

No. 17-7894
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

TAWUAN TOWNES,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the
Alabama Supreme Court

**BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court decline to review Townes's claim that the process by which the Alabama Court of Criminal Appeals corrected the trial transcript was improper where the claim does not involve a federal question, is not worthy of this Court's certiorari review, and is without merit?
2. Should this Court decline to review Townes's claim that the jury was improperly instructed on the element of intent during the guilt phase of his trial where this claim is without merit?

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STATEMENT OF THE CASE

A. The Proceedings Below

On November 13, 2008, Tawuan Townes and Cornelius Benton went to the home of Christopher Woods, a known drug dealer, to rob him. During the attempted robbery, Woods was beaten and shot. Woods died as a result of the bullet wound to his chest. Townes was indicted by the Grand Jury of Houston County for the following offense: murder during a burglary in violation of Ala. Code §13A-5-40(a) (4). The jury found Townes guilty of this capital offense. A jury sentencing hearing was then held. After deliberating, the jury recommended death by a ten-to-two vote.

The trial court then conducted its own sentencing hearing. After this hearing, the trial court found that the following aggravating circumstances existed: the Ala. Code, § 13A-5-49(4) aggravating circumstance that the capital offense occurred during a burglary; and, the Ala. Code § 13A-5-49(4) aggravating circumstance that the capital offense occurred during a robbery. *Townes v. State*, ___ So. 3d ___, 2015 WL 9263802, *51 (Ala. Crim. App. Dec. 18, 2015). The trial court found the existence of the following statutory mitigating circumstances: the Ala. Code § 13A-5-51(1) mitigating circumstance that Townes had no significant history of prior criminal activity; and, the Ala. Code § 13A-5-51(7) mitigating circumstance that

Townes was a young adult when he committed the capital murder. *Id.* The trial court also considered the non-statutory mitigating circumstances concerning Townes's background. *Id.* at *51-52. After weighing the aggravating and mitigating circumstances, the trial court sentenced Townes to death.

On June 6, 2013, the Alabama Court of Criminal Appeals reversed and remanded Townes's capital murder conviction and sentence of death. In reversing Townes's conviction and death sentence, the Alabama Court of Criminal Appeals found that the trial court's jury instruction that "intent must be inferred if the fact was done deliberately and death was reasonably to be apprehended or expected as a natural and probable consequence of the act" created a mandatory presumption that Townes intended to kill the victim if he deliberately pulled the trigger of the rifle while the rifle was pointed in the direction of the victim in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979), and *Francis v. Franklin*, 471 U.S. 307 (1985). Pet. App. A, pp. 12-14. The Alabama Court of Criminal Appeals also noted in footnote 2 of its opinion that the trial court's use of the phrase "must be inferred" created the mandatory presumption but had the trial court used the phrase "may be inferred" there would have been no error. Pet. App. A, p. 13.

On June 20, 2014, the circuit court filed a supplemental record with the Alabama Court of Criminal Appeals. The third supplemental record contained a “Notice to the Court” indicating that the transcript submitted to the Alabama Court of Criminal Appeals was incorrect. Specifically, the circuit court explained:

The Alabama Court of Criminal Appeals issued an opinion June 13, 2014 reversing and remanding the above style[d] case. The reason for the reversal was because the trial court allegedly gave a mandatory-conclusive presumption instruction using the word “must”. Upon reviewing the Court of Criminal Appeals opinion this court listened to the court reporter’s tape recording of the jury instruction and the tape reveals this court used the word “may” and not “must”. The word “may” allows for a permissive inference and not a mandatory-conclusive inference. Therefore, the transcript submitted to the Alabama Court of Criminal Appeals is incorrect.

(3d Supp., p. 22)

The Alabama Court of Criminal Appeals then ordered the parties to file supplemental briefs addressing the following issues: “(1) whether the record may be corrected at this point in the proceedings; and (2) what is the proper procedure to correct the record at this point.” Resp. App. A. The parties filed their supplemental briefs on July 14, 2014. Significantly, Townes did not address the question of what the proper procedure would be to correct the record but only argued that the record could not be corrected.

