SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1236

TITLE DONALD A. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., Petitioners V. CRAWFORD BULLOCK, JR.

PLACE Washington, D. C.

DATE November 5, 1985

PAGES 1 - 54

ALDERSON REPORTING
(202) 628-9300
20 F STREET, N.W.
WASHINGTON, D.C. 20001

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -x

3 DONALD A. CABANA, SUPERIN- :

4 TENDENT, MISSISSIPPI STATE :

5 PENITENTIARY, ET AL., :

6 Petitioners, :

7 V. : No. 84-1236

8 CRAWFORD BULLOCK, JR. :

9 -x

10 Washington, D.C.

11 Tuesday, November 5, 1985

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 11:38 o'clock a.m.

15 APPEARANCES:

16 MARVIN L. WHITE, JR., ESQ., Special Assistant Attorney

17 General of Mississippi, Jackson, Mississippi; on behalf

18 of the petitioners.

19 JOSEPH T. MC LAUGHLIN, ESQ., New York, New York; on

20 behalf of the respondent.

21

22

23

24

25

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 C O N T E N T S

2 ORAL ARGUMENT OF PAGE

3 MARVIN L. WHITE, JR., ESQ.,

4 on behalf of the petitioners 3

5 JOSEPH T. MC LAUGHLIN, ESQ.,

6 on behalf of the respondent 24

7 MARVIN L. WHITE, JR., ESQ.,

8 on behalf of the petitioners - rebuttal 52

9

10

11

12 Afternoon Session: Page 21

13

14

15

16

17

18

19

20

21

22

23

24

25

ALDERSON REPORTING COMPANY, INC.

20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 PROCEEDINGS

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Cabana against Bullock.
4 Mr. White, I think you may proceed whenever
5 you are ready.
6 ORAL ARGUMENT OF MARVIN L. WHITE, JR., ESQ.,
7 ON BEHALF OF THE PETITIONERS
8 MR. WHITE: Mr. Chief Justice, and may it
9 please the Court, we are here today seeking a
10 clarification of the Court's holding in Enmund versus
11 Florida. This needed clarification comes about from
12 what we contend to be an erroneous interpretation placed
13 on Inman by the Court of Appeals for the Fifth Circuit.
14 Further, there has developed in this area a
15 split among the circuits as to how, when, and by whom
16 these Enmund criteria findings are to be made. The
17 Fifth Circuit has held in several cases, this being one
18 of them, that there must be some talismanic jury finding
19 of the factors while the Eleventh Circuit holds that
20 Enmund is a question of proportionality and can be found
21 from the record by an appellate court.
22 The basic procedural background of this
23 particular case is that Mr. Bullock was convicted by the
24 Circuit Court of Hines County in 1979. The conviction
25 and sentence was affirmed in August of 1980 by the

1 Mississippi Supreme Court. And then this Court denied
2 cert in 1981.
3 In this interim there after Enmund was decided
4 in 1982, the District Court entered an opinion in this
5 case on the habeas denying the write of habeas corpus in
6 June of 1983, and then the Fifth Circuit reversed this
7 Court, the District Court, in 1984.
8 The facts, of course, that give rise to this
9 case are that on the night of September the 21st, 1978,
10 the petitioner and a fellow named Rickie Tucker and some
11 other friends went to a night spot in Jackson and at the
12 end of the evening, when the place closed, they were
13 found, Bullock and his friend were found without a ride,
14 and their friends had left them there, and Mark Dickson
15 offered them a ride home.
16 On the way there, there developed some
17 altercation after stopping to buy a loaf of bread and
18 finding none there. Bullock borrowed money from Mark
19 Dickson. There developed an altercation over some drugs
20 or some payment for drugs. It is not really clear in
21 the record what it is. Dickson says, I don't have any
22 money. You can take my car as payment.
23 They got back in the car after this, and drove
24 a little further on. Dickson stopped the car and began
25 to fight with Rickie Tucker, who was in the back seat of

1 the car. Tucker ordered or told Bullock to grab hold of
2 Dickson, which he did. Dickson broke away, got out of
3 the car, ran down the road, then, pursued by Tucker this
4 whole time.
5 Dickson -- I mean, Bullock had a cast on his
6 leg, and he followed these people down the road, these
7 two, and joined in the fray again, grabbing Bullock by
8 the hair -- I mean Dickson by the hair of the head, and
9 was hit himself by Tucker wielding a whiskey bottle as
10 he hit Mr. Dickson on the head, cutting his hand.
11 The evidence shows that Mr. Dickson was killed
12 by having his skull crushed by concrete blocks, and then
13 Bullock and Dickson disposed of the body that night.
14 Tucker wanted to burn the car and the body. Dickson
15 said no -- I mean, Bullock said, no, let's take the
16 car. And they buried -- took the body and submerged it
17 in a lake, Bullock wading out into the lake with the
18 cast on and everything, making sure the body was
19 securely under the water after weighting it down with
20 concrete blocks.
21 Now, some two days later Bullock was arrested
22 while riding Dickson's car. Tucker was also tried in
23 this case, and in the case there it went to a jury
24 also. The jury decided in that case to give Mr. Tucker
25 the life sentence. The jury in this case, of course,

1 imposed the death penalty.

2 The issues, of course, are clear. The Fifth

3 Circuit holding that since this trial, while the trial

4 jury did not make a finding that Mr. Bullock intended to

5 kill, or contemplated that lethal force would be used,

6 actually killed or attempted to kill, then we cannot

7 impose the death penalty on Mr. Bullock.

8 QUESTION: Mr. White, has the Fifth Circuit

9 since its decision in this case ever had presented to it

10 the question of whether the state might go back and

11 attempt to retry on this issue, whether that might be

12 double jeopardy of some sort?

13 MR. WHITE: Yes, they have. In Jones versus

14 Thigpen, which is also on cert before this Court right

15 now, the Fifth Circuit has said that they will apply it

16 retroactively, and if there appears to them an

17 evidentiary sufficiency on this, or the state did not

18 offer proof on this particular instance, even though it

19 was tried in a pre-Enmund context, that they will apply

20 the double jeopardy clause and forbid us from retrying

21 them under Bollington in that case.

22 So, we are faced with that situation in what

23 we feel is an unfair position of being placed in, of

24 having to have anticipated something that was not

25 anticipated at the time these people were tried.

1 QUESTION: What was the disposition in this
2 case?
3 MR. WHITE: In this case we were allowed to go
4 back.
5 QUESTION: You were remanded for a new
6 sentencing hearing.
7 MR. WHITE: New sentencing hearing, yes. We
8 were allowed or told that we could go back and
9 resentence, as we were in --
10 QUESTION: If you lose this case, there won't
11 be one, will there, under the Fifth Circuit's present
12 rulings?
13 MR. WHITE: Under the Fifth Circuit's present
14 ruling, if, depending on how they -- of course, there
15 was evidence of his intent --
16 QUESTION: I see.
17 MR. WHITE: -- offered in this case.
18 QUESTION: I see. There was.
19 MR. WHITE: So they are saying that they don't
20 really question the fact that there was not intent shown
21 here. They just said the jury didn't make that
22 finding.
23 QUESTION: And the Appellate Court couldn't.
24 MR. WHITE: That the Appellate Court could not
25 make this finding.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 QUESTION: What reason did they give? The
2 right to a jury trial?
3 MR. WHITE: The right to a jury trial. They
4 never really clearly expressed why this finding had been
5 made. They talk about the fact that the jury, the
6 confusing jury instruction, the possibility -- and of
7 course the right to trial by jury there, and we contend
8 that this is a proportionality review, and not one that
9 has to be -- those findings are -- the Appellate Court
10 can find it.
11 The District Court so held in this case, and
12 then it was, of course, reversed by the Fifth Circuit.
13 QUESTION: Mr. White, in Mississippi the law
14 requires the jury to make all the findings necessary
15 both for guilt and sentencing. Is that correct?
16 MR. WHITE: Yes, they did.
17 QUESTION: And has the Mississippi law been
18 amended since this case arose with regard to Enmund?
19 MR. WHITE: Yes, in 1984, just last year, the
20 legislature, on the advice of the Attorney General's
21 office, after the decisions in the Fifth Circuit by --
22 in Hart v. Louisiana, and in the Skillern versus Estelle
23 and in the District Courts, we decided that it would be,
24 in order to stop any further recourse to this particular
25 avenue of complaint about our death penalty, not -- that

