The Burger Court Opinion Writing Database

Cabana v. Bullock

474 U.S. 376 (1986)

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

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

From: The Chief Justice

Circulated: JAN 9 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1236

DONALD A. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., PETITIONERS *v.* CRAWFORD BULLOCK, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January ——, 1986]

CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I concur in JUSTICE WHITE's opinion for the Court. However, I see no need for remanding for further findings in the State's courts. It is true that the Mississippi Supreme Court did not have *Enmund*'s findings explicitly in mind when it reviewed the sentence of death imposed on respondent Bullock, because the Mississippi courts completed their review before *Enmund* was decided. Nevertheless, the Mississippi Supreme Court's opinion makes it clear that *Enmund*'s concerns have been fully satisfied in this case.

In rejecting respondent's claim that there was insufficient evidence to support his capital murder conviction because he "was an unwilling participant in the robbery-homicide," that court explicitly found "[t]he evidence is overwhelming that appellant was present, *aiding and assisting in the assault upon, and slaying of*, Dickson." *Bullock* v. *State*, 391 So. 2d 601, 606 (1980) (emphasis added), cert. denied, 452 U. S. 931 (1981). That court further rejected a claim that the death penalty was disproportionate to sentences imposed in similar cases, after again finding that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson." *Id.*, at 614.

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

From: **The Chief Justice**

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Recirculated: JAN 17 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1236

DONALD A. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., PETITIONERS *v.* CRAWFORD BULLOCK, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January ——, 1986]

CHIEF JUSTICE BURGER, concurring.

Although I see no need for remanding for further findings in the State's courts, I join the Court's opinion. It is true that the Mississippi Supreme Court did not have *Enmund*'s findings explicitly in mind when it reviewed the sentence of death imposed on respondent Bullock, because the Mississippi courts had completed their review before *Enmund* was decided. Nevertheless, the Mississippi Supreme Court's opinion makes it clear that *Enmund*'s concerns have been fully satisfied in this case.

In rejecting respondent's claim that there was insufficient evidence to support his capital murder conviction because he "was an unwilling participant in the robbery-homicide," that court explicitly found "[t]he evidence is overwhelming that appellant was present, *aiding and assisting in the assault upon, and slaying of*, Dickson." *Bullock* v. *State*, 391 So. 2d 601, 606 (1980) (emphasis added), cert. denied, 452 U. S. 931 (1981). That court further rejected a claim that the death penalty was disproportionate to sentences imposed in similar cases, after again finding that "[t]he evidence is overwhelming that appellant was an active participant in the assault and homicide committed upon Mark Dickson." *Id.*, at 614.

Surely these statements reflect a conclusion of the State court that respondent actively participated in the actual kill-

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 15, 1985

No. 84-1236

Cabana v. Bullock

Dear Thurgood, Harry and John,

We are will be in dissent in the above. Would you be willing, Harry, to do the dissent?

Sincerely,

Bill

Justice Marshall
Justice Blackmun
Justice Stevens

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 3, 1985

No. 84-1236

Cabana v. Bullock

Dear Byron,

I too shall await Harry's dissent.

Sincerely,

Bill

Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 2, 1986

No. 84-1236

Cabana v. Bullock

Dear Harry,

Please join my in your dissent in the above. I will, however, be adding a short statement of my own.

Sincerely,

Bill

Justice Blackmun

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: JAN 9 1986

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1236

DONALD A. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., PETITIONERS *v.* CRAWFORD BULLOCK, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January ——, 1986]

JUSTICE BRENNAN, dissenting.

Although I join JUSTICE BLACKMUN's dissent, I adhere to 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) (BRENNAN, J., dissenting). Accordingly, I would vacate the death sentence and remand the case so that the state court can determine what sentence—other than death—may be appropriate.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 16, 1986

No. 84-1236

Cabana v. Bullock

Dear John,

Please join me.

Sincerely,

Bill

Justice Stevens

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: _____

Recirculated: JAN 16 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1236

DONALD A. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., PETITIONERS *v.* CRAWFORD BULLOCK, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January ——, 1986]

JUSTICE BRENNAN, dissenting.

