No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

TAWUAN TOWNES, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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February 20, 2018

CAPITAL CASE

QUESTIONS PRESENTED

Tawuan Townes's capital conviction and death sentence were initially reversed by the Alabama Court of Criminal Appeals based on an instruction that improperly required the jury to presume that Mr. Townes possessed the specific intent to kill, a necessary element of capital murder in Alabama. This jury instruction was contained in a trial record produced and certified by the court reporter present at the trial and then reviewed and relied upon over the next two and a half years by undersigned counsel, the State, and the appellate courts during the drafting of multiple briefs, and oral argument that led to the lower court decision reversing Mr. Townes's conviction and sentence.

After this decision, the trial judge informed the appellate court that he had listened to an audiotape of the trial and heard the word "may" and not the word "must" in the jury instruction. The appellate court ordered a second court reporter to transcribe the audiotape of the guilt/innocence phase jury instructions, specifically indicating to the court reporter that the only real issue was whether the judge had said "may" as the judge contended or the word "must" as Mr. Townes contended (resulting in reversal and a new trial). This second court reporter transcribed the judge's instruction as the intent to kill "may be inferred." Based upon the modified record, the appellate court affirmed Mr. Townes's conviction and sentence.

These facts give rise to the following questions:

I. Did the process by which the Alabama courts amended the certified record after reversible error had been found violate due process and the Eighth Amendment requirement for heightened reliability in capital cases?

II. Where there is a substantial risk that the jury was improperly instructed on the critical issue of intent, are the Eighth and Fourteenth Amendments violated?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

CASES

STATUTES

PETITION FOR WRIT OF CERTIORARI

Tawuan Townes respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals reversing Mr. Townes's conviction and death sentence, Townes v. State, No. CR–10–1892 (Ala. Crim. App. June 13, 2014), has since been withdrawn and is attached at Appendix A. The opinion of the Alabama Court of Criminal Appeals affirming Mr. Townes's conviction and death sentence, Townes v. State, No. CR–10–1892, 2015 WL 9263802 (Ala. Crim. App. Dec. 18, 2015), is not yet reported and is attached at Appendix B, along with that court's order denying rehearing. The order of the Alabama Supreme Court denying Mr. Townes's petition for a writ of certiorari, Ex parte Townes, No. 1160523 (Ala. Oct. 20, 2017), is unreported and attached at Appendix C.

JURISDICTION

The Alabama Court of Criminal Appeals affirmed Mr. Townes's conviction and death sentence on December 18, 2015. Townes v. State, No. CR–10–1892, 2015 WL 9263802 (Ala. Crim. App. Dec. 18, 2015). On March 17, 2017, the Court of Criminal Appeals denied rehearing. The Alabama Supreme Court denied Mr. Townes's petition for a writ of certiorari on October 20, 2017. Ex parte Townes, No. 1160523 (Ala. Oct. 20, 2017). On January 3, 2018, Justice Thomas extended the time for filing this

petition for a writ of certiorari to February 20, 2018. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On November 13, 2008, two armed men entered 1021 Blackshear Street in Dothan, Alabama, and attempted to rob Christopher Woods. (C. 50.)[1] Mr. Wood's girlfriend, India Starks, fled from the home. (R. 450-51.) In the midst of the robbery, Mr. Woods was shot once in the hip and once in the chest and died. (C. 50.)

At 4:40 a.m. on November 14, 2008, Dothan police awakened Tawuan Townes, arrested him, and brought him to an interrogation room at the police station. (R. 672, 674.) Tawuan had just recently turned 18 years old (C. 510; R. 396), had no prior experience with the criminal justice system (C. 309; R. 1079), and had last attended

[1] "R." refers to the trial record. "C." refers to the clerk's record. "SR." refers to the first supplemental record. "SSR." refers to the second supplemental record. "SSSR." refers to the third supplemental record. "SSSSR." refers to the fourth supplemental record.

school as a tenth grader (C. 493; R. 923-24). Throughout the interrogation, the police repeatedly told Tawuan that his co-defendant had implicated him in the crime, when in fact, his co-defendant had not been apprehended.[2] (C. 494, 496, 506; R. 647.) In addition, the detectives offered to help Tawuan if he confessed and explained that he would "spend forever in prison" if he did not. (C. 494-95, 497.)