1 it was constitutionally required or anything, but just
2 that this would forestall one more complaint we would
3 have and one more layer of appeal that we would have to
4 go through in deciding these issues to impose the death
5 penalty. So --

6 QUESTION: What would the law now require?

7 MR. WHITE: The law now requires that the jury
8 on sentence, during the sentence phase, to make those
9 findings, and they are expressly set out, just as they
10 were set out in Enmund, that the jury must find that he
11 either killed, attempted to kill, contemplated that
12 lethal force would be used, or intended that life be
13 taken.

14 QUESTION: And you concede that the jury
15 findings in this case were inadequate to meet Enmund?

16 MR. WHITE: No, we do not. No, we do not
17 concede that. We have never conceded that, and we hold
18 that the jury was properly instructed, and that in
19 returning the death sentence on the guilt phase, that
20 they by virtue of their finding found that he actually
21 participated in the killing here.

22 The Mississippi Supreme Court held that he was
23 present and aiding and abetting, aiding and assisting in
24 the assault and the slaying of Dickson.

25 QUESTION: And it is your position that

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 someone who was present and who does some overt act at
2 the time of the killing to assist meets any Enmund
3 requirement without --
4 MR. WHITE: Yes, I do. Without his
5 acquisition -- we distinguish it from Enmund in the fact
6 that Enmund's participation was only shown to be in the
7 robbery, whereas here we have a participation in the
8 actual assault and slaying of the person. Therefore we
9 distinguish that from Enmund, saying that it is not a
10 situation where Enmund applies here in that regard.
11 The jury further --
12 QUESTION: Well, the jury instruction was a
13 little confusing, was it not, when it said first that
14 the jury had defined that Bullock, while acting in
15 concert and while present at the time and place by
16 consenting to the killing, and then went on to say that
17 whether or not it was done with a design to effect the
18 death.
19 How do you reconcile --
20 MR. WHITE: Well, that particular instruction
21 as instructions are required to be read in the state of
22 Mississippi must be read in the context of all the other
23 instructions, and Instruction 16 makes the flat
24 requirement that he must have killed, and read in
25 conjunction with those two, I think that that clarifies

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 any problem there.

2 We would contend, too, that the finding there

3 is clear enough that he consented to and did act in

4 furtherance of this slaying. Further on the sentence

5 phase the court did mention in Enmund that it was not

6 dispositive, but a matter of concern that on the

7 sentence phase instruction, the jury was told, as in

8 this case, that they could consider as a mitigating

9 factor his -- the fact that he was an accomplice, and

10 that his participation was relatively minor.

11 So, we have that, too, that the jury was in

12 this pre-Enmund context told to look at his

13 participation and see if it was in fact minor, and that

14 if it was, then they could use that as a mitigating

15 circumstance and then weigh that against the aggravating

16 circumstances that they --

17 QUESTION: Mr. Attorney General, your argument

18 is that there was enough of a finding even by the jury.

19 MR. WHITE: Yes, that is one of our arguments.

20 QUESTION: That is one of your arguments, but

21 even if there wasn't, you say there was enough of a

22 finding by the Mississippi Supreme Court.

23 MR. WHITE: Yes, sir.

24 QUESTION: Wholly aside from what the jury

25 might have done. Why don't you just argue that there

1 not only was such a finding, but that there is no need
2 for a jury to decide it? I guess that is part of your
3 argument, isn't it?
4 MR. WHITE: That is part of our argument.
5 QUESTION: You just don't have a right to a
6 jury trial --
7 MR. WHITE: And sentence.
8 QUESTION: -- to make that kind of a finding.
9 MR. WHITE: That's right. That is the core of
10 our argument, that first and foremost there is no right
11 to a jury finding or a jury --
12 QUESTION: In a sentencing phase.
13 MR. WHITE: -- sentencing phase on --
14 QUESTION: Yes.
15 MR. WHITE: The jury is not required to make
16 the sentencing. Therefore this finding was not
17 something that this Court engrafted on as an element to
18 the crime or an element to the sentencing -- so what we
19 are saying is that the Court there, although the finding
20 was a sketchy finding, they said the court of
21 Mississippi, as this Court relied on the finding of the
22 Florida Supreme Court, because the District Court in
23 Florida had found totally different facts.
24 QUESTION: We could, I suppose, analytically
25 agree with you that the Mississippi Court could have

1 made such a finding, but that it didn't, but it didn't
2 make a good enough --
3 MR. WHITE: It didn't make a sufficient enough
4 finding. But then, of course, we would ask that it just
5 be remanded for them to make a further finding
6 possibily, but that is -- we consider that the jury
7 finding there, that that instruction was clear enough
8 that they had -- the jury had to find that intent was
9 there, or that he --
10 QUESTION: The Fifth Circuit certainly didn't
11 approach it as that it was an element of the crime.
12 MR. WHITE: Not as an element of the crime,
13 no. They --
14 QUESTION: They just remanded for
15 resentencing.
16 MR. WHITE: Yes, but with the requirement the
17 jury make those findings.
18 QUESTION: I understand.
19 MR. WHITE: Not that the court could do so,
20 but the Eleventh Circuit, of course, has taken a
21 completely different approach, and that is that it is a
22 proportionality finding, that jury findings might be
23 very --
24 QUESTION: Why do you call it a
25 proportionality? Why do you have to dress it up in

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 language like that? It is just that this is a finding,
2 a necessary finding that has to be made, but an
3 Appellate Court may make it.
4 MR. WHITE: Well, that is exactly what we --
5 QUESTION: Just because there is no
6 requirement for a jury to do it.
7 MR. WHITE: Well, this Court has couched it in
8 terms --
9 QUESTION: Well, I mean, that is your
10 argument.
11 MR. WHITE: Of proportionality.
12 QUESTION: All right.
13 MR. WHITE: And Solem V. Helm and Pully v.
14 Harris, that is the way that this Court has addressed
15 this thing, and so we were just using the Court's own
16 language there.
17 QUESTION: General White, can I follow up on
18 that? Because there is one part of your argument I
19 don't quite follow. You argue that there was a
20 sufficient jury finding that basically they were
21 instructed that if he was not an unwilling participant,
22 that that is enough of an element of intent or something
23 along those lines, and I think the Mississippi Supreme
24 Court said something to the same effect, that he was not
25 an unwilling participant, but did the Mississippi

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 Supreme Court say anything that we cannot reasonably
2 assume that the jury itself had already found?
3 I mean, you argue, in other words, that the
4 Mississippi Supreme Court in effect made a finding of
5 fact that the jury did not make, and if so, just exactly
6 what was it?
7 MR. WHITE: Well, of course, our first
8 position is that the finding was made by the jury.
9 QUESTION: Right, I understand, but even if it
10 wasn't you say, well --
11 MR. WHITE: Even if it wasn't, even if that
12 jury finding has found that that finding was -- may be
13 insufficient there somehow, the Supreme Court in its
14 consideration --
15 QUESTION: And what I am trying to find out
16 is, what is there in the Supreme Court opinion that goes
17 beyond anything that we could reasonably attribute to
18 the jury?
19 MR. WHITE: Well, I don't think there is a
20 lot, other than just maybe in a clearer language than
21 the jury instruction. The jury instruction is --
22 QUESTION: I see.
23 QUESTION: The arguable defect in the jury
24 instruction, at least in part, is that they might not
25 even, if you look at certain parts of the instruction,

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 they wouldn't have to find any kind of an intent.