On March 4, 2015, the Alabama Court of Criminal Appeals entered the following order concerning the circuit court's notification that the record should be corrected:

Rule 10(g), Ala. R. App. P., provides in relevant part, that “[t]he appellate court may, on motion of a party or on its own initiative, order that a supplemental or corrected record be certified and transmitted to the appellate court if necessary to correct an omission or misstatement” *See also In re Holmes*, 821 N.E.2d 568, 571 (Ohio 2004) (holding that “[a]n appellate court has the power on its own initiative to order the correction of an imperfect trial record,” and the failure to do so constituted an abuse of discretion); *Bishop v. State*, 833 So. 2d 92, 93 (Ala. Crim. App. 2002); *Zwerin v. 533 Short North LLC*, 14 F. Supp. 3d 769, 772 (S.D. Ohio 2014); *People v. Ray*, 302 P.3d 289, 292 (Colo. App. 2012). In accordance with Rule 10(g), Ala. R. App. P., this Court remands this cause with instructions for the circuit court to appoint a different court reporter to transcribe the guilt-phase jury instructions and to transmit a supplemental/corrected transcript to this Court. *Cf. Edwards v. State*, 628 So. 2d 1021, 1024 (Ala. Crim. App. 1993). The supplemental record shall be filed with this Court as soon as practicable and no later than 56 days from the date of this order.

Resp. App. B.

Townes did not object when the Alabama Court of Criminal Appeals ordered that a different court reporter be appointed to transcribe the guilt-phase jury instructions and to transmit a supplemental/corrected transcript to that court. In addition, Townes did not request that the new court reporter indicate whether the audio recording was clear.

As the Alabama Court of Criminal Appeals found: “The circuit court complied with this Court’s instruction and, on April 9, 2015, filed a corrected record.” *Townes*, 2017 WL 9263802 at *6. The court reporter certified that the corrected transcript was a “true and correct transcript of the guilt-phase jury instructions. ...” (4th Supp., p. 56) The Alabama Court of Criminal Appeals found that “[t]he corrected record establishes that the circuit court gave the following instruction regarding specific intent:

“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 *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.”

Id. After reviewing the corrected jury instruction, the Alabama Court of Criminal Appeals withdrew its opinion of June 13, 2014, and issued a new opinion affirming Townes’s conviction and death sentence. *Id.* Specifically, concerning the issue before this Court, the Alabama Court of Criminal Appeals found that “[t]he circuit’s instruction to the jury that it may infer intent created a permissible presumption as opposed to a mandatory presumption. ... Accordingly, no error, plain or otherwise, resulted from the circuit court’s jury instructions regarding specific intent, and this issue does

not entitle Townes to any relief.” *Id.* Townes then filed a petition for writ of certiorari in the Alabama Supreme Court. The Alabama Supreme Court denied the petition on October 20, 2017.

B. Statement of the Facts

The Alabama Court of Criminal Appeals set forth the facts concerning the capital murder of Christopher Woods in its December 18, 2015, opinion, as follows:

Townes had plans to rob Woods, a known drug dealer. Woods lived in a house in Dothan with his girlfriend, India Starks. On November 13, 2008, Townes and Cornelius Benton drove to Woods's house. Townes was armed with a .22 caliber rifle, and Benton was armed with a .380 caliber pistol that belonged to Townes's brother. Townes and Benton wore dark clothing and obscured their faces to conceal their identities. Townes also wore a toboggan cap.

Around 2 p.m., Starks heard Townes and Benton bang on the door, and, as Woods looked outside, they kicked open the door and entered the house. Woods said, “Please don't do this.... Man, don't do this. Please don't do this.” (R. 437.) Woods backed away and sat in a chair, at which point the men “told him to shut up and just tell [us] where it's at.” (R. 437.) As Woods begged for his life and Starks's life, Benton repeatedly hit him in the face to force Woods to give them money. Townes shot Woods in the chest with the .22 caliber rifle and Benton continued to hit Woods. Benton then shot Woods in the leg, after which he resumed hitting Woods in the face and demanding money. Starks heard Woods screaming and begging, “Man, don't do this.” (R. 450.)

After Woods was shot the second time, Starks ran to a neighbor's house to telephone emergency 911. As Starks was escaping, one of the men asked, “Where you going, bitch?” (R.

451.) While Starks was on the telephone with emergency 911, she saw the two men leave. Starks went back to Woods's house to attend to Woods. According to Starks, the room where the attack occurred was ransacked, Woods was slumped over in the chair, and her cellular telephone was missing. Woods died as a result of the bullet wound to the chest.

