In the

ORIGINAL

Supreme Court of the United States

EARL ENMUND,

Petitioner,

v.

FLORIDA

No. 81-5321

Washington, D. C.

Tuesday, March 23, 1982

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The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:11 o'clock p.m.

APPEARANCES:

JAMES S. LIEBMAN, ESQ., New York, New York; on behalf of the Petitioner.

LAWRENCE A. KADEN, ESQ., Assistant Attorney General of Florida, Tallahassee, Florida; on behalf of the Respondent (Pro hac vice).

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Enmund against Florida.

Mr. Liebman, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES S. LIEBMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. LIEBMAN: Mr. Chief Justice, and may it please the Court, Petitioner, Earl Enmund, has been sentenced by the state of Florida to be executed for the crime of murder. Now, two factual determinations of the Florida Supreme Court surrounding Mr. Enmund's actual involvement in that crime are critical here, and I would like to take a moment to summarize those findings.

First, the Florida Supreme Court determined that Earl Enmund did not himself take life. Rather, it determined that Sampson Armstrong, Mr. Enmund's confederate in a robbery, killed both of the victims, that is, Mr. Thomas Kersey and Mrs. Eunice Kersey, in an exchange of gunfire that was initiated by Mrs. Kersey. The Florida Supreme Court determined that during these events and during the robbery, Petitioner was not on the scene but was 200 yards away in the get-away car.

More importantly, the Florida Supreme Court secondly expressly determined that the killings

committed by Sampson Armstrong were not intended or contemplated as a part of the robbery scheme with which Mr. Enmund had associated himself and had helped plan. Rather, the Florida Supreme Court, in its own words, determined that those killings by Sampson Armstrong "were spontaneous and were precipitated by the armed resistance of Mrs. Kersey," again, at a time when Earl Enmund was 200 yards away, and was not at all able to take any part in that spontaneous decision by Sampson Armstrong to return Mrs. Kersey's fire.

QUESTION: Does the record show whether when they entered -- embarked on this enterprise, Enmund was aware that his friend had a gun?

MR. LIEBMAN: No, Your Honor. The evidence on the gun is -- on the guns is extremely confused. In fact, the prosecutor told the jury both in the opening argument and in the closing argument that it was not going to be able to tell them anything about the guns or even how many guns there were. They didn't know that. Now, all we know is that Sampson Armstrong had a gun and Mrs. Kersey had a gun. Beyond that --

QUESTION: On the ballistics tests, how many different guns were indicated?

MR. LIEBMAN: Two, at least two. There were some bullets that they did not trace to either gun, but

they couldn't tell whether they were from those guns or others. They just couldn't do a ballistics test.

QUESTION: And how many people involved in the enterprise?

MR. LIEBMAN: Well, that is unclear also, but there were at least Sampson Armstrong, Jeanette Armstrong and Earl Enmund, and possibly Ida Jean Shaw, and then there was Mr. and Mrs. Kersey at the scene. One other fact that I should mention is that Sampson Armstrong told J.B. Neil, his friend, who testified at trial against Sampson, that both Sampson and Jeanette Armstrong had guns.

QUESTION: Is there a reasonable inference that there were three different firearms involved here?

MR. LIEBMAN: Well, there's a reasonable inference that there were at least two. I think the state's statement to the jury that it couldn't --

QUESTION: I thought you just said that there were two that they could identify and one they couldn't identify. That makes three.

MR. LIEBMAN: No. No, Your Honor. I misspoke if I said that. There were two that they could identify, and all of the other bullets could have come from one of those two guns. They just couldn't determine it, because those bullets were too injured to

allow conclusive ballistics determinations.

QUESTION: How many bullets were put in the bodies?

MR. LIEBMAN: Mr. Kersey was shot twice. Mrs. Kersey was shot six times. They found a total of nine bullets, those eight plus an additional ninth bullet, but they could only do successful ballistics tests on five of the bullets.

Now, in order to affirm Petitioner's conviction of first degree murder on those findings that I just mentioned, the Florida Supreme Court found it necessary and said that it found it necessary to rely on two what it has called in the past constructive devices, and to establish murder, the court first relied on Florida's constructive malice doctrine. Under that doctrine, a person who is engaged in a robbery who kills is conclusively presumed, despite any other evidence, to be -- to have intended that death, and thus to be a murderer.

The court then applied Florida's accessorial rule under which all of the robbery confederates who are either actually or, as the Florida Supreme Court determined was actually the case here, are only constructively present at the time the killings took place are also conclusively presumed to have an intent

to kill, and therefore to be murderers.

Now, I want to stress that under the Florida rule, including, and this is stated in the Pope case which is cited repeatedly by the Supreme Court in affirming Petitioner's conviction, and also the Hampton case, and both of those cases are cited on Page 13 of our opening brief, the Florida courts have clearly held that in a case in which the jury would find that there is no foreseeability that the deaths would occur, that there was no contemplation by the accomplices of any possible death, even in that kind of a case, Florida's felony murder rule and its accessorial rules apply.

Now, in this record, Mr. Enmund's principal submission, which we have set out in Point 1 of our opening brief, is that execution is an excessive and disproportionate punishment, in violation of the Eighth and Fourteenth Amendments, for one who did not himself take life, attempt or assist in taking life, and for one who did not intend that life be taken by another.

Now, at the outset I want to make very clear that Petitioner's submission here does not in any way challenge Florida's authority to devise rules governing accessorial liability or its ability to define the crime of felony murder or to punish those crimes severely, but Petitioner's first submission does raise the single

question of the constitutionality of inflicting the one punishment, the unique punishment of death on one who has not taken part in a design himself to take life or to have it taken by another.

