

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: TENNESSEE, Petitioner v. DONALD RAY
MIDDLEBROOKS

CASE NO: 92-989

PLACE: Washington, D.C.

DATE: Monday, November 1, 1993

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TENNESSEE :

4 Petitioner :

5 v. : No. 92-989

6 DONALD RAY MIDDLEBROOKS :

7 - - - - -X

8 Washington, D.C.

9 Monday, November 1, 1993

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:03 a.m.

13 APPEARANCES:

14 CHARLES W. BURSON, ESQ., Attorney General of Tennessee,
15 Nashville, Tennessee; on behalf of the Petitioner.

16 DAVID C. STEBBINS, ESQ., Nashville, Tennessee; on
17 behalf of the Respondent.

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1 PROCEEDINGS

2 (10:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 92-989, Tennessee v. Donald
5 Ray Middlebrooks. General Burson.

6 ORAL ARGUMENT OF CHARLES W. BURSON

7 ON BEHALF OF THE PETITIONER

8 MR. BURSON: Mr. Chief Justice, may it please
9 the Court:

10 We ask the Court today to reverse the judgment
11 of the Tennessee supreme court vacating the sentence of
12 death imposed by a jury on Donald Middlebrooks.

13 The Tennessee death penalty system achieves the
14 goal of rational and principled sentencing in which only
15 those truly deserving of the death penalty suffer the
16 imposition of death. The central procedural components of
17 the system are narrowing, particularized, and
18 individualized considerations at the penalty phase and
19 proportionality review on direct appeal.

20 In Tennessee --

21 QUESTION: Have you ever held that
22 proportionality review is constitutionally required?

23 MR. BURSON: Your Honor, the comparative
24 proportionality review I think this Court has said is not
25 constitutionally required. The Tennessee supreme court

1 indicated that it undertakes both types, traditional
2 proportionality as well as comparative proportionality.

3 QUESTION: So you're just describing the
4 Tennessee --

5 MR. BURSON: Yes.

6 QUESTION: -- system.

7 MR. BURSON: Yes.

8 In Tennessee, narrowing first occurs when
9 murderers who might otherwise be eligible as capital
10 offenders are excluded by definition from the class of
11 first degree murderers. It next occurs when the
12 legislature defines specific circumstances of first degree
13 murder for which death may be imposed. Unless the jury
14 finds beyond a reasonable doubt that such a circumstance
15 exists, they cannot impose death.

16 This is the means of channeling the jury's
17 discretion so as to reduce the likelihood of death being
18 imposed for irrelevant or constitutionally impermissible
19 factors such as race. It's the State's position that
20 Tennessee's felony murder narrowing device serves this
21 purpose in a rational, principled, and constitutionally
22 sufficient manner.

23 It is rational in that it clearly, objectively,
24 and specifically identifies circumstances of first degree
25 murder that do not embrace all first degree murders.

1 QUESTION: Do you have any idea, General Burson,
2 of the percentage of first degree murders that are not
3 subject to the capital sentencing procedure? Do you have
4 those statistics --

5 MR. BURSON: No, Justice Kennedy --

6 QUESTION: -- or can you get them to me?

7 MR. BURSON: -- and we've tried to kind of run
8 those down, and they're very elusive. The classes that
9 would not be subject to first degree murder would be
10 simple intent murderers as well as those who murder not in
11 the course of a felony that might be extremely reckless,
12 and they would be preexcluded from the class of first
13 degree murder.

14 QUESTION: But you can't give us any idea of the
15 percentage of the total universe of first degree murders
16 that the excluded portion consists of?

17 MR. BURSON: No.

18 QUESTION: General Burson, how are you defining
19 first degree murder if simple intent murder comes within
20 first degree murder?

21 MR. BURSON: No, simple intent murder does not
22 come within first degree murder. In Tennessee --

23 QUESTION: I thought you said a moment ago that
24 it did.

25 MR. BURSON: Oh, no, it's excluded by definition

1 from first degree murder. I said that that is a group of
2 murderers that might otherwise be eligible for a capital
3 offense, but that are excluded from the definition of
4 first degree murder.

5 QUESTION: What do you mean by simple intent
6 murder, just to -- what is that?

7 MR. BURSON: Well, I mean that --

8 QUESTION: No intent to kill?

9 MR. BURSON: Well, that you have an intent --
10 no, that you have an intent to kill as distinguished from
11 premeditated, deliberate, and wilful.

12 Tennessee has actually construed, for instance,
13 deliberated that you've got to have a very cool purpose,
14 premeditated, cannot be formed in an instant, it has to be
15 formed in some period of time beyond an instant, and so it
16 would appear that what we would think of as a straight
17 intent murder, with intent formed in an instant, which
18 many jurisdictions allow under premeditation, would be
19 precluded.

20 QUESTION: In other words, the murders that are
21 eligible are all premeditated murders and all felony
22 murders.

23 MR. BURSON: That's correct.

24 QUESTION: And in the felony murder category, as
25 the statute was at the time of this crime, it did not

1 require intent to kill, is that right?

2 MR. BURSON: That's correct.

3 It's our position that the circumstance is
4 rational in that it clearly, objectively, and specifically
5 identifies circumstances of first degree murder that don't
6 embrace all first degree murders. It's principled in that
7 it's justifying --

8 QUESTION: Well, again, you say circumstances of
9 first degree murder that don't embrace all --

10 MR. BURSON: Yes.

11 QUESTION: -- first degree murder. What first
12 degree murders are not embraced?

13 MR. BURSON: Premeditated and deliberate murders
14 are not embraced and also, today, child abuse murders are
15 not embraced by the felony murder aggravating
16 circumstance.

17 QUESTION: Oh, by the felony murder --

18 MR. BURSON: Yes. I'm sorry for the confusion,
19 Mr. Chief Justice.

20 QUESTION: But --

21 QUESTION: But all first degree murders are
22 potentially eligible. Everything that tends --

23 MR. BURSON: Yes.

24 QUESTION: -- to be defined as a first degree
25 murder is potentially eligible --

1 MR. BURSON: Yes, Justice --

2 QUESTION: -- for the death penalty.

3 MR. BURSON: Yes, Justice Ginsburg, the --
4 each -- if you're convicted of the offense of first degree
5 murder, the jury has two choices, life or death. That's
6 the same --

7 QUESTION: So there's no narrowing at that
8 stage. All first degree -- everyone that's eligible for
9 first degree murder -- everyone convicted of a first
10 degree murder, whether felony murder or premeditated
11 murder, is eligible for the death penalty, and all of the
12 narrowing goes on at the sentencing stage, is that right?

13 MR. BURSON: That's correct.

14 QUESTION: Is that entirely correct, General
15 Burson? Certainly there are some homicides that are not
16 death-eligible in Tennessee, are there not?

17 MR. BURSON: Yes, and -- this -- Mr. Chief
18 Justice, the point I'm trying to make, basically what
19 Tennessee does, it describes first degree murder, which
20 are premeditated murders, felony murders. All other
21 homicides, all other murders fall below the line into
22 second degree murder, and none of those are -- is it
23 possible to impose the death penalty on.

