

9 Supreme Court of the United States

October Term, 1968

Office-Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

In the Matter of:

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EDWARD BOYKIN, JR.,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

-----X

Docket No. 642

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Place Washington, D. C.

Date March 4, 1969

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C O N T E N T S

ORAL ARGUMENT OF:

P A G E

E. Graham Gibbons, Esq.
on behalf of Petitioner 2

David W. Clark, Esq.
on behalf of Respondent 18

REBUTTAL ARGUMENT OF:

E. Grham Bibbons, Esq.
on behalf of Petitioner 42

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - -X
4 Edward Boykin, Jr., :
5 Petitioner, :
6 v. : No. 642
7 State of Alabama, :
8 Respondent. :
9 - - - - -X

10 Washington, D. C.
11 Tuesday, March 4, 1969.

12 The above-entitled matter came on for argument at
13 10:43 a.m.

14 BEFORE:

15 EARL WARREN, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN M. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
20 POTTER STEWART, Associate Justice
21 BYRON R. WHITE, Associate Justice
22 ABE FORTAS, Associate Justice
23 THURGOOD MARSHALL, Associate Justice

24 APPEARANCES:

25 E. GRAHAM GIBBONS, Esq.
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(Counsel for Petitioner)

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(Counsel for Respondent)

P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 642, Edward Boykin, Jr., Petitioner, versus Alabama.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Gibbons.

ORAL ARGUMENT OF E. GRAHAM GIBBONS, ESQ.
ON BEHALF OF PETITIONER

MR. GIBBONS: Mr. Chief Justice, may it please the Court.

I represent Edward Boykin, Jr., who is the only man in America that awaits execution for the crime of common-law robbery. And if he is permitted to die will be the sixth man to be executed by the State of Alabama in almost 40 years for that crime.

This case is before this Court on certiorari to the Supreme Court of Alabama. That Court by a 4 to 3 decision affirmed five death sentences. Edward Boykin was brought to trial on five separate indictments for robbery.

And a plea of guilty was entered and on that plea he was sentenced to death five times.

Now, this case as I see it raises three grave constitutional issues. The first one is that it violates the Constitution Due Process Clause for a conviction to be based upon a plea of guilty where in the record of trial there is no affirmative showing that that plea was voluntarily and

1 understandingly given.

2 Secondly, the imposition of the death penalty for the
3 common-law robbery violates the provision of the cruel and
4 unusual Eighth Amendment clause.

5 And thirdly, a statute which allows a jury unfettered
6 discretion in a capital case violates the petitioner's right
7 to due process.

8 Q May I ask you whether that last point was raised
9 and decided below? I have looked for it and I haven't been
10 able to find it.

11 A Yes, it was. It was raised below.

12 Q Would you show me where? Would you tell me
13 where it is? I have looked for it and haven't found it.

14 A Well, it was raised in my brief. I do not know
15 whether the Supreme Court of Alabama considered it or not.
16 Their decision indicates that they did not.

17 Q There is nothing in their decision on it? There
18 is nothing in the papers that we have before us?

19 A No, sir. There is no treatment in the Supreme
20 Court of Alabama decision as to that point.

21 Q I want to be very clear on this, Mr. Gibbons,
22 because it is a jurisdictional matter. There is nothing in the
23 papers before us that shows that the point with respect to
24 your argument with respect to the need for standards to guide
25 the jury in imposing punishment. There is nothing in the papers

1 before us that shows that that was raised and decided below.

2 Am I right or wrong about that?

3 A The only thing I can say is that it was raised
4 in the court below.

5 Q Is your brief here in the Supreme Court of
6 Alabama?

7 A I don't know.

8 Q That is where you say it was raised?

9 A I don't know whether it is or not.

10 Q Well, it was raised in the second case is to
11 follow it, wasn't it?

12 A Well, what I was just about to say was that in
13 view of the oral argument on that specific point that is going
14 to be presented in Maxwell against Bishop, that in the time
15 limitation that I have, I am going to address myself to the
16 first issues, first two issues.

17 Q Well, was the first issue raised below? I don't
18 see that treated in the opinion of the Supreme Court of Alabama.

19 A Well, it was raised below in this sense, that
20 under the automatic appeal statute in Alabama, the Supreme Court
21 of Alabama must look at the entire record.

22 Q They must note any clear error?

23 A Yes, sir.

24 Q That is the statute?

25 A Yes, sir.

1 Q You would say that anything that we might re-
2 verse they should have noted?

3 A Well, they certainly noted that, because three
4 Justices in Alabama wanted to reverse on that first issue
5 which I am raising and which I intend to argue about now.

6 Q But, again, did you argue that in your brief
7 before the Supreme Court of Alabama?

8 A No, sir. No, sir, I did not submit that issue
9 in my brief below.

10 Q That was raised by the dissenting ---

11 A That was raised by the dissenting opinion.

12 Q Was there a motion to withdraw the plea?

13 A No, sir.

14 Q Any stage?

15 A No, sir.

16 Now, if I may ---

17 Q Was it represented by counsel?

18 A He had a court-appointed attorney. I might
19 explain to the court here that I am in the same position you
20 all are because I entered this case at the trial, at the
21 appellate level. I was not even in the case until after the
22 sentence was given and everything.

23 Now, addressing myself, if I may, to this point, that
24 the due process clause required that a trial record show
25 affirmatively that the plea of guilty was voluntarily and

1 understandingly made, I think there are three points of reason-
2 ing, that inevitably draws to that conclusion.

3 The first is, I don't think it is arguable, that a
4 plea of guilty must be voluntarily and understandingly made.
5 That is because as I think we all realize that a plea of
6 guilty is an admission of guilt. It is a judicial confession
7 in effect.

8 And certainly the waiver of such a fundamental right
9 to contest guilt, to give the prosecution the whole boat so to
10 speak, the waiver of that right is so fundamental that I don't
11 think it is arguable, that it should be voluntarily and
12 understandingly given.

13 Secondly, that in order to be meaningful it must be
14 affirmative and this affirmative procedural step must appear on
15 the record because -- what I am saying here is this: That if
16 you look at this record right here, you do not know and I do not
17 know whether Edward Boykin entered his plea of guilty volun-
18 tarily and understandingly.

