The Burger Court Opinion Writing Database

Lockett v. Ohio

438 U.S. 586 (1978)

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

File in this case

CHAMBERS OF
THE CHIEF JUSTICE

January 24, 1978

MEMORANDUM TO THE CONFERENCE:

The assignment sheet is enclosed.

I reserved my vote in 76-6997, Lockett v. Ohio, to analyze more closely the possibility of a remand. But the Ohio statute, as construed by the Ohio Supreme Court, does not permit the sentencer to consider fully what I described in my conference discussion (for want of a better definition) as "comparative culpability." By this I meant to include the defendant's actual intent and the degree of his participation in the crime. Thus, at the moment, given our holdings up to date, at best in plurality opinions, I do not think that the statute can be saved by remanding it for further construction by the Ohio Supreme Court. I am also reconsidering my "affirm" vote in 76-6713, Bell v. Ohio, in light of the discussion on Lockett.

Although I did not agree with the views of the plurality in our preceding cases, I am now prepared to yield with the hope that there can be a majority opinion here. With deference, I feel that our plurality opinions on the death penalty have created uncertainty and instability in an area which deserves the greatest certainty and stability that can be provided, and this calls for a Court opinion. I am willing to attempt to undertake a memo suggesting a ground for reversal that may give the states a clearer idea of what they may do, and may have some chance of winning the support of a Court.

It may be an unrewarding undertaking, but I hope to submit a memo -- not an opinion -- based on the following propositions:

(a) that we must not erode the role of the felony-murder principle in determinations of guilt, and

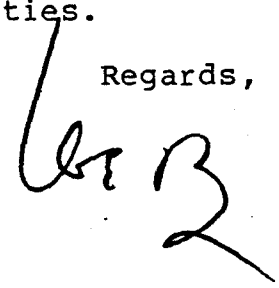
(b) that in imposing the death penalty, a state must not preclude the sentencer from considering fully the defendant's intent and degree of participation in the offense as mitigating factors.

Of course, I do not propose that we preclude a death penalty for one who hires an assassin or plans a homocide, but only that we require the states to permit the sentencer to consider the relative culpability of one who drives a getaway car and is not shown to have intended or taken part in the actual killing. This could only apply in sentencing -- not in the determination of guilt.

If there is a possibility that four others could yield their individual views, as I would be yielding mine, and join in an opinion based generally on my proposal, then there is hope that we can produce the first majority opinion on this issue since we stirred up the subject.

Obviously, you will await my memo, but if five were now to indicate a rejection of my suggested proposal, I would get on to other duties.

Regards,



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

CHAMBERS OF
THE CHIEF JUSTICE

April 10, 1978

Re: 76-6997 - Lockett v. Ohio

MEMORANDUM TO THE CONFERENCE:

I took this assignment only for a memorandum of a proposed disposition. The period of gestation has been long and perhaps the whole business should have the "Roe-Doe" Remedy, but here it is.

We granted certiorari in this case to consider, among other questions, whether Ohio violated the Eighth and Fourteenth Amendments by sentencing Lockett to death, pursuant to a statute that limited the sentencing judge's discretion to consider the special circumstances of Lockett's crime as mitigating factors.

My initial reaction was to affirm the sentence. I continue to adhere to the view, expressed in my Furman dissent, that the Eighth Amendment prohibits resort to "cruel and unusual" punishment, only in that it forbids traditional cruelty. The imposition of punishment grossly disproportionate to the severity of the crime, such as that of 17th and 18th century England, may well fall under the Eighth Amendment. But I do not think that the Eighth Amendment requires any particular sentencing procedure.

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

CHAMBERS OF
THE CHIEF JUSTICE

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

June 9, 1978

From: The Chief Justice

Circulated: JUN 9 1978

Recirculated: _____

MEMORANDUM TO THE CONFERENCE:

Re: 76-6997 Lockett v. Ohio

The process of trying to shape a disposition of this case (and Bell) that will reconcile the varying views and command a Court has proven more of a task than I anticipated when I sent my sanguine memo of April 10.

Absent a Court in support of something along the enclosed lines, I have concluded that a terse Per Curiam reversing is in order with the less said the better except that all factors tendered in mitigation be considered as has been the practice in non-capital cases.

The problem with this enterprise is that converting a sound practice into a constitutional command is something for which I have small taste.

I welcome suggestions.

Regards,

WEB

Re: 76-6997 - Lockett v. Ohio

We granted certiorari in this case to consider, among other questions, whether Ohio violated the Eighth and Fourteenth Amendments by sentencing Sandra Lockett to death pursuant to a statute that narrowly limited the sentencer's discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors.