And we believe that the answer to that question, that death is a disproportionate punishment in that situation, is mandated by this Court's prior decision, the logic of its decision in Coker versus Georgia. In Coker, the Court decided a question that Gregg versus Georgia had left open, and that was whether there are certain crimes short of deliberate homocide committed by the defendant that the Eighth Amendment prohibits the states from punishing by death, and indeed, the Court determined in Coker that Ehrlich Coker could not constitutionally be executed for the serious, in fact, the often life-threatening crime of rape, even where that crime in that particular case had been carried out in part by the offender holding a knife to the victim's throat during the rape.

Now, the crucial point I want to make here is that in condemning Earl Enmund to death, the state of Florida has proved nothing more on his part than a degree of participation in the crime of robbery that is identical to Ehrlich Coker's degree of participation in the crime of rape. Insofar as anything the two men did

or intended or even foresaw, they are the same.

Now, here it is true that two deaths occurred, but I want to stress, I think it is important for purposes of Eighth Amendment decision-making here that that was at the hands and at the decision of Sampson Armstrong, and as the Florida Supreme Court expressly determined, that was not by any design or act on Earl Enmund's part, apart from being himself a part of the robbery, and therefore the Florida Supreme Court, the Florida courts all the way along, the instructions, in order to link Mr. Enmund to those deaths, they could not rely on anything he did or intended, and they did not purport to. Rather, they linked him to those deaths solely by virtue of the constructive malice and constructive presence devices. Those are the only links, and those are the links that the Florida Supreme Court expressly relied on.

QUESTION: You say it would be irrational for reasonable jurors to have concluded that everybody involved in that automobile knew about the number of guns that were present and who had them?

MR. LIEBMAN: Well, the first point, Your Honor, is that on the instructions given here, the jury was not asked to confront that point and made no finding on it, and the --

QUESTION: My question didn't go to that. Suppose -- Jurors often conclude things which are not covered by instructions, and they are permitted to do so. Would it be irrational or unreasonable for a juror to conclude that everyone in that car knew that this was an armed enterprise?

MR. LIEBMAN: I think, Your Honor, that on the proof that we have in this case, that would be a difficult inference for the jury to draw. I don't know if I can say it would be an irrational inference, but it would be extremely difficult, because the only time the state actually connected Mr. Enmund to those guns was two days later, when he participated in a plan with Sampson Armstrong and Ida Jean Shaw to dispose of the weapons.

Now, we know something about the calibers. We know that there was a .22-caliber gun, and that that belonged to Ida Jean Shaw. She disposed of that weapon and said it was her gun. She also said that the .38-caliber weapon that she disposed of was one that she had seen in the hands of either Sampson Armstrong or Jeanette Armstrong some time before these events occurred. So, all of the evidence is at least consistent, with the possibility that those guns were on the persons only of the Armstrongs and Mrs. Kersey, and

that Petitioner didn't know, and of course the jury here was instructed that if there are two possible inferences that it can draw from the evidence, you know, equally strong, then it must draw the inference in favor of the defense, and I would suggest that that instruction here would make it quite difficult for the jury to determine that Earl Enmund knew something about the guns.

But, of course, in any event, the jury was not asked here to make any determination about the guns. The state said it couldn't really prove very much about the guns, and it just didn't have to, because the felony murder rule that it was acting under allowed it not to have to prove that sort of thing.

And I want to stress that for purposes of criminal liability and for purposes of severe punishment, I have no doubt that these vicarious devices and these conclusive presumptions that the Florida Supreme Court relied upon are perfectly okay to establish a nexus betwee what the offender actually did and these killings, but here the punishment is death, and in that qualitatively different situation, the Eighth Amendment implies it requires that the courts apply qualitatively different standards.

And in particular, as this Court stated so recently in Eddings versus Oklahoma, what the Eighth

Amendment requires in death penalty cases is a sensibility to the uniqueness of the individual offender. What this Court repeatedly has called in Woodson, Roberts, Lockett, a concern, a concern for the individual culpability of that offender for his particular offense, and for his particular character, and what we suggest here is that that crucial Eighth Amendment concern in death penalty cases for individual culpability simply will not permit the gap between what Earl Enmund actually did and intended here as a robbery and the Kerseys' deaths at the hands of Sampson Armstrong to be bridged by nothing more than what is really a legal fiction.

In short, the Eighth Amendment requires that actual individual culpability be the touchstone of how we determine who lives and who dies.

QUESTION: Well, is it a legal fiction or is it an irrebuttable presumption that a participant in a felony which results in death has that consequence? You call it a legal fiction.

MR. LIEBMAN: Well, let me explain why I call it that, because I did carefully use those terms. The Florida Supreme Court has stated that even in a case where it is in fact provable and the defendant could prove beyond a reasonable doubt that he did not intend

death, that he did not know that there was any reasonable likelihood of death, that no death was contemplated, even in that situation, the felony murder presumption, conclusive presumption of malice applies, and in that case, where the defendant could make that proof, it has to be a fiction, because the jury could be convinced beyond a reasonable doubt that there was no intent, there was no malice, and yet they would be forced to find malice.

QUESTION: Well, isn't it in fact something a little different from a fiction, just a judgment by the state involved that if you participate in a robbery, and because a robbery is sufficiently likely to lead to a fatal killing, that you are going to be held accountable for the killing, too, without regard to your intent as to kill?

MR. LIEBMAN: Well, Your Honor, that's why I say that that type of reasoning is okay. There is no constitutional wrong there so far as finding criminal liability or even punishing the person with a severe term of years, but where the problem comes in with that is in the Eighth Amendment area, where the death penalty is involved, because there individual culpability must be crucial, and we can't just say that because in most cases this would be true, we are going to presume that

it is true in all cases.

QUESTION: Yes, but I think the argument is aided by stripping away whatever there is of a fiction, and just looking at the, you know, what facts the state has proved and what reasons are traditionally held out for the felony murder doctrine.

MR. LIEBMAN: That's true, but the reasons that are held out, what I am suggesting is that those reasons in the Eighth Amendment area, where the death penalty is imposed, is inconsistent with the requirement of focusing on individual culpability in determining who lives and who dies.