In his statement to police, Tawuan said that he and Cornelius Benton decided to rob Mr. Woods, a local drug dealer. (C. 499, 504.) Tawuan told the police that Benton kicked in the front door of the residence and beat and shot Mr. Woods. (C. 499-500.) While Tawuan further stated that he fired a shot to scare Mr. Woods, he repeatedly denied shooting at Mr. Woods or having any intent to kill him. (C. 498, 500, 510.) He also repeatedly discussed how he told Benton not to shoot the victim. (C. 500, 508, 509.) Mr. Townes was indicted on one count of capital murder in connection with the death of Christopher Woods on November 19, 2008. (C. 15.)

During jury selection, the trial court granted the State's challenge for cause of veniremember J.P., even though J.P.'s views on the death penalty were not

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[2]Cornelius Benton, the 23-year-old co-defendant, eluded arrest until after Mr. Townes's trial and sentencing. See State vs. Benton, CC-2011-001139.00 (Houston County Cir. Ct. Aug. 10, 2011). When he was arrested, he admitted shooting Mr. Woods and pleaded guilty to murder. *Dothan Man Avoids Death Row In Murder Case*, DOTHANFIRST.COM, http://www.dothanfirst.com/news/top-stories/dothan-man-avoids-death-row-in-murder-case/130607577 (last visited Feb. 17, 2018). He was deemed a habitual offender because of his prior convictions for cocaine possession and escape and sentenced to 20 years in prison. See State vs. Benton, CC-2011-001139.00 (Houston County Cir. Ct. Oct. 15, 2012); see also State vs. Benton, CC-2007-000331.00 (Houston County Cir. Ct. Nov. 5, 2007); State vs. Benton, CC-2004-000832.00 (Houston County Cir. Ct. Oct. 18, 2004).

disqualifying. (R. 286-88.) The State then struck five of the eight qualified African-American veniremembers, leaving one African American on Mr. Townes's jury. (R. 339-40, 361; SR. 10-37.) The trial court did not find a prima facie case of racially discriminatory jury selection. (R. 340-41, 360-62.)

On March 8, 2011, Mr. Townes's capital trial commenced. (R. 357, 363.) During opening statements, District Attorney Douglas Valeska showed the jury Mr. Townes's mug shots and pointed out that Mr. Townes's appearance had changed since his arrest. (R. 367.) He then informed the jury that the evidence would show that Mr. Townes shot the victim in the thigh with a .22 caliber rifle and Cornelius Benton shot the victim in the chest with a .380 caliber handgun. (R. 370-72.) Defense counsel did not contest the State's version of events except as to the issue of intent, telling the jury that Mr. Townes had committed felony murder because he intended to rob but did not intend to kill. (R. 397-99.)

During the State's case, District Attorney Valeska presented the testimony of six police officers, the victim's girlfriend, a medical examiner, a firearms expert, a forensic scientist, and the victim's mother. (R. 399-711.) The victim's mother was the first witness called. (R. 399-400.) District Attorney Valeska showed her an autopsy photograph of her son (C. 444; R. 404), and she testified that the last time they spoke they expressed their love for one another (R. 401).

India Starks, the victim's girlfriend, testified that the suspect with the braids (Mr. Townes) shot with the longer gun (the .22 caliber rifle) and appeared to hit the victim in the leg. (R. 446-47.) She testified that the other man (Cornelius Benton) shot

the victim with the shorter gun (the .380 caliber handgun). (R. 448.)

When the firearms expert took the stand, District Attorney Valeska asked him whether he had worked cases where .380 caliber and .22 caliber weapons had killed, and then asked the same question about .45 caliber weapons. (R. 525.) The medical examiner took the stand and testified that the smaller .22 caliber bullet struck the victim in the chest and caused his death. (R. 615-17.) District Attorney Valeska introduced twelve autopsy photographs into evidence (C. 477-85, 487-89; R. 582-610), and repeatedly asked the medical examiner about the amount of pain felt by the victim (R. 588, 592, 595, 597-98, 602, 604, 606-07, 619-20).

When questioning the four police officers involved in Mr. Townes's arrest and interrogation, District Attorney Valeska showed each officer Mr. Townes's mug shot and asked about his change in appearance. (C. 454; R. 550, 566, 626, 666-67.) During one officer's testimony, District Attorney Valeska entered Mr. Townes's statement to police into evidence. (R. 697.) During a second officer's testimony, District Attorney Valeska introduced into evidence several .45 caliber bullets, a .45 caliber magazine, a knife, and handwritten rap lyrics recovered from a backpack found in the utility room of a residence where Mr. Townes sometimes stayed. (C. 453; R. 628-32; SSR. 12-21.)