24 QUESTION: So it would be perfectly proper to
25 say that there is some narrowing there, would there not?

1 MR. BURSON: Yes. Yes.

2 QUESTION: All right. Now, in terms of those
3 that are above the line, with respect to the felony murder
4 category, I take it you agree that the felony murder
5 aggravator, so-called, does no further narrowing? We
6 don't have any disagreement about that, do we?

7 MR. BURSON: It narrows the class of first
8 degree murders.

9 QUESTION: Yes, once it is -- once the murder is
10 classified as a felony murder, once the jury has come in
11 with a verdict to felony murder --

12 MR. BURSON: Yes.

13 QUESTION: -- as opposed to premeditated murder,
14 then the possible application later of the felony murder
15 aggravator, so-called, does not narrow that subset of
16 first degree murders, i.e. felony murders, any further.

17 MR. BURSON: That's correct.

18 QUESTION: We agree on that?

19 MR. BURSON: Yes.

20 QUESTION: And as I understand it, your position
21 is there is a further narrowing which is constitutionally
22 sufficient, and that further narrowing is the result of
23 applying, in effect, the Tison standard, the threshold
24 proportionality standard that Tison imposed, right?

25 MR. BURSON: That certainly occurs independent

1 of the aggravator, and we would contend it also occurs
2 during the penalty phase when the jury considers all of
3 the factors that an additional narrowing takes place, but
4 in terms of the recklessness standard, that's
5 constitutionally required by Tison, and it does restrict
6 the State's ability to impose death on anyone who does not
7 meet that standard.

8 QUESTION: Well, is it your position that the
9 application of the Tison standard satisfies the
10 constitutional requirement of narrowing? Once that
11 standard has been applied, no further narrowing need take
12 place constitutionally, is that your position?

13 MR. BURSON: Our position is that the entire
14 system accomplishes that --

15 QUESTION: Well, can you give me --

16 MR. BURSON: -- as an aggravator --

17 QUESTION: Excuse me, general, please.

18 MR. BURSON: Yes. Excuse me.

19 QUESTION: Can you give me a yes or no answer?
20 Is it constitutionally sufficient to apply the Tison
21 standard such that no further narrowing is
22 constitutionally required?

23 MR. BURSON: Yes.

24 QUESTION: Right. Does it follow from that,
25 then, that no narrowing need take place in the category of

1 premeditated murders, because I assume premeditated
2 murders at least satisfy the kind of proportionality
3 threshold that Tison was trying to get at?

4 MR. BURSON: Maybe, and maybe not, if I could
5 explain. The issue with premeditated murder would be
6 different than the issue of felony murder. The issue with
7 premeditated murder may well be a vagueness issue,
8 depending on how narrowly the State would define its
9 premeditated class. It would not be --

10 QUESTION: Well, do you think that your
11 premeditated class is vaguely defined?

12 MR. BURSON: I think in recent months the
13 Tennessee supreme court has begun to very narrowly define
14 premeditated murder, and I think it is possible that it
15 would serve -- could serve as a valid aggravating
16 circumstance.

17 QUESTION: So that, again, if it satisfied -- if
18 premeditated -- if the class of premeditated murder is so
19 defined as to pass muster under Tison, no further
20 narrowing would be required constitutionally.

21 MR. BURSON: Under -- yes, under Tison and under
22 Creech and Godfrey.

23 QUESTION: So Tison has basically, on your view,
24 superseded the narrowing requirement, hasn't it?

25 MR. BURSON: No, it --

1 QUESTION: If you satisfy Tison you're home free
2 so far as narrowing is --

3 MR. BURSON: No. If I might explain, and I
4 think it's important, we're looking at an entire system.
5 The aggravating circumstance has the purpose of narrowing
6 from the entire class of -- we're saying first degree
7 murderers.

8 Now, it does that, and it has to be -- do that
9 in a principled -- on a principled rationale, and those --
10 this court I think has found that the Eighth Amendment
11 requires deterrence, or retribution, as the principal
12 basis for that narrowing.

13 Tison is a component of the system which is more
14 or less the safety net that cuts across the entire system.
15 It is not a narrowing device necessarily unto itself. It
16 sets a substantive, constitutional threshold below which
17 no one for felony murder can be sentenced to death.

18 QUESTION: Well, intent murders would -- what
19 you have called simple intent murders would satisfy Tison.

20 MR. BURSON: Yes. I don't even think they would
21 be included in Tison. Tison was addressing the
22 participation of an accomplice in a felony murder.

23 QUESTION: All right, but I would take it that
24 as a general proposition, all first degree murders
25 would -- let's just stick to premeditated for a moment. I

1 would say as a general proposition that all premeditated
2 murders would satisfy Tison's threshold requirement, would
3 you agree?

4 MR. BURSON: Yes, but again, unless premeditated
5 murder were a felony murder, Tison really isn't
6 applicable.

7 QUESTION: Well, premeditated at least by the
8 Tennessee definition is not a -- could not be a felony
9 murder. I mean, felony murder is not defined that way.

10 MR. BURSON: Well, but a pre -- someone could
11 kill in a premeditated fashion in the course of a felony.

12 QUESTION: And just be convicted of felony
13 murder, yes.

14 MR. BURSON: Yes, or they could be convicted of
15 premeditated murder and be subject to the felony murder
16 aggravating circumstance.

17 QUESTION: All right, in which case -- but
18 that's not the case before us, because in that case a
19 further narrowing would in fact be taking place.

20 So go back to the premeditated murder category
21 itself. As a general proposition, you agree that that
22 would satisfy Tison.

23 MR. BURSON: Yes --

24 QUESTION: All right.

25 MR. BURSON: -- as we've discussed it.

1 QUESTION: Then does it not follow from the
2 position you're taking with respect to Tison's application
3 to felony murder that no further narrowing need take place
4 in the premeditated murder category because it satisfies
5 Tison.

6 MR. BURSON: I would not agree because it
7 satisfies Tison, but I would agree that you could have, in
8 the way we've discussed it, a premeditated, aggravating
9 circumstance, so that --

10 QUESTION: Well, there's one thing I'm just not
11 getting, then. If Tison is not sufficient in
12 premeditated, why is Tison sufficient to satisfy narrowing
13 in felony murder, or do I misunderstand your position that
14 it is?

15 MR. BURSON: Justice Souter, I guess -- and I
16 don't mean to pick this point, but Tison as we have read
17 it is a case involving the standard, the threshold
18 standard for felony murders and participants in felony
19 murder, not premeditated murders, and that's why --

20 QUESTION: No, but it's applying -- it's
21 applying an Eighth Amendment threshold, and the Eighth
22 Amendment threshold would apply to any case, wouldn't it?

23 MR. BURSON: Correct. Well, it would -- it
24 would -- an intent murder or a premeditated murder by the
25 very definition exceeds the Tison standard of

1 recklessness.

