The Burger Court Opinion Writing Database

Dobbert v. Florida

432 U.S. 282 (1977)

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

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
~~Mr.~~ Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

JUN 10 1977

Circulated: _____

Recirculated: _____

No. 76-5306 - Dobbert v. Florida

MR. CHIEF JUSTICE BURGER, concurring:

I join the opinion of the Court. A crucial factor in this case, for me, is that, as the Court's opinion recites, when petitioner committed the crime, a Florida statute permitted the death penalty for the offense. Petitioner was at least constructively on notice that this penalty might indeed follow his actions. During the time which elapsed between the commission of the offense and the trial, the statute was changed to provide different procedures for determining whether death was an appropriate punishment. But these new procedures, taken as a whole, were, if anything, more favorable to the petitioner; consequently the change cannot be read otherwise than as the Court's opinion suggests.

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

From: The Chief Justice

Circulated: _____

Recirculated: JUN 16 1977

PRINTED
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-5306

Ernest John Dobbert, Jr., Petitioner, *v.* State of Florida. } On Writ of Certiorari to the Supreme Court of Florida.

[June —, 1977]

MR. CHIEF JUSTICE BURGER, concurring.

I join the opinion of the Court. A crucial factor in this case, for me, is that, as the Court's opinion recites, when petitioner committed the crime, a Florida statute permitted the death penalty for the offense. Petitioner was at least constructively on notice that this penalty might indeed follow his actions. During the time which elapsed between the commission of the offense and the trial, the statute was changed to provide different procedures for determining whether death was an appropriate punishment. But these new procedures, taken as a whole, were, if anything, more favorable to the petitioner; consequently the change cannot be read otherwise than as the Court's opinion suggests.

HAB

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

CHAMBERS OF
THE CHIEF JUSTICE

July 28, 1977

Re: 76-5306 (A-33) Dobbert v. Florida

Dear Lewis:

I concur.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

/

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 23, 1977

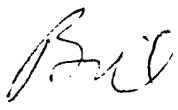
RE: No. 76-5306 Dobbert v. Florida

Dear Bill:

Will you please add the following at the foot of your opinion in the above. Thurgood and I have agreed upon it as a statement which can serve in all but the most unusual of the capital cases:

> "Mr. Justice Brennan and Mr. Justice Marshall, dissenting: Adhering to our views 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, 231 (1976), we would vacate the death sentence in this case."

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 23, 1977

RE: No. 76-5306 Dobbert v. Florida

Dear John:

Perhaps this form will be more helpful in Order List cases that you will be processing. Of course, I leave open the possibility that your forthcoming dissent may persuade me that this is one of the "unusual" cases.

Sincerely,

Mr. Justice Stevens

cc: Mr. Justice Marshall

WJB

5/23/77

Bill here for signature for 76-5306 Dobbert v Florida

Mr. Justice Brennan and Mr. Justice Marshall, dissenting:

Adhering to our views 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, 231 (1976), we would vacate the death sentence in this case.

✓

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 2, 1977

RE: No. 76-5306 Dobbert v. Florida

Dear John:

Confirming what I said at Conference this morning, please join me in your dissent in the above.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 29, 1977

Re: No. 76-5306 (A-33) Dobbert v. Florida

Dear Mr. Justice Powell:

Mr. Justice Brennan has asked me to inform you that, of course, as you must understand, he would grant the stay.

Respectfully,

Carmen Legato,
law clerk to Mr. Justice
Brennan

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 24, 1977

Re: No. 76-5306, Dobbert v. Florida

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

J

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 18, 1977

Re: No. 76-5306 - Dobbert v. Florida

Dear Bill:

I agree.

Sincerely,

Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 3, 1977

Re: No. 76-5306 - Dobbert v. Florida

Dear John:

Please join me.

Sincerely,

T.M.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

July 28, 1977

Re: No. 76-5306 (A-33) - Dobbert v. Florida

Dear Lewis:

I will not be a party to denying a stay in this capital case.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 18, 1977

Re: No. 76-5306 - Dobbert v. Florida

Dear Bill:

Please join me.

