

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

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WASHINGTON, D.C. 20543

DKT/CASE NO. 84-6075

TITLE RICKY WAYNE TISON AND RAYMOND CURTIS TISON,
Petitioners V. ARIZONA

PLACE Washington, D. C.

DATE November 3, 1986

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 RICKY WAYNE TISON AND RAYMOND :

4 CURTIS TISON, :

5 Petitioners :

6 v. : No. 84-6075

7 ARIZONA :
8 -----x

9 Washington, D.C.

10 Monday, November 3, 1986

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:58 a.m.

14 APPEARANCES:

15 ALAN M. DERSHOWITZ, ESQ., Cambridge, Massachusetts;
16 appointed by this Court.

17 WILLIAM J. SCHAFER, III, ESQ., Chief Counsel, Criminal
18 Division, Arizona Attorney General's Office,
19 Phoenix, Arizona.

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PROCEEDINGS

CHIEF JUSTICE REHNQUIST: We will hear arguments next in Tison versus Arizona.

Mr. Dershowitz, you may proceed whenever you're ready.

ORAL ARGUMENT OF ALAN M. DERSHOWITZ, ESQ.,

ON BEHALF OF PETITIONERS

MR. DERSHOWITZ: Thank you, Mr. Chief Justice, and may it please the Court:

The State of Arizona seeks to execute two young men who it acknowledges lacked the specific intent to kill, and did not, in fact, kill.

It also acknowledges the categorical rule, as this Court categorized it in Cabana, precluding any state from executing, quote, a person who has not in fact killed, attempted to kill, or intended that a killing take place --

QUESTION: Did you say the state concedes what?

MR. DERSHOWITZ: The state concedes that there was no specific intent to kill, and that there was no killing.

QUESTION: What do you mean by that?

MR. DERSHOWITZ: Well, I'm using the state's language. The state says, in its brief, the original conclusion --

1 QUESTION: Well, whatever the state says, what
2 about the Supreme -- what did the Supreme Court of
3 Arizona find?

4 MR. DERSHOWITZ: It also found, in its first
5 appeal, that there was no specific intent --

6 QUESTION: Well, what about the second? They
7 recited the facts and said that the evidence
8 demonstrates beyond a reasonable doubt that petitioner
9 intended to kill.

10 MR. DERSHOWITZ: Intended. But they made a
11 distinction between specific or individualized intent --

12 QUESTION: Where? Where is that?

13 MR. DERSHOWITZ: Well, I read from the state's
14 response on cert where it says, the original conclusion
15 --

16 QUESTION: I'm talking about the Supreme Court
17 of Arizona.

18 MR. DERSHOWITZ: But the state has construed
19 and interpreted the Supreme Court's opinion in this
20 matter.

21 QUESTION: I know. But we have to look --
22 we're reviewing that judgment.

23 MR. DERSHOWITZ: The Supreme Court of Arizona
24 made no statement at all in the second appeal about
25 whether there was specific intent or not. They just

1 said, intent.

2 And I think one can reasonably read the second
3 opinion and the first opinion. The first opinion said
4 there was no specific intent. The second opinion said
5 there was intent.

6 QUESTION: There's a difference between intent
7 and specific intent?

8 MR. DERSHOWITZ: It was the very difference
9 that was raised in this Court in Enmund, and the
10 argument that was made in Lockett: actual intent versus
11 presumed intent, or actual intent versus legal intent.

12 And what the Court was saying --

13 QUESTION: Well, I thought the -- I thought,
14 as I read their second opinion, they went through these
15 facts, and they found intent, based on those facts,
16 beyond a reasonable doubt.

17 MR. DERSHOWITZ: They found beyond reasonable
18 doubt --

19 QUESTION: What are we supposed to do about
20 that?

21 MR. DERSHOWITZ: Well, you're supposed to ask
22 the question, how did they construe the word "intent".
23 The issue before this Court is the legal interpretation
24 of intent.

25 Put another way, can the Arizona Supreme Court

1 now can define foreseeability as intent, after this Court
2 stated in the Enmund case, in specific response, by the
3 way, to an argument made by the Arizona Supreme Court,
4 the very argument it makes here was made by the Arizona
5 Attorney General --

6 QUESTION: Florida.

7 MR. DERSHOWITZ: -- as amicus, as amicus --
8 they filed an amicus brief in the Enmund case -- and
9 they argued, quote, it is just as proper to say that one
10 who felony murdered through a risk creation was at fault
11 for the death as it is to say that one who
12 premeditatedly murdered was at fault for this death.
13 And they should be treated similarly.

14 The same argument was made by the Florida
15 Attorney General, and was explicitly rejected by this
16 Court in Enmund, as it was, Your Honor, rejected by you
17 in the Lockett case, when in Lockett -- remember that in
18 Lockett the Florida court had found -- had found that
19 the defendant had acted purposefully.

20 And then Your Honor, in your opinion in that
21 case, said, purposefully, however, cannot mean
22 presumptively purposefully. It has to be actually
23 purposefully. And that's what was not found in this
24 case.

25 So what we have here is an attempt essentially

1 to relitigate the identical issue decided by the Enmund
2 case, because that case was presented precisely to this
3 Court.

4 Can foreseeability be interpreted to mean
5 constructive intent? This Court?

6 QUESTION: What degree of foreseeability under
7 our test do you think is permissible? What about --

8 MR. DERSHOWITZ: Yes, yes. There is a degree
9 of foreseeability, and that's the degree of
10 foreseeability this Court set out in the Enmund case,
11 and I quote its language:

12 It would be very different if the likelihood
13 of a killing in the course of a robbery was so
14 substantial that one should share the blame for the
15 killing if he somehow participated in the felony.

16 And then the Court went on to define it:

17 Competent observers had concluded that there
18 is no basis in experience for the notion that death so
19 frequently occurs in the course of a felony, for which
20 killing is not an essential ingredient, that the death
21 penalty would be warranted.k

22 QUESTION: What about supplying the inmates of
23 a prison who were planning a breakout with substantial
24 quantities of arms in order to break out? What are the
25 probabilities there?

1 MR. DERSHOWITZ: Well, in this case, what
2 happened is, the Attorney General of the state argued to
3 the jury that it was part of the plan, of the breakout,
4 not to fire any weapons.

5 Had any weapons been fired, the breakout would
6 have failed. That was the plan that was used. And it
7 succeeded. There was not a shot fired.

8 There had been a promise made by the boys'
9 father to them that no shots would be fired. The plan
10 was carefully calculated --

11 QUESTION: And you think that's enough to
12 eliminate the probability, the mere fact that he got a
13 promise from the --

14 MR. DERSHOWITZ: No, no. No, no. Oh, no, of
15 course not.

16 QUESTION: -- incarcerated felon that he
17 wouldn't fire these guns that were delivered to him?

18 MR. DERSHOWITZ: No, it was the method of the
19 plan. That is, a plan was devised to avoid the
20 possibility of shooting. That plan worked. Not a shot
21 was fired.

22 Not a shot was fired until two or three days
23 later, when the father took the young boys by complete
24 surprise, tricked them into being sent away for water.

25 And the boys at that point certainly were

1 entitled to rely on a promise, as the court below found
2 -- and this is a very crucial finding. Both the trial
3 court and the Court of Appeals found, the killing in
4 this case was not necessary to the carrying out of the
5 felony, almost as if to answer the Enmund point, saying,
6 if it was so essential to the felony, that would be
7 different.

8 But they found, as part of the aggravating
9 factors, ironically, that it was not necessary.

10 QUESTION: When you say the Court of Appeals,
11 Mr. Dershowitz --

12 MR. DERSHOWITZ: The Supreme Court.

13 QUESTION: -- you mean the Supreme Court --

14 MR. DERSHOWITZ: The Supreme Court of Arizona
15 found, as did the trial court, that the killings here
16 were not necessary. If they were not necessary, they
17 were also not predictable. I mean the killings of the
18 Lyons family.

19 Obviously, there were two situations here, the
20 breakout at the prison, carefully planned after a
21 promise. Not a shot was fired. Had a shot been fired,
22 the prosecutor said the plan would have failed. That's
23 why no shots were fired.

24 Three days later, the father takes the young
25 boys when he's holding a family hostage and says, in

1 response to the pleas of the victims, please go back and
2 get us water and keep us alive, the father says to the
3 boys, go get them water so they can be kept alive, as
4 the boys interpreted it.

