No. 22-490

IN THE

Supreme Court of the United States

LYDELL CHESTNUT, Deputy Warden of Broad River Road Correctional Secure Facility,

Petitioner,

vs.

QUINCY J. ALLEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is a case in which a defendant who had murdered four people in two states presented as mitigation testimony that he had schizophrenia and an eating disorder, and the state presented testimony that he did not have schizophrenia but was malingering. The judge stated that he had considered all the mental health testimony and that the defendant had not proved he had schizophrenia. The state PCR court found that the judge had considered the eating disorder but assigned it little weight. The Court of Appeals for the Fourth Circuit found that the trial judge had not given proper consideration to the eating disorder, in violation of the rule of *Lockett* v. *Ohio* and its progeny, and that the state PCR court's holding to the contrary was unreasonable under 28 U. S. C. § 2254(d). This raises the following questions:

As stated by Petitioner:

1. Did the Fourth Circuit violate 28 U. S. C. § 2254(d) limitations and needlessly overturn a state death sentence on an insubstantial premise that Allen's mental health evidence was not afforded "meaningful consideration and effect" when the judge stated at sentencing that he had considered all the mental health evidence but did not explicitly reference Allen's eating disorder?

Fairly included as a logical prerequisite to Petitioner's question:

2. Does the United States Constitution actually require "meaningful consideration and effect" of background evidence with no direct connection to the crimes or the defendant's free will to commit them? That is, is the rule of *Lockett* v. *Ohio* really in the Constitution, and if not should that precedent be overruled?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Statutes

Secondary Authorities

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No counsel, party, or any person or entity other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

This case involves the extended relitigation in federal court of issues litigated and fairly decided in state court, causing excessive delay in the execution of a just sentence for horrible crimes. This delay is unnecessary, because the rule claimed to have been violated is not really a federal question at all. Such unnecessary and unjust delay is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

This is a capital case of extreme, horrifying aggravating circumstances in which the only established mitigating circumstances are tangential, with little or no relation to the crimes or the defendant's culpability for them.

Quincy Allen aspired to be a mafia hit man. See *State* v. *Allen*, 687 S. E. 2d 21, 23 (S.C. 2009) (direct appeal). In July 2002, he began practicing by shooting a homeless man, James White, twice with a shotgun. White miraculously survived. *Id*., at 22. Three days later he killed Dale Hall by shooting her three times, "placing the shotgun in her mouth as she pleaded for her life." He then burned Ms. Hall's body with gasoline. *Ibid*.

The following month, Allen got into an argument in a restaurant with two sisters. The argument escalated when the boyfriend of one of the sisters, Brian Marquis, entered the restaurant, accompanied by his friend, Jedediah Harr. After the confrontation, when Harr and Marquis were in Harr's car, Allen fired his gun at Marquis but hit Harr in the head, killing him. *Ibid*.

Shortly afterward, Allen committed two murders in North Carolina, for which he was convicted in that

state. *Ibid*.; App. 235, and n. 4 (state post-conviction review ("PCR") decision).

In the present South Carolina case, Allen pleaded guilty to two counts of murder (Hall and Harr), one count of assault and battery with intent to kill (White), and four other crimes. He was sentenced to death for the murders. See *Allen*, 687 S. E. 2d, at 22.

The penalty trial was "a 10 day, heavily litigated and zealously argued case." Pet. for Cert. 6. The parties' mental health experts disagreed on whether Allen had schizophrenia but agreed that he had rumination disorder. App. 2 (Fourth Circuit opinion). Judge Cooper, the trial judge, explained his decision in a detailed statement. App. 208-223.

Judge Cooper expressly stated that he had considered the "list of mental illness as described by" the defense expert as well as the evidence regarding Allen's troubled upbringing. App. 209. However, Judge Cooper found "I have not seen convincing evidence that Mr. Allen had a *major* mental illness at the time of the crimes in 2002." App. 210 (emphasis added). This statement is followed by another clear indication that the judge did consider lesser mental illnesses, his acknowledgment of "a series of short-stay hospitalizations ... no recognition of a mental illness that required or demanded a treatment program." *Ibid*.