Although I join JUSTICE BLACKMUN's and JUSTICE STEVENS' dissents, I adhere to 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) (BRENNAN, J., dissenting). Accordingly, I would vacate the death sentence and remand the case so that the state court can determine what sentence—other than death—may be appropriate.

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

From: **Justice White**

Circulated: DEC 2 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1236

DONALD A. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., PETITIONERS *v.* CRAWFORD BULLOCK, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[December ——, 1985]

JUSTICE WHITE delivered the opinion of the Court.

In *Enmund* v. *Florida*, 458 U. S. 782 (1982), we ruled that the Eighth Amendment forbids the imposition of the death penalty on "one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.*, at 797. This case requires us to determine in whose hands the decision that a defendant possesses the requisite degree of culpability properly lies.

I

Early in the morning of September 22, 1978, respondent Crawford Bullock and his friend Ricky Tucker accepted Mark Dickson's offer of a ride home from a bar in Jackson, Mississippi. During the course of the ride, Tucker and Dickson began to argue about some money Dickson supposedly owed Tucker. The argument became a fight: Dickson stopped the car, and Dickson and Tucker exchanged blows. Bullock attempted to grab Dickson, but Dickson eluded his grasp and fled from the car. Tucker gave chase and succeeded in tackling Dickson, while Bullock, who had a cast on his leg, followed more slowly. When Bullock caught up with the struggling men, he held Dickson's head as Tucker struck Dickson

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 9, 1985

84-1236 - Cabana v. Bullock

Dear Bill,

Re your letter of December 5, your suggestion is a good one, and I hope the additional footnote in the new draft will satisfy you.

Sincerely yours,

Justice Rehnquist

Copies to the Conference

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

From: **Justice White**

Circulated: _____

Recirculated: DEC 9 1985

p. 13

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1236

DONALD A. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., PETITIONERS *v.* CRAWFORD BULLOCK, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[December ——, 1985]

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

From: **Justice White**

Circulated: _____

Recirculated: DEC 20 1985

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 12, 13

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1236

DONALD A. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., PETITIONERS *v.* CRAWFORD BULLOCK, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[December ——, 1985]

JUSTICE WHITE delivered the opinion of the Court.

In *Enmund* v. *Florida*, 458 U. S. 782 (1982), we ruled that the Eighth Amendment forbids the imposition of the death penalty on "one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.*, at 797. This case requires us to determine in whose hands the decision that a defendant possesses the requisite degree of culpability properly lies.

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Early in the morning of September 22, 1978, respondent Crawford Bullock and his friend Ricky Tucker accepted Mark Dickson's offer of a ride home from a bar in Jackson, Mississippi. During the course of the ride, Tucker and Dickson began to argue about some money Dickson supposedly owed Tucker. The argument became a fight: Dickson stopped the car, and Dickson and Tucker exchanged blows. Bullock attempted to grab Dickson, but Dickson eluded his grasp and fled from the car. Tucker gave chase and succeeded in tackling Dickson, while Bullock, who had a cast on his leg, followed more slowly. When Bullock caught up with the struggling men, he held Dickson's head as Tucker struck Dickson

Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Stylistic changes throughout and pp. 8, 10, 11, 14, 15

Circulated: _____

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1236

DONALD A. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., PETITIONERS *v.* CRAWFORD BULLOCK, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January ——, 1986]

JUSTICE WHITE delivered the opinion of the Court.

In *Enmund* v. *Florida*, 458 U. S. 782 (1982), we ruled that the Eighth Amendment forbids the imposition of the death penalty on "one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.*, at 797. This case requires us to determine in whose hands the decision that a defendant possesses the requisite degree of culpability properly lies.