5 The father then disables the car so it can't
6 be used. The message was clearly sent to those two
7 boys, that father is not going to kill. The boys are
8 then not in a position of control when the father kills.

9 QUESTION: Mr. Dershowitz, suppose we read the
10 Supreme Court opinion as saying specific intent or any
11 other kind of intent that satisfies Enmund we found to
12 be present in this case?

13 Then we must go and say, what? What would
14 then be our standard to review?

15 MR. DERSHOWITZ: There is no way, Your Honors,
16 with all due respect, of reading the Arizona Supreme
17 Court decision as finding specific intent. They
18 categorically do not find specific intent, and they
19 could not on the record in this case.

20 QUESTION: Just accept my assumption for the
21 moment, that that's the way we read it.

22 Now, what would be our standard, then, of
23 reviewing that finding? You're arguing the facts.

24 MR. DERSHOWITZ: Oh, no, no, no. We're
25 arguing that this Court has made a legal, constitutional

1 conclusion as to what kind of intent must be found.

2 QUESTION: Yes, yes.

3 MR. DERSHOWITZ: Your Honor in Lockett
4 characterized it as purposefulness. The Supreme Court
5 in this case -- in Enmund, found it as intent in fact.

6 What this Court has done is, it's taken a
7 different concept, foreseeability, a concept that was
8 rejected in Enmund, and it said, magically, we now
9 redefine foreseeability to mean intent.

10 If that were allowed to stand, any state could
11 now circumvent this Court's decision in Enmund and say,
12 well, recklessness means intent. Well, carelessness
13 means intent.

14 When this Court said intent --

15 QUESTION: Well, again, just suppose we don't
16 understand the Supreme Court of Arizona to have applied
17 a legal standard --

18 MR. DERSHOWITZ: It did.

19 QUESTION: Well, I know but --

20 MR. DERSHOWITZ: It did, and the Attorney
21 General acknowledges it did.

22 QUESTION: You say it, but I'm not all that
23 much convinced. So if I'm not convinced, what am I
24 supposed to do with this case?

25 MR. DERSHOWITZ: Well, I think first you

1 should ask the Attorney General of Arizona, and he will
2 tell you that's he convinced, because it's clear.

3 QUESTION: Well, no, but give me some advice.
4 What should I do if I think that the Supreme Court of
5 Arizona purported to apply the right standard of
6 intent? Then do I go through these facts and say, well,
7 they just made a mistake?

8 MR. DERSHOWITZ: No, no. Because if you can't
9 --

10 QUESTION: Or there's no evidence to support
11 their finding?

12 MR. DERSHOWITZ: Well, there is no evidence to
13 support that finding. That is clear. There is no
14 evidence to support a finding of specific intent.

15 QUESTION: Well, if that's true, of course,
16 that's the end of the case.

17 MR. DERSHOWITZ: That's the end of the case.
18 Your Honor, we think that's the end of the case.

19 But we think not only can there be no finding
20 -- and that's, by the way, what distinguishes this case
21 from Cabana v. Bullock. In Cabana v. Bullock, counsel
22 conceded their could be a finding on the record of
23 intent under Enmund.

24 In this case, we categorically dispute that.
25 The State of Arizona agrees with us. And the Arizona

1 Supreme Court used the following language in defining
2 intent:

3 Intent to kill includes the situation in which
4 the defendant intended --

5 QUESTION: Where are you reading -- what are
6 you reading from?

7 MR. DERSHOWITZ: From the Arizona Supreme
8 Court's decision, second appeal.

9 QUESTION: Where -- on what page is that?

10 MR. DERSHOWITZ: On page --

11 QUESTION: This is the second, not the first,
12 appeal?

13 MR. DERSHOWITZ: On page 345.

14 Intent to kill includes the situation in which
15 the defendant intended, contemplated, or anticipated
16 that lethal force would or might be used.

17 That is simply not the definition of specific
18 intent. It is not the American Law Institute's
19 definition. It is not the definition in any state.

20 It is the exact difference between specific
21 intent, which is a subjective, personalized standard,
22 and an objective intent, which is an objective,
23 depersonalized standard of, in this case, recklessness.

24 And I don't think the Arizona Attorney General
25 will in candor try to argue here what he has never

1 argued in the brief and what he has never argued below,
2 and that is, that there was a specific finding of
3 specific individualized intent.

4 I think it is clear that what the state did
5 here is, it redefined intent to fit the facts of this
6 case into the Enmund holding on intent.

7 Now --

8 QUESTION: Mr. Dershowitz, I'm still not clear
9 on what you mean by specific intent. I thought you had
10 agreed that probability is enough; that if you intend to
11 do something which, although you don't intend that
12 somebody die, it is very probable --

13 MR. DERSHOWITZ: No, that was not --

14 QUESTION: -- that somebody's death would come
15 from that --

16 MR. DERSHOWITZ: No, Justice --

17 QUESTION: -- that is not enough for your --

18 MR. DERSHOWITZ: That is not enough, Justice
19 Scalia. What is enough --

20 QUESTION: Well, what if I'm committing a
21 felony, and I'm carrying a gun, and a police officer
22 comes toward me to stop the felony and I shoot at him?

23 MR. DERSHOWITZ: Yes.

24 QUESTION: I frankly don't care whether he
25 lives or dies. I just want to prevent him from stopping

1 the felony.

2 MR. DERSHOWITZ: That would be --

3 QUESTION: Now, I do not have --

4 MR. DERSHOWITZ: That would be enough for a
5 trigger man. A trigger man who shoots with reckless
6 disregard for human life -- let me explain why --

7 QUESTION: It's just probability, then, right?

8 MR. DERSHOWITZ: No, it's not just
9 probability. The trigger man has control. And the law
10 has always been clear. When you shoot into a moving
11 bus; when you're a terrorist and you shoot into a crowd;
12 when you're shooting from a fleeing -- from a policeman
13 when you're fleeing, that is specific intent.

14 Because what you're doing is, you're shooting
15 without regard to the consequences.

16 In this case, not only did the defendants not
17 intend to kill. The intended not to kill. They --

18 QUESTION: So if I through the gun to the
19 trigger man, as the policeman's approaching him, he
20 says, I need a gun, and I throw the gun to him. And
21 again, I don't care whether he kills the policeman or
22 not.

23 MR. DERSHOWITZ: In that case --

24 QUESTION: I don't have intent to kill?

25 MR. DERSHOWITZ: In that case, courts might

1 argue that it's part of the res gestae, that you were
2 there, you threw the gun. This is a very different
3 case.

4 QUESTION: Probability is always involved,
5 isn't it?

6 QUESTION: Well, res gestae is a rule of
7 evidence.

8 MR. DERSHOWITZ: That's right. And it might
9 conclude -- the res gestae is a rule of evidence, and it
10 would be for this Court to determine whether or not --
11 and after all, this Court has said, constructive
12 presence is not enough; constructive killing is not
13 enough.

14 It is often an argument that this Court has
15 been involved in as to whether something is actual or
16 constructed. And in the felony murder death penalty
17 issue, this Court has demanded actual rather than
18 constructive.

19 QUESTION: But you've just agreed, I though,
20 with Justice Scalia that actual intent in the pristine
21 sense of that word, I shoot at you intending to kill you
22 --

23 MR. DERSHOWITZ: Right.

24 QUESTION: -- is not required here?

25 MR. DERSHOWITZ: For a trigger man, it is not

1 required in the one case where he shoots knowing that
2 there is an extremely high likelihood that death will
3 result, not caring which person he kills.

4 That was the origin of the felony murder rule,
5 not caring which person he kills.

6 QUESTION: Well, but how can you be sure that
7 that is the only exception to the requirement of
8 pristine intent? Certainly Enmund does not say, this
9 example and this example only is the exception?

10 MR. DERSHOWITZ: Yes, it does. It has one
11 example. It says, it would be very different if the
12 likelihood of killing was so substantial. And then it
13 talks about a felony for which killing is an essential
14 ingredient. Terrorism is an example of that. Here --

15 QUESTION: Yes, but these are your examples,
16 simply drawn from far more general language than Enmund.

17 MR. DERSHOWITZ: No, no. This is the -- this
18 is the example that's in Enmund. I am responding to
19 Justice Scalia's question by saying that intent for the
20 trigger man may very well be different than intent for
21 the non-trigger man. The non-trigger man does not
22 control the situation.

23 Think of the facts in this case. The boys,
24 young boys, are promised by their father that there'll
25 be no shooting. There is no shooting. The boys

1 honestly believe and intend that no one will die.