Four times, Judge Cooper qualified his discussion of mental illness with the limitation that he was speaking of a *major* mental illness. See App. 210 (twice), 211 (twice). In the last reference, he refers to testimony regarding "a major mental illness characterized by delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior, and negative symptoms, such as affective flattening, alogia, or

avolition." App. 211-212. Obviously, he was speaking of schizophrenia, not rumination disorder.

On state post-conviction review, trial counsel testified that he thought at the time of the hearing that Judge Cooper had not complied with *Lockett* v. *Ohio*, 438 U. S. 586 (1978). App. 300-301, and n. 21. The PCR court did not interpret the judge's statement that way, however. The court found that the trial judge had made a "global assessment of the facts and circumstances" presented but simply "did not give the evidence of mental illness the weight [the defense] wanted him to give." App. 301.

This interpretation arose in the context of an ineffective assistance claim rather than a straight *Lockett* claim, as Allen did not make a *Lockett* claim. Even so, the holding effectively rejects a *Lockett* theory for this case. The State has chosen not to make a procedural default argument in this Court, which is its prerogative. See *Banks* v. *Dretke*, 540 U. S. 668, 705 (2004).

The South Carolina Supreme Court summarily denied certiorari and denied rehearing. App. 39. On federal habeas corpus, the district judge interpreted Judge Cooper's statement the same way that the state PCR judge did. He had considered all the mitigating evidence but did not give the bad childhood or the established mental diagnosis much weight. App. 127. Therefore, Allen had "fail[ed] to show the PCR court's ruling is contrary to, or an unreasonable application of, clearly established federal law or is based on an unreasonable determination of the facts." *Ibid*. A divided panel of the Court of Appeals for the Fourth Circuit reversed, Judge Rushing dissenting. App. 72.

SUMMARY OF ARGUMENT

The State asks this Court to review the Fourth Circuit's finding that the state PCR's court decision was not merely incorrect but unreasonable within the meaning of 28 U. S. C. § 2254(d). On that ground, the decision is not merely erroneous but obviously so. The PCR court interpreted the trial judge's statement as not ignoring the evidence at issue but merely assigning it little weight, especially when weighed against the enormity of the aggravating factors in this case. That would be entirely within the sentencer's authority. That interpretation is likely correct but certainly reasonable. The Fourth Circuit majority's decision to the contrary is so clearly wrong as to warrant summary reversal.

However, the clear error by the Court of Appeals in this case raises a deeper question, one fairly included in the state's Question Presented as a logical prerequisite. Why is this hair-splitting distinction between disregarding marginal mitigating evidence and assigning it little weight a federal constitutional question at all? Did the Eighth Amendment, ratified in 1791, *really* require consideration of every scrap of mitigation a defendant wants considered? That is, was *Lockett* v. *Ohio* wrongly decided, and if so should it be overruled?

Lockett was clearly wrong on the standard of original understanding currently used in this Court's interpretation of constitutional provisions. There was no consideration of mitigation at all in murder cases in 1791, and there was none for the highest degree of murder in most states when the Fourteenth Amendment was ratified in 1868.

Lockett meets the criteria for overruling laid out in recent decisions of this Court. It was egregiously wrong and poorly reasoned. It was inconsistent with prior

decisions only a few years old at the time. The legal landscape has changed in that the quasi-mandatory laws enacted in the belief that *Furman* v. *Georgia* required them have long since been amended or repealed to restore discretion. That is, *Lockett* originally served a useful catalytic function which is no longer needed. The factual landscape has changed in that what seemed like a simple, easily complied-with rule at the time has now produced long, expensive trials, bloated appeals, and protracted litigation over marginal mitigating evidence and counsel's effectiveness in presenting it, all to the delay and hence denial of justice in the very worst murder cases.

Far from providing the clarity that Chief Justice Burger sought, *Lockett* spawned a chaotic line of decisions that Chief Justice Roberts aptly described as "a dog's breakfast of divided, conflicting, and ever-changing analyses."

There is no reliance interest weighing against overruling. The prosecution cannot appeal, so those defendants who relied on *Lockett* to form their penalty-phase strategy already have the benefit of lesser sentences that cannot be increased.

