

LOCKETT SYMPOSIUM
THE OTHER LOCKETT

*Dennis Balske**

In the mid-seventies, I was teaching the criminal defense practicum at The Ohio State University College of Law. My counterpart at Capital University Law School was Max Kravitz. He and I represented James and Sandra Lockett, brother and sister, in the Ohio Supreme Court after they had been tried separately for a pawn shop murder-robbery that took place in Akron, Ohio.¹ They both were sentenced to death.

James, a tall, strongly built black man, entered the store with two other robbers, Al Parker and Nathan Dew. Sandra was the getaway driver. Parker asked to see a gun. The pawn shop owner handed him that gun. Parker returned the gun to the owner and asked to see a bigger one. When the owner complied, Parker loaded the bigger gun with two cartridges from his pocket. He announced that it was a “stick-up.” The owner grabbed the gun while Parker’s finger was on the trigger. It fired. The alarm sounded. The trio ran. The owner died.

Parker worked out a plea deal to non-capital murder in return for the State dropping the death penalty. Dew was convicted of aggravated murder. Parker agreed to testify against Sandra and James. Sandra and James went to trial facing possible death sentences. Both were convicted and sentenced to death.

The cases presented different legal issues in their respective appeals. My case for James had a stronger issue than Max’s case for Sandra. He and I argued the respective cases in the Ohio Supreme Court the same day.

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1. State v. Lockett, 358 N.E.2d 1077 (Ohio 1976); State v. Lockett, 358 N.E.2d 1062 (Ohio 1976).

The issue in James's case was whether the defense should have been allowed to impeach Parker with a prior tape-recorded statement he made to James's defense attorney. When James's attorney interviewed him at the jail, Parker made an exculpatory statement about James's participation in the robbery-murder. But, when he testified at James's trial, he gave a different account, which incriminated James. The question on appeal was whether Judge James Barbuto, wrongly refused to permit the use of the tape recording of Parker's first favorable statement to impeach Parker's testimony, considering the State's case rested squarely on Parker's credibility.

Judge Barbuto refused to allow the defense to use the statement because it had not provided the tape to the prosecution in advance of trial. On appeal, James argued that the Ohio rules governing what information the defense must provide to the prosecution explicitly exempted witness statements made to the defense. The court of appeals agreed with the State and upheld the conviction and death sentence.²

Both sides made the same arguments to the Ohio Supreme Court. During the argument before the Court, the justices seemed skeptical of the State's position and receptive to James's position. But, Justice Celebrezze, a judge known for thrashing attorneys for seemingly no good reason, particularly in his days as a Cleveland trial court judge, piped up. He asked a hypothetical question, starting with "What would you say to an argument that..." followed by an extremely weak hypothetical position. To my thinking, the hypothetical position bordered on frivolous. I paused, thought about his question, and responded with one word: "Hogwash." Justice Celebrezze said nothing in response. Instead, he voted against James, joined by one other dissenting justice.

But five justices voted in James's favor. They reasoned that the rule did not authorize the discovery of statements made by witnesses to the defense attorney or his agents. Parker was clearly a witness. The impeaching statement was gathered by the defense attorney. By refusing to permit the use of the tape, Judge Barbuto erred. Moreover, because the State's case rested squarely on the shoulders and credibility of Parker, Barbuto's order prejudiced James's defense. The Court reversed the conviction and death sentence. The case was returned to Akron for a new trial. Columbus attorney Bill Lazarow agreed to try the case with me.

2. State v. Lockett, 1975 WL 180841 (Ohio App. Dec. 31, 1975).

Sandra wasn't so lucky. The Court upheld her conviction and death sentence. She asked the Supreme Court of the United States to review her case.³

During this time period, I learned about a project called "Team Defense." I received a glossy brochure explaining how "Team Defense" handled capital murder cases, using a team concept. Lawyers, investigators, jury selection experts, etc. joined forces to provide the best possible representation in capital cases. The moving forces were two talented attorneys, Millard Farmer from Atlanta, Georgia, and Morris Dees from the Southern Poverty Law Center (Center) in Montgomery, Alabama.

This sounded like a great idea. So, I wrote them, filled them in on James's case, and asked them if they would be interested in participating. They said yes. We agreed to meet in Akron at James's first court appearance in advance of his new trial.

We met with Dees and the Center's Legal Director, John Carroll, in Akron. We took them to meet James. We then appeared before Judge Barbuto, the judge whose erroneous ruling was the reason for the retrial.