2 It's not only that they don't intend anyone to
3 die, or they're not concerned for human life. They
4 intend specifically that no one will die. They do
5 everything reasonably within their power to assure that
6 no one dies.

7 The father knows that, and has to trick them
8 -- except in the beginning --

9 QUESTION: (Inaudible.)

10 MR. DERSHOWITZ: Your Honor, they should be
11 punished. And they are being punished, very severely,
12 for the separate crime of bringing guns in, of breaking
13 their father out of prison.

14 The only issue in this case is whether they
15 had the intent required for a non-trigger man for
16 execution.

17 These young boys will spend the rest of their
18 lives in prison for the very serious crimes they've
19 committed. They have provided guns --

20 QUESTION: But that depends to some extent on
21 probability. I didn't understand --

22 MR. DERSHOWITZ: Your Honor, Lockett provided
23 guns.

24 QUESTION: Please, please. I don't understand
25 your response to the second hypothetical I put to you.

1 Never mind the trigger man. The person who tosses the
2 gun to the trigger man.

3 There is no way in which he has an intent to
4 kill within the Constitutional role; is that right?

5 MR. DERSHOWITZ: Well, of course if he has an
6 intent to kill. But there's no way that act alone --

7 QUESTION: No, he doesn't -- he doesn't care
8 whether the policeman lives or dies. But the trigger
9 man asks for a gun. "Toss me a gun." He tosses him the
10 gun. Could he be --

11 MR. DERSHOWITZ: First of all, the defendant
12 who doesn't care whether defendant lives or dies is in a
13 very different situation from these defendants who cared
14 deeply that someone lived, not died.

15 QUESTION: I understand. But please answer my
16 hypothetical. I'm trying to see what your theory of
17 intent is?

18 MR. DERSHOWITZ: The theory of intent is that
19 for a trigger man, recklessness in the sense of absolute
20 disregard for human life is enough. For a non-trigger
21 man it is not. You have to have a specific intent. And
22 --

23 QUESTION: And the answer to my hypothetical
24 is?

25 MR. DERSHOWITZ: No, it would not be enough

1 for a trigger man -- for a non-trigger man to have
2 thrown a gun to somebody without intending to --

3 QUESTION: He says: "There's a policeman
4 coming. Throw me a gun quick." That wouldn't be enough?

5 MR. DERSHOWITZ: That wouldn't be enough. No,
6 no. And that is not this case in any event.

7 This case is handing guns over under an
8 agreement that no shooting would take place. No
9 shooting -- this is Lockett. In Lockett, he gave him
10 the guns, too. In Lockett the guns were provided. In
11 Enmund the guns were provided.

12 What Your Honor, Justice Scalia, is asking
13 for, in a sense, is a return to the felony murder rule
14 where guns are provided.

15 And to throw a hypothetical back, which I'm
16 not entitled to do, but I'll throw it back to myself,
17 what if the defendant -- what if there were a statute
18 saying, anyone who provides guns to an armed robber in
19 the course of an armed robbery, whereby death results,
20 is guilty of first-degree capital murder?

21 That would be clearly within Enmund. That's
22 what Enmund decided. Because the facts of Enmund were
23 exactly that.

24 There is no difference between this case and
25 Enmund, except that this case is far more compelling.

1 In this case, there was an intent not to
2 kill. This was --

3 QUESTION: (Inaudible.)

4 QUESTION: In Enmund, had he provided the gun?

5 MR. DERSHOWITZ: The state certainly argued
6 that he had provided the gun in Enmund. The gun had
7 belonged to his common law wife. He then disposed of
8 the gun. Certainly, a reasonable judge and jury could
9 conclude that he had provided the gun.

10 It was an armed robbery. He was the one who
11 planned the robbery.

12 In this case, these young boys were brought
13 into the robbery at the last minute. One of the
14 codefendants, Greenawalt, directed what went on in the
15 penitentiary. Their father directed what went on
16 thereafter.

17 They had no -- there was never a time when you
18 could have left their father's side, when the father
19 left any of them alone, the three of them, so that they
20 could leave. These are young kids under the control of
21 their father.

22 QUESTION: Well, they were 18 and 19 at the
23 time?

24 MR. DERSHOWITZ: They were 18 and 19. No
25 prior criminal records. Their father had made them a

1 promise. Their father had been planning a breakout for
2 awhile. They were brought into it at the very last
3 minute. No shots were fired.

4 Three days later -- or 2-1/2 days later --
5 their father had to send them away, again, to trick them
6 and fool them into believing no shooting would occur.
7 And when they were away from the scene, or close, or
8 coming back, the father -- and there's no dispute about
9 this --

10 QUESTION: You're resolving all the factual
11 doubts in favor of your clients, it seems to me. And we
12 have to take the facts, presumably, as found by the
13 Arizona court.

14 MR. DERSHOWITZ: Your Honor, we are willing to
15 have the facts taken in the light least favorable to the
16 defendants, as the Arizona Supreme Court found them.
17 Because there is no dispute about the fact that they
18 didn't kill. There is not dispute that the father sent
19 them away. There is no dispute that they were carrying
20 small arms, and the father was carrying --

21 QUESTION: Well, you say there are no dispute
22 about these facts -- you say that there are no dispute
23 about these facts. You're presumably relying on
24 testimony of one of the parties.

25 But the courts don't have to rely -- don't

1 have to take the testimony of any interested witness.

2 MR. DERSHOWITZ: What happens --

3 QUESTION: Even though it's not disputed.

4 MR. DERSHOWITZ: Well, here's the situation:
5 Were it not for the statements of these young boys,
6 there'd be no evidence they committed the crime. The
7 only evidence of their involvement comes from the
8 statement.

9 QUESTION: Well, the state isn't -- the trier
10 of fact is entitled to believe what it wants and
11 disbelieve what it wants.

12 MR. DERSHOWITZ: Not under Arizona law, Your
13 Honor. No, under Arizona law, a document, a statement,
14 an admission, cannot be taken apart and believed for one
15 purpose and not believed for another, when there is no
16 dispute about the facts.

17 There is no way, Your Honor --

18 QUESTION: Well, Arizona -- if that -- Arizona
19 law has changed a great deal since I practice there,
20 then.

21 MR. DERSHOWITZ: It may have. But Your Honor,
22 there's no way under Arizona law -- and I'd be
23 interested to see what the Attorney General says about
24 this -- in which where an undisputed fact is made as
25 part of a statement in a confession, and that is

1 admitted into evidence, where undisputed, the trial
2 court can disbelieve that and believe its opposite.

3 If one even ignores it, there is no evidence
4 on the issue. But there is absolutely not a shred of
5 evidence in the record of this case which could lead a
6 fact finder to the opposite conclusion, which could lead
7 a fact finder to determine that there was specific
8 intent.

9 That's why Arizona concedes there's no
10 specific intent.

11 QUESTION: Mr. Dershowitz, are your facts the
12 same as are in the opinion of the court?

13 MR. DERSHOWITZ: We of course accept the facts
14 that are in the opinion of the court.

15 QUESTION: Well, you've been arguing those, so
16 certainly those facts are accurate.

17 MR. DERSHOWITZ: Those facts are accurate.
18 There's no dispute between what the majority found and
19 what the dissent found or what the Arizona Attorney
20 General finds.

21 There is a set of facts. There is surmise or
22 speculation one can engage in. But Arizona law does
23 require that these facts be found beyond a reasonable
24 doubt.

25 QUESTION: Mr. Dershowitz, excuse me for

1 interrupting you in the middle of a sentence, but you
2 read from page 345 of the opinion of the Arizona Supreme
3 Court.

4 Take a look at 346, and I'll direct your
5 attention to some language that may be relevant to the
6 question of intent.

7 MR. DERSHOWITZ: Right.

8 QUESTION: Three forty six, the carryover
9 paragraph. Start with the sentence beginning with: Thus
10 --

11 MR. DERSHOWITZ: Yes.

12 QUESTION: -- petitioner could anticipate the
13 use of lethal force during this attempt to flee the
14 confinement; in fact, he later said that during the
15 escape he would have been willing personally to kill in
16 a 'very close life or death situation,' and that he
17 recognized that after the escape there was a possibility
18 of killing.