2 MR. WHITE: That's true, but they were also

3 instructed -- they had to look at the instruction as a

4 whole.

5 QUESTION: I know, but the argument is that

6 they might have understood they didn't need to find

7 intent at all. And in that event, if you approach it

8 that way, then the Mississippi Supreme Court certainly

9 did find something that the jury didn't necessarily

10 find.

11 MR. WHITE: Well, possibly so, but there is

12 another -- our interpretation or our interpretation of

13 Enmund is that the Court left us with four options

14 there, and any one of those would support the death

15 penalty, one of those being that he attempted to kill,

16 and actually took a part in the furtherance of that, or

17 that he killed.

18 We don't read Enmund as requiring that if

19 someone actually killed, that he had to have an intent

20 to do so in that particular context.

21 QUESTION: Yes, but the Fifth Circuit's

22 position, I think, was that because of the instructions

23 to the jury in the trial court, although there might

24 have been evidence that would have supported the same

25 finding that the Supreme Court of Mississippi made, the

1 jury might not have made that, might not have made that
2 finding.
3 MR. WHITE: Yes, that has been their position
4 both in this case and in Redigs and Jones, Skillern and
5 Hart v. Louisiana, all of those. They are concerned
6 with whether the jury made this finding there.
7 QUESTION: So I don't think it is entirely
8 accurate to say that the Supreme Court of Mississippi
9 did nothing that we know for sure the jury did --
10 MR. WHITE: Well, we contend that that finding
11 that they made that he was an active participant,
12 present, aiding, and assisting in the assault and the
13 slaying, we think that is sufficient enough finding, and
14 --
15 QUESTION; If the jury didn't make it, the
16 Supreme Court did, and you say that was enough.
17 MR. WHITE: That is enough. That is
18 sufficient.
19 QUESTION: And it is enough under -- as a
20 matter of Mississippi law as well if the jury doesn't
21 make the finding?
22 MR. WHITE: It has been. Of course, this
23 case, as has been pointed out, was tried long before
24 Enmund, so that was not in their mind when they were
25 making this finding. Since that time, on cases that

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 were tried pre-Enmund or even after Enmund but before
2 the amendment of the statute, the Supreme Court does
3 make that finding, and they have --
4 QUESTION: They thought it was consistent with
5 Mississippi law, obviously.
6 MR. WHITE: Right. Certainly they did.
7 Mississippi law does allow them to make that finding.
8 It is not as some other state --
9 QUESTION: Until the statute was passed.
10 MR. WHITE: Until the statute was passed, and
11 we even had some cases since that time where those --
12 QUESTION: General White, I won't ask you to
13 do it now, but after lunch it would be helpful to me if
14 you would call my attention to the portion of the
15 Mississippi Supreme Court opinion in which you think
16 they made a finding the jury did not make.
17 MR. WHITE: Yes, sir.
18 QUESTION: That would be helpful, because I
19 have a problem with it.
20 MR. WHITE: Of course, in Mississippi, the
21 situation involved we will have, there are about ten
22 cases involved now. We have 40 people on death row, and
23 ten of those cases are such that this case will impact
24 on those cases as to how this decision comes out,
25 because there were no jury findings made in those cases,

1 and the findings on Enmund were basically done by the
2 Supreme Court are not made at all because it was not an
3 issue raised before the Supreme Court.
4 We would submit that the view taken by the
5 Eleventh Circuit is a more -- approach in this
6 particular context, that the finding of an Appellate
7 Court on the record is done all the time, and the
8 decision, of course, in Ross v. Kemp is totally
9 consistent with the ruling in this Court in Enmund
10 versus Florida.
11 · The basis of proportionality, relying on the
12 facts as set forth here in Florida, throughout the Inman
13 opinion this Court makes it plain that it was deciding a
14 case based on proportionality, on a proportionality
15 review of the record, and as we said earlier, later in
16 Solem versus Helm, the same type of reasoning was used.
17 Each criteria set forth in Solem versus Helm was
18 supported by Enmund as an example, and of course the
19 argument that due process requires in Mississippi some
20 jury finding is not persuasive, because as we possibly
21 said earlier, that Spaziano held that there was no
22 constitutional right to a jury determination of
23 sentence, and therefore Enmund requires only that the
24 death penalty cannot be imposed under the defendant's --
25 unless the defendant's individual participation

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 justifies it in the given case.

2 So, we look at these findings found by the

3 state, by the State Supreme Court. We look -- the Fifth

4 Circuit totally ignored the fact that in the sentencing

5 instructions, that they were given the mitigating factor

6 that the defendant was an accomplice in the capital

7 offense, and his participation was relatively minor.

8 They even make the comment in the opinion that the state

9 after this guilt phase instruction gave no other

10 instruction that focused the jury's attention to his

11 culpability in this crime or his participation in this

12 crime. And we --

13 CHIEF JUSTICE BURGER: We will resume there at

14 1:00 o'clock, counsel.

15 MR. WHITE: Thank you, Your Honor.

16 (Whereupon, at 12:00 o'clock p.m., the Court

17 was recessed, to reconvene at 1:00 o'clock p.m. of the

18 same day.)

19

20

21

22

23

24

25

ALDERSON REPORTING COMPANY, INC.

20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 AFTERNOON SESSION

2 (12:59 P.M.)

3 CHIEF JUSTICE BURGER: Mr. White, you may
4 resume your argument.

5 ORAL ARGUMENT OF MARVIN L. WHITE, JR., ESQ.,
6 ON BEHALF OF THE PETITIONERS - RESUMED

7 MR. WHITE: Mr. Chief Justice, and may it
8 please the Court, I think I will attempt to answer
9 Justice Stevens' question at this time. Having reviewed
10 the opinion of the Supreme Court and some of the factors
11 involved there, we would answer it in this way, that the
12 jury finding, of course, was a general verdict, and so
13 we did not know the precise parameters of what they
14 found there.

15 However, the Mississippi Supreme Court, its
16 findings in two specific instances in the opinion do
17 delineate with great exactitude just what they found, or
18 their interpretation of what the jury found and what
19 they see from the record, and those were in the context
20 of evidentiary sufficiency on the claim of the failure
21 to grant a directed verdict as to manslaughter, where
22 they found that Bullock was present, aiding --

23 QUESTION: What are your citations? Are you
24 referring to -- what?

25 MR. WHITE: To the opinion in the Mississippi

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 Supreme Court.

2 QUESTION: Is that -- what is your citation?

3 MR. WHITE: It is the appendix to the

4 petition.