I.

Lockett was charged with aggravated murder with the specifications (1) that the murder was committed for the purpose of escaping detection, apprehension, trial, or punishment for aggravated robbery, and (2) that the murder was committed while committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery. That offense was punishable by death in Ohio. See Ohio Rev. Code Ann. § 2929.03 (1975 Repl. Vol.). She was also charged with aggravated robbery. The case against her depended largely upon the testimony of a co-participant, one Al Parker, who gave the following account of Lockett's participation in the robbery and murder.

V

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

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1978

Re: 76-6997 - Lockett v. Ohio

MEMORANDUM TO THE CONFERENCE:

Enclosed is the final draft of the above.

I should point out that we have noted probable jurisdiction in Corbitt v. New Jersey, No. 77-5903, which presents a Jackson issue similar to the one in Lockett. Corbitt presents a challenge under Jackson to a New Jersey statute which imposes a mandatory life sentence on defendants convicted after a jury trial, but permits defendants who do not contest their guilt to be sentenced to a term of years.

Regards,

WEB

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 23 1978

Re: 76-6997 - Lockett v. Ohio

We granted certiorari in this case to consider, among other questions, whether Ohio violated the Eighth and Fourteenth Amendments by sentencing Sandra Lockett to death pursuant to a statute[1/] that narrowly limited the sentencer's discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors.

I.

Lockett was charged with aggravated murder with the aggravating specifications (1) that the murder was committed for the purpose of escaping detection, apprehension, trial, or

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

CHAMBERS OF
THE CHIEF JUSTICE

June 26, 1978

76-6997 - Lockett v. Ohio

MEMORANDUM TO:

Mr. Justice Stewart
Mr. Justice Powell
Mr. Justice Stevens

Lewis and I spent a substantial period reviewing my prior draft and his "Saturday" proposed alternative insert for pages 27-31.

I enclose a merger of his proposal and mine, which he authorized me to say is acceptable to him.

A fresh, full Wang draft will be around soon -- I hope.

Regards,

WEB

pp 4, 11, 14, 15, 16, 17, 20
22-25, 26, 27, 28, 29
32, 33, 34, 35, 36

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 26 1978

Re: 76-6997 - Lockett v. Ohio

We granted certiorari in this case to consider, among other questions, whether Ohio violated the Eighth and Fourteenth Amendments by sentencing Sandra Lockett to death pursuant to a statute[1/] that narrowly limited the sentencer's discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors.

I.

Lockett was charged with aggravated murder with the aggravating specifications (1) that the murder was committed for the purpose of escaping detection, apprehension, trial, or

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

CHAMBERS OF
THE CHIEF JUSTICE

June 27, 1978

Re: 76-6997 - Lockett v. Ohio

MEMORANDUM TO THE CONFERENCE:

The bottom lines of pages 6, 13, 14 and 26 were deleted by accident in yesterday's circulation. Please substitute these corrected pages.

Regards,

WEB

STYLISTIC CHANGES
1, 2, 4, 5, 6, 7, 9, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 27, 28 29, 30, 31, 33, 34, 35, 36

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 28 1978

Re: 76-6997 - Lockett v. Ohio

We granted certiorari in this case to consider, among other questions, whether Ohio violated the Eighth and Fourteenth Amendments by sentencing Sandra Lockett to death pursuant to a statute[1/] that narrowly limits the sentencer's discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors.

I.

Lockett was charged with aggravated murder with the aggravating specifications (1) that the murder was "committed for the purpose of escaping detection, apprehension, trial, or

CHANGES AS MARKED

Pgs 7, 8, 12, 15, 17, 18, 19, 20, 21

Mr. Justice
Mr. Jus
Mr. J
Mr. Just
Mr.
Mr.
Mr.

From: The

Circulated:

Recirculated: JUN 30 1978

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-6997

Sandra Lockett, Petitioner, *v.* State of Ohio. } On Writ of Certiorari to the Supreme Court of Ohio.

[June —, 1978]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court with respect to the constitutionality of petitioner's conviction (Parts I and II), together with an opinion (Part III), in which MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, joined, on the constitutionality of the statute under which petitioner was sentenced to death and announced the judgment of the Court.

We granted certiorari in this case to consider, among other questions, whether Ohio violated the Eighth and Fourteenth Amendments by sentencing Sandra Lockett to death pursuant to a statute[1] that narrowly limits the sentencer's discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors.

