

The Burger Court Opinion Writing Database

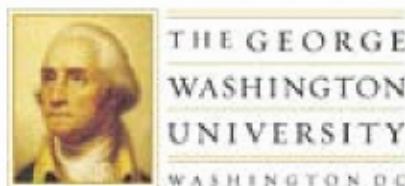
Aikens v. California

406 U.S. 813 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

June 1, 1972

file

5/10/72 Blue Order

Re: No. 68-6027 - Aikens v. California

Dear Byron:

I agree with your proposed disposition of the
above case.

Regards,

LRB

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 68-5027, 69-5003, 69-5030, and 69-5031

1/31/72

Ernest James Aikens, Jr., Petitioner, 68-5027 <i>v.</i> State of California.	On Writ of Certiorari to the Supreme Court of California.
William Henry Furman, Petitioner, 69-5003 <i>v.</i> State of Georgia.	On Writ of Certiorari to the Supreme Court of Georgia.
Lucious Jackson, Jr., Petitioner, 69-5030 <i>v.</i> State of Georgia.	On Writ of Certiorari to the Court of Criminal Appeals of Texas.
Elmer Branch, Petitioner, 69-5031 <i>v.</i> State of Texas.	On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[February —, 1972]

MR. JUSTICE DOUGLAS.

In these four cases the death penalty was imposed, two of them for murder, and two for rape. In each the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury. In *Aikens* the trial was to the judge, in the other cases it was to a jury. The cases are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitutes "cruel and unusual punishments" within the meaning of the Eighth Amendment as applied to the States

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 21, 1972

MEMORANDUM TO THE CONFERENCE:

Having received a copy of the opinion of the Supreme Court of California -- People v. Anderson -- decided February 18, 1972, involving the constitutionality of the death penalty, I concluded that the Aikens case, No. 68-5027, on which we heard argument, should be disposed of by per curiam. To expedite matters, I have taken the liberty of preparing a proposed per curiam which I attach.

bill
William O. Douglas

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 68-5027

From: Douglas, J.

Circulated: 2-21

Earnest James Aikens, Jr., Petitioner, Recirculated: _____
v. On Writ of Certiorari to the
State of California. Supreme Court of California.

[February —, 1972]

PER CURIAM.

This case is here on a petition for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitutes "cruel and unusual punishments" within the meaning of the Eighth Amendment as applied to the States by the Fourteenth.

On February 18, 1972, after oral argument in the instant case, the Supreme Court of California in *People v. Anderson*, — Cal. 2d —, — P. 2d —, held that the death penalty constituted "cruel or unusual punishments" within the meaning of Art. 1, § 6, of the California Constitution. It moreover made that decision "fully retroactive," *id.*, at —, and suggested the procedure whereby "any prisoner now under a sentence of death" may have that sentence modified.

Since *Aikens v. California* now rests wholly on an adequate state ground, the federal question tendered is no longer necessary for decision. Accordingly we dismiss the petition.

So ordered.

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 31, 1972

Dear Byron:

In No. 68-6027 - Aikens v. California,
please join me in your proposed Per Curiam.

W. O. D.

Mr. Justice White

cc: Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 68-5027, 69-5003, 69-5030, and 69-5031

^{Mr. Justice Brennan, J.} Circulated: 3/29/72

Recirculated:

Earnest James Aikens, Jr.,
Petitioner,
68-5027 v.
State of California.

On Writ of Certiorari to
the Supreme Court of
California.

William Henry Furman,
Petitioner,
69-5003 v.

State of Georgia.

On Writ of Certiorari to the
Supreme Court of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 v.
State of Georgia.

Elmer Branch, Petitioner,
69-5031 v.
State of Texas.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[March —, 1972]

Memorandum of MR. JUSTICE BRENNAN.

The petitioners in these four cases are under sentences of death imposed upon them for the commission of crimes. The petitioners in No. 68-5027 and No. 69-5003 were convicted, in California and Georgia respectively, of murder; the petitioners in No. 69-5030 and No. 69-5031 were convicted, in Georgia and Texas respectively, of rape. We granted certiorari, 403 U. S. 952 (1971), to consider whether death is a punishment for crime that is today cruel and unusual and consequently, by virtue of

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 31, 1972

RE: No. 68-~~6027~~ - Aikens v. California

Dear Byron:

I agree with your proposed Order in the above case.

