In the

Supreme Court of the United States

SANDRA LOCKETT,

Petitioner,

--VS--

THE STATE OF OHIO,

Respondent

No. 76-6997
C-3

Washington, D. C.
January 17, 1978

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THE STATE OF OHIO,

Respondent

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Washington, D.C.

Tuesday, January 17, 1978

The above-entitled matter came on for argument at 1:06 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ANTHONY G. AMSTERDAM, ESQ., Stanford University Law School, Stanford, California 94305
For Petitioner

CARL M. LAYMAN, III, ESQ., Assistant Prosecuting Attorney, Appellate Review Division, Summit County, City-County Safety Building, 53 East Center Street, Akron, Ohio 44308
For Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 76-6997, Sandra Lockett against Ohio.

Mr. Amsterdam, you may proceed whenever you are ready.

ORAL ARGUMENT OF ANTHONY G. AMSTERDAM, ESQ.

ON BEHALF OF PETITIONER

MR. AMSTERDAM: Thank you, Mr. Chief Justice.

May it please the Court:

The case of Sandra Lockett versus Ohio raises many of the same issues relating to the constitutionality of the Ohio death penalty statutes that were involved in the Bell case just argued.

However, in the Lockett case there are some serious federal constitutional questions in regard to the procedures through which Miss Lockett's conviction of the crime of aggravated murder was obtained and because the Court will not and need not reach the question of penalty unless it affirms her conviction on the merits, I would like to devote some portion of my argument time to the issue of whether or not the Federal Constitution was violated in Miss Lockett's conviction by improper prosecutorial comment on her failure to take the witness stand in her defense.

In addressing this issue, let me if I may just describe very briefly the background of this trial and the

respective theories of the parties at the trial.

Miss Lockett stands convicted and condemned of the crime of aggravated murder for a killing of Sydney Cohen, a pawn shop proprietor in the course of a pawn shop robbery.

At the time that Mr. Cohen was killed, the gun was in the hands of Al Parker, the chief state prosecution witness in this case.

The prosecution's theory is that Parker, Petitioner's brother, James Lockett, one Nathan Dew and the Petitioner had conspired and planned together to rob Syd's Market Loan Company, that they had all gone there for that purpose, that the Petitioner had remained outside in the car and that the three men had gone in, committed the robbery in the course of which, according to his own testimony Mr. Cohen snatched at the gun and it went off accidentally and although the killing was totally outside the plan of the robbery, he was killed.

Now, the important thing to recognize --

QUESTION: You say "totally outside the plan." I am not sure what you mean by that, Mr. Amsterdam. They had bullets in the gun, did they not?

MR. AMSTERDAM: I refer Your Honor simply to Mr. Parker's own testimony. If Your Honor will look at page 62, the question was asked, "Now, Al, the purpose to go to the pawn shop was to do what? What was the plan when you went to the pawn shop? To do what?"

Answer, "To rob."

"It hadn't been discussed, the killing?"

"No, sir."

"Okay. That wasn't part of the plan?"

"No, sir."

That is what I mean, Your Honor.

QUESTION: Well, of course I suppose, on that theory, the perpetrators would not need any bullets in the gun if they had no intention whatever of making use of them, would they?

Would not an empty pistol have done just as well?

MR. AMSTERDAM: Well, Your Honor, the --

QUESTION: They loaded it there, I recall now.

MR. AMSTERDAM: There was a plan to -- they did not go into the pawn shop with a gun. They went in with bullets and they certainly did arm a gun which was in there. There is no doubt that the planning included using a weapon, a loaded weapon but the plan did not include killing. It is not one of these execution-style, kill the witness type of things, according to the prosecutor's own testimony.

For purposes of the self-incrimination issue, however, what is important is this, that the prosecution theory as against petition is entirely that she was a party to this conspiracy to go in and rob.

The defense theory was not that the Petitioner did

not know her brother and Dew and Parker or that she was somewhere else. The Defense admitted that she went with them to the pawn shop and sat outside but the Defense contention was that there was no plan to rob at all and that she thought that they were going in to pawn a ring.

Now, all of the evidence which connects the Petitioner with a specific plan to rob the pawnshop is Parker's testimony. If this Court will examine the opinion of the Ohio Supreme Court, it will find that its whole recitation of the facts of the case consist of a recitation of Parker's testimony with a statement that it was corroborated by the testimony of several other minor witnesses.

What is significant, however, is that the testimony of those witnesses, while corroborating parts of Parker's and while consistent with a theory of Petitioner's guilt, was also perfectly consistent with a theory of Petitioner's innocence, including the very theory of Petitioner's innocence espoused by the Petitioner herself, namely, that she was just along for the ride.

Now, against this background, the following things happened in trial. Petitioner did not testify. There was an unhappy incident in which her lawyer indicated she would take the stand but she declined and did not. She called the only two members of the conspiracy, Dew and her brother, whom the prosecution did not present -- because Parker was the chief

prosecution witness and they both took the Fifth in front of the jury, moving all of the conspirators out of account as possible witnesses and then, in the course of closing arguments in the case, the prosecutor made the argument of which we complain.

In a theme that recurs constantly throughout the argument and staccato repetition underlining for emphasis the theme, the prosecutor repeated again and again -- seven times in all -- that the prosecution's evidence was uncontradicted and unrefuted and the prosecutor closed uncontradicted and unrefuted evidence, nothing from the defense, no evidence from the defense.

Now, our submission is simply that in the context of this case that is a -- would be taken by the jury to direct their attention to the Defendant's failure to take the stand in her own behalf. It is therefore a forbidden comment on her privilege against self-incrimination and vitiates her conviction under Griffin versus California.

To argue this point, I think I need only make a factual analysis, if I may, of Parker's testimony because I think that if one understands what Parker's testimony is about and how this case appeared to the jury, the Fifth Amendment issue can only result one way.

If you look at Parker's testimony you will find that there are a total of 15 episodes which in any way could

conceivably connect Petitioner to the plot to rob the store.

Now, by 15 episodes, I do not want to give the impression that there is a lot of evidence. First of all, all this is Parker's testimony.

