

11/69
Supreme Court of the United States

October Term, 1968

In the Matter of:

-----X
BILLY DON FRANKLIN BOULDEN,

Petitioner,

vs.

WILLIAM C. HOLMAN, WARDEN,
Kilby Prison, Montgomery, Alabama,
Respondent.
-----X

Docket No. 644

Office-Supreme Court, U.S.
FILED

MAR 11 1969

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Place Washington, D. C.

Date February 26, 1969

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C O N T E N T S

ORAL ARGUMENT OF:

P A G E

William B. Moore, Jr., Esq.

on behalf of Petitioner

2

REBUTTAL ARGUMENT OF:

William B. Moore, Jr., Esq.

on behalf of Petitioner

29

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 -----x

4 Billy Don Franklin Boulden, :

5 Petitioner, :

6 v. :

No. 644

7 William C. Holman, Warden, :

8 Kilby Prison, Montgomery, Alabama, :

9 Respondent. :

-----x

10 Washington, D. C.

11 Wednesday, February 26, 1969.

12 The above-entitled matter came on for argument at

13 1:10 p.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 THURGOOD MARSHALL, Associate Justice

23 APPEARANCES:

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Montgomery, Alabama 36104

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE WARREN: No. 644, Billy Don Franklin
3 Boulden versus William C. Holman, Warden.

4 THE CLERK: Counsel are present.

5 MR. CHIEF JUSTICE WARREN: Mr. Moore.

6 ORAL ARGUMENT OF WILLIAM B. MOORE, JR., ESQ.

7 ON BEHALF OF PETITIONER

8 MR. MOORE: Mr. Chief Justice, Honored members of this
9 Court, I have been appointed by this Court to present this
10 Petitioner, Billy Don Franklin Boulden.

11 The matter before the Court that we raised originally
12 was on an involuntary confession. At a later state, after the
13 Government of the Fifth Circuit, the Witherspoon case came out
14 and I raise that point also on a stacked jury.

15 And I talked it over with opposing counsel, both of
16 us have commented on it in our briefs, his brief; therefore,
17 I will comment on both these aspects.

18 Q Was the Witherspoon raised below?

19 A I did not raise it below in the Fifth Circuit;
20 no, sir. Because it didn't come out until after I had been
21 at the Fifth Circuit. That is why, your Honor, I wasn't smart
22 enough to get started with it.

23 Q What jurisdiction do we have to consider it here?

24 A I believe that in my brief I have found a case
25 whereby you can consider it.

1 In Keifer-Stewart versus Seagram the Court pointed
2 out that matters that were not passed on ---

3 Q That is from a Federal Court?

4 A Sir?

5 Q That is from a Federal Court? Is this from a
6 Federal Court?

7 Q Knapp against Ohio.

8 A Sir?

9 Q Knapp against Ohio, is a pretty good authority
10 for you.

11 A This is the Supreme Court saying that I was
12 referring to here.

13 Q Yes, but is this case coming here from a
14 Federal Court?

15 A Yes, sir.

16 Q I see.

17 A On appeal it started in the State Court in
18 Alabama.

19 Q On habeas?

20 A Yes, sir.

21 Q All right.

22 A Then it came through the District Court and
23 then the Court of Appeals and now we are here.

24 Q Yes.

25 A I would like to comment first on the aspect of

1 it, having to do with the involuntary confession. This is, as
2 I understand, a voluntary confession the totalitary of circum-
3 stances doctrine really gets down to the question of common
4 sense.

5 Whether or not the accused gave up some right that
6 he had, whether or not he was coerced and whether or not the
7 individual can be coerced under these circumstances.

8 And here we have a 19-year old Negro boy who was out
9 in the woods fishing, a 15-year old white, married girl comes
10 along and whether he seduced her or not is open to speculation.

11 In any event, they entered into two acts and as they
12 were coming back down out of the woods, the Game Warden, who
13 was unbeknown to either one of them were in the woods halted
14 them and it is charged that at that point this young boy took
15 a pistol and shot the game warden.

16 He apparently lost his head if the evidence is
17 correct because then he took the officer's piston and emptied
18 it and then he was charged with cutting him with a knife some
19 55 feet through the woods.

20 A lot of unusual circumstances like it is a small
21 boy and a 200-pound game warden, no blood on the boy, but the
22 game warden real bloody, but then we get down into the con-
23 fession part of it.

24 He was immediately apprehended at the scene or very
25 shortly thereafter. The girl ran out on the woods and she

1 hollered and two police officers happened to hear her and came
2 in and apprehended him.

3 The State Troopers came in, the local sheriff's organ-
4 ization -- there was some 20 peace officers out there immedi-
5 ately. And at that time, according to the record, the police
6 captain or the State Trooper Captain said he told him he didn't
7 do it.

8 The girl was brought forward and she said, "That is
9 him."

10 Then according to the boy he and the Captain had some
11 conversation to the effect 'They want to kill you and if you
12 don't confess, I am going to turn them loose on you.'

