

The Burger Court Opinion Writing Database

Eddings v. Oklahoma

455 U.S. 104 (1982)

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

November 16, 1981

Re: No. 80-5727 - Eddings v. Oklahoma

MEMORANDUM TO THE CONFERENCE:

I will take on a dissent in the above.

Regards,

A handwritten signature in cursive script, appearing to be "Warren", written in black ink.

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

CHAMBERS OF
THE CHIEF JUSTICE

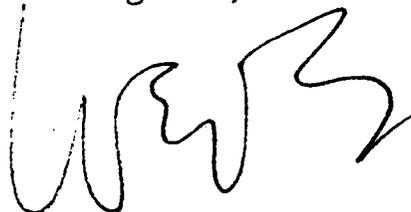
December 1, 1981

Re: No. 80-5727 - Monty Lee Eddings v. Oklahoma

MEMORANDUM TO THE CONFERENCE:

I will file a dissent in this case.

Regards,

A handwritten signature in black ink, appearing to be "W. E. Burger", written in a cursive style.

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

From: The Chief Justice

Circulated: DEC 30 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5727

MONTY LEE EDDINGS, PETITIONER *v.* OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF OKLAHOMA

[December —, 1981]

CHIEF JUSTICE BURGER, dissenting.

It is important at the outset to remember—as the Court does not—the narrow question on which we granted certiorari. We took care to limit our consideration to whether the Eighth and Fourteenth Amendments prohibit the imposition of a death sentence on an offender because he was sixteen years old at the time he committed the offense; review of all other questions raised in the petition for certiorari was denied. — U. S. — (1981). Yet the Court today decides the case on a point raised for the first time in petitioner's brief to this Court—a claim which was not presented to the Oklahoma courts and was not presented to this Court in the petition for certiorari.¹ Relying on this “eleventh-hour” claim, the Court strains to construct a plausible legal theory

¹The Court struggles to demonstrate that “the question of whether the decisions below were consistent with our decision in *Lockett* is properly before us.” *Ante*, at 9–10 n. 9. It argues that petitioner's “*Lockett* claim” was somehow inherent in his general assertion that the death penalty was “excessive.” However, it is obvious that petitioner not only failed to present to this Court the question which the Court now addresses, but never “fairly presented” the *Lockett* argument to the state courts so as to have afforded them the first “opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim.” *Picard v. Connor*, 404 U. S. 270, 275–277 (1971). Indeed, petitioner concedes as much, admitting that the “*Lockett* error was not enumerated or argued on appeal to the Oklahoma Court of Criminal Appeals. . . .” Brief at 64.

1, 2, 5, 7, 8, 9

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

From: The Chief Justice

Circulated: _____

Recirculated: ~~JAN 12 1982~~

JAN 12 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5727

MONTY LEE EDDINGS, PETITIONER v. OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

[January —, 1982]

CHIEF JUSTICE BURGER, dissenting.

It is important at the outset to remember—as the Court does not—the narrow question on which we granted certiorari. We took care to limit our consideration to whether the Eighth and Fourteenth Amendments prohibit the imposition of a death sentence on an offender because he was sixteen years old at the time he committed the offense; review of all other questions raised in the petition for certiorari was denied. — U. S. — (1981). Yet the Court today goes beyond the issue on which review was sought—and granted—to decide the case on a point raised for the first time in petitioner's brief to this Court. This claim was neither presented to the Oklahoma courts nor presented to this Court in the petition for certiorari.¹ Relying on this "eleventh-hour" claim,

¹The Court struggles to demonstrate that "the question of whether the decisions below were consistent with our decision in *Lockett* is properly before us." *Ante*, at 9-10 n. 9. It argues that petitioner's "*Lockett* claim" was somehow inherent in his general assertion that the death penalty was "excessive." However, it is obvious that petitioner not only failed to present to this Court the question which the Court now addresses, but never "fairly presented" the *Lockett* argument to the state courts so as to have afforded them the first "opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." *Picard v. Connor*, 404 U. S. 270, 275-277 (1971). Indeed, petitioner concedes as much, admitting that the "*Lockett* error was not enumerated or argued on appeal to the Oklahoma Court of Criminal Appeals. . . ." Brief at 64.