5 QUESTION: Right. What page was that?

6 MR. WHITE: A-81 and 2.

7 QUESTION: Okay.

8 MR. WHITE: And on -- the second reference

9 will be A-117.

10 QUESTION: Okay. Thank you.

11 MR. WHITE: Where the Court found in the

12 context of that manslaughter instruction that he was

13 present, aiding, and assisting in the assault upon and

14 slaying of Dickson and then in its proportionality

15 review analysis it again makes the finding that the

16 appellant was an active participant in the assault and

17 homicide.

18 QUESTION: I am sorry, Mr. White, I didn't get

19 your second reference.

20 MR. WHITE: A-117.

21 QUESTION: 117?

22 MR. WHITE: Right. And that is in the

23 appendix to the --

24 QUESTION: Oh, yes. Thank you very much.

25 That is -- the appellant was an active participant in

1 the assault and homicide committed upon Dickson. Those
2 two findings there would be what we would contend was
3 the finding of the Supreme Court of Mississippi in those
4 cases.
5 QUESTION: Thank you.
6 MR. WHITE: The issue, of course, here is not
7 whether it was a jury finding, but whether there is in
8 fact evidence in the record of intent or evidence in the
9 record that the person killed, attempted to kill,
10 intended to kill, or contemplated that lethal force
11 would be used.
12 The opinion in Enmund, we contend, was to cull
13 out those people who did not have those, and there were
14 very few, as pointed out in the opinion in Enmund, that
15 fit into this category. The Fifth Circuit, we contend,
16 has engrafted a constitutional requirement that these
17 must be found by the jury that we do not feel comports
18 with this Court's opinion in Enmund.
19 And in conclusion, we would submit that the
20 view of determination of the Enmund factors and criteria
21 used by the Eleventh Circuit is much more consistent
22 with the ruling than the Fifth Circuit holding that they
23 must be made by a jury.
24 We would reserve the remainder of our time for
25 rebuttal.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 CHIEF JUSTICE BURGER: Very well.

2 Mr. McLaughlin.

3 ORAL ARGUMENT OF JOSEPH T. MC LAUGHLIN, ESQ.,

4 ON BEHALF OF THE RESPONDENT

5 MR. MC LAUGHLIN: Mr. Chief Justice, and may
6 it please the Court, we seek affirmance of the Circuit
7 Court's determination that Crawford Bullock could not
8 lawfully be sentenced to death for capital murder where
9 the jury was not instructed to find and did not find
10 that he killed, attempted to kill, intended to kill, or
11 contemplated the use of lethal force.

12 This result, dictated by this Court's
13 decisions in Enmund, Lockett, Mullany, and others, means
14 simply that the defendant may be resentenced properly
15 under the amended Mississippi death penalty statute
16 which specifically requires the jury to find that the
17 defendant's conduct satisfies one or more of the Enmund
18 factors before it may determine whether to impose the
19 death sentence.

20 Crawford Bullock's death sentence was imposed
21 and upheld by the Mississippi Supreme Court prior to
22 this Court's decision in Enmund, and it was not based on
23 his personal responsibility or his moral guilt.

24 There are at least four things this case is
25 not about, and I would like to start by exploring them

1 briefly. First, we seek no limit on the power of the
2 state to define crimes, including felony murder, but we
3 do urge consistency with this Court's own view expressed
4 in Lockett where the Court said states have authority to
5 make aiders and abetters equally responsible as a matter
6 of law with principles or to enact felony murder
7 statutes, but the definition of a crime does not
8 automatically dictate the proper penalty.

9 Second, we seek no redefinition or refinement
10 of Enmund which in words of plain meaning and common
11 understanding prohibits, we would submit, the execution
12 of one who does not kill, attempt to kill, intend to
13 kill, or contemplate that lethal force would be used.

14 QUESTION: How do you place in this whole
15 panorama of the findings with respect to the
16 overwhelming evidence? You are addressing primarily the
17 charge, I take it.

18 MR. MC LAUGHLIN: I am addressing the charge,
19 Your Honor, but I also feel and will address the point
20 that the Mississippi Supreme Court did not make findings
21 with respect to the ability or the eligibility of
22 Crawford Bullock to be sentenced to death.

23 The Mississippi Supreme Court discussed in the
24 two places cited in the appendix by counsel for the
25 petitioner a concept of accessory or aiding and abetting

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 liability. Indeed, their opinion came down before the
2 Enmund decision. They did not purport to and did not
3 make any Enmund findings.

4 I think it is very important, frankly, to
5 focus on what the Supreme Court of Mississippi did say.
6 First, with respect to the sentence on Page A-81 cited
7 by counsel for the petitioners --

8 QUESTION: Eighty-one?

9 MR. MC LAUGHLIN: Eighty-one, Mr. Chief
10 Justice. The sentence that was read was that the
11 appellant was present, aiding, and assisting in the
12 assault upon and slaying of Dickson. Now, just prior to
13 that, the Court lays out the standard by which it
14 reaches that conclusion, which I submit is not a
15 finding. Just above that, on that very same page, the
16 Court says that in passing upon a motion for a directed
17 verdict in a criminal case, beginning now to read at the
18 top of Page A-81, "All evidence most favorable to the
19 state together with reasonable inferences are considered
20 as true, and evidence favorable to the appellant is
21 disregarded."

22 That, I submit, is perhaps a standard of
23 appellate review. It is not a finding weighing the
24 evidence that this particular person meets any one of
25 the Enmund criteria.

1 Secondly, the Mississippi Supreme Court at
2 Page A-117, Your Honors, in talking about the
3 participation, the active participation of Crawford
4 Bullock in the assault and homicide was talking about
5 the statutory crime of felony or capital murder under
6 the law of Mississippi. We do not challenge the guilt
7 of Mr. Bullock. We have not challenged the sufficiency
8 of the evidence to support his guilt of the crime of
9 capital murder.
10 I think it is important to put in context what
11 the Mississippi Supreme Court said, because on Page
12 A-116, the Mississippi Supreme Court introduced their
13 conclusion that Mr. Bullock was an active participant in
14 the homicide by saying, and I quote from the middle of
15 the page, "The law is well settled in this state that
16 any person who is present, aiding, and abetting another
17 in commission of a crime is equally guilty with the
18 principal offender."
19 It is fair for the Mississippi Supreme Court
20 to have said --
21 QUESTION: I am not quite sure what your point
22 is about what you have just read.
23 MR. MC LAUGHLIN: My point, Mr. Chief Justice,
24 is --
25 QUESTION: They are merely stating a general

1 proposition of Mississippi law, are they not?

2 MR. MC LAUGHLIN: Yes, I believe that is

3 correct, and they are not making the specific kind of

4 finding required before someone may be put to death.

5 QUESTION: What about the top of 117 and Page

6 81?

7 MR. MC LAUGHLIN: Your Honor, that sentence at

8 the top of Page 117 follows exactly upon their

9 statement, if you will, of the law of Mississippi,

10 namely that a person who aids and abets in the

11 commission of a crime, here either the crime of robbery,

12 of which the defendant, Mr. Bullock, was found guilty --

13 QUESTION: The statement from the court on

14 Page 117 is not a general statement of law. They are

15 statements with respect to the evidence on this record,

16 on the record then before them.

17 MR. MC LAUGHLIN: Your Honor, I don't think

18 the Mississippi Supreme Court was purporting to review

19 the evidence on the record before them. I think --

20 QUESTION: Well, then, what did they mean when

21 they said the evidence is overwhelming that appellant

22 was an active participant in the assault and homicide

23 committed upon Mark Dickson, and so forth?