13 Prior to then getting there the atmosphere was
14 building up all this time in that one of these police officers
15 had his gun out and said, "How old are you, boy?" He said,
16 "You are old enough to die." He said, "Run, I ain't killed me
17 a nigger all day." And so

18 With this sort of atmosphere building up all the
19 time there immediately took three cars to transport him not
20 back to his home jail but across the river over to an adjoining
21 county.

22 Then the peace officers come in, the two of them, the
23 interrogator and the Captain. And one of them has a hidden
24 microphone and a tape recorder and if you listen to the tape
25 you can hear ominous sound of the jail doors opening and

1 closing, which means that nothing had gone on until they
2 turned that tape on.

3 And at that time -- this is the first question --
4 "Billy, now you understand what we are doing. We just want to
5 talk to you, want you to tell us the truth about everything
6 that happened today."

7 That is all the warning he had.

8 Q Where was this, at the station house?

9 A It is in a jail in an adjoining county. He was
10 taken, as the Courts say for safe keeping not to his home
11 jail ---

12 Q What is the interval between this episode and
13 the arresting episode?

14 A He was arrested in the late afternoon about
15 5 o'clock and this is around midnight, around 11 o'clock.

16 Q And the written confession resulted in this
17 interrogation?

18 A Well, sir, there is two of three of them. We
19 will get to those in a bit.

20 Q Where did it occur? Alabama? What was the
21 adjoining county?

22 A That happened in Morgan County.

23 Q That happened in Morgan County?

24 A Yes, sir. I misunderstood what you asked me.

25 Q Instead of being carried to Tequila he was

1 carried on up to Athens, and had troopers in front and in back
2 and he was riding in the car ---

3 Q Where did it happen? in Morgan County?

4 A Out in the country from Decatur. It is out
5 across the river down there.

6 Q Across the river from Decatur?

7 A Yes. He was down there fishing on a creek bank.

8 Q Down toward Hartsville?

9 A Flint Community is the name of it.

10 Q Yes.

11 A It is just a very small community down there.

12 I missed one thing at Flint Community. The mob
13 started together before they ever took him out of there. There
14 was a lot of talk, lot of people congregating.

15 They took on in the sheriff's office and put him in
16 a cell there in the jail, up there in Athens, Alabama, the
17 adjoining county from where he was. His daddy was down there
18 trying to find him in Morgan and they told him he couldn't see
19 him, couldn't talk to him.

20 Well, after they got this tape recording with a
21 hidden microphone and this case is -- must have been the same
22 investigator because he said he was just trying to familiarize
23 himself with the criminal. He was just getting acquainted.

24 And after he got acquainted for about an hour's worth,
25 then he came back in there and reduced this confession to

1 writing. Now he still hadn't told him that he had a right to
2 keep quiet. Nobody ever told him that he might have a right to
3 a lawyer, but they told him finally, it was written in this
4 written confession, that it might be used against him.

5 Q When was this?

6 A This was sometime after midnight, your Honor.

7 Q No, I mean what month and year?

8 A This is May 1, 19 -- a month before Miranda.

9 Q Yes. Well, as of that time nobody had ever
10 decided that he did have a right to a lawyer. Isn't that right?

11 A No, sir. I realize that.

12 But the circumstances could be considered whether or
13 not he did have a right to a lawyer but a right to remain
14 silent. That is my main point. The right to remain silent was
15 never told to him.

16 Q How old was this boy?

17 A Nineteen, sir. Weighed about 120 pounds, been
18 sickly, had broken legs, screws in his legs, had a series of
19 headaches, 83 I.Q., sub-normal. We had a psychologist that
20 said his defensive mechanism would make him do most anything
21 to avoid immediate danger. Not what might happen to him in
22 the next week but that was his basic defensive mechanism.

23 That is in the record and is also in the brief.

24 I got hold of this first confession and had it
25 transcribed and it is in the record. They brought the tapes

1 in and I think the tapes are also a part of the record now.
2 And this was just conversation in rough language and the use
3 of four-letter words and this sort of thing, where everybody
4 understood each other they thought there in that jail cell.

5 Then he polished it up a little bit and put it in
6 considerable better form and Billy Don Franklin Boulden signed
7 it.

8 The next morning at 6 o'clock he was carried back to
9 Morgan County and Judge Bloodworth was one of the circuit
10 judges there, had him brought in, one door open in the court
11 house, brang State Troopers in the courtroom, and proceeded
12 to tell him his rights.

13 He told him that he had a right to a preliminary,
14 he had a right to a hearing on bond and on his own rights,
15 and had a right to an attorney if he couldn't hire one. Then
16 they promptly proceeded to carry him off to jail prison.

17 Four days later, I believe it was, two peace officers,
18 these same two State Troopers along with the local sheriff and
19 a Deputy Fire Marshall rode down there to get him to bring him
20 back to Morgan County. And on the way back they stopped by
21 the scene and had him re-enact the scene, they wired ahead and
22 the State Solicitor was out there with all kinds of electronic
23 equipment, and again they had a hidden microphone and led him
24 around through it and supplied, suggested answers to him which
25 you can hear on the tape.