19 And down at the bottom of the page, at the
20 beginning of the last paragraph: From these facts --
21 and a number of others are stated on that page -- we
22 conclude that petitioner intended to kill. Petitioner
23 participated up to the moment of the firing of the final
24 shots -- the fatal shots -- were substantially the same
25 as that of Gary Tison and Greenawalt.

1 MR. DERSHOWITZ: Your Honors, we invite, and
2 urge, in fact, the Court to read in full the statement
3 from this "very close life or death situation" statement
4 comes. Because it's very clear what the boys saying is,
5 afterward we realized that there was a possibility that
6 life could be taken. We certainly didn't want it to be
7 taken. We didn't really think about it. That was the
8 actual statement.

9 QUESTION: Did the young men carry guns
10 throughout the whole escape?

11 MR. DERSHOWITZ: The young man carried small
12 guns throughout the escape; never fired the guns.

13 QUESTION: Didn't they participate in stopping
14 the automobile?

15 MR. DERSHOWITZ: Without -- yes. Without a
16 gun, one of the young boys was, as he put it, elected --

17 QUESTION: They had the guns with them?

18 MR. DERSHOWITZ: -- by the father -- without
19 the gun -- the young boy was elected to go and wave the
20 car down.

21 QUESTION: Yes.

22 MR. DERSHOWITZ: He knew, because the father
23 told him, that the car would be taken. The car was
24 taken. The transfer was made.

25 Nobody is denying their responsibility for

1 these serious crimes of kidnapping, breakout of prison.

2 But then after the crime was completed, after
3 the car was taken, the father then, without any
4 necessity -- as the courts found; no necessity at all;
5 could have easily have left them there -- the father and
6 the other defendant, on their own, after sending the
7 boys away, made a shocking and surprising decision to
8 kill this family in cold blood.

9 There are findings by the Arizona Supreme
10 Court that it was not necessary, that it was
11 spontaneous, it was not part of the original plan.

12 This is just like Enmund. In Enmund there was
13 spontaneity. It was not part of the original plan.
14 After Enmund left the person to go into the house,
15 something unexpected happened.

16 In this case it was the father who did
17 something unexpected. In the other case it was the
18 gunman. A family was tragically killed in both cases.

19 This Arizona case is an attempt to relitigate
20 Enmund. And we will hear relitigation after
21 relitigation in every state if this Court allows every
22 state to redefine intent the way it chooses to redefine
23 it.

24 Nobody again disputes -- and I want to reserve
25 the rest of my time for rebuttal -- the fact that these

1 young men wanted nobody to die. They were tricked into
2 standing away while the father slaughtered the family in
3 the middle of the night.

4 That is the finding of the Arizona Supreme
5 Court. The issue in this case is whether or not that
6 kind of nonspecific intent, foreseeability, can be
7 redefined to mean the kinds of intent that this Court
8 said is constitutionally required to execute under
9 Enmund.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
11 Dershowitz.

12 We'll hear now from you, Mr. Schafer.

13 ORAL ARGUMENT OF WILLIAM J. SCHAFER, ESQ.,

14 ON BEHALF OF RESPONDENT

15 MR. SCHAFER: Mr. Chief Justice, and may it
16 please the Court:

17 I believe this case raises three issues that
18 stem from Enmund.

19 The first, I believe, is whether Arizona
20 courts adequately addressed the Enmund issue at all.

21 The second, I believe, is whether Enmund
22 prohibits a death sentence for someone who did not do
23 the actual act of killing.

24 And the third is, what should this Court do
25 with a state court finding of fact that Enmund has been

1 complied with, as there was such a finding here.

2 I will address those three issues, in that
3 order.

4 First, did Arizona adequately address the
5 Enmund issue to begin with? And I believe that it did.
6 A defendant's participation, relative to the
7 participation of the others, has, since 1974, always
8 been a concern in death penalty cases in Arizona.

9 One of the statutory factors that may mitigate
10 a sentence is a defendant's minor participation in the
11 crime, again compared to other participants in the
12 crime.

13 Whether or not the defendant raises that point
14 in the trial court, which is the sentencer in the State
15 of Arizona, the sentencer must determine what the extent
16 of the defendant's participation was; and if it was
17 minor, according to the statute, that may -- but it does
18 not necessarily -- mean that the sentence may be
19 mitigated.

20 Now prior to about 1978, the consideration
21 that was given to that particular factor, the minor
22 participation, was rather perfunctory. That changed,
23 however, with the Lockett opinion, and the questions it
24 posed as to whether a death sentence could be imposed on
25 one who had no intent to kill, which was the language in

1 Lockett.

2 This case, I believe, is an example of that
3 change. Here the trial court had before it the two
4 statements of each of the petitioners, that each of them
5 gave prior to their trials.

6 The reports the trial court also had of the
7 probation department, one of which contained a very
8 detailed summary of a conversation with Raymond Tison;
9 and the trial court also had the evaluation report of
10 each petitioner that was done by a court appointed
11 doctor named Doctor --

12 QUESTION: Which one was Raymond Tison?

13 MR. SCHAFER: Well, Your Honor, all I can tell
14 you is, he was the younger of the two, I believe. He
15 was the one who drove eventually the Lincoln off into
16 the bushes at apparently the request of his father.

17 He was the one who also said that he believed
18 that the boys were at the Mazda when the actual
19 shootings took place.

20 Ricky, however, tells a different story.

21 Also, each petitioner -- and the state, as a
22 matter of fact -- submitted written memos to the trial
23 court, prior to the sentencing, arguing the aggravation
24 and the mitigation, specifically addressing themselves
25 to Lockett, and the question it raised of intent and

1 limited participation.

2 The state, in those memos, argued that a death
3 penalty could be imposed for murder felony; and the
4 petitioners argued, among other things -- they had a
5 rather lengthy memo -- that they had no intent to kill,
6 and that under Lockett, their participation was so
7 minor, their participation was so limited, that a death
8 sentence would be disproportionate to their involvement
9 in the crime.

10 After a joint sentencing -- and the sentencing
11 was joint as to both petitioners here and also as to all
12 the crimes committed; and that, by the way, involved
13 actual live evidence other than the statements I've
14 mentioned, concerning not only this case, but the other
15 crimes that were committed -- after that hearing, the
16 trial court said that he disagreed with the petitioners'
17 arguments.

18 He said that their involvement was not minor;
19 that they were active and equal participants right up to
20 the moment of the shooting; and that they had to share
21 equal blame with everyone else.

22 Then that point, the extent of their
23 participation, was specifically argued in briefs and
24 argued orally to the Arizona Supreme Court by both
25 petitioners on a direct appeal.

1 And the Arizona Supreme Court, after its own
2 independent review of the record which it does in every
3 death penalty case in Arizona, the Arizona Supreme Court
4 came to the same conclusion as the trial court.

5 The participation of each of the petitioners,
6 they said, was not minor. It was substantial, said the
7 court, and the blame that they each had was equal to
8 that of the actual killers.

9 Then the Arizona Supreme Court, citing both
10 Lockett and the Eighth Amendment, said, and I quote: We
11 assent to the retributive principle of justice, which
12 demands that persons be punished in proportion to their
13 personal involvement in the crime, focussing the inquiry
14 on the harm which may fairly be attributed to the
15 participants' conduct.

16 Now that ended the direct appeal on those
17 murder convictions.

18 A few years later, this Court announced its
19 decision in Enmund v. Florida. And following that, both
20 of these petitioners filed state petitions for
21 post-conviction relief.

22 Again, along with other things, they both
23 contended that Enmund precluded a death sentence in
24 their case. The state responded, and the trial court
25 denied the petitions without oral argument.

1 Each petitioner then requested the Arizona
2 Supreme Court to review that dismissal, and the Supreme
3 Court ordered additional briefing, and specifically
4 ordered briefing on the application of Enmund, and
5 ordered briefing on the language in Enmund concerning
6 lethal force.

7 Oral argument was had in the Arizona Supreme
8 Court on those issues. And the Supreme Court then
9 delivered an opinion addressing Enmund and its
10 application to the facts. And the Supreme Court
11 sustained each of the death sentences, holding that the
12 facts were significantly different from Enmund -- that's
13 almost a quote from the Arizona Supreme Court. And that
14 the Arizona Supreme Court was satisfied beyond a
15 reasonable doubt that the Tisons intended to kill, and
16 that, they said, the dictates of Enmund were satisfied.

17 Now, from that decision of the Arizona Supreme
18 Court, both Tisons petitioned this Court.

19 Through all of this, the trial court, twice in
20 the Arizona Supreme Court, two oral arguments in the
21 Supreme Court, the emphasis was on the individual
22 participation of each petitioner, and the individual
23 culpability of each of the petitioners.