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1, 5, 8, 9

STYLISTIC CHANGES

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

From: The Chief Justice

Circulated: _____

Recirculated: JAN 18 1982

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5727

MONTY LEE EDDINGS, PETITIONER v. OKLAHOMA

**ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF OKLAHOMA**

[January 19, 1982]

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE,
JUSTICE BLACKMUN, and JUSTICE REHNQUIST join,
dissenting.

It is important at the outset to remember—as the Court does not—the narrow question on which we granted certiorari. We took care to limit our consideration to whether the Eighth and Fourteenth Amendments prohibit the imposition of a death sentence on an offender because he was 16 years old at the time he committed the offense; review of all other questions raised in the petition for certiorari was denied. 450 U. S. 1040 (1981). Yet the Court today goes beyond the issue on which review was sought—and granted—to decide the case on a point raised for the first time in petitioner's brief to this Court. This claim was neither presented to the Oklahoma courts nor presented to this Court in the petition for certiorari.¹ Relying on this "eleventh-hour" claim, the

¹The Court struggles to demonstrate that "the question of whether the decisions below were consistent with our decision in *Lockett* is properly before us." *Ante*, at 9-10, n. 9. It argues that petitioner's "*Lockett* claim" was somehow inherent in his general assertion that the death penalty was "excessive." However, it is obvious that petitioner not only failed to present to this Court the question which the Court now addresses, but never "fairly presented" the *Lockett* argument to the state courts so as to have afforded them the first "opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim." *Picard v. Con-*

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

November 5, 1981

RE: No. 80-5727 Eddings v. Oklahoma

Dear Chief:

Lewis has agreed to undertake the opinion for the
Court in the above.

Sincerely,

Bill

The Chief Justice

cc: 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: DEC 8 1981

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5727

MONTY LEE EDDINGS, PETITIONER *v.* OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF OKLAHOMA

[November —, 1981]

JUSTICE BRENNAN, concurring in the judgment.

Adhering 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) (dissenting opinion), I concur in the judgment of the Court setting aside the death sentence imposed under the Oklahoma death penalty statute.

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

Justice Brennan

2nd DRAFT

circulated: _____

SUPREME COURT OF THE UNITED STATES circulated: DEC 4 1981

No. 80-5727

MONTY LEE EDDINGS, PETITIONER v. OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF OKLAHOMA

[December —, 1981]

JUSTICE BRENNAN, concurring.

I join the Court's opinion without, however, departing from 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) (dissenting opinion).

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 3, 1981

Re: 80-5727 - Eddings v. Oklahoma

Dear Lewis,

I shall be in dissent and shall
await the Chief Justice's writing.

Sincerely yours,



Justice Powell

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 30, 1981

Re: 80-5727 - Eddings v. Oklahoma

Dear Chief,

I join your dissent in this
case.

Sincerely,



Chief Justice

Copies to the Conference

bkh

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 3, 1981

Re: No. 80-5727 - Eddings v. Oklahoma

Dear Lewis:

Please join me.

Sincerely,

J.M.

T.M.

Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 14, 1981

Re: No. 80-5727 - Eddings v. Oklahoma

Dear Lewis:

I shall await the dissent or dissents in this case.

Sincerely,



Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

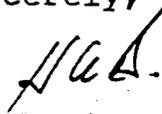
January 4, 1982

Re: No. 80-5727 - Eddings v. Oklahoma

Dear Chief:

I, too, join your dissent in this case.

Sincerely,



The Chief Justice

cc: The Conference

HAI

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 4, 1982

Re: No. 80-5727 - Eddings v. Oklahoma

Dear Chief:

I, too, join your dissent in this case.

Sincerely,



The Chief Justice

cc: The Conference

[note to The Chief Justice only]

Dear Chief:

The typist may wish to correct the spelling of "homicide." See page 2 (twice) and page 9.



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

From: Justice Powell

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5727

MONTY LEE EDDINGS, PETITIONER *v.* OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF OKLAHOMA

[November —, 1981]

JUSTICE POWELL delivered the opinion of the Court.