24 MR. MC LAUGHLIN: I think, Your Honor, they

25 were simply restating the law of Mississippi that a

1 person who aids and abets in the commission of a crime,
2 and here the crime could either be robbery or the crime
3 of capital murder, which does not require and did not
4 require in this case that Crawford Bullock kill, attempt
5 to kill, intend to kill, or contemplate the use of
6 lethal force. It only required, and this is where the
7 jury charge, I think, is most instructive, because it is
8 based on the statute, which of course is what the
9 Mississippi Supreme Court is talking about. It only
10 required that the man be present, present at the scene,
11 that he consent to the killing.

12 QUESTION: Are we reading the same page here?

13 MR. MC LAUGHLIN: Yes, Your Honor, I believe
14 we are.

15 QUESTION: May I read it to you? "When the
16 evidence," and I assume they are referring to the
17 record, "is overwhelming that appellant was an active
18 participant in the assault and homicide," that is not a
19 general statement of law. It isn't a statement of law
20 at all. It is a statement of what the record told the
21 Supreme Court of Mississippi.

22 MR. MC LAUGHLIN: Your Honor, if they were
23 purporting to state the fact, and the fact they were
24 purporting to state was that Mr. Bullock killed,
25 attempted to kill, intended to kill, or contemplated

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 that lethal force would be used, they didn't say.

2 What they said was, under the law of

3 Mississippi, a person who aids and abets in the

4 commission of a crime is equally guilty. What the

5 Mississippi Supreme Court also said was that Rickie

6 Tucker beat and killed the deceased. They did not say

7 that Mr. Bullock struck or beat or killed the deceased.

8 What they said was, he was present, and under the law of

9 Mississippi, as an aider and abetter --

10 QUESTION: No, they didn't say he was

11 present. They didn't say that at all. They said he was

12 an active participant. I am confused about --

13 MR. MC LAUGHLIN: Your Honor, he is a

14 statutory participant in the crime because he was

15 present.

16 QUESTION: I think we need an interpreter

17 here, because what I read in the English language here

18 isn't what you are telling us.

19 MR. MC LAUGHLIN: Your Honor, the Mississippi

20 Supreme Court said that they accepted Crawford Bullock's

21 statement of the facts, and indeed they based their

22 statement of the facts upon them. They said further

23 that his testimony at the trial was consistent with the

24 statement that he gave to the police, which is in the

25 record.

1 In that statement, Mr. Bullock said he was
2 present. He did not strike the deceased. Rickie Tucker
3 struck the deceased, and he killed him.
4 QUESTION: Go back to 81. This is the Supreme
5 Court of Mississippi speaking, their evaluation of the
6 record. The evidence is overwhelming that appellant was
7 present, aiding, and assisting in the assault upon and
8 the slaying of Dickson, and in removing and discarding
9 his wallet and the personal effects and so forth,
10 disposing of his body.
11 MR. MC LAUGHLIN: I would submit respectfully
12 that that is a restatement of the law of Mississippi,
13 and the law of Mississippi is that a person is deemed to
14 be equally guilty with the principal, with the person
15 who commits the crime, if he is present and he aids and
16 abets in the offense.
17 The offense here is either the robbery or the
18 capital murder. Neither of those offenses requires a
19 finding by anyone, and the Mississippi Supreme Court, I
20 submit, did not make such a finding, that Mr. Bullock
21 killed, attempted to kill, intended to kill, or
22 contemplated the use of lethal force.
23 QUESTION: Counsel, are you defending the
24 Fifth Circuit's opinion?
25 MR. MC LAUGHLIN: Your Honor, yes, I am

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 defending the Fifth Circuit's opinion, because it
2 concludes --
3 QUESTION: Well, it certainly never addresses
4 the finding of the Mississippi Supreme Court or whatever
5 you want to call those words.
6 MR. MC LAUGHLIN: It does not address the
7 description by the Mississippi Supreme Court. That is
8 correct.
9 QUESTION: Do you think it should have?
10 MR. MC LAUGHLIN: Well, Your Honor, perhaps in
11 the perfect world it should have, but I think the point
12 here is that there was no --
13 QUESTION: Well, it seems to me this leads me
14 to the other -- suppose that there was no doubt that the
15 Mississippi Supreme Court made the finding that Enmund,
16 that you -- even you would concede Enmund requires, that
17 they made the finding. Would you be here then?
18 MR. MC LAUGHLIN: Yes, Your Honor, we would
19 be.
20 QUESTION: So you would be saying that the
21 jury must make the finding?
22 MR. MC LAUGHLIN: I would be saying that the
23 jury must make the finding, depending upon the facts of
24 the individual case, the charge that is given to the
25 jury, the nature of the crime --

1 QUESTION: You would say an appellate court
2 finding, even though it reads right on Enmund, just
3 doesn't satisfy the constitution. Is that it?
4 MR. MC LAUGHLIN: I would say, Your Honor,
5 here, first of all, it doesn't satisfy Mississippi's own
6 law. It doesn't satisfy the Constitution because it
7 doesn't satisfy Mississippi's law.
8 QUESTION: That isn't what I am asking.
9 MR. MC LAUGHLIN: Secondly, I would say it
10 does not satisfy the Constitution of the United States
11 unless --
12 QUESTION: Why not?
13 MR. MC LAUGHLIN: Because, Your Honor, it is
14 our position that the Enmund findings, the establishment
15 of the threshold beyond which one must ask before one
16 can be eligible for the sentence of death, is like, is
17 equivalent to the component, an element of the crime
18 which the jury must find for the reasons this Court has
19 set forth over time as to why the jury is an important
20 protection. But I do think it is important to note here
21 --
22 QUESTION: Well, you mean it would be
23 unconstitutional for a judge to be authorized to hold
24 the sentencing hearing?
25 MR. MC LAUGHLIN: No, Your Honor. I was --

1 QUESTION: He would be making these very
2 findings.
3 MR. MC LAUGHLIN: Not necessarily. I was
4 attempting --
5 QUESTION: Well, he would, if he was going to
6 impose the death sentence in this. If a single judge
7 had been authorized to hold a sentencing hearing and
8 impose the sentence, he would have had to make the
9 Enmunds finding if he was going to --
10 MR. MC LAUGHLIN: Your Honor, under our
11 argument that Mississippi law compels this result, that
12 is not necessarily true.
13 QUESTION: Well, I know, but Mississippi law
14 isn't going to decide our constitutional issue.
15 MR. MC LAUGHLIN: Well, it is the Fourteenth
16 Amendment which applies the law of Mississippi or
17 requires, since Mississippi has protected this interest,
18 that the jury do it.
19 QUESTION: What case have you got to support
20 that statement?
21 MR. MC LAUGHLIN: Well, Your Honor, I believe
22 when one looks at Hicks versus Oklahoma, the Fourteenth
23 Amendment was their reply to protect a state-protected
24 liberty interest, and that is the case upon which we
25 were relying, but I think it is important to clarify one

1 thing, if I may, in response to your question.

2 It is not necessarily the case that an

3 Appellate Court or a reviewing court, let us say, could

4 not find that Enmund was satisfied, and let me explain.

5 First, it is not necessary that the questions that the

6 Mississippi law now requires be asked in every capital

7 murder case, it is not necessary that those questions

8 precisely be asked outside the state of Mississippi.

9 If, for example, the statute under which the

10 defendant was indicted and convicted required the jury

11 to find that the person intentionally or with malice

12 aforethought took life. The statute takes care of it.

