Brennan, the validity of the majority's legislative and judicial survey is subject to legitimate attack because the court considered only states which allow the death penalty for felony murder

\begin{quote}
132. The role of the jury in safeguarding the rights of those who may be sentenced to death was well stated by Justice Stewart in Gregg v. Georgia.

The jury also is a significant and reliable objective index of contemporary values because it is so directly involved. The Court has said that "one of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system." It may be true that evolving standards have influenced juries in recent decades to be more discriminating in opposing the sentence of death.

428 U.S. at 181-82 (footnotes and citations omitted).

At least one commentator has affirmed this view with specific reference to Enmund:

Critics may wonder why an already overburdened court system need go through the wasted time and expense of remanding a case on an apparent technicality, even when the evidence overwhelmingly shows that the defendant has a sufficiently culpable mental state. But trial judges can easily avoid this problem simply by giving an instruction, sua sponte, that if the jury convicts the defendant under a felony murder theory, it must come to some finding regarding the defendant's mental state [under Enmund]—before imposing the death sentence. On balance, it is better to compel trial judges to make the extra effort of such a sua sponte instruction than to leave any possibility that the jury sentenced a defendant to death without being forced to make a finding regarding his culpability. The death penalty cases leading up to Enmund not only deal with individual rights of the defendant, but with the value of the jury as the embodiment of community conscience. By examining jury behavior, the Court has frequently come to conclusions about the constitutionality of the death penalty for certain behavior. It would be unfortunate if this vital function of the jury were dissipated.

Note, supra note 11, at 887-88 (footnotes and citations omitted).

133. For a discussion of the major proportionality cases leading up to Tison, see supra notes 15-67 and accompanying text.

134. Tison, 107 S. Ct. at 1686. For a discussion of Tison's survey of state statutes, see supra notes 101-08 and accompanying text.

135. 107 S. Ct. at 1686-87.
\end{quote}
in reaching its conclusion that "an apparent consensus" of the states accept the death penalty as an appropriate punishment for criminals like the Tison brothers. In view of the additional states which have abolished the death penalty entirely, about three-fifths of all American jurisdictions reject the majority's position. It is also important to note that even in those jurisdictions which statutorily provide for the death penalty in these situations, the death sentence is almost never carried out for felony murderers who do not kill or specifically intend to kill. These deficiencies in the majority's survey led Justice Brennan to conclude that there is no societal consensus affirming the death penalty as an appropriate punishment for nontriggermen who do not intend to kill. He also concluded that in those rare cases where the death penalty is imposed on such criminals, the state acts in an arbitrary and thus unconstitutional manner.

Despite the forcefulness of Justice Brennan's dissent, the number of states which apparently do not authorize the death penalty for nontriggermen and the reluctance of those who do authorize it to impose it are not factors fatal to the majority's analysis. While it may be true, as Justice Brennan observed, that no state within the past twenty-five years has executed a nontriggerman absent a finding of intent to kill, those numbers are no doubt affected by the general confusion which has plagued death penalty/felony murder jurisprudence particularly with regard to the felon's mental state. It is at best difficult to determine what the states have been doing in practice with their felony murder sentencing procedures over the past twenty-five years. Indeed, the importance of mental state to the capital sentencing process for felony murderers has only been a matter of constitutional importance since the Court's 1982 decision in Enmund.

Unfortunately, Enmund did little to resolve the issue of whether intent was a required element in the capital sentencing of any nontriggerman. However, the Tison majority, with its reckless disregard for

136. Id. at 1697 (Brennan, J., dissenting) (citing the majority opinion at 1685-86).
137. Id. The District of Columbia and the following 14 states have abolished the death penalty: Alaska, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, West Virginia, Wisconsin and Vermont. See N.A.A.C.P. Legal Defense and Education Fund, Death Row, U.S.A., August, 1987.
138. 107 S. Ct. at 1697-98 (Brennan, J., dissenting).
139. Id. at 1701.
140. Id. (citing Furman v. Georgia, 408 U.S. 238 (1972)).
141. For a discussion of the majority's analysis, see supra notes 95-114 and accompanying text.
142. For a discussion of the felony murder doctrine and the controversy surrounding it, see supra notes 6-9 and accompanying text.
143. For a discussion of Enmund, see supra notes 45-67 and accompanying text.
144. These states are discussed supra at note 62 and accompanying text.
human life standard, has corrected a significant weakness in the *Enmund* holding by imposing a less stringent mental state requirement for non-triggermen who are more heavily involved in criminal acts.\(^{145}\)

It is difficult to discern what remains of *Enmund* since procedural safeguards imposed by the Court within the past sixteen years have made capital punishment a highly improbable penalty for juries to exact in cases involving minor participant felons.\(^{146}\) The holding in *Tison*, however, allowing imposition of the death penalty on those who act recklessly during the course of serious crimes which ultimately end in death, is consistent with the Court’s position that the death penalty should be reserved for the most reprehensible criminals who cause the most abhorrent damage to society.\(^{147}\)

IV. Conclusion

With its decision in *Tison v. Arizona*, the Supreme Court has established “reckless disregard for human life” as the minimum culpable mental state required to justify imposition of the death penalty on major participant felony murderers who do not themselves kill or intend to kill. In doing so, the Court has provided important clarification on its position in the controversy surrounding the death penalty as imposed on convicted felony murderers and has insured consistency in state sentencing procedures while protecting defendants’ rights by embracing only the most culpable and dangerous of criminals.

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\(^{145}\) *Tison*, 107 S. Ct. at 1688.

\(^{146}\) For a discussion of the evolution of the Court’s procedural safeguards, see *supra* notes 16-57 and accompanying text.

\(^{147}\) *Tison*, 107 S. Ct. at 1688.