

The Burger Court Opinion Writing Database

Carter v. Kentucky

450 U.S. 288 (1981)

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



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

CHAMBERS OF
THE CHIEF JUSTICE

March 5, 1981

RE: 80-5060 - Carter v. Kentucky

Dear Potter:

I join.

Regards,

A handwritten signature in dark ink, appearing to be 'L. Stewart', written over the typed word 'Regards,'.

Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 18, 1981

RE: No. 80-5060 Carter v. Kentucky

Dear John:

Please join me in your concurring opinion in
the above.

Sincerely,

A handwritten signature in cursive script, appearing to be "Bill", written in dark ink.

Mr. Justice Stevens

cc: The Conference

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

From: Mr. Justice Stewart

Circulated: 17 FEB 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5060

Lonnie Joe Carter, Petitioner, } On Writ of Certiorari to the
v. } Supreme Court of Ken-
Commonwealth of Kentucky. } tucky.

[March —, 1981]

Low

JUSTICE STEWART delivered the opinion of the Court.

In this case a Kentucky criminal trial judge refused a defendant's request to give the following jury instruction: "The defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." The Supreme Court of Kentucky found no error.¹ We granted certiorari to consider the petitioner's contention that a defendant, upon request, has a right to such an instruction under the Fifth and Fourteenth Amendments of the Constitution. — U. S. —.²

¹ The *per curiam* memorandum opinion of the Supreme Court of Kentucky, *Carter v. Kentucky*, No. 79-SC-452-MR, May 13, 1980, is unreported.

² Kentucky is one of at least five States that prohibit giving such an instruction to the jury. Others are Minnesota, see *State v. Sandve*, 156 N. W. 2d 2230, 233-234, but see *State v. Grey*, 256 N. W. 2d 74, 77-78 (the instruction may be necessary in some cases to prevent manifest injustice); Nevada, see *Jackson v. State*, 438 P. 2d 795, 798, Nev. Rev. Stat. § 175.181 (1979); Oklahoma, see *Brannin v. State*, 375 P. 2d 276, 279-280, *Hart v. State*, 560 P. 2d 207, 212; and Wyoming, see *Kinney v. State*, 256 P. 1040, 1042. A few States have a statutory requirement that such an instruction be given to the jury unless the defendant objects. See *e. g.*, Conn. Gen. Stat. Ann. § 54-84 (West 1958). The majority of the States, by judicial pronouncement, require that a defense request for such a jury instruction be honored. See, *e. g.*, *Woodard v. State*, 234 Ga. 901, 218 S. E. 2d 629.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 18, 1981

Re: 80-5060 - Carter v. Kentucky

Dear Potter,

Under the compulsion of previous decisions that are unlikely to be disturbed, I join your opinion.

Sincerely yours,



Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 19, 1981

Re: No. 80-5060 - Carter v. Kentucky

Dear Potter:

Please join me.

Sincerely,

J.M.

T.M.

Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

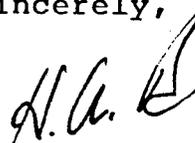
February 20, 1981

Re: No. 80-5060 - Carter v. Kentucky

Dear Potter:

Please join me.

Sincerely,

A handwritten signature in dark ink, appearing to read "H. A. Blackmun". The signature is written in a cursive style with a prominent initial "H" and a long, sweeping tail.A small, simple handwritten flourish or mark, possibly a checkmark or a stylized "L", located below the signature.

Mr. Justice Stewart

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

From: Mr. Justice Powell

No. 80-5060, Carter v. Kentucky

Circulated: FEB 26 1981

Recirculated: _____

JUSTICE POWELL, concurring.

Although joining the opinion of the Court, I write briefly to make clear that, for me, this result is required by precedent, not by what I think the Constitution should require.