Secondly, many of these episodes are very minor details, quite consistent with innocence -- as consistent with innocence as with guilt. They are just probably historic.

But when I say episodes, I mean scenes. If you conceive of it as though we were projecting a movie or making a movie of these events, there would be 16 scenes and that is important because the question is, who is available to testify to each of these scenes?

Our submission is that the only relevant scenes, the only witnesses are Parker, the Defendant, the other co-defendants and therefore when the prosecutor says "Our evidence is uncontradicted,' the jury says, "Who could contradict it?"

Answer, "Only the Defendant."

QUESTION: Well, what do you do as counsel when you have only uncontradicted evidence? Do you mean you cannot tell the jury it is uncontradicted?

MR. AMSTERDAM: I mean, Mr. Justice Marshall --

QUESTION: No, just that one point. Of course, you can always say it is uncontradicted.

MR. AMSTERDAM: If you say on one occasion that the

evidence is uncontradicted, that would be a very different t hing than if you say it seven times uncontradicted and unrefuted. It also makes a difference whether Petitioner is the only person who can contradict or refute evidence. We are not arguing that the Prosecutor can never say evidence is uncontradicted. What we are arguing is that if the Prosecutor's description --

QUESTION: If the Defendant does not testify and puts on no defense, then the Prosecutor cannot say that his testimony that he has produced is uncontradicted.

MR. AMSTERDAM: No, I would not say that, Your Honor. I would say the Prosecutor may not amass such a repeated --

QUESTION: What, can he not say it three or four times?

MR. AMSTERDAM: It depends on the nature of the case.

QUESTION: I do not see how you can do that.

MR. AMSTERDAM: Well, Your Honor --

QUESTION: I do not see how you can muzzle the Prosecutor by your trial tactics.

MR. AMSTERDAM: Mr. Justice Marshall, it is one thing to affirmatively argue the credibility of a prosecution witness. It is another -- I know of some cases I have argued if you would not let me say uncontradicted, I would not know

how to argue because I was so happy to have it uncontradicted. You cannot say, muzzle the Prosecutor that way. And as Defense Counsel, I am for muzzling him, but you know --

MR. AMSTERDAM: Well, if the Prosecutor makes an argument which invites the jury to say to itself, "Gee, the Defendant did not take the stand. If she had taken the stand, then if she had been innocent, she would have taken the stand. But she did not take the stand so she must be guilty."

That, it seems to me, is what the privilege is all about. Now, the Prosecutor is arguing --

QUESTION: Do you think a jury -- jurors, intelligent jurors do not ask that question of themselves, even if the prosecutor has never mentioned a word about it?

MR. AMSTERDAM: That is certainly a risk which is involved in the system but it is the square holding in Griffin versus California that that risk cannot be increased in any way by comment on the part of any of the parties to the proceeding. A prosecutor cannot invite the jury to draw that conclusion, even though the jury might do it itself, nor can the Court and a prosecutor's argument which hammers home to the jury again and again, so that the jury must necessarily be thinking to itself, what we are being asked to convict on is the fact that the Defendant did not take the stand and answer the evidence of the prosecution. It is nothing more or less than a common --

QUESTION: And that he did not put on any testimony.

MR. AMSTERDAM: Pardon me, Mr. Justice Marshall?

QUESTION: And that the Defendant did not put on any testimony.

MR. AMSTERDAM: Not in the context of this case. It cannot mean that in the context of this case because in the context of this case, the only testimony the Defendant could have presented was the Defendant's own testimony. I will agree that the Prosecutor can say, can direct the jury's attention to the fact that there are other available witnesses whom the Defendant did not call but the very purpose of my analysis of Parker's testimony was to show that, in fact, there were no other witnesses in this case.

QUESTION: I trust, Mr. Amsterdam, you are not going to consume all of your time on this question. There are other questions in this case and I think you may fairly asume that some of those who voted to grant certiorari in this case were interested in those other questions.

MR AMSTERDAM: All right, I think that it may make sense for me to pass to the death penalty questions at this point.

QUESTION: You can answer this one yes or no, though. Was there an instruction in this case, any instruction from the Court as to the significance of the Defendant's not testifying?

MR. AMSTERDAM: Yes, there was. There was one paragraph --

QUESTION: This has no significance attached to it?

MR. AMSTERDAM: Your second point?

QUESTION: That says no significance should be attached to it?

MR. AMSTERDAM: That is correct.

QUESTION: Yes, thank you.

MR. AMSTERDAM: That is correct.

All right, then, if I may move to the death penalty issues in this case.

QUESTION: This first question is covered in your brief.

MR. AMSTERDAM: Pardon?

QUESTION: It is covered in your brief, is it not?

MR. AMSTERDAM: Yes.

QUESTION: The first question, yes.

MR. AMSTERDAM: The only thing I had wanted to point out, Justice Stewart, because it was not dealt with in our brief -- since it was raised only in Respondent's brief was the notion that there were other witnesses who could have testified.

Going to Justice Marshall's question, the answer is on the facts of this case there are no other witnesses who could testify to any relevant events that split the difference

between the prosecution and defense theory.

If I may move into the dealth penalty question, I simply want to speak to two of the several constitutional attacks on Ohio's death penalty because I think it is important to point out their relationship.

One is the one of which the Court heard arguments this morning, that the Ohio death penalty statute is too narrow, too much circumscribes consideration of mitigating circumstances to meet the command of the Woodson and Roberts cases that individualized consideration be given to circumstances of offense and offender.

The second argument, which is raised in both Bell and Walton, is the argument that the application of the death penalty to a person who was neither a participant in the killing nor an intentional perpetrator of any act that was directed toward killing affronts the proportionality principle of Coker and earlier cases because just as much as Ehrlich Coker, Sandra Lockett may be a felon, but not a murderer, not a deliberate taker of human life.

Now, I want to point out, though, that there is a relationship between those two arguments because in combination they produce still a third constitutional contention which is the narrowest conceivable ground on which these cases could be decided.

Inasmuch as the very circumstance which we contend

precludes the death penalty totally, that, is the fact that Sandra Lockett has been condemned for a crime which she did not do, did not attempt, did not intend -- that is, a killing.

