

The Burger Court Opinion Writing Database

Enmund v. Florida

458 U.S. 782 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

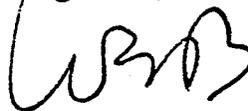
June 8, 1982

Re: No. 81-5321 - Enmund v. Florida

Dear Sandra:

I join.

Regards,



Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 29, 1982

RE: 81-5321 - Enmund v. Florida

Dear Sandra:

I join.

Regards,

WEB/dam

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 21, 1982.

No. 81-5321 -- Enmund v. Florida -- Proposed Opinion
of Justice Brennan, Concurring in the Judgment.

Dear Byron,

- If you should receive the votes of Thurgood, Harry, and John for your disposition of this case, I will file the following concurrence in the judgment.

JUSTICE BRENNAN, concurring in the judgment.

I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See Gregg v. Georgia, 428 U.S. 153, 227 (1976) (dissenting opinion). I therefore concur in the Court's judgment vacating the judgment below insofar as it affirms the death sentence.

Sincerely,

W. J. B., Jr.

Justice White.
Copies to the Conference.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 23, 1982

RE: No. 81-5321 Enmund v. Florida

Dear Byron:

Will you please add at the foot of your dissenting opinion the following:

"JUSTICE BRENNAN. I join Justice White's dissent without, however, departing from my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227 (1976)(dissenting opinion)."

Sincerely,



Justice White

Copies to the Conference

To: The Chief Justice
 Justice White
 ✓ Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: Justice Brennan

Circulated: 25 June 1982

Recirculated: _____

No. 81-5321 -- Enmund v. Florida --
Concurring Opinion of Justice Brennan.

JUSTICE BRENNAN, concurring.

I join the Court's opinion. However, I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See Gregg v. Georgia, 428 U.S. 153, 227 (1976) (dissenting opinion).

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: JUN 30 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-5321

EARL ENMUND, PETITIONER v. FLORIDA

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF FLORIDA**

[June —, 1982]

JUSTICE BRENNAN, concurring.

I join the Court's opinion. However, I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See *Gregg v. Georgia*, 428 U. S. 153, 227 (1976) (dissenting opinion).

To: The Chief Justice
 Justice Brennan
 ✓ Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice White**

Circulated: 14 JUN 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-5321

EARL ENMUND, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
 OF FLORIDA

[June —, 1982]

JUSTICE WHITE, dissenting.

The Supreme Court of Florida affirmed Enmund's conviction and sentence of death after concluding that the "only evidence of the degree of [Enmund's] participation is the jury's likely inference that he was the person in the car by the side of the road near the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money." 399 So. 2d 1362, 1370 (Fla. 1981). This justifiable inference was enough under Florida law to find Enmund guilty as a principal in the crime since he was "constructively aiding and abetting the commission of the crime of robbery, and thus was guilty of first degree murder." Under the Florida capital punishment law, therefore, it was irrelevant whether petitioner had planned the robbery, whether he knew or contemplated that life might be taken during the robbery, and whether he took life himself. If read literally, neither the exposition of the Florida law quoted above nor the relevant jury instruction at the guilt phase of the trial required that Enmund even know that there was to be a robbery.¹ Had he mistakenly and

¹The only part of the jury instructions relating to accessorial liability makes no mention of whether the jury had to find that Enmund knowingly participated in the robbery or that he intended that life be taken in the robbery:

To: The Chief Justice
 Justice Brennan
 ✓ Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice White**

STYLISTIC CHANGES THROUGHOUT.
 SEE PAGES: 3

Circulated: _____

15 JUN 1982

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-5321

EARL ENMUND, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
 OF FLORIDA

[June —, 1982]

JUSTICE WHITE, dissenting.

