In the

Supreme Court of the United States

JOSEPH S. HOOPER, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS AND JAMES D. WHITE, WARDEN,

Petitioners,

v.

JOHN LOUIS EVANS, III

NO. 80-1714

Washington, D. C.

March 24, 1982

Pages 1 thru 56

ALDERSON REPORTING

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JOSEPH S. HOPPER, COMMISSIONER, :
ALABAMA DEPARTMENT OF CORRECTIONS, :
AND JAMES D. WHITE, WARDEN, :
Petitioners, : No. 80-1714
v. :
JOHN LOUIS EVANS, III :

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Washington, D. C.

Wednesday, March 24, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:14 o'clock p.m.

APPEARANCES:

EDWARD C. CARNES, ESQ., Assistant Attorney General of Alabama, Montgomery, Alabama; on behalf of the Petitioners.

JOHN L. CARROLL, ESQ., Montgomery, Alabama; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Hopper against Evans.

I think you may proceed whenever you are ready.

ORAL ARGUMENT OF EDWARD E. CARNES, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. CARNES: Mr. Chief Justice, and may it please the Court, this is a federal habeas case here on certiorari from the Fifth Circut Court of Appeals. Respondent in this case is a murderer named Evans who was convicted and sentenced to death under the Alabama capital punishment statute, which was later involved in this Court's decision in Beck v. Alabama.

At this time this Court handed down its Beck decision, Respondent Evans' conviction and sentence had already been affirmed by the state appellate courts. This Court had denied certiorari, and the district court had denied the federal habeas petition which is at issue in this case.

After the Beck decision was handed down, the Fifth Circuit reversed the denial of habeas, and held that Beck required that Evans be retried and resentenced. It did so in spite of the fact that this case is different from the Beck case in every material way.

The facts in this case are virtually unique. Early in 1977, Evans and a co-defendant named Ritter, both of whom had just been released on parole from an Indiana prison, began a cross-country crime spree. That crime spree lasted over two months, and by their own admission, involved between two and three dozen violent felonies committed in seven different states. One of those violent felonies was a robbery they committed of a pawn shop in Mobile, Alabama, in January of 1977.

It is absolutely undisputed in the record that prior to that robbery, which is the basis of this case, Evans and Ritter had discussed the possibility that one of their robbery victims might try to go for a weapon, and that they had agreed between themselves that if that happened they would kill him.

When Evans and Ritter entered the pawn shop in Mobile, a man named Mr. Nassar was working behind the counter. Evans pulled a pistol. Nassar dropped to his hands and knees behind the counter and started crawling away. Evans thought that Nassar might be going for a gun, so he leaned over the counter and deliberately shot him to death.

They then pulled another robbery in Mobile, and left that state to continue their crime spree in another state. During the crime spree, and after they

had killed Nassar, Evans telephoned an FBI agent in his home town and offered to turn himself in if that FBI agent could guarantee Evans that he would be executed when he turned himself in. The agent told Evans he couldn't make him any promises, and for that reason Evans refused to turn himself in. That is from Evans' own sworn testimony at the grand jury.

After more robberies, Evans and Ritter were finally captured in Little Rock, Arkansas, by FBI agents in March of 1977. From the very beginning, instead of contesting his guilt, Evans admitted it and bragged about it. He confessed to the robbery and murder of Nassar and the two to three dozen other violent felonies he had committed to the FBI agent who captured him within hours of his capture, to the Mobile police officers after he waived extradition and was returned to Alabama, and to the news media at every available opportunity.

Evans insisted that he wanted to be convicted and sentenced to death for the murder, and his insistence on that so frustrated his attorneys that they arranged through the court to have Evans examined by a psychiatrist. The psychiatrist did examine Evans, and he reported back to the court that Evans was competent and rational, that he knew the difference between right

and wrong, that he thoroughly understood the nature and consequences of his actions, and that he sincerely preferred execution to a long term in prison.

Before that, Evans had voluntarily appeared before the grand jury, over the objections of his attorney, and had testified under oath to the grand jury that he had robbed and murdered Mr. Nassar, that he fully understood what he was doing, that Nassar was not the first person he had killed, and that he would kill again in the same situation. Evans also testified to the grand jury that he preferred execution over life in prison.

Then, at arraignment, Evans pleaded guilty. The judge entered Evans' guilty plea in the official minutes of the court, but nonetheless scheduled the case for trial, because that is the peculiar procedure in Alabama capital case guilty pleas.