Whether *Lockett* v. *Ohio* should be overruled is an important question deserving of this Court's consideration on full briefing and argument.

ARGUMENT

I. The state court's decision was eminently reasonable, and the Court of Appeals' holding to the contrary is clearly erroneous.

"As amended by AEDPA, [28 U. S. C.] § 2254(d) ... preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree

that the state court's decision conflicts with this Court's precedents. It goes no further." *Harrington* v. *Richter*, 562 U. S. 86, 102 (2011). Yet time and again, this Court has needed to reverse decisions of courts of appeals that effectively decided the case *de novo* and then declared any contrary state court decision "unreasonable." See, e.g., *ibid*.; *Sexton* v. *Beaudreaux*, 585 U. S. __, 138 S. Ct. 2555, 2560, 201 L. Ed. 2d 986, 992 (2018). Frequently, this Court deems it appropriate to reverse summarily, as in *Sexton*. That is a possible disposition in this case.

A fair reading of the sentencing judge's remarks is that he understood and complied with the rule of *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion) and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), but simply did not find that the rumination disorder and bad childhood had significant mitigating weight. See Appendix to Petition for Certiorari ("App.") 208-223. The state PCR court read it that way, see App. 301, and had a similar assessment of the evidence. See App. 299.

In 1976, this Court effectively decided that guided discretion was the sole constitutional method for capital sentencing, see *Woodson* v. *North Carolina*, 428 U. S. 280, 303 (1976) (lead opinion), rejecting the mandatory laws that had recently been enacted in the justified belief that *Furman* v. *Georgia*, 408 U. S. 238 (1972), required mandatory capital sentencing. See Scheidegger, Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism, 17 Ohio St. J. Crim. L. 131, 147 (2019). The decision necessarily meant that the weight to be given to various mitigating circumstances would vary with the opinions of the sentencers. That variation was substantially increased two years later in *Lockett*, when this Court stripped the state legislatures of the authority to decide which circumstances would be considered mitigating. See

Lockett, 438 U. S., at 623 (White, J., dissenting on this point though concurring in the judgment).

When a majority embraced the *Lockett* rule four years later in *Eddings*, the Court noted, "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." 455 U. S., at 113-114 (emphasis in original). In *Eddings*, as in the present case, the sentence was decided by a judge, not a jury, and the qualifying phrase "as a matter of law" was included and emphasized because of the judge's dual role in such a proceeding. The judge's decision that the mitigating evidence could not be considered as a matter of law, instructing himself as he would a jury, was not valid. However, if the judge had decided, as a properly instructed jury might, that the evidence proffered as mitigating was not mitigating or was not entitled to significant weight, that would have been within his discretion.

In a study of jurors' statements about how much weight they give different factors, Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1562 (1998), noted two categories of "reduced culpability" evidence, which he dubbed "proximate" and "remote." The first category "is evidence that 'suggests any impairment of a defendant's capacity to control his or her criminal behavior, or to appreciate its wrongfulness or likely consequences.' " *Ibid*. "Remote" evidence "includes such things as abuse as a child or other deprivations." *Ibid*. The jurors in the study gave considerably more weight to proximate than remote evidence. Two-thirds gave no weight to childhood abuse, and only 15% considered a background of poverty to be mitigating. *Id*., at 1565.

In a much-quoted passage in her concurrence in *California* v. *Brown*, 479 U. S. 538, 545 (1987), Justice O'Connor expressed her view that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are *attributable* to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (Emphasis added.) But the Jury Project data indicate that a great many people in our society do not buy the argument that the crime is attributable to the background. After all, bad childhood evidence often comes in the form of testimony from siblings with equally bad childhoods who have not murdered anyone. "Mental problems" encompass a great many conditions which may be proximate or remote in Garvey's classification, and most people think that difference is substantial in assessing culpability.