Defense counsel did not call any witnesses. (R. 712.) In closing, counsel argued that Mr. Townes was an unsophisticated 18-year-old who made a terrible decision to rob the victim but did not intend to kill. (R. 776-77, 778, 780, 784.) He asked the jury not to let the district attorney's attempts to paint Mr. Townes as a bad person obscure the facts. (R. 777-78.) He then asked the jury to find Mr. Townes guilty of felony

murder. (R. 784.)

In his closing argument, District Attorney Valeska emphasized that Mr. Townes looked different at trial than he did at the time of the crime, when he had "dreads", and argued that Mr. Townes's change in appearance indicated that he was guilty of capital murder. (R. 747, 754, 797.) District Attorney Valeska told the jury that the evidence contradicted the defense's theory that Mr. Townes shot the victim in the leg. (R. 751.) Defense counsel objected, pointing out that the State had told the jury that Mr. Townes shot the victim in the leg. (R. 751-52.) District Attorney Valeska then insinuated that he and his police officers had more evidence of Mr. Townes's guilt than they were able to present to the jury (R. 756, 759-60), reminded the jury of the victim's mother's testimony about telling her son that she loved him (R. 760), once again showed the jury the autopsy photographs (R. 786-89), and described in detail the pain and suffering experienced by the victim (R. 763, 765, 773, 794). District Attorney Valeska also argued that, because Mr. Townes had a backpack with .45 caliber bullets, he was the type of individual who committed capital murder. (R. 748-49, 785.) District Attorney Valeska concluded his argument by asking the jury to "send a loud message" by convicting Mr. Townes of capital murder. (R. 798.)

Following closing arguments, Circuit Court Judge Larry Anderson instructed the jury that it was required to find specific intent to kill if Mr. Townes acted deliberately and could reasonably apprehend that his actions would result in death.

(R. 824.)[3] Judge Anderson also informed the jury that the difference between capital murder and felony murder was an intentional killing. (R. 832.) Following deliberations that spanned two days (R. 851-54), during which the jury asked to review India Starks's testimony (R. 853), the jury found Mr. Townes guilty of capital murder during a burglary (R. 861-62).

Immediately following the verdict, the penalty phase commenced. (R. 863-64.) District Attorney Valeska told the jury that he would prove that Mr. Townes actually preferred the death penalty over life without parole. (R. 867.) He argued that he would also prove three aggravating circumstances: the capital offense occurred during a burglary, the capital offense occurred during a robbery, and the capital offense was especially heinous, atrocious, and cruel compared to other capital offenses. (R. 868, 872.) He then incorporated the testimony and exhibits admitted at the guilt/innocence phase and presented victim impact testimony from the victim's parents. (R. 887-94.)

In support of a sentence of life without parole, defense counsel presented the testimony of Beverly Harris, Dr. David Ghostley, and Tawuan's parents. (R. 894-941, SR. 4-83.) Tawuan's mother testified about the poverty and violence that defined his childhood. (R. 897-98.) She testified to the troubles he had in school from an early age, when he was given medication at five years old. (R. 898.) She told the jury that she was a poor influence on him, that she made him stop taking his medication, and that

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[3]The original certified record established that Judge Anderson instructed the jury that it "must infer intent." Subsequently, the record was amended to reflect that the jury was instructed that it "may infer intent." This instruction, and the process by which it was amended, form the basis of this petition. See infra, at 14-23.

her drug addiction led her to put her welfare ahead of the welfare of her children. (R. 898, 900, 914-15, 932.) She talked about how she tried to pay the bills by selling drugs and how she was sent to prison when Tawuan was 14 years old. (R. 901, 910-12.)

Tawuan's father testified about how, as a young child, Tawuan grew up poor and was surrounded by domestic violence, alcoholism, drug dealing, and drug abuse. (SR. 6, 8, 11-13, 16.) He testified that he abandoned all of his children when Tawuan was five or six years old and was then out of Tawuan's life for almost a decade. (SR. 6, 9.) When he moved closer to Tawuan after Tawuan's mother went to prison, he did not provide Tawuan with housing even though Tawuan had nowhere to live. (SR. 9.)