Judge Barbuto had a big ego and was unfriendly to the defense, to say the least. He made clear that he ruled with an iron fist and that he was not inclined to have extra lawyers from Alabama involved in the case. Afterwards, Dees and Carroll politely declined to join in James's representation. The following year I joined them at the Southern Poverty Law Center.

While waiting to appear before Judge Barbuto, we sat in the room where juries deliberated. It was attached to Judge Barbuto's chambers and courtroom. We were shocked by what we saw. On the wall adjoining the judge's chambers, we viewed a framed blow-up of the front-page story covering the Kennedy assassination. It carried the bold headline: **"SNIPER'S BULLET CUTS DOWN PRESIDENT"** and showed the President in his car just after he'd been struck down by Oswald's sniper attack. We also observed the framed awards the judge had received for his work as a prosecutor, proudly displayed on the walls. In short, any juror deliberating in this jury room would quickly see that the judge was tough on crime, particularly tough on persons accused of murder and very favorably disposed to the prosecution.

We filed a motion asking him to remove these "prejudicial" objects from his jury room. He refused to do so. We then filed a motion asking him to remove himself from the case because he not only favored these

3. Lockett v. Ohio, 434 U.S. 889 (1977) (granting certiorari).

prejudicial objects in his jury room, but he had also previously sentenced James to death. We again were unsuccessful. So, we took our request to the Ohio Supreme Court. Shortly after, without any ruling from the Court, we were informed that a retired judge would replace Barbuto to try the case. The retired judge proved to be kind and fair.

The prosecution team was led by John Kirkland. He was in his forties, a little chubby, and very smooth. At our first meeting he pointed out the holes in the soles of his shoes, informing us that these were his trial shoes—shoes that he wore for jury trials and that would lead the jury to believe he was a regular “Joe.” He also bragged that he hadn’t opened a law book since graduating from law school. We didn’t know whether to be scared because this meant he was brilliant or to be happy because it meant he was plain lazy.

The case turned on whether the jury would believe James, who said he had no idea that Parker and Dew were planning to rob the place, or Parker, who claimed that James was in on his and Dew’s plan. We thought James would make a good witness, and we called him to testify.

He did well. His testimony was sincere and convincing. Kirkland did not seriously undercut his testimony during cross-examination. It turned out that Kirkland was, in fact, lazy. If he had done his homework and studied the case more closely, he could have scored some points.

The jury was out for a long, long time. It seemed like forever, and we were hopeful that James would be acquitted. But the jury just couldn’t reach a verdict. The case ended in a mistrial, meaning that we would have to return to Akron to try it again. We learned that 10 of the 12 jurors favored an acquittal, and the two holdouts believed James was only guilty of manslaughter rather than capital murder. We had come so close to winning an acquittal. Now we would have to start over, handicapped by the fact that the prosecution had previewed our entire defense.

When we returned for the retrial we discovered that the lazy Mr. Kirkland had been replaced by a superstar prosecutor, Larry Vuillemin. What a difference.

We prepared James to testify again, believing that he would do well as he had at the previous trial. We were wrong. Vuillemin destroyed him. That may be an understatement. By the time he finished his magnificent cross-examination—I kept hoping he was finished, but he kept it up and kept it up, scoring so many points it felt like they should just stop the trial and give him the verdict—no one in the courtroom believed that what James was claiming could possibly be true. The proof was in the verdict—a very quick guilty verdict.

Little did we know, though, that Sandra's loss in the Ohio Supreme Court was a blessing in disguise. When the Supreme Court of the United States declared the Ohio capital murder statute, which provided for a death sentence without any consideration of mitigation, unconstitutional,⁴ it meant that all of the Ohio death sentences, including James's, had to be commuted to life sentences.

Better yet, Sandra's case became the lodestar for modern capital trial practice. Suddenly, our pretrial investigations went from simply defending against the charges to delving into our clients' lives so that we could humanize them to show how and why they came to be the persons who committed the murder(s).

Perhaps the most satisfying news from James's case came years later. Remember Judge Barbuto, the judge whose erroneous ruling required a new trial, who was less than friendly to the lawyers from the Southern Poverty Law Center, who refused to take down the inflammatory materials from his jury deliberation room, and who refused to voluntarily remove himself from James's case? Well, it turned out he was not a very nice person, a fact that was disclosed by Geraldo Rivera in a lengthy exposé on ABC Television's 20-20 program.⁵

Geraldo referred to the judge as the "Italian stallion." The report's primary allegation was that Barbuto was "running a whorehouse in his chambers." Geraldo interviewed three women who claimed they had been sexually involved with Barbuto. Four more women were mentioned. Most were purported to be prostitutes who granted sexual favors for lenient sentences. One was an employee who said she caved in to Barbuto's demands so she could keep her job.