Reading the trial judge's sentencing comments and the Court of Appeals majority's opinion, it is evident that the trial judge agrees with the majority view that remote evidence has little, if any, weight, while proximate evidence is much more weighty. That is, no doubt, why most of the discussion concerns whether schizophrenia had been proved, and there was little mention of rumination disorder. That explains why the judge referred four times to the question of whether the defendant had a *major* mental illness. See App. 210-211. That qualifier must be there for a reason. Whether a mental illness might be considered "major" or not in other contexts, in the context of assessing culpability an illness that impairs free will is much more significant than one that is merely a problem in a person's life with no impact on volition or *mens rea*. In a sentencing context, a statement that no major mental illness had been proved is consistent with undisputed evidence that the defendant has rumination disorder, an unfortunate

condition but one with little or no bearing on his free will to commit the crimes or refrain from committing them.

The trial judge stated unequivocally that he did consider the background evidence and the full list of mental illnesses. App. 209. It would take a very powerful indication to the contrary to contradict this plain statement, and there is none. The state PCR court's finding that the judge did comply with the *Lockett-Eddings* rule, App. 301, is very likely correct, but it is most certainly within the range of reasonable disagreement. The Court of Appeals majority's holding to the contrary is the unreasonable decision in this case. It warrants summary reversal.

II. The question of whether *Lockett* was wrongly decided and should be overruled is fairly included in the question presented.

While summary reversal on a narrow issue is a possible disposition, this may be an occasion to take a step back and ask a broader question. Why is this sentencing issue in this state-court case a federal question at all? Why does the United States Supreme Court or a United States Court of Appeals need to pick over state court sentencing records looking for the fine distinction between excluding a marginal mitigating factor from consideration and including that factor but giving it little weight?

The reason, of course, is *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and its progeny. Without the *Lockett* line, there would be no federal question here. There would be no jurisdiction to consider it on federal habeas corpus. See 28 U. S. C. §§ 2241(c)(3), 2254(a); see also *Kimmelman* v. *Morrison*, 477 U. S. 365, 383 (1986) (§ 2254(a) requirement is jurisdictional). The correct-

ness of *Lockett* is "a necessary predicate to the resolution of the question presented in the petition," *Caspari* v. *Bohlen*, 510 U. S. 383, 390 (1994), and therefore "a subsidiary question fairly included in the question presented." See *id*., at 389.

While it is sometimes said that this Court will not consider issues raised only by *amici curiae*, some of the Court's most important decisions are contrary examples. See, e.g., *Teague* v. *Lane*, 489 U. S. 288, 300 (1989) (retroactivity raised by *amicus*); *Stovall* v. *Denno*, 388 U. S. 293, 294, n. 1 (1967) (same); *Mapp* v. *Ohio*, 367 U. S. 643, 646, n. 3 (1961) (Fourth Amendment issue raised by *amicus*). In the present case, with the question raised by *amicus* at the petition stage, the objection that the issue has not been fully argued in the merits briefs could be easily addressed by adding it explicitly in the order granting certiorari.

For the reasons stated in the next two parts, the question of the validity of *Lockett* is important and worthy of this Court's attention. Neither its status as subsidiary to the petitioner's stated question nor the fact that it is explicitly raised only by an *amicus* should prevent its consideration.

III. *Lockett* v. *Ohio* was wrongly decided.

The wrongness of *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion), is the simplest question in this case. *Lockett* is a remnant of a bygone era. There was a time when this Court regularly declared new rules to be contained in old provisions of the Constitution, rules that were clearly not understood to be there at the time those provisions were adopted. See, e.g., *Miranda* v. *Arizona*, 384 U. S. 436, 500 (1966) (Clark, J., dissenting) ("*ipse dixit*"); *id*., at 505 (Harlan, J., dissenting) ("strained reading of history"); *Doe* v.

Bolton, 410 U. S. 179, 221 (1973) (White, J., dissenting) ("nothing in the language or history of the Constitution").