Beverly Harris testified that Tawuan asked to live with her after the friend he had been staying with had to move and he had nowhere else to go. (SR. 37-38.) She told the jury that Tawuan provided her with financial support, giving her half of his Burger King wages, and that he was great with her kids. (SR. 38-39.) In cross-examining Ms. Harris, and over defense objection, District Attorney Valeska insinuated that Tawuan preferred the death penalty to life without parole based upon jailhouse recordings that the State had not turned over to the defense. (SR. 44-50, 60-66.) District Attorney Valeska also asked Ms. Harris if she recognized the handwritten rap lyrics in the backpack as Tawuan's handwriting, and she testified that she did not. (SR. 64-65.) Dr. Ghostley then testified about the impact Tawuan's troubled childhood had on his development. (SR. 72-73.)

In defense counsel's closing statement, he argued that the mitigating circumstances, including the fact that Tawuan was 18 years and four months old at the

time of the crime (R. 965), that he had a troubled childhood (R. 967-71, 974-76), and that he had no prior criminal record (R. 965), were not outweighed by the aggravating circumstances. (R. 964.) Counsel argued that Tawuan "never had a chance from the get-go" (R. 967), and pointed to the fact that Tawuan's brothers all struggled as adults as evidence of the dysfunctional environment in which they were raised (R. 970-71). Defense counsel also argued that Tawuan had shown remorse by waiving his rights and telling the police about the crime. (R. 973-74.)

In rebuttal, District Attorney Valeska argued that Mr. Townes had not accepted responsibility for his actions because he pleaded not guilty. (R. 977.) He argued that the .45 caliber bullets and writings – "rap crap" – found in the backpack weighed in favor of a death verdict. (R. 980, 982, 988.) He also told the jurors that he believed they were smart enough to vote for the death penalty even though most of them were women (R. 983-84), pointed to the fact that Mr. Townes was "just sitting over there" during the trial as evidence of his lack of remorse (R. 984), referred to the mitigating evidence as a "[n]amby pamby bunch of crap" (R. 984), and argued that Biblical teachings required a death sentence (R. 988). At the end of his penalty phase closing argument, District Attorney Valeska told the jurors that they needed to "send a message" to the community in the form of a death sentence (R. 989, 992), referred to himself as "the soldier of death" (R. 991), and admonished the jury to "do what's right" by sentencing Mr. Townes to death (R. 989, 991).

During the jury charge, Judge Anderson refused defense counsel's request to instruct the jury that it could consider mercy and that it could impose a life sentence

for any reason. (C. 252, 257; R. 943-44, 946.) Judge Anderson did instruct the jury that their sentencing vote would be a recommendation. (R. 1013-14.) On March 10, 2011, the same day that the penalty phase commenced, the jury recommended a death sentence by a vote of 10 to 2. (C. 278; R. 1027-28.)

On July 18, 2011, Judge Anderson held a sentencing hearing at which he considered evidence that had not been presented to the jury. (C. 307-12; R. 1038-39.) He also expressed confusion over which gunshot killed the victim. (R. 1054.) District Attorney Valeska explained that Mr. Townes killed the victim by shooting him in the leg. (R. 1054.) District Attorney Valeska then once again mentioned Mr. Townes's decision to plead not guilty as a reason to sentence him to death. (R. 1055.)

Judge Anderson found that the State had proven two aggravating circumstances, capital murder during a burglary and capital murder during a robbery. (C. 321-22; R. 1079.) He found two statutory mitigating circumstances, each of which he gave "some weight": Mr. Townes's young age and the fact that he had no significant history of prior criminal activity. (C. 322-23; R. 1079-80.) Judge Anderson then noted that the non-statutory mitigating circumstances presented by the defense were common to most capital murder cases. (R. 1080 ("Also, in looking at nonstatutory mitigators, and having tried numerous capital murder cases, many times there is some commonality to some of this mitigation evidence: That an individual comes from a bad background; that there is poverty; that there is a bad family life; that there is domestic violence; that the defendant is living on the street; and et cetera, et cetera."). He then highlighted testimony about how, at five years old, Mr. Townes struggled in

kindergarten and had to be sent home by the principal. (R. 1081.) Judge Anderson stated, "He's brought nothing but misery to people throughout his life." (R. 1081.) Judge Anderson then referred to the jury's vote as advisory and a recommendation, found that the aggravating circumstances outweighed the mitigating circumstances, and sentenced Mr. Townes to death. (C. 325; R. 1083.)