Now, to take your example, Ehrlich Coker went into a rape. He held a knife to the victim's throat. He committed a crime for which death was a foreseeable result. There is no question on the facts of Coker that death was a foreseeable result, and Georgia argued because of that that that was a crime that serious harm or death was so likely that they should be able to punish it severely, as if death had occurred, and this Court --

QUESTION: Mr. Liebman, in this case he is guilty of murder, in your book.

MR. LIEBMAN: He is guilty of murder.

QUESTION: And he has to be sentenced to

something, right?

MR. LIEBMAN: That is correct, Your Honor.

QUESTION: You are not saying, turn him loose.

MR. LIEBMAN: No, and I want to make that clear over and over again.

QUESTION: Well, that's what I -- I don't think you have quite -- Exactly what is your position in this case? What should this man have been sentenced to, in your opinion?

MR. LIEBMAN: The punishment for felony murder in Florida, where there is no death penalty, is life in prison without possibility of parole for 25 years. Mr. Enmund is at this point --

QUESTION: Wait a minute. You said life imprisonment for 25 years?

MR. LIEBMAN: It is life in prison without possibility of parole for 25 years.

QUESTION: I see. I see.

MR. LIEBMAN: After 25 years, the parole board then can exercise its discretion. And for purposes of that punishment or even a mandatory life sentence without possibility of any parole --

QUESTION: Right.

MR. LIEBMAN: -- there would be no constitutional problem with what has happened here. I

think that the Woodson case makes it quite clear that while we have no problem with mandatory sentences, mandatory severe sentences where the death penalty is not involved; where the death penalty is involved, we have a different issue, and what I am arguing here is that where you have that different issue, and the crucial part of that different issue is individual culpability, when we are separating who lives and who dies, we must look at the individual culpability of the offender.

And when we look at the individual culpability of Earl Enmund and Ehrlich Coker, it is indistinguishable. The two culpabilities of the two men are indistinguishable, and therefore on this individual culpability measure the Eighth Amendment simply cannot rationally be seen as tolerating Mr. Enmund's sentence of death at the same time as it conclusively and for all cases says that Mr. Coker cannot be punished by death.

QUESTION: Well, in Coker's case, nobody died, and here someone did die as a result of the enterprise with which Enmund was connected.

MR. LIEBMAN: Well, first of all, Your Honor, you are assuming, I think, by that statement that there was a but for connection between Mr. Enmund and the death, and even that has not been proved as a matter of

Florida law. All you need to do is prove that he took part in a robbery, and that a death occurred as part of that robbery. But there is no proof here -- They left Mr. Enmund out at the car. He knew the Kerseys, so they left him out at the car, because he could be identified, but there is no proof here that they wouldn't have left him at home and gone ahead and done it if he didn't go along.

So that even on that assumption you don't have that proof here, but I would suggest that the death is not -- it cannot be enough. Otherwise, if we had -- we could have the death penalty for negilgent vehicular homocide, or for a person who jaywalks negligently, steps out in front of a car, the car swerves to avoid him, and there is a death. There is a causation. There is a criminal violation by jaywalking, and there is a death there, but I would suggest that the death penalty simply would be -- would be too extreme a penalty for that crime.

What this case -- this Court's cases have looked at very clearly is not the disembodied injury, but the injury caused by the design of the offender. It looks to the connection between the offender's design, his acts that he took in furtherance of that design, and the harm that results, and what I am suggesting here is

that the connection between the design with which Petitioner took place, that is, a design to commit a robbery, the connection between that and the killings is purely by virtue of these constructive malice devices. The Florida Supreme Court had nothing else to go on, and in that sense there is no difference between Ehrlich Coker, who did everything that Earl Enmund did, but there was no death resulting at the hands or by the decision of somebody else, but in terms of individual culpability, Ehrlich Coker did everything, thought everything, foresaw everything that Earl Enmund did, and if the Constitution -- if the Eighth Amendment with its crucial focusing on individual culpability, says that Mr. Coker falls below the line and cannot be constitutionally --

QUESTION: Are you going to get around to suggesting what culpability means?

MR. LIEBMAN: Well, Your Honor, I think that --

QUESTION: Or do you want to --

MR. LIEBMAN: I would be glad to.

QUESTION: All right.

MR. LIEBMAN: In our submission, the culpability that should be the determining factor is the intent to take life, conscious purpose to take life as you defined it in your concurring decision in Lockett.

QUESTION: Yes, but what if -- would it be enough in your book if Enmund had said, well, I will wait for you in the car, you've got guns, if necessary, go ahead and use them?

MR. LIEBMAN: Your Honor, at common law, at the common law --

QUESTION: I don't care about -- what is your submission?

MR. LIEBMAN: We -- our submission is that in that situation, the person has -- he has intended death, if only in a conditional circumstance.

QUESTION: Right.

MR. LIEBMAN: But he has intended death, and therefore he falls above the line, and this is consistent with the common law rule.

QUESTION: But it would fall on the other side of the line, I suppose, in your book if he just knew they had guns.

MR. LIEBMAN: That is correct, Your Honor.

QUESTION: And didn't say what I said he said.

MR. LIEBMAN: That is correct. Or -- it can't come down to him saying it.

QUESTION: No.

MR. LIEBMAN: It would be a jury question as to whether --

QUESTION: A jury question, yes.

MR. LIEBMAN: -- he had actually thought that, or had been --

QUESTION: And so it is circumstantial proof of intent.

MR. LIEBMAN: Exactly, Your Honor, which is precisely what every case on intent entails.

QUESTION: And you are saying that just the fact that you participate in a robbery, there are so many robberies that don't involve a threat to life that you -- that is just not a sufficient basis for inferring intent.

MR. LIEBMAN: That's exactly right, Your Honor.

QUESTION: Would you say that? Suppose in this very case the jury had been instructed that to find Enmund guilty you had to find that he intended to take life, based on circumstantial evidence. Suppose the jury had come back with a finding of guilty and imposing the death penalty.