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Early in the morning of September 22, 1978, respondent Crawford Bullock and his friend Ricky Tucker accepted Mark Dickson's offer of a ride home from a bar in Jackson, Mississippi. During the course of the ride, Tucker and Dickson began to argue about some money Dickson supposedly owed Tucker. The argument became a fight: Dickson stopped the car, and Dickson and Tucker exchanged blows. Bullock attempted to grab Dickson, but Dickson eluded his grasp and fled from the car. Tucker gave chase and succeeded in tackling Dickson, while Bullock, who had a cast on his leg, followed more slowly. When Bullock caught up with the struggling men, he held Dickson's head as Tucker struck Dickson

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 18, 1986

MEMORANDUM TO THE CONFERENCE

Re: Cases held for Cabana v. Bullock, 84-1236

(1) Thigpen v. Jones, No. 84-1237. Respondent participated in an armed robbery in which the proprietor of a grocery store was killed. He was tried and convicted of capital murder and sentenced to death. The jury instructions did not require the jury to find facts satisfying Enmund in order to convict. The state supreme court, ruling before Enmund was decided, held that because Mississippi law defined capital murder to include a killing done with or without any design to effect death, the state's failure to show respondent's precise role in the killing did not invalidate the death sentence.

The CA5, acting on respondent's first habeas petition, held that the death sentence must be vacated, not only because there was no finding in the state courts that respondent met the Enmund criteria, but also because there was insufficient evidence in the record of the state proceedings to support such a finding. The court further held that because of the failure of the state to adduce sufficient evidence with respect to the Enmund criteria at respondent's trial, the Double Jeopardy Clause would forbid the state to attempt to resentence respondent to death.

The opinion in Cabana does not speak directly to the double jeopardy issue. Nonetheless, it strongly suggests that the CA5 should have permitted the state judicial system to undertake the Enmund inquiry and to reinstate the death sentence should the proper findings be made. The notion that the failure to introduce sufficient evidence at trial to allow the findings to be made should foreclose the state from seeking to reinstate the death sentence seems inconsistent with Cabana's holding that there is no constitutional requirement that the Enmund findings be made either at the guilt phase or the sentencing phase of the trial. I would therefore GVR on Cabana.

(2) Allen v. Georgia, No. 84-6051 (petition for rehearing of denial of certiorari). Petitioner, with an accomplice, was involved in the rape and murder of an elderly woman. The jury

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 3, 1985

Re: No. 84-1236-Cabana v. Bullock

Dear Byron:

I await the dissent.

Sincerely,

T.M.

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 3, 1985

Re: No. 84-1236 - Cabana v. Bullock

Dear Harry:

Please join me in your dissent.

Sincerely,

T.M.

Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 15, 1985

Re: No. 84-1236, Cabana v. Bullock

Dear Bill:

I shall be glad to undertake the dissent in this case.

Sincerely,

Harry

Justice Brennan

cc: Justice Marshall
Justice Stevens

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 2, 1985

Re: No. 84-1236, Cabana, Superintendent v. Bullock

Dear Byron:

I shall be undertaking a dissent in this case in due course.

Sincerely,

Harry

Justice White

cc: The Conference

Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: DEC 3 1 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1236

DONALD A. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., PETITIONERS *v.* CRAWFORD BULLOCK, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January ——, 1986]

JUSTICE BLACKMUN, dissenting.

Last Term, in *Caldwell* v. *Mississippi*, 472 U. S. —— (1985), (a case not even cited by the Court in its controlling opinion, *ante*), we recognized institutional limits on an appellate court's ability to determine whether a defendant should be sentenced to death:

> "Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed '[those] compassionate or mitigating factors stemming from the diverse frailties of humankind.' When we held that a defendant has a constitutional right to the consideration of such factors, we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses." *Id.*, at —— (slip op. 8–9) (citations omitted; interpolation in original).

That statement in *Caldwell* is not an abstract disquisition on appellate courts generally. It concerns, in particular, the institutional limits of the Supreme Court of Mississippi in

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

From: **Justice Blackmun**

Circulated: _____

Recirculated: JAN 14 1986

Stylistic changes
Footnotes renumbered
and pp. 1, 2, 6, and 14

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1236

DONALD A. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., PETITIONERS *v.* CRAWFORD BULLOCK, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January ——, 1986]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Last Term, in *Caldwell* v. *Mississippi*, 472 U. S. —— (1985), (a case not even cited by the Court in its controlling opinion, *ante*), we recognized institutional limits on an appellate court's ability to determine whether a defendant should be sentenced to death:

> "Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed '[those] compassionate or mitigating factors stemming from the diverse frailties of humankind.' When we held that a defendant has a constitutional right to the consideration of such factors, we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses." *Id.*, at —— (slip op. 8–9) (citations omitted; interpolation in original).