1 And had another full confession.

2 Q You say these tapes are part of the record in
3 this Court?

4 A Yes, sir. And they are also transcribed.

5 Q Now this confession that appears beginning on
6 page 51 of the appendix, reproduced in actual handwriting, have
7 you gotten to this one yet?

8 A In my chronical?

9 Q In your chronical?

10 A Yes.

11 Q You are down to the third one now?

12 A Yes, I am down to the third one where they took
13 him back to the scene.

14 Q First of all, is this the handwriting of the
15 petitioner?

16 A That is the State Trooper.

17 Q That is the State Trooper?

18 A I believe you can see the signature.

19 Q I do see the signature of the petitioner which
20 seemed to be different. State Trooper's handwriting, not the
21 petitioner's?

22 A No question. I mean that is ---

23 Q That is not an issue?

24 A That isn't.

25 Q Is what happened at the first arraignment in

1 the transcript?

2 A Yes, sir.

3 Q Do you remember where it is? Don't bother, don't
4 bother if you don't -- go on with your argument. I will find
5 it.

6 A I believe I can answer most anything you ask
7 but I will try.

8 Q I just wanted to see what the colloquy was when
9 the judge told him he could have a lawyer and so forth.

10 A I will try to comment on that, but I want to
11 save a little time for rebuttal.

12 Q All right. Take your time. Do it your own way.
13 Don't bother. It is all right.

14 A I am trying to touch on the basis ---

15 Q It is all right. Go right ahead.

16 A Then we got it back down in the woods, there
17 were many State Troopers around. This is the third confession
18 now. The hidden microphone that he didn't know anything about,
19 the handcuffs off and said, "All right, lead us through it."

20 And then they reenacted the whole scene out there.
21 Again, nobody told him then by everybody's admission that he
22 had a right to remain silent. As a matter of fact he had been
23 told about all these rights by the judge but nobody had done
24 anything about it.

25 If he had had a lawyer he certainly wouldn't have

1 made those first two confessions.

2 Here he is out at the scene being told to reenact it
3 with his handcuffs off, being arraigned by State Troopers, and
4 they had told him about all his rights but nobody had done much
5 about it. But he had already confessed twice before we get
6 onto this.

7 Well, then they go to trial. This was on May 1st and
8 2nd, and four days later and we go to trial on May 21st. I was
9 not in the trial. This was a lawyer appointed for him up there.

10 The lawyer was appointed the day before I believe,
11 no, no, no, three or four days before, a week before. Then he
12 was arraigned and they went to trial on May the 27th. During
13 the course of the trial this taped-in-the-woods confession
14 where he reenacted was first read in and as if that wasn't
15 enough, then they played the tapes for the jury just before
16 the jury retired.

17 Now this lawyer that was representing the petitioner
18 objected to the reading, objected to the playing of the tapes
19 and that is all in the record.

20 Q On what grounds did he object?

21 A They went back out of here before the jury and
22 showed it to them -- I will answer that in rebuttal, if I may.

23 Q Sure.

24 A Let me comment briefly if I may on the second
25 point we raise here and this is the Witherspoon case.

1 There are sixteen -- in Alabama we have a code
2 section which allows you to ask whether or not you believe in
3 capital punishment, have a fixed thing against capital punish-
4 ment. And sixteen of these people said they did. And they
5 are set out in detail. Here is a typical one.

6 "Bradford W. Nixon: I have a fixed opinion
7 against capital punishment.

8 Mr. Hurdley: Challenge.

9 The Court: Defense?

10 Mr. Chenault: No questions.

11 The Court: Stand aside, Mr. Nixon."

12 This went on for sixteen times and which we say is
13 squarely right in the face of this Witherspoon opinion in which
14 six of the jurors said they did not believe in the death
15 penalty and were excused without any attempt to determine
16 whether they could nevertheless return the verdict of death.

17 And these sixteen were, with two possible exceptions,
18 were summarily dismissed and excused forthwith and outright
19 without any further comment or question.

20 Q Now the exceptions were Mr. John L. Nelson and
21 Mr. E. O. Moon? Exceptions as you call it? On page 17?

22 A Yes, sir.

23 I took each one of their testimony as to those
24 four or five lines there.

25 Q And those would be the two what you call

1 possible exceptions? Is that right? Have I got the right two?

2 A No, sir. What I am talking about, those are
3 firmly within Witherspoon as I see it.

4 "John L. Nelson raised his hand" -- this is on
5 page 17.

6 Q Yes.

7 A "Mr. Huntley: Challenge.

8 The Court: Do you have a fixed opinion against capi-
9 tol or penitentiary punishment?

10 Mr. Nelson: Capital punishment.

11 The Court: You think you would never be willing to
12 inflict the death penalty in any type case?

13 Mr. Nelson: Yes, sir.

14 Mr. Hundley: We challenge."

15 Well now that might be an exception but ---

16 Q Well, now look at Mr. Moon, the next man. E. O.
17 Moon.

18 A "Do you have a fixed opinion against capital
19 punishment?

20 Mr. Moon: Capital punishment.

21 The Court: You mean you would never inflict the
22 death penalty in any case?

23 Mr. Moon: That's right.

24 Mr. Hundley: Challenge."

25 Q Now do you claim that those are the two

1 exceptions?