Today it is well established that the original understanding of a constitutional provision, also stated as text informed by history, is the key to correct interpretation. See *Crawford* v. *Washington*, 541 U. S. 36, 49 (2004) (confrontation, "original understanding"); *District of Columbia* v. *Heller*, 554 U. S. 570, 595 (2008) ("text and history"); *Alleyne* v. *United States*, 570 U. S. 99, 103 (2013) (jury trial on mandatory minimum, "original meaning"); *Ramos* v. *Louisiana*, 590 U. S. __, 140 S. Ct. 1390, 1395, 206 L. Ed. 2d 583, 589 (2020) ("what the term 'trial by an impartial jury ...' meant at the time of the Sixth Amendment's adoption"); *N. Y. State Rifle & Pistol Ass'n* v. *Bruen*, 597 U. S. __, 142 S. Ct. 2111, 2137, 213 L. Ed. 2d 387, 417 (2022) ("*Bruen*") (" 'original meaning' ").

Some precedents that are indisputably contrary to the original understanding of constitutional provisions survive by virtue of *stare decisis*, see *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000), and some do not. See *Dobbs* v. *Jackson Women's Health Org.*, 597 U. S. __, 142 S. Ct. 2228, 2279, 213 L. Ed. 2d 545, 600 (2022) (slip op., at 69). But all were wrongly decided as an original matter.

There is no good reason for the Eighth Amendment to be exempt from the principles of interpretation that govern the other components of the Bill of Rights. *Miller* v. *Alabama*, 567 U. S. 460, 469 (2012), was candid in declaring that the Court's decisions under the Eighth Amendment were free of the inconvenient "historical prism." But see *id*., at 506 (Thomas, J., dissenting) (line of cases on which *Miller* is based, including *Lockett*, "finds 'no support in the text and history of the Eighth Amendment' "). But a candid

description of how the Court has ignored original understanding in the past is not a principled basis for doing so in the future. More recently, the Court has invoked "the original and historical understanding of the Eighth Amendment" in a method of execution case. *Bucklew* v. *Precythe*, 587 U. S. __, 139 S. Ct. 1112, 1122, 203 L. Ed. 2d 521, 531-532 (2019). Unless the Court is prepared to split Eighth Amendment jurisprudence into two parts, one governed by text and history and the other not, the same principles should apply to all Eighth Amendment cases.

The *Lockett* plurality opinion announced a constitutional right of capital defendants under the Eighth Amendment "that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U. S., at 604. There can be no doubt that this holding is contrary to the original understanding of the Eighth Amendment. "At the first step, the government may justify its regulation by 'establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood.' " *Bruen*, 142 S. Ct., at 2126, 213 L. Ed. 2d, at 405 (quoting *Kanter* v. *Barr*, 919 F. 3d 437, 441 (CA7 2019)). If so, " 'the analysis can stop there.' " *Ibid*. (quoting *United States* v. *Greeno*, 679 F. 3d 510, 518 (CA6 2012)).

The *Lockett* analysis can stop there. There is no question that a mandatory sentence of death for murder was the law throughout the United States at the time the Eighth Amendment was ratified. See *Woodson* v. *North Carolina*, 428 U. S. 280, 289 (1976) (lead opn.). There is also no question that such mandatory sentences remained the law in federal courts and most states at the time the Fourteenth Amendment was

adopted. By 1868, just three states had abolished capital punishment, W. Bowers, Executions in America, Table 1-1, p. 6 (1974), and only six more had adopted discretionary sentencing laws by that year. See *id*., Table 1-2, at 8. While there is some debate as to whether we should be looking at 1791 or 1868, that debate is moot in this case as both dates yield the same answer. Cf. *Bruen*, 142 S. Ct., at 2163, 213 L. Ed. 2d, at 446 (Barrett, J., concurring). Either all the states or three-quarters of them (28/37) had mandatory death sentences for murder at the time of adoption. Developments many decades later, see *Woodson*, at 291-292, do not change that conclusion.

The *Lockett* plurality opinion itself effectively concedes that the rule is based on the plurality's assessment of policy concerns rather than a constitutional mandate based on text and history. "We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases." *Lockett*, 438 U. S., at 604-605. That is a *non sequitur*. "Important" does not equal "constitutionally required." There are countervailing considerations that may make an "anything goes" approach inappropriate. In noncapital sentencing, it was already widely recognized in 1978 that individualization of sentences had gone too far, and more structure was needed to reduce sentence disparity. A reform effort was underway that later culminated in the Sentencing Reform Act of 1984. See *id*., at 622, n. 5 (White, J., dissenting in part); *United States* v. *Booker*, 543 U. S. 220, 292 (2005) (Stevens, J., dissenting). If the balancing of individualization versus consistency is within the legislative power for noncapital sentencing, why is it not for

capital sentencing? Certainly nothing in the text or history of the Eighth or Fourteenth Amendments says it is not.