19 And yet he is going to have to die because of the
20 bareness of the record.

21 And it is a simple thing. By analogy it is the same
22 reasoning that this court used in the Miranda decision. There
23 there was a question of a waiver and this court said that if in
24 a trial court if you are going to introduce an out-of-court
25 confession, then the record must affirmatively show that that

1 confession was obtained voluntarily and understandingly.

2 The same thing is true that we are asking here. If
3 you are going to rely on a plea of guilty, then the record
4 ought to show it. And we wouldn't have this trouble right
5 here, this question wouldn't be before the court, it wouldn't
6 give the trouble to the Supreme Court that it gave them if the
7 same sort of litany that is in the record about indigency if
8 you had just a trial court determining being sure that the
9 fellow knew that when he plead guilty he was subjecting himself
10 to the maximum punishment.

11 I would like to comment about this record.

12 Q What effect do you think the Alabama procedure
13 has that notwithstanding the plea there must be a prima facie
14 case made out or that the plea is accepted?

15 A Well, I don't think that has too much to do with
16 the issue that I am trying to speak about here for the reason
17 that that comes after the plea.

18 Q Well, I know. I know. But his plea doesn't
19 become effective as the basis for carrying out the sentence
20 without that additional requirement being fulfilled, namely
21 the showing of the prima facie case.

22 Isn't that the Alabama law?

23 A No, sir, that is not the Alabama law. The
24 Alabama law is that you put on a prima facie case as a sort
25 of penalty trial, where you determine where -- you let the jury

1 see what kind of a case it was. But, a plea of guilty in
2 Alabama is a conviction of the offense.

3 Q The jury cannot find the man innocent?

4 A No. That is right.

5 Q Isn't that your answer?

6 A Yes, sir.

7 Now looking at the record, it is 35 pages for which
8 a man is going to die for and all that is in it, the first page
9 is an indictment, talking about robbery, not the death penalty.
10 It sets bail at \$2500.

11 There is a proceeding of determining indigency where
12 the fellow is asked do you need an attorney and he says no.
13 There is in this record the testimony of the witnesses, the
14 complaining witnesses, and then the first time that the death
15 penalty is mentioned is in the almost pro forma instructions
16 of the judge when he gives the jury two forms.

17 If you are going to give him imprisonment, you use
18 this form. If you are going to use death, you use this form.
19 And then at that time the jury goes out and comes back in and
20 Edward Boykin is to die. And that is all the record shows.
21 And that is what I am trying to say today.

22 Now, I just believe that the Constitution, Due Process
23 Clause requires that this affirmative showing be made.

24 Q Did I understand that there was no motion at
25 any time to withdraw the plea of guilty?

1 A There was no motion at any time; no, sir.

2 Q I am interested in the statement of facts on
3 page 7 of your brief that indicates that after this conviction
4 and death sentence there was an automatic appeal under Alabama
5 law.

6 A Yes, sir, there is.

7 Q But the Alabama Court, despite the conceded
8 indigency of the petitioner did not appoint counsel on appeal
9 and thereafter when a member of the Civil Liberties Union
10 attempted to represent him he was told that he could not because
11 he wasn't authorized to practice?

12 A Yes, sir.

13 Q And thereafter when, I guess you entered the case,
14 it was too late as you say to raise any issue on motion for a
15 new trial as the statutory time period had elapsed. I am
16 interested in knowing what that means.

17 A Well, the date of the sentence starts the running
18 of the time when you can file a motion for a new trial.

19 Q Here apparently the trial court neglected
20 actually to impose the sentence, didn't he?

21 A Well, he ---

22 Q Or to set the date.

23 A Well, he didn't set the date until the next day
24 when the defendant was brought back in for proper sentencing
25 as to form.

1 Q Yes.

2 A But the 30-day limitation started running on the
3 day of sentence which was the 21st of September. I didn't get
4 in this case until the 27th of October when a friend of mine
5 told me he couldn't prosecute the appeal and would I take it.
6 And at that time I got into it.

7 But, any sort of motion for new trial or grounds,
8 excessiveness of that sort of thing, that is all waived unless
9 you raise on a motion for a new trial.

10 Q And that must be made within 30 days?

11 A Yes, sir. You see, the automatic appeal statute
12 in Alabama came prior or was enacted prior to Gideon against
13 Wainwright about counsel. But you have an automatic appeal
14 but you don't get an automatic attorney on that appeal. You
15 have to ask for it.

16 Q And by the time he had a lawyer the 30-day
17 period had elapsed? Can you tell us in a word what might have
18 been done if the 30-day period had not elapsed?

19 A Well, a motion for a new trial and some of the
20 grounds I am raising now ---

21 Q What? Which ones?

22 A Principally the excessiveness of the penalty in
23 the light of the offense. Nobody expected -- now I can only
24 conjecture about this record. Just as anybody can. But
25 Alabama gives the penalty for robbery about once every eight

1 years.

2 Q If we can just for a moment confine ourselves
3 if you would be willing to, to the question I asked. What
4 could have been done within that 30-day period, that could not
5 have been done after the period?

6 A A motion for a new trial could have been filed
7 and heard by the trial court.

8 Q Yes. Of course, he did have trial counsel,
9 didn't he?

10 A He had court appointed counsel for the trial.

11 Q Yes, he was appointed by the court but he had
12 trial counsel.

13 A His duties under Alabama practice are over when
14 the sentence comes in.

15 Q Doesn't embrace any duties to make a motion for
16 a new trial, does it?

17 A It is the view that attorneys take. I personally
18 take the view that it goes all the way through parole, if he
19 needs help even after he gets paroled, if he gets a sentence.
20 But technically, or by application the trial appointed, court
21 appointed attorney duties are over.

22 Q Yes, I practiced down there.

23 Now, I suppose after the sentence it would have been
24 too late then to withdraw the plea of guilty, or would it?

25 A I believe it would. Yes.

1 Q A motion to withdraw the plea of guilty has to
2 be made before sentence?

3 A Before submission to the jury.

4 I would like to address my further argument to the
5 second point and that is the question of applying the provision
6 of the Eighth Amendment prescription of cruel and unusual
7 against the offense of common-law robbery.