2 A Yes, sir.

3 Q All right.

4 A Then when we get to the next one Riley:

5 "The Court: Do you have a fixed opinion against
6 capital or penitentiary punishment?

7 Mr. Riley: Capital punishment.

8 Mr. Hundley: Challenge.

9 Mr. Chenault: No questions.

10 The Court: Stand aside, you are excused."

11 "Simpson.

12 The Court: Do you have a fixed opinion against
13 capital punishment?

14 Mr. Simpson: Yes, sir.

15 Mr. Hundley: We challenge.

16 Mr. Chenault: No questions.

17 The Court: Stand aside. You are excused."

18 So there are at least fourteen of them right there
19 where they are just perfunctorily excused. If I may, I would
20 like to save a few minutes for rebuttal.

21 MR. CHIEF JUSTICE WARREN: You may.

22 Mr. Clark.

23 ORAL ARGUMENT OF DAVID W. CLARK, ESQ.

24 ON BEHALF OF RESPONDENT

25 MR. CLARK: Mr. Chief Justice, and may it please the

1 Court.

2 This is a case murder in the first degree conviction
3 arising in Morgan County, Alabama.

4 The crime was committed on May the 1st of 1964, in
5 the afternoon.

6 Now, right after this murder occurred the police
7 arrested this young man and there was some evidence brought out
8 that there was a mob but actually the patrolman testified that
9 a few curiosity seekers came around.

10 They held this young man until Captain John Williams
11 came to talk with him.

12 Now the petitioner testified that some one of the
13 officers threatened to kill him and told him to run and he
14 would shoot him.

15 Now we had at the habeas corpus hearing ---

16 Q Was that denied?

17 A That was denied.

18 Q I beg your pardon.

19 A Yes, sir.

20 Q It was.

21 A That is what I am going to bring out. At the
22 habeas corpus hearing in the District Court in Montgomery we
23 had an officer, John Brom, B-r-o-m, testify and that is record
24 page 657 that no one pointed a gun at the petitioner and no one
25 spoke to him of the crowd. That was at page 654.

1 Q Did the man who was supposed to have said that
2 testify?

3 A Yes, sir.

4 Q Did he deny it?

5 A Billy Boulden said that an Officer Gould and
6 another patrolman there -- well, this was the only patrolman
7 there, testified he didn't point it, didn't see anybody point a
8 gun and didn't hear anybody threaten him.

9 Q But how about the one who was supposed to have
10 said it. Did he testify?

11 A Yes, sir.

12 Q And he denied it, did he?

13 A Yes, sir.

14 Q That is all I wanted to know.

15 A And, of course, Judge Johnson, the District
16 Judge had the benefit of both of their testimonies.

17 Q Yes, that is all I wanted to know.

18 A And his conclusion was it was evident it was
19 non-habeas corpus.

20 Now, this was pointed out the boy was arrested
21 about 5:30, I believe around 7:00 or 7:30 at night, pursuant
22 to an order of the Circuit Judge, this young man was moved to
23 the adjoining county's jail, Limestone County in Athens,
24 Alabama.

25 Here he was interrogated ---

1 Q Would you mind telling us what the reason for
2 the removal was to the other county?

3 A Yes, sir, as a precautionary measure. There had
4 been a murder committed of a man and there had been a possi-
5 bility of a rape there.

6 Q It was a matter of security?

7 A Yes.

8 Q All right.

9 A It was a short distance to the next county.

10 Q Yes, all right.

11 A Now, there was something said he wasn't warned
12 or the rights at that time before this first confession was
13 taken. That was the one, May the 1st, at the jail in Athens,
14 Alabama, that night.

15 Now, we call the Court's attention to I believe it is
16 Appendix, page 45, where the question,

17 "Captain Williams, I believe you stated earlier that
18 you advised the defendant he didn't have to make a statement
19 and that he was entitled to a lawyer. Is that correct?

20 "I did.

21 "On May 1?

22 "Yes, sir."

23 That is record page 45. Rather Appendix page 45.

24 Q Was that the law of Alabama at that time, that
25 he was entitled to a lawyer?

1 A No, sir.

2 Q At the time he was interrogated by ---

3 A Incidentally, this trial, I would point out to
4 the Court that the murder occurred on the 1st of May and the
5 trial was May the 27th through the 29th.

6 Q Of 1965?

7 A Of '64, sir.

8 Q '64.

9 A Prior to either Escobedo or ---

10 Q Prior to either one?

11 A I should like to point out that ---

12 Q This Captain Williams said that he was told the
13 petitioner that he was entitled to a lawyer, what at the time
14 he was being interrogated?