The Supreme Court of Florida affirmed Enmund's conviction and sentence of death after concluding that the "only evidence of the degree of [Enmund's] participation is the jury's likely inference that he was the person in the car by the side of the road near the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money." 399 So. 2d 1362, 1370 (Fla. 1981). This justifiable inference was enough under Florida law to find Enmund guilty as a principal in the crime since he was "constructively aiding and abetting the commission of the crime of robbery, and thus was guilty of first degree murder." Under the Florida capital punishment law, therefore, it was irrelevant whether petitioner had planned the robbery, whether he knew or contemplated that life might be taken during the robbery, and whether he took life himself. If read literally, neither the exposition of the Florida law quoted above nor the relevant jury instruction at the guilt phase of the trial required that Enmund even know that there was to be a robbery.¹ Had he mistakenly and

¹The only part of the jury instructions relating to accessorial liability makes no mention of whether the jury had to find that Enmund knowingly participated in the robbery or that he intended that life be taken in the robbery:

To: The Chief Justice
 Justice Brennan
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

pp. 2, 3, 11, 12, 13;
 and stylistic changes

From: Justice White

Circulated: _____

Recirculated: 22 JUN 1982

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-5321

EARL ENMUND, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
 OF FLORIDA

[June —, 1982]

JUSTICE WHITE, dissenting.

The Supreme Court of Florida affirmed Enmund's conviction and sentence of death after concluding that the "only evidence of the degree of [Enmund's] participation is the jury's likely inference that he was the person in the car by the side of the road near the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money." 399 So. 2d 1362, 1370 (Fla. 1981). This justifiable inference was enough under Florida law to find Enmund guilty as a principal in the crime since he was "constructively aiding and abetting the commission of the crime of robbery, and thus was guilty of first degree murder." Under the Florida capital punishment law, therefore, it was irrelevant whether petitioner had planned the robbery, whether he knew or contemplated that life might be taken during the robbery, and whether he took life himself. If read literally, neither the exposition of the Florida law quoted above nor the relevant jury instruction at the guilt phase of the trial required that Enmund even know that there was to be a robbery.¹ Had he mistakenly and

¹The only part of the jury instructions relating to accessorial liability makes no mention of whether the jury had to find that Enmund knowingly participated in the robbery or that he intended that life be taken in the robbery:

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 22, 1982

Re: 81-5321 - Enmund v. Florida

Dear Harry,

As you suggest, I shall eliminate the sentence beginning at the bottom of page 2 of my dissent, although we have treated Florida differently from Georgia by denying Zant-type certioraris.

Also, 1. I shall drop into footnote 2 the paragraph at the beginning of Part I of the dissent; 2. change the last full sentence on page 11 to read as follows: "It is irrelevant to this inquiry whether the death penalty was property imposed on those who shot the victims in this case."; 3. make an appropriate adjustment in the following sentence; 4. make other minor changes that may conform the dissent more closely to your views.

Sincerely yours,



Justice Blackmun
Copies to the Conference
cpm

To: The Chief Justice
 Justice Brennan
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: Justice White

Circulated: 6/25/82

Recirculated: _____

81-5321 -

ENMUND v. FLORIDA

JUSTICE WHITE delivered the opinion of the Court.

I

The facts of this case, taken principally from the opinion of the Florida Supreme Court, are as follows. On April 1, 1975, at approximately 7:45 a.m., Thomas and Eunice Kersey, aged 86 and 74, were robbed and fatally shot at their farmhouse in central Florida. The evidence showed that Sampson and Jeanette Armstrong had gone to the back door of the Kersey house and asked for water for an overheated car. When Mr. Kersey came out of the house, Sampson Armstrong grabbed him, pointed a gun at him, and told Jeanette Armstrong to take his money. Mr. Kersey cried for help, and his wife came out of the house with a gun and shot Jeanette Armstrong, wounding her. Sampson Armstrong, and perhaps Jeanette Armstrong, then shot and killed both of the Kersseys, dragged them into the kitchen, and took their money and fled.

Two witnesses testified that they drove past the Kersey house between 7:30 and 7:40 a.m. and saw a large cream or yellow-colored car parked beside the road about 200 yards from the house

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 25, 1982

Re: 81-5321 - Enmund v. Florida

Dear Harry,

I should be glad to make the changes
you suggest and will count you as a "join".