8 This is a direct attack upon Title 14, Section 415 of
9 the Code of Alabama which is the penalty statute for the
10 common-law offense of robbery. And we all know that the
11 common-law offense of robbery, its essential elements, are the
12 taking of property from a person with the violence or with the
13 threat of violence.

14 Now, the attack on this statute is because the
15 breadth and range of it are simple assault with a larceny can
16 give you the death penalty under this statute.

17 Now, in application of this provision of the Eighth
18 Amendment, this Court has indicated certain standards or
19 certain things that they look at. One of them is that it is
20 not a static concept, that it is not a nonprogressive thing,
21 that it moves with the times.

22 And that they have even indicated -- you have even
23 indicated that in a more enlightened society it might encompass
24 greater and greater things. And I am saying to this Court
25 today that Alabama is the only State that has this common-law

1 offense of robbery with the death penalty.

2 And I submit that in the light of this Court's
3 decisions, decisions such as Weems 60 years ago, when this
4 Court knocked down a punishment where a fellow, he falsified
5 some Government documents and he got 12 years imprisonment and
6 loss of his civil rights, this Court at that time, 1910, said
7 that one of the standards is the disproportionate, dispro-
8 portional of the offense with the punishment.

9 Now looking directly at Alabama, Alabama, the crime of
10 unpremeditated murder, with malice in Alabama, the maximum
11 punishment is life imprisonment. Yet for larceny and a simple
12 assault you can get the death penalty.

13 I respectfully submit that this standard of dispro-
14 portional is applicable to Edward Boykin.

15 Q You mean robbery, don't you?

16 A Yes, sir. Robbery. Common-law robbery.

17 Q What is the difference between common-law robbery?
18 What is it the other states have that Alabama doesn't have?

19 A The other States have a statutory form of
20 robbery, classifying it in aggravation.

21 Q Which adds what to attacking the man, threatening
22 with a weapon, threatening to kill him or something, and taking
23 his money. What does it add to that? The other States.

24 A It adds the description of aggravation.

25 Q I mean what conduct does he have to do in addition

1 to that?

2 A Well, in a statutory, in an armed robbery
3 statute he has to be armed, or he has to kill somebody or
4 whatever classification or qualification these statutes give it.

5 Q But all the statutory robberies as I understand
6 it are based on the fact that one man meets another or finds
7 him, threatens him with a weapon if he doesn't give him his
8 property and takes it away from him or tries to. Isn't that
9 statutory robbery? As well as common-law robbery?

10 A No, sir, in common-law robbery, you can have
11 conceivably a school boy in a corridor in a high school in
12 Alabama can snatch a book away from another student and under
13 the statute in Alabama he can get death.

14 Q That is conceivable, but did you ever hear of
15 a thing like that?

16 A No, sir, I never have, nor have I ever heard
17 really in terms of thinking that a fellow who didn't kill
18 anybody wouldn't get death, wouldn't sacrifice his own life for
19 it.

20 Q You mean you have never heard of anybody being
21 convicted for robbery without killing somebody?

22 A No, sir, I am saying that it is shocking to think
23 even under the Judeo-Christian concept that we work on that a
24 life must be taken when no life was taken.

25 Q I don't know what is the custom now, but

1 certainly 50 years ago it was certainly a custom.

2 A I am not saying that robbery isn't a serious
3 crime. It is most serious. But we have got to recognize that
4 life is a fundamental thing. Life is fundament right, too.

5 Q Each life.

6 A Yes, sir.

7 Q The victim and the person who does it.

8 A Yes, sir.

9 Q The threatened victim, his life is pretty dear,
10 too, isn't it?

11 A Most dear.

12 Q Mr. Gibbons, the printed Appendix doesn't con-
13 tain any transcript at all of how this jury was qualified, the
14 voir dire of the jury. Is that available anywhere? Is there
15 a typewritten transcript of that in the original record?

16 A It is not available and assuming that the
17 practice is as I know it to be, it was not transcribed.

18 Q Can you -- I have in mind as perhaps you might
19 guess the decision of this Court in the Witherspoon Case,
20 Witherspoon against Illinois, you make no contention under that
21 decision but it occurred to me that there might well be one to
22 make.

23 A That may be so, but the record there doesn't
24 disclose. I mean I know, or it is conjecture. I don't want to
25 go outside of the record, but the practice is to qualify them

1 as they have been doing for a long time and that is if you have
2 got -- I think if it had appeared in the record you would have
3 a contravention with the Witherspoon case.

4 Q Does the statutes or laws or case laws of Alabama
5 with respect to qualifying a jury in a capital case throw any
6 light on this question?

7 A Yes, sir.

8 Q What is that? What is the purport of that?

9 A They hold that if a challenge for cause, if a
10 prospective juror has any hesitency in giving the death penalty.

11 Q It occurs to me that you are representing a
12 client under sentence of death have put a good many eggs in one
13 basket. If you have a Witherspoon claim it might behoove you
14 to make it or perhaps Federal habeas corpus is a more appropriate
15 place for that. Perhaps you considered that.

16 Q Mr. Gibbons, as I understand it, you are here
17 attacking the constitutionality of the Alabama statute on its
18 face; that is to say, you are saying that the statute is bad
19 apart from the facts of this particular case, because the
20 statute authorizes the jury to fix a death sentence in the
21 case of robbery.

22 You point out that Alabama uses a common-law definition
23 of robbery. I don't remember seeing in your brief a reference
24 to just how Alabama views the definition of common-law crime of
25 robbery.

1 From your argument I take it that any sort of unlawful
2 taking, do you need force?

3 A A taking with violence or with the threat of
4 violence.

5 Q Right.

6 Now there are states in which the crime of armed
7 robbery is punishable by death?

8 A Yes, sir.

9 Q And what happened here was in fact an armed
10 robbery. There is no dispute about that, is there? That is
11 to say, that Boykin was carrying a gun, Boykin did in fact use
12 the gun in robbery, Boykin did in fact discharge the gun, and
13 in fact a girl in the store was wounded in the calf of her
14 leg. Am I correct?