15 A Yes, sir.

16 Q Was that the law of Alabama?

17 A It was not an absolute requirement of Alabama
18 but in that circuit, Judge Bloodworth was really an advanced
19 judge in thinking at that time. He had insisted on those things.

20 Q Because it wasn't the law generally? There wasn't
21 any constitutional requirement?

22 A It was not an absolute requirement at that time.

23 Q I beg your pardon?

24 A It was not an absolute requirement at that time.

25 Now, I should like to point out to the Court that an

attorney was appointed at arraignment on May the 7th and a demurrage to the indictment was filed and the case was heard about three weeks later. He had time to prepare for it.

Now, back to the confession on the evening of May the 1st, after being advised of these rights ---

Q What time?

A What?

Q What time?

A I believe it was 10:30 or 11 o'clock, somewhere in there.

Q At night?

A At night, yes.

He had been fed and was permitted to bathroom facilities and so forth, and allowed to smoke and there was no long interrogation.

Q As a matter of fact you said I wish to make the following voluntary statement to E. B. Watts. I am not being in no way offered no reward, no hope of reward to get me to make a statement. I have been told by Mr. Watts that any statement I make can be used against me in a court of law. He just volunteered that statement?

A It is my understanding Mr. Watts asked him those questions and then wrote it down.

Q But he says, "I, Billy Watts."

A Yes, sir.

1 That was written in the confession. Lt. Watts
2 testified at the habeas corpus that he asked the man these
3 questions and then wrote it down.

4 Now, after this confession was given, which inci-
5 dentally I would like to point out neither this confession nor
6 the tape recording was used at the original trial on May the
7 27th.

8 On the next morning, May the 2nd, petitioner was taken
9 before Judge James Bloodworth and advised of his rights. He
10 was advised fully. I believe there are 127 pages in the record,
11 showing the advice he gave.

12 At hearing that morning at six o'clock he advised him
13 of the seriousness of the offenses, he advised him to get a
14 lawyer, how serious the crimes were, the possibility of a death
15 sentence, and he talked with the parents and relatives of the
16 boy also, and he told them. That is in the record.

17 Now, after this hearing and I believe at that time
18 the family was endeavoring to get a Sherman Powell, a local
19 attorney to represent Don Boulden. They were not successful.

20 Now, because a further precautionary measure, Judge
21 Bloodworth had this man transferred to Kilby Prison. Then
22 May the 6th the man was brought back from Kilby and indicted
23 on three indictments, murder, rape and robbery. He was tried
24 on the murder.

25 They brought him back and passed through Coleman and

1 then they passed through Decatur, where he reenacted the crime.
2 Now, a transcription of that tape and those tapes were put in
3 evidence at the trial.

4 As this case occurs before either Escobeda or Miranda,
5 it don't tie up the circumstance rule was applied. Now in the
6 brief of the petitioner, he cites Payne versus Arkansas. Well,
7 I think that is one that really shows all the faults.

8 Here was a case of a 19-year old person was denied
9 a hearing, was arrested by a warrant, denied a hearing before
10 a magistrate who could advise him of his rights to remain silent,
11 or to counsel. He was not advised of these rights by the court
12 in Arkansas. He was held in comunicado for three days without
13 advice of counsel, friends, relatives, was denied food for long
14 periods, threatened by violence and so forth.

15 Now those things in the totality of circumstances
16 would indicate an involuntary confession of one that was coerced.
17 Such was not the case in this Boulden matter.

18 Q Mr. Clark, it may or may not be material to the
19 case, I don't know, but, I was just wondering on the facts
20 here the petitioner testified that the girl consented. She
21 testified she had been raped.

22 Upon leaving the wooded area where the act took place
23 the two were confronted by a Conservation Officer for the State
24 of Alabama. Then the girl ran away at that time to a nearby
25 highway where she located a Deputy Sheriff.

1 What did she say to the officer who first confronted
2 them, the Conservation Officer? Did she explain ---

3 A Mr. Hays. She hollered rape as they say, she
4 complained of rape.

5 Q To this officer?

6 A To this officer.

7 Q I see. And she didn't look to him for protection,
8 she ran away from it?

9 A She ran to the officer, yes, sir, and got behind
10 the Officer Hays.

11 Q No, I am talking about the Conservation Officer.

12 A I am, too, sir.

13 Q I beg your pardon?

14 A She ran behind Officer Hays, the Conservation
15 Officer.

16 Q I thought she ran clear away and ---

17 A Oh, no, sir.

18 After Hays was killed she ran away to the highway
19 and contacted some highway ---

20 Q She was there when he was killed?

21 A Yes.

22 Q Oh, I see. I beg your pardon.

23 Q Was she an eye witness?

24 A Yes, sir, she was.

25 Q Did she testify in this case?

 A I believe she did.

1 Q I hadn't understood that from the briefs.

2 A I am not certain, your Honor, without looking at
3 the beg record, which I don't have before me.

4 Q Some of her testimony is here in the printed
5 transcript. But -- I thought she ran off before the killing.

6 A I don't have the -- she ran away, I believe,
7 before he had actually died, the Conservation Officer. She ran
8 for help.