24 In each instance, the penalty was tailored to
25 fit the individual blameworthiness. Now, I do not

1 believe that Enmund requires anything more than that. I
2 believe the record will show you that the Arizona
3 Supreme Court did adequately address the Enmund issue.

4 QUESTION: You're arguing your first point?

5 MR. SCHAFER: Yes.

6 QUESTION: Go ahead.

7 MR. SCHAFER: The second and third issues
8 present, I believe, whether Enmund --

9 QUESTION: Before you leave the first point --

10 MR. SCHAFER: Yes, Your Honor.

11 QUESTION: I take it you do subscribe to the
12 statement on page 345 as the correct test under Enmund:
13 intend to kill includes the situation in which the
14 defendant intended, contemplated, or anticipated that
15 lethal force would or might be use, or that life would
16 or might be taken; that's sufficient in your view?

17 MR. SCHAFER: It is sufficient, and I believe,
18 to a word, those are the words this Court used at
19 various places in the Enmund opinion. And I've attempt
20 to lay those forth in the brief.

21 The word, I believe, that the petitioners pick
22 up on is the word "might". However, the word "might"
23 was used by this Court -- I believe there's only one
24 reference to it in the Enmund opinion; but my memory
25 tells me that it's at 458 U.S. page 788, where this

1 Court uses the word "might".

2 Now, I did not argue this case in the Arizona
3 Supreme Court.

4 QUESTION: Would you agree that that
5 definition is broad enough to include any felony murder?

6 MR. SCHAFER: No, I do not, Your Honor. And I
7 believe that the Arizona Supreme Court, from my
8 knowledge of this case, because it was my people who
9 wrote the brief and argue it --

10 QUESTION: In this case, why did the boys go
11 to get the water?

12 MR. SCHAFER: We dispute, Your Honor, that the
13 boys did go to get the water. And in my brief, I
14 attempted to lay that forth. The statement of Raymond
15 Tison says that his father said, after Mr. Lyons asked
16 for water, and don't kill us, he said, give us water,
17 we'll be able to stay here until tomorrow afternoon, or
18 words essentially to that effect. Raymond Tison then
19 says: We went to the Mazda to get the water. That's
20 apparently where the water was, and they all knew it.

21 That is not what Ricky says, however. Ricky
22 says --

23 QUESTION: Well, if you were going to shoot a
24 man, would you go get him a drink of water?

25 MR. SCHAFER: You might very well, Your

1 Honor. And I can't --

2 QUESTION: Why?

3 MR. SCHAFER: I can't --

4 QUESTION: Why?

5 MR. SCHAFER: I can't cite you any place in
6 the record that would indicate to you why he said that.
7 However, it may well have been -- we can speculate --
8 that he was trying --

9 QUESTION: Well, can you speculate on a man's
10 life? Can you? Please, don't ask me.

11 MR. SCHAFER: I would not speculate on a man's
12 life.

13 QUESTION: Thank you.

14 MR. SCHAFER: The only thing I intend to
15 speculate on is the answer to your question, which was
16 why would he do that? Why would he say such a thing --

17 QUESTION: He did that to keep him from dying
18 of thirst. That's what he said.

19 MR. SCHAFER: Your Honor, I don't believe he
20 said that.

21 QUESTION: He said he got -- he went to keep
22 him from dying.

23 MR. SCHAFER: No, I dispute that, Your Honor.
24 And I don't believe there is anything in the record that
25 Gary Tison --

1 QUESTION: But he went to get him water in
2 order to kill him.

3 MR. SCHAFER: Raymond went to get the water,
4 Your Honor. That's not what Ricky said in Ricky's
5 statement.

6 QUESTION: I'm talking about Raymond.

7 MR. SCHAFER: Well, again, the record does not
8 show why Raymond did that. What it does show is that
9 Raymond went to get the water because he thought that's
10 what his father was asking him to do.

11 I believe more correctly, Raymond would not
12 say that my father was asking me to do that. I think
13 what Raymond says is, that was directed to the boys.
14 However -- and there were three at the time. One of the
15 brothers is dead, Donny. There are two left.

16 However, Ricky does not say that at all.
17 Ricky Tison in his statements, and he's consistent
18 throughout those statements, says that they were there
19 when the shots were fired.

20 As a matter of fact, Ricky says that they
21 watched the shots being fired. He says, they stood back
22 and they watched.

23 That's not what Raymond says. Raymond's
24 recollection, according to the statements, is that he
25 was 50 to 75 yards away.

1 QUESTION: He didn't see the shots; he heard
2 them?

3 MR. SCHAFER: I think he goes further than
4 that. He says, he heard them and saw the flashes.

5 QUESTION: Well, he heard it and saw a flash,
6 which meant he wasn't there.

7 MR. SCHAFER: Well, he was a few yards away,
8 yes. That's what Raymond says. That's not what Ricky
9 says, however.

10 QUESTION: Mr. Schafter, if I understand your
11 view of the case, the result would still be the same
12 even if they'd been five miles away at the time of the
13 actual killing, because all the preceding events would
14 have clearly satisfied the test?

15 MR. SCHAFER: Well, Your Honor, they couldn't
16 get five miles away --

17 QUESTION: No, they couldn't. But I mean,
18 they really didn't have to be in the immediate vicinity
19 at the time the killing took place, did they?

20 MR. SCHAFER: No, I believe, for the language
21 of the Arizona Supreme Court -- and it fits the facts, I
22 think, perfectly as I've laid them out in the brief.
23 And I do have to admit that there's a dispute between
24 what Raymond says and what Ricky says as to where they
25 were.

1 But one of our points that we have argued, and
2 I believe we have argued it consistently, is that these
3 two individuals participated, not only in the underlying
4 felonies, but they actually participated in the murder
5 up to the time the trigger was fired.

6 QUESTION: But supposing right after they
7 stopped the car with the family in it, the two boys
8 instead of following along as they did, had just gone on
9 a hike, walked away half a mile, and then the father and
10 the older brother, killed the family?

11 MR. SCHAFER: I think that would be different,
12 and I would probably be making a different argument to
13 you.

14 But I also believe --

15 QUESTION: But would the death penalty be
16 permissible on those facts, given the history of this
17 crime?

18 I'm trying to find out whether you think their
19 presence at the scene is of constitutional importance or
20 not?

21 MR. SCHAFER: I think their presence at the
22 scene is important, but you have to couple that --

23 QUESTION: Well, I should have phrased it
24 different. Was it essential? Or is it merely a matter
25 of foreseeability?

1 MR. SCHAFER: Oh, no. I believe, in this
2 case, it's essential. If you're asking me in another
3 case can I envision a case that would satisfy the
4 dictate of Enmund where an individual was not present at
5 the scene, yes, I certainly can.

6 QUESTION: Why wouldn't it satisfy it in this
7 particular case if the two younger boys, right after
8 stopping the car and driving it wherever they -- down to
9 the end of the road or wherever they were -- they just
10 walked away, and were maybe a mile away at the time the
11 father shot the people?

12 MR. SCHAFER: Well, my answer to you would be,
13 I think in order to show that these two petitioners
14 contemplated and knew what was going on, that we would
15 probably have to go further than the scenario you've
16 given me.

17 And I think in this case, there is much more
18 than that. These two petitioners escorted the Lyons
19 family -- I have to back up. There were actually two
20 different drives off the road.

21 After the car was stopped -- during which, by
22 the way, everyone had guns except the man, Raymond, who
23 was standing on the road. And he says somewhere in the
24 statement, I couldn't have carried a gun then because it
25 would have been suspicious. But everybody else -- they

1 were astride the road -- had guns.

2 They came out after the car was stopped with
3 the guns drawn. The first little side trip that was
4 made was then made, I think the record indicates, of the
5 trial testimony, about seven-tenths of a mile off of
6 that highway.

7 From there, once the cars were stopped and the
8 exchange of goods between the Lincoln and the Mazda was
9 going on, another little drive of the Lincoln was taken,
10 50 or 75 yards away from that spot.

11 Now, Raymond did that driving. Again, he
12 says, at the request of my father, I drove the Lincoln
13 over to that spot 50, 75 yards away.

14 After that, this family, who was standing back
15 and forth in various places, were escorted to the
16 Lincoln by everyone with guns drawn. As a matter of
17 fact, I think at one spot in the statement, Ricky says,
18 we always had those guns.