In the context of its times, *Lockett* did serve a useful function initially. To put it bluntly, this Court had committed a major error in *Furman* v. *Georgia*, 408 U. S. 238 (1972). That precedent was widely and justifiably interpreted as requiring mandatory sentencing for a capital punishment law to be valid, with the result that Congress and many state legislatures passed laws that were more severe than the ones they would have enacted if left to their own policy preferences. See Scheidegger, 17 Ohio St. J. Crim. L., at 145-156. *Lockett* served as a catalyst to facilitate the repeal of these laws and their replacement with discretionary laws. But that catalytic function was completed decades ago.

Today, *Lockett* stands as a restriction on legislative authority to balance individualization against other important considerations in capital sentencing. This restriction has no basis in the text of the Eighth Amendment. It should stand as *stare decisis* if and only if it meets the criteria established in this Court's precedents. In the next part, we will show that there is enough of a question on this point to warrant this Court's attention.

IV. *Lockett* v. *Ohio* meets the criteria for overruling.

"[O]verruling a precedent is a serious matter. It is not a step that should be taken lightly. Our cases have attempted to provide a framework for deciding when a precedent should be overruled, and they have identified factors that should be considered in making such a decision." *Dobbs* v. *Jackson Women's Health Org.*, 597 U. S. __, 142 S. Ct. 2228, 2264, 213 L. Ed. 2d

545, 582 (2022) (slip op., at 43) (citing *Janus* v. *State, County, and Municipal Employees*, 585 U. S. __, 138 S. Ct. 2448, 2478-2479, 201 L. Ed. 2d 924, 955 (2018) (slip op., at 34–35); *Ramos* v. *Louisiana*, 590 U. S. __, 140 S. Ct. 1390, 1414, 206 L. Ed. 2d 583, 610-611 (2020) (slip op., at 7-9) (Kavanaugh, J., concurring in part)).

The *Ramos* concurrence cited in *Dobbs* listed seven factors:

> "the quality of the precedent's reasoning; the precedent's consistency and coherence with previous or subsequent decisions; changed law since the prior decision; changed facts since the prior decision; the workability of the precedent; the reliance interests of those who have relied on the precedent; and the age of the precedent." *Ramos*, 140 S. Ct., at 1414, 206 L. Ed. 2d, at 610-611.

Six of these factors point to overruling *Lockett*.

A. Quality of Reasoning.

As a policy argument submitted to a legislature, *Lockett*'s discussion of individualized sentencing would not be egregiously wrong, see *Lockett*, 438 U. S., at 602-605, though it would certainly be debatable. See *id*., at 622-623, n. 5 (White, J., dissenting in part). But that was not the question. The question was whether the Constitution permanently removes from the people the authority to make this decision and to revise it in the future if it is found to be mistaken. Cf. *Dobbs*, 142 S. Ct., at 2265, 213 L. Ed. 2d, at 585 (slip op., at 45). The reasoning to support this proposition is not merely erroneous in *Lockett*, it is absent. The rule of that case "bears no relation whatever to the text of the Eighth Amendment," *Walton* v. *Arizona*, 497 U. S. 639, 671 (1990) (Scalia, J., concurring in part and concurring in

the judgment),[2] and the opinion made no attempt to establish a relation.