13 Enmund is satisfied because the man was charged with

14 intentional killing.

15 Second, it is not necessary that these

16 questions be asked, or that the jury be involved

17 specifically. If, for example, the defendant was the

18 sole actor in the crime, and this is undisputed, because

19 there a jury verdict, even a general verdict of guilt

20 under a felony, a classic felony murder statute,

21 necessarily means that the defendant took life.

22 Now, it doesn't answer the question raised by

23 the amicus as to whether or not it is required

24 constitutionally also to find that there was an

25 intentional taking of life, but putting that question

1 aside, if there is a sole actor in any of these cases in
2 the Eleventh Circuit, the Wainwright cases, et cetera,
3 are cases where the only person involved in the crime is
4 the person whom the jury convicts.
5 It would not be necessary in those cases to go
6 back and resentence and ask question which are really
7 pointless, because the jury has already made the
8 determination which satisfies Enmund if Enmund does not
9 require more than just a killing.
10 Third, if the defendant was convicted of
11 felony murder but the jury found an aggravating
12 circumstance beyond a reasonable doubt that the
13 defendant intentionally killed during the commission of
14 the predicate felony, it would not be necessary in my
15 view to go back and require of the questions that
16 Mississippi has decided must be put in every case could
17 be put in other states as a matter of constitutional
18 law. Enmund would be satisfied, and indeed there are
19 statutes which are quite explicit on the point.
20 Indiana, which is an amicus in this case, has a statute
21 --
22 QUESTION: How do you read the Court of
23 Appeals for the Eleventh Circuit decisions? Do they say
24 that the Enmund finding may be made by an Appellate
25 Court?

1 MR. MC LAUGHLIN: The Ross case comes out of
2 Georgia, Your Honor, and the Georgia Supreme Court has
3 now said that the jury must find specifically either
4 capital or malice murder.
5 QUESTION: Now, how about my question?
6 MR. MC LAUGHLIN: But putting that aside, Your
7 Honor, the Eleventh Circuit case, the Ross case
8 specifically, does conflict on its face with the holding
9 in Bullock, because it says the jury finding is not
10 required. However --
11 QUESTION: Why does it -- the Court of Appeals
12 for the Fifth Circuit did not even address it.
13 MR. MC LAUGHLIN: No, that is true, Your
14 Honor. It didn't. But it is a conflicting decision in
15 the sense that the two -- on the question of the -- the
16 role of the jury cannot be put side by side and said to
17 be consistent, but --
18 QUESTION: Anyway, you agree that the Eleventh
19 Circuit has held that the Appellate Court may make the
20 finding.
21 MR. MC LAUGHLIN: Yes, I believe that is
22 correct, Your Honor.
23 QUESTION: And you disagree with that?
24 MR. MC LAUGHLIN: I disagree with it depending
25 on the facts, because as I was about to say in addition

1 to the three exceptions I have already given, I believe
2 there are at least two more exceptions to the rule that
3 the questions must be put to the jury at least in a
4 state like Mississippi, which requires those questions
5 to be put.
6 If, for example, defendnt concedes one of the
7 Enmund factors, and this is true certainly in the Fourth
8 Circuit case, which is cited in the briefs, Ross --
9 Roach, excuse me, against Martin, if the defendant
10 concedes one of the Enmund factors, then again there is
11 no point in requiring on resentencing under Enmund a
12 jury finding specifically addressed to the Enmund
13 question, because the defendant has conceded it. It is
14 not an issue.
15 And finally I would say there has to be an
16 exception to take into account those cases, and I think
17 this exception would have to be carefully and with great
18 measure applied. But to take into account those cases
19 where, for example, the forensic evidence is
20 overwhelming, the testimony is overwhelming that it was
21 the specific defendant who killed or intended to kill or
22 attempted to kill or contemplated that lethal force
23 would be used, where all of those factors come together
24 to such a point, as Judge Clark said in concurring in
25 dissenting in the Eleventh Circuit case that even he

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 would concur in the result, although he disagreed with
2 the reasoning of the Eleventh Circuit, because, he said,
3 based on the factors as he knew them, that was the right
4 result. I don't know what the trial record in Ross
5 would show. It may well be there is conflicting
6 evidence there, and if so --

7 QUESTION: Mr. McLaughlin, it seems to me that
8 your last example is a concession, whether you intended
9 it to be or not, that it is all right for a Federal
10 Court of Appeals to make the required finding.

11 MR. MC LAUGHLIN: Well, Your Honor, the
12 petitioner here has never argued that. It has never
13 been an issue anywhere in the Fifth Circuit or here.

14 QUESTION: What is your reason? You give a
15 lot of reasons why the rule doesn't do much harm and so
16 forth, but why do you contend, Spaziano having been
17 decided the way it was, why do you contend that a judge
18 or appellate court may not make a required finding?
19 What is the reason for your position?

20 MR. MC LAUGHLIN: Well, Your Honor, in
21 Mississippi, the reason for it is that the legislature
22 determined long before Mr. Bullock was sentenced that
23 the jury had to make the findings both at the guilt
24 stage and at the sentencing stage, and that they had to
25 sentence the defendant.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 QUESTION: So your answer is, it is a matter
2 of Mississippi law, this is the appropriate factfinder
3 on this issue.
4 MR. MC LAUGHLIN: It is, Your Honor.
5 QUESTION: But if Mississippi had a different
6 law, you might not --
7 MR. MC LAUGHLIN: If Mississippi had a
8 different law, then we would be pushed, frankly, to our
9 position, that the due process clause requires as a
10 matter of constitutional law, regardless of the state
11 statute, that the jury make the finding, because
12 Appellate Courts --
13 QUESTION: The Fifth Circuit didn't rely on
14 Mississippi law, did it?
15 MR. MC LAUGHLIN: No, it didn't, Your Honor.
16 It never considered the issue. It was briefed, but it
17 wasn't reached by the Fifth Circuit.
18 QUESTION: I don't see how they could make
19 that argument and then say there are some cases that are
20 so clear that we sitting in the Court of Appeals in the
21 federal collateral review status in effect --
22 MR. MC LAUGHLIN: Well, Your Honor, I am not
23 advocating it, and I would not push the Federal Court,
24 frankly, into that business, and as I say, petitioners
25 never argued it, it has never been an issue in the case,

1 and we certainly don't think it would be the appropriate
2 standard to apply. All I am saying is that I think
3 Judge Clark recognized in his concurring and dissenting
4 opinion in the Ross case that there may be some other
5 exceptions where the Court will develop over time, if it
6 is appropriate, some concept of harmless error, error
7 beyond a reasonable doubt, but I am not advocating that
8 position, and I am not suggesting it is pressented by
9 this record, because this record, if it presents
10 anything, presents a sharp dispute.

11 There is no question but that the evidence,
12 even as construed in a statutory or other fashion by the
13 Mississippi Supreme Court, supports the conclusion that
14 Rickie Tucker killed the deceased, and there is no
15 finding and no suggestion of any finding anywhere,
16 either by the jury or by the Mississippi Supreme Court
17 that Crawford Bullock had any intent to take the life of
18 Mark Dickson.