MR. LIEBMAN: Well, Your Honor --

QUESTION: Would that evidence be -- Would that be a sufficient basis for -- right on this record?

MR. LIEBMAN: Well, on this record, I think it would be an extremely close question, and the reason that I say that, it is not only my reading of the

record, but as I read the Florida Supreme Court decision, they looked into the question of intent, they looked into the question on this record of the design with which Mr. Enmund had taken part, because intent was relevant at various points of their analysis.

QUESTION: Yes. Yes.

MR. LIEBMAN: And what they said was, repeatedly, he involved himself in a design to rob, and they used those terms several times, 49 through 50 of the Appendix, and they determined that the deaths that occurred occurred spontaneously at Sampson Armstrong's decision. Now, I am not saying that as to Sampson Armstrong that you couldn't say that there was an intent, but they occurred spontaneously at a time when Earl Enmund was no more part of the enterprise, and therefore, because the intent to kill or whatever state of mind there was arose at that time, when Earl Enmund was no more on the scene and couldn't have participated in it, for that reason, I think it would be a very difficult proposition, to find intent, when I think the Florida Supreme Court, looking at the record, has said that there is no intent.

QUESTION: But in any event, you don't suggest that a person has to pull the trigger himself or --

MR. LIEBMAN: Absolutely not, Your Honor.

There can be an inference drawn from the fact that he pulled the trigger --

QUESTION: Oh, sure.

MR. LIEBMAN: -- that he intended, but there could be an inference drawn from many other factors even if he doesn't pull the trigger. I would just direct the Court's attention to a Cardoza opinion for the New York court of appeals, People versus Emialeta. It had to look at precisely this question. There were several people involved, and did they all intend death, and Judge Cardoza for that court determined that they did, looking to the circumstances of the crime. The non-trigger men plus the trigger men were found to have participated in a design to kill.

QUESTION: Pertaining to your point about intent, assume in this case that Enmund was the only member of this group who entered the residence. He was armed, but he had no intention to shoot, so he testified. A struggle ensued in which the gun went off, his gun went off accidentally. What would that situation --

MR. LIEBMAN: Well --

QUESTION: How would that be viewed in light of your emphasis on intention? He would testify he had no intention whatever to use the gun. It went off

accidentally.

MR. LIEBMAN: Well, Your Honor, in that situation, it would be a jury question, and as you said in Coker, the jury system is designed and operates successfully to decide just that question. You give them a standard and you give them the facts. But if the jury determined, and I don't think juries are quick to believe this kind of thing, but if the jury did determine that it was pure accident, that there was no intent, then the death penalty would be inappropriate because the jury would have thereby decided that this person was not at the intent level of culpability, but fell way below it. It fell at a much lower point because there was not an intent, and criminal law has long recognized that the difference between intent and non-intent is a big step. It is the widest divide that we have in our mental states that we look at in criminal law, and therefore, by finding that this person was below that divide, I think that they would be finding a very, very different level of culpability that if the person had intent.

QUESTION: You would say that the fact that he carried a gun was no different from the fact that Coker carried a knife.

MR. LIEBMAN: That is correct, Your Honor.

The foreseeability of the harm, particularly because Ehrlich Coker had not only carried the knife but wielded it and used it in a way that was very dangerous.

QUESTION: He wielded it, but he didn't quite use it.

MR. LIEBMAN: That's true, although he did hold it to the victim's throat, and --

QUESTION: As a threat.

MR. LIEBMAN: -- created a very dangerous situation. I think that I have laid out our principal submission under Coker, and therefore I would like to reserve the balance of my time.

QUESTION: Mr. Kaden.

ORAL ARGUMENT OF LAWRENCE A. KADEN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. KADEN: Chief Justice Burger, may it please the Court, the real issue in this case today is whether a state legislature could rationally conclude that a death sentence should be available for a defendant convicted of first degree murder based on his extensive participation in an armed robbery which he planned, procured accomplises for, weapons, participated in, and helped to cover up.

The Florida Supreme Court has answered this question in the --

QUESTION: Did you say he procured the weapons? Did you say he procured the weapons?

MR. KADEN: That's right, Your Honor. There's a very reasonable inference which the jury evidently accepted that the .22 pistol that Ida Jean Shaw kept in her glove compartment was used, Earl Enmund had control of that car also. Earl Enmund --

QUESTION: What is support for your statement that he procured the weapons?

MR. KADEN: Ida Jean Shaw testified that she kept a .22 gun and a pistol in her car. She also testified at some place in the record, and the records are voluminous -- I can't tell you what page -- that Earl Enmund owned a .38 caliber pistol.

QUESTION: Then he also helped to -- undertook to conceal the weapons after the crime, did he?

MR. KADEN: That's right, Your Honor. Earl Enmund was arrested for possession of a concealed weapon, for possession of a weapon by a convicted felon. Earl Enmund, in an attempt to alibi his involvement, went out and made a big record in the town there, the local town, of buying a .38 caliber pistol for defense two or three days after the murders. He was trying to show that at the time he didn't have a pistol at the time of the murders. I don't think the jury

believed that.

In any event, the Florida Supreme Court has answered that question I presented in the affirmative, and I think that based upon common sense and legal precedent, this Court must do the same. The Court should refuse to read an absolute intent requirement into the Eigtht Amendment of the United States Constitution.

This issue has not precisely been decided by this Court before, I realize that, or we wouldn't be here. However, the Court has provided general constitutional guidelines. Florida has followed these guidelines. Florida's legislative determination comports with all the constitutional requirements previously set forth by this Court. The record before the Court presents a good case where the state courts' factual determinations must be accepted.

Now, in the Florida Supreme Court, Petitioner argued this point, and I quote, "Absence of direct proof that the defendant intended to cause the death of the victim is highly relevant in determining the appropriate penalty." Highly relevant. We don't contest that. Now, however, Petitioner is claiming that absence of proof of actual intent to kill should be an absolute constitutional bar to the imposition of the death

penalty. He is asking too much from the Constitution.