15 A Yes, sir. That is correct.

16 Q Now that would be armed robbery within the
17 definition of other States, right?

18 A Yes, sir.

19 Q Your point, however, is that it is not necessary
20 -- is your point that it is not necessary for us to reach the
21 constitutionality of the armed robbery death penalty statutes
22 because you are asking us to consider this statute on its face
23 without reference to the facts of this particular case. Is
24 that right?

25 A That is correct, sir.

1 Aside from what this Court may think of murder say,
2 as justifying the death penalty, the question before the Court
3 as I see it and the issue I am trying to make is that the
4 death penalty for robbery is cruel and unusual. It is dis-
5 proportionate, it comes in a time when no other State except
6 Alabama applies it.

7 Q But your problem, however, is that here you have
8 an armed robbery, and you have an armed robbery in the course
9 of which somebody, Boykin did shoot and somebody was wounded.
10 So it is not just a simple unaggravated robbery. Your attack
11 must be, well I suppose you wouldn't be averse to attacking
12 that as a basis for the death penalty, but the other part of
13 your attack I take it is that the statute is bad for over-
14 breadth.

15 A It is bad on its face because of the expanse and
16 range to which it can be applied.

17 Mr. Chief Justice, may I reserve whatever time I
18 have left for rebuttal?

19 MR. CHIEF JUSTICE WARREN: You may.

20 Mr. Clark.

21 ORAL ARGUMENT OF DAVID W. CLARK, ESQ.

22 ON BEHALF OF RESPONDENT

23 MR. CLARK: Mr. Chief Justice and may it please the
24 Court.

25 In April and May of 1966, Mobile, Alabama, experienced

1 a series of robberies. One Edward Boykin was arrested, a
2 Grand Jury returned five indictments against him for robbery.
3 I would like to point out the time element and the space of
4 the city involved.

5 These five robberies took place from April 23, 1966
6 -- that was the first one -- there was one on May 3, one on
7 May 5, May 6 and one on May 8.

8 The manner of operation was that this young man went
9 into either a grocery store or drug store or service station
10 and would exhibit a pistol and commit robbery and then when he
11 would leave he would fire the pistol so nobody would follow him
12 out.

13 There was one wounding of a little girl. I believe
14 the evidence showed that he fired into the floor and the bullet
15 ricocheted and hit this young lady in the leg.

16 At the time of the trial the Court appointed one
17 Evan Austill, the Court appointed attorney to represent ---

18 Q What was his name?

19 A Evan Austill, A-u-s-t-i-l-l. His father and he
20 practice together. His father has been a member of the Bar
21 for years.

22 Q I gather that you don't raise the question about
23 these questions being properly presented, or do you?

24 A No, sir.

25 Q You don't mention it in your brief.

1 A No, sir. I am not going to argue that. We will
2 stand on my brief. I think it explains some of it, your Honor.

3 Q Do you speak about that in your brief?

4 A No.

5 Q It is a jurisdiction question, isn't it?

6 A Which particular question was that, your Honor?

7 Q Whether we can reach questions which were not
8 raised and decided in the State Supreme Court.

9 A Well, I feel that under this section entitled
10 15, Section 382(1)-13 wherein the Supreme Court considered all
11 the things raised at the trial that you could do that, sir.

12 Q As far as it appears from what I have been able
13 to glean, and, of course, we don't have the briefs of the parties
14 before the Supreme Court before us, but really nothing at all
15 was raised at the trial. There was simply a guilty plea and
16 as the counsel has said, five sentences of death on this
17 petitioner.

18 And that is all that appears, plus some evidence of
19 his conduct. And then in the Supreme Court of Alabama all that
20 appears that they considered of the questions raised here was
21 whether or not the trial court failed to protect the petitioner's
22 right to due process with regard to his plea of guilty as you
23 put it and that is the only things they considered.

24 Neither one of the other two questions so far as I
25 can find out was raised or considered or decided in any of the

1 courts of Alabama. Am I wrong about that?

2 A No, sir, you are correct. It could have been
3 considered although they did not mention it under that Title
4 15, Section 382.

5 Q Well, why, it wasn't raised at the trial?

6 A No, sir.

7 Q Either one of these?

8 A Not raised at the trial.

9 A while ago you raised the question about the
10 Witherspoon matter.

11 Q Yes.

12 A Whether Witherspoon applies to this. I would
13 like to call your Honor's attention to Appendix Page 10 and 11
14 wherein Mr. Sidney Flager, the Assistant District Attorney
15 prosecuting the case pointed out they had 12 jurors sitting in
16 a box, would they be all right and the defendant there said
17 they would and his attorney, Mr. Austill, said they would.

18 Q Is there anything in the record to show that
19 any one of those jurors was asked any question at all about
20 anything at any time?

21 A No, sir. This is the entire matter and I have
22 the original record here and nothing was said about qualifying
23 them as to death penalty or anything.

24 Q Or anything.

25 A It was an agreed jury. Both sides agreed that

1 they would be ---

2 Q We don't even know if they are qualified, do we?
3 We don't even know whether they are over 21, do we? We don't
4 even know whether they can hear. Nobody questioned them at
5 all. What is the practice? You just pick twelve people and
6 put them in the jury box?

7 A Yes, sir, you pick twelve and qualify them.

8 Q Well, where is the qualification in this record?

9 A By agreement, both sides.

10 Q Now the record says that the Judge says, "If I
11 am correct, if I am correct, there are twelve people there."
12 That is what he says on page 10.

13 "If I am correct, there are twelve of the panel of
14 jurors seated in the jury box." And he says, "Is that satis-
15 factory to both sides," and both sides said "Yes."

16 A That Mr. Flagler was one of the sides in that he
17 is the District Attorney there prosecuting.

18 Q Yes. And then isn't it also true that at the
19 end the Judge says, "Are you the same jury that was here
20 yesterday?"

21 A Well, your Honor, jurors are selected for a
22 week.

23 Q Sir?

24 A Juries in Alabama are selected for a week of
25 the trial.

1 Q The same twelve?

2 A No, sir.

3 Q Well, he says, "Young man, I had to call you
4 back to supply"-- no that is not where it is. It is near the
5 end there where he says you were there. I will get the page
6 in just a minute.