I

Lockett was charged with aggravated murder with the aggravating specifications (1) that the murder was "committed for the purpose of escaping detection, apprehension, trial, or punishment" for aggravated robbery, and (2) that the murder was "committed . . . while committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery." That offense was punishable

[1] The pertinent provisions of the Ohio death penalty statute appear as an appendix to this opinion.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 26, 1978

Dear John:

When you asked me yesterday whether I might join an opinion reversing in Lockett and Bell and I said that I had certainly not foreclosed that possibility I forgot that they were January cases in which I am not participating.

Sincerely,

Bill

Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 12, 1978

RE: No. 76-6997 Lockett v. Ohio

Dear Chief:

Please mark me out of this case.

Sincerely,

Bill

The Chief Justice

cc: The Conference

J

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 13, 1978

Re: No. 76-6997, Lockett v. Ohio

Dear Chief,

I have read your memorandum in this case with much interest. Let me say at the outset that I join John in expressing gratitude for your leadership in seeking to develop a Court opinion. Secondly, I also join him in agreeing with the basic conclusion expressed in the final paragraph on page 17 of your memorandum, and I would hope that a Court opinion could be written reaching that conclusion on the basis of our recent cases.

In my view, an opinion reaching this conclusion should be based not on the Due Process Clause of the Fourteenth Amendment, but squarely on the Eighth Amendment (as incorporated in the Fourteenth), for at least three reasons. First, the parties did not brief and argue this issue as a Due Process question, but as one involving only the Eighth and Fourteenth Amendments. Second, the recent decisions of the Court that impel you, albeit reluctantly, to the conclusion you express were based exclusively on the Eighth and Fourteenth Amendments, not on the Due Process Clause. Finally, and perhaps most importantly from a practical standpoint, a decision based upon Due Process would call into question the constitutional validity of literally thousands of sentences imposed upon convicted defendants throughout the country, and would surely lead to countless habeas corpus petitions attacking those convictions. By contrast, a decision based upon the Eighth Amendment could be and should be confined to death sentences.

My recollection is that at our Conference discussion we agreed that the opinion in this case (or in Bell v. Ohio) should dispose of every constitutional attack made upon the Ohio statute in both cases, in order to preclude extended future litigation. I think this decision was wise, and in the best interests of Ohio and ourselves, not to mention those on death row in that State. My recollection is that a majority thought that these other constitutional attacks were without merit, with the exception of a requirement on the State Supreme Court to give careful comparative review to the facts in each case relied upon for the imposition of the death sentence.

I sincerely hope that your laudable effort to develop a Court opinion in this case will be successful, and assure you of my continuing cooperation to achieve this end.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 14, 1978

No. 76-6997, Lockett v. Ohio

Dear Chief,

My suggestions with respect to your proposed opinion parallel almost exactly those expressed by Lewis in his letter to you of today. My only qualification, with which I am sure Lewis would agree, is that reliance not be placed on the Eighth Amendment simpliciter, but on its incorporation in the Fourteenth Amendment, since this is a state case.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 26, 1978

No. 76-6997, Lockett v. Ohio

Dear Chief,

Your redraft of pages 27-31 is acceptable to me, and I much appreciate your efforts.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 27, 1978

Re: No. 76-6997, Lockett v. Ohio

Dear Chief,

I am glad to join your opinion.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 20, 1978

Re: No. 76-6997 — Lockett v. Ohio

Dear Chief:

1. I agree with parts I, II and IV of your circulation of June 9, 1978.

2. I am unable, however, to concur in your part III. For the reasons stated in my dissenting opinion in Roberts v. Louisiana and Woodson v. North Carolina, the Eighth Amendment requires no more to justify imposition of the death penalty than that the jury find beyond reasonable doubt that the defendant has committed the elements of a crime and that the crime is one for which death is not a disproportionate penalty. The death penalty statute need not provide a system of aggravating or mitigating circumstances or a mixture thereof.

I am thus unable to join an opinion mandating that to satisfy the Eighth Amendment a state must require that the jury receive and is free to consider any and all mitigating circumstances that the defendant may desire to place before it. I do not construe the Eighth Amendment as embodying the theory of individualized sentencing or the proposition that the penalty must fit the criminal rather than the crime that he has deliberately committed.

Furthermore, vesting in the jury unlimited authority to consider mitigating circumstances is to enhance its power to dispense at will its own brand of justice in an essentially standardless manner. In the long run, imposing the death penalty under such a mandate would revert to that which in my view was an unacceptably erratic system that could not be relied upon to contribute to any of the ends of criminal punishment. Furman v. Georgia, 408 U.S. 238 (WHITE, J., concurring).