Florida's position, as was reiterated in our brief numerous times, is that the Court should refrain from drawing a bright line in a case like this in an area which has traditionally been left to the state legislatures. Now, Petitioner counters with the fact that, well, death is different. The legislature shouldn't be allowed to control this.

Yes, death is different, but it's different for the innocent victims as well as the defendant, and that is the precise reason, the precise reason this case is different from Coker v. Georgia. In Coker, the Court has already drawn a bright line. Unless this Court can be persuaded to recede from that line, that is where the line should stay. If the victim dies, the death penalty should be available. If the victim lives, then death is out of the question.

QUESTION: Well, would you say that the death penalty ought to be available under our cases in a case of negligent homocide?

MR. KADEN: Of course not, Your Honor, but I think that is a legislative determination, not a judicial one.

QUESTION: So you would say if the Florida legislature provides the death penalty for negligent

homocide, there would be nothing that any federal court could do about it.

MR. KADEN: If it complied -- if their legislative determination complied with all the factors previously enunciated by this Court, with the aggravating factors and the mitigating circumstances and the weighing process. I doubt that could be done, but the legislature does have the authority to do that.

QUESTION: So you say that death is both -- the occurrence of the victim's death is both, in effect, a necessary and a sufficient basis for imposing the death penalty.

MR. KADEN: After Coker, Your Honor.

Now, the Florida legislature has constructed a statutory framework for imposing death sentences which complies with all this Court's previous opinions. In Florida, death sentences are not automatic. This is Proffitt. The statute requires that any evidence proffered in mitigation must be considered by the sentencing authorities. This was Lockett before Lockett was decided.

Finally, the statute requires that the sentencing decision be based upon the entire record. In Petitioner's case, all three parts of Florida's three-tiered system agreed that death was appropriate.

This is a factual determination. The judgment of the jury, the trial court, and the Florida Supreme Court should be respected by this Court. Florida has based culpability in terms of foreseeability. A criminal becomes fully responsible for his criminal conduct. A criminal who creates situations from which violence can occur must suffer the consequences once that violence occurs, in this case death.

Someone like Earl Enmund, who originated the idea for this robbery, procured the weapons and accomplices, extensively participated in the crime, helped to cover up the crime by directing that the weapons be disposed of by directing from his jail cell that other defendants in the case perjured themselves, someone like Earl Enmund, who used the ill-gotten gains from the murders to pay off his bad debts, someone like Earl Enmund should be eligible for the maximum penalty, but again, in Florida, just because a defendant is eligible for a maximum penalty, it doesn't mean that he is going to automatically get it.

QUESTION: Wouldn't liable to be a better word than eligible for?

MR. KADEN: Yes, Your Honor.

QUESTION: Suppose in this case there had been no guns involved, but two people went in the house, and

one of the victims pulled a gun, and one of the robbers picked up an ashtray, a glass ashtray and killed them with it?

MR. KADEN: The difference --

QUESTION: They are no different.

MR. KADEN: -- would be negligible.

QUESTION: Yes.

MR. KADEN: They are still engaging in foreseeably dangerous conduct, depending on the facts and circumstances in that hypothetical. The natural and probable consequences of being prepared and willing to use a weapon would be death, and that is what precisely occurred here.

QUESTION: That would apply to the man who was sitting out in the car?

MR. KADEN: That's right.

QUESTION: Of course, on the facts of this case, as you just put them a moment ago, it woudn't hurt the state to have to prove intent. I would think you -- the facts the way you reviewed them would indicate that --

MR. KADEN: Well, Justice White, I have talked to the prosecutor, and he would like to have been able to have proved intent, but he couldn't do it because there was no one left who was willing to talk. The two

victims were dead. If one of the victims had lived, there is a very good chance that premeditated murder could have been proven, but just because the defendants are skilfull in killing their victims doesn't mean that the state is left without the right to exact the maximum penalty.

QUESTION: Excuse me. Did you say the defendant killed them? Shot them? He shot them?

MR. KADEN: I didn't say Earl Enmund killed anyone, Your Honor.

QUESTION: Oh, well, you said, the defendant.

MR. KADEN: Earl Enmund is guilty of first degree murder based on his participation under Florida law.

QUESTION: I thought so.

QUESTION: Would it be constitutional for a state to provide that at any time firearms, loaded firearms are used and death then results, intent is presumed?

MR. KADEN: I think so, Your Honor. I don't see any constitutional bar to that. That is basically the felony murder rule, except you added the part about the firearms. The felony murder rule is beyond constitutional challenge. This Court has said that. Also the fact that aiders and abetters can be held

equally responsible, that is also beyond constitutional challenge.

QUESTION: The statutory requirement that the gun be loaded would be even a stronger case than ordinary felony homocide, would it not?

MR. KADEN: That's right, Your Honor.

QUESTION: Well, but then you are saying in certain circumstances you don't require intent.

MR. KADEN: That's exactly right, Your Honor. Death is never required in Florida's statutory framework. The decision to impose death is a mixture of considerations. The jury makes a recommendation based on the facts of the crime and the facts pertaining to the individual, the defendant, and he makes -- the jury a recommendation to the trial court. The trial court can accept or reject that recommendation, and that decision by the trial court is then subject to appellate review.

QUESTION: Well, are there under existing Florida law without regard to what considerations there may be under the Eighth Amendment, are there homocides which do not require intent or even the constructive intent that the Supreme Court of Florida found here, but that nonetheless render one liable to the death sentence?

MR. KADEN: Do you mean like treason or

kidnapping?

QUESTION: No, I mean just your run of the mine homocides.

MR. KADEN: I am not sure I understand your question.

QUESTION: Well, what is the lowest level of intent you can have for a homocide in Florida and still be subjected to the death penalty under Florida statutes?