I also agree with your proposed disposition in McGautha and the eighteen other cases you have listed. I am frankly surprised that this is all the California cases before us. I think I read the other day that the population of death row in California is now around 103.

Sincerely,



Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 31, 1972

68-6027 - Aikens v. California

Dear Byron,

I agree with the order you have prepared in this case and with your proposed disposition of the other capital cases from California.

Sincerely yours,

P. S.

Mr. Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 31, 1972

MEMORANDUM TO THE CONFERENCE

I attach a suggested order dismissing the writ of certiorari in the Aikens case.

There are eighteen other death cases from California pending on petitions for certiorari, including Anderson's own earlier petition, plus the petition for rehearing in McGautha. Could we not simply deny the petitions in all these cases with a citation to the Aikens dismissal?

Perhaps the following form would do:

No. 203 October Term 1970
McGautha v. California

The petition for rehearing is denied. See
Aikens v. California, supra.

The writs of certiorari in the following cases are denied. See Aikens v. California, supra.

No. 68-5007 Anderson v. California

68-5020 Smith v. Nelson

68-5021 Reeves v. California

68-5025 Massie v. California

68-5026 Varnum v. California

68-5029 Robinson v. California

69-5002 Tolbert v. California

69-5009 Hill v. California

69-5012 Pike v. California

Wm.

Briner 0071

103

-2-

69-5019 Miller v. California
69-5020 Coogler v. California
69-5021 Mabry v. California
69-5022 Nye v. California
69-5026 Robles v. California
69-5037 King v. California
69-5040 Milton v. California
69-5042 Floyd v. California
70-5005 Terry v. California

✓ B.R.W.

206

5
No. 68-~~6027~~ - Aikens v. California

Petitioner in this case, which has been orally argued and is now sub judice, has filed a Suggestion of Mootness and Motion for Remand based on the intervening decision of the California Supreme Court in People v. Anderson, 6 Cal. 3rd 628 (1972). That decision declared capital punishment in California unconstitutional under Article 1, § 6, of the State Constitution. The decision rested on an adequate state ground and the State's petition for writ of certiorari was denied. ____ U.S. _____. The California Supreme Court declared in the Anderson case that its decision was fully retroactive and stated that any prisoner currently under sentence of death could petition a superior court to modify its judgment. Petitioner thus no longer faces a realistic threat of execution, and the issue on which certiorari was granted--the constitutionality of the death penalty under the Federal Constitution--is now moot in his case. Accordingly the writ of certiorari is dismissed.

(attached 5/31/72 Non-Ex. 20) 3-63

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 68-5027, 69-5003, 69-5030, and 69-5031

Ernest James Aikens, Jr., Petitioner, 68-5027 <i>v.</i> State of California.	On Writ of Certiorari to the Supreme Court of California.
William Henry Furman, Petitioner, 69-5003 <i>v.</i> State of Georgia.	On Writ of Certiorari to the Supreme Court of Georgia.
Lucious Jackson, Jr., Petitioner, 69-5030 <i>v.</i> State of Georgia.	On Writ of Certiorari to the Supreme Court of Georgia.
Elmer Branch, Petitioner, 69-5031 <i>v.</i> State of Texas.	On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[February —, 1972]

Memorandum of MR. JUSTICE MARSHALL.

These four cases present the question whether the death penalty is a cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution.

Both No. 68-5027 and No. 69-5003 involve petitioners convicted in state courts of murder. Aikens was convicted of two separate first-degree murders and sentenced to die for one of them.¹ In his Brief, at 3, Aikens

¹ State law prohibited a death sentence for the other murder because of Aiken's age at the time he committed the offense. Cal. Penal Code § 190.1.

pp. 1, 2, 3, 15, 17, 18, 28, 35 see 35-37, 40, 41, 53, 55, 56-58
and minor changes

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 68-5027, 69-5003, 69-5030, and 69-5031. From: Marshall, J.

Ernest James Aikens, Jr.,
Petitioner,
68-5027 *v.*
State of California.

William Henry Furman,
Petitioner,
69-5003 *v.*
State of Georgia.

Lucious Jackson, Jr.,
Petitioner,
69-5030 *v.*
State of Georgia.