As an added TV bonus, one of the women said Barbuto liked to dress up in women's underwear and be beaten. To try to keep all of this under the rug, said Rivera, Barbuto relied on a personal enforcer named Bobie Brooks, an ex-con with a manslaughter conviction who went around town intimidating potential witnesses.

A word about Max Kravitz, Sandra's lawyer before the Ohio Supreme Court. Max passed away in 2007 at age 60 from a cerebral hemorrhage. Although we did not work together on our respective *Lockett* cases, we did work together on another capital case before James Lockett's retrials.

4. *Lockett v. Ohio*, 438 U.S. 586, 606 (1978).

5. See Mark Rollenhagen, *Court Refuses Appeal Akron Man Tried to Sue 20/20*, CLEV. PLAIN DEALER, Dec. 9, 1993.

Our client was Ronnie Pinson. His distressed mother called to say that her son, Ronnie, had been charged with capital murder. I agreed to meet with Ronnie. He was an earnest, good-looking black man in his early twenties. He was unemployed. Of course, Ronnie's mother had no money. So I went to the judge assigned to the case and asked him to appoint me. He refused.

Soon after, I complained to Max. He agreed that the judge was being unreasonable and said, "If you'll do it for free, I'll do it for free." We did. Forty-three years later, Max's generosity stands as the foundation for a terrific Sixth Amendment story.

Ronnie protested his innocence. Although it was a capital case, the prosecutor was offering a guilty plea to manslaughter. Ronnie said, "Tell me what to do." We said, "You can't plead guilty if you're innocent." We decided a polygraph would help us sort out our conundrum.

We hired a polygrapher and accompanied him to the jail. The admitting official said "No polygrapher is going in without an order from the captain." We went to the captain. The captain said, "Not without an order from the judge." We went to the judge. He said, "Take it up with the court of appeals." This meant go to trial without the test because you couldn't "take it up with the court of appeals" until after trial, and then only if Ronnie were convicted and possibly sentenced to death.

It was the Wednesday before the opening of the trial. With help from our law school clinical colleagues, we filed a Section 1983 action against the captain and the unreasonable judge in federal court seeking a temporary restraining order and a preliminary injunction. By Friday afternoon we were in a federal court hearing, the unreasonable judge and captain with their lawyer and me with Max at my side.

I remember two things from the hearing. While arguing our position to the federal judge, I inadvertently called the unreasonable judge, Judge Fred Williams, by the captain's last name, Martin. Judge Williams, acting as if he were the presiding judge, even though he was the defendant, rose from his seat at counsel table and sternly corrected my error. This doesn't bode well for next week's trial, we thought.

Later that afternoon, the federal court issued an order granting us relief. It held that prohibiting the polygraph examination would infringe on Ronnie's Sixth Amendment right to the effective assistance of counsel.⁶ Saturday morning our polygraph operator went to administer the test. Unbeknownst to us, Ronnie had an abscessed tooth. It had required immediate dental intervention, including removal of the tooth under, and

6. Pinson v. Williams, 410 F. Supp. 1387, 1388 (S.D. Ohio 1975).

you guessed it, lots of novocaine. Turns out, this is not a good time for a polygraph test. Yes, the results were a whopping “inconclusive.”

Monday brought jury selection and some really ugly (attitudinally, not cosmetically, speaking) prospective jurors. Tuesday started the same. To our surprise, the prosecutor, who was at his charming best before the prospective jurors, lowered his offer from manslaughter to armed robbery. Ronnie’s response remained the same: “I’m innocent. Tell me what to do.”

That’s when Max, who had more experience than me, to his credit, stepped in and said, “We’re taking it. It’s too good to pass up even if you are innocent. There’s a great likelihood of conviction and the possibility of a death sentence.”⁷ Ronnie pleaded guilty to armed robbery.

After the plea, we asked the prosecutor what had moved him to reduce his offer from manslaughter to armed robbery. “The judge,” he responded. Our unreasonable judge, it turned out, worried that the trial was going to cut into his Christmas vacation. So, he leaned on the prosecutor to make the case go away. Seems to fit the axiom that you’re better off not knowing how the sausage is made, don’t you think?

In any event, three cheers for Max—for his work on Sandra’s case, for his wisdom, for his great sense of humor, and for his commitment to his clients.

7. Remember, these were pre-*Lockett* mitigation days, before we, as a capital defense bar under Millard Farmer’s astute tutelage, learned that the secret to winning capital cases is to not go to trial.