7 Q How was this jury selected? The ordinary method
8 is the beginning of the week. The sheriff brings in the jurors
9 names. They are selected and the judge qualifies them as to
10 whether or not they are able to serve as jurors on account of
11 their age.

12 A That is correct.

13 Q And then during the week they divide it up and
14 if any man has any desire to question him as to any special
15 qualifications or to a particular case, they ask questions.

16 A That is correct.

17 Q They were qualified at the beginning of the week,
18 I assume?

19 A This one had been qualified as to that.

20 Q Well, on page 32, "Some of you gentlemen were
21 on the jury yesterday." What is the meaning of that? It
22 varies from day to day?

23 A Pardon me, sir?

24 Q Does it vary or I thought you said the same
25 twelve sit throughout the week?

1 A No, sir. I said that the panel that they call
2 I believe is 50 jurors.

3 Q Well, just one more question. Is there anything
4 in this record that shows that the Court explained to the jury
5 the range of sentence?

6 A No, sir. The old charge does not.

7 Q So the jury did not have any idea at all?

8 A I beg your pardon. May I quote from the actual
9 record, page 30. He said, -- he gave a definition of robbery.
10 "Now robbery once again, gentlemen, is a felonious taking of
11 money or goods of value from another against his will and
12 without his permission by violence or putting him in fear."

13 That boils it down in a nutshell just what robbery
14 is. Now, it carries from 10 years minimum in the penitentiary
15 to the supreme penalty of death by electrocution.

16 Q What page is that on?

17 A That is the old charge.

18 Q Page 32. Isn't it on page 32?

19 A Page 32 in the Appendix.

20 Q What is there that you just read that shows why
21 you should give death in one case and 10 years in another?
22 That is my point.

23 A Yes.

24 Q Is there anything other than that?

25 A No. There is no direction as to how you would

1 do that. However, as this Court pointed out, I believe it
2 was in Giaccio versus Pennsylvania -- it was one of them --
3 that they could do that, a jury could find a degree. There
4 is nothing prohibiting that.

5 Now, I would point out that in Alabama, robbery is
6 a capital offense. That, of course, means it carries the death
7 penalty and they can to a lesser degree give anywhere from
8 death on down to 10 years. That is left to the jury's dis-
9 cretion.

10 Now, in spite of no instructions, you do have this,
11 that this jury has heard the entire trial. They have been able
12 to determine how severe a case of robbery this is, and this
13 particular instance there was a gun used, there was violence.
14 They could pass on that.

15 They are the best ones to judge how severe the
16 sentence should be.

17 Q The entire trial is between pages 10 and page 31
18 in the record?

19 A Yes, sir, that is the entire evidence put on.
20 In Alabama when you have a plea of guilty such as we had here,
21 they put on a prima facie case. Now, in all five of these
22 cases I think they called seven witnesses. That is all that is
23 required, that you have the man pleading guilty which is a
24 judicial confession to that effect, that he entered a plea of
25 guilty.

1 They have that plus the prima facie case made out by
2 the State. We maintain that is sufficient to put it to the
3 jury.

4 Q Mr. Clark, I note in the transcript on 33 that
5 the Judge says, "It is now in the hands of the State" -- this
6 is after he pronounced sentence -- "and it is up to the Governor
7 if he cares to do anything about it. It is not up to the Trial
8 Judge."

9 Now, could you tell us whether there has been an
10 appeal to the Governor in this case?

11 A No, sir, there has not been one yet. Because
12 of this petition before this Honorable Court. Had there not
13 been one to this Court, then about two or three days before
14 his execution there would have been a hearing in the Governor's
15 office. A clemency hearing.

16 Q Is that automatic?

17 A Yes, sir. That is automatic.

18 At this hearing he may appear by himself, by attorney,
19 his family, his minister. I have been at some of them that
20 they have had as many as 35 or 40 people, to speak for this
21 man and ask that his case be commuted to life imprisonment.
22 But as you pointed out, there has been none in this case.

23 Q When was the last execution in Alabama? You
24 didn't have one last year, did you?

25 A No, sir. It has been several years. In my

1 brief I point out one that was in 1964. I handled that case
2 through the Alabama Supreme Court and it went on to an electro-
3 cution. That incidentally was one for robbery.

4 Q But it also involved a very horrible killing.

5 A Yes, sir.

6 May I explain that?

7 Q I think you did in your brief.

8 A Yes, sir.

9 Q Certainly you can explain it.

10 A Well, I went over it lightly. But in that
11 particular case there was a robbery. Also the man committed a
12 murder during this robbery. It just happened that he was
13 going with this young lady. He was a married man with a family
14 and as the District Attorney determined in that case they had
15 the two indictments, one for murder and one for robbery, that
16 it would be better to prosecute on the robbery.

17 In Alabama they regard robbery as a serious offense.
18 Now a good attorney could have possibly attacked the young
19 lady's reputation and maybe it would have been merely a
20 manslaughter conviction.

21 Q I gather from all of the circumstances of the
22 robbery, including this very gruesome and bazarre sort of
23 killing were brought before the jury. Is that correct?

24 A Yes.

25 Q And what he took was the young woman's car,

1 after killing her.

2 A Car, jewelry and some money.

3 Q May I ask, Mr. Clark, does your automatic
4 appeal statute, would it apply had Boykin got a prison sentence
5 instead of the death sentence?

6 A No, sir, that applies merely to the death
7 sentence. He could ask for an appeal and been granted one.

8 Q I gather that special statute of searching the
9 record, does that apply where the automatic appeal statute
10 applies?

11 A No, sir, the appellate courts have that duty
12 in all cases.

13 Q All cases.

14 A To look into the record.

15 Q All criminal appeals?

16 A Yes, sir.

17 Q I see.

18 A Now then, there was something brought out about
19 a motion for a new trial. Usually that is done by the
20 attorney who is appointed to handle the defense of that trial.
21 Also, in a case which results in the death penalty, the same
22 attorney goes right on through the Supreme Court. His one
23 appointment takes effect.

24 However, Mr. Gibbons is representing the defendant
25 on appeal to the Supreme Court of Alabama and on certiorari to

1 this court.

2 Q May I ask you further, let us suppose that a
3 defendant were tried on one account of robbery, then the jury
4 has a problem of fixing the punishment.