That statement in *Caldwell* is not an abstract disquisition on appellate courts generally. It concerns, in particular, the

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 5, 1985

84-1236 Cabana v. Bullock

Dear Byron:

Please join me.

Sincerely,

Lewis

Justice White

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 5, 1985

Re: No. 84-1236 Cabana v. Bullock

Dear Byron,

Given Enmund I agree with almost all of your opinion in this case. My disagreement is as to an inference that may be drawn from part V dealing with the remedy for the "hypothesized Eighth Amendment violation"; you say that rather than the federal court itself making a factual determination that has not been made by the state court, the federal court should require the state judicial system to make the required factual finding in the first instance. I agree with you that this course probably makes most sense in the usual case, but I would not like to foreclose the possibility of the sort of harmless error analysis on the part of the federal habeas court engaged in by the Eleventh Circuit in Ross v. Kemp, 756 F.2d 1483, 1499-1500 (CA11 1985)(CLARK, J., concurring in the judgment.) For example, if the defendant at trial has admitted that he intended to kill someone, and claims only self-defense, I should think the federal habeas court could make the finding itself and thereby conclude that the failure of the state court system to make the finding was "harmless error." Since you hold earlier in the opinion that we are not talking about a constitutionally required "element of the crime," but only a requirement of proportionality, I would not like to see the possibility which I mention wholly foreclosed by this opinion.

What do you think?

Sincerely,

WHR

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 9, 1985

Re: No. 84-1236 Cabana v. Bullock

Dear Byron,

Please join me.

Sincerely,

WHR

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 3, 1985

Re: 84-1236 - Cabana v. Bullock

Dear Byron:

I shall await Harry's dissent.

Respectfully,

John

Justice White

Copies to the Conference

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: 1-15-86

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1236

DONALD A. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., PETITIONERS *v.* CRAWFORD BULLOCK, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January ——, 1986]

JUSTICE STEVENS, dissenting.

The justification for executing the defendant depends on the degree of his culpability—"what [his] intentions, expectations, and actions were. American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability,' *Mullaney* v. *Wilbur*, 421 U. S. 684, 698 (1975), and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing." *Enmund* v. *Florida*, 458 U. S. 782, 800 (1982). The Eighth Amendment therefore precludes the imposition of a death sentence upon a defendant whose "crime did not reflect 'a consciousness materially more "depraved" than that of any person guilty of murder.'" *Id.*, at 800–801.

Because the finding of moral culpability required by *Enmund* is but one part of a judgment that "is ultimately understood only as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live,"* I believe that the decision whether a death sentence is the only adequate response to the defendant's moral culpability must be made by a single decisionmaker, be it the

Spaziano v. *Florida*, 468 U. S. ——, —— (1984) (STEVENS, J., dissenting).

pp. 1, 2

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

From: **Justice Stevens**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1236

DONALD A. CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., PETITIONERS *v.* CRAWFORD BULLOCK, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January ——, 1986]

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, dissenting.

The justification for executing the defendant depends on the degree of his culpability—"what [his] intentions, expectations, and actions were. American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability,' *Mullaney* v. *Wilbur*, 421 U. S. 684, 698 (1975), and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing." *Enmund* v. *Florida*, 458 U. S. 782, 800 (1982). The Eighth Amendment therefore precludes the imposition of a death sentence upon a defendant whose "crime did not reflect 'a consciousness materially more "depraved" than that of any person guilty of murder.'" *Id.*, at 800–801.

Because the finding of moral culpability required by *Enmund* is but one part of a judgment that "is ultimately understood only as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live,"* I believe that the decision whether a death sentence is the only adequate response to the defendant's moral cul-

Spaziano v. *Florida*, 468 U. S. ——, —— (1984) (STEVENS, J., concurring in part and dissenting in part).

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 5, 1985

No. 84-1236 Cabana v. Bullock

Dear Byron,

Please join me.

Sincerely,

Sandra

Justice White

Copies to the Conference