II. PROCEEDINGS BELOW

On October 14, November 14, and December 19, 2011, the Alabama Court of Criminal Appeals granted additional time for the circuit clerk to file the record on appeal. (C. 435, 436, 438.) On December 12, 2011, the court reporter who recorded Mr. Townes's capital trial certified a "true and correct transcript of all proceedings." (R. 1105.) On January 6, 2012, the circuit clerk filed the certified record with the Alabama Court of Criminal Appeals. (R. 1106.) Mr. Townes then filed two motions to supplement the record (SR. 3-7; SSR. 3-7), one of which asked the trial court to review the completeness of the record with regard to the jury instructions (SR. 5). Judge Anderson granted both motions (SR. 9; SSR. 9), and the circuit clerk subsequently filed two supplemental records (SR. 90; SSR. 22).

The certified record contained the following jury instruction:

> A specific intent to kill is an essential ingredient of capital murder as charged in this indictment, and may be inferred from the character of an assault, the use of a deadly weapon, or other attendant circumstances. Such intent ***must be inferred*** if the act was done deliberately and death was reasonably to be apprehended or expected as a natural and probable consequence of the act.

(R. 824 (emphasis added).) On appeal, Mr. Townes argued that this instruction

violated state and federal law because it created a mandatory presumption with regard to the issue of specific intent. (Appellant's Br. 12; Reply Br. 2.) At no point during this stage of the proceedings did the Attorney General, the District Attorney, the court reporter, or the trial judge challenge the accuracy of the record. Indeed, in its brief and at oral argument, the Attorney General for the State of Alabama conceded that the trial court instructed the jury that "specific intent ***must*** be inferred." (State's Br. 13 (emphasis added).) On June 13, 2014, the Alabama Court of Criminal Appeals reversed Mr. Townes's conviction and sentence, finding that the trial court's jury instruction improperly required the jury to presume that Mr. Townes possessed the specific intent to kill, which was the critical issue at Mr. Townes's trial. Townes v. State, No. CR–10–1892, at 5 (Ala. Crim. App. June 13, 2014) (opinion withdrawn).

It was not until after the Court of Criminal Appeals's opinion, on June 20, 2014, that the circuit clerk filed a notice from Judge Anderson stating that he had listened to an audio recording of the jury instructions and determined that he had said "may" and not "must." (SSSR. 22-23.) After receiving briefs from the parties, the Court of Criminal Appeals determined that a second court reporter should listen to the audio recording and transcribe the jury instructions. (SSSSR. 3-4.) In its remand order directing the trial court to appoint a different court reporter to transcribe the jury instructions, the Court of Criminal Appeals explained that it had reversed Mr. Townes's capital conviction based on the certified record containing a mandatory presumption ("intent must be inferred"), but that the trial court, who had sentenced Mr. Townes to death and who would be appointing the new court reporter, had

"notified this Court that there may have been an error in the transcription," and that the trial court claimed to have used the word "may," not "must." (SSSSR. 3-4.)

The second court reporter filed a 56-page supplemental record of the guilt/innocence phase jury instructions. (SSSSR. 5-60.) The only difference between the certified record and the newly transcribed record was a change of the word "must" to "may" in the intent instruction. (SSSSR. 25.) Subsequently, the Court of Criminal Appeals found that "no error, plain or otherwise, resulted from the circuit court's jury instructions regarding specific intent." Townes v. State, No. CR-10-1892, 2015 WL 9263802, at *6 (Ala. Crim. App. Dec. 18, 2015). While acknowledging ten other errors, id. at *7-8, 20, 22, 25, 28, 30, 32, 36-37, 39-40, the Court of Criminal Appeals found that each was harmless and affirmed Mr. Townes's conviction and death sentence. Id. at *52.

Mr. Townes then sought review in the Alabama Supreme Court on several questions, including whether the jury instructions, and the process by which the record of those instructions was amended, violated the Eighth and Fourteenth Amendments. The Alabama Supreme Court denied Mr. Townes's petition for a writ of certiorari over one dissent. Ex parte Townes, No. 1160523 (Ala. Oct. 20, 2017). Mr. Townes now respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Alabama Court of Criminal Appeals in this case.

REASONS FOR GRANTING THE WRIT

I. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE PROCESS BY WHICH THE ALABAMA COURTS AMENDED THE CERTIFIED RECORD AFTER REVERSIBLE ERROR HAD BEEN FOUND VIOLATES DUE PROCESS AND THE REQUIREMENT FOR HEIGHTENED RELIABILITY IN CAPITAL CASES.

This Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." Parker v. Dugger, 498 U.S. 308, 321 (1991). A critical component of meaningful appellate review is an accurate record. See, e.g., Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding that state courts could not refuse to provide transcript to indigent defendant); see also Hardy v. United States, 375 U.S. 277, 280 n.3 (1964) (quoting Bennett Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn. L. Rev. 783, 792-93 (1961)) ("Frequently, issues simply cannot even be seen - let alone assessed - without reading an accurate transcript. Particularly is this true of questions relating to evidence or to the judge's charge . . .").