The *constitutional* basis for a requirement to consider mitigating circumstances at all went back only two years to a "death is different" pronouncement in the lead opinion in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). *Woodson* acknowledged that individualized sentencing was generally a policy choice "rather than a constitutional imperative" but announced such an imperative for capital cases only. *Id*., at 304. That pronouncement itself had no basis in the text or history of the Eighth Amendment. See *Lockett*, 438 U. S., at 603-604. But even *Woodson* did not go so far as to constitutionalize a rule that *everything* the defendant throws against the wall must be considered and that legislatures are powerless to draw any boundaries. See *id*., at 604. The *Lockett* plurality just announced that drastic rule out of blue sky. See *ibid*. To the extent that *Lockett* went beyond *Woodson*, "it failed to ground its decision in text, history, or precedent." Cf. *Dobbs*, 142 S. Ct., at 2266, 213 L. Ed. 2d, at 585 (slip op., at 45).

Ipse dixit is not reasoning. *Lockett*'s non-reasoning was egregiously wrong.

B. Consistency and Coherence with Previous and Subsequent Decisions.

Lockett was not consistent with previous decisions. As Justice White noted dissenting in part, the decision "completed [the Court's] about-face since *Furman* v. *Georgia*, 408 U. S. 238 (1972)." 438 U. S., at 622. Having previously said discretion in capital sentencing must be guided, the Court was effectively requiring unguided discretion on the mitigating side.

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2. *Walton* was overruled on another ground in *Ring* v. *Arizona*, 536 U. S. 584 (2002).

See *ibid*. He also noted that despite what the plurality opinion said, it had eviscerated *Proffitt* v. *Florida*, 428 U. S. 242 (1976), and *Jurek* v. *Texas*, 428 U. S. 262 (1976), decided just two years earlier. See *Lockett*, at 623. He was right.

Proffitt approved a capital sentencing statute which directed that "[e]vidence *may* be presented on any matter the judge deems relevant to sentencing and *must* include matters relating to certain legislatively specified aggravating and mitigating circumstances." 428 U. S., at 248 (emphasis added). The statute clearly did not promise that every aspect of the defendant's background that he proffered as mitigating would be considered, but the Court upheld the statute nonetheless. *Lockett* did not say that *Proffitt* was overruled, and the Florida courts continued to use their approved system until this Court yanked the rug out from under them, based on *Lockett*, in *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987). Texas suffered a similar fate. See Scheidegger, 17 Ohio St. J. Crim. L., at 156.

The subsequent decisions in the *Lockett* line have been incoherent. This factor substantially overlaps with the workability factor, and we will discuss it under that heading.

C. Changed Law.

The change in the law since *Lockett* is an unusual variation on the "real-world consequences" consideration noted in *Ramos*, 140 S. Ct., at 1415, 206 L. Ed. 2d, at 611 (slip op., at 8) (Kavanaugh, J., concurring in part). While *Lockett* had no basis in the Constitution, it did deal with a real-world situation which no longer exists, a situation of this Court's own creation. Before *Furman* v. *Georgia*, the Ohio House of Representatives had passed a capital sentencing statute based on the Model Penal Code. Misled by *Furman*, the Senate

changed it to a statute that was mandatory unless one of only three mitigating circumstances was present. As a result, Sandra Lockett's limited role in the crime and lack of intent to kill could not be considered. See Scheidegger, 17 Ohio St. J. Crim. L., at 151-153.

The sweeping mandate of the *Lockett* rule served as a useful catalyst to force the revision of laws imposing severe limitations on mitigating circumstances which the state legislatures would probably not have enacted if left to their own policy preferences. See *supra*, at 15. The "*Furman* hangover" is long gone, see Scheidegger, 17 Ohio St. J. Crim. L., at 157, and any limitations that may be imposed legislatively would be deliberate policy choices. Today, we have the opposite situation. Legislatures that may wish to place some restraints on marginally mitigating evidence for the reasons discussed in Part IV-D below cannot do so.

Reading Chief Justice Burger's opinion in *Lockett*, one gets the impression that he believed the Court was imposing only a clear, simple, easily followed requirement. See *Lockett*, 438 U. S., at 602 ("clearest guidance"); *id*., at 608 ("statute must not preclude"). That might have been true if the *Lockett* mandate and the subsequent rule of *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), had been narrowly construed by later opinions, but instead the mitigation line was bloated out of all proportion. See *Graham* v. *Collins*, 506 U. S. 461, 492-497 (1993) (Thomas, J., concurring). Undoing the "contribution to rationality and consistency [the Court] made in *Furman*," *id*., at 492, was one consequence, but it was not the only one.