At the trial, the state presented overwhelming evidence of Evans' guilt, including the testimony of eye witnesses and undisputed scientific evidence. After the state had rested its case, Evans filed a written motion to plead guilty, which was accepted into evidence and went to the jury. Then Evans took --

QUESTION: There is no dispute about all this so far?

MR. CARNES: No dispute at all, Your Honor.

QUESTION: In that statement, in one of his statements, did he not at least imply strongly that if confined, as distinguished from being executed, he would escape and kill again?

MR. CARNES: Yes, Your Honor, he, as a matter of fact, told the jury that at the trial, and he told the grand jury that. In the trial testimony on Page 38 of the Appendix, he said, "Our whole trip was based on robbery. Kind of a spree. It was well planned, and I've been in crime a long time. Before you go back in there, the only thing I've got to say to the jury is that I've been at it a long time, and if you don't come back with a death sentence, which is the only other thing I can think you can come out with, I'm going to get out and I'm going to do it again. There's not any question whatsoever."

Evans, in addition to testifying to that before the trial jury, also testified under examination by the district attorney that he felt no remorse about the killing, and that he wouldn't hesitate to kill again in the same situation. He also admitted that his attorneys had advised him some 20 to 30 times not to take the course of action he was taking at trial.

There were absolutely no lesser included

offense evidence of any kind whatsoever presented at the trial. The jury took less than 15 minutes to convict him. The next day, the judge held a sentence hearing, and after weighing the aggravating and mitigating circumstances, found that the aggravating circumstances far outweighed the mitigating, and then the judge sentenced Evans to death, as he had requested all along to be sentenced.

After the case was affirmed by the Alabama appellate courts and this Court denied cert, the habeas petition, which is at issue in this Court, was filed in the federal district court in Mobile. That habeas petition --

QUESTION: Could you --

MR. CARNES: Excuse me.

QUESTION: -- tell me whether there was any attempt made to file a habeas petition in the state courts first?

MR. CARNES: No, Your Honor. Under Alabama law, what we have is a coram nobis petition, which is the same thing, but under Alabama law you can't raise in a coram nobis petition any issues that you could have raised on appeal but didn't, and also, there's a very strong line of authority in Alabama law that you can't file a coram nobis petition or have any kind of

collateral review unless you aver that you're innocent, something which, of course, no attorney representing Evans could do.

So, we have conceded from the very beginning that he had exhausted any state court remedies to have his federal claims aired in state court.

QUESTION: And the question could not have been raised in a state habeas?

MR. CARNES: Could not have been raised. It would have been rejected without any answer at all being required by the state.

The federal habeas petition that Evans filed in federal district court, or that his new attorneys filed for him, did aver that the preclusion clause contained in the Alabama statute was unconstitutional because it prohibited jury instructions when there was evidence to support them, something this Court later found in the Beck case.

However, the habeas petition in this case did not aver that there was no evidence -- that there was any evidence to support a lesser included offense instruction in this case, and the habeas petition did not aver that Evans had been harmed, affected, or influenced in any way by the preclusion clause. As a matter of fact, at the habeas hearing, Evans, through

his attorneys, insisted that he was attacking the statute only on its face and as applied statewide instead of for whatever reason it may have affected him. The district --

QUESTION: In other words, he did not make the argument on which the Fifth Circuit acted.

MR. CARNES: No, Your Honor, he surely didn't. As a matter of fact, the habeas transcript, his attorneys' remarks on the habeas transcript, Pages 34 and 43, they specifically say that he is not attacking it because of anything it did to him. Quoting his attorney in the lower court on Page 34 of the hearing transcript, "First of all, we are not going to argue whether or not capital punishment is good or bad, or argue whether anything regarding the statute in particular was applied in Mr. Evans' case in such a way that it was unconstitutionally applied. What we will be arguing here is the unconstitutionality of the Alabama death penalty statute both on its face and as it has been applied in the state of Alabama," meaning statewide in other cases.

They essentially attempted to use the habeas petition as a declaratory judgment, but I doubt if even -- they would have had even enough standing for a declaratory judgment. The district court denied the

petition. Then, after the Beck decision was released, the Fifth Circuit reversed. To the state's argument that Evans had never even argued that he was harmed, affected, or in any way influenced by the preclusion clause, the Fifth Circuit replied, "However persuasive this argument might otherwise be, it has been foreclosed by the Supreme Court."

What the Fifth Circuit thought foreclosed it from making any inquiry into harm and prejudice was the paragraph on Pages 642 and 643 of Justice Stevens' opinion, where this Court said that, "In every case we think," meaning in every case being discussed, "the Alabama statute would lead to unreliable fact finding."