2 QUESTION: Exactly, so that if Tison is your
3 means of satisfying for felony murder, and a premeditated
4 murder always exceeds the Tison threshold, then doesn't it
5 follow that there need be no further narrowing in a
6 premeditated murder case --

7 MR. BURSON: I have said --

8 QUESTION: -- or among the class --

9 MR. BURSON: I have said -- that's what I have
10 said. That's correct.

11 QUESTION: Okay.

12 MR. BURSON: Yes.

13 QUESTION: General Burson, maybe --

14 MR. BURSON: Yes, Justice --

15 QUESTION: -- I can ask the same question this
16 way. You don't need any aggravator other than the crime
17 that fits within the Tennessee statute plus Tison for
18 felony murder, that's it?

19 MR. BURSON: Yes.

20 QUESTION: You said premeditated is a higher --
21 kind of a higher category, and yet you do need an
22 aggravator under the Tennessee law for premeditated
23 murder. That's the strange -- you say, number 1 is
24 premeditated murder, number 2 is felony murder, but felony
25 murder you don't have to prove anything other than the

1 felony murder itself with the Tison qualifications. For
2 premeditated murder, you do. What is the rationale for
3 that?

4 MR. BURSON: Justice Ginsburg, I think we're
5 talking about in premeditated the mens rea of intent.
6 Felony murder would encompass reckless -- extremely
7 reckless murders as well as those who would intend, so in
8 comparing a recklessness mens rea, so to speak, against a
9 premeditated mens rea, the level of intent would have to
10 be greater for premeditated murder.

11 However, the level of culpability, these are all
12 first degree murder offenses. The level of culpability is
13 comparable for premeditated murderers and for felony
14 murderers, and what the legislature in Tennessee has
15 determined is that deterrence serves as a justifying
16 rationale to create an aggravating circumstance of felony
17 murder as a class of murderers, and they have come to that
18 conclusion with certain types of premeditated murders such
19 as a police murder, State attorney general murder, that
20 sort of thing, which are purely based upon deterrent
21 reasons.

22 But when I suggest that the premeditated
23 standard as intent and deliberateness and coolness is
24 higher than recklessness, I only mean as a mens rea, not
25 in terms of culpability.

1 QUESTION: So at the sentencing stage, felony
2 murder is considered the graver offense than premeditated,
3 because it doesn't need any additional aggravator, is
4 that --

5 MR. BURSON: It is considered the offense that
6 the General Assembly has determined they have a reasonable
7 chance of deterring by increasing the severity of the
8 penalty to death. It doesn't necessarily mean that it's
9 more severe in another manner, except that I think they
10 could also conclude that the extent of harm in a felony
11 murder is greater than in a straight, premeditated murder.

12 Those are the rationale that this Court has
13 looked at in terms of defining the aggravating
14 circumstance. It's our position that the Tennessee
15 General Assembly has determined that as to felony
16 murderers, and at the general level of definition that's
17 all that they're required to do.

18 QUESTION: General Burson, when did the General
19 Assembly make this determination? When was this statute
20 that's at issue in this case passed?

21 MR. BURSON: This statute I think was in '77 or
22 so, and --

23 QUESTION: What if this murder had taken place
24 before 1987, when Tison was decided? Say you had this
25 very same set of facts in 1980. Could you have then

1 defended this scheme as constitutional, because there's
2 nothing in the Tennessee statute that requires
3 recklessness?

4 MR. BURSON: I think that the recklessness
5 component of it certainly gives it a --

6 QUESTION: Where does the requirement to satisfy
7 a recklessness component come from? Isn't it Tison?

8 MR. BURSON: It comes from -- yes.

9 QUESTION: So if you didn't have Tison on the
10 books, which wasn't decided till 1987, your statute was
11 then unconstitutional, I assume. It became --

12 MR. BURSON: Well, to the extent --

13 QUESTION: -- constitutional once Tison was
14 decided.

15 MR. BURSON: To the extent it would have applied
16 to one who acts less than reckless, and we also had --

17 QUESTION: But then we have no finding of
18 recklessness in this case, do we?

19 MR. BURSON: No, but I think the --

20 QUESTION: Because there's no such instruction.

21 MR. BURSON: The -- we don't, but the court made
22 it very clear, the Tennessee supreme court, that it would
23 perform this type of proportionality review, and I think
24 this Court said in Cabana v. Bullock that that
25 proportionality review was not required by the jury, that

1 it was sufficient if the appellate court applied the Tison
2 standard.

3 QUESTION: If you would carry Justice Stevens'
4 analogy back, you might say that before this Court decided
5 Enmund in 1983, maybe from 1977 to 1983 the statute was
6 constitutional, from 1983 to 1987 it wasn't, and after
7 1987 it is.

8 MR. BURSON: Well, yes, and the Tennessee
9 supreme --

10 QUESTION: Of course, we don't know whether your
11 supreme court might not have read in the Tison requirement
12 on its own, do we? Do we have any cases in which your
13 supreme court declined to read in Tison before we did?

14 MR. BURSON: I --

15 QUESTION: I mean, you claim they've gone
16 further than we have in the present case. Surely they
17 might on their own have gone as far as Tison before we
18 did.

19 MR. BURSON: Your, Honor, I can't say that they
20 addressed that.

21 QUESTION: But at least it isn't the Tennessee
22 legislature that required the recklessness requirement.
23 That much we all agree on, I guess.

24 MR. BURSON: No, no, I'm not suggesting that.
25 I'm saying the Tennessee legislature applied the deterrent

1 rationale to making felony murder an aggravating
2 circumstance.

3 QUESTION: The Tennessee supreme court did
4 address the question of the relative culpability of
5 premeditated murder and felony murder, didn't it, and it
6 found them equal in culpability under the statute, didn't
7 it?

8 MR. BURSON: Correct, and we would agree that
9 they are equal in culpability.

10 QUESTION: Well, aren't you -- doesn't that then
11 go back to Justice Ginsburg's question of a moment ago?
12 How do you explain the fact that of two categories of
13 murder of equal culpability, the defendants convicted in
14 the one category, premeditated, require -- are subject to
15 a narrowing requirement and those in the second category,
16 felony, are not?

17 MR. BURSON: Justice Souter, our position is
18 that the Eighth Amendment allows an aggravator to have, as
19 a justifying rationale, deterrence --

20 QUESTION: Well, you --

21 MR. BURSON: -- or retribution, so you do not
22 have to set up an aggravator based upon culpability.

23 QUESTION: I'm -- maybe I don't understand your
24 answer, but it doesn't seem to me that that responds to
25 the question. You're still, under your law, engaging in a

1 narrowing function with respect to one category, and
2 you're not engaging in a narrowing function with respect
3 to the other, isn't that right?

4 MR. BURSON: Let me see if I could respond this
5 way. If the two categories in the Tennessee system were
6 premeditated murder and the killing of two or more
7 persons, it would be perfectly rational to have as an
8 aggravating circumstance the killing of two or more
9 persons as you did in Lowenfield, and so it's -- what you
10 have to look at for an aggravator, we would suggest, is
11 the -- are the objective criteria that circumscribe the
12 class of first degree murders. In this case, it's the
13 conduct of felony murder.