Elmer Branch, Petitioner,
69-5031 *v.*
State of Texas.

Circulated: _____
On Writ of Certiorari to
the Supreme Court of California. Recirculated on 5/28/72

On Writ of Certiorari to the
Supreme Court of Georgia.

On Writ of Certiorari to the
Court of Criminal Appeals
of Texas.

[June —, 1972]

Memorandum of MR. JUSTICE MARSHALL.

These four cases present the question whether the death penalty is a cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution.

Both No. 68-5027 and No. 69-5003 involve petitioners convicted in state courts of murder. Aikens was convicted of two separate first-degree murders and sentenced to die for one of them.¹ In his Brief, at 3, Aikens

¹ State law prohibited a death sentence for the other murder because of Aiken's age at the time he committed the offense. Cal. Penal Code § 190.1. The California Supreme Court has recently held

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 31, 1972

Re: California Capital Cases *b6, b7c, b7d*

Dear Byron:

I agree with your suggested disposal of these cases as outlined in your memorandum of today.

Sincerely,

HAB.

Mr. Justice White

cc: The Conference

*News from Blackmun
Conference Book.*

BB
NY
To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
— Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: MAY 12 1972

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 68-5027, 69-5003, 69-5030, and 69-5031

Earnest James Aikens, Jr., Petitioner, v. State of California.	On Writ of Certiorari to the Supreme Court of California.
William Henry Furman, Petitioner, 69-5003 v. State of Georgia.	On Writ of Certiorari to the Supreme Court of Georgia.
Lucious Jackson, Jr., Petitioner, 69-5030 v. State of Georgia.	On Writ of Certiorari to the Court of Criminal Appeals of Texas.
Elmer Branch, Petitioner, 69-5031 v. State of Texas.	On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[May —, 1972]

Memorandum of MR. JUSTICE POWELL.

The Court granted certiorari in these cases to consider whether the death penalty is any longer a permissible form of punishment consistent with the constitutional prohibition against cruel and unusual punishments. 403 U. S. 952 (1971). The question is one of grave importance. Our decision, whatever the ultimate resolution, will affect directly the lives of some 700 persons presently under sentence of death in state and federal prisons. It will likewise affect all those throughout the country awaiting trial on charges for

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 2, 1972

Re: No. 68-6027 Aikens v. California

Dear Byron:

I agree with your proposed order in the above case, and with your proposed disposition of the other capital cases from California.

Sincerely,

Lewis

Mr. Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 15, 1972

Re: 68-5027 - Aikens v. California
69-5003 - Furman v. Georgia
69-5030 - Jackson v. Georgia
69-5031 - Branch v. Texas

Dear Lewis:

I have just finished reading your memorandum in the above-entitled cases, and think it is really first rate from beginning to end. The section on retribution was particularly interesting to me, since both your own language and the splendid quotation from Lord Denning articulated a view which I have felt in the pit of my stomach for some time, but for which I have never been able to find words.

In connection with your discussion of recent enactments providing for the death penalty, my recollection is that when I was in the Justice Department I participated in some work on explosives legislation in 1970 in which the law finally enacted by Congress contained a provision for the death penalty.

It may seem like nit-picking to pick out one sentence in a 49-page opinion with which I so fully agree and make a comment about it, but nonetheless I shall do so. Your sentence beginning on the bottom of page 3, explaining the effect of the Fourteenth Amendment on the States, could it seems to me be read as saying that the Fourteenth Amendment carries over not merely the due process language of the Fifth Amendment, but likewise the requirement of indictment and prohibition against double jeopardy. While the Court in Benton v. Maryland.

has held that the Fourteenth Amendment incorporates the prohibition against double jeopardy, I personally had some difficulty with that holding; however, apart from that, I have a feeling not verified by any research that the Court has never held the indictment requirement of the Fifth Amendment applicable to the States. Unless you want to go into this aspect of the Fourteenth Amendment in the sentence in question, I would think it could be narrowed to describe the Fourteenth Amendment as carrying over the due process language of the Fifth Amendment without more, or at most the due process language and the double jeopardy prohibition.

Whatever your decision on this very minor point, I shall take great pleasure in joining your fine opinion.

Sincerely,

A handwritten signature in cursive ink, appearing to read "Bill".

Mr. Justice Powell