In lifting those three words, "in every case," out of context, and misinterpreting them, the Fifth Circuit ignored the fact that the cert question was very carefully limited in Beck to cases in which there was factual evidence to support a lesser offense verdict. Also, this Court's holding on the very first page of the Beck opinion says, "We hold the death penalty may not be imposed under these circumstances," referring to circumstances in which there was lesser included offense.

QUESTION: Mr. Carnes, at this point, if the Fifth Circuit should be affirmed and you lose this procedure here, in your view, are you jeopardizing all

pre-Beck convictions in the state of Alabama?

MR. CARNES: There is no question about it, Your Honor.

QUESTION: How many are there?

MR. CARNES: There were -- reading the Alabama Supreme Court's Beck opinion on remand, there were at least 50, plus, from the time of that -- my best estimate is, there were more than 60.

QUESTION: Sixty?

MR. CARNES: More than 60 pre-Beck convictions and sentences. Of that number, Your Honor, we have conceded that all but, at the outside, ten are entitled to retrial under the Beck decision.

QUESTION: Under the Beck decision?

MR. CARNES: Yes, sir.

QUESTION: So that at the outside, only ten then would be affected by this one --

MR. CARNES: Yes, Your Honor.

QUESTION: -- if you lose.

MR. CARNES: It's Evans, Ritter, six more before this Court now, and perhaps two more in the state courts. This is our most compelling case, and this Court could conceivably issue a decision in this case that Evans, and by extrapolation Ritter, were valid and should be affirmed and not set aside, but that the

others were, because in none of the other cases did people follow the unusual and unique course of action that Evans and Ritter did here at the trial.

The frustrating thing --

QUESTION: May I ask, while you are giving us this summary, those that you in effect concede were covered by Beck, are they all cases in which the record would have supported a lesser included offense? I mean, there was evidence in the record that would have justified it? Is that --

MR. CARNES: Yes, sir, all.

QUESTION: That was the theory?

MR. CARNES: Yes, sir, Your Honor.

QUESTION: And then the seven or eight cases other than Ritter and Evans, I take it, are cases in which one cannot be as sure as one might be here that the preclusion clause didn't really affect it --

MR. CARNES: Without question.

QUESTION: -- what was put into evidence or offered in evidence.

MR. CARNES: Yes. Without question. The other cases are primarily, though I don't think entirely, cases where there was an alibi, where the defense essentially was, well, whoever did it surely did it. That's the capital offense. But I was 200 miles

away with my girlfriend. Here we go beyond that. In the Fifth Circuit, in the initial opinion, they said, well, the state is being fundamentally unfair to Mr. Evans. First, they told him there was no lesser offense, and now they are saying, we ought to affirm his death sentence because he didn't present evidence of a lesser offense.

That might be a valid argument for those other cases, but in this case they ignored our argument where we said, look, not only was there no evidence, but we can show you from this unusual, extraordinary record that Evans was not influenced in any way, that he would not have presented any evidence of any lesser included offense, that he launched this self-destructive legal course before he was even captured, much less before he knew anything about the preclusion clause.

When we argued that, then the Fifth Circuit came back and said, oh, well, in effect, saying, oh, well, even if you're right, we are foreclosed by the "in every case" language of Beck.

The frustrating thing about that was that it seemed so clear to me that in Beck what this Court was talking about was that in every case where there was lesser offense evidence, there would be pressure on the jury not to acquit the capital offense because the jury

was convinced the man was guilty of a serious lesser offense.

You can't have the jury convinced that he is guilty of a serious lesser offense unless there is some evidence that places in dispute an element of the higher offense not necessary to the lower offense. No jury could rationally, anywhere, say that Evans might be guilty of a serious lesser offense instead of the capital offense. Your opinion seemed so clear, but the Fifth Circuit just wouldn't see it.

In view of the fact that Beck itself does not mandate reversal in this case, harm and prejudice is necessary. It's necessary because this Court's decisions recognize that there is a general requirement of harm and prejudice to establish a constitutional violation in any case, with two exceptions. One is where there is a specific Bill of Right guarantee involved, which is not involved in this case, and the other is where there is a denial of a procedural right which has been specifically recognized as encompassed within the right to fair trial.

The best example I know of this is the Beck case itself. This Court recognized at least in death cases that the giving of lesser included offenses when the evidence justified them was necessary to a fair

trial, specifically and necessary, but that doesn't control this case, because this Court has never held, and no court has ever held that giving lesser included offense instructions when there was no evidence to support it was necessary for a fair trial.