19 And I would also dispute, I believe, a point
20 Mr. Dershowitz made that the boys only had handguns at
21 the time. I believe the record will show you that
22 during the prison break, Ricky had a shotgun, which he
23 pointed at the guard behind the glass wall. Pointed it
24 at him, and as another one came in the room, he pointed
25 it at him.

1 And I believe the statements by Ricky and
2 Raymond would show you, throughout they were armed,
3 whether it was with small guns or with shotguns at
4 various times, we can't tell.

5 Now, in this case, in answer to your question,
6 there was something else that was done by each of
7 those. And to me, it's very crucial. They, with arms
8 at side, escorted these people into the Lincoln. And
9 that is where the discussion took place: Leave us with
10 some water. We can stay here until tomorrow afternoon.

11 They escorted these people, and our Supreme
12 Court points that out, to the killing ground. That's
13 where they were killed. They escorted them into the
14 Lincoln. After that was when Ricky stood back and
15 watched. He then watched the killing.

16 Now, I believe that is different than the
17 scenario given me where they walk off. It does add
18 quite a bit. And our Supreme Court, I submit to you --

19 QUESTION: Does it add, because you think it
20 increases the likelihood that they actually intended
21 that the father would do the killing?

22 MR. SCHAFER: Oh, it certainly does. Because
23 part of what went on -- I just gave you the overall --

24 QUESTION: But then you seem to be suggesting
25 that some degree of actual intent to have a killing

1 occur is part of the inquiry.

2 MR. SCHAFER: I believe under Enmund it is.
3 Killed, attempted to kill -- they did not kill or
4 attempt to kill. I have to admit that for the purpose
5 of this question.

6 The question then would be if their
7 participation --

8 QUESTION: What would your view be if we could
9 know the facts, and of course we can never be sure in a
10 case like this, if you could accept the fact that they
11 were genuinely surprised by the fact that the father
12 actually killed these people? Would you still come to
13 the same conclusion?

14 MR. SCHAFER: Well, I have a difficult time
15 accepting that fact. But assuming --

16 QUESTION: No, I understand that. But I'm
17 trying to figure out what the -- what would your view be
18 if you could accept that fact hypothetically?

19 MR. SCHAFER: No, I believe I could still make
20 a reasonable argument under Enmund that these two
21 petitioners contemplated that lethal force would be used.

22 QUESTION: Would or might be used.

23 MR. SCHAFER: Yes, we have to remember that
24 this entire incident took place over 11 or 12 days, it's
25 debatable, from July 30 until August 11, possibly 12

1 days. The individuals --

2 QUESTION: Let me just ask one other
3 question. Do you think the record tells us whether the
4 Arizona Supreme Court thought these boys were genuinely
5 surprised, or thought they actually expected the father
6 to do what they did?

7 MR. SCHAFER: I -- the way I read this
8 opinion, it reads no other way than that the Arizona
9 Supreme Court was convinced these individuals were not
10 surprised and they knew what was about to happen.

11 And I believe that you will see most of that
12 at page 346 of the Joint Appendix. The Arizona Supreme
13 Court goes through, in the top five-sixths of that page,
14 one fact after another which, to me, leads to the --

15 QUESTION: Most of those facts are consistent
16 with either reading. That's what puzzles me.

17 MR. SCHAFER: With either reading?

18 QUESTION: Either that they were surprised or
19 they were not surprised.

20 MR. SCHAFER: Well, I don't read them as
21 consistent with, that they were surprised, Your Honor.
22 If you look at the first paragraph, thus petitioner
23 could anticipate -- and he's only talking about one boy
24 here -- the use of lethal force during his attempt to
25 flee confinement. He then points out that either or

1 both of them actually, although he's only talking about
2 one, were ready to use the guns.

3 QUESTION: But that's talking about what
4 happened in the prison. That has nothing to do whether
5 they were surprised that their father killed this family.

6 MR. SCHAFER: Yes, I just led that -- was
7 leading into the next paragraph. And the way I read
8 that, no. They would say to you -- although they don't
9 say it specifically in the opinion, they were not
10 surprised.

11 But I would follow up by saying, I still
12 believe you could make -- I could -- a reasonable
13 argument that under Enmund, these two individuals
14 anticipated or contemplated that lethal force would be
15 used.

16 QUESTION: Mr. Schafer, limited to the time
17 when they went to get the water, what is there in the
18 record that shows that they had any inclination that
19 there was about to be a murder, specifically?

20 MR. SCHAFER: Your Honor, I, first of all,
21 would disagree that they went to get the water. But if
22 I were to concede that, that they both went to get the
23 water, and during that absence the killings took place,
24 what I would say to you is, as I've said in the brief,
25 Ricky Tison says in his statements that I heard -- I'm

1 paraphrasing again, of course -- Gary Tison, the father,
2 say that I'm thinking about killing this family. That's
3 what Ricky says in his statement.

4 Raymond Tison says that he could see that his
5 father was going through turmoil, although that may not
6 be his word. And Raymond thought that perhaps it was
7 because the baby was there, this 22-month old baby.

8 Both of those petitioners, Ricky because he
9 heard his father say that, that I'm thinking of killing
10 this family, and Raymond because he saw him thinking
11 about something as awful as that, he knew that something
12 was going on with his father.

13 Now I believe --

14 QUESTION: Is that it?

15 MR. SCHAFER: Well --

16 QUESTION: Factually, is that it?

17 MR. SCHAFER: If we limit it to the scene, I
18 was about to say, if you're talking just about the scene.

19 QUESTION: Yes, yes.

20 MR. SCHAFER: And I believe that that happened
21 before Raymond says that Gary Tison said, go get the
22 water.

23 QUESTION: Well, I was asking about after he
24 said go get the water.

25 MR. SCHAFER: All right, after he --

1 QUESTION: After he said, go get the water,
2 what specifically happened or was said that makes these
3 men guilty of murder, that they knew the father was
4 going to do it.

5 MR. SCHAFER: If we limit it to them --

6 QUESTION: That's what I'm asking you to do.

7 QUESTION: If we limit it to them being back
8 at the Mazda, which Ricky disputes, there is nothing, I
9 think, from that point on, except the firing of the
10 guns.

11 The record will show you that when Raymond
12 says they were back at the Mazda --

13 QUESTION: So their participation in the
14 firing of the gun was zero?

15 MR. SCHAFER: Oh, we have conceded that. I
16 do. Their participation in the firing of the gun was
17 zero. They did not, and the record will not show you,
18 that they pulled those triggers with at all.

19 QUESTION: Well, what are they charged with?

20 MR. SCHAFER: They're charged with murder.
21 However, the record --

22 QUESTION: But they didn't pull the trigger?

23 MR. SCHAFER: This is true.

24 QUESTION: And they didn't know the trigger
25 was going to be pulled?

1 MR. SCHAFER: I dispute that they did not
2 anticipate --

3 QUESTION: I said, know. Did they know it was
4 going to happen?

5 MR. SCHAFER: I can't stand here today and
6 tell you that they knew -- knew -- that at that time
7 that trigger would be pulled. Except I refer again to
8 Ricky's statement --

9 QUESTION: Don't you have to know to take a
10 man's life? You don't have to answer.

11 MR. SCHAFER: Oh, I didn't think you had
12 finished that question, Your Honor.

13 The second and the third issues, in this case,
14 to me, are whether Enmund prohibits a death sentence for
15 a non-trigger man, and what does this Court do with the
16 state court finding that Enmund has been satisfied.

17 Now, if this were a habeas corpus action, I
18 would answer the last question by saying that you should
19 accord the state court finding a presumption of
20 correctness. That is what the habeas corpus statute
21 says, and that is what this Court said, I believe, in
22 Cabana v. Bullock.

23 This is not a habeas corpus action. But for
24 the purposes that we are now discussing, I really don't
25 believe it makes any difference. Over and above the

1 habeas corpus statute, this Court has said that it pays
2 great deference to state court findings, factual
3 findings.

4 The habeas corpus statute, I think, merely
5 incorporates that principle.

6 For the reason stated in Cabana, a state court
7 finding should be accorded great weight, whether it
8 makes its way to this Court by way of habeas corpus or
9 some other method.

10 Therefore, the state court finding in this
11 case, which was a finding of intent to kill according to
12 the definition as stated on page 345, I believe it is,
13 should be accorded great weight, and should not be
14 overturned unless this Court can say that the finding is
15 not fairly supported by the record, which is really also
16 out of the habeas corpus statute.