9 Q After the shooting, is that correct?

10 A Yes, sir.

11 Q Do you know where we would find that in the
12 record here?

13 A Yes, sir, that would be in the large record,
14 about 400 pages. It was sent up as Exhibit E.

15 Q Not in the ---

16 A Not in the Appendix; no, sir. I believe the
17 Court has informed us that your Honors will take knowledge of
18 that.

19 Q Some on pages 54 and 55 of the printed record.
20 This is one of the statements?

21 A Of course, 54 and 55 is Boulden's statement.

22 Q Yes.

23 Q The statement on page 5 of the petitioner's brief
24 is this: "After they were stopped by Hays and prior to the
25 shooting and sticking Boulden had told Ann Burnett to run, and

1 she did, hence she was not an eye witness when Hays met his
2 death." That is just counsel's statement. On top of page 5.

3 A That is the testimony of Boulden.

4 Now this case has gone through the District Court on
5 Federal habeas corpus after being affirmed by the Supreme Court
6 of Alabama, and then it went up to the Fifth Circuit. And
7 the Fifth Circuit, affirming the action the District Court held
8 that each of the appellant statements, his actions, the facts
9 reflecting his physical and mental condition and environment
10 from the moment of his arrest to the end of the last interro-
11 gation are essential fragments or facets for the consideration
12 on the issue of voluntariness.

13 But we find from the record here no possible sugges-
14 tion that Boulden's will was overborne on the occasion of the
15 last confession by having made earlier ones.

16 Now both the District Court and the Circuit Court of
17 Appeals found that the first confession, the one that was not
18 used in the trial, the one on May the 1st, was voluntary and
19 also that the second one was also.

20 Based on that held that on the totality of the
21 circumstance rule that the confession was voluntary.

22 Now as to this question of Witherspoon, as Mr. Moore
23 pointed out, Witherspoon took place after we had filed briefs
24 on that. However, I feel that the objection that the State
25 Court hadn't had a chance to rule on it would be a waste of

1 time. If we went back we would have to come back here again,
2 probably. So I won't press that objection.

3 I would like to point out on the Witherspoon Case that
4 the Illinois statute was: "In trial for murder it shall be
5 a cause for challenge of any juror who shall on being examined,
6 state that he has conscientious scruples against capital
7 punishment or that he is opposed to the same."

8 Now that was the Illinois statute.

9 I would like to point out the difference of Iowa
10 cites Section 30.57 in Alabama in addition to about twelve
11 grounds for challenge we have these others but out in Section 57.

12 On the trial for any offense which may be punished
13 capitally or by imprisonment in the penitentiary is a good
14 cause of challenge by the State that the person has a fixed
15 opinion against capital or penitentiary punishment, thinks that
16 a conviction should not be had on circumstantial evidence which
17 calls a challenge may be proved by the oath of the person or
18 by other evidence.

19 Now, there is a lot of difference between scruples
20 against capital punishment and a fixed opinion.

21 Q The Witherspoon opinion, as I understand it, did
22 however, didn't rely much on the words of the statute but
23 rather what actually happened in the voir dire of the jury.

24 A Yes.

25 Q And that would be the test in any case, under

1 the Witherspoon Opinion?

2 A Yes, I believe on that case it was on a narrower
3 interpretation of this particular Illinois statute.

4 Q Well, what happened in the qualifying of the
5 jury? Often the record will show in the actual voir dire of
6 the jury the words of the statute weren't very carefully
7 followed. Now, in this case, according to the printed appendix
8 here, what was asked was just the statutory language. Do you
9 have a fixed opinion against capital punishment almost in each
10 one of these sixteen cases. Is that right?

11 A That is our contention. What is a fixed opinion?
12 A fixed opinion we just look to the dictionary on that and it
13 is a firm or not movable established opinion, one that can't
14 be changed, a fixed opinion against capital punishment would
15 mean that under no circumstances would ---

16 Q Does it mean the same thing to each one of the
17 sixteen?

18 A The question was, "Do you have a fixed opinion?"

19 Q It did. You mean each one of the sixteen gave
20 'fixed' the same meaning? You couldn't mean that.

21 A I don't mean that and I didn't mean to say that
22 it interpreted ---

23 Q Now each one was asked if they had a fixed
24 opinion and it was up to each one of them to decide what 'fixed'
25 meant?

1 A Yes.

2 Q Well, even if it meant to each one of them
3 exactly what you say it means to you and means to Noah Webster
4 isn't it perfectly possible that a person can have a fixed
5 opinion against capital punishment? That is, he would vote
6 against it if he were a legislator or try to get the legislature
7 to abolish it if he were the governor?

8 But in the meantime would follow his duty as a juror?
9 Certainly, I suppose, there are judges, many judges, who have
10 a fixed opinion against capital punishment, as a matter of
11 policy and as citizens but who do their duty and sentence
12 people to death when that is what their duty requires.