Instead, their contention basically, and what the Fifth Circuit probably is saying is that it is fundamentally unfair, the existence of the preclusion clause itself was unfair and detrimental. Every fundamental fairness claim this Court has ever decided, it has required a showing of harm and prejudice. The burden to prove harm and prejudice should be on Evans, not only because it is part of his claim, a threshold part of his claim, but also because this is a habeas corpus case.

The interesting thing about both the Fifth Circuit opinions is, after they said initially this is a habeas case in the Southern District of Alabama, they never again mentioned habeas corpus. Also, Evans, in this Court, his entire brief, beside a passing reference, the references to this habeas case, never discusses the significance of this being a habeas corpus case. They ignore entirely Henderson v. Kibbe, where this Court said that not only did you have to show prejudice, but you had to show more than you would show

in a direct appeal.

QUESTION: Mr. Attorney General, what section in the Constitution says you have to show prejudice?

MR. CARNES: Your Honor, it is more an interpretation of this Court --

QUESTION: But it is not in the Constitution, is it?

MR. CARNES: My understanding is, this Court has said it's in the Constitution by --

QUESTION: Well, I'm asking you, where is it in the Constitution?

MR. CARNES: It is not on the boldfaced lettering of the Constitution. It is within this Court's interpretation of the Constitution, and other cases --

QUESTION: Do you find it in the same place where you find the requirement that instruction be given on a lesser included offense?

MR. CARNES: Yes, Your Honor. Thank you.

QUESTION: And on the burden of proof and the presumption of innocence?

MR. CARNES: Yes, Your Honor.

QUESTION: I am still asking where. I don't know. I mean, all of them together are trying to give the answer. I mean, what amendment to the Constitution

or what section of the Constitution says it? None. I will answer it. None.

MR. CARNES: We also find support for our position that this is a specially significant case because it is a habeas corpus case from Mr. Justice Stevens' separate opinion earlier this month in Rose v. Lundy.

The Fifth Circuit said, and they argue here, that Chapman v. California placed the burden on the state to disprove harm and prejudice beyond a reasonable doubt. That is wrong because Chapman applies, as it said, only where a constitutional violation is first established. No constitutional violation has been established in this case. Instead, harm and prejudice is a threshold requirement to their fundamental fairness claim.

If this were a case where lesser included offense instructions should have been given because there was evidence for them, then Chapman would apply, but there is no constitutional requirement for lesser offense instructions absent evidence for them.

But in any event, perhaps it is a moot argument, because the record in this case not only does not support Evans' contention that he was harmed or prejudiced or any conceivable contention, but it also

disproves beyond a reasonable doubt and beyond any doubt any harm or prejudice on Evans. It shows there was none.

It shows it in two ways, first, because there was no evidence at trial at all to support it, and then also because it shows that the preclusion clause didn't influence or affect his course of action. The best way to point this out is from the crucial, decisive, absolutely undisputed fact that Evans, according to his own sworn statements, began this self-destructive course of action before he knew anything at all about the preclusion clause.

Also, the record, which is unusually complete, does not reflect that the existence of the preclusion clause after he learned of it had any reinforcement effect whatsoever. He started certainly when he called the FBI agent and said, I'll turn myself in if you can guarantee me you'll be executed. He hadn't heard of the preclusion clause. He hadn't heard of the mandatory verdict form requirement or anything of that nature.

The jury verdict form requirement is an alternative grounds that they assert this case should be reversed on. Now, this, Alabama's pre-Beck capital punishment statute, the one Evans was tried under, was not a mandatory death penalty statute, as witnessed by the undisputed fact that the judge was the sentencing

authority, and also Page 67 of this record shows that roughly a third of the convictions were sentenced to life without parole.

The problem was, it appeared from the jury's perspective, as Mr. Justice Stevens pointed out in his opinion in Beck, to be a mandatory one, because the jury wasn't told of the judge's later sentencing function. Our response to that is, fine, but according to Beck and according to any reasoned analysis, the verdict form requirement could have only two conceivable effects. One would be at the guilt stage where, according to the historical information in earlier cases, it might impermissibly encourage the jury to acquit. Our response to that is, so what? Why should Evans be allowed to complain because his jury was impermissibly encouraged to acquit him? He was convicted in spite of the preclusion clause and not because of it.