Inasmuch as that factor of the case is one of the very factors whose consideration the Ohio statute precludes, this Court could decide these cases simply on the ground that whether or not it would be constitutional for a state to impose the death penalty in a case like this, it is unconstitutional for the state to do so while forbidding the sentencer even to consider the mitigating circumstance that the Defendant was not the perpetrator of the crime and neither intended nor did anything in furtherance of the killing itself as distinguished from the underlying robbery.

Now, that argument and the arguments about the narrowness of the Ohio statute in preclusion of consideration of mitigating circumstances is what --

QUESTION: Are you asking us to abolish the concept of felony murder, felony homicide?

MR. AMSTERDAM: Oh, Lord, no, Mr. Chief Justice Burger. There is no attack here at all on the felony murder concept. As far as conviction goes, that is perfectly appropriate. But if Coker has any meaning, one of its meanings must be that if the Defendant's conviction rests only on the felony that the death sentence which is being imposed, not for the murder but only for the felony, is disproportionate.

Our argument goes only to the death penalty. It has nothing to do with the constitutionality of felony murder as a basis for conviction. That is perfectly accepted.

What I think it is important to recognize on the facts of this case, however, is the fact that that is exactly what Petitioner is. She is, at most, an armed robber.

She has the mental state, the culpability of any participant in any armed robbery and no more than that.

The prosecution in its brief suggests that the jury must have found that the Defendant intended to kill Sydney Cohen because part of the element of aggravated murder is purposely killing.

I want to dispel that theory right now. It is true that the Court charged the jury that but it also charged the jury -- and this is the key to this whole case -- at pages 118 and 119 of the Appendix: "A person engaged in a common design with others to rob by force and violence an individual or individuals of their property is presumed to acquiesce in whatever may reasonably be necessary to accomplish the object. And if under the circumstances it may reasonably be expected that the victim's life would be in danger by the manner and means of performing the criminal act, each one engaged in the common design is bound by the consequences naturally or probably arising in its furtherance.

"If the conspired robbery and the manner of its

accomplishment would be reasonably likely to produce death, each plotter is equally guilty with the principal offender as an aider and abettor in the homicide.....An intent to kill by an aider and abettor may be found to exist beyond a reasonable doubt under such circumstances."

Now, later on that same page the Court defines intent as the same thing as purpose and elsewhere in this charge it talks about inferences as a very different thing from presumptions. So what the jury was charged in this case was that it should find the Defendant guilty of purposely killing Sydney Cohen if she participated in an armed robbery attempt.

The Court of Appeals and the Supreme Court affirmed her convictions on exactly that theory. Indeed, the very issue which divided the Ohio Supreme Court here four to three would never have arisen on this.

So what we are dealing with is, we are dealing with a case in which the Defendant has been sentenced to die for nothing more than participation in an armed robbery which, at someone else's hands resulted in death. Now, --

QUESTION: Would the same thing go for James Lockett and Dew?

MR. AMSTERDAM: Their involvement could, on a factual record different than this one have been shown to be more substantial.

QUESTION: No, but how about on this record? How

about on this record? How about James Lockett, for example?

MR. AMSTERDAM: Mr. Justice, you see first of all, the problem with analysis like that is, we are talking about a record in which no lawyer was addressing the problem of Lockett's culpability and so I really do not -- I just do not know the answer.

QUESTION: So you do not say that only the trigger man may be punished, then?

MR. AMSTERDAM: Oh, no. No, no, no, no.

QUESTION: Who else may be? Anybody who had the intent that there be a death?

MR. AMSTERDAM: I think that this Court has to look very carefully at what was involved in Coker and what is the rationale from which the Court has sustained capital punishment at all. The question of whose finger was on the trigger is not important but the question whether or not the Defendant was a participant in a scheme aimed directly and deliberately at human life is very important and this Defendant was not a planner or a plotter in a scheme to kill.

Now, whether James Lockett was or not, Your Honor, I do not know. His --

QUESTION: Well, arguably, under your rule, Parker perhaps would not be subject to the death penalty, either.

MR. AMSTERDAM: Someone other than Parker on this record might be. But --

QUESTION: I am talking about Parker.

MR. AMSTERDAM: Parker? Well, there again, Your Honor --

QUESTION: He said it was accidental and that the plan did not include any intent to cause death.

MR. AMSTERDAM: May I distinguish as I did, Your Honor, two separate issues? The first issue is whether or not the death penalty may be imposed on these people at all as a matter of constitutional law. And the other is whether Ohio law may forbid consideration even of these elements.

Now, I will go this far with no hesitation, that it is impermissible constitutionally for Ohio to forbid consideration of the fact that Parker's shooting was accidental.

That I would say categorically. That is to say, even if the death penalty can be imposed on Parker, for Ohio to say, as it has, that whether he shot and deliberately and intentionally killed Sidney Cohen and whether the gun went off by accident is not relevant. It may not even be considered in sentencing. That violates the Eighth Amendment.

Now, whether Ohio could say that an unintended killing by someone who was in there taking steps toward killing with a knowledge that that is likely -- that poses a difficult question this case does impose because that is not Sandra Lockett.

That might be James Lockett. It might be Dew. It

probably is Parker on this record but it certainly is not Sandra Lockett because Sandra Lockett, at most, was aware of the fact that people were going into a store with a loaded gun -- no indication of any plan as to how it would be used, in answer to the Chief Justice's question -- simply that bullets would be put in a gun.

I take it that the idea of putting bullets in the gun does not necessarily mean to fire because since the gun was being taken from the pawn shop proprietor and since he would know that, empty, it would pose no threat, one would have to load it in order to pose a credible threat for a robbery so there is no supposition whatever that anybody intended to shoot that gun.

And, Mr. Justice White, our submission does not turn at all on whose finger is on the trigger. It is whether to use the language of the Gregg case itself, the Defendant has been sentenced to death for a deliberate killing which this Defendant has not [done.]

If a defendant is part of a scheme in which somebody else shoots, that is just as deliberate as if the defendant shoots himself or herself.

I would like to leave some time for rebuttal and although there are other aspects of the case, I think that this has sufficiently presented the inner relationship of the issues and particularly the narrowest ground of decision so

that it provides a good stopping place unless the Court has further questions.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Amsterdam.