When Townes was arrested, he was in possession of the SIM card from Starks's cellular telephone. After Townes was arrested, he gave a statement to police officers. In his statement, Townes admitted that he and Benton went to Woods's house to rob Woods because Townes needed money. Townes, however, adamantly denied intending to kill Woods. Townes stated that he intended to scare Woods when he shot the .22 caliber rifle and that the rifle used only “little bullets.” (C. 500.)

After hearing closing arguments of counsel and being instructed on the law by the circuit court, the jury convicted Townes of murder made capital because it was committed during the course of a burglary. (footnote omitted)

Id. at *1.

REASONS FOR DENYING THE PETITION

It is worth noting at the outset that Townes has not alleged – let alone proven – any traditional ground for certiorari. He has not, for instance, argued that the decision of the Alabama Court of Criminal Appeals conflicts with the decision of other state courts, *see*, Sup. Ct. R. (10)(b), or that this case presents a novel and important question of federal law, *see*, Sup. Ct. R. 10(c). There is no split here, no novel issue presented, and no conflict alleged. At bottom, Townes requests that this Court engage in a fact-bound determination of whether the

Alabama Court of Criminal Appeals properly allowed the record to be corrected in this case to reflect a proper jury instruction. This Court should, therefore, deny Townes's petition for writ of certiorari.

I. This Court should decline to review Townes's claim that the process by which the Alabama Court of Criminal Appeals corrected the trial transcript was improper.

Townes contends that the process used by the Alabama Court of Criminal Appeals to correct the record was improper. There are at least three reasons this Court should deny certiorari on this claim.

A. This Court should deny certiorari because this claim does not create a federal question.

Townes argues here, and argued in the state courts, that the process used by the Alabama Court of Criminal Appeals to correct the trial record was improper. The Alabama Court of Criminal Appeals, after being informed by the trial court that the record should be corrected, ordered that the record be corrected pursuant to Rule 10(g) of the Alabama Rules of Appellate Procedure. Resp. App. B. In its order, the Alabama Court of Criminal Appeals also instructed the circuit court to appoint a different court reporter to transcribe the guilt phase jury instructions and to transmit a supplemental/corrected transcript to that court. Resp. App. B.

The application of Rule 10(g) of the Alabama Rules of Appellate Procedure to correct the record in Townes's case is strictly a matter of state

law. A state may apply its own rules of appellate procedure to correct a record under that independent state law. The holding of the Alabama Court of Criminal Appeals is not intertwined with federal law and is based completely on Rule 10(g) of the Alabama Rules of Appellate Procedure. This Court should, therefore, deny certiorari on Townes's claim because it was based on an independent state law rule and does not present a federal question.

B. The underlying issue is not worthy of this Court's review.

Next, this Court should deny certiorari on this question because the underlying issue is not worthy of this Court's review. Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons. In addition, the demands on this Court's time mandate that it select for review only those truly important cases that will have a wide ranging impact. Townes has not alleged compelling grounds for this Court to grant certiorari review. The process by which the Alabama Court of Criminal Appeals corrected the record in this case to reflect the correct guilt phase jury instruction is of such narrow scope and limited precedential value that it is not worthy of certiorari consideration.

C. The Alabama Court of Criminal Appeals properly ordered that the record be corrected pursuant to Rule 10(g) of the Alabama Rules of Appellate Procedure.

The Alabama Court of Criminal Appeals originally found the trial court's jury instruction that "intent must be inferred if the fact was done deliberately and death was reasonably to be apprehended or expected as a natural and probable consequence of the act" created a mandatory presumption that Townes intended to kill the victim if he deliberately pulled the trigger of the rifle while the rifle was pointed in the direction of the victim in violation of Sandstrom v. Montana, 442 U.S. 510 (1979), and Francis v. Franklin, 471 U.S. 307 (1985). Pet. App. A. The Alabama Court of Criminal Appeals held that the instruction resulted in plain error because the issue of intent was "very much at issue in this case" and held that "the evidence establishing Townes's intent to kill was not so overwhelming as to render harmless the circuit court's erroneous instruction." Pet. App. A. The Alabama Court of Criminal Appeals, citing *Blackmon v. State*, 7 So. 3d 397, 434-435 (Ala. Crim. App. 2005), also noted in footnote 2 of its opinion that the trial court's use of the phrase "must be inferred" created the mandatory presumption but had the trial court used the phrase "may be inferred" there would have been no error. Pet. App. A.