The second conceivable effect would be at the sentence stage, where the fact that the jury had reached a sentencing decision that had been publicly announced before the judge came to making his decision could conceivably impermissibly encourage the judge to pronounce a sentence of death, something that was alluded to in Beck.

Our position on that is twofold. First of

all, sentencing errors never have been held to invalidate otherwise reliable convictions. The Fifth Circuit in this case didn't just say, go back and resentence Evans. They said, go back and retry him.

QUESTION: So did Beck, didn't it?

MR. CARNES: Yes. The specific holding said that, but we have read it and interpreted it and conceded it from our first reading of it that we had to retry.

QUESTION: Yes.

MR. CARNES: The second position on the mandatory verdict form requirement is that it could not conceivably have affected even Evans' sentence in this particular case, because at every stage of the proceeding Evans had asked to be executed, before he was captured, throughout the grand jury, the trial, and so forth and so on. Any other sentence was inconceivable, not only because Evans asked for it, but also because he expressed no remorse, and told everybody, the jury, the judge, everybody, "I'm going to do it again."

So, basically what we say here is, even if the jury verdict form requirement was constitutional error insofar as the sentence was concerned, the record proves beyond a reasonable doubt, Chapman analysis, it was harmless error.

There is also an alternative ground for affirming in this case -- for affirming the conviction, reversing the Fifth Circuit in this case, and that's the guilty plea. Alabama has an unusual guilty plea in capital cases rule. The guilty plea rule basically is that a guilty plea in a capital case is given effect, but the case must still be submitted to the jury. Under Alabama's unusual rule, the formula is something like this. A guilty plea plus evidence to support the jury's verdict of guilt equal a waiver on appeal of non-jurisdictional defects.

On appeal, the Alabama courts did in this case consider the constitutional issues about the statute. They had to in the process of determining whether there were any jurisdictional defects, because there's a two-step process. One, are there any defects, any unconstitutional parts of the statute? If the answer to that is yes, then they have to say, well, are these severable or non-severable, because under Brady, the unconstitutionality of a severable part of the statute is waived, but in Alabama law and virtually every other law, if some part of the statute had been determined to be unconstitutional at the threshold inquiry, and then had been determined to be non-severable, then the entire statute would have fallen. The conviction would have

been void ab initio, and the court would not have had power to convict and sentence Evans under the statute, and we would have conceded it was jurisdictional error. That is why they approached that inquiry in this particular case.

To the Fifth Circuit's holding that Evans' guilty plea did not waive the preclusion clause because it was limited to a waiver of antecedent defects, we have two responses. Our first response is, the unconstitutionality of the statutory provision on preclusion clause existed from the time the statute was enacted, and was in existence at the time that the Evans case went to trial. Therefore, it was an antecedent defect.

Secondly, even if it wasn't, under Menna v. New York, the effect of a guilty plea is to render irrelevant anything that is logically consistent with the factual guilt, and that does not stand in the way of factual guilt once it's established.

QUESTION: Mr. Attorney General, do you read the judgment of the court of appeals, if affirmed, as requiring habeas relief in the form of a new trial on guilt?

MR. CARNES: Yes, Your Honor. It said, the state may not impose the sentence of death on Evans

unless and until he is retried and resentenced. There is no question about that.

QUESTION: Retried with the lesser included offense instructions.

MR. CARNES: I don't know if they meant that or just retried with formal notice that he can raise them if he wants to.

QUESTION: What else could it mean?

MR. CARNES: It could mean you've got to go back and give him another chance to say, well, let me try to dream up some lesser included offense. In other words, Alabama law is absolutely clear. The Ritter case on remand, four Justices who address it all agree that you still don't have to give lesser offense instructions unless there is some evidence to support them. The Fifth Circuit might be saying, you've got to tell him that in advance and let him run through it again, and they specifically said, we're not even going to worry about whether he'll try that or not. We're just going to make the state do it.

I'd like to save the rest of my time.

CHIEF JUSTICE BURGER: Very well, for rebuttal.

Mr. Carroll.

ORAL ARGUMENT OF JOHN L. CARROLL, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. CARROLL: Mr. Chief Justice, and may it please the Court, I think in order to get an adequate understanding of exactly what constitutional issues we deal with in this case, it's important to understand the framework of Alabama law as it applies directly to this particular situation. Two points need to be made. Under Alabama's capital statute, capital murder and felony murder are entirely different. Felony murder is first degree murder. It does not require a showing of intent.