Of course, the Justices of this Court have an obligation to provide clear guidance for the states whenever they are in a position to do so. But there are limits to that approach, particularly when the suggestion is that we construe the Eighth Amendment so as to constitutionalize the rehabilitative model of criminal justice, a suggestion that it may take longer than I have to accept.

3. My vote in the Conference to reverse was based on the proposition that the imposition of the death penalty should be reserved for those who intend to kill and to take human life. Otherwise, the penalty is disproportionate and violative of the Eighth Amendment. Those who intentionally kill, hire or conspire to kill, or anticipate that their colleagues will kill, may be punished by death. But I would hold that the Eighth Amendment bars the penalty as to those the jury has failed to find had the requisite intent to take the life of another person.

In view of the approach you have taken, I may simply dissent rather than alone to concur on the basis of the views expressed in paragraph 3 above.

Sincerely yours,

The Chief Justice

Copies to the Conference

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

From: Mr. Justice White

Circulated: 6/26/78

Recirculated: _____

Re: 76-6991 - Sandra Lockett v. The State of Ohio &
76-6513 - Willie Lee Bell v. The State of Ohio

MR. JUSTICE WHITE, dissenting in part and concurring in the judgment of the Court.

I concur in Parts I, II, and III of the Court's opinion and in the judgment. I cannot, however, agree with Part IV of the Court's opinion and to that extent respectfully dissent.

I

The Court has now completed its about-face since Furman v. Georgia, 408 U.S. 238 (1972). Furman held that as a result of permitting the sentencer to exercise unfettered discretion to impose or not to impose the death penalty for murder, the penalty was then being imposed discriminatorily,[1] wantonly and freakishly,[2] and so infrequently[3] that any given death sentence was cruel and unusual. The Court began its retreat in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), where a plurality held that statutes which imposed mandatory death sentences even for first-degree murders were constitutionally invalid because

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 27, 1978

MEMORANDUM TO THE CONFERENCE

Re: 76-6997 - Sandra Lockett v. The State of Ohio &
76-6513 - Willie Lee Bell v. The State of Ohio

I am changing the opening of my opinion in this case to state that I concur in Parts I and II of the present circulation but dissent from Part III. Of course, I continue to concur in the judgment.

I shall also add a footnote indicating that I find it unnecessary to address other issues relating to the sentences.

B. R. W.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

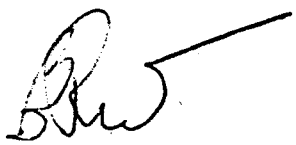
June 27, 1978

MEMORANDUM TO THE CONFERENCE

Re: 76-6997 - Sandra Lockett v. The State of Ohio
76-6513 - Willie Lee Bell v. The State of Ohio

I may eventually get this right but maybe not. The opening of my opinion in these cases should read as follows:

> MR. JUSTICE WHITE, dissenting in part and concurring in the judgments of the Court.
>
> I concur in Parts I and II of the Court's opinion in No. 76-6997, Lockett v. Ohio and Part I of the Court's opinion in No. 76-6513, Bell v. Ohio and in the judgments. I cannot, however, agree with Part III of the Court's opinion in Lockett and Part II of the Court's opinion in Bell and to that extent respectfully dissent.



Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 6/30

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 76-6997 AND 76-6513

Sandra Lockett, Petitioner,
76-6997 *v.*
State of Ohio.

Willie Lee Bell, Petitioner,
76-6513 *v.*
State of Ohio.

On Writs of Certiorari to the Supreme Court of Ohio.

[June —, 1978]

MR. JUSTICE WHITE, dissenting in part and concurring in the judgments of the Court.

I concur in Parts I and II of the Court's opinion in No. 76-6997, *Lockett* v. *Ohio*, and Part I of the Court's opinion in No. 76-6513, *Bell* v. *Ohio*, and in the judgments. I cannot, however, agree with Part III of the Court's opinion in *Lockett* and Part II of the Court's opinion in *Bell* and to that extent respectfully dissent.

I

The Court has now completed its about-face since *Furman* v. *Georgia*, 408 U. S. 238 (1972). *Furman* held that as a result of permitting the sentencer to exercise unfettered discretion to impose or not to impose the death penalty for murder, the penalty was then being imposed discriminatorily,[1] wantonly and freakishly,[2] and so infrequently[3] that any given death sentence was cruel and unusual. The Court began its retreat in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), and *Roberts* v. *Louisiana*, 428 U. S. 325 (1976), where a plural-

[1] See *Furman* v. *Georgia*, 408 U. S., at 240 (Douglas, J., concurring).
[2] See *id.*, at 306 (STEWART, J., concurring).
[3] See *id.*, at 310 (WHITE, J., concurring).