Petitioner Monty Lee Eddings was convicted of first degree murder and sentenced to death. Because this sentence was imposed without "the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases," *Lockett v. Ohio*, 438 U. S. 586, 606 (1978) (opinion of BURGER, C.J.), we reverse.

I

On April 4, 1977, Eddings, a 16 year old youth, and several younger companions ran away from their Missouri homes. They travelled in a car owned by Eddings' brother, and drove without destination or purpose in a southwesterly direction eventually reaching the Oklahoma turnpike. Eddings had in the car a shotgun and several rifles he had taken from his father. After he momentarily lost control of the car, he was signalled to pull over by Officer Crabtree of the Oklahoma Highway Patrol. Eddings did so, and when the Officer approached the car, Eddings stuck a loaded shotgun out of the window and fired, killing the Officer.

Because Eddings was a juvenile, the State moved to have him certified to stand trial as an adult. Finding that there was prosecutive merit to the complaint and that Eddings was not amenable to rehabilitation within the juvenile system, the

pg 10

Handwritten notes:
LTP ✓
Please call me
JH

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

From: Justice Powell

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5727

MONTY LEE EDDINGS, PETITIONER v. OKLAHOMA

**ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF OKLAHOMA**

[November —, 1981]

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Because Eddings was a juvenile, the State moved to have him certified to stand trial as an adult. Finding that there was prosecutive merit to the complaint and that Eddings was not amenable to rehabilitation within the juvenile system, the

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— page 3, 4, 9, 10

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

From: Justice Powell

Manipulated: _____

Re-manipulated: ~~JAN 4 1982~~

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5727

MONTY LEE EDDINGS, PETITIONER v. OKLAHOMA

**ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF OKLAHOMA**

[January —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

Petitioner Monty Lee Eddings was convicted of first degree murder and sentenced to death. Because this sentence was imposed without "the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases," *Lockett v. Ohio*, 438 U. S. 586, 606 (1978) (opinion of BURGER, C.J.), we reverse.

I

On April 4, 1977, Eddings, a 16 year old youth, and several younger companions ran away from their Missouri homes. They travelled in a car owned by Eddings' brother, and drove without destination or purpose in a southwesterly direction eventually reaching the Oklahoma turnpike. Eddings had in the car a shotgun and several rifles he had taken from his father. After he momentarily lost control of the car, he was signalled to pull over by Officer Crabtree of the Oklahoma Highway Patrol. Eddings did so, and when the Officer approached the car, Eddings stuck a loaded shotgun out of the window and fired, killing the Officer.

Because Eddings was a juvenile, the State moved to have him certified to stand trial as an adult. Finding that there was prosecutive merit to the complaint and that Eddings was not amenable to rehabilitation within the juvenile system, the

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January 7, 1982

PERSONAL

80-5727 Eddings v. Oklahoma

Dear Sandra:

I have just read with interest your opinion concurring in part and in the judgment in this case.

As this is a capital case that has attracted national attention, I have been hopeful that we could have an unqualified opinion of the Court. I note that you join all of my opinion except the "characterization of the evidence and the weight to be given to it". I had not thought that my opinion characterized the evidence in anyway that encroached on the trial court's prerogative. My review of the evidence seemed necessary to make clear that factors relevant to Lockett were present in this case, and had been put aside by the Oklahoma courts as irrelevant to the sentence of death. I entirely agree with you that the significance and weight of the evidence is to be left to the trial court.

I would be happy to consider changes that might meet your concerns. I could make explicit, for example, that the significance and weight of the evidence is to be determined by the trial court on remand. I say something to this effect on page 12 of the opinion.

I welcome your concurring views, particularly your excellent rebuttal of the Chief Justice's dissent. If you should decide to join the opinion in its entirety, you could say - as we often do - that you write separately to make clear your understanding that consideration of the evidence is for the trial court and also to address more fully some aspects of this important case.

Finally, as this case is here on cert from a state court, I am not sure that Connor v. Finch (cited in your first footnote) would itself support our review of the

Lockett issue. For the reasons stated in the second paragraph of n. 9 (p. 10) of my opinion, it is clear that we do have authority to address the Lockett issue.