Capital murder, under the applicable decisions of the Alabama Supreme Court, require a specific showing of intent, leading to the present practice in Alabama that juries are instructed, where the evidence supports such instruction, that a defendant may be found guilty of capital murder if the jury finds that he intentionally killed a particular victim, or he may be found guilty of felony murder if that intent is lacking, and that is clearly the differentiating factor under Alabama law between felony murder and capital murder. It is not like many of the other states.

QUESTION: May death be imposed in either event?

MR. CARROLL: Death may only be imposed in the case of the conviction for capital murder. For a

conviction for felony murder, a life sentence with the possibility of parole is the sentence.

QUESTION: How does that fit the evidence in this case, that proposition of law that you have just stated?

MR. CARROLL: Chief Justice Burger, our position is really multifaceted on how that particular law fits this case. We contend that there is evidence in the record, particularly in Mr. Evans' grand jury testimony, which indicates that had that grand jury testimony been presented to the trial jury, the trial judge would have instructed on the lesser included offense of felony murder. It raises a factual question about the intent that Mr. Evans possessed.

We do not say necessarily that these questions involve sufficiency of the evidence. We only say that they involve questions of, would the trial judge have instructed the jury on the lesser included offense of felony murder, and under Alabama law, charges must be given which are supported by any evidence, however weak, insufficient, or doubtful in credibility.

QUESTION: Is this an additional argument for affirmance? The court of appeals didn't go on that basis, did it?

MR. CARROLL: This is an additional argument

for affirmance, Your Honor.

QUESTION: Can you give me the exact testimony of other evidence that backs that up?

MR. CARROLL: I can, Your Honor. It appears at various places in the Appendix, but is set out most recently in our brief on the merits of the case.

QUESTION: Did you present this argument --

QUESTION: Well, where is it?

MR. CARROLL: Did we present the argument to the court of appeals?

QUESTION: This particular argument.

MR. CARROLL: This particular argument was not presented exactly to the court of appeals.

QUESTION: Will you give me a page?

QUESTION: Page 6 on the blue brief.

MR. CARROLL: It is page --

QUESTION: Blue brief?

MR. CARROLL: The Joint Appendix, Pages 12 through 35, I believe, is Mr. Evans' grand jury testimony.

QUESTION: That is his brief, the brief for Petitioner?

MR. CARROLL: I am talking about the Joint Appendix, Justice Marshal.

QUESTION: That's not blue. Now, what page in

the Joint Appendix?

MR. CARROLL: The Joint Appendix, Pages 8 through Pages 23 contain the grand jury testimony of particular -- pardon me, of Mr. Evans.

QUESTION: And I want to know what part of that gives any basis for a lesser included offense.

MR. CARROLL: First of all, Justice Marshal, on Page 21 of the Joint Appendix.

QUESTION: Yes, sir.

MR. CARROLL: Mr. Evans testifies, "Like I said, you never want to hurt anybody, and we always try to pick places to rob that we didn't think anybody would get hurt."

QUESTION: Yes. What else?

MR. CARROLL: Pardon me?

QUESTION: He didn't think anybody would get hurt.

MR. CARROLL: And then on Page 19 --

QUESTION: With a loaded gun.

MR. CARROLL: Then on Page 19 of the Joint Appendix, it says, "I was going to shoot him if he reached for a firearm. Of course, our intention is always, you know, never to hurt anybody if you don't have to. That's stupidity. But if it ever came down to me or somebody else, whether that's pure instinct.

That's self-preservation. I'm going to fire."

QUESTION: How do you square that with what he said that you have repeated or your friend repeated on Page 6 of the blue brief?

MR. CARROLL: It may well be, Your Honor.

QUESTION: Well, how do you square the two things? The argument you are making -- Is this another case? Have I got the wrong case, where he said, my name is John Lewis Evans, and I killed him, and I'd do it again, and if you let me out I'll do it again?

MR. CARROLL: This is the same John Lewis Evans, and that's precisely the point, Chief Justice Burger, is that there is a conflict in evidence. He says many different things at many different times.

QUESTION: But this is the evidence that was before the jury, is it not?

MR. CARROLL: That is the evidence before the trial jury. That's exactly correct. Our point is not necessarily, though we contend that in and of itself would have been sufficient to support a lesser included offense instruction under --

QUESTION: This -- on Page 6?

MR. CARROLL: On Page 6. On this whole question, though, of harm and prejudice, we refer to the grand jury testimony as being an example of the kind of

testimony that could have been presented to the trial jury.

QUESTION: What part of what is reproduced on Page 6 would have entitled him to a lesser included offense charge?