5 I don't suppose there is anything like presentence
6 report or any evidence introduced to his history, is there?
7 What is your practice? Is there any effort to duplicate in
8 front of the jury --

9 A No, sir.

10 Q -- what is in the ordinary presentence report
11 about the man's family background, what kind of a person he
12 has been and whether this is an isolated incident or part of a
13 long history of crime, the sort of thing that a judge usually
14 has before him?

15 A No, sir, not in this type of case because the
16 jury returns the verdict. However, the defendant could put on
17 character witnesses and things of that nature during the trial.

18 Q During the trial?

19 A Yes, sir.

20 Q But suppose he had led an exemplary life and
21 suppose his counsel decided that for strategic reasons that he
22 didn't want to get the question of guilt, whether he did this
23 or not, mixed up with the facts about the man's life which was,
24 of course, the kind of thing conceivable. I have badly
25 described it but I am sure you will agree that it is conceivable

1 that a lawyer might make a strategic judgment of that sort.

2 Then the jury would have to consider punishment with-
3 out anything before it as to what kind of man this is.

4 A That is true. That would be a matter of trial
5 strategy.

6 Q Well, it might be a very critical one in which
7 the lawyer makes a judgment in good faith and with professional
8 competence that he later desperately regrets.

9 A Yes.

10 Q And his client who is electrocuted probably
11 regrets it even more.

12 A I feel that this case here represents one
13 because this attorney entered a plea of guilty for the man and
14 I suppose assuming that there would be a prison sentence.
15 What brought this on as I pointed out earlier, there had been
16 a series of robberies and the jury returned this verdict.

17 Q This trial took place in September of 1966?

18 A That is correct, sir.

19 Q That is when the jury was impanelled, sworn
20 as indicated on page 10 of the Appendix?

21 A Correct.

22 Q Long before this Court's decision in the
23 Witherspoon case so that the defense counsel was not aware of
24 any right to challenge the jury on the basis of Witherspoon
25 -- constitutional basis on which Witherspoon was decided.

1 That is correct, isn't it?

2 A That is true. However, he did have those
3 challenges that are set out in Title 30, Sections 55 and 57.
4 And in my argument last week I pointed out that if he had a
5 fixed opinion against capital punishment, with either one on
6 Section 57, however, we contend that they waive that.

7 Q It wasn't a known waiver, was it? It couldn't
8 have been any known waiver of any right under the Witherspoon
9 case. The Witherspoon case hadn't been decided.

10 A And that is another thing I would like to point
11 out to this court. This man still has his opportunity to go
12 back before the State Court on coram nobis and bring these
13 things up.

14 At that time he will be appointed an attorney and
15 they would have a full hearing on these matters, the identical
16 matters brought up here.

17 Q Is it still thought in Alabama that good
18 character alone could be charged to the jury as sufficient
19 to generate a reasonable doubt of guilt?

20 A Yes, sir.

21 Q Well, here there was a plea of guilty?

22 A Yes, sir, that is right.

23 Q Does the court not inquire into the voluntariness
24 of a plea in Alabama?

25 A Yes, sir, they should. The record does not

1 reflect that here.

2 Q Well, wouldn't you think that it should be done
3 by all means in a capital case where a man's life is at stake?
4 Why wasn't it done here?

5 A Yes, sir. I don't know that it wasn't done,
6 your Honor. It is just recorded as such.

7 Q Can you tell us whether it was or was not done?

8 A No, sir. I was not present at the trial.
9 However, I would like to point out to your Honor, you have
10 Rule 11 of your Federal Rules of Criminal Procedure that require
11 such warning to the defendant and while no particular ritual need
12 be observed by the trial court, such as a formal finding, a
13 recitation of plea presented with understanding, and an
14 affirmative duty, that nonetheless it exists on the part of
15 the Trial Court to advise the accused fully.

16 And that was cited from Hulsey versus the United
17 States, 369 F. 2d 284. So apparently in your Federal Court
18 on your Federal rules you have a duty, you don't have to
19 affirmatively show that in the record. There is no showing
20 that this man was not advised of the seriousness of his plea.
21 Besides that, he had an attorney representing him.

22 Q Who tried the case?

23 A This particular one was before Judge Gilliard.

24 Q How long had he been a judge?

25 A Judge Gilliard has been on the bench I think

1 about six or eight years as a Circuit Judge. At one time he
2 served as a Probate Judge.

3 Q What are his initials?

4 A Walter Gilliard, I believe. I don't know the
5 middle initial.

6 Q Was he in the firm of Palmer Gilliard?

7 A Palmer is his brother, I believe. And his
8 father was Palmer Gilliard, I believe, also. He was our
9 senior member of the bar. He died at the age of 103.

10 Q The judge, and I am looking at page 33 of the
11 Appendix, in sentencing the petitioner indicated, at least by
12 negative implication, if you will, that he had some discretion
13 not to follow the jury's recommendation of the death sentence.

14 Is that right?

15 A Yes, sir.

16 Q He says in case No. 15520, the Court will impose
17 sentence according to the verdict of the jury. And in case
18 No. 15521 the Court will again follow the verdict of the jury.
19 And so on. And so, which leads to a possible implication that
20 he didn't have a duty to do so.

21 What is the law in Alabama on that?

22 A Notwithstanding the verdict I believe the judge
23 could send it back.

24 Q Send it back to whom?

25 A For the jury to redetermine sentence.

1 Q Under what kind of instructions?

2 A He could instruct the jury just on that matter,
3 if he thought it did not warrant that penalty. However, in
4 Alabama, your death penalty is provided for robbery and he
5 had already instructed that ---

6 Q That they could. That they did have that option.

7 Q Is there any authority for that? It doesn't
8 as I read this -- perhaps I am wrong, perhaps it is a little
9 different from my Brother Stewart's reading -- I read it all
10 the judge thought he could do was to make a recommendation for
11 clemency which would be to the Governor.

12 When you read the first couple of sentences of what
13 he said there, but I know judges, trial judges can do things
14 that aren't always strictly according to the book, I suppose,
15 but is there any authority in law to send the case back to the
16 jury and ask them to, instruct them to reconsider their
17 verdict?