Sincerely yours,



Justice Blackmun

Copies to the Conference

cpm

85

To: The Chief Justice
 Justice Brennan
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice White**

pp. 12 and 16; stylistic
 changes throughout

Circulated: _____

Recirculated: 6 | 28 | 82

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-5321

EARL ENMUND, PETITIONER v. FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
 OF FLORIDA

[June —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

I

The facts of this case, taken principally from the opinion of the Florida Supreme Court, are as follows. On April 1, 1975, at approximately 7:45 a.m., Thomas and Eunice Kersey, aged 86 and 74, were robbed and fatally shot at their farmhouse in central Florida. The evidence showed that Sampson and Jeanette Armstrong had gone to the back door of the Kersey house and asked for water for an overheated car. When Mr. Kersey came out of the house, Sampson Armstrong grabbed him, pointed a gun at him, and told Jeanette Armstrong to take his money. Mr. Kersey cried for help, and his wife came out of the house with a gun and shot Jeanette Armstrong, wounding her. Sampson Armstrong, and perhaps Jeanette Armstrong, then shot and killed both of the Kersseys, dragged them into the kitchen, and took their money and fled.

Two witnesses testified that they drove past the Kersey house between 7:30 and 7:40 a.m. and saw a large cream or yellow-colored car parked beside the road about 200 yards from the house and that a man was sitting in the car. Another witness testified that at approximately 6:45 a.m. he saw Ida Jean Shaw, petitioner's common law wife and Jeanette Armstrong's mother, driving a yellow Buick with a

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 29, 1982

MEMORANDUM TO THE CONFERENCE

Re: No. 81-5321 - Enmund v. Florida

In response to Sandra's dissent, I have sent to the printer the following changes in the circulating draft. First, footnote 2 will be replaced by the following:

"The Florida Supreme Court's understanding of the evidence differed sharply from that of the trial court with respect to the degree of Enmund's participation. In its sentencing findings, the trial court concluded that Enmund was a major participant in the robbery because he planned the robbery in advance and himself shot the Kerseys. 399 So.2d, at 1372. Both of these findings, as we understand it, were rejected by the Florida Supreme Court's holding that the only supportable inference with respect to Enmund's participation was that he drove the getaway car. The dissent, while conceding that this holding negated the finding that Enmund was one of the triggermen, persists in suggesting the trial court's finding that Enmund planned the robbery remains undisturbed. Post, at _____. As we have said, we disagree with that view. In any event, the Florida Supreme Court did not affirm that finding and apparently found it unnecessary and irrelevant to deal with it at all, since driving the escape car was enough to warrant conviction and the death penalty, whether or not Enmund intended that life be taken or anticipated that lethal force would be used."

Second, a new footnote 15 will be dropped at the end of part IIB on page 10 and the remaining footnotes renumbered. The new footnote reads as follows:

"The dissent characterizes the state statutes somewhat differently. It begins by noting that 32 states "authorize a sentencer to impose a death sentence for a death that occurs during the course of a robbery." Post, at _____. That is not relevant to this case, however. Rather, at issue is the number of states which authorize the death penalty where the defendant did not kill, attempt to kill, or intend to kill. The dissent divides the statutes into three categories. Its first category of 21 statutes include nine about which there is no disagreement -- Cal., Fla., Ga., Miss., Nev., S.C., Tenn., Wash., and Wyo. In 11 other states listed by the dissent -- Ariz., Colo., Conn., Idaho, Ind., Mont., Neb., N.M., N.C., Okla., and S.D. -- the majority looks solely at the provisions defining the crime of capital murder. Colorado's capital sentencing statute makes a defendant's minimal participation in a murder an absolute defense to imposition of the death penalty. See n. 10, supra. Contrary to the dissent's claim that this provision would have been of no help to petitioner, see n. 36, post, if the case is judged on the basis of the Florida Supreme Court's findings, see n. 2, supra, such a provision would have barred imposition of the death penalty in this case. Similarly, the Ariz., Conn., Ind., Mont., Neb., and N.C. capital sentencing statutes do not permit capital punishment solely for vicarious felony murder and reduce the likelihood that the death penalty will be imposed on a vicarious felony murderer, even where aggravating circumstances are present, by making a defendant's minimal participation in the homicide a mitigating circumstance. See n. 12, supra. Three other states -- Idaho, Okla., and S.D. -- allow a defendant who does not kill or actually kill to be executed only where other aggravating circumstances are present, and in those states the felony murder itself cannot serve as an aggravating circumstance. See n. 13, supra. New Mexico's capital sentencing statute requires the jury to find at least one statutory aggravating circumstance before the death penalty may be imposed, and in addition aggravating circumstances must outweigh mitigating circumstances. N.M. Stat. Ann. §31-20A-4(C)(1) and (2) (Supp. 1981). The statute lists seven statutory aggravating circumstances, six of which require an intent to kill. N.M. Stat. Ann. §31-20A-5(B)-(G) (Supp. 1981). The only aggravating circumstance which does not include an intent element is not applicable here, for it requires that the victim must be "a peace officer who as acting in the lawful discharge of an official duty when he was murdered." N.M. Stat. Ann. §31-20A-5(A) (Supp. 1981). The remaining state, Vermont, limits the death penalty to narrow circumstances not present here. See n. 11, supra.