14 QUESTION: I still don't -- maybe I'm missing
15 a -- I don't think you've answered Justice Ginsburg's
16 question.

17 MR. BURSON: If you are -- maybe I don't
18 understand the question.

19 QUESTION: I thought her question was -- in any
20 case, my question is, as the supreme court of Tennessee
21 has construed it, the two subcategories are first degree
22 murder of equal culpability, isn't that -- is that
23 correct?

24 MR. BURSON: Correct.

25 QUESTION: Okay, and you narrow --

1 MR. BURSON: Comparable.

2 QUESTION: -- those convicted in the one
3 category, you don't of those convicted in the other. How
4 do you explain the fact that you don't?

5 MR. BURSON: I don't know how to say it any
6 other way than I have said it. They have narrowed it and
7 decided on felony murder as an aggravator based upon the
8 rationale of deterrence, and that's the basis on which the
9 legislature has done this, and this Court's Eighth
10 Amendment jurisprudence says that's fine as far as
11 aggravating circumstances.

12 QUESTION: Well, you say that that aggravating
13 circumstance is not constitutionally required anyway. If
14 they do it for the one but not for the other, they do it
15 voluntarily and without Federal constitutional compulsion
16 for the one. You said that they don't need that further
17 aggravator, anyway.

18 MR. BURSON: No, then I was misunderstood. I
19 think there needs to be -- there needs to be an
20 aggravating circumstance.

21 QUESTION: I thought you said it was enough
22 simply to have first degree murder defined the way your
23 State defines it --

24 MR. BURSON: And then --

25 QUESTION: -- and you would not have any

1 further --

2 MR. BURSON: Oh, I see. I see.

3 QUESTION: -- aggravating circumstance at all.

4 MR. BURSON: I think under Lowenfield that's

5 possible, yes.

6 QUESTION: So then whatever -- even if Justice

7 Souter's -- is correct that you have an aggravating

8 circumstance for the one type of first degree murder but

9 not for the other, it is not an aggravating circumstance

10 in your view that is required by the Federal Constitution.

11 MR. BURSON: I think --

12 QUESTION: It's one that Tennessee chose to

13 create on its own.

14 MR. BURSON: I think under Lowenfield that's

15 correct.

16 QUESTION: But once you have an aggravator,

17 don't you have to have some rationale for having it in the

18 one case and not in the other?

19 MR. BURSON: I would suggest that not if it's --

20 not as a constitutional proposition. Not if it's not

21 constitutionally required.

22 QUESTION: I thought your whole position here

23 was that felony is itself a discrete category which is a

24 sufficient aggravator.

25 MR. BURSON: It is --

1 QUESTION: I don't know why you're running away
2 from that just a little bit in response to Justice Souter
3 and Justice Ginsburg's question. A felony murder is
4 itself a separate evil that the State can punish in an
5 aggravating way, because a felony is involved.

6 MR. BURSON: Justice Kennedy, I agree with that.

7 QUESTION: I thought that's what your
8 position --

9 MR. BURSON: That is my position, and where it
10 seems to me we are -- the -- we're elevating almost form
11 over substance. This is what Lowenfield got away from.
12 The point is that if we narrow either through the
13 definitional stage or if it's as an aggravator, if we
14 narrow the circumstances as Justice Kennedy has noted, and
15 that is a sufficiently discrete sort of set of
16 circumstances to guide the jury's discretion, and that's
17 what we're after, that is what -- that's what the
18 Constitution requires.

19 QUESTION: Well then, do you contend it would be
20 constitutional to have the death penalty imposed for a
21 felony murder that the only intent -- there's no
22 recklessness involved. The only intent was to commit a
23 robbery. Would that be constitutional? To commit a
24 robbery, and in the course of the robbery a person gets
25 killed.

1 MR. BURSON: You mean, and you are an
2 accomplice, or you are the killer?

3 QUESTION: You are a robber, and in the course
4 of the robbery, maybe you stumble, and you accidentally
5 shoot the gun and the man gets killed. That's a clear
6 case of felony murder with no intent to kill, no
7 recklessness, let's assume. Would you say that could
8 constitutionally support the death penalty? Under your
9 answer to Justice Kennedy, I think you'd say yes.

10 MR. BURSON: As the Court's formulation of the
11 standard is now, yes, because the Court just says you have
12 to -- under the Enmund standard, you only have to kill and
13 it doesn't require -- the Court hasn't addressed a
14 particular standard, but clearly an accomplice would have
15 to at least be reckless before that would happen, but if
16 you killed --

17 QUESTION: I'm assuming no recklessness on the
18 part of the killer. He just had an intent to commit the
19 felony, and all of the deterrence rationale you talked
20 about would apply there.

21 MR. BURSON: It's hard for me to believe that
22 the Court would not apply that same recklessness standard,
23 and I would suggest that that probably --

24 QUESTION: But that's the extent --

25 MR. BURSON: -- would not be upheld.

1 QUESTION: -- of your narrowing requirement
2 under your statute. All you have to do is be a
3 participant in a felony murder where all you intended to
4 do was to commit the felony.

5 MR. BURSON: Yes, and that's overlaid with this
6 Court's jurisprudence on recklessness.

7 May I save the balance of my time for rebuttal,
8 please?

9 QUESTION: Very well, General Burson. Mr.
10 Stebbins, we'll hear from you.

11 ORAL ARGUMENT OF DAVID C. STEBBINS

12 ON BEHALF OF THE RESPONDENT

13 MR. STEBBINS: Mr. Chief Justice and may it
14 please the Court:

15 I would like to start by clarifying a few points
16 of Tennessee law, if I might. First degree murder in
17 Tennessee is defined as felony murder or premeditated
18 murder. All first degree murderers are death-eligible,
19 but no first degree murderer can be sentenced to death
20 absent proof beyond a reasonable doubt of a statutory
21 aggravating circumstance.

22 All twelve of the aggravating circumstances
23 require proof of additional elements for persons convicted
24 of premeditated murder. Eleven of the statutory
25 aggravating circumstances require proof of additional

1 elements for persons convicted of felony murder. Only
2 with the felony murder aggravating circumstance is there
3 automatic elevation of one class of murderers into being
4 subject to the death penalty above the other class without
5 proof of anything further.

6 Two other points is --

7 QUESTION: Well, is your point that that's
8 irrational, and therefore doesn't meet rational basis
9 review?

10 MR. STEBBINS: Well, I think my point is that
11 the Tennessee -- this is what the Tennessee supreme court
12 found to violate the Tennessee constitution. The fact
13 that this one class is automatically elevated -- this one
14 class is defined, excuse me, to be the morally culpably
15 equivalent class -- I'm sorry.

16 QUESTION: Well, but does it violate the Federal
17 Constitution so long as the narrowing within the
18 definition of first degree murder is alone enough to
19 comply with our narrowing requirement?