Sincerely,

H. A. B.

Mr. Justice Rehnquist

cc: The Conference

J

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 23, 1977

No. 76-5306 Dobbert v. Florida

Dear Bill:

Please join me.

Sincerely,

L Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

July 25, 1977

No. 76-5306 (A-33) Dobbert v. Florida

Justice Powell has requested that I distribute copies of Dobbert's application to him for recall of mandate to each Chambers. The Justice has called for a response from Florida by noon on Wednesday, July 27, 1977. We will distribute copies of that response, and Justice Powell will inform you of any action he proposes to take.

Jim Alt

Jim Alt
Law Clerk to Justice Powell

Enclosure

lab

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

July 27, 1977

76-5306 (A-33) Dobbert v. Florida

MEMORANDUM TO THE CONFERENCE

Dobbert filed an application for stay of mandate pending consideration of his petition for rehearing. Bill Rehnquist denied this application on July 15, and Dobbert now has filed a second application with me requesting recall of our mandate pending action on the petition for rehearing. Copies of this application were distributed to your respective Chambers on July 25.

I requested a response from the Attorney General of Florida, which was received today. It includes exhibits which, on their face, indicate that certain extensions of time already have been granted by the Florida Supreme Court. The Attorney General represents in his response that:

> "The effect of the foregoing is to stay any possible execution of petitioner until this Court rules on rehearing . . . ."

While I cannot say with certainty that the exhibits accompanying the response foreclose the possibility of execution prior to October, I do think we are justified in concluding that the chance of execution prior to our disposition of the petition for rehearing is extremely remote. Moreover, I see nothing in petitioner's request for rehearing that suggests any likelihood of a rehearing being granted.

Under these circumstances, I am inclined to deny the application, especially in view of the action already taken by Bill Rehnquist. But this is a capital case, and when the Court is in Term applications for stays are considered by the entire Conference. Accordingly, I would like your informal views.

LFP
I will go along to deny

I will defer acting on the application at least until I hear from a majority of you. I will, of course, be guided by a majority vote. I can be reached in my Richmond office (804-782-2733) or your Chambers can simply advise my Chambers as to your view.

I have discussed this procedure with the Chief Justice, and he is in accord.

With my best to each of you.

Sincerely,

LFP

LFP/lab

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-5306

Ernest John Dobbert, Jr., Petitioner, *v.* State of Florida. | On Writ of Certiorari to the Supreme Court of Florida.

[May —, 1977]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner was convicted of murder in the first degree, murder in the second degree, child abuse, and child torture. The victims were his children. Under the Florida death penalty statute then in effect he was sentenced by the trial judge to death. The Florida Supreme Court affirmed and we granted certiorari to consider whether changes in the Florida death penalty statutes subjected him to trial under an *ex post facto* law or denied him equal protection of the laws, and whether the significant amount of pretrial publicity concerning the crime deprived petitioner of his right to a fair trial. We conclude that petitioner has not shown the deprivation of any federal constitutional right, and affirm the judgment of the Florida Supreme Court.

I

Petitioner was convicted of murdering his daughter Kelly Ann, age 9, and his son Ryder Scott, age 7. He was also found guilty of torturing his son Ernest John, age 11, and of abusing his daughter Honore Elizabeth, age 5. The brutality and heinousness of these crimes are relevant both to petitioner's motion for a change of venue due to pretrial publicity and to the trial judge's imposition of the sentence of death. The

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 13, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-5306 Dobbert v. Florida

I have sent to the printer a change adding some language to the sentence beginning on page 2, line 8. The initial portion of the sentence will now read:

> "The judge then detailed some of the horrors inflicted on young Kelly Ann, upon which he relied to meet the statutory requirement that aggravating circumstances be found:"

Sincerely,

WHR

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 17, 1977

Re: 76-5306 - Dobbert v. Florida

Dear Bill:

In due course, I will circulate a dissent. At present, I intend to rely on the rationale of Lindsey v. Washington, 301 U.S. 397, as requiring rejection of the argument you make in Part IIB of your opinion at pages 13-14.