Where the record is disputed, this Court has held that due process requires that a defendant have a "voice in determining" its accuracy. Chessman v. Teets, 354 U.S. 156, 164 (1957). In Chessman, the defendant was allowed to review and suggest changes to the proposed record but was not allowed to attend the hearing at which the record was settled. Id. at 159-60. This Court held that "the ex parte settlement of this state court record violated petitioner's constitutional right to procedural due process." Id. at 162; see also Mitchell v. Wyrick, 698 F.2d 940, 942 (8th Cir. 1983) ("We find that Mitchell and his attorney fully participated in the state transcript proceeding as

required under Chessman, and that seven of the nine requested changes were made at that hearing.").

Here, the Alabama Court of Criminal Appeals ordered the trial court to appoint a second court reporter, who was not present at Mr. Townes's trial, to review an audiotape and submit a new version of the guilt/innocence phase jury instructions. (SSSSR. 3-4.) In its remand order, the lower court explained that it had reversed Mr. Townes's capital conviction based on the certified record containing a mandatory presumption ("intent must be inferred"), but that the trial judge, who had sentenced Mr. Townes to death and who would be appointing the new court reporter, had "notified this Court that there may have been an error in the transcription," and that the judge claimed to have used the word "may," not "must." (SSSSR. 3-4.) In response to this order, the court reporter submitted a transcript of just the guilt/innocence phase jury instructions in which the *only* change was the word "must" to "may." (SSSSR. 25.) The process by which one word in the certified record was changed, only after reversible error had been found, falls far short of this Court's requirement that such proceedings "satisfy[] the requirements of procedural due process." Chessman, 354 U.S. at 165; see also Cole v. Arkansas, 333 U.S. 196, 202 (1948) (reversing where defendants were denied procedural due process on appeal).

Moreover, Chessman and this Court's subsequent precedent make clear that states cannot delegate to the trial court the decision of whether that same court

committed reversible error.[4] See Draper v. Washington, 372 U.S. 487, 499-500 (1963) (holding that allowing trial judge to prevent appeal by deeming it frivolous violated due process); Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214, 216 (1958); Chessman, 354 U.S. at 162. As this Court recognized in Eskridge, "[t]he conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review." 357 U.S. at 216; see also Commonwealth v. Dougherty, 18 A.3d 1095 (Pa. 2011) (finding judge erred in denying request for recusal); id. at 1096 (Baer, J. concurring) ("Litigants and the appellate courts alike have but one vehicle through which to examine a trial court's proceedings for potential irregularities: the certified record. Therefore, to alter a record is to strike at the very pillars of meaningful appellate review, and concomitantly therewith, the basic tenets of due process.").

Allowing the trial judge in this case to correct one word of a voluminous record - after the decision had been issued[5] - is particularly problematic given that the

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[4]The rules that govern criminal appeals in Alabama do not provide the parties with access to any audio recordings of the trial proceedings. See, e.g., Ala. R. App. P. 10. Thus there is generally no opportunity for defendants to review such recordings to determine whether discrepancies exist between the recordings and the certified record.

[5]In another capital case, Judge Anderson directed a clerk to review an audiotape and file a certificate changing "inference" to "innocence" in the jury instructions after the Alabama Supreme Court had issued its opinion but prior to rehearing on direct appeal. See Hammonds v. Comm'r, Ala. Dep't of Corr., No. 15-11797, 2017 WL 4675707, at *3-4 (11th Cir. Oct. 17, 2017); see also Hammonds v. Allen, 849 F.Supp.2d 1262, 1305 (M.D. Ala. 2012). In reviewing these instructions, the Eleventh Circuit Court of Appeals considered the original certified record, and not the corrected record, in part because:

> Considering corrected page 228 in these circumstances could create a perverse incentive for a party to withhold a key fact that is otherwise lost

