

LOCKETT SYMPOSIUM

**RECOLLECTIONS ON THE *LOCKETT* CASE IN THE
U.S. SUPREME COURT**

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While I was personally unable to participate in the *Lockett* Symposium, I read Peggy Davis's paper with great interest, since I filled in for her on the *Lockett* case after she departed the Legal Defense Fund (LDF). I was the LDF lawyer who was principally responsible for working with Tony Amsterdam on the case. Having been at LDF for less than 6 months, my role was pretty much limited to editing the excellent draft that Peggy had left us. The only thing I recall about the edit was a word-change made solely for atmospheric purposes: the draft frequently referred to the victim, Sidney Cohen, as "the pawnbroker," and I was concerned that the term might arouse sympathetic memories of the famous motion picture in which Rod Steiger gave a searing performance as a Jewish pawnbroker in a minority neighborhood. So, I deleted the word "pawnbroker" and changed it mostly to "the proprietor of the shop" or just "the proprietor."

My only other memory of the briefing process is that on the very same day that we filed the *Lockett* certiorari petition, the Supreme Court granted certiorari in *Bell v. Ohio*.¹ At LDF we now had to assume that *Bell* rather than *Lockett* would be the test case for determining the constitutionality of the Ohio death-sentencing statute, so we invited Bell's attorney, Fred Hoefle of Cincinnati, to New York City to work with us. He graciously accepted, and Tony, David Kendall and I spent several days in the summer of 1977 working together with Fred on the brief. Then,

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1. 433 U.S. 907, 907 (1977).

much to our surprise, the Supreme Court granted certiorari in *Lockett*² in October 1977 at the start of the new term and put us on an expedited briefing schedule so that *Lockett* could be argued together with *Bell* in January 1978.

I second-chaired Tony Amsterdam at his Supreme Court oral argument in *Lockett*, and Tony was magnificent—as always. But there was one unsettling moment when Justice Harry Blackmun said something derogatory of a personal nature to Tony. I forget the exact context, but Justice Blackmun’s words were “Well you argued *Furman*, didn’t you?” or something similar, and his facial expression and tone of voice left no doubt that he was not paying Tony a compliment. This was the Justice Blackmun who had dissented in *Furman*³ in 1972, and who had voted in favor of mandatory death sentences only 18 months before the *Lockett* argument, in *Woodson v. North Carolina*⁴ and *Roberts v. Louisiana*⁵—not the Justice Blackmun who several years later announced that he would “no longer . . . tinker with the machinery of death” in *Callins v. Collins*.⁶ So his apparent personal hostility to Tony was disturbing. Fortunately we still got his vote in *Lockett*, albeit in a concurring opinion that was narrower than the majority opinion.

Years later, after Max Kravtiz’s heroic efforts to free Sandra Lockett entirely had failed (*habeas* on a guilt-related issue was granted by the District Court but the 6th Circuit reversed),⁷ I received a poignant letter from her. She had seen me being interviewed on the prison TV and wrote that she was happy to finally be able to associate a face with the name. After her release from prison she called me and it was great to finally have the opportunity to speak with her.

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2. *Lockett v. Ohio*, 434 U.S. 889, 889 (1977).
 3. *Furman v. Georgia*, 408 U.S. 238, 405 (1972).
 4. 428 U.S. 280, 307 (1976).
 5. 431 U.S. 633, 639, (1977).
 6. 510 U.S. 1141, 1145 (1994).
 7. *Lockett v. Arn*, 740 F.2d 407, 413 (6th Cir. 1984).