17 And I do not believe that this Court can say
18 that on this record. Throughout these proceedings,
19 there has been little or no dispute that Raymond and
20 Ricky Tison planned the escape; that they gathered the
21 guns; they gathered the cars; and they gathered the
22 ammunition to do it.

23 To effect that escape, they used those guns as
24 they needed them. And they, with the others, kidnapped
25 the Lyons family at gunpoint. They went through the

1 belongings of the Lyons family, and they took what they
2 needed to continue the escape, including the car.

3 And then, with the others, by using the guns
4 they had gathered, they herded the Lyons into the
5 Lincoln to be killed.

6 Now, all of these facts are in the various
7 statements of both of the petitioners. The only thing
8 that has been disputed is what these two knew about the
9 killings before they actually occurred.

10 They say they were caught by surprise. We
11 believe that the state court is rather clear in its
12 finding that they believe they were not caught by
13 surprise; that they knew what was about to happen; they
14 knew that Gary Tison was considering killing the family.

15 Raymond Tison said he knew his father was
16 mulling that over in his mind. And Ricky said he heard
17 his father say that he was thinking about killing the
18 family.

19 And after that, Ricky said, they stood back.
20 They went back to the ground they had been occupying
21 before, the ground from which they ushered the family
22 into the Lincoln, and from there, Ricky says, they
23 watched as the family was killed with a great many
24 shotgun blasts.

25 Ricky and Raymond Tison were as much a part of

1 what happened as anyone else. They, with the others,
2 decided to kidnap and rob. And they with the others
3 kidnapped the Lyons family at gunpoint. They went
4 through the belongings. They robbed at gunpoint.

5 And then, once they had taken what they
6 needed, they stood by as the accomplices did the actual
7 killing. Up until the shots were fired, the
8 participation of one was the participation of all.

9 In the plot to get away, each participated
10 equally. And each did his part to prepare for those
11 killings.

12 In the sense that the Model Penal Code uses
13 the word "cause," the conduct of these two was a cause
14 of the result because they contemplated the harm, and
15 they contemplated that lethal force would be used.

16 They simply did not know that the Lyons would
17 be the ones who were the result of that harm. These --

18 QUESTION: Is that any different than saying
19 they foresaw that lethal force would be used?

20 MR. SCHAFER: I don't want to use the word,
21 "foresaw", but --

22 QUESTION: I know you don't. But is there any
23 difference?

24 MR. SCHAFER: I think it probably is a
25 difference only in degree, Your Honor. And in answer to

1 I believe it was some of your questions of Mr.
2 Dershowitz, if I was standing here, I would have said, I
3 don't know if I would speculate on a definition of
4 foresee in this instance.

5 I would go back to the language that you used
6 in Enmund, and that our Supreme Court was parroting in
7 their opinion.

8 QUESTION: What are you -- what language are
9 you specifically referring to in Enmund?

10 MR. SCHAFER: Specifically the quote that Mr.
11 Dershowitz gave you from Enmund -- here it is: It would
12 be very different in the likelihood of a killing in the
13 course of a robbery were so substantial that one should
14 share the blame for the killing if he somehow
15 participated in the felony. Period.

16 That's the language which appears on 779, I
17 believe, of 458. And I think that this Court --

18 QUESTION: Well, one reading of that language
19 is that even if he didn't intend that -- even if he
20 didn't intend that life be taken, he nevertheless might
21 be guilty if the likelihood were -- and the
22 circumstances were such that he just should be -- that
23 that would make him culpable too.

24 MR. SCHAFER: Yes. So substantial. Those
25 were the words I was really trying to underline with my

1 words.

2 But I believe you qualify that language when
3 you said the likelihood of a killing is so substantial
4 --

5 QUESTION: Do you think that is equivalent to
6 a finding of intent?

7 MR. SCHAFER: Yes, Your Honor, I believe it
8 very well can be. And here I believe the Arizona
9 Supreme Court was saying -- although they did not use
10 any language from the Model Penal Code as I have; but to
11 me, that's what they were saying.

12 And they do have a reference on a page that's
13 been quoted from already, page 346 in the Joint
14 Appendix, that these people may not have seen that these
15 particular people were going to be killed, but they
16 knew, contemplated, that there would be harm resulting
17 from what they had done and what they participated in.

18 QUESTION: Whether they intended these
19 particular people to die or not?

20 MR. SCHAFER: These particular ones. And I
21 believe that gets back to the initial question that Mr.
22 Dershowitz was asked about specific intent.

23 If you go back to the first Arizona Supreme
24 Court opinion, where they use the word, specifically, I
25 believe as I read that opinion, that is what Justice

1 Struckmeyer said, a different justice than wrote the
2 second opinion.

3 He was saying that although the record may not
4 show that they had a specific intent to kill these
5 specific persons, that does not make any difference.
6 Although he doesn't go as far as to talk about intent.

7 QUESTION: May I ask a question about that,
8 though? Referring again to that critical page from the
9 Enmund opinion, the next sentence refers to cases in
10 which death so frequently occurs in the course of a
11 felony for which killing is not an essential ingredient.

12 MR. SCHAFER: Yes.

13 QUESTION: Do you think the killing was an
14 essential ingredient in this case of either the escape
15 or the kidnapping?

16 MR. SCHAFER: I don't believe it was an
17 essential ingredient of either of those.

18 I believe it is much more arguable that it was
19 practical, an essential agreement to effect a safe
20 escape.

21 And there is one statement that -- I believe
22 it is Raymond now -- says that with his father, it was a
23 matter of no survivals. And he says, he summarizes most
24 everything that went on out there by saying, and this is
25 almost a direct quote: We all knew the odds that we

1 were playing with out there.

2 And I believe that summarizes a good deal of
3 what happened. They knew the odds.

4 QUESTION: What were the odds?

5 MR. SCHAFER: The odds were that they would
6 conceivably end up with a death sentence because someone
7 could easily have killed, as is what happened.

8 Thank you, Mr. Schafer.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
10 Schafer.

11 Mr. Dershowitz, you have 8 minutes remaining.

12 REBUTTAL ARGUMENT OF ALAN M. DERSHOWITZ, ESQ.,

13 ON BEHALF OF THE PETITIONERS

14 MR. DERSHOWITZ: Thank you.

15 First, there is a specific finding on page 336
16 that it was not essential to the defendants' continued
17 evasion of arrest that these persons be murdered.

18 Second, I must correct the record, because
19 this Court has been badly misinformed about the status
20 of Ricky Tison's statements. We heard from the Attorney
21 General that Ricky Tison consistently said he was not
22 sent away to get water.

23 I categorically dispute that. There is not a
24 single statement in this record by Ricky in which he
25 does not consistently say that the boys, all three of

1 them, were sent away to get water.

2 There is only a dispute as to whether they
3 remained there at the time the shooting began, whether
4 they were on the way back or at the scene of the crime.

5 In fact, Ricky's first statement when he was
6 arrested at gunpoint at the shootout is -- and here's
7 the testimony at the trial -- at this point Gary told
8 the boys to go back and get the water

9 Everybody agrees with that.

10 At about the time they got back to the Mazda
11 -- the Mazda -- they heard the shotguns go off. Due to
12 the darkness, all they could see were flashes from the
13 shotguns.

14 There is a disagreement, we acknowledge that.
15 The state concedes that it is essential to this case
16 that they be present at the scene of the crime. Why is
17 presence essential?

18 Generally, presence is essential because it is
19 evidentially relevant to the intent of the defendants.

20 Buy here we have presence if -- at best,
21 presence coming back -- after any doubts had been
22 resolved in their minds about whether the father would
23 kill, when the father says, no, go get the water.

24 And in fact, if you look at the record of this
25 case, you will see on page 21 that the young boy's

1 statement, saying that I thought the father was
2 struggling with this case, is followed by, that's what I
3 think now about it.

4 In other words, at the time of the confession,
5 it occurred to him that the father was struggling.

6 There is a lot of chronological confusion in this case.
7 When the young boys' statements are read as such, they
8 always come out saying, in effect, at the time we didn't
9 know what was going on.

10 Then they're in jail, or they're arrested, and
11 they're asked about their state of mind, and they
12 reconstruct their state of mind as of that point in
13 time.