20 MR. STEBBINS: No, I believe it does, because
21 the problem is we're not just talking about narrowing
22 here, but some principled narrowing, and this is exactly
23 what the --

24 QUESTION: That's your point, that it's
25 unprincipled and fails rational basis review.

1 MR. STEBBINS: Yes, it fails --

2 QUESTION: What's the last case of ours that
3 held a State statute failed rational basis review?

4 MR. STEBBINS: I can't point you to a case, Your
5 Honor, but looking at what the Tennessee --

6 QUESTION: Many moons. It's been a long time.

7 MR. STEBBINS: That may be, but the Tennessee
8 supreme court here has found that it violates Article I,
9 section 16 of the Tennessee constitution. They've also
10 made that finding as an independent finding, independent
11 of any Eighth Amendment analysis.

12 QUESTION: Well, they're free to find it
13 violates the Tennessee constitution. That's not what
14 we're discussing here. We're discussing whether it
15 violates the Federal Constitution. If we find that it
16 doesn't, Tennessee can find it to violate its constitution
17 whatever way it wants. I think we're just discussing the
18 Federal issues here, aren't we?

19 MR. STEBBINS: I understand that, but the point
20 I would like to make first, Your Honor, if I may, is that
21 this is an independent State ground that the Tennessee
22 supreme court has relied on.

23 QUESTION: Two of the three in the majority said
24 this holding, based on Article I, section 16 of the
25 Tennessee constitution, so two of them put it squarely and

1 apparently solely on the Tennessee constitution, but they
2 concurred in the principal opinion, which puts it on both
3 grounds.

4 MR. STEBBINS: But I think, Your Honor, under
5 the majority opinion that there are alternative,
6 independent, adequate State grounds. In -- at page 4950
7 of the appendix to the petition for cert, the Court makes
8 a very clear State law finding. It says, and I quote,
9 "Our legislature, however, has seen fit to prohibit such
10 duplication by statute in noncapital sentencing, and we
11 are of the opinion that Article I, section 16 of the
12 Tennessee constitution prohibits such duplication in
13 capital sentencing as well."

14 This conclusion they reach by looking only at
15 the Tennessee sentencing statutes for noncapital cases,
16 looking at the capital sentencing procedures in Tennessee,
17 and looking at the Tennessee constitution. There is no
18 mention at this point of the Federal Constitution or any
19 Federal case law. Because of that, this is an independent
20 and adequate State ground, and this which allows -- excuse
21 me -- which prevents this Court from hearing the case,
22 because of the independence and adequacy of the State
23 ground, and as you look also at the second portion of the
24 Court's opinion concerning the narrowing, the Court
25 specifically rejects Federal case law, the rationale of

1 Federal case law in Lowenfield --

2 QUESTION: Mr. Stebbins, can I just interrupt
3 you to --

4 MR. STEBBINS: Certainly.

5 QUESTION: You made a motion on this point that
6 I think the Court denied, and your position is fully
7 stated in your brief, so I wonder if you're making the
8 best use of your time.

9 MR. STEBBINS: I just wanted to make a couple of
10 quick points on it, Your Honor, because at least in one
11 other case -- I'm familiar with this case in a similar
12 situation, Ohio v. Huertas just a couple of terms ago, did
13 dismiss the writ after argument, and most of the argument
14 was based on a State law analysis, but I will be very
15 brief, Your Honor.

16 But I would just like to make the point that in
17 the second part of the opinion that they reject the
18 rationale of Lowenfield as finding it inapposite under the
19 Tennessee constitution, and under the Tennessee
20 constitution adopt the rationale of -- the non-Federal
21 rationale announced in Cherry, in Engberg, and in Collins.

22 QUESTION: Is the page you're referring to in
23 the appendix to the petition?

24 MR. STEBBINS: Excuse me, Your Honor, I'll --
25 the -- page 61 and 62, A-61 and 62 of the appendix to the

1 petition for cert.

2 The Tennessee supreme court has found that the
3 treatment of the felony murderer separately and
4 differently than the equivalently defined premeditated
5 murderers is irrational under the Tennessee constitution,
6 and I would submit that it's equally irrational under the
7 Eighth Amendment.

8 QUESTION: I notice that Tennessee has as one of
9 its aggravating factors the killing of a child under 12
10 years of age.

11 MR. STEBBINS: That's correct, Your Honor.

12 QUESTION: If someone kills an 11-year-old, can
13 they argue under your theory that really it's irrational
14 to distinguish between someone who kills an 11-year-old
15 and a 12-year-old?

16 MR. STEBBINS: Under my theory, no, I don't
17 think so. My theory is --

18 QUESTION: What's the rationality there that's
19 not present here?

20 MR. STEBBINS: Well, there you've got something
21 that is different from the crime itself. The problem with
22 the felony murder aggravator in Tennessee is it defines
23 the crime of first degree murder. First degree murder in
24 Tennessee is a murder committed during the course of a
25 felony. You find that, the jury finds that, and they find

1 the person guilty of first degree murder. The jury is
2 then told --

3 QUESTION: But that's only one type of first
4 degree murder.

5 MR. STEBBINS: That's correct.

6 QUESTION: So you have an aggravator which in
7 effect says this one type of first degree murder is worse
8 than the other type of first degree murder. It's still an
9 aggravator, however.

10 Now, you may argue that that is a rather sloppy
11 way of achieving that result, but can you say that the
12 result is irrational? The State has decided that of the
13 two types of murder that fall within first degree, one is
14 worse than the other, and they choose to make that
15 determination by declaring that whole class to be an
16 aggravator. I agree it's logically pretty sloppy, but I
17 don't know that it's irrational.

18 MR. STEBBINS: Well --

19 QUESTION: And I should think it's eminently
20 more rational than the 11-year-old, 12-year-old dichotomy,
21 because the State is interested in deterring felonies.

22 MR. STEBBINS: But as the Tennessee supreme
23 court found, though, that the Tennessee legislature has
24 defined felony murderers and premeditated murderers to be
25 equally culpable. They are guilty of first degree murder.

1 Then automatically, not by any operation -- just
2 by the operation of the statute, the felony murderers are
3 elevated up to be subject to the death penalty, when
4 premeditated murderers that the Tennessee supreme court
5 views as equally culpable or perhaps even more culpable
6 are not treated worse, and the --

7 QUESTION: Where do you -- where -- what cases
8 of ours do you rely on for the proposition that there is
9 this sort of rationality requirement in the Eighth
10 Amendment?

11 MR. STEBBINS: Well, just last term in Arave v.
12 Creech, this Court held that there was -- where an
13 aggravating circumstance serves to distinguish those who
14 are sentenced to death from those who are not, that the
15 aggravating circumstance must genuinely narrow on a
16 principle basis, and the Tennessee supreme court
17 essentially here has said this is not principled.

18 QUESTION: That's where you derive the
19 rationality requirement from then, in the Eighth
20 Amendment?

21 MR. STEBBINS: For one, Your Honor, yes, and I
22 think also in Zant v. Stevens this court addressed that
23 the aggravating circumstances where they are used to
24 narrow the class of persons eligible for the death penalty
25 must have some rational penalogical basis. They must

1 satisfy one of the concerns of this Court expressed in
2 Furman, that the death penalty not be imposed in an
3 arbitrary or capricious manner.