This, of course, is a personal note to you and I will, of course, respect whatever you decide to do.

Sincerely,

Justice O'Connor

lfp/ss

January 11, 1982

80-5727 Eddings v. Oklahoma

Dear Sandra:

On the enclosed pages 11 and 12 of the third draft of my opinion in this case, I have made changes in line with our discussion on Saturday.

I believe these are improvements, and I am grateful to you for suggesting them. If you have further suggestions I will be happy to consider them also.

Sincerely,

Justice O'Connor

lfp/ss

— page 11, 12

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

From: Justice Powell

Circulated: _____

Recirculated: JAN 13 1982

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5727

MONTY LEE EDDINGS, PETITIONER v. OKLAHOMA

**ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF OKLAHOMA**

[January —, 1982]

JUSTICE POWELL delivered the opinion of the Court.

Petitioner Monty Lee Eddings was convicted of first degree murder and sentenced to death. Because this sentence was imposed without "the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases," *Lockett v. Ohio*, 438 U. S. 586, 606 (1978) (opinion of BURGER, C.J.), we reverse.

I

On April 4, 1977, Eddings, a 16 year old youth, and several younger companions ran away from their Missouri homes. They travelled in a car owned by Eddings' brother, and drove without destination or purpose in a southwesterly direction eventually reaching the Oklahoma turnpike. Eddings had in the car a shotgun and several rifles he had taken from his father. After he momentarily lost control of the car, he was signalled to pull over by Officer Crabtree of the Oklahoma Highway Patrol. Eddings did so, and when the Officer approached the car, Eddings stuck a loaded shotgun out of the window and fired, killing the Officer.

Because Eddings was a juvenile, the State moved to have him certified to stand trial as an adult. Finding that there was prosecutive merit to the complaint and that Eddings was not amenable to rehabilitation within the juvenile system, the

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 20, 1982

Memorandum to the Conference

There are three cases being held for the decision in 80-5727, Eddings v. Oklahoma:

Legare v. Zant----80-6725 Cert. to Georgia SC

This case is here after the Georgia courts denied petitioner's effort to gain post-conviction relief. Petitioner argues that the jury was prevented from considering his youth as a mitigating factor. Petitioner was 17 years of age at the time of the killing. The prosecutor, on voir dire, asked nearly every prospective juror whether the defendant's youth would have any effect on the juror's consideration of the death penalty. According to petitioner, the few prospective jurors who said that they would consider the defendant's youth were struck by the state. In closing argument, the prosecutor referred back to his question on voir dire and urged the jury not to consider the defendant's youth. He said:

"I asked each and every one of you that if because of the age of the defendant in this case, you would be more likely to vote against the death penalty for him than you would, say, a thirty year old man ... I asked each one of you and each one of you said no ...

"And you'll have the satisfaction of knowing that you have, in a case where the evidence demanded, not only justified, but demanded the death penalty, if you disconsider his age, disconsider all of those things which you're not supposed to consider...

"Just remember the evidence. ... Push the age of the defendant out of your mind. He may be seventeen years chronologically but he's older than any of us in the ways of evil ..." Pet. at 21.

Furthermore, during the defense counsel's closing argument, the prosecutor objected to his statement to the jury that "if you're going to take a seventeen year old boy and electrocute him, now--where are you going to cut it off,

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 1, 1981

Re: No. 80-5727 Eddings v. Oklahoma

Dear Lewis:

In the event that none of my senior colleagues in dissent intend to write in this case, I shall.

Sincerely,



Justice Powell
cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 1, 1981

Dear Chief:

In circulating my earlier memo stating that I would write a dissent in No. 80-5727, Eddings v. Oklahoma, I had forgotten your earlier memo stating that you would dissent in that case. I will, of course, await your dissent.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 5, 1982

Re: No. 80-5727 Eddings v. Oklahoma

Dear Chief:

Please join me in your dissenting opinion in this case.