MR. KADEN: Under premeditated murder, you have to prove intent to kill. Under felony murder, you have to prove the participation, the actual participation in the underlying felony, and the felonies are not just any felonies, like forgery is not included. It would be just dangerous, violent felonies, like armed robbery, or sexual --

QUESTION: You don't need to prove intent there at all.

MR. KADEN: That's right.

QUESTION: Except to --

MR. KADEN: Intent is presumed by the participation, the willing participation in the dangerous, foreseeably dangerous conduct.

QUESTION: You have to prove intent to rob, though, don't you?

MR. KADEN: That's right. You have to prove

-- the jury has to find that they were participating in the underlying felony.

Now, as I was saying, the death sentence in Florida is not automatic. Florida has a statutory mitigating circumstance which the jury must consider and the trial court must consider. That circumstance, that mitigating circumstance specifically directs their attention to an accomplice's degree of involvement in the felony, in the capital felony. If an accomplice is truly a minor accomplice, like Earl Enmund claims, then he is going to have the benefit of this mitigating circumstance.

However, the jury rejected and the trial court factually found that Earl Enmund was a major accomplice. His involvement was major. The Florida Supreme Court did not disturb that finding. That must be accepted by this Court. Earl Enmund's participation was --

QUESTION: Does that mean, counsel, that the sentencing authority could not consider the degree of his participation?

MR. KADEN: No, Your Honor.

QUESTION: Was that precluded? That appeared to be one of the arguments made by the Petitioner.

MR. KADEN: I realize that. That argument is

not valid in this case.

QUESTION: Explain why and how.

MR. KADEN: I am saying that Florida directs that this mitigating circumstance be considered. In addition to that, the statute requires that the individual nature of the defendant, the character of the defendant and the nature and circumstances of the crime must be considered, and this is taken from the whole record, and in fact that's what the trial court did. You can read the trial court's specific findings.

Now, Petitioner has attempted to cloud his culpability in this case by making reference to the spontaneity of the crime, the fortuitousness of the crime. In other words, he has claimed that his conduct was technically, technically no different from Coker's, therefore he, like Coker, can't get a death sentence.

Unfortunately for Petitioner, but more unfortunately for his victims, Earl Enmund's case is fatally different. By his wilfull, reckless participation in a foreseeably dangerous felony involving deadly weapons, Petitioner took the risk that death might result, and once that risk came to fruition and once death did result, the rationale behind Coker is no longer constitutionally controlling.

The best and the only solution is to make

intent merely one of the numerous factors which make up the sentencing equation. Several of the members of this Court have already recognized that. This is what Lockett requires, and this is exactly what Florida's law has done. Intent should be just a factor.

Now, Petitioner in his reply brief has said that we have grudgingly admitted that intent can be relevant. We would be trying to fool the Court if we said intent was not relevant. But intent is not controlling. Intent should not be controlling. There is no requirement in the Eighth Amendment for intent before a death sentence can be imposed.

Now, in Coker, the Court set forth a two-pronged test. The first part of the test was whether a particular punishment contributed to the acceptable goals of punishment as recognized by society. The first part that needs to be discussed is deterrence.

Now, Petitioner has argued that one who does not intend death can't be deterred. He can't be deterred from what he didn't intend to commit. But Petitioner has missed the point. The point is that Florida's law is designed to prevent the commission of the underlying felony, the foreseeably dangerous underlying felony the natural and probable consequences

of which is death.

If there was no felony in this case, no attempted robbery, or no robbery, there wouldn't have been deaths. If the death penalty is made unavailable in situations like this, shrewd, cunning criminals will insulate themselves from the death penalty by procuring less mentally gifted criminals to do their dirty work. That would defy common sense. That would be going against public policy of allowing the states to enforce their criminal justice systems and protect their citizens by criminal laws which need to be enforced.

A second situation that could occur would be where a smart criminal procures a juvenile who, depending on what happens in Eddings, might not be eligible for the death penalty. Again, this would be against public policy.

A second goal of punishment which a death penalty in this type of situation achieves is moral outrage, or retribution. Florida's law meets this goal, too. Earl Enmund's moral guilt was presupposed by his participation in this violent felony. He has been made fully responsible for what he has done, the old "an eye for an eye, a tooth for a tooth, and a life for a life." This theory of retribution allows society to strike back for Earl Enmund's deliberate act which upset

the moral order of society.

In fact, a felony murder is even more reprehensible than the average, if you have an average premeditated murder. That is because the victim of a felony murder is randomly selected. There is no rhyme or reason. It happens to be the poor student who is working in a gas station at night, or the poor person that happens to be on duty at a convenience store on the late shift. There is no reason for them to die, but it doesn't make any difference to the victim. They are murdered whether they are felony murdered, premeditatedly murdered, or whatever theory you want to use.

Society is hurt the same way. The victim is still dead, and society has the right to strike back on the person who caused these deaths.

A final theory which Florida's law meets is incapacitation. If a criminal who has killed once is executed, he can't kill again. Now, you might say that this doesn't come up very often, but just the week before last the Florida Supreme Court affirmed a death sentence for a prisoner who had been sent to prison for murder, and he had a life sentence, and he murdered again. If he had been executed that first time, no second murder would have occurred.

The second part of the proportionality test that was set forth in Coker is whether the punishment is grossly --

QUESTION: Well, one thing, he can't be found innocent any more than once, can he? Right? He can't be found innocent --

MR. KADEN: He can't be retried again.

QUESTION: -- more than once, can he?

MR. KADEN: He can be retried once.

The second part of the proportionality test is whether the punishment is grossly out of proportion to the severity of the crime. Petitioner was convicted of first degree murder, and he hasn't even begun to attempt to challenge his conviction. Therefore, Coker's proportionality test is satisfied. That is all the Constitution requires. The Court shouldn't draw any further line than what has already been done. Leave it to the legislatures.