A week after the Alabama Court of Criminal Appeals issued its opinion, the circuit court filed a third supplement record with the Court of Criminal Appeals. In this supplemental record, the circuit court informed the Court of Criminal Appeals that after reviewing that court's opinion, it had listened to the court reporter's tape recording of the jury instructions and the tape revealed that the circuit court used the term "may" and not "must" which allowed for a permissive inference and not a mandatory-conclusive inference. (3rd Supp., p. 22)

After receiving the supplemental transcript from the circuit court, the Alabama Court of Criminal Appeals ordered the parties to file supplemental briefs addressing the following issues: "(1) whether the record may be corrected at this point in the proceedings; and (2) what is the proper procedure to correct the record at this point." Resp. App. A. Significantly, Townes did not address the question of what the proper procedure would be to correct the record in his supplemental brief but only argued that the record could not be corrected for various reasons. After the supplemental briefs were filed, the Court of Criminal Appeals, pursuant to Rule 10(g), Ala. R. App. P., remanded this case to the circuit court and ordered the circuit court to "appoint a different court reporter to transcribe the guilt-phase jury instructions and to transmit a supplemental/corrected transcript" to that

Court. Resp. App. B. Townes did not object to this procedure after the Court of Criminal Appeals entered its order and did not request an opportunity to listen to the tape recording of the guilt-phase instructions.

The Alabama Court of Criminal Appeals properly allowed the trial transcript to be corrected in this case to reflect the jury instruction that was actually given by the circuit court under the provisions of Rule 2(b) and Rule 10(g) of the Alabama Rules of Appellate Procedure. *See Ex parte Gamble*, 784 So. 2d 323, 326 (Ala. 2000) (noting that Rule 10(f) [now Rule 10(g)] “allows the Court of Criminal Appeals to ‘order that a supplemental or corrected record be certified and transmitted to the appellate court if necessary to correct an omission or misstatement.’”); *Weaver v. State* 401 So. 2d 344, 348 (Ala. Crim. App. 1981) (“Rule 10(f) [current Rule 10(g)] provides broad power in the appellate courts to direct that omissions be corrected and to determine ‘all other questions as to the form and content of the record.’”).

The Alabama Court of Criminal Appeals properly corrected the record in the instant case where the word “must” instead of “may” appeared incorrectly in the guilt-phase jury instructions which caused the Alabama Court of Criminal Appeals to reverse Townes’s conviction. This was especially true where the Alabama Court of Criminal Appeals noted that

“[h]ad the circuit court used the phrase, ‘may be inferred,’ there would have been no error.” Pet. App. A. Because the jury instruction in this case was not mandatory but was, in fact, permissive, the Alabama Court of Criminal Appeals properly exercised its sound discretion and ordered that the record be corrected to reflect the actual jury charge that was given by the circuit court. To do otherwise would create a miscarriage of justice because the jury was properly instructed in this case.

The federal cases cited by Townes do not entitle him to certiorari review because they are not similar factually to the instant case. *See Chessman v. Teets*, 354 U.S. 156 (1957) (Supreme Court reversed case because the petitioner was not given his day in court upon the controversial issues of fact and law involved in the settlement of the record – i.e., that petitioner was not represented by counsel in those proceedings, that a substitute court reporter finished the transcript, that the substitute court reporter was an uncle by marriage of the deputy district attorney in charge of this case and worked in close collaboration with the prosecutor and two police officers in preparing the transcript, and that the testimony of these officers related to some of the petitioner’s list of inaccuracies in the transcript – in violation of petitioner’s constitutional rights to due process); *Hardy v. United States*, 375 U.S. 277 (1964) (indigent petitioner deprived of

transcript on appeal even though had new attorney on appeal who could not discharge his duty unless he had a transcript of the testimony and evidence presented by petitioner at his trial); *Draper v. State of Washington*, 372 U.S. 487 (1963) (the Court held that the petitioner's constitutional rights were denied because the trial court's conclusion that the indigent petitioner's appeal was frivolous prevented him from obtaining full appellate review of the trial proceedings); *Mitchell v. Wyrick*, 698 F.2d 940 (8th Cir. 1983) (petitioner failed to show that he was prejudiced or harmed from not having a complete record on appeal and failed to show that the complete record would have benefited him on appeal).