13 A That is true. They have a fixed opinion but a
14 fixed opinion as a juror would indicate one who would under no
15 circumstances would change his mind.

16 Q No he wouldn't change his mind. He would be
17 against it as a citizen and as a matter of policy. A lot of
18 people, while we had national prohibition, had a fixed opinion
19 against it. They thought it was a silly, unwise law. But as
20 jurors they would follow the directions of the court and
21 convict people for violating the prohibition laws.

22 A Of course, that question wasn't asked would they
23 find the person guilty and sentence them to death under any
24 circumstances.

25 Q It was asked of two of the jurors. It was

1 asked of two of the jurors, wasn't it? On page 17, Mr. Nelson
2 and Mr. Moon, but it wasn't of any of the others.

3 A That just indicated that that is what they all
4 thought was a fixed opinion.

5 Q That is what, according to the most recent
6 evidence that I have seen that the majority of the people of
7 the United States are against capital punishment as a matter
8 of principle or policy, but this doesn't mean that they would
9 not be able to carry out their duties as jurors, does it?
10 Or follow the instructions of the court?

11 A Yes, if he had a fixed opinion against doing a
12 certain thing ---

13 Q I guess you just don't understand it, sir.

14 A Based on that, your Honor, we feel that
15 certiorari should be denied in this case.

16 MR. CHIEF JUSTICE WARREN: Mr. Moore.

17 REBUTTAL ARGUMENT OF WILLIAM B. MOORE, JR., ESQ.

18 ON BEHALF OF PETITIONER

19 MR. MOORE: May it please the Court, in rebuttal I
20 have a few notes set down here.

21 No. 1, my good friend Mr. Dave Clark says this
22 involved curiosity seekers. When you get to reading the record
23 you will see in there that the Solicitor commented very firmly
24 on it, that he was trying to send a man down to Kilby for safe-
25 keeping.

1 Because he said, "Judge, you know he knows what
2 happened out there at Flint last night when that mob gathered."

3 Then we get on down into what Boulden told the girl
4 at the scene. The record, Mr. Justice, will reveal that Boulden
5 told the girl to run. She was not an eye witness to the murder
6 if he did kill him, which he has denied since then.

7 Q He was murdered?

8 A That is correct.

9 We thought it particularly appropriate and did set
10 out on page 24 in here what led up to this thing, her testimony,
11 and she did testify as to their acts up there in the woods.
12 The precautions he used, he used a contraceptive on both times.
13 And this is spelled out by her own testimony in some detail,
14 indicating that now this rape thing was an afterthought when
15 she got down there and saw that peace officer.

16 And Boulden is the one that told her to run. To me,
17 one of the most impressive items in this whole thing here is
18 that these officers wanted a confession. They wanted a con-
19 fession to convict. They weren't looking for who did it. They
20 thought they had found and under one of the outstanding opinions
21 of this court they were after a confession on which they could
22 convict and could hang this man.

23 He was never told at any time that you don't have to
24 talk to us, that you have got a right to remain quiet. Just
25 because they didn't put him on bread and water and put a lash

1 on his back doesn't mean he wasn't coerced. Just because his
2 bathroom privileges weren't taken away from him and they gave
3 him a couple of cigarettes doesn't mean he wasn't coerced.

4 When those two peace officers were standing there
5 with this man in his cell with those doors behind him telling
6 him we want to know what happened, a little bitty 120-pound boy

7 ---

8 Q How old was he?

9 A Nineteen. Never been in trouble before, ill
10 health ---

11 Q He had a pistol, didn't he?

12 A Did he have a pistol?

13 Q Yes.

14 A Yes, sir, I think he did. They never found it.

15 Q Well, he said he did.

16 A In some of these confessions he did and it never
17 showed up at the trial.

18 Q And the girl said he did?

19 A That is correct.

20 Q Is there any indication that anybody else could
21 have done this?

22 A He has said so, your Honor.

23 Q What?

24 A He has said so later when he got before the
25 Government, he said at that time that two other men showed up

1 on the scene and did it and he said they threatened his family
2 and he was trying to protect his family. Again, I cannot vouch
3 for that one way or the other.

4 The circumstances I have said throughout are strange.
5 I went up there and got the bloody clothes and brought it down.

6 Q How long was it after the girl ran to the street
7 or the road, highway, when the officers came back down to where
8 he was killed?

9 A Very shortly.

10 Q What?

11 A Very shortly.

12 Q How far was it?

13 A Less than a mile, about a half a mile to a mile.

14 Q And they came right back?

15 A Very shortly, your Honor. Yes, sir.

16 Q That is the only information they had was what
17 she gave them?

18 A This is correct.

19 Q That this boy had killed him?

20 A That is right.

21 Q Where was he then?

22 A He was back down there in the woods. His story
23 had been changed that two men came up and were fishing. But
24 again, I am not trying my lawsuit on this.

25 Q I understand that.

1 A This is what he told when he got to the Governor's
2 Office and he told it when we started in the District Court.
3 And that is when I got in the case, in the District Court.
4 Judge Johnson's department was the first association I had ever
5 had with the case.