Now, while this is not controlling before the Court, it certainly should be persuasive that approximately half the states have legislatively determined that death should be available if the constitutional principles are satisfied in a situation like this. This was recognized by Justice Blackmun and Justice Rehnquist in the Lockett decision.

Also relevant, but I won't say controlling, is what Congress is doing. I discuss this in my brief. Petitioner disagrees. The Court is going to have to read Senate bill 114 for itself, but I think -- I am satisfied the Court will find that Congress has favorably passed out of Committee a law which would allow the death penalty to be imposed on the non-homocidal crimes of espionage, treason, and attempted assassination of the President. That --

QUESTION: Except for Mr. Spinkelnik, when was the last time anybody was executed in Florida?

MR. KADEN: That is the last time, Your Honor. There is an execution -- in fact, Sampson --

QUESTION: Except for that, when was the last time?

MR. KADEN: I am not sure, Your Honor. I believe it was 1965.

QUESTION: You go through all these motions, and --

MR. KADEN: That's right, Your Honor. I --

QUESTION: -- it never happens.

MR. KADEN: Sampson Armstrong, the co-defendant here, is scheduled to die next week. Right now, at this minute, he is having a hearing in Bartow. I don't know what the outcome of that is.

QUESTION: In where?

MR. KADEN: Bartow, Florida, in the state court system there. Actually, I think it is Hardee County, Florida, where the murders were committed.

The federal statute I just mentioned would also allow the death penalty where an accomplice intentionally participates in an act in which there is a risk of death and the victim dies as a direct result of that act. The direct result question would be a jury question, but it would allow for a death sentence to be imposed in the context like Earl Enmund's case. The House is currently considering a similar bill. I don't have a number. This bill was introduced after my brief was filed.

Also persuasive, but not controlling, is the model penal code. The model penal code, as outlined by the brief filed by the Washington Legal Foundation in this case, specifically includes accomplices to robbery as persons who could be captially punished if death occurs. The intent and recklessness is presumed if the murder is committed during a robbery.

As the Foundation pointed out, if the model penal code had been in effect in Florida when these murders occurred and when the trial occurred, Petitioner could have been sentenced to death under that model

penal code.

Next, I would like to discuss Petitioner's argument that the Florida Supreme Court has eliminated the death sentence in cases like this. Petitioner has cited, oh, eight or ten cases at the conclusion of his brief, but what Petitioner fails to tell this Court is that those cases all involved jury recommendations of life sentences which the trial court overruled and the Florida Supreme Court rejected. Petitioner's jury recommended a death sentence.

Petitioner's second argument in his brief was that this record cannot support his death sentence. This argument should not be persuasive. The trial court specifically found, and the Florida Supreme Court upheld this finding, that Earl Enmund's involvement was major, not minor, as Earl Enmund would have you believe. But for Earl Enmund, these murders would not have occurred. The jury, the trial court, and the Florida Supreme Court all agreed that death was the appropriate sentence for Petitioner. This decision was reached after they considered the unique circumstances of Earl Enmund's character and the individual circumstances of the crimes.

QUESTION: Mr. Kaden, may I interrupt you with a question? The trial judge found, I believe, that the defendant Enmund and the defendant Sampson Armstrong

each fired into the bodies of Mr. and Mrs. Kersey. Now, the appellate court came up with a different holding. How does that affect the sentencing process?

MR. KADEN: It doesn't affect it at all in this case because there were two valid, unchallenged aggravating circumstances, no mitigating circumstances. When there -- Under Florida law, when there is one aggravating circumstance, no mitigating circumstance, death is presumed. If the Florida Supreme Court made any mistakes at all in this case, it would be throwing out that factual finding by the trial court.

The trial court was aware from the trial that Jeanette Armstrong, who had gone up to the murder scene, was seriously wounded. There is evidence in the record that she blacked out. Because of the fact that the victims' bodies had two different types of bullets found in them, the trial court took the reasonable inference that Earl Enmund had either left the car or never been in the car and gone up and done the shooting.

QUESTION: Well, if the trial court made that finding, and then also said that the defendant's participation was major, was the finding that his participation was major based on the belief that he had fired the shot?

MR. KADEN: No, that was based on the entire

record.

QUESTION: And what do we do when the appellate court throws it out?

MR. KADEN: That was based on the entire record, which showed that he was the one who originated the plan, he planned the thing, he was seen driving in the car out there, seen driving back. He covered it up by directing that Ida Jean Shaw dispose of the murder weapons. His involvement was major. That factual determination must be accepted by this Court.

What the Florida Supreme Court didn't say, and it was not brought out by the state, although this is in the record, Willie Lee testified that early on the morning of the murders, he observed the vehicle which was seen in front of the house, he observed it drive by his place where he was standing waiting for a ride. Inside the car, he testified that absolute -- excuse me, he testified that Ida Jean Shaw was driving, Earl Enmund was in the passenger seat, that there were two unidentified blacks in the back of the car, a male and a female, two young blacks.

He testified that he was still waiting for his -- the same ride when the vehicle returned. This time, Earl Enmund was driving at a reckless rate of speed, Ida Jean Shaw was in the passenger seat, and one of the

blacks who had been in the back to begin with -- I shouldn't say that. One of the people in the back seat was slumped over. Okay.

You might ask what relevance does that have. All right. Another witness testified that she saw a black male in the car out in front of the victim's residence. However, another witness testified that the person in the car that he saw -- this is Robert Davis. He testified on cross examination that the person he saw had long hair. Earl Enmund is bald. I think the trial court could take notice of that. That is not in the record.

Therefore, the only reasonable inference which the trial court can make was that Earl Enmund was not in that car, since the person who was seen in the car had long hair. That is in Robert Davis's testimony, and that wasn't discussed by the Florida Supreme Court. I don't know why.