There are no facts in this case similar to the facts in the cases cited above. There is no evidence that Townes did not have the complete record in his case or that Townes was not given his day in court concerning the appellate record in this case. Instead, the record was corrected to reflect the actual guilt-phase jury instruction that was given by the circuit court, a correction that caused Townes's case to be affirmed rather than reversed.

Neither do the decisions cited by Townes in the Alabama appellate courts entitle him to certiorari review of his case. The cases cited by Townes either concern missing portions of transcripts where the defendants failed to timely request that the record be supplemented or cases where the

defendants never requested that the transcript be supplemented. *See Ex parte Frazier*, 758 So. 2d 611, 616 (Ala. 1999); *McGriff v. State*, 908 So. 2d 961, 992, 1024 (Ala. Crim. App. 2000); *Armstrong v. State*, 710 So. 2d 531, 532-533 (Ala. Crim. App. 1997); *Allison v. State*, 645 So. 2d 358, 360-361 (Ala. Crim. App. 1994); *M.B. v. State*, 630 So. 2d 490, 490-491 (Ala. Crim. App. 1993); *L.W.C. v. State*, 576 So. 2d 681, 682-683 (Ala. Crim. App. 1991); *William v. State*, 548 So. 2d 516, 518 (Ala. Crim. App. 1988); *Boyd v. State*, 542 So. 2d 1247, 1258-1259 (Ala. Crim. App. 1988); *Lipscomb v. State*, 68 So. 2d 862, 864 (Ala. Crim. App. 1953).

The cases cited by Townes do not involve requests to correct a portion of the transcript that was transcribed incorrectly. Those cases, therefore, have no application to the instant case.

II. This Court should decline to review Townes's claim that the jury was improperly instructed on the element on intent during the guilt phase of his trial.

Townes also contends that there is some doubt in this case whether the jury was properly instructed on the specific intent necessary to find him guilty of capital murder. Townes relies on the jury instruction that was later corrected to support his argument. There are at least two reasons this Court should deny certiorari on Townes's claim.

First, this Court should deny certiorari on this question because it seeks only fact-bound error correction. Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons. In addition, the demands on this Court's time mandate that it select for review only those truly important cases that will have a wide ranging impact. Townes has not alleged compelling grounds for this Court to grant certiorari review. Townes's argument that the jury was not properly instructed on specific intent – based on an incorrect jury instruction – is of such narrow scope and limited precedential value that it is not worthy of certiorari consideration.

Second, Townes's argument is without merit. The circuit court properly instructed the jury on the specific intent to kill necessary to find Townes guilty of the capital murder of Christopher Woods.¹ The circuit court instructed the jury as follows:

A specific intent to kill is an essential ingredient of capital murder as charged in this indictment, and may be inferred from

¹ Townes also appears to argue that there is some question about the authenticity of the corrected jury instruction. However, Townes did not object to the process used by the Alabama Court of Criminal Appeals to correct the record and never asked to be included in this process. Moreover, both the circuit court and the second court reporter found that the circuit court used the permissive word “may” rather than the mandatory word “must.” In addition, the court reporter who filed the corrected jury instructions certified that the jury instructions were a “true and correct” transcript of the guilt-phase jury instructions. (4th Supp., p. 56)

the character of the assault, the use of a deadly weapon, or other attendant circumstances. Such intent 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.

(4th Supp., p. 21) The Alabama Court of Criminal Appeals found that “[t]he circuit court’s instruction to the jury that it may infer intent created a permissible presumption as opposed to a mandatory presumption. *See Blackmon*, 7 So.3d at 434-35 (holding that the circuit court’s instruction that specific ‘intent may be inferred if the act is done deliberately and the death was reasonably to be apprehended or expected as a natural and probable consequence of the act’ created a permissive presumption).” *Townes*, 2015 WL 9263802, at *6. This holding by the Alabama Court of Criminal Appeals complies with this Court’s holdings in *Francis v. Franklin*, 471 U.S. 307 (1985), and *Sandstrom v. Montana*, 442 U.S. 510 (1979). Because the jury in this case was properly instructed on specific intent, this Court should deny Townes’s petition for writ of certiorari.

CONCLUSION

For the reasons set forth above, this Court should deny Townes's petition for writ of certiorari.

Respectfully submitted,

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