D. Changed Facts.

One major but indirect consequence of the *Lockett* line is a large contribution to the extreme delays that plague capital punishment. Decades of delay

between sentence and execution are common. The people and the surviving victims deserve better. See *Bucklew v. Precythe*, 587 U. S. __, 139 S. Ct. 1112, 1134, 203 L. Ed. 2d 521, 544 (2019).

In the early post-*Furman* cases, penalty decisions tended to be based largely on the information already presented to the jury in the guilt phase of the trial. See Scheidegger, 17 Ohio St. J. Crim. L., at 160. "Today, the defense demands, in addition to state-paid counsel, 'mitigation specialists' to investigate the defendant's entire life and mental health evaluations regardless of whether there is any reason to think the defendant has a mental illness." *Ibid.* Lengthy penalty trials full of marginally relevant mitigation evidence leads to swollen appellate records and consequently delayed appeals.

But the worst delays come after the direct appeal. The combination of the *Lockett* rule with the greatly expanded extent of ineffective assistance litigation has proved a toxic mixture. Despite the acknowledgment of the majority in *Rompilla* v. *Beard*, 545 U. S. 374, 383 (2005), that capital defense lawyers are not required to "scour the globe" for every speck of evidence regarding the defendant's life, they actually are. See *id*., at 404 (Kennedy, J., dissenting). That is only because the *Lockett* line mandates its admission and consideration. With unlimited evidence required, there are unlimited targets for attacking the performance of trial counsel. This is, in part, why habeas corpus attacks on capital judgments have become massive documents. In *In re Reno*, 55 Cal. 4th 428, 514-515, 283 P. 3d 1181, 1246 (2012), the California Supreme Court noted that successive habeas corpus petitions in capital cases were typically hundreds of pages long and made up to a substantial extent of claims of ineffective assistance of counsel.

This Court recently upheld, against Eighth Amendment challenge, a statute that authorizes the judge to exclude marginally mitigating evidence "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." *United States* v. *Tsarnaev*, 595 U. S. __, 142 S. Ct. 1024, 1037-1038, 212 L. Ed. 2d 140, 155-156 (2022) (slip op., at 13-15). Why, then, can a legislature not exclude categories of marginally mitigating evidence on the ground that the minimal probative value of such evidence is outweighed by the delay and hence denial of justice that comes from litigating it or from litigating attacks on counsel for not finding it or not introducing it?

The present case suggests a prime target for exclusion: a mental disorder that is a problem in the defendant's life but has no connection with the crimes or his free will to commit or refrain from committing them.

E. Workability.

Thirty years after Chief Justice Burger thought he had finally provided the states with clear guidance, Chief Justice Roberts described the resulting line of cases as "a dog's breakfast of divided, conflicting, and ever-changing analyses. That is how the Justices on *this* Court viewed the matter, as they shifted from being in the majority, plurality, concurrence, or dissent from case to case, repeatedly lamenting the failure of their colleagues to follow a consistent path." *Abdul-Kabir* v. *Quarterman*, 550 U. S. 233, 267 (2007) (dissent) (emphasis in original).

The familiar history is traced in the *Abdul-Kabir* dissent and need not be repeated here. To this we need only add the Court of Appeals' opinion in *Tsarnaev*,

supra. *Lockett* still does not provide clear guidance as it approaches the half-century mark.

F. Reliance.

The reliance factor is simple. There is none. It is unlikely that anyone has relied on the *Lockett* rule in deciding to commit murder, and any such reliance would not be worthy of respect. Defendants who relied on *Lockett* in their trial strategy have already received their sentences, and they will not be subject to any greater sentence because *Lockett* is overruled. Only defendants can appeal or collaterally attack criminal judgments. The prosecution cannot. A rule of procedure that favors only the defense side therefore creates no reliance interests.

The factors to be considered under *stare decisis* indicate that *Lockett* is a prime candidate for overruling or at least pruning back. This important issue warrants this Court's full consideration, given that no one else can correct the *Lockett* error.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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