18 A I don't have it before me, your Honor, but there
19 have been cases where they have done that.

20 Q They have done it, but you don't know of any
21 statutory or case law that approves it?

22 A No, sir. Now there was something brought out in
23 the brief about the finding of guilty by the jury and the fixing
24 of the sentence by that same jury violated his constitutional
25 rights.

1 I believe this Honorable Court in a footnote in
2 Giaccio versus Pennsylvania held that in so holding we intend
3 to cast no doubt whatever on the constitutionality of the
4 subtle practice in many states to juries fixing defendants
5 guilty of crime the power to fix punishment within legally
6 prescribed limits.

7 Now, I found two cases wherein courts that followed
8 that one is in California, In Re Anderson, California Supreme
9 Court of November 18, 1968 followed that. That was in a murder
10 case, however, but they had there under I believe Section 160
11 of their Criminal Code that a jury could find the person
12 guilty of murder in the first degree and on Section 160.1
13 the same jury could fix his punishment at either death or life
14 imprisonment.

15 The Supreme Court of California held that that was
16 no violation of his constitutional rights. This same thing is
17 followed in the Supreme Court of Washington in Washington
18 versus Smith in the Washington Supreme Court on October 29,
19 1968.

20 And the last paragraph of that opinion I think is
21 pertinent here.

22 "The defendants argument against the death sentence
23 on moral and practical grounds are persuasive." However, they
24 should be addressed to the legislature.

25 If, as they maintain a majority of the people today

1 are opposed to the death penalty an effort to get the legis-
2 lature to eliminate it should have a considerable chance of
3 success.

4 That is our contention if there is objection to the
5 death penalty. The proper way is to take that through the
6 legislature in this.

7 Q Mr. Clark, I am sorry to ask you so many
8 questions. May I ask you a question about the nature of the
9 trial here.

10 Now, robbery is a capital offense.

11 A That is correct.

12 Q And the Court -- does the Court accept the guilty
13 plea without more, or is this a trial on the question of guilt?
14 Was the jury informed that the defendant had pleaded guilty?

15 A Yes, sir. They were informed.

16 Q That doesn't appear here, does it? But they are
17 informed that the defendant had pleaded guilty?

18 A Yes, sir. It doesn't appear from the record
19 here, but when there has been a plea of guilty in Alabama the
20 jury hears a prima facie case to determine the seriousness of
21 the crime.

22 Q In other words -- do you argue that in a sense
23 this is not a unitary trial, what happened here? In a sense
24 that this trial was on the question of punishment?

25 A Yes, sir. That was meant principally the

1 question of punishment. There had been a plea of guilty
2 already.

3 Q And that that plea of guilty is accepted --

4 A Yes, sir.

5 Q -- in Alabama. Suppose this had been a murder
6 case. Is it the custom in Alabama to accept a plea of guilty?

7 A Usually when they enter a plea of guilty to
8 murder they will enter a plea of guilty to murder for the
9 second degree which would cover the life sentence.

10 Q Well, if it is clear, but you don't know of
11 any situation where ---

12 A No, sir. They usually try those, for first
13 degree murder.

14 Q They go to trial?

15 A They go to trial. Yes, sir.

16 Q And they don't accept a plea of guilty?

17 A No, sir.

18 Q But in spite of the fact that the ultimate
19 result may be the same here, namely electrocution, in a
20 robbery case the Court will accept and lay before the jury the
21 plea of guilty? Is that right?

22 A Yes, sir.

23 Q Are you saying that as a matter of law the court
24 does not allow you to accept a plea of guilty to first degree
25 murder in Alabama or are you just ---

1 A I know of no case in which that has happened,
2 your Honor.

3 Q Well, now, for example in the State with which
4 I am most familiar as a matter of law a trial court is limited
5 in accepting and being allowed to accept a plea of guilty to
6 first degree murder. Is there any such law in your State?

7 A No, sir. I know of none. But in practice ---

8 Q You just mean as a matter of practice they cop
9 a plea to second degree murder?

10 A That is correct.

11 Q Well, if they plead guilty to murder in the
12 first degree unless it is changed since I was ---

13 A Yes.

14 Q The Judge is required to call a jury to give
15 the jury enough evidence to show a prima facie case, just
16 that number of witnesses and to show, give the jury enough
17 information with which it supposedly they could rest a verdict.
18 And that is the way it was done in the first degree.

19 A That has not.

20 Q Has that been changed?

21 A No.

22 I believe Mr. Justice Black has answered my question.

23 Q So it is not just a penalty trial as perhaps you
24 stated and I didn't get the implication of it. This is
25 something more than just a penalty trial. It is a penalty

1 trial plus a trial in which prima facie case is made that the
2 guilty plea is warranted?

3 A Yes, sir, you could not have the conviction
4 without putting on a prima facie case.

5 Q Could the jury after the prima facie case goes
6 in and the judge says, let's it go to the jury, is the jury
7 permitted to find him innocent?

8 A No, sir. It would not be on this robbery.

9 Q Didn't the jury's verdict actually recite that
10 the jury found him guilty as charged the indictment on his
11 plea of guilty?

12 A Yes, sir.

13 Q That is what the verdict actually cited?

14 A Yes, sir. I think that is what they said.

15 Q What happens if the judge finds that a prima
16 facie case has not been made up?

17 A He could so instruct the jury.

18 Q And direct what?

19 A That no prima facie case was made up. And I
20 assume the defense counsel would then move for a direct
21 acquittal.

22 Q After a plea of guilty?

23 Q After a plea of guilty?

24 A That wasn't in the case.

25 Q Well, I mean, does that ever happen?

1 A No, sir. Not to my knowledge. A prima facie
2 case wouldn't take too much to put on, your Honor, just one or
3 two witnesses at the most.

4 Q Well, I have a very vivid recollection of that
5 factor because I was appointed to the -- and as it was a jury
6 was called and a jury was selected. I had a trait whereby he
7 was not to get this.

8 The jury came back and tried to defy the court's order.
9 They wanted to give him the death sentence on the prima facie
10 case and the judge finally told them they could give it to him
11 but he would set it aside. And so they accepted it.