Finally, Florida disagrees with Petitioner's assertion that he presented evidence in mitigation in this case. The record is clear that he did not. Petitioner's attorney did make a brief statement in his closing argument concerning Earl Enmund's involvement, but in Florida as well as probably most of the other states, what an attorney says is not evidence. Even

Petitioner's trial attorney recognized this when asked by the trial court during the sentencing phase if he had any evidence to present. He replied, and I quote, "We have no evidence." That is Page 1,677 of the record.

I don't see how Petitioner can come into this Court and argue now that the Florida Supreme Court or the trial court refused to consider what he didn't present. Despite his failure to present evidence in the sentencing phase, it is clear from the Florida Supreme Court's opinion and the trial court's findings of fact that the entire record was considered. If there had been any evidence in mitigation, it would have been found. There was none in this case.

Florida's legislative and judicial conclusions comport with all the principles previously enunciated by this Court. In short, there is no constitutional barrier to prevent the state of Florida from carrying out the death sentence which was ordered six years ago on this defendant for a crime which was committed nearly seven years ago.

The state of Florida urges this Court, let the Constitution be controlling rather than individual notions of what is fair in a case like this. The Court must continue to allow the various state legislatures to make the laws and to allow these laws to be enforced.

Crime needs to be stopped. The states should be allowed to enforce their criminal laws.

Based on this record and the facts of this case, Earl Enmund's death sentence should be affirmed. Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Liebman?

ORAL ARGUMENT OF JAMES S. LIEBMAN, ESQ.,
ON BEHALF OF THE PETITIONER - REBUTTAL

MR. LIEBMAN: Yes, Mr. Chief Justice.

To begin with, I was rather startled that Mr. Kaden argued or appeared to be arguing that Earl Enmund was inside that house, and that the trial court made the correct finding on that. In the Supreme Court of Florida, the state of Florida took the following position about the facts of Mr. Enmund's participation in the case. I am reading from their brief on appeal at Page 33:

"Appellant Enmund in this case, being constructively present some 200 yards away and aiding in the escape, was therefore a second degree principal, and therefore guilty under Florida's felony murder rule."

They argued there and they took the position that the facts were only enough to support exactly what the Florida Supreme Court found, that he wasn't at the

house, that he was 200 yards away, and I just think that if the Court reviews the record, it will see that the Florida Supreme Court, whose findings are do respect, as this Court held, for example, in Sumner v. Mada so recently, that those findings are absolutely correct on the record, and the state took that position in the Florida Supreme Court.

Now, turning to Justice O'Connor's argument or question during my opponent's argument, I would like to refer the Court to Page 55 of the Joint Appendix, the tan Appendix. On that page, the Florida Supreme Court finds that two of the four aggravating circumstances that the trial court had found were not present in the case, and then it cites the Elledge case in the middle. The Elledge case is the Florida rule that if there are any aggravating circumstances that are rejected and there is any mitigating evidence, any mitigating circumstance at all, then you have to remand for resentencing.

And what did the Florida Supreme Court say, having wiped out two of the aggravating circumstances in the case and then applying the Elledge rule? It said, and I am quoting, and this is from the very last two sentences on the page, "The finding" -- it's referring to the trial court's finding -- "The finding that no

mitigating circumstances were present was not error. Therefore, the sentence of death is appropriate, and we approve it."

They found not that there was some mitigating circumstances or whatever, they found that there were no mitigating circumstances. They say it no less than three times on that page.

Sandra Lockett helped plan the murder in the Lockett case. She pointed out the store, the pawn shop that was robbed. Sandra Lockett hid a gun from the police while the police were searching a taxicab she was in. Sandra Lockett hid two of her cohorts in the attic when the police were searching her house. And yet this Court held, and even in Justice Blackmun's more narrow rule in the Lockett case, that the lack of involvement in the homocide, and I am quoting Justice Blackmun's opinion there, it's "involvement in the homocide was a mitigating circumstance that if no other circumstance was considered had to be considered."

And here, I think, in black and white, at least three different occasions on Page 55, the court has said that there were no mitigating circumstances, that it did not consider those.

Moving to a question that Your Honor, Chief Justice asked --

QUESTION: Doesn't Florida law say what a mitigating circumstance is, or is it just undefined?

MR. LIEBMAN: Well, they do define in the statute that there are eight mitigating circumstances, but --

QUESTION: Well, none of them is participation or a lack of it.

MR. LIEBMAN: That's right, but the way that --

QUESTION: Well, that's all the Supreme Court is saying. There aren't any mitigating circumstances within the meaning of the statute.

MR. LIEBMAN: No, as I -- Your Honor, as I understand the Florida rule, it is not mitigating circumstances within the statute, but mitigating circumstances. But in any case, for the Court to turn dire consequences on whether there are mitigating circumstances but they are statutory or non-statutory, I think, would also violate the principle in Lockett that all of these mitigating circumstances have to be considered, but I would also point out that what the trial court found, and I believe that this is on Page 34, if I am not -- well, it's on Page 28. "The Court can find no mitigating circumstnaces as it applies to this Defendant." That is what the trial court said. That is the finding that the Surpeme Court said was not

in error, and based on which it affirmed.

If I could turn for just a moment to a question that the Chief Justice asked about a statute saying that guns would be enough, if guns were involved and everybody knew about it, could that be enough. My opponent also mentioned Senate bill 114 and the model penal code. All of those examples, I want to point out, involve a subjective state of mind with regard to the homocide that was not proved here.

Now, we think the intent line is the best line, but there is also another line that would be a subjective state of culpability with regard to the homocide, be it recklessness, serious -- some sort of awareness of it, and that was not found in this case. It would be enough under the model penal code. It would be enough under Senate 114. But it was not found here.

CHIEF JUSTICE BURGER: Your time has expired now, counsel.

MR. LIEBMAN: Thank you, Your Honor.

CHIEF JUSTICE BURGER: The case is submitted.

(Whereupon, at 3:08 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Earl Enmund, Petitioner, V. Florida No. 81-5321

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BY Rene Hammond