In that case, at the time of the offense, the defendant was on notice that he might receive a 15-year sentence; his trial under the new statute was invalidated because the standard of punishment had been changed to increase substantially the likelihood that he would receive a 15-year sentence.

In this case the change in Florida procedure increased the probability of a death sentence much more dramatically than did the change involved in Lindsey. For here, prior to the amendment, there was no possibility of a death sentence and one has now been imposed.

Respectfully,

JPS

Mr. Justice Rehnquist

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

From: Mr. Justice Stevens

Circulated: JUN 1 1977

Recirculated: ______________

76-5306 - Dobbert v. Florida

MR. JUSTICE STEVENS, dissenting.

There are three reasons why the Court's interpretation of the ex post facto clause[1/] is unacceptable: (1) it is inconsistent with controlling precedent; (2) it overlooks an important purpose of the clause; and (3) it authorizes the kind of capricious decisionmaking that the clause was intended to prevent.

Only a few simple facts are relevant to the question of law presented by this case.[2/] At the time of petitioner's offense, there was no constitutional procedure for imposing the death penalty in Florida. Several months after his final offense was completed, Florida enacted the death penalty statute that was upheld in Proffitt v. Florida, 428 U.S. 242. Before this statute was passed, as a matter of Florida law, the crime committed by petitioner was not a capital offense.[3/] It is undisputed, therefore, that a law passed after the offense is the source of Florida's power to put petitioner to death.

1/ Art. I, § 10 provides that "[n]o State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." There is a separate prohibition against ex post facto laws in Art. I, § 9, which applies to Congress.

2/ The atrocious character of this individual's crimes, which the Court recounts in such detail, is of course no more relevant to the legal issue than the fact that 10 of the 12 jurors who heard all of the evidence voted to spare his life.

pp. 1-2, 4-5

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

From: Mr. Justice Stevens

Circulated: _____

2nd DRAFT

Recirculated: JUN 9 '77

SUPREME COURT OF THE UNITED STATES

No. 76-5306

Ernest John Dobbert, Jr., Petitioner, v. State of Florida. | On Writ of Certiorari to the Supreme Court of Florida.

[June —, 1977]

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Only a few simple facts are relevant to the question of law presented by this case.[1] At the time of petitioner's offense, there was no constitutional procedure for imposing the death penalty in Florida. Several months after his offense, Florida enacted the death penalty statute that was upheld in *Proffitt* v. *Florida*, 428 U. S. 242. Before this statute was passed, as a matter of Florida law, the crime committed by petitioner was not a capital offense.[2] It is undisputed, therefore, that a law passed after the offense is the source of Florida's power to put petitioner to death.

The Court holds that Florida may apply this law to petitioner without violating the *ex post facto* clause.[3] In its view,

[1] The atrocious character of this individual's crimes, which the Court recounts in such detail, is of course no more relevant to the legal issue than the fact that 10 of the 12 jurors who heard all of the evidence voted to spare his life.

[2] In response to this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238, the Florida Supreme Court held that the Florida death penalty had been abolished, that even the category of "capital offenses" had ceased to exist, and that there was no possible procedure under existing Florida law for imposing the penalty. *Donaldson* v. *Sack*, 265 So. 2d 499 (1972); *State* v. *Robert*, 269 So. 2d 678 (1972). Following these decisions, therefore, the crime committed by petitioner was not a capital offense.

[3] Art. I, § 10 provides that "[n]o State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Con-

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

August 1, 1977

Re: 76-5306 (A-33) - Dobbert v. Florida

Dear Lewis:

If any member of the majority votes in favor of a stay, I shall so vote. Otherwise, I will acquiesce in a denial.

Respectfully,

Mr. Justice Powell

Copies to the Conference