*There is no disagreement that three states require a culpable mental state short of intent before a non-triggerman may be put to death, compare n. 5, supra, with n. 37, post, a mental state which Enmund was not proven to possess. Similarly, the dissent's second category of seven states which authorize the death penalty only if the defendant had specific intent to kill the victim differs from our group of specific intent states only because we include New Mexico in that group. Compare n. 7, supra, with n. 38, post. Finally, there is no disagreement that three states restrict application of the death penalty to felony murderers who actually kill. Compare n. 6, supra, with n. 39, post."

Third, the full paragraph in the text on page 12 will be replaced by the following paragraph:

"The majority criticizes these statistics on the ground that they do not reveal the percentage of homicides that were charged as felony murders or the percentage of cases where the State sought the death penalty for an accomplice guilty of felony murder. Post, at _____. We doubt whether it is possible to gather such information, and at any rate, it would be relevant if prosecutors rarely sought the death penalty for accomplice felony murder, for it would tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the death penalty excessive for accomplice felony murder. The fact remains we are not aware of a single person convicted of felony murder over the past quarter century who did not kill or attempt to kill, and did not intend the death of the victim, who has been executed, and that only three persons in that category are presently sentenced to die. Nor can these figures be discounted by attributing to petitioner the argument that "death is an unconstitutional penalty absent an intent to kill," post, at _____, and observing that the statistics are incomplete with respect to intent. Petitioner's argument is that because he did not kill, attempt to kill, and he did not intend to kill, the death penalty is disproportionate as applied to him, and the statistics he cites are adequately tailored to demonstrate that juries -- and perhaps prosecutors as well -- consider death a disproportionate penalty for those who fall within his category."²²

Fourth, the Connecticut statutes will be cited in footnote 12 rather than footnote 11.

Otherwise, there will be only stylistic changes, absent some reason to make further revisions.

Am.

HAB

Supreme Court of the United States
Washington, D. C. 20543

June 29, 1982

CHAMBERS OF
JUSTICE BYRON R. WHITE

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 81-5321, Enmund v. Florida

1. No. 81-5578, Brewer v. Indiana. Petitioner was charged with being the triggerman who committed a murder during an armed robbery. One count of the indictment charged him with knowingly and intentionally shooting the victim, and one charged him with felony murder. A standard accomplice instruction making petr responsible for his co-robber's acts was given at trial, but it is not clear whether the instruction applied to both counts charged. According to the dissent below, instructions given at the penalty phase of petitioner's trial may also have allowed petitioner to be sentenced to death on an accomplice theory. However, the state supreme court found it "inescapable that [petitioner] is the man who stood 'in back,' announced a holdup and fired the shot that killed," unless a witness's testimony was not worthy of belief, and it refused to reassess the witness' credibility. 417 N.E.2d 889, 905 (Ind. 1981). This petition also challenges the Indiana provisions for sentencing review. I will vote to deny.