4 QUESTION: Mr. Stebbins, maybe it would be
5 better if we were to deal with a concrete case than to
6 talk in these abstract categories, and let me tell you one
7 that has been on my mind. Let's take a robbery of a home,
8 and the robber in case number 1 intentionally kills the
9 homeowner in that process, and then case number 2 is a
10 robbery, and the robber recklessly kills the homeowner in
11 that process.

12 The second case, on your rationale, could not
13 attract the death penalty -- let's assume there's no other
14 aggravator, just the felony -- but the first one could.
15 Why does it make -- why do you come -- say that that's
16 rational?

17 MR. STEBBINS: Well, first of all I think that's
18 incorrect under what I'm saying. I think in both of those
19 situations a person could be sentenced to death, because
20 you have a felony plus an intentional or premeditated
21 murder.

22 QUESTION: No, no, no, in the felony murder case
23 you don't have any premeditated. You have a reckless
24 murder in conjunction with a felony. Your argument is
25 that that person cannot be subjected to the death penalty,

1 but the premeditated murder with a felony could be.

2 MR. STEBBINS: Yes, but the premeditated
3 murderer with nothing else, without the additional felony,
4 could not be sentenced to death.

5 QUESTION: I'm asking you why in those two
6 concrete situations it isn't perfectly logical, rational,
7 to treat them the same, to say that both are subject to
8 the death penalty?

9 MR. STEBBINS: Well, very simply, in the one
10 hypothetical, Your Honor, you've got -- as I understand
11 it, and perhaps I misunderstand your hypothetical, but
12 you've got premeditation and something else. You have a
13 felony.

14 In the second hypothetical, you have no
15 premeditation, no intent, or perhaps reckless intent, and
16 you have the commission of a felony which raises it up to
17 be the equivalent of premeditated murder in the first
18 place, and you have nothing in addition to distinguish
19 that murderer from the first murderer, or to make him
20 worse.

21 QUESTION: But why can't the State think in
22 terms of dangerousness, in terms of deterrent, it wants to
23 deter that reckless action as much as the premeditated
24 action?

25 MR. STEBBINS: That's my point exactly, Your

1 Honor. If they are treated equally, then I would have no
2 complaint here, but they're not. They're treating the
3 reckless and -- first of all, if I may make a point, is
4 that in this case and prior to 1989 in Tennessee there was
5 no reckless requirement, and no recklessness has been
6 made.

7 QUESTION: In my hypothetical you are not
8 treating them equally, and you say that's okay, and that I
9 don't understand. Reckless plus robbery, no death
10 penalty. Premeditated plus robbery, death penalty.
11 That's what you say is fair and rational.

12 MR. STEBBINS: Yes. I mean, the problem I'm
13 making, though, is that, not the premeditation plus
14 robbery, a premeditated murder with nothing else would
15 satisfy the death penalty, would get a death penalty here.

16 Reckless, which only becomes the equivalent of a
17 premeditated murder because it was committed during the
18 course of a robbery, is then automatically subjected to
19 the death penalty, whereas with the premeditated murder,
20 who is already all by itself a highly culpable crime
21 because of the definition of premeditation --

22 QUESTION: Your point is that it's irrational,
23 constitutionally impermissible, for the State to say
24 premeditated and reckless are on the same line. That's --

25 MR. STEBBINS: No. I'm sorry, Your Honor,

1 that's not my point. My point is it's constitutionally
2 impermissible to treat the reckless murderer worse than
3 the premeditated murderer, because the reckless --

4 QUESTION: In my hypothetical, you're saying
5 it's necessary to comport with the Constitution to treat
6 the felony murder better. Not equally, but better --

7 MR. STEBBINS: I --

8 QUESTION: -- because in my hypothetical the
9 premeditated robber is subject to the death penalty, the
10 reckless robber is not, so the reckless robber is being
11 treated better, not the same.

12 MR. STEBBINS: But the premeditated robber is
13 being treated worse because of there is an additional
14 element proven in the crime -- the robbery.

15 With the reckless robber, he is being elevated
16 already to being the equivalent of the premeditated
17 murderer merely by the use of the robbery, and then he's
18 elevated up above that by the use of the robbery also. A
19 reckless murder by itself, without the robbery, would not
20 be death-eligible in Tennessee. Only because it's
21 committed during the course of a felony does a reckless or
22 unintentional murder become the equivalent of premeditated
23 murder in the first place.

24 QUESTION: But you would agree, would you not,
25 in my two hypothetical cases, that your answer is yes, in

1 that situation you must favor the felony murderer by
2 making that reckless robber not subject to the death
3 penalty where the premeditated robber is?

4 MR. STEBBINS: Again, Your Honor, I appear to be
5 missing your point on this, or I'm not explaining myself
6 well. If you have a premeditated murder -- if I may make
7 a hypothetical all by itself --

8 QUESTION: Well, why don't you just stick with
9 my hypothetical, and tell me -- we have a robbery of a
10 home. The homeowner is killed. In one case the killing
11 was premeditated, in the other one it's reckless. I take
12 it on your argument that the State could not
13 constitutionally subject the reckless robber to the death
14 penalty, or am I misunderstanding your argument?

15 MR. STEBBINS: No, I believe that's correct,
16 Your Honor.

17 QUESTION: But the State could subject the
18 premeditated robber to the death penalty.

19 MR. STEBBINS: That's correct, Your Honor.

20 QUESTION: So if yes to those questions, to
21 both, then you're saying it's constitutionally required to
22 favor the felony murderer.

23 MR. STEBBINS: Again, it's not favoring the
24 felony -- reckless felony murderer, Your Honor. The
25 reckless felony murderer goes in to rob the home with no

1 intent. He is raised up to be the equivalent of the
2 premeditated murderer merely by the proof of the robbery.
3 The premeditated murder all by itself is death-eligible.
4 The reckless killer is not death-eligible absent adding
5 the robbery on top of that. That raises it up to be first
6 degree murder.

7 QUESTION: So you're saying that in a -- let's
8 take a totally hypothetical situation, unlike Tennessee,
9 that a State cannot make a felony murder that qualifies
10 under Tison's recklessness, they cannot make that a
11 capital offense without some aggravating circumstance?

12 MR. STEBBINS: I believe that's true, Your
13 Honor, and I also believe --

14 QUESTION: Now, what case would you rely on for
15 that?

16 MR. STEBBINS: Your Honor, I would say that if
17 you look at this Court's holding in all of its holdings
18 from like, Gregg, and Zant, and Creech last year, whenever
19 there has been a definition by a State that is as broad as
20 this, that includes felony murder with no intent, it
21 includes plain, premeditated murder as the basis for death
22 eligibility, that every State where this Court has looked,
23 it has required proof of some additional --

24 QUESTION: But I asked you for a case from this
25 Court that supports the answer that you just gave, and to

1 say that the States have required something more doesn't
2 necessarily mean that the Constitution requires it.