Sincerely,

whr

The Chief Justice

Copies to the Conference

David - please
comply

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 2, 1981

Re: 80-5727 - Eddings v. Oklahoma

Dear Lewis:

Your opinion is excellent and my join is unqualified. I make only one trivial suggestion that you are surely free to reject. In the last sentence of footnote 10 on page 10, instead of saying "we require", I wonder if it might be better to say "Lockett requires"?

Respectfully,



Justice Powell

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 2, 1981

Re: 80-5727 - Eddings v. Oklahoma

Dear Lewis:

Please join me.

Respectfully,



Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

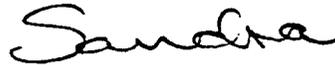
December 3, 1981

No. 80-5727 Eddings v. Oklahoma

Dear Lewis,

I plan to write a separate concurrence in this case expressing agreement with your application of the rule in Lockett to the circumstances of this case, but also indicating certain other observations concerning the application of the death penalty to minors.

Sincerely,



Justice Powell

Copies to the Conference

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

From: Justice O'Connor

Circulated: JAN 7 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-5727

MONTY LEE EDDINGS, PETITIONER, *v.* OKLAHOMA
ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEAL
OF OKLAHOMA

[January —, 1982]

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I concur in the judgment of the Court and in Parts I and II of its opinion. I also agree with the Court that the rule in *Lockett v. Ohio*, 438 U. S. 586 (1978), requires the trial court to consider and weigh all of the mitigating evidence concerning the petitioner's family background and personal history.* However, I do not join the Court's characterization

* Despite THE CHIEF JUSTICE's argument that we may not consider the *Lockett* issue because it was never fairly presented to the court below, there is precedent for this Court to consider the merits of the issue. In *Wood v. Georgia*, 450 U. S. 261, 265, n. 5 (1981), this Court wrote:

"Even if one considers that the conflict-of-interest question was not technically raised below, there is ample support for a remand required in the interests of justice. See 28 U. S. C. § 2106 (authorizing this Court to 'require such further proceedings to be had as may be just under the circumstances')."

In *Connor v. Finch*, 431 U. S. 407 (1977), the appellants did not make a blanket challenge to a House reapportionment plan, even though they challenged particularly egregious, localized violations in the plan. Nevertheless, the Court wrote:

"And even if the constitutional validity of the entire court-ordered House plan could not appropriately be viewed as an issue implicitly raised by the parties, this Court has the authority and the duty in exceptional circumstances to notice federal-court errors to which no exception has been taken, when they 'seriously affect the fairness . . . of judicial proceedings.'" *Id.*,

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 11, 1982

No. 80-5727 Eddings v. Oklahoma

Dear Lewis,

I am pleased with the proposed changes. When you circulate them, I will then circulate a revised concurrence, eliminating any objections to your opinion and any references to the characterization of the evidence and the weight to be given it.

Sincerely,



Justice Powell

pp. 1, 3,

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

2nd DRAFT

From: Justice O'Connor

SUPREME COURT OF THE UNITED STATES

No. 80-5727

Filed: _____
Recirculated: JAN 15 1982

MONTY LEE EDDINGS, PETITIONER, v. OKLAHOMA

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEAL OF OKLAHOMA

[January —, 1982]

JUSTICE O'CONNOR, concurring. *in my opinion*

I write separately to address more fully the reasons why this case must be remanded in light of *Lockett v. Ohio*, 438 U. S. 586 (1978), which requires the trial court to consider and weigh all of the mitigating evidence concerning the petitioner's family background and personal history.*

omission

Because sentences of death are "qualitatively different" from prison sentences, *Woodson v. North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, J.), this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.

*Despite THE CHIEF JUSTICE's argument that we may not consider the *Lockett* issue because it was never fairly presented to the court below, there is precedent for this Court to consider the merits of the issue. In *Wood v. Georgia*, 450 U. S. 261, 265, n. 5 (1981), this Court wrote:

"Even if one considers that the conflict-of-interest question was not technically raised below, there is ample support for a remand required in the interests of justice. See 28 U. S. C. § 2106 (authorizing this Court to 'require such further proceedings to be had as may be just under the circumstances')."

omission

Because the trial court's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.