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 23, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-6997, Lockett v. Ohio

I vote to reverse. I continue to adhere to my view, expressed in Furman v. Georgia, 408 U.S. 238, 314, Gregg v. Georgia, 428 U.S. 153, 231, and Coker v. Georgia, 45 U.S.L.W. 4961, 4966, that the death penalty is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments.

T.M.

22 JUN 1978

No. 76-6997, Lockett v. Ohio

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I continue to adhere to my view that the death penalty is, under all circumstances, a cruel and unusual punishment prohibited by the Eighth Amendment. See Furman v. Georgia, 408 U.S. 238, 314-374 (1972) (Marshall, J., concurring); Gregg v. Georgia, 428 U.S. 153, 231-241 (1976) (Marshall, J., dissenting). The cases that have come to this Court since its 1976 decisions permitting imposition of the death penalty have only persuaded me further of that conclusion. See, e.g., Gardner v. Florida, 430 U.S. 349, 365 (1977) (Marshall. J., dissenting); Coker v. Georgia, 433 U.S. 584, 600-601 (1977) (Marshall, J., concurring in the judgment); Alford v. Florida,

printed
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-6997

Sandra Lockett, Petitioner,
v.
State of Ohio.

On Writ of Certiorari to the Supreme Court of Ohio.

[June —, 1978]

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I continue to adhere to my view that the death penalty is, under all circumstances, a cruel and unusual punishment prohibited by the Eighth Amendment. See *Furman* v. *Georgia*, 408 U. S. 238, 314–374 (1972) (MARSHALL, J., concurring); *Gregg* v. *Georgia*, 428 U. S. 153, 231–241 (1976) (MARSHALL, J., dissenting). The cases that have come to this Court since its 1976 decisions permitting imposition of the death penalty have only persuaded me further of that conclusion. See, *e. g.*, *Gardner* v. *Florida*, 430 U. S. 349, 365 (1977) (MARSHALL, J., dissenting); *Coker* v. *Georgia*, 433 U. S. 584, 600–601 (1977) (MARSHALL, J., concurring in the judgment); *Alford* v. *Florida*, No. 77–1490 (May 30, 1978) (MARSHALL, J., dissenting from denial of certiorari). This case, as well, serves to reinforce my view.

When a death sentence is imposed under the circumstances presented here, I fail to understand how any of my Brethren—even those who believe that the death penalty is not wholly inconsistent with the Constitution—can disagree that it must be vacated. Under the Ohio death penalty statute, this 21-year-old Negro woman was sentenced to death for a killing that she did not actually commit or intend to commit. She was convicted under a theory of vicarious liability. The imposition of the death penalty for this crime totally violates the principle of proportionality embodied in the Eighth Amend-

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 17, 1978

Re: No. 76-6997 - Lockett v. Ohio

Dear Chief:

I agree with others that your memorandum of April 10 is helpful and that it promises to take the Court down the road to a Court opinion in the Ohio capital punishment cases. The memorandum is particularly helpful, I feel, because it outlines rather dramatically the difficulties that have beset the Court in its death penalty decisions of recent years and focuses upon the pendulum swings that have taken place. It discloses the corner into which the Court painted the States and reveals the causes for the mandatory statutes (which some of us predicted) and now the swing back to the discretionary with all its ramifications.

I suspect that, like Bill Rehnquist, I shall not be able to join the opinion that evolves. Having said that, however, I presume to say that (1) I prefer the Eighth Amendment rather than the Due Process approach, and (2) that the Court should dispose of all challenges raised. I share the feeling that others have expressed that most of these are without merit.

More specifically, my position at conference was that a sentencing authority must be permitted to consider the degree of a non-triggerman's involvement. It would follow that the Ohio statute was unconstitutional as applied to Sandra Lockett on that fairly narrow ground. When I first read your opinion, I thought that this would be its thrust, as revealed by the language on page 12 and some on pages 13-14. At the end of your opinion, however, I sense a shift to the plurality position in Woodson, namely, that to be constitutional a capital sentencing statute must permit consideration of age, prior record, prospects for

rehabilitation, and character. Language on pages 14-15 and 17 seems to read to this effect. For me, the point of taking a non-triggerman case was that there might be some broader agreement on the necessity of considering the factor distinctive to non-triggermen, namely, the degree of involvement. Those in the Woodson plurality might well wish to write beyond an opinion so confined, but I would have thought that they at least could join such an opinion as a basic proposition.