19 Indeed, the question here is whether the jury
20 must make one or more of the Enmund findings before an
21 individual convicted of felony murder may be sentenced
22 to death in a state where all capital sentence findings
23 must be made by the jury. We don't seek and don't
24 believe it is necessary to attack in any way the holding
25 in Spaziano.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 If there are states, as there are, that
2 protect and preserve the role of the judge in the
3 sentencing process, the role we suggest, which is a
4 narrow one, does not require any other result. It
5 simply requires either that the case meet one of the
6 exceptions that I outlined or that the jury make
7 findings to push that defendant across the
8 constitutional threshold where he is at least eligible
9 to be sentenced to death.
10 It does not require that he be sentenced to
11 death, and it does not preclude the role of the judge in
12 deciding whether to sentence that person to death.
13 Indeed, it does not preclude the judge from overruling,
14 as the judge did in the Florida case of Spaziano, a
15 recommendation by the jury that the defendant be
16 sentenced to life.
17 It simply says that you must have a finding by
18 the jury, at least in those states where the jury must
19 make all capital guilt and sentencing findings as a
20 matter of constitutional due process.
21 I think the jury instructions here are well
22 worth spending a bit of time on, because it is certainly
23 our position, and we thought frankly that petitioner had
24 abandoned his argument. There is no mention of it in
25 his brief. It is certainly our position that the jury

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 findings here did not, did not meet in any way the
2 Enmund requirements. The reason for that is that the
3 jury instructions are at best conflicting and at worst
4 positively misleading.
5 The jury is told, and not told in a vacuum, it
6 is told based on a statute which defines capital murder
7 as a killing when done with or without any design to
8 effect death by any person engaged in a robbery or other
9 predicate felony. The jury was told by the prosecutor
10 before it ever reached the stage where it was charged
11 that we do not have to prove "that he, Crawford Bullock,
12 killed or robbed this man. All we have to show is that
13 he aided and abetted," and that is exactly, I submit,
14 what the Mississippi Supreme Court was talking about
15 when they talked about accessorial or aiding and
16 abetting liability.
17 But when you come to the charge, I think it is
18 important to look at Charge 15. It is repeated in its
19 entirety on Pages 10 and 11 of respondent's brief in
20 this matter. The jury was not required to find that
21 Crawford Bullock killed or attempted to kill or intended
22 to kill or contemplated the use of lethal force.
23 Indeed, quite to the contrary, the jury was
24 told that if Mr. Bullock did any act, any act which was
25 prior to, immediately before, leading up to, connected

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 to the commission of the crime, whether that act was
2 done with or without any desire to effect death, then by
3 consenting to the killing, by being there, by being
4 geographically proximate, if you will, to the killing
5 done by Rickie Tucker, then Crawford Bullock could be
6 sentenced to death.

7 We submit that does not meet and cannot meet
8 the Enmund standard. It could, for example, mean on the
9 facts of this case that the jury thought it was enough
10 that sitting in a two-door automobile, which this
11 automobile was, Crawford Bullock opened the door at some
12 point and Rickie Tucker stepped out of the automobile
13 and chased the driver, ultimately the victim in this
14 case, Mark Dickson, before he beat him to death.

15 That certainly, particuarly when it is told,
16 when the jury is told that it doesn't have to be an act
17 with any design to cause death, that, I submit, woul not
18 meet the standard of Enmund or any other standard
19 requiring some certainty in the capital sentencing
20 process before the ultimate punishment of death is
21 inflicted.

22 The jury was told, as counsel for the
23 petitioner pointed out, in another instruction, in a
24 conflicting instruction, that it could find Mr. Bullock
25 guilty of capital murder and then sentence him to death

1 if he actually killed, but that instruction was directly
2 contradicted by the prior instructions, which said that
3 intent didn't matter, design didn't matter. Consent,
4 whatever that was, consent was the key, and any overt
5 act leading up to the Commission of the crime by
6 another. That, I submit, is not a sufficient ground for
7 this jury or any jury, at least in the state of
8 Mississippi, to find that this person killed or
9 attempted to kill or intended to kill or contemplated
10 the use of lethal force.

11 What was the jury to think, for example, about
12 the meaning of the term "consent?" Was it to think,
13 because consent is not defined anywhere in this charge
14 by the Court, was it to think that it meant to agree
15 somehow, or was it meant to think that consent meant, as
16 the dictionary tells us it can mean, acquiescence, tacit
17 agreement, or restraint of opposition in accepting
18 something about which one has reservations?

19 Mr. Bullock was certainly no hero in this
20 exercise, but he had a cast on his leg which was
21 severely injured, and he was on crutches. Mr. Bullock
22 was struck by Rickie Tucker with a bottle, and his hand
23 was severely injured. He was in the hospital for a week
24 after this incident.

25 He was not in any condition, let us say, to do

1 anything necessarily. He said, he testified, and the
2 Mississippi Supreme Court said his testimony was
3 consistent with his statements to the police, and was
4 the basis upon which they recounted the facts in their
5 opinion. He said he yelled at Rickie Tucker to stop
6 hitting Mark Dickson.

7 QUESTION: But he was holding him in the
8 meantime so that he could be hit with the bottle, wasn't
9 he?

10 MR. MC LAUGHLIN: Your Honor, no. He
11 testified --

12 QUESTION: That is what the evidence is.

13 MR. MC LAUGHLIN: Your Honor, I respectfully
14 submit that is not what the evidence is. There was no
15 dispute, and two of the police investigating officers
16 testified that Crawford Bullock's statement matched the
17 facts to a T. There was no blood from Mr. Bullock, who
18 was bleeding profusely, found on the concrete blocks
19 which were used to kill Mr. Dickson by Rickie Tucker.
20 There was no blood found on the ground or in the
21 depression where the body of the victim lay, despite the
22 fact that Mr. Bullock was bleeding profusely.

23 As Justice Garwin said, concurring with the
24 Fifth Circuit, the version of the facts -- he did talk
25 about the facts, although the rest of the court did not

1 talk about the facts in any great detail. The version
2 of the facts was perfectly consistent with the notion
3 that Mr. Bullock, whether he intervened as he testified,
4 to stop the fight and was not successful, or whether he
5 intervened for some other purpose, and there is no
6 finding on that anywhere, there is no evidence to
7 suggest that he held this person and this person was
8 killed when he was holding him. Indeed, all the
9 evidence is the other way, and the police so testified.
10 QUESTION: What difference would it make
11 whether he died when he was holding him or five minutes
12 or later or an hour later?
13 MR. MC LAUGHLIN: Your Honor, the --
14 QUESTION: The evidence also shows, and is not
15 disputed, that he helped tie the concrete blocks on the
16 body to sink it into the lake.
17 MR. MC LAUGHLIN: Your Honor, the evidence
18 does show that, and the post-crime conduct is something
19 which juries look at to decide whether it has probative
20 value all the time, and we are not defending the conduct
21 --
22 QUESTION: We can't even be sure that the
23 fellow was dead by that time. He might have still been
24 alive.
25 MR. MC LAUGHLIN: Your Honor, the pathologist

1 testified here, and there was no dispute about this,
2 that Mr. Dickson was killed almost instantly by the blow
3 on the head from the cement blocks --
4 QUESTION: Which was it, the bottle or the
5 cement block?
6 MR. MC LAUGHLIN: Your Honor, it is absolutely
7 clear it was the cement block. The bottle disappeared.
8 It was never found. It was not introduced into
9 evidence. The bottle hit Mr. Bullock and broke open the
10 back of his hand. He then retreated, and his blood was
11 found first 15 feet away from the scene, and then 50
12 yards away from the scene. He says he was running
13 away. Whatever the facts, whatever the version of the
14 facts would be, those facts were accepted, and they were
15 not disputed, Your Honor, by the Mississippi Supreme
16 Court or by the witnesses who testified at trial.
17 QUESTION: Obviously the jury didn't believe
18 him when he said he was running away.
19 MR. MC LAUGHLIN: Well, Your Honor, we don't
20 know what the jury believed, because they were told it
21 was enough if he did any overt act with or without the
22 design to cause death, as long as he was involved in the
23 robbery, which the jury found he was, and he consented
24 to the killing, and I submit that is not the same as a
25 finding that he killed, attempted to kill, intended to

1 kill, or contemplated the use of lethal force.