2. No. 81-5731, Hyman v. South Carolina. Petitioner and four others were indicted for an armed robbery in which a person was killed. The trial court charged the jury that it could impose the death penalty on an accomplice who did not intentionally kill, and the jury found petitioner guilty. During the penalty hearing the prosecutor took the position that the jury should recommend the death penalty only if they found petitioner to be the triggerman. However, during their deliberations the jury submitted a question to the judge and he charged them that they need not find petitioner was the triggerman in order to impose the death penalty. He did, however, instruct that they could consider this as a non-statutory aggravating or mitigating factor. The South Carolina Supreme Court affirmed the conviction and sentence. In doing so it stated that,

"[Petitioner] argues that the charge was erroneous because the trial judge failed to instruct the jury they could find as a statutory mitigating circumstance (1) he was an accomplice in a murder committed by another person and his participation was relatively minor. . . . There is no evidence in the record to support such a charge, therefore the judge did not err by

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Supreme Court of the United States
Washington, D. C. 20543


CHAMBERS OF
JUSTICE BYRON R. WHITE

June 30, 1982

MEMORANDUM TO THE CONFERENCE

Re: 81-5321 - Enmund v. Florida

In response to Sandra's latest circulation, I shall change the last three sentences of footnote two to read as follows:

The dissent, while conceding that this holding negated the finding that Enmund was one of the triggermen, argues that the trial court's finding that Enmund planned the robbery was implicitly affirmed. Post, at _____. As we have said, we disagree with that view. In any event, the question is irrelevant to the constitutional issue before us, since the Florida Supreme Court held that driving the escape car was enough to warrant conviction and the death penalty, whether or not Enmund intended that life be taken or anticipated that lethal force would be used.



To: The Chief Justice
 Justice Brennan
 ✓ Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

pp. 4, 9-12, 13-14
 and stylistic

From: **Justice White**

Circulated: _____

Recirculated: 30 JUN 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-5321

EARL ENMUND, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
 OF FLORIDA

[July —, 1982]

JUSTICE WHITE delivered the opinion of the Court.

I

The facts of this case, taken principally from the opinion of the Florida Supreme Court, are as follows. On April 1, 1975, at approximately 7:45 a.m., Thomas and Eunice Kersey, aged 86 and 74, were robbed and fatally shot at their farmhouse in central Florida. The evidence showed that Sampson and Jeanette Armstrong had gone to the back door of the Kersey house and asked for water for an overheated car. When Mr. Kersey came out of the house, Sampson Armstrong grabbed him, pointed a gun at him, and told Jeanette Armstrong to take his money. Mr. Kersey cried for help, and his wife came out of the house with a gun and shot Jeanette Armstrong, wounding her. Sampson Armstrong, and perhaps Jeanette Armstrong, then shot and killed both of the Kersseys, dragged them into the kitchen, and took their money and fled.

Two witnesses testified that they drove past the Kersey house between 7:30 and 7:40 a.m. and saw a large cream or yellow-colored car parked beside the road about 200 yards from the house and that a man was sitting in the car. Another witness testified that at approximately 6:45 a.m. he saw Ida Jean Shaw, petitioner's common law wife and Jeanette Armstrong's mother, driving a yellow Buick with a

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 23, 1982

Re: No. 81-5321 - Enmund v. Florida

Dear Byron:

Please join me in your dissent.

Sincerely,

JW
TM

Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

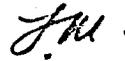
June 28, 1982

Re: No. 81-5321 - Enmund v. Florida

Dear Byron:

Please join me.

Sincerely,



T.M.

Justice White

cc: The Conference

HAB

June 21, 1982

Re: No. 81-5321 - Enmund v. Florida

Dear Sandra:

As I indicated at our short conference this morning, I feel unable to join Part II of your opinion. It is true that I do not accept the argument that the death penalty may not be imposed on a felony murderer absent a finding that he intended to kill the victim. I am not sure, however, that that was petitioner's argument. My own position is set forth in my separate opinion in Lockett, and is, I think, not in accord with your Part II. I am not far from Byron's position. Accordingly, I am writing him today, with copies to the conference, suggesting a change in his opinion and, if he goes along, a partial joinder in it.