Sincerely,

HAB

The Chief Justice

cc: The Conference

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

From: Mr. Justice Blackm

Circulated: JUN 21 19

Recirculated: _____

No. 76-6997 - Lockett v. Ohio

MR. JUSTICE BLACKMUN, concurring in the judgment.

I, too, would reverse the judgment of the Supreme Court of Ohio insofar as it upheld the imposition of the death penalty on petitioner Sandra Lockett. I would do so, however, for a reason more limited than that the Court espouses, and for an additional reason not relied upon by the Court.

I

The first reason is that, in my view, the Ohio judgment in this case improperly provided the death sentence for a defendant who only aided and abetted a felony murder, without permitting any consideration by the sentencing authority of the extent of her involvement, or the degree of her mens rea, in the commission of the

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 27, 1978

MEMORANDUM TO THE CONFERENCE:

Re: No. 76-6997 - Lockett v. Ohio

The changes the Chief Justice has made in his latest draft makes necessary changes in my circulation. A new draft is enclosed.

HAB.

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

No. 76-6997 - Lockett v. Ohio

Circulated: _____

Recirculated: JUN 27 1978

MR. JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

I join the Court's judgment, but only Parts I and II of its opinion. I, too, would reverse the judgment of the Supreme Court of Ohio insofar as it upheld the imposition of the death penalty on petitioner Sandra Lockett, but I would do so for a reason more limited than that which the Court espouses, and for an additional reason not relied upon by the Court.

I

The first reason is that, in my view, the Ohio judgment in this case improperly provided the death sentence for a defendant who only aided and abetted a murder, without permitting any consideration by the sentencing authority of the extent of her involvement, or the degree of her mens rea, in the commission of the

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 29 1978

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-6997

Sandra Lockett, Petitioner, *v.* State of Ohio, } On Writ of Certiorari to the Supreme Court of Ohio.

[June —, 1978]

MR. JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

I join the Court's judgment, but only Parts I and II of its opinion. I, too, would reverse the judgment of the Supreme Court of Ohio insofar as it upheld the imposition of the death penalty on petitioner Sandra Lockett, but I would do so for a reason more limited than that which the Court espouses, and for an additional reason not relied upon by the Court.

I

The first reason is that, in my view, the Ohio judgment in this case improperly provided the death sentence for a defendant who only aided and abetted a murder, without permitting any consideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea,* in the commission of the homicide. The Ohio capital statute, together with that State's aiding and abetting statute, and its statutory definition of "purposefulness" as including reckless endangerment, allow for a particularly harsh application of the death penalty to any defendant who has aided or abetted the commission of an armed robbery in the course of which a person is killed, even though accidentally.[1] It might be that to

[1] Ohio Rev. Code Ann. § 2903.01 (B) (Supp. 1977) provides that "[n]o person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit . . . aggravated robbery," and § 2903.01 (C) states

STYLISTIC CHANGES

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-6997

Sandra Lockett, Petitioner, *v.* State of Ohio. } On Writ of Certiorari to the Supreme Court of Ohio.

[July 3, 1978]

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 14, 1978

No. 76-6997 Lockett v. Ohio

Dear Chief:

I join Potter and John in saying that your memorandum is constructive, and the summary of the situation is quite interesting.

The conclusion you reach in the final paragraph of your memorandum is, as you suggest, in accord with the Woodson plurality, and also what was said in Harry Roberts:

> "It is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." No. 76-5206, slip op. at 4.

I therefore wholly concur in your conclusion.

As to the proper analytical framework, I agree with Potter that we should remain with the Eighth Amendment analysis. I am not at all sure where the due process clause might lead us.

You have not yet addressed the other issues raised in the Ohio cases. I share Potter's recollection that at least a majority of us thought it best to dispose of all of them. In my view none is meritorious.

Sincerely

Lewis

The Chief Justice

lfp/ss

cc: The Conference

April 29, 1978

No. 76-6997 Lockett v. Ohio
No. 76-6513 Bell v. Ohio

Dear Chief:

In your memorandum of yesterday, you advised that assignments will be deferred until you have all votes in the four cases mentioned.

I have today written you separately in 77-747 (Fleck), casting a vote to reverse.

As to the two Ohio capital cases (Bell and Lockett) I believe I have voted to the extent possible on the basis of what has been circulated. In my letter to you of April 14, I expressed my concurrence with your proposed resolution of the principal issue in these cases, assuming that the analytical framework remains the Eighth Amendment. I also stated that I view none of the other issues as meritorious.

As to Bakke, my view remain as previously stated. I would affirm as to Bakke himself and an inflexible quota system, but would reverse that part of the California Court's judgment that forbids a state university from considering race as one factor to be weighed, competitively, along with other relevant factors in making admission decisons.