Mr. Layman.

ORAL ARGUMENT OF CARL M. LAYMAN, III, ESQ.

ON BEHALF OF RESPONDENT

MR. LAYMAN: Mr. Chief Justice and may it please the Court:

I would like to turn directly to the death penalty issue first and then if there is time remaining I will address the Prosecutor's comment issue.

I would like to point out to the Court that this was not an accidental killing. That would be contrary to what the jury found. And that the evidence in the Appendix supports Al Parker's testimony and, in fact, there is a plan to commit a robbery in which it is reasonably foreseeable that deadly force will be used.

QUESTION: What verdict should the jury have returned if they were persuaded that it was an unintended accidental killing?

MR. LAYMAN: If it was accidental, it would have to be not guilty. If it was unintentional --

QUESTION: Not guilty?

MR. LAYMAN: There is a difference in Ohio. If it

was accidental, it would have been not guilty. If it was unintentional in a sense that they did not have what we now determine or call purposeful but before it was an intentional act, it would have been involuntary manslaughter under our statutes.

QUESTION: Mr. Layman, can you have accidental homicide in a felony? In the commission of a felony?

MR. LAYMAN: No, that is the point I am trying to make that it was not an accident.

QUESTION: Well, you said it could be an accidental one there. I thought you were saying something you did not really mean.

MR. LAYMAN: No, I did not.

QUESTION: At the common law there could be a felony murder that was purely accidental.

QUESTION: That is right.

QUESTION: In other words, a cat burglar climbing up a slate roof could dislodge one of the slates and strike a pedestrian on the head and kill him and that would be a felony murder at common law.

MR. LAYMAN: I do not believe that under our state law --

QUESTION: That is not Ohio law?

MR. LAYMAN: That is not the law, no, sir.

QUESTION: At any rate, the jury could have

returned a verdict of less than than the degree they did had they believed the testimony.

MR. LAYMAN: Absolutely.

QUESTION: Yes.

MR. LAYMAN: And the testimony was not just Al Parker's. Joann Baxter testified concerning the planning and the use of the weapon by this group on two different occasions and the Petitioner in this case dreamed up the idea of robbery.

She thought of and it is in the Appendix, that "We could pick out this grocery store named Easter's. But you gotta get the dude. He's big and he's got a .45."

So it is in her mind, it is in the conspirators' mind force will be used. Now, they did not sit down and plan, "I am going to go in and kill this guy and run," no, but the idea of aiding and abetting, the idea of felony murder is established in Ohio.

QUESTION: Well, let me ask you a question, if I may, Mr. Layman. I understood you to say in response to Justice Stewart's question, I believe it was, a moment ago, that Ohio does not follow the ordinary concept of felony murder, at least what I consider to be the ordinary concept of felony murder and that is, if one goes into the convenience store with a gun intending to rob the proprietor and the gun goes off accidentally in the course of commission of the robbery, he is guilty of first degree murder under what I understood to be classical

felony murder law.

MR. LAYMAN: Ohio presumes the intent or infers the intent that you would say is lacking in your example.

In other words, if you can show the common law scheme of a felony murder, then the Ohio law says that each of the participants, whether or not there was a trigger man, has that intent or that purpose but you have to find that they were part of it and that it was reasonably foreseeable that force would be used.

QUESTION: What intent? The intent to kill or the intent to rob?

MR. LAYMAN: No, the intent to commit an offense.

QUESTION: What do you think of this instruction to the jury, "It must be established in this case that at the time in question there was present in the mind of the Defendant specific intent to kill Sidney Cohen." Does that mean what it says or not?

MR. LAYMAN: You have to find the specific intent through an inference coming through aiding and abetting and felony murder rules.

QUESTION: Somebody has to have had the specific intent to kill.

MR. LAYMAN: Right. But you can presume that from all the facts and circumstances in the crime itself which --

QUESTION: Well, when you say presume, do you mean

the same thing as infer?

MR. LAYMAN: Yes, sir.

Now, with respect to the mitigating factors --

QUESTION: Just one detail. You mentioned the testimony about her actual intent. Does not the record tell us why she did not go into the pawn shop?

MR. LAYMAN: That is correct. She did not want to go in because she was known there by --

QUESTION: And does that not suggest she really did not expect the man to be killed?

MR. LAYMAN: I do not believe necessarily. There could have been other witnesses there, other people who knew her from that pawn shop. I do not think that is a total answer to that.

Turning to the mitigation phase, I would like to point out to the Court that the Ohio Supreme Court in a number of cases has substantially broadened the initial conception or definitions of mental deficiency and psychosis and I point them out in my brief. They are specifically State versus Black and State versus Bell, where they broaden the interpretation and while it is true that you take all these factors in consideration in reaching the -- one of the three specific statutory grounds for mitigation, the Court does consider them.

They do consider each one of the factors that the

Petitioner complains of, the age, the mental state, the degree of participation -- all work together in reaching one of the statutory grounds and I would ask this Court to compare this framework, Ohio's framework with that of Texas wherein any evidence of mitigation was not in and of itself a basis for mitigation but had to be utilized in answering a specific question and in Jurek it was whether or not the Defendant would be a continuing threat to society.

Each one of those factors was not in and of themselves significant, the degree of participation or the age or youth or the mental state -- but they were all taken in consideration through the judicial interpretation of the statute and I would ask this Court to do the same thing with regard to Ohio. Ohio does consider the factors in reaching their decision.

Petitioner claims this mitigating factor never works. Well, that is just not true. Nathan Earl Dew was mitigated on this very ground, a co-conspirator of the Petitioner. But Nathan Earl Dew was the dupe, the pawn that was directed by the Petitioner, who planned this, who directed them to go to Sydney Cohen's.

She knew that there was going to be a likelihood of force, of violent force in reaching the robbery and in carrying out the robbery and therefore you have the rule, at least in Ohio, the felony murder rule and the fact that aiders and

abettors are punished equally with the principal.

QUESTION: Mr. Layman, are you saying that she had knowledge that Dew did not have?