MR. CARROLL: The fact that he says, "I'm the one that pulled the trigger during the commission of a felony. It's a very close question, and certainly not our strongest argument.

QUESTION: Well, when are you going to get to that?

QUESTION: Yes.

QUESTION: That even if there is no evidence whatsoever in the record to support such an instruction, you nevertheless, you are entitled to this habeas corpus?

MR. CARROLL: I was working my way there as I was talking about Alabama law.

QUESTION: Right.

MR. CARROLL: Let me --

QUESTION: I haven't let you get there. That's right.

MR. CARROLL: Let me go back to that particular point. Again, the crucial difference between capital murder under Alabama law and first degree murder is the question of intent, but more importantly, Alabama

has created a procedure that some other states have, certainly not the majority, for how to deal with capital defendants, and their way to deal with capital defendants is, always the case is tried. You cannot plead guilty under Alabama law, and the case cited by both sides, the Protho versus the State of Alabama, is the decision of the Alabama court of criminal appeals indicating that is the case. You cannot plead guilty under Alabama law. You are entitled to have a jury try the case, and you're entitled to have a jury fix the punishment in the case.

Now, what that translates into is not some sort of empty procedure, but in fact that every case brought under a capital indictment in Alabama goes to a trial by jury, and that's exactly what happened in this particular case. In this particular case, the judge voir dired the jury, he sequestered the witnesses, he said no one could sit who could not be fair and impartial, there was argument of counsel, there was presentation of evidence, there was a charge to the jury, and there was an important part of the charge to the jury that I think is worth noting, and that appears on Page 44 of the Joint Appendix.

Judge Hoplander, who was the trial judge, charged the jury, "I can only tell you that in reaching

your verdict, you may not take the simple approach and say, if the defendant admits he did it, we go no further. You must reach a verdict that is supported by all of the creditable evidence that has been presented to you in this particular case."

So, even the trial judge did not see this as an empty procedure. The question then occurs, how does the Beck decision and the infirmity in the Alabama constitutional -- pardon me, the Alabama death penalty law relate to this particular statute? And the answer is simply this. Beck identified a fatal flaw in the Alabama statute, that a jury was precluded from reaching a verdict on a lesser included offense that was supported by the evidence. It made the procedure in this case as infirm as the procedure in any other case, and that flaw applies to cases like this, because in every case in Alabama, even where there is an attempted plea of guilty, the trial must be conducted in a constitutional fashion. That's the clear ruling of the Alabama court and the clear ruling of the Constitution.

QUESTION: Well, what if this trial had taken place after our decision in Beck, and the Alabama court had simply said, we know we have to give an instruction on a lesser included offense if the evidence supports one, but here there just isn't any evidence supporting

one. You wouldn't suggest that they still had to give an instruction on a lesser included offense.

MR. CARROLL: We would suggest that that would frame an issue, a federal constitutional issue under this Court's Beck decision.

QUESTION: Well, can you imagine this Court or any other court deciding that with no evidence to support it it was a constitutional requirement that you had to give an instruction on a lesser included offense?

MR. CARROLL: Justice Rehnquist, where we clearly differ is how the relevant inquiry proceeds. Do we look simply at the facts as they were presented to the jury, or do we look further and look at the facts as they could have been presented to the jury had it not been for the preclusion clause or its existence.

QUESTION: Well, I am hypothesizing a case that came after Beck, so that the defendant would have been on notice that he could have an instruction if the evidence supported it.

MR. CARROLL: Given the state of Alabama law, which is this incredibly liberal standard as to what lesser included offense instructions you are entitled to, I would find it a rare case in Alabama where a trial jury in a capital murder case was not instructed on the issue of capital murder and felony murder. In effect,

what that would be would be a directed verdict on the issue of intent in a capital case, and I quite frankly can't see our Alabama courts directing that kind of verdict.

QUESTION: Counsel, do I understand you that there is nothing in the trial record that justifies a lesser included offense instruction?

MR. CARROLL: Justice Marshal, our position on that point is that the evidence as actually presented to the trial jury.

QUESTION: Well, I'm talking about -- that's the only kind of evidence I understand, is that there's nothing in this record, you admit that there is nothing in this record that justifies a charge, an instruction on a lesser included offense.

MR. CARROLL: We do not concede that point. We would argue that under the liberal standard of Alabama's lesser included offense law, that trial testimony would support the giving of a lesser included offense on felony murder alone, but we also point out to the Court that there is other evidence in the record that indicates that more evidence could have been presented to the trial jury.