Sincerely,

HAB

Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 21, 1982

Re: No. 81-5321 - Enmund v. Florida

Dear Byron:

According to my notes, John at conference stated that it would be a good thing if we could have a Court opinion in this case. Whether that is possible, I do not know. Sandra's opinion now has been joined by the Chief, Lewis, and Bill Rehnquist, so she is close to having a Court. I find, however, that I cannot join Part II of her opinion.

As you pointed out at conference, your views and mine, while not the same, are not too far apart. The difference, I believe, is revealed in our respective opinions in Lockett v. Ohio, 438 U.S. 586 and 613, 621. Having said this, I am kindly disposed to your dissent in the present case provided you could see your way clear to eliminate the sentence beginning at the very bottom of page 2. I believe that sentence implies that an appellate court's review of a death sentence may cure an error made by the sentencing authority. I may be wrong, but my recollection is that that is precisely the question we certified to the Supreme Court of Georgia in Zant v. Stephens. I suspect the sentence which troubles me could be deleted without affecting the integrity of your opinion.

If you feel free to remove that sentence, then I would write separately as follows:

"Although I continue to believe that the Eighth Amendment does not require in every case a finding of actual intent to kill before a capital sentence may be imposed, see Lockett v. Ohio, 428 U.S. 586, 613, 614-615, n. 2 (1978) (opinion concurring in part and concurring in the judgment), I agree with JUSTICE WHITE that the death penalty may not be inflicted where the defendant did not take life, did not attempt to take life, and did not intend to take life. I therefore join his opinion except those portions thereof suggesting that the death penalty may not be imposed absent a finding of actual intent to kill. See, ante, at 3, and n. 2 (dissenting opinion)."

Sincerely,

Justice White



cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 23, 1982

Re: No. 81-5321 - Enmund v. Florida

Dear Byron:

I join your dissent as recirculated on June 22 except, of course, footnote 2 thereof. Please feel free to designate this in any way you like; I suppose, however, you could drop an asterisk footnote after the word "dissenting" on page 1, with the footnote to read substantially as follows:

"JUSTICE BLACKMUN joins all but n. 2 of this opinion. See Lockett v. Ohio, 438 U.S. 586, 614-615, n. 2 (1978) (opinion concurring in part and concurring in the judgment)."

Sincerely,



Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 25, 1982

Re: No. 81-5321 - Enmund v. Florida

Dear Byron:

I wonder if you could make two minor changes in your proposed new opinion for the Court:

1. Would you consider eliminating the phrase "and perhaps the prosecutors as well" near the bottom of the text on typed page 14?

2. In the carryover sentence on pages 18 and 19, could you add the word "actions" so that the final clause reads "what Enmund's intentions, expectations, and actions were."?

If you could make these two minor changes, you have my joinder.

Sincerely,



Justice White

cc: The Conference

85 10/5/82

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 28, 1982

Re: No. 81-5321 - Enmund v. Florida

Dear Byron:

This will confirm my joinder.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal flourish underneath.

Justice White

cc: The Conference

May 20, 1982

81-5321 Enmund v. Florida

Dear Sandra:

I have read your draft opinion, delivered to me yesterday, with some care.

I think it is excellent, and will be happy to join you.

I return your draft.

As you have largely followed Harry's reasoning in Lockett, I would expect him to join. John Stevens and I - and Potter when he was on the Court - were together in all of the capital cases, I believe, except in Coker. You may wish to ask John to take an advance look, and - if you think it helpful - you could say to him that I have done so and approve.

Thank you for giving me to the opportunity.

Sincerely,

Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 27, 1982

81-5321 Enmund v. Florida

Dear Sandra:

Please join me.