MR. LAYMAN: No, I am not suggesting that but she is the one that was the mastermind in the crime.

QUESTION: Under the statute, how is there a principal way to differentiate between the two, give her the death penalty and not give it to Dew?

MR. LAYMAN: Because in considering, as Black defines the third negating factor, the mental state, the emotional state and the degree of participation in it, she was the mastermind; she directed this person and you look at Nathan Earl Dew's mind, his emotional state and you look at Sandra Lockett's and she is more culpable and when you talk about, well, do you have to intend to commit murder, intend to kill? I say no.

You can consider, though, that in mitigation but it should not be in and of itself the mitigating factor but it is considered in Ohio's framework in 2929.04(B), when you consider the nature and circumstances of the crime as well as the history, character and condition of the defendant.

QUESTION: May I ask you about degree of participation? You say the Ohio court may consider it. It does not fit within the language of any one of the three specified mitigating circumstances, does it? If so, would you point

the language out to me? We talked a good deal today about the third mitigating circumstance, that is, that the offense was a product of psychosis or mental deficiency but under which one of those terms would you include degree of participation in the crime?

MR. LAYMAN: Well, I think it could be considered under any one of them in that, in reading the first part of it under the first paragraph of B, when you consider the nature and circumstances of the crime in reaching this and was this a --

QUESTION: Was the jury so instructed in this case specifically?

MR. LAYMAN: Your Honor, the jury does not take part in the final sentencing.

QUESTION: Right but I have not checked the opinion of the Ohio Supreme Court since you made this point but did the Ohio Supreme Court in this case construe either one of these terms, psychosis or mental deficiency as including degree of participation in the crime?

MR. LAYMAN: The Ohio Supreme Court did not make an express determination on that issue but I am saying that you can consider all of the evidence --

QUESTION: Is it the decision of the Ohio Supreme Court that it does so include degree of participation within the language of the statute?

MR. LAYMAN: Not those specific terms, as I stated in State versus Black was the most recent broadening -- it talked about the mental state and the things that go into your mental state or your emotional state and I would like to point out that it seems to me that you can consider whether there was a cold, calculated plan by the Petitioner to carry out a crime as opposed to some bizarre behavior or some unplanned kind of behavior and look at the degree of participation in that sense in reaching the mental state or the emotional state of the defendant.

QUESTION: It does not say mental state. It says "mental deficiency." I agree with what you say. My difficulty is whether or not it comes within the statute and whether juries are so-instructed.

MR. LAYMAN: I am referring to, Your Honor, a broadening interpretation by the Court --

QUESTION: Right.

MR. LAYMAN: -- of that specific language. It is State versus Black and it is cited in my brief. The citation in Ohio Supreme Court is 48 Ohio State 2nd 262 which broadens the interpretation of the definition of that particular statute.

QUESTION: And we are to read the statute as interpreted by the Supreme Court of Ohio. Is that what you are telling us?

MR. LAYMAN: Yes, sir. Yes, Mr. Chief Justice.

QUESTION: Mr. Layman, I should not, perhaps, dwell on this but what about the disparity between Parker and Lockett? How can the State of Ohio conclude that Parker did not commit aggravated murder and that Lockett did?

MR. LAYMAN: Your Honor, I think that is answered in Gregg and the other cases in terms of the necessity for plea bargaining, court-approved plea bargaining and when you are considering that, you are considering something different than what is before this Court today.

The use of mercy, the use of plea bargaining are as I understand it, not the same kind of considerations as you have in this case.

QUESTION: That has accepted a plea from him which necessarily was a determination that he did not commit aggravated murder, was it not? And now in a separate proceeding out of the same incidents taking the position that Lockett did commit it. Is that not right?

MR. LAYMAN: No, that is not correct because Parker did plead guilty to aggravated murder and perhaps --

QUESTION: Was it not murder without aggravation or something -- I don't mean --

MR. LAYMAN: Without an aggravating specification which is necessary to get to the death penalty. You still have the same main charge.

QUESTION: What is the aggravating specification that justifies the death penalty against Lockett and is not present with respect to Parker?

MR. LAYMAN: Under Ohio statute, the aggravating specification was commiting the aggravated murder while committing another crime and this was, to wit, aggravated robbery.

QUESTION: Did she have the same opportunity to plead guilty to that lesser included offense?

MR. LAYMAN: Before trial she was offered voluntary manslaughter. During trial, she was twice offered aggravated murder without the specification and she refused both times.

QUESTION: In other words, that was the same degree that Parker confessed to?

MR. LAYMAN: During trial, that was the same degree. Before that, the voluntary manslaughter case would only carry with it a four to 25-year sentence, much less than even the aggravated murder case but she did not accept that offer.

QUESTION: Does this record show whether that -- whether her counsel recommended that?

MR. LAYMAN: Yes, they did. It shows that and they did recommend it and she did not accept it and it is on the record, at least in two instances that they wanted to

put in the record, the offer has been made, do you want to accept it? And I do not know the rationale. There is one digression in the record where her mother is present and apparently has influence on the Petitioner.

QUESTION: Is it a correct reading of the Ohio statute that whatever factors may have persuaded the prosecutor that a sentence of four to 25 years would have been appropriate in this case since she was sitting outside, or whatever it might be -- those factors could not be considered by the sentencing judge. He had to carry out the mandate of the statute.

MR. LAYMAN: Well, I do not know that I would say that those are the reasons that went into the plea bargaining, was the strength of the case whether or not you could convict the Defendant on --

QUESTION: Well, the judge has considerably less discretion than the prosecutor. That much is clear, is it not? The sentencing judge.

MR. LAYMAN: I'll go to that -- I would agree to that extent, yes, once you have got to a conviction with aggravated murder with a specification.

QUESTION: Well, is it a question of degree of discretion or is the question that they have totally different functions? That is, the prosecutor and the judge?

MR. LAYMAN: Well, obviously, that is true. They

have different functions and I do not know that that is the kind of questions that we are dealing with when you are saying whether or not this person has been offered a plea before the trial and then, having gone through the trial, whether you have the same considerations to be facing -- not only the prosecutor but the trial court.