6 Q What happened when these two officers and the
7 girl had reported to, came to him or he came to them? Was there
8 any scuffle or anything of that kind?

9 A Apparently they just apprehended him is the way
10 I read the record and then called for the Highway Patrol.

11 Q Was he running away or anything?

12 A The record doesn't reveal that, your Honor. My
13 recollection as to whether he was actually running at that time
14 or not, I think he was just out there in the woods, is about all
15 we know.

16 But never was he told that he had a right to remain
17 silent. I think you have got to know what a right is, know
18 that you have got one before you can give it up.

19 Q Did he testify at the trial?

20 A Yes, sir. He did.

21 Q What did he say? Did he say that he thought
22 somebody else killed the man?

23 A Not at that time. No, sir.

24 Q At the trial?

25 A No, sir, he did not.

1 Q Did he admit that he did?

2 A Yes, sir.

3 Q At the trial?

4 A At the trial.

5 Q Did he testify?

6 A Yes, sir.

7 Q And he admitted the killing?

8 A Yes, sir.

9 Again, he said that he was protecting his family.

10 That is what he said at a later time.

11 Q His defense, as I understand it, was that he saw
12 this girl and he invited her to go out in the woods with him and
13 she went with him?

14 A That is right.

15 Q And they had intercourse and he then, when they
16 arrested and tried him he admitted that and admitted that he
17 shot the officer. There was no other defense was there?

18 A This is true.

19 Q Admitted that he shot him and that was the trial?
20 That was all the evidence, wasn't it?

21 A Yes.

22 Q When he testified at the trial, did he say what
23 this officer had told him that he had been wanting a long time
24 to kill a nigger?

25 A He testified to that in the District Court here.

1 In the original hearing I don't think it was ever asked of him.

2 No, sir. Not at the original trial.

3 Q Well, he was asked about the shooting, wasn't he?

4 A He was asked about the shooting.

5 Q And he didn't say anything about that statement
6 made by him?

7 A No, sir.

8 He was asked a series of questions just about
9 right along in the form of this confession that was taken out
10 there in the scene where he reenacted, where they took his
11 handcuffs off and when you read it you will see he said, "Well,
12 I am even glad to get my handcuffs back on," because he was
13 arraigned with security people out there then.

14 Again, nobody ever told him he had a right to keep
15 his mouth shut.

16 Q But when he was testifying in the trial, what
17 did he say was his reason for shooting the man?

18 A I don't know if anybody ever asked him that.

19 Q I thought you said he was doing it to protect
20 his family?

21 A That is the reason he -- what he now says is the
22 reason he testified and made this confession -- no, no, I beg
23 your pardon. I didn't mean that at all.

24 Q I misunderstood.

25 A If he did it, the circumstances indicate he lost

1 his head which certainly didn't spell out first degree murder
2 but that is again, not what I am raising here.

3 Q Where do we find his testimony, is it in the
4 appendix?

5 A Judge, again, we were trying to put this record
6 down pursuant to our instructions and I don't ---

7 Q This seems to be the habeas corpus hearing
8 mostly in the appendix, isn't it?

9 A Well, I think we are going to have to go back to
10 the original record which is here.

11 MR. CLARK: I think it would be 478 to about 600, I
12 think in the big record.

13 MR. CHIEF JUSTICE WARREN: In the big record?

14 MR. CLARK: Yes, sir.

15 MR. JUSTICE BLACK: 478 to 600?

16 MR. CLARK: Yes, sir.

17 MR. MOORE: Again, I might want to make one more
18 observation that I realize that the two rights that I have
19 presented this Court are in Congress. If I am correct that this
20 is an involuntary confession by statute, then I presume that
21 he is entitled to a new trial.

22 If, on the other hand, Witherspoon is applicable, I
23 presume then his conviction would stand but the death penalty
24 could not be carried out. And this is obviously the decision
25 the Court will make in any event, one way or the other.

1 But I thought I owed the Court an explanation why I
2 sought both rights.

3 As the attorney for the man it appears to me that I
4 must exhaust all possible remedies and lines of protection that
5 he might have.

6 Q I don't think anybody is going to object to
7 your doing that. Whether accepted or not that is the question.

8 A I understand that.

9 Q I am sure nobody would ---

10 A If I could answer any question, I would be
11 pleased to try.

12 MR. CHIEF JUSTICE WARREN: Very well.

13 MR. MOORE: Thank you, sir.

14 MR. CHIEF JUSTICE WARREN: Mr. Moore, you were
15 appointed by this Court to represent this indigent defendant
16 and I want you to know that we are grateful for such service by
17 lawyers. We believe it is a real public service.

18 We thank you for what you have done in this case.

19 And, Mr. Clark, we thank you for your affair in
20 representation of the State in this proceeding also.

21 MR. CLARK: Thank you.

22 MR. MOORE: We appreciate the chance, your Honor.

23 (Whereupon, at 1:57 p.m. the oral argument in the
24 above-entitled matter was concluded.)