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 13, 1978

No. 76-6997 Lockett v. Ohio

Dear Chief:

This is in response to your suggestion that we give you our comments in writing. Although I fully agree with your conclusion on the Eighth Amendment issue, I am having difficulty with two aspects of your draft opinion.

First, in holding that the Eighth Amendment requires the sentencing authority to consider all relevant mitigating circumstances, you rely extensively and almost exclusively on dicta in Justice Black's opinion for the Court in Williams v. New York, 337 U.S. 241 (1949). The issue in Williams was not whether the sentencing authority must consider mitigating circumstances, but whether it may consider evidence in sentencing that would not have been admissible at the trial on guilt. The Court there held only that consideration of such evidence did not violate the Due Process Clause of the Fourteenth Amendment.

It seems to me that more specifically focused support for your Eighth Amendment holding in this case could be derived from the plurality opinion in Woodson. There the history of the growth of individualized sentencing was traced in detail, with particular attention to capital sentencing. 428 U.S., at 289-301. In addition, the conclusions that were drawn tied explicitly to the Eighth Amendment concepts of "evolving standards of decency," id., at 301, and of "the fundamental respect for humanity underlying the Eighth Amendment," id., at 304. At the same time, it was made clear that the conclusions "rest[ed] squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long." Id., at 305. Although I understand that you did not agree with that opinion at that

Brennan 77

time, I believe that there is much in that opinion that tracks your reasoning and supports your holding here. In order not to leave the mistaken impression that the Court is now taking a fundamentally different tack from that of the plurality in Woodson and the other 1976 cases, would it not be desirable to draw primarily on the Woodson opinion?

My second concern is that the Court not leave any question as to the continued validity of the statutes upheld in Proffitt and Jurek. Your opinion holds that "the Eighth Amendment requires . . . consideration of [a] broad range of factors," including "among others, the degree of participation in the criminal conduct, record of prior offenses, age, proof or lack of specific intent to cause the death of the victim, and any other aspect of a defendant's life that the defendant proffers as a basis for a sentence less than death." Opinion at 30. The Florida statute at issue in Proffitt, however, listed only a set of seven statutory mitigating circumstances. 428 U.S., at 249 n. 6. Thus, the argument could be made that the Florida statute did not allow the sentencing authority to consider "any . . . aspect of the defendant's life that the defendant proffers as a basis for a sentence lss than death."

This argument would fail, in my view, because as the plurality noted in Proffitt, the list of mitigating factors in the Florida statute does not purport to be an exclusive list:

> "[T]he capital-sentencing statute explicitly provides that '[a]ggravating circumstances shall be limited to the following [eight specified factors.].' §931.141(5) (Supp. 1976-1977). (Emphasis added.) There is no such limiting language introducing the list of statutory mitigating factors. See §921.141(6)(Supp. 1976-1977)."

428 U.S., at 250 n. 8. Since the judgment in Proffitt proceeded on the assumption that the statutory list of mitigating factors was not exclusive, there is no inconsistency with your holding in this case.

The Texas statute at issue in Jurek required the jury to answer three questions at the sentencing stage. 428 U.S., at 269. The question for the plurality in Jurek, as for the Court in the instant case, was whether these

three statutory questions allow sufficient individualized consideration of the offender and offense to satisfy the Eighth Amendment. See id., at 271-272. The plurality was satisfied that the Texas Court of Criminal Appeals had construed the second statutory question - "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" - so broadly as "to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show." Id., at 272, citing and quoting 522 S.W.2d, at 939-940. Thus, despite the facial narrowness of the statutory inquiry under the Texas statute, the Texas court - unlike the Ohio court here - had construed its statute to allow consideration of any mitigating factor to which the defendant could point. It was explicitly on this basis that the plurality upheld the Texas statute, and it is on this basis that Jurek differs from the Ohio statute.

But in view of the arguable similarities between the statutes at issue in Proffitt and Jurek and the Ohio statute at issue here, I think it would be prudent for the Court to make clear the distinctions between those cases and this one.

One further thought: Do you think the broad generalizations as to "individualized sentencing" by judges can be read to reflect doubt on the validity of indeterminate sentencing that we have approved (e.g., Calif.)? And what about statute severely limiting judicial discretion in sentencing, such as mandatory minimum terms?

Sincerely,

L. Lewis

The Chief Justice

lfp/ss

cc: The Conference

June 26, 1978

PERSONAL

Lockett 76-6997

Dear John:

As perhaps you know from your clerk (John Muench, I believe), Lockett ran into considerable trouble late Friday and Saturday.