QUESTION: Well, it is correct, is it not, Mr. Layman, that if the Defendant fails to establish any one of the three mitigating circumstances, the statute is mandatory in the sense that it requires the death penalty?

MR. LAYMAN: If none of the mitigating factors are found, that is true.

Now, the Petitioner contends that the death penalty is disproportionate for this Petitioner because she did not commit the crime of aggravated murder with the intent to kill Sydney Cohen but this totally ignores the rule of aiding and abetting and of felony murder as at present in Ohio and in federal case law, the cases I have pointed out and --

QUESTION: His point is, as I understood it, was not that she should not be convicted but that she should not be given the death penalty. Is that not his point?

MR. LAYMAN: That is true and I am saying that it is considered. However, in relying on Coker and the disproportionality kind of argument, you are saying that she is less culpable than the trigger man and I think that that is

not the kind of thing that this Court can say per se --

QUESTION: He is not talking about culpability. He is talking about sentencing.

MR. LAYMAN: True, but I think culpability is one of the things you use in determining whether or not the sentence is imposed properly or not, what degree of culpability, what degree of planning and participation did she have in this crime? Did she bring it about?

And if this Court is to say that the evolving standard of decency argument as well as the disproportionate argument of Coker and Gregg is to apply, then you would have to make a rule where a person who is classified as an aider and abettor or has a lesser degree of participation than the trigger man, then you have to overturn Ohio case law on aiding and abetting.

QUESTION: Well, we are not involved here with a question of Ohio law. We assume the Ohio law has been settled by your legislature and by your Supreme Court construing its enigmas. The question is, is that Ohio law in its application of this case compatible with the Constitution of the United States? That is our question.

I mean, Ohio law could conceivably make any unlawful killing a murder punishable by death and there might be no question about what the Ohio law was, so that a person speeding and hitting and killing a pedestrian would be

guilty of murder in Ohio and punishable by death. That would not solve the constitutional question of whether or not the Ohio law in its application to the hypothetical case I posed was a constitutional law.

MR. LAYMAN: I agree with that, Your Honor.

However, in this case you have a very narrow category of murder that is before the Court. Aggravated murder only applies to a very narrow category of murders. A person has to be either committing a felony murder or murder for hire, a very narrow group of them and then and only then do you get to the question of the mitigating process and when you review the nature and circumstances of the crime here I think there is sufficient evidence before the mitigating authority or the punishing authority to say that the crime committed was of a degree of culpability meriting the death penalty.

Now, I would like to turn to the first issue, if I might, for just a moment and discuss the Prosecutor's closing argument.

Petitioner primarily relies on Griffin versus California, which discussed the direct comment of the prosecutor that the defendant did not take the stand and did not see fit to explain the state's evidence. This is not the case here.

The Prosecutor in this case made the comment that

the evidence was unrefuted and uncontradicted but did not directly --

QUESTION: But he also said that the defense did not put on any evidence.

MR. LAYMAN: That is true but that is not --

QUESTION: Well, I mean, it was an issue.

MR. LAYMAN: The defense attorney and the defense did not put on the evidence but two things I would like to point out: The Prosecutor's comments were not objected to at the trial and there was an instruction given regarding the defense failure to testify by the trial court that they could not take that into consideration which was directly contrary to the Griffin instruction which they were told that they could take --

QUESTION: While not involved in this case it has always been very interesting to me that the only person that can comment on the failure to take the witness stand is the judge, specifically the instruction.

MR. LAYMAN: But in relation to this, the state would urge that first there is a waiver issue under Estelle and additionally that it would be harmless here.

Either one of these factors would be sufficient to refute the Petitioner's comment. However, I do not believe that even in and of itself that the comments were such that they were error. I think you can distinguish them

clearly from the Griffin case.

Now, there is one other issue, the fourth one that is raised about whether or not this is a new interpretation of the aiding and abetting statute and I would submit to the Court that it is not a new interpretation. That is, it is the same one as it has always been.

The Legislative Commission notes state that this is a codification of the old law. The trial court in its charge, as pointed out by Petitioner's counsel, read the old law. The very quotes he gave you from that charge were the old law on aiding and abetting. Thus there is no change and the Petitioner had notice the old law was to be applied.

I would also submit that this issue is one of statutory interpretation and while, as Mr. Justice Stewart noted that it is this Court's duty to make sure that the statutes are interpreted correctly, it is still one of statutory interpretation and absent a constitutional issue which they have tried to bring into this case of retroactivity of a change in the law, the statutory interpretation should be followed.

QUESTION: Mr. Layman, may I go back to the death penalty problem for just a moment? Under the Ohio criminal practice generally, is it normally the practice to take into consideration the prior criminal record of the defendant in the sentencing determination?

MR. LAYMAN: Yes.

QUESTION: In non-capital cases. Is there any reason why -- it is correct, is it not, that that prior criminal record is not, the court is not permitted to take it into consideration in a capital case?

MR. LAYMAN: No, that is not correct. You can consider it. As I quoted the statute in this, you can not only consider the nature and circumstances of the crime but you can take into consideration the character, history and condition of the defendant and the history clearly includes the past record.

QUESTION: Yes, but just for the purpose of determining whether there was duress or whether there was mental -- just for the purpose of determining what are the three mitigating circumstances.

MR. LAYMAN: That is true. I would like to point out to the Court --

QUESTION: And in the non-capital cases it is given independent significance, is it not? Is that not the practice of the judge to give it independent weight in determining what kind of a sentence to impose?

MR. LAYMAN: It is one of the factors that is to be considered among many others in determining sentence. It is not just the single factor but it is given some consideration. There are guidelines for sentencing in non-capital

cases just the way there are guidelines set up for litigation fees under Ohio's --

QUESTION: There are more mitigating circumstances that may be considered in a non-capital case than may be considered in a capital case.

MR. LAYMAN: There are more statutory-enumerated mitigating --

QUESTION: Does that sound like a plan the legislature would have adopted if it had not felt that it was compelled to by the Furman case, do you suppose?

MR. LAYMAN: I am not --

QUESTION: Is that really a sensible way to go about the problem?