3 MR. STEBBINS: I believe, though, if you look at
4 this Court's opinion in Lowenfield, for example,
5 Lowenfield says the States may do two things, they may
6 broadly define death-eligible crimes, and if they broadly
7 define them, i.e. saying felony murder or premeditation,
8 then they must have an aggravating circumstance that
9 narrows the class, or they may very narrowly define the
10 class of death-eligible murderers as Texas and Louisiana
11 have done. If they do that, then there is no
12 constitutional requirement for further narrowing.

13 QUESTION: Well, so don't you think it
14 represents a sufficient narrowing in the terms that
15 Lowenfield used that if they say -- if the State says,
16 from all homicides we are going to choose premeditated
17 murder and felony murder that meets the Tison
18 qualification, and we're not going to have aggravating
19 circumstances. We're going to let you show all the
20 mitigating evidence you want.

21 MR. STEBBINS: This Court simply has never
22 approved such a scheme.

23 QUESTION: Well, it may never have, but has it
24 ever disapproved it?

25 MR. STEBBINS: No, the State has never

1 disapproved it, either, but again, if you look at this
2 last term in Creech, this Court analyzed the Idaho statute
3 and looked at it and declared it very broad, and the Court
4 went on to look at the aggravating circumstance that was
5 at issue in that case and found that under the Idaho
6 scheme and under the Eighth Amendment, that it was
7 necessary for the aggravating circumstance to narrow that
8 class of death-eligible people.

9 QUESTION: Mr. Stebbins --

10 MR. STEBBINS: The -- yes.

11 QUESTION: -- you don't need aggravating
12 circumstances at all. I mean, we've said you can
13 narrow -- you don't have to narrow at the jury stage, you
14 can narrow at the definition stage, so we don't really
15 need aggravating circumstance, isn't that right?

16 MR. STEBBINS: If the definition is sufficiently
17 narrow --

18 QUESTION: Well, let's assume that what
19 Tennessee has is this situation. It defines first degree
20 murder as all murder that is committed with intent or
21 reckless disregard. All killing with intent or reckless
22 disregard. Then it defines as aggravating circumstances
23 premeditation or felony murder, murder in the course of a
24 felony. Would that be constitutional, in your --

25 MR. STEBBINS: I -- I -- no, it would not, Your

1 Honor. It would not --

2 QUESTION: It would not. Why?

3 MR. STEBBINS: It would not -- two reasons.

4 One, it would not narrow the class at all. It would
5 include every one of those persons, basically.

6 QUESTION: What -- what -- what? Every killing
7 that is done with intent or reckless disregard is done
8 with either meditation or in the course of another felony?
9 That narrows it a lot, it seems to me.

10 MR. STEBBINS: Perhaps I misunderstood your
11 hypothetical. I thought you defined it so that that would
12 basically --

13 QUESTION: It's a very broad definition of first
14 degree murder. It includes all murder with intent or with
15 reckless disregard. The case goes to the jury, and the
16 jury is told, you may impose death if you find an
17 aggravating circumstance of premeditation or of killing in
18 the course of a felony.

19 MR. STEBBINS: I don't believe that this Court
20 would find that that provides adequate guidance for the
21 jury or have sufficiently narrowed the class. I -- no
22 case this Court has held since 1972 has found --

23 QUESTION: Well, that's the right answer for
24 your case. I mean, you would have to say that that's bad
25 in order to say that this is bad, because what this boils

1 down to is the same thing.

2 MR. STEBBINS: Yes. The question is, how
3 broadly --

4 QUESTION: Mr. Stebbins, I thought Tennessee had
5 not opened up every felony murder to the death penalty but
6 only the commission of murder in the course of committing
7 certain named felonies.

8 MR. STEBBINS: That's correct, Your Honor,
9 there's eight --

10 QUESTION: So there has been a narrowing. It
11 isn't all felonies, it is certain named felonies.

12 MR. STEBBINS: There has been -- yes, not every
13 felony is included in that, but every felony that is
14 included in the definition of first degree murder is also
15 included in the aggravating circumstance.

16 QUESTION: Yes, but of course, Lowenfield says
17 that the narrowing can be done at the guilt phase. I
18 mean, there's no -- we've never said there is a
19 requirement that it has to be done at the sentencing
20 phase, have we?

21 MR. STEBBINS: No. No, there isn't, Your Honor,
22 and the Court has not required that where there has been a
23 sufficiently narrow definition of first degree murder or
24 death eligibility, and I would submit that in -- last
25 term, the case that this Court reviewed from Idaho, that

1 the definition of death eligibility there was considerably
2 narrower than what Tennessee has, and yet this Court still
3 required the aggravating circumstances in that situation
4 to genuinely narrow the class and provide some guidance.

5 QUESTION: But in Arave, Mr. Stebbins, the
6 challenge was that the aggravating circumstance was too
7 vague, wasn't it? It wasn't whether you had to have an
8 aggravating circumstance.

9 MR. STEBBINS: Well, the Court went on, and
10 after determining vagueness to discuss and state very
11 plainly that not only must the aggravating circumstance be
12 definite, but it must genuinely narrow, and do so on a
13 principled basis, citing Zant v. Stevens primarily for
14 that proposition, and this Court has held where a State
15 uses aggravating circumstance to genuinely narrow --
16 whether they have to or not, but where they do, they have
17 to narrow in a principled manner and they have to define a
18 class of persons that's more culpable than another class.

19 Here, you have one class of equally culpable, as
20 defined by the Tennessee legislature, first degree
21 murderers automatically subject to the death penalty, and
22 the other class is not so automatically subjected to the
23 death penalty.

24 QUESTION: Mr. Stebbins --

25 MR. STEBBINS: Yes.

1 QUESTION: -- just a question of Tennessee law.
2 Is a nonpremeditated killing in the course of a felony,
3 other than those listed, murder under Tennessee law?

4 MR. STEBBINS: A nonpremeditated killing during
5 the course of an unlisted --

6 QUESTION: An unlisted felony.

7 MR. STEBBINS: The fact that it was committed
8 during another felony that's not listed in the first
9 degree murder statute would have no effect on it. There
10 is no second degree felony murder in Tennessee.

11 QUESTION: So it wouldn't be murder at all.

12 MR. STEBBINS: Correct. It might be involuntary
13 manslaughter, but it could not be murder.

14 QUESTION: Well, how -- are you sure that's the
15 correct answer, Mr. Stebbins? Certainly, at common law,
16 Justice Souter's hypothesis, intentional but not
17 premeditated killing was traditional second degree murder.
18 Tennessee doesn't regard that as murder?

19 MR. STEBBINS: Perhaps I got the hypothetical
20 wrong.

21 QUESTION: I may have misunderstood his --

22 QUESTION: No, my hypo was, it is a
23 nonpremeditated killing, and it is not committed in the
24 course of one of the listed felonies. Can that be murder
25 under Tennessee law?