12 A Yes, sir. That is what I mentioned a while ago.

13 Q That was the practice then, to my knowledge.

14 Q Mr. Clark, I notice that page 25 of Petitioner's
15 brief that he raises the question a guilty plea can be effec-
16 tive must be made voluntarily, knowingly and intelligently.
17 And he says a trial judge has an affirmative constitutional
18 duty to ascertain whether or not a guilty plea was voluntarily
19 made.

20 A Yes.

21 Q Now, if we take this record as it is in this
22 transcript, there is nothing to indicate that there was any-
23 thing done by the Court to determine whether it was voluntarily
24 made, must we assume that this is all that the Court went on?

25 A Yes, sir, because that is substantially the same

1 as the original record. However, oh, I get what you mean, sir.

2 No, sir. You are assuming that he did not because
3 it does not appear in the record. Is that right?

4 Q Yes. I would assume that we must decide it on
5 this record. That is all there is on the subject matter.

6 A Yes. Now the case Carnley versus Cochran that
7 he cited in support of that had to do with the confession, I
8 believe.

9 I did cite a case wherein there was no particular
10 format that they had to use, nothing in the Federal ---

11 Q It isn't a question of format. There was
12 absolutely nothing here. That is the problem. Absolutely
13 nothing. Now, is there anything in the record that we can
14 consider to negate this statement that a trial judge has
15 affirmative constitutional duty to ascertain whether or not
16 a guilty plea was voluntarily made?

17 A No, sir. But all that appears there is not
18 shown in the record, exactly the questions he asked.

19 Q Well, if we decide this issue, this particular
20 issue, are we entitled to decide it fairly on what is in this
21 transcript and nothing more?

22 A Yes, sir. That is all the spoken and written
23 words that were transcribed and put in the record, either in
24 the record that was before the Alabama Supreme Court or this
25 Honorable Court.

1 However, as I pointed out and I cited one case that
2 there is nothing that requires, to my knowledge, that it appear
3 in the record that he did so advice and in fact say,
4 "Mr. Boykin, you know you can get the death penalty."

5 Q Well, I wasn't asking about your law. I was
6 asking about the facts in this case. This was all we have to
7 go on.

8 A Yes, sir. That is correct.

9 Your Honor, I believe that that in my brief will
10 explain my points and thank you.

11 MR. CHIEF JUSTICE WARREN: Mr. Gibbons.

12 REBUTTAL ORAL ARGUMENT OF E. GRAHAM GIBBONS, ESQ.

13 ON BEHALF OF PETITIONER

14 MR. GIBBONS: Mr. Chief Justice and may it please the
15 Court.

16 I have just a couple of comments in rebuttal. One
17 is with regard to the post conviction remedy that the Attorney
18 General suggests that Edward Boykin might follow.

19 When I get back to Mobile I might be able to think of
20 10 or 11 more, but I can think of three right now.

21 One is that he might be dead before somebody gets
22 interested in filing a post-conviction remedy. The second is
23 that in a post conviction remedy ---

24 Q Well, the execution of the sentence has been
25 stayed hasn't it?

1 A Sir, it has been stayed by the Supreme Court of
2 Alabama pending the hearing in this court. Secondly, he has
3 no right of attorney. The Attorney General indicates that he
4 has it as a matter of right, and yet here is an excerpt from
5 the Code of Alabama and the first case annotated under this
6 section of appointment of counsel for a coram nobis is that
7 the trial judge in his discretion can determine whether he gets
8 appointed counsel or not.

9 And the third ground that post conviction remedy is
10 not satisfactory, is that in a post conviction remedy the
11 Petitioner has the burden of proof. He has already sacrificed
12 his cloak of innocence. He has already sacrificed the Court's
13 scrutiny of his fundamental rights.

14 Because in a post conviction remedy hearing, he has
15 to prove and I submit that this Court holding, that in a trial
16 in a capital case, if the record must affirmatively disclose,
17 then think of the burdens that post conviction remedies would
18 solve.

19 It would take a lot of burden off of courts, Just
20 apply this simple rule. Edward Boykin wouldn't need a post
21 conviction remedy, if the record affirmatively showed.

22 Now, there is another point.

23 Q Go ahead. Make it your last point.

24 A Yes, sir.

25 There is no automatic clemency hearing that I know of

1 in Alabama. If he has an attorney he can ask for it, but
2 there is nothing in the statute that says he has it as a
3 matter of right.

4 MR. CHIEF JUSTICE WARREN: Mr. Gibbons, would you
5 mind submitting to the Court a copy of your brief in the
6 Supreme Court of Alabama?

7 MR. GIBBONS: Yes, sir.

8 Your Honor, that is two. I have submitted two
9 briefs.

10 MR. CHIEF JUSTICE WARREN: You have you say?

11 MR. GIBBONS: I submitted two briefs.

12 MR. CHIEF JUSTICE WARREN: Oh, yes, well both of
13 them then.

14 May I say to the Attorney General that if you have
15 any response to make to it you may do so.

16 MR. CLARK: I have copies of Mr. Gibbons, of both
17 of his briefs.

18 MR. CHIEF JUSTICE WARREN: Here?

19 MR. CLARK: Yes, sir, they happen to be in my folder.
20 If your Honor wants them.

21 MR. CHIEF JUSTICE WARREN: May they be submitted then,
22 submitted to our Clerk? There is no hurry about it. Do it
23 at your leisure.

24 MR. JUSTICE BLACK: May we have a copy of the State's
25 brief also? I guess we will have to know them both.

1 MR. CLARK: Yes, your Honor, I have them both.

2 MR. CHIEF JUSTICE WARREN: Mr. Gibbons, inasmuch as
3 you have accepted the assignment of this Court to represent
4 this indigent defendant, the Court would have you know that
5 it appreciates your service. We consider that a real public
6 service and we are indebted to you for having made this
7 representation of this indigent defendant.

8 And, of course, Mr. Clark, we likewise appreciate
9 the diligent manner in which you have represented the people
10 of your State.

11 MR. CLARK: Thank you, your Honor, it is a special
12 privilege and pleasure to be here.

13 MR. GIBBONS: May I state to the Court that I
14 consider it the greatest honor that I have received during my
15 legal career.

16 (Whereupon, at 11:50 a.m. the oral argument in the
17 above-entitled matter was concluded.)
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