MR. LAYMAN: I think that because the Court made its ruling that they wanted to set up some guidelines but I do not think that it is necessarily constitutionally-required that it have all these same considerations that you would have, for instance, even in Florida.

QUESTION: In a capital case your judge would have less latitude than in other kind of cases.

MR. LAYMAN: No, he still -- it is --

QUESTION: It sounds weird to me, frankly.

MR. LAYMAN: Mr. Justice Stevens, you have the same ability to make these considerations in going and deciding the question of one of the statutory questions --

QUESTION: It is not the question of whether or not the capital sentence will be imposed. It is the question of whether or not one of these three mitigating circumstances is present.

MR. LAYMAN: That is true but in the same manner as in Texas, where they do not have this as a statutory basis for mitigation, you have to answer the question, is he going to be a continuing threat? You consider the past record. You consider the degree of probability. All of these things go into answering that question but this Court did not require Texas to set out as statutory grounds any one of those factors specifically and say, "This is a statutory ground for mitigation."

QUESTION: Do you think the trial judge in Ohio has as much discretion as the trial judge in Texas in deciding whether or not to impose the death penalty?

MR. LAYMAN: Yes, sir. I would also like to point out to the Court that the trial judge here has the benefit of a psychiatric report, presentence investigation -- he has a great deal of information to work with in making his decision and it is required by statute that the trial court have these bases for making his decision so that the court does have sufficient information to look at the background and the condition of the defendant and that is apparent in this record where we can see that the presentence report,

the psychiatric examinations were all placed in the record and were considered by the trial court.

If I might quote Justice Stewart in closing. In Gregg, Justice Stewart stated that "There is a heavy burden which rests on those who attack the judgment of the representative of the people and a caution is necessary lest this Court become the ultimate arbiter of the standards of criminal responsibility throughout the country."

And I would suggest that this admonition applies equally well in this case because we have a state that is not exactly like any other state.

It is not exactly like Florida. It is not exactly like Georgia or Texas but it provides mitigating factors which channel the discretion, give guidelines to the sentencing authority and I think that it is sufficient to say this case is not one of a mandatory death sentence.

It gives sufficient guidelines to make the decision to the sentencing authority.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Amsterdam.

QUESTION: Mr. Amsterdam, before you start, will you tell us whether you are asking us to overrule Jurek and if not, whether you agree with your opponent that --

MR. AMSTERDAM: What main case?

QUESTION: The Jurek v. Texas case. Your opponent argues that the Ohio judge has just as much discretion as the Texas judge that the standards, that if we follow the Jurek case, we have to affirm this conviction.

REBUTTAL ARGUMENT OF ANTHONY G. AMSTERDAM, ESQ.,

ON BEHALF OF PETITIONER

MR. AMSTERDAM: I disagree entirely. The dialectic is the same -- that is, I disagree with counsel entirely.

The dialectic is the same. That is, in Jurek, all of the background factors were considered relevant to a statutory question -- that dialectic is the same -- but it makes all the difference in the world whether the question is a broad question or a narrow question.

The question in Texas of whether or not the defendant is likely to commit acts of dangerousness in the future, that is a broad question that opens up the defendant's whole life and in fact, virtually anything is relevant to that but the question under the Ohio statute, whether the victim induced the killing -- what does the defendant's background have to do with that at all?

Whether or not the defendant was under duress -- the defendant's background has got nothing to do with that.

Mental deficiency, I will come back in a moment to speak to Justice Powell's question about what it means, but what it means is something very, very narrow.

Yes, Justice Stevens, I agree that the dynamic is the same but the problem with Ohio is that, unlike Texas, the statutory questions to which the background is relevant is so narrow as to cut out most of the defendant's life with the result that the kind of sending people to their death is a faceless, undifferentiated mass which the Court condemned in Woods and it happens in Ohio and did not happen in Texas.

QUESTION: Now, let me take that last point you made. I am a little confused. Suppose a woman hired a man to kill her husband so that she could marry someone else. Do you suggest that under Ohio law that in imposing the penalty that her background would have nothing to do with that?

MR. AMSTERDAM: Absolutely. It would have nothing to do with it.

QUESTION: What if she had -- what if the record showed that on one other occasion she had been charged with the same offense but found not guilty by a jury?

MR. AMSTERDAM: It has nothing to do with it except if that --

QUESTION: Does it not show going to the state of mind?

MR. AMSTERDAM: -- except if that is being defined as being provocation but Justice Stevens' analysis of the Ohio statute is exactly right. Unless one of those three

factors is found, the death penalty is mandatory and what that means is that every factor that does not go in from one of those three factors cannot even be weighed as irrelevant.

Now, the breadth of those factors is the problem. If one of the Ohio statutes was as broad as question number two in Jurek, will the defendant be dangerous in the future? The question opens up a whole life. We would have a different problem.

But these are narrow and that brings me to Justice Powell's question. Might I direct Your Honors' attention to page 141 of the Appendix in which the trial judge here explicitly defines mental deficiency and the trial judge -- now, this is, Justice Powell, the tryer of fact. This is the tryer who condemned Sandra Lockett on the findings of fact under the statute because there is no jury. The judge is making a decision.

The judge says, "Mental retardation and mental deficiency under the law are synonymous," and then he goes on to read out of the DSM2, that is, the Diagnostic and Statistical Manual of the American Psychiatric Association, Second Edition, the number of categories and he is saying that not only is mental deficiency identical to mental retardation but that if you have a score above 70, you are not retarded.

That is why we say that all of this business about how broadly the Ohio Supreme Court has construed the

statute is nonsense.

The only case in which the Ohio Supreme Court has given a broad construction for mental deficiency is the Black case. It did not apply the statute to any state of facts in the Black case. It was simply answering a constitutional challenge that the statute was void for vagueness.

Whereever it has had to apply the term mental deficiency to a state of facts it has said that educational depravation is not mental deficiency. Cultural deprivation is not mental deficiency. Emotional deprivation is not mental deficiency. It means mental retardation.

And if it meant more than that, this case would have to be reversed because the trial judge who found the facts found them on the theory that the defendant could be found to have a mitigating circumstance and could escape the death penalty only if she were mentally retarded.