Alabama appellate courts consistently deny defendants' untimely requests to supplement the appellate records. See McGriff v. State, 908 So. 2d 961, 992, 1024 (Ala. Crim. App. 2000) (affirming capital conviction where defendant failed to supplement record prior to appeal; "It is the appellant's duty to point out deficiencies in the record within the time allowed by the Rules of Appellate Procedure."), overruled on other grounds by Ex parte McGriff, 908 So. 2d 1024 (Ala. 2004); Armstrong v. State, 710 So. 2d 531, 532-33, 535 (Ala. Crim. App. 1997) (denying Batson claim where trial court's reasoning "inexplicably missing" from record and defendant failed to file motion to supplement); Allison v. State, 645 So. 2d 358, 360 (Ala. Crim. App. 1994) (denying appeal; "There has been no request to supplement the record on appeal and the time for so doing has expired."); M.B. v. State, 630 So. 2d 490, 490-91 (Ala. Crim. App. 1993) (denying challenge to adequacy of record where defendant failed to object to certification of transcript); L.W.C. v. State, 576 So. 2d 681, 682-83 (Ala. Crim. App. 1991); William v. State, 548 So. 2d 516, 517-18 (Ala. Crim. App. 1988); Boyd v. State, 542 So. 2d 1247, 1258-59, 1260 (Ala. Crim. App. 1988) (denying defendant's request to supplement record because of failure to file proper motion; affirming conviction and death sentence); Lipscomb v. State, 68 So. 2d 862, 864 (Ala. Ct. App. 1953); see also Ex parte Frazier, 758 So. 2d 611, 616 (Ala. 1999) (affirming capital conviction where

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> in a voluminous record until the most opportune moment, regardless of whether that moment arises before the state has completed its review.

Id. at *6; see also Burks v. United States, 437 U.S. 1, 17 (1978) ("[T]he purposes of the [Double Jeopardy] Clause would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple.'").

defendant failed to supplement record with race of potential jurors); Flowers v. State, 799 So. 2d 966, 994 (Ala. Crim. App. 1999) (same). In William, the Court of Criminal Appeals stated:

> Here, the appellant attempts to cast the burden of 'correcting' the record upon this Court by having us review the tape recordings of the trial court reporter. However, corrections to the record should be made before that record is ever submitted to an appellate court.

548 So. 2d at 518 (affirming conviction). In Lipscomb, the Court of Criminal Appeals found that it could not review an issue because the relevant exhibits were not a part of the certified record. 68 So. 2d at 863. On rehearing, the defendant attempted to supplement the record with the exhibits. Id. at 864. The Court of Criminal Appeals refused to consider the exhibits because doing so "would tend to encourage carelessness in appellate procedure and unduly prolong litigation." Id.

In L.W.C., the defendant filed a motion in the Court of Criminal Appeals to strike two transfer orders from the certified record. 576 So. 2d at 682. Defense counsel attached an affidavit attesting to the fact that the orders should not have been included in the record on appeal. Id. The Court of Criminal Appeals denied the motion to amend the record and found:

> The certificates of a trial court clerk which certify that instruments and a transcript are true and correct are accepted as the sole and conclusive evidence of the proceedings in the circuit court for purposes of appeal.
> . . .
> The longstanding rule of [the Alabama Supreme Court] has been that the Supreme Court and the Court of Criminal Appeals is remitted to the consideration of the record alone and absolute truth must be imputed to it, and if it is incomplete or incorrect, amendment or correction must be sought by appropriate proceedings rather than by impeachment on hearing in the appellate court, by statements in brief, by affidavits, or by

other evidence not appearing in the record . . . .

Id. at 682-83 (quotation marks, brackets, and citations omitted).

There is no precedent in Alabama for the actions taken in Mr. Townes's case, and for good reason. Permitting substantive changes to the record after the record had been certified and after reversible error had been found violated his right to due process and the requirement for heightened reliability in capital cases. Parker, 498 U.S. at 321; Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Chessman, 354 U.S. at 162; Griffin, 351 U.S. at 19.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE SUBSTANTIAL RISK THAT THE JURY WAS IMPROPERLY INSTRUCTED ON THE CRITICAL ISSUE OF INTENT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Due Process Clause of the Fourteenth Amendment protects against a conviction except where the State has proven beyond a reasonable doubt every element of the offense. See, e.g., In re Winship, 397 U.S. 358, 364 (1970). This requirement prohibits the use of evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. Sandstrom v. Montana, 442 U.S. 510, 523-24 (1979). In Sandstrom, this Court determined that a jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" was a mandatory presumption which served to relieve the State's burden of persuasion on the element of intent, and was therefore unconstitutional. Id. at 512, 523-24; see also Carella v. California, 491 U.S. 263, 266 (1989); Francis v. Franklin, 471 U.S. 307, 325, 326 (1985).