1 MR. STEBBINS: If it was an intentional murder,
2 it would be murder.

3 QUESTION: So there is a narrowing, then, that
4 does indeed go on.

5 MR. STEBBINS: Yes, but the fact it would
6 require intent, and the fact that a nonlisted felony was
7 also committed would have no effect at all on the
8 determination that it's murder. It's irrelevant.

9 QUESTION: The fact of the felony would be
10 irrelevant, but it would still be classified as murder if
11 it was an intentional killing.

12 MR. STEBBINS: If it was an intentional killing,
13 it would be classified as second degree murder, that's
14 correct, Your Honor.

15 If the Court has no further questions, thank
16 you.

17 QUESTION: Counsel, as I understand your
18 argument, just before you subside, Justice Ginsburg asked
19 you a question about a robbery with an intentional murder
20 and a robbery with a reckless murder. I take it -- let's
21 have a third hypothetical. Let's say there's just a
22 sniper who does not enter the house. He kills the
23 homeowner intentionally. That person must be subject to
24 the death penalty only if there is an aggravating
25 circumstance, correct?

1 MR. STEBBINS: That's correct.

2 QUESTION: And what you're saying is they're
3 equally culpable, and that this is the differential that's
4 unconstitutional. So you have to say, basically, that a
5 felony is not a sufficient aggravator.

6 MR. STEBBINS: I'm saying a felony is not a
7 sufficient aggravator where the underlying crime is felony
8 murder.

9 QUESTION: So you're not challenging it as an
10 aggravator for the premeditated --

11 MR. STEBBINS: No, I'm not, Your Honor. I'm not
12 making that point at all. The felony is a valid
13 aggravator if the underlying crime is not felony murder.
14 the only constitutional problem with this is it's -- well,
15 because it elevates with nothing further.

16 QUESTION: Going back to Justice Ginsburg's
17 hypothetical about a felony murderer who in one case is
18 reckless and in the other case deliberately kills --

19 MR. STEBBINS: Yes.

20 QUESTION: -- would you say that it's irrational
21 to say that the one who is reckless is less culpable than
22 the one who killed deliberately?

23 MR. STEBBINS: Is it irrational to say that
24 the -- no. In fact, traditionally the one who is reckless
25 has killed recklessly has been held to be less culpable

1 than the one who has killed premeditatively.

2 QUESTION: Would you say the contrary view would
3 be irrational, and if you don't say it, why don't you say
4 it?

5 (Laughter.)

6 MR. STEBBINS: Well, yes, I would. I think
7 arising out of many years of jurisprudence is that felony
8 with intent, or with -- no intent, or with recklessness,
9 the only way they are made as equally culpable as a
10 premeditated murder is through the fact of a felony. This
11 elevates them to the equivalent of a premeditated
12 murder --

13 QUESTION: Surely --

14 MR. STEBBINS: -- and that's the way the
15 Tennessee system operates.

16 QUESTION: Surely you're not suggesting that
17 every time a State creates an aggravator it is acting
18 unconstitutionally if it has not included as an aggravator
19 something that is even worse than the aggravators it has
20 included. Is that what you're arguing, that unless the
21 State comes forth with a full-blown system of all
22 aggravators in their proper --

23 MR. STEBBINS: Absolutely not. That's not what
24 I'm arguing.

25 QUESTION: Well, they put one aggravator here.

1 There may be things that are even worse.

2 MR. STEBBINS: Well, what the Tennessee supreme
3 court has said, though, is that they can't do that under
4 the Tennessee constitution. It's irrational under the
5 Tennessee constitution regardless of whether it is under
6 the Eighth Amendment.

7 QUESTION: Thank you, Mr. Stebbins.

8 MR. STEBBINS: Thank you.

9 QUESTION: General Burson, you have 3 minutes
10 remaining.

11 REBUTTAL ARGUMENT OF CHARLES W. BURSON

12 ON BEHALF OF THE PETITIONER

13 MR. BURSON: Thank you, Mr. Chief Justice.

14 First, it's our position that following
15 Lowenfield, that whether you call it an aggravator, if
16 it's -- if the circumstances are described in the offense
17 itself that meet the goal of narrowing the jury's
18 discretion, or if they're described in an aggravator, that
19 fulfills the Eighth Amendment purpose --

20 QUESTION: Do you hold --

21 MR. BURSON: -- and we would suggest --

22 QUESTION: -- the part of Lowenfield that says
23 to pass constitutional muster a capital sentencing scheme
24 must genuinely narrow the class of persons eligible for
25 the death -- you agree with that, don't you?

1 MR. BURSON: Yes, and we would suggest that this
2 does.

3 Going to Justice Ginsburg's hypothetical, this
4 hypothetical proves the deficiency in the Tennessee court
5 decision. Yes, both the reckless killer and the
6 intentional killer in the course of a robbery, house
7 robbery, are subject to the death penalty.

8 There's nothing constitutionally that says they
9 shouldn't be subject to the death penalty, and Tennessee
10 did not -- this is the point. They did not invalidate the
11 felony murder aggravator, or the felony murder aggravating
12 circumstance.

13 What they have done is exactly what the last
14 part of the discussion was. After saying in the opinion,
15 and after this Court has said previously, particularly in
16 Tison, that a reckless killer can be equally culpable to a
17 premeditated killer, the Tennessee court, in discussing
18 the constitutionality of death for felony murder, said the
19 exact same thing, and now what they're suggesting is that
20 you've got to -- you are more culpable in some way if the
21 murder was premeditated.

22 It would have been one thing if they had
23 invalidated the felony murder aggravator, or the use of
24 felony murder as a death-eligible device, but they didn't,
25 and that is the illogic of the opinion, starting from the

1 premise that they are equally culpable.

2 QUESTION: General, do you think that Tison
3 holds that recklessness is equally culpable with intent,
4 or does it merely hold that the recklessness in that case
5 was sufficient to cross the constitutional threshold?

6 MR. BURSON: I think it's clear in the opinion
7 of the case that what it said is that recklessness could
8 be equally culpable to premeditated murders, and there
9 were a number of examples, and this case, this case proves
10 that point. There could be --

11 QUESTION: In that case there were three other
12 aggravating circumstances --

13 MR. BURSON: In this --

14 QUESTION: -- in Tison.

15 MR. BURSON: Yes. In this case there was
16 another aggravating circumstance of heinous, atrocious,
17 and cruel.

18 QUESTION: Your argument doesn't depend on that.

19 MR. BURSON: It certainly doesn't, but if this
20 killing were reckless, if this person plunged a knife into
21 the chest of this person recklessly and not with
22 premeditation, then that certainly proves the point that
23 this recklessness could rise to the culpability of any
24 intentional killing, or any premeditated killing.

25 Thank you very much, Mr. Chief Justice.

1 CHIEF JUSTICE REHNQUIST: Thank you, General
2 Burson. The case is submitted.

3 (Whereupon, at 11:02 a.m., the case in the
4 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:

TENNESSEE V. DONALD RAY MIDDLEBROOKS

CASE 92-98

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

BY Ann Marie Federico

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