Now, that brings me back to the question of degree of culpability being considered and if I may speak again to the following murder question because I think I have been very unclear on Ohio law as to this.

And this is a key question. Several of Your Honors asked about it. I think it needs to be cleared up.

The answer is that Ohio does not have the traditional felony murder rule that Justice Stewart and Justice Rehnquist were talking about.

If you look at page 205 of the Appendix, the Ohio Supreme Court says that it does not. Under Ohio -- and this is not for aggravated murder, this is for first degree murder et al, there has got to be a purposeful killing in the course of a felony.

But what they then say is that any felony which is done with a deadly weapon creates a risk of death as its natural and probable consequence and that one who engages in such a felony is presumed to have intended to kill.

QUESTION: Then they have a felony murder doctrine when the felony is committed with a deadly weapon.

MR. AMSTERDAM: It is the equivalent of that, Justice Rehnquist, that is, what it is is that they have a different logic but it reaches the same result.

Most states say that if you have a killing in the course of a felony, you do not have to have intent, you have got felony murder. Ohio says you have to have an intentional killing in the course of a felony but a killing in the course of a felony with a deadly weapon is presumed to be intentional killing so you get to exactly the same result and Justice Rehnquist, in terms of the answer to your question, presume does not mean to infer.

If Your Honor will look at page 117 of the Appendix, you will see that the trial judge in charging the jury defines an inference for the jury and that is very different

from what it says about presumption on pages 118 and 119.

This is not simply an inference.

QUESTION: Well, these are questions the court -- you know, in one opinion you will find Misstate or confused, presumption and inference. I mean, I would not be willing to take at face value any one single statement in a charge to a jury is going to be conclusive on a state's law -- I do not think.

MR. AMSTERDAM: I totally agree but the point is that every judge who has considered this case below has taken the position that Sandra Lockett was convicted not because in fact she intended Sydney Cohen's death, not because the jury could have inferred that, but because Ohio law says that if you engage in an armed felony, you are presumed -- one of the judges in the Court of Appeals' opinion said that liability is attached to the defendant, ascribed to the defendant. This is not language of inference.

This is language that says, the defendant is treated as though she intended killing Sydney Cohen even though she did not and Mr. Chief Justice, the answer to the question of, what would the jury have done if it had found that she did not intend to kill?

The answer to that question is that this jury following these instructions could not have found that she did not intend to kill because if they followed the

instructions that they were given, they had to find that if she engaged in a plan to participate in armed robbery, that she was presumed to intend to kill so this jury could not have acquitted. The facts of this record --

QUESTION: No, that is the law of felony murder that you have just stated, is it not?

MR. AMSTERDAM: It is the Ohio version, if you will, of the felony murder rule; although the trappings of it are different, the result is exactly the same.

So what we have is a case in which the following are the facts and not only resulted in the death sentence but were not even permitted to be considered by the sentence served and here again is my major disagreement with counsel.

These facts, because relevant only to three narrow issues which do not, in fact make them relevant, do not enter into the sentencing hopper at all. Defendant not only was not the trigger man. That is not terribly important. But the defendant did not himself participate in any plan or scheme that encompassed killing as a part of the design.

Her culpability is no greater than that --

QUESTION: The Ohio Supreme Court said that she participated in a plan where it was reasonably likely that a killing would take place. That is what it said.

MR. AMSTERDAM: Oh, I would agree that that tractional finding is supported but, Your Honor, what this Court

said in Gregg was that the death penalty --

QUESTION: That is more than you are saying it is presumed. Their ultimate -- their bottom line was, to the Ohio Supreme Court, that on this record, Sandra Lockett intended to kill. That was their bottom line.

MR. AMSTERDAM: No, Your Honor, it is not -- the more I think and presume. What I think --

QUESTION: Well, they still feel that the record reflects that this was the case and establishes beyond a reasonable doubt that the Appellant had a purposeful intent to kill. That is their bottom line, however they get there.

MR. AMSTERDAM: The bottom line is a pure and unmitigated fiction, Your Honor, is it not? That is, is not what the court says --

QUESTION: They say that if you engage in a plan where one of the reasonable results would be a killing.

MR. AMSTERDAM: Your Honor, this --

QUESTION: Now, I am just saying what they said.

MR. AMSTERDAM: Mr. Justice Harlan once pointed out that even a dog knows the difference between being kicked and tripped over and what the Ohio statute says is that if you trip over a dog, you are presumed to have kicked him.

In short, the Defendant's actual intent to participate in a killing is irrelevant, if the Ohio Court deems

that death may result from a dangerous robbery, the defendant is presumed, deemed, treated as though she committed the deliberate intentional killing which this Court --

QUESTION: This does not distinguish Parker from Lockett, I take it.

MR. AMSTERDAM: Nothing distinguishes Parker from the Defendant in this case except the state decision not to treat him as a capitally-punishable offender.

QUESTION: You said very vigorously that this was a fiction. But is not the concept of felony murder a legal fiction in the classical sense?

MR. AMSTERDAM: Your Honor, I have not the slightest doubt that the use of the felony murder rule is a fiction and the question, as Mr. Justice Stewart put it, is whether life or death may turn on it.

Certainly, some fictions cannot be used in the load. The peonage cases held that. You cannot forbid slavery and you cannot say, anybody who breaks a labor contract is deemed to have intended at the time he entered into it to have defrauded, therefore you can specifically enforce it. That is involuntary servitude.

Here we say Ohio has done the same thing. It has used a fiction that treats a non-murderer as a murderer and this Court said in Gregg that the death penalty was apportionate for deliberate murder.

That is not the Defendant, save by fiction, That fiction, we say, is unconstitutional.

QUESTION: Professor Amsterdam, do you think it is a fair comment to say that the Ohio legislature, creating the problems we have here, misunderstood the Court's holding in Furman?

MR. AMSTERDAM: Oh, absolutely. The two authors of the bill have said in their own article that, describing what happened, that the statute with which we are controlled here was due to Senate Amendments to a House version that would not have presented any of these problems. Of course that is it.

QUESTION: Well, you argued Furman, did you not?

MR. AMSTERDAM: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:09 o'clock p.m., the case was submitted.]