Potter and I were unwilling to go along with pages 27-31 of the Chief's draft as written. Also, we wanted to omit discussion of the other issues, particular the Jackson issue. A Conference between Potter and the Chief was only partially successful, as the Chief was not inclined to omit or modify substantially the general, rather sweeping discussion of "individualized sentencing".

The Chief and I also talked Saturday morning, and he indicated then a willingness to change some of the language and make it clear that he was not criticizing fixed minimum terms. My clerk, Jim Alt (who really did the work) and I prepared a suggested substitute from the bottom of page 27 to the middle of page 31. Potter, and his Chambers, made some helpful changes in this.

The Chief, who was at his residence, agreed that we could deliver our suggested revision to his clerk, Henry Parr, and also that the clerks could confer. On Sunday morning, the Chief advised me that he had not had an opportunity to consider our draft. He seemed more optimistic about our getting together.

In any event, I enclose a copy of the proposed substitute language. If I have correctly understood the Chief, I believe we are close enough to agree on some compromise language. It would be a pity for the four of us, at least, not to work this out.

Sincerely,

The Justice Stevens

cc: Mr. Justice Stewart

June 26, 1978

No. 76-6997 Lockett v. Ohio

Dear Chief:

I write to confirm my approval of the insert for pages 27-31 circulated with your memorandum of this date.

Your willingness to work this out on a mutually satisfactory basis is especially appreciated at this season of the Term.

Sincerely,

The Chief Justice

lfp/ss

cc: Mr. Justice Stewart
Mr. Justice Stevens

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 27, 1978

No. 76-6997 Lockett v. Ohio

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

lfp/s

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 14, 1978

Re: No. 76-6997 - Lockett v. Ohio

Dear Chief:

In all probability I will not join your opinion in this case, and you are accordingly entitled to discount the following observation. I agree entirely with Potter that any implications of your opinion which would have any spillover outside of the area of death sentences would be disastrous, and if you agree with him that such a spillover is a possibility that you consider modification of the relevant portions of the opinion.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 21, 1978

Re: No. 76-6997 Lockett v. Ohio

Dear Chief:

As presently advised, I join Parts I, II, and IV of your proposed opinion for the Court. I will in due course file a very short dissenting statement from Part III of that opinion.

Sincerely,

WHR

The Chief Justice

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 Stevens

From: Mr. Justice Rehnquist

Circulated: JUN 28 1978

Recirculated: _____

No. 76-6997 Lockett v. Ohio

MR. JUSTICE REHNQUIST, concurring in part and dissenting.

I join Parts I and II of the Chief Justice's opinion for the Court, but am unable to join Part III of his opinion or in the judgment of reversal.

I

Whether out of a sense of judicial responsibility or a less altruistic sense of futility, there are undoubtedly circumstances which require a member of this Court "to bow to the authority" of an earlier case despite his "original and continuing belief that the decision was constitutionally wrong." Burns v. Richardson, 384 U.S. 73, 98 (1966) (Harlan, J., concurring).

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 29, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-6997 - Lockett v. Ohio

Attached are pages 4 and 5 of my dissent in this case, which have been changed as indicated to respond to the Chief's recirculation of June 28th.

Sincerely,

Attachment

in effect, that in order to impose a death sentence the judge or jury must receive in evidence whatever the defense attorney wishes them to hear. I do not think the Chief Justice's effort to trace this quite novel constitutional principle back to the plurality opinions in the Woodson cases succeeds.

As the opinion admits, ante at ____ n.14, the statute upheld in Gregg v. Georgia, 428 U.S. 153 (1976), permitted the sentencing authority to consider only those mitigating circumstances "'authorized by law.'" Id. at 164 (Opinion of Stewart, Powell, and Stevens, JJ.) (citation omitted).

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 12, 1978

Re: 76-6997 - Lockett v. Ohio

Dear Chief:

Not only do I agree with your analysis of the position that the Court has in fact reached; I also found your review of the State statutes most enlightening and persuasive. Of greatest importance, I applaud your leadership in seeking to develop a Court opinion in this difficult area.

Respectfully,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 12, 1978

Re: 76-6997 - Lockett v. Ohio

Dear Chief:

Please join me.

Respectfully,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 16, 1978

RE: 76-6997 - Lockett v. Ohio

Dear Chief:

Although I do not qualify my join, I think the suggestions which Lewis made in his letter of June 13, 1978 are excellent.

Respectfully,

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 27, 1978

RE: No. 76-6997 - Lockett v. Ohio

Dear Chief:

Please join me.

Respectfully,

The Chief Justice

Copies to the Conference