The certified record of Mr. Townes's trial established that, at the conclusion of the guilt/innocence phase, the trial court erroneously instructed the jury that the specific intent to kill "***must be inferred*** if the act was done deliberately and death was reasonably to be apprehended or expected as a natural and probable consequence of the act." (R. 824 (emphasis added).) As the Alabama Court of Criminal Appeals recognized, this instruction directed the jury that once it was convinced of the predicate facts – that Mr. Townes acted deliberately and that death was a reasonable consequence – it was required to conclude that Mr. Townes had the specific intent to kill, without consideration of any of the other evidence submitted by either the State or the defense. Townes v. State, No. CR–10–1892, at 12-13 (Ala. Crim. App. June 13, 2014) (opinion withdrawn) [hereinafter Townes I] . Because this instruction created a mandatory presumption on the critical issue of intent, it relieved the State's burden of proof on this issue, in violation of the Due Process Clause. Carella, 491 U.S. at 266; Franklin, 471 U.S. at 325; Sandstrom, 442 U.S. at 523-24; see also Townes I, at 14.

Alabama law is clear that a necessary element of capital murder is the specific intent to kill. See, e.g., Brown v. State, 72 So. 3d 712, 715 (Ala. Crim. App. 2010). In Mr. Townes's case, the only issue before the jury was whether he possessed the specific intent to kill or whether, as defense counsel contended, the jury should find Mr. Townes "guilty of something other than capital murder" because he only intended to rob the victim but did not have the specific intent to kill. (R. 398-99); see also Townes I, at 14-15 ("The issue of intent was very much at issue in this case. In fact, Townes's intent to kill was the only issue left for the jury to decide." (citations omitted)). In light

of the centrality of the intent issue and the evidence that Mr. Townes shot to scare the victim and not to kill, the Court of Criminal Appeals reversed Mr. Townes's conviction and sentence. Townes I, at 14-19; see also Carella, 491 U.S. at 270 (Scalia, J., concurring in the judgment) (quoting Connecticut v. Johnson, 460 U.S. 73, 85-86 (1983)) ("'An erroneous presumption on a disputed element of a crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence. If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict.'").

A second court reporter, who was not present at Mr. Townes's trial, has now reported that the judge instructed that the intent to kill "***may be inferred*** if the act was done deliberately and death was reasonably to be apprehended or expected as a natural and probable consequence of the act." (SSSSR. 21 (emphasis added).) This court reporter did not indicate whether any audio recording was clear or whether the jury may have misunderstood the instructions. As a consequence, there is now a conflict between the certified record - produced and certified by the court reporter present at the trial and then reviewed and relied upon over the next two and a half years by undersigned counsel, the State, and the appellate courts during the drafting of multiple briefs and oral argument that led to the lower court decision reversing Mr. Townes's conviction and sentence - and the "corrected record" - produced by a court reporter who was not present at the trial.

When confronted with the possibility that jurors misunderstood instructions on

a critical issue, this Court has found that those instructions violate the Constitution. See Shafer v. South Carolina, 532 U.S. 36, 53 (2001) (reversing where trial court's instructions "did nothing to ensure that the jury was not misled"); Mills v. Maryland, 486 U.S. 367, 381 (1988) (reversing where there was "at least a substantial risk that the jury was misinformed"); Sandstrom, 442 U.S. at 519 (reversing while acknowledging that "[w]e do not reject the possibility that some jurors may have interpreted the challenged instruction as permissive"). The conflicting accounts of the jury instructions at issue here do not resolve whether the jury may have applied a mandatory presumption in finding Mr. Townes guilty of capital murder. Thus the intent instructions do not satisfy the prohibition on mandatory presumptions or the requirement for heightened reliability in capital proceedings. See Franklin, 471 U.S. at 325 (reversing conviction "[b]ecause a reasonable juror could have understood the challenged portions of the jury instruction in this case as creating a mandatory presumption"); Sandstrom, 442 U.S. at 519 ("However, the fact that a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that Sandstrom's jurors actually did proceed upon one or the other of these latter interpretations."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Because of that qualitative difference [between the death penalty and imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). As this Court held in Andres v. United States, 333 U.S. 740, 752 (1948):

> That reasonable men might derive a meaning from the instructions given

> other than the proper meaning [ ] is probable. In death cases doubts such as those presented here should be resolved in favor of the accused.

Id. at 752 (reversing capital conviction); see also Mills, 486 U.S. at 376 ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds.").

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Alabama Court of Criminal Appeals.

Respectfully Submitted,

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