14 The state categorizes the Enmund finding as a
15 finding of fact. It is anything but a finding of fact.
16 It is a construction of law. It deserves no weight by
17 this Court. It is an attempt to reinterpret Enmund's
18 intent.

19 Statements of fact have been found, and they
20 were found in our favor. For example -- I hope I can do
21 this briefly -- during the second -- the first appeal,
22 one of the issues raised by the defendants was whether
23 or not they were entitled to a second degree murder
24 instruction.

25 Under Arizona law, if there was any evidence

1 to support second degree murder, they would be entitled
2 to it.

3 The Arizona Supreme Court said they were not
4 entitled to a second degree instruction, because there
5 was no evidence of second degree murder; only evidence
6 of felony murder.

7 Second degree murder would include
8 foreseeability, recklessness, all of the things we're
9 talking about. Yet the Arizona Supreme Court rejected
10 an instruction on second degree murder, saying,
11 therefore, that this was an all or nothing case.

12 This was felony murder, that is, accidental
13 murder carried out in the course of a felony, or it was
14 not murder at all.

15 And if that's not the case, then they're
16 entitled to a new trial. Because in Arizona law, if
17 there was any evidence of recklessness, of second degree
18 murder, in this case, they would be entitled to a new
19 trial.

20 The jury should not have had an
21 all-or-nothing, if you don't find felony murder, you
22 free them outright. That should not have been the
23 issue, and that was not the case under Arizona law.

24 The Attorney General said that the penalty
25 here was tailored to these particular individuals.

1 Nothing could be further from the truth.

2 The trial court's findings about these two
3 young boys who never fired a shot were exactly the same,
4 word for word, as its findings about Greenawalt who
5 actually gunned down all the killers, and intended to do
6 so.

7 QUESTION: Mr. Dershowitz, let me go back to
8 your jury instruction point.

9 Who requested the second degree murder
10 instruction?

11 MR. DERSHOWITZ: The defendants. And they had
12 a point. If there was any evidence under law of second
13 degree murder, they were entitled to that instruction.
14 And the court said there was no evidence of second
15 degree murder.

16 The court has also found, in the first
17 opinion, in effect, that there was no such evidence. So
18 I think they were -- I think what we have here --

19 QUESTION: Excuse me, I don't understand
20 that. To be second degree murder, it would have had to
21 be in addition to felony murder?

22 MR. DERSHOWITZ: There were three levels of
23 intent under Arizona law. Premeditated: irrelevant in
24 this case. Felony murder, accidental: Maybe it
25 happened, maybe it didn't. Third level is higher than

1 accidental, but lower than premeditated. That's second
2 degree murder.

3 If there was any evidence of an intent between
4 premeditated and accidental, they were entitled to that
5 second degree murder instruction.

6 And the court said, in rejecting that
7 argument, this is either-or. There was no evidence on
8 the record of this case of -- short of premeditation, of
9 recklessness, foreseeability, or any other element of
10 mens rea that would entitle the state not to have a
11 second degree conviction, or the defendant to have a
12 second degree murder instruction.

13 QUESTION: Second degree was higher than
14 felony, or lower?

15 MR. DERSHOWITZ: The intent level of second
16 degree is higher than the intent level for felony
17 murder. The penalty is higher for felony murder than it
18 is for second degree. That's traditional.

19 Second degree murder requires not
20 premeditation, but some level of mens rea more than
21 accidental.

22 In this case, the judge said -- the Court of
23 Appeals said, it was all or nothing. Either there was
24 evidence of felony murder, or there was no evidence of
25 murder.

1 QUESTION: But in that context -- in that
2 context -- I don't see why the trial judge wouldn't
3 handle it that way.

4 MR. DERSHOWITZ: Give a second degree murder
5 instruction?

6 QUESTION: It was clearly a felony murder
7 situation as the law was at that time. Wasn't it
8 clearly --

9 MR. DERSHOWITZ: But what if the jury
10 disbelieved, Your Honor, that the felony was still going
11 on?

12 For example, one of the arguments made at
13 trial was, the felonies had stopped when the transfer
14 was made. The car had been stolen. They had gotten all
15 they want. And the murders occurred promiscuously by
16 these defendants afterward.

17 If the jury had believed that, without a
18 second degree murder instruction, they either had to
19 acquit these people of murder altogether, or convict
20 improperly of felony murder.

21 QUESTION: I doubt that the jury could believe
22 that.

23 MR. DERSHOWITZ: The jury could believe --

24 QUESTION: I doubt whether the jury could
25 believe that.

1 MR. DERSHOWITZ: The jury --

2 QUESTION: And I doubt whether the trial court
3 believed the jury could believe that. And that's why he
4 said, this is a felony murder case.

5 MR. DERSHOWITZ: Your Honor, the trial court
6 has no right to conclude --

7 QUESTION: In other words, not because there
8 was an absence --

9 MR. DERSHOWITZ: -- whether or not a jury
10 would believe; this is not a civil case, Your Honor.
11 The trial court can't direct a verdict on any aspect of
12 the government's burden of proof.

13 The defendants did not testify. The burden
14 was on the government to prove that there was a felony
15 that continued. The defendants contested that through
16 their lawyer.

17 For a second degree murder instruction, the
18 defendants were entitled to an assumption by the trial
19 court that the jury might have disbelieved the felony
20 was ongoing, and were therefore entitled to a second
21 degree murder instruction unless there was no evidence
22 of a mens rea sufficient for second degree murder.

23 And that's what this court held, that there
24 was no such evidence, and there is no such evidence.

25 QUESTION: It's not a matter of there being no

1 evidence -- no mens rea necessary for second degree.
2 It's a matter of there being no felony necessary for
3 felony. When you're asking for a lesser instruction,
4 you're asking the judge to tell the jury, it's possible
5 that the felony conviction won't stand.

6 MR. DERSHOWITZ: That's right.

7 QUESTION: In which case you come to the
8 lesser ones.

9 MR. DERSHOWITZ: And that's exactly what they
10 were entitled to.

11 QUESTION: What I'm saying is, that the reason
12 he made his ruling is not because there -- not
13 necessarily because there was no evidence of intent to
14 kill, but because there was overwhelming evidence of
15 felony.

16 MR. DERSHOWITZ: Your Honor, no judge is
17 allowed to assume that the jury will believe
18 overwhelming evidence. And it wasn't overwhelming that
19 the felony continued.

20 The issue in this case was not, was there a
21 felony, but was this murder, carried on by the trigger
22 men, carried on as part of a felony which had already
23 terminated?

24 A jury could easily disbelieve that, and then
25 it stuck either with nothing or a second degree murder

1 conviction.

2 In many cases like this, you get a second
3 degree murder conviction. If the defendants were
4 entitled to a second degree murder conviction, they were
5 entitled to a new trial.

6 If they were not, then there is a finding in
7 this record, as there already is a finding in this
8 record, on the second appeal, that the level of intent
9 required for the Enmund finding has not been met in this
10 case.

11 So we think, Your Honors, that the legal issue
12 has already been resolved by this Court in Enmund. The
13 factual has already been resolved by the Supreme Court
14 in Arizona.

15 QUESTION: Mr. Dershowitz, may I ask one other
16 question?

17 What it boils down to, in your view, is that
18 they're holding is that the level of intent required for
19 an Enmund finding is less than the level of intent
20 required for second degree murder.

21 MR. DERSHOWITZ: The level of intent required
22 for second degree murder in this case is clearly,
23 everybody would acknowledge, less than what is required
24 for Enmund.

25 Second degree murder -- no state punishes

1 second degree murder by death. The penalty -- the level
2 of intent required for second degree murder includes
3 clearly things that are not specific intent.

4 That is our argument. The question in this
5 case is whether or not they had a level of intent which
6 comes within the Supreme Court's definition, in Enmund,
7 of specific intent.

8 But we're arguing alternatively, there is not
9 even a finding, nor could there be a finding on this
10 record, because the finding is to the opposite effect,
11 that even a level of foreseeability that is argued for
12 by the state could not be met in this case.

13 CHIEF JUSTICE REHNQUIST: Your time has
14 expired, Mr. Dershowitz.

15 MR. DERSHOWITZ: Thank you.

16 CHIEF JUSTICE REHNQUIST: The case is
17 submitted.

18 (Whereupon, at 12:00 p.m., the case in the
19 above-entitled matter was submitted.)
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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:

#84-6075 - RICKY WAYNE TISON AND RAYMOND CURTIS TISON, Petitioners V.

ARIZONA

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BY Paul A. Richardson

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