Sincerely,

Lewis

Justice O'Connor

Copies to the Conference

LFP/vde

June 22, 1982

81-5321 Enmund v. Florida

Dear Sandra:

It now appears that your fine opinion will not command a Court. The ironic result is that two Justices (WJB and TM) who join Byron will never vote for capital punishment. Thus, you have a majority of the only seven Justices who really judge these cases.

I do have one suggestion for your consideration. One of the weakest points in Byron's opinion is that it will result in a federal, constitutional law of "intent." You mention this at page 24 of your opinion. It may be worth emphasizing now that the Court will be required to review highly subjective definitional problems customarily left to state criminal law.

For example, suppose that two persons--both of whom are armed--enter a grocery store to commit a robbery. Robber #1 cleans out the cash registers. While he is doing so he hears Robber #2 order the customers and employees to lie down. A few moments later Robber #1 watches as his partner executes each of the victims. He did not kill, attempt to kill, and swears he had no intent to kill. This is a fairly typical scenario, and I recall several cert petitions this year presenting such fact patterns.

Under BRW's opinion it would be unconstitutional to give the death penalty to such "active" onlookers--unless it can be said that their participation was such as to amount to intent to kill. But, as I understand it, this question would now be one of federal constitutional law. After all, a State could provide that anyone who takes part in an armed robbery has an intent to kill--given the likelihood that someone will be hurt. Indeed, felony murder relies in major part on this notion. But after today's decision it is clear that the State's definition of "intent" is not dispositive; rather it is the presently undeveloped federal constitutional definition that will control.

The Court opinion pretends that "intent" is something like an objective fact. But intent is a legal concept, and it is not easily defined. For these reasons, I have favored HAB's approach in Lockett. I am sorry he now has abandoned it. If the sentencer had the proper facts before it in this case, I doubt that a death sentence would have been imposed.

Sincerely,

LFP

Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 29, 1982

81-5321 Edmund v. Florida

Dear Sandra:

Please join me in your dissent.

Sincerely,



Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 1, 1982

Re: No. 81-5321 Enmund v. Florida

Dear Sandra:

Please join me in your opinion for the Court.

Sincerely,



Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 29, 1982

Re: No. 81-5321 Enmund v. Florida

Dear Sandra:

Please join me in your dissenting opinion.

Sincerely,



Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 21, 1982

Re: 81-5321 - Enmund v. Florida

Dear Byron:

Although I share the view you expressed in Lockett that the death penalty may not be inflicted without a finding that the defendant possessed a purpose to cause the death of the victim, I think Harry is correct in pointing out that that point need not be made in order to justify reversal in this case. Like Harry, I also cannot accept the analysis in Part II of Sandra's opinion. My hope, therefore, is that you can make changes sufficient to satisfy Harry's concerns, which might then enable us to have an opinion for the Court, assuming of course that Bill Brennan and Thurgood would be willing to join your opinion with a separate statement preserving their views.

Respectfully,



Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 23, 1982

Re: 81-5321 - Enmund v. Florida

Dear Byron:

Please join me in your dissent (except for note
2).

Respectfully,



Justice White

Copies to the Conference

83 JUN 25 1982

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 25, 1982

Re: 81-5321 - Enmund v. Florida

Dear Byron:

Please join me.

Respectfully,



Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR



May 19, 1982

Re: No. 81-5321 Enmund v. Florida

Dear Lewis,

I thank you for looking at this preliminary draft.
I will welcome your thoughts.

Sincerely,

A handwritten signature in cursive script that reads "Sandra".

Justice Powell

pp. 18, 24, 25, 28

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall —
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens

From: Justice O'Connor

Circulated: **MAY 26 1982**

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-5321

EARL ENMUND, PETITIONER *v.* FLORIDAON WRIT OF CERTIORARI TO THE SUPREME COURT
OF FLORIDA

[May —, 1982]

JUSTICE O'CONNOR delivered the opinion of the Court.

The question presented in this case is whether the Cruel and Unusual Punishments Clause of the Eighth Amendment, applied to the States through the Fourteenth Amendment, prohibits a State from executing a defendant who has been convicted of felony murder, but who did not himself kill, or specifically intend to kill, the victim.