2 I think perhaps more importantly than my

3 submission is this Court's teaching in Francis against

4 Franklin and other cases that certainly in this kind of

5 a case, in a death penalty case, the extreme punishment,

6 that we have to be sure that the jury found on a

7 constitutionally permissible basis that this man was

8 entitled to be sentenced to death.

9 If Francis v. Franklin means anything, I

10 submit it means that. If there are conflicting

11 instructions, we can't allow a death penalty, the

12 extreme punishment, to stand in the face of the

13 possbility that the jury was confused.

14 Now, petitioner's counsel referred to

15 aggravating and mitigating circumstances. I think it is

16 important to note here that we have no record of what

17 mitigating circumstances the jury found. They may well

18 have found that Mr. Bullock was an accomplice whose

19 participation was relatively minor. There is no written

20 record of the mitigating circumstances, if any, found by

21 this jury.

22 QUESTION: Did you appear in the Court of

23 Appeals?

24 MR. MC LAUGHLIN: Yes, I did, Your Honor.

25 QUESTION: Was the argument -- was the

1 Mississippi Supreme Court's treatment of the evidence
2 urged to the Court of Appeals in terms of Enmund?
3 MR. MC LAUGHLIN: Yes. It was argued. It was
4 fully briefed. Yes, Your Honor.
5 QUESTION: It was argued by your opponent that
6 the Mississippi Supreme Court's finding satisfied
7 Enmund?
8 MR. MC LAUGHLIN: Yes, I believe it was,
9 because we certainly argued to the contrary.
10 QUESTION: And yet the Court of Appeals never
11 addressed the issue at all?
12 MR. MC LAUGHLIN: The Court of Appeals did not
13 address it. No, Your Honor, that is correct.
14 Your Honor, it has been suggested that the
15 Mississippi Supreme Court has decided that the law as we
16 urge it, at least as it relates to the law of
17 Mississippi, should not be and cannot be applied
18 retroactively. It is, of course, our position that
19 Mississippi law has always required that capital
20 sentencing findings be made by the jury. That is what
21 the statute says.
22 Most recently, Your Honor, in a case which was
23 not available to us when we filed our briefs. It is a
24 case entitled Gray versus the State of Mississippi. It
25 is found at 472 Southern 2nd 409. The Mississippi

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

1 Supreme Court had a recent opportunity to consider the
2 Enmund findings, the amended statute, which we say would
3 control if this Court affirmed and sent Mr. Bullock back
4 to be sentenced, and we recognize double jeopardy does
5 not attach. He could be resentenced to death if the
6 jury found the appropriate findings.

7 But in that case, the court considered what
8 would happen to Mr. Gray, because Mr. Gray had been
9 convicted and sentenced to death prior to the amendment
10 of the Mississippi death penalty statute requiring the
11 jury specifically to make the Enmund findings in the
12 language of Enmund, and what the court said, I think,
13 was quite instructive at 472 Southern 2nd 409.

14 The court said that the instructions given to
15 the jury to make Enmund -- require the jury to make
16 Enmund findings because for Gray to be found guilty and
17 sentenced to death he had to be found by the jury to
18 have unlawfully, wilfully, and feloniously, and of his
19 malice aforethought, killed and murdered. Then the
20 court went on to define malice aforethought as a
21 predetermination to commit an act without legal
22 justification or excuse.

23 I submit that certainly supports the notion
24 that the Mississippi Supreme Court would apply this if
25 it were properly presented to them. He couldn't present

1 it to them because of the timing of the decision, but
2 Mr. Bullock should be sent back to Mississippi to be
3 resentenced.
4 Thank you.
5 CHIEF JUSTICE BURGER: Do you have anything
6 further, Mr. White?
7 ORAL ARGUMENT OF MARVIN L. WHITE, JR., ESQ.,
8 ON BEHALF OF THE PETITIONERS - REBUTTAL
9 MR. WHITE: Just a point or two to make some
10 clarifications. The evidence in the Mississippi Supreme
11 Court -- in the evidence before the trial court there as
12 far as the blood and everything, the testimony was that
13 they couldn't make a determination whose blood that was
14 on the rocks, and further, that we did not have these
15 findings or the idea of what these findings, the
16 specific language these findings were to be made in
17 until some two years after Bullock was decided, three
18 years after it was tried.
19 So, the actual wording of the findings of the
20 Mississippi Supreme Court as the opponents contend was
21 not in the language of Enmund I don't think would have
22 any bearing here. We do have a finding that if he was
23 an active participant and that active participation was
24 holding someone by the hair of the head while somebody
25 else beat him with a bottle or hit him with a bottle,

1 and he, of course, at that time was injured himself, and
2 so we do contend that the evidence is clear that Mr.
3 Bullock was right in the middle of all this, and is
4 certainly a candidate for the death penalty.

5 QUESTION: General White, could I just ask
6 you, because I am a little confused on it, is it
7 correct, as your opponent says, that the evidence is
8 also clear that he was not killed by the bottle, but he
9 was killed by the concrete block?

10 MR. WHITE: He was killed by the concrete
11 blocks being dropped on his head.

12 QUESTION: Which happened after the striking
13 with the bottle.

14 MR. WHITE: Well, as a part, as a continuation
15 after Bullock was injured by the bottle hitting his hand
16 as he was hitting the man's head.

17 QUESTION: Did Bullock have any part in the
18 act of hitting with the concrete block?

19 MR. WHITE: The evidence does not show so.

20 QUESTION: I see.

21 QUESTION: It does show that he helped use the
22 concrete block to tie him up with a hose so that his
23 body would sink.

24 MR. WHITE: Yes, he was the one who suggested
25 the place to get rid of the body, the whole scenario

1 after the crime of getting rid of the body.

2 QUESTION: Do you consider -- I am sure there

3 are very persuasive fact, and there are certainly very

4 troublesome facts, but are they relevant to the Enmund

5 issue, the post-death facts of the way they disposed of

6 the body?

7 MR. WHITE: Well, traditionally, I think we

8 look at someone's intent by their actions surrounding

9 the crime. We determine intent when we don't have -- we

10 very seldom have the case where the guy, a criminal

11 comes in and says, yes, I intended this and this and

12 this. In that case where we don't have that, we have

13 got to look at surrounding facts.

14 QUESTION: But I just want to be -- you are

15 suggesting that the post-death facts tend to

16 substantiate the conclusion that Bullock intended the

17 death to occur.

18 MR. WHITE: Yes, sir.

19 QUESTION: I see.

20 CHIEF JUSTICE BURGER: Thank you, gentlemen.

21 The case is submitted.

22 (Whereupon, at 1:36 o'clock p.m., the case in

23 the above-entitled matter was submitted.)

24

25

CERTIFICATION

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

#84-1236 - DONALD A. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., Petitioners V. CRAWFORD BULLOCK, JR.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

RECEIVED
SUPREME COURT, U.S
MARSHAL'S OFFICE

'85 NOV 12 P3:57