The Fifth Amendment, applicable to the States through the Fourteenth, provides that no person "shall be compelled in any criminal case to be a witness against himself." The question in Griffin v. California, 380 U.S. 609 (1965), was whether this proscription was violated if jurors were told that they could draw inferences from a defendant's failure to testify. The Court held that neither the judge nor the prosecutor could suggest that jurors draw such inferences. A defendant who chooses not to testify hardly can claim that he was compelled to testify. The Court ^{also} held, nevertheless, that any "penalty imposed by courts for exercising [this] constitutional privilege" cannot be tolerated because "[i]t cuts down on the privilege by making its assertion costly." Id., at 614.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 18, 1981

Re: No. 80-5060 Carter v. Kentucky

Dear Potter:

In due course I shall circulate a short dissent from your draft opinion in this case.

Sincerely,

Justice Stewart

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: FEB 18 1981

Recirculated: _____

WHR Draft 2/18/81

Re: No. 80-5060 Carter v. Kentucky

JUSTICE REHNQUIST, dissenting.

The Court has reached its conclusion in this case by a series of steps only the first of which is traceable to the United States Constitution. Yet since the result of the Court's decision is to reverse the judgment of the Supreme Court of Kentucky, the decision must obviously rest upon the fact that the decision of that Court is inconsistent with the United States Constitution.

As the Court points out, the constitutional question presented by this case is one the Court has specifically anticipated and reserved, first in Griffin v. California, 380 U.S. 609, 615, and more recently in Lakeside v. Oregon, 435 U.S. 333 (1978).

Stylistic

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

1st PRINTED DRAFT

Circulated: FEB 24 1981

SUPREME COURT OF THE UNITED STATES

No. 80-5060

Lonnie Joe Carter, Petitioner, } On Writ of Certiorari to the
 v. } Supreme Court of Ken-
 Commonwealth of Kentucky. } tucky.

[March —, 1981]

JUSTICE REHNQUIST, dissenting.

The Court has reached its conclusion in this case by a series of steps only the first of which is traceable to the United States Constitution. Yet since the result of the Court's decision is to reverse the judgment of the Supreme Court of Kentucky, the decision must obviously rest upon the fact that the decision of that Court is inconsistent with the United States Constitution.

As the Court points out, the constitutional question presented by this case is one the Court has specifically anticipated and reserved, first in *Griffin v. California*, 380 U. S. 609, 615, n. 6 (1965) and more recently in *Lakeside v. Oregon*, 435 U. S. 333 (1978).

But the Court, with a singular paucity of reasoning, points to the fact that in a case arising in the federal system, a defendant requesting a charge similar to that which petitioner requested here was held by this Court to be entitled to it. The differences, of course, are obvious: In the first place, the case of *Bruno v. United States*, 308 U. S. 287 (1939) was governed by the federal statute there cited:

"The accused could 'at his own request but not otherwise be a competent witness. And his failure to make such a request shall not create any presumption against him.' Such was the command of the law makers. The only way Congress could provide that abstention from testifying should not tell against an accused was by an implied direction to judges to exercise their traditional

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: FEB 18 '81

Recirculated: _____

80-5060 - Carter v. Kentucky

JUSTICE STEVENS, concurring.

While I join the Court's opinion, I add this comment to emphasize that today's holding is limited to cases in which the defendant has requested that the jury be instructed not to draw an inference of guilt from the defendant's failure to testify. I remain convinced that the question whether such an instruction should be given in any specific case--like the question whether the defendant should testify on his own behalf--should be answered by the defendant and his lawyer, not by the State. See Lakeside v. Oregon, 435 U.S. 333, 343-348 (1978) (STEVENS, J., dissenting).

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: _____

1st PRINTED DRAFT

Recirculated: 1981 _____

SUPREME COURT OF THE UNITED STATES

No. 80-5060

Lonnie Joe Carter, Petitioner, | On Writ of Certiorari to the
 v. | Supreme Court of Ken-
 Commonwealth of Kentucky. | tucky.

[March —, 1981]

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins,
 concurring.

While I join the Court's opinion, I add this comment to emphasize that today's holding is limited to cases in which the defendant has requested that the jury be instructed not to draw an inference of guilt from the defendant's failure to testify. I remain convinced that the question whether such an instruction should be given in any specific case—like the question whether the defendant should testify on his own behalf—should be answered by the defendant and his lawyer, not by the State. See *Lakeside v. Oregon*, 435 U. S. 333, 343-348 (1978) (STEVENS, J., dissenting).