I

The evidence at trial showed that at approximately 7:30 a.m. on April 1, 1975, Sampson and Jeanette Armstrong approached the backdoor of Thomas and Eunice Kersey's farmhouse on the pretext of obtaining water for their overheated car.¹ When Thomas Kersey retrieved a water jug to help the Armstrongs, Sampson Armstrong grabbed him, held a gun to him, and told Jeanette Armstrong to take his wallet. Hearing her husband's cries for help, Eunice Kersey came around the side of the house with a gun and shot Jeanette Armstrong. Sampson Armstrong, and perhaps Jeanette Armstrong, returned the fire, killing both of the Kerseys.²

¹ Much of the evidence concerning these crimes came from J. B. Neal, to whom Sampson Armstrong made numerous admissions on the day of the murders. See Record (R.) 1344-1365.

² J. B. Neal testified that Armstrong had told him that two guns were involved; Jeanette had one and Sampson had the other. R. 1354.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 23, 1982



No. 81-5321 Enmund v. Florida

Dear Lewis,

Thank you for your letter. I am somewhat frustrated and quite concerned that my draft failed to attract a majority. As you correctly observe, it is particularly ironic since it does represent a majority of those actually deciding these matters.

I will incorporate your concerns in what will now become a dissent. In this business one must learn to "grin and bear it."

Sincerely,

Justice Powell

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens

From: Justice O'Connor

Circulated: JUN 29 1982

ATEX DRAFT

Recirculated: _____

No. 81-5321 Enmund v. Florida

JUSTICE O'CONNOR dissenting.

Today the Court holds that the Eighth Amendment prohibits a State from executing a convicted felony murderer. I dissent from this holding not only because I believe that it is not supported by the analysis in our previous cases, but also because today's holding interferes with state criteria for assessing legal guilt by recasting intent as a matter of federal constitutional law.

I

The evidence at trial showed that at approximately 7:30 a.m. on April 1, 1975, Sampson and Jeanette Armstrong approached the backdoor of Thomas and Eunice Kersey's farmhouse on the pretext of obtaining water for their overheated car.¹ When Thomas Kersey retrieved a water jug to help the Armstrongs, Sampson Armstrong grabbed him, held a gun to him, and told Jeanette Armstrong to take his wallet. Hearing her husband's cries for help, Eunice Kersey came around the side of the house with a gun and shot

¹Much of the evidence concerning these crimes came from J. B. Neal, to whom Sampson Armstrong made numerous admissions on the day of the murders. See Record (R.) 1344-1365.

PP. 1, 8, 9, 20, 24

Stylistic Changes Throughout

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens

SUPREME COURT OF THE UNITED STATES

No. 81-5321

From: Justice O'Connor

EARL ENMUND, PETITIONER v. FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Regulated: _____

Recirculated: JUN 30 1982

[July 2, 1982]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

Today the Court holds that the Eighth Amendment prohibits a State from executing a convicted felony murderer. I dissent from this holding not only because I believe that it is not supported by the analysis in our previous cases, but also because today's holding interferes with state criteria for assessing legal guilt by recasting intent as a matter of federal constitutional law.

I

The evidence at trial showed that at approximately 7:30 a.m. on April 1, 1975, Sampson and Jeanette Armstrong approached the backdoor of Thomas and Eunice Kersey's farmhouse on the pretext of obtaining water for their overheated car.¹ When Thomas Kersey retrieved a water jug to help the Armstrongs, Sampson Armstrong grabbed him, held a gun to him, and told Jeanette Armstrong to take his wallet. Hearing her husband's cries for help, Eunice Kersey came around the side of the house with a gun and shot Jeanette Armstrong. Sampson Armstrong, and perhaps Jeanette Armstrong, returned the fire, killing both of the Kerseys.²

¹ Much of the evidence concerning these crimes came from J. B. Neal, to whom Sampson Armstrong made numerous admissions on the day of the murders. See Record (R.) 1344-1365.

² J. B. Neal testified that Armstrong had told him that two guns were