QUESTION: Was it offered?

MR. CARROLL: Was it offered to the court and

then refused?

QUESTION: Yes, sir.

MR. CARROLL: No, it was not, Justice Marshal.

QUESTION: Well, what can you complain of if something is not offered?

MR. CARROLL: Well, I think we are into the whole question of constitutional error, and what burdens are upon whom to show what in a particular --

QUESTION: Well, what constitutional provision gives you the right to complain about evidence that you didn't offer?

MR. CARROLL: Justice Marshal, John Evans was convicted and tried under an unconstitutional death penalty scheme, as unconstitutional as the schemes this Court struck down in Woodson, as unconstitutional as the schemes it struck down in Furman. In those cases, there was no inquiry into what evidence was before the trial jury. They were struck down on their face.

QUESTION: Counsel, you are here, though, on collateral attack.

QUESTION: Your argument is unbelievable to me.

QUESTION: You are here on a collateral attack, and under Wainwright and Sykes, don't you have to show prejudice and cause to prevail here?

MR. CARROLL: Under Wainwright and Sykes, we

must show cause and prejudice if there is some sort of procedural default. There has been no allegation by the state, and in fact such an allegation would not be true, that there is a procedural default. The issue of the constitutionality of the Alabama death penalty statute was reserved by the trial counsel in this case, presented to the Alabama Court of Criminal Appeals and the Alabama Supreme Court, so this is a different prejudice or different concept of prejudice that we deal with here.

Our position as far as prejudice goes is really threefold. First of all, we contend that the constitutional error in this case is one of those kinds of constitutional error where prejudice is to be presumed. It is presumed because it is impossible to ascertain on the face of this record what prejudice came to the defendant. It is impossible to ascertain exactly what would have happened under a constitutional statute, so that that fits squarely within the lines of cases of this Court that says prejudice is to be presumed.

QUESTION: Well, what was the statute struck down in Beck?

MR. CARROLL: This --

QUESTION: What was the rule struck down in Beck?

MR. CARROLL: The specific holding of the Court was that the lesser included offense -- that the preclusion of lesser included offense instructions was constitutionally infirm.

QUESTION: There was an Alabama rule that it wouldn't have done you any good to offer evidence of a lesser included offense.

MR. CARROLL: That's exactly right, Justice White.

QUESTION: Because there was a flat rule against submitting it to the jury.

MR. CARROLL: Exactly.

QUESTION: So you were told, don't offer evidence.

MR. CARROLL: We were told that offering evidence would mean nothing.

QUESTION: Yes.

MR. CARROLL: But you haven't yet, at least for my ear, mentioned a scintilla of evidence that would hint of a lesser included offense. Now, if you have one, I would like to hear it.

MR. CARROLL: Mr. Chief Justice, the trial record -- there is a close question on the evidence as actually presented to the jury as to whether or not there is evidence of a lesser included offense

instruction, but the defendant's grand jury testimony, had that been presented to the trial jury, would clearly have warranted a lesser included offense instruction, which brings me into the next cog of our argument on prejudice.

Again, it's our position in the case that this is an Eighth Amendment case, that this Court has never said in the past that it is not -- that it requires prejudice when there's an Eighth Amendment violation. Even if this is not an Eighth Amendment violation, this is a fundamental right which infects the entire trial process, the method by which evidence is assembled into the record.

QUESTION: Counsel, let me try again. You say if you had given the same testimony that was given before the grand jury, you would be in a position to have the point raised about the lesser included offense.

MR. CARROLL: That's right, Justice Marshal.

QUESTION: Well, what in the world stopped him from testifying? He was on the stand. He could have testified exactly as he testified before the grand jury.

MR. CARROLL: He certainly could have.

QUESTION: And he didn't.

MR. CARROLL: And he didn't. Why he didn't, we don't know, and that is precisely the problem in the

case.

QUESTION: Well, there was a rule of law that said it wouldn't have done him any good.

MR. CARROLL: There was a rule of law that said it wouldn't have done him any good. That's exactly right.

QUESTION: But wasn't that same -- wasn't that rule in effect when he testified before the grand jury?

MR. CARROLL: Yes, it was.

QUESTION: And still he testified.

MR. CARROLL: And still he testified. But he could not have had his jury reach a felony murder or first degree murder verdict. He could not have been sentenced to life in prison under Alabama law.

QUESTION: Some place I missed the point.

MR. CARROLL: Again, the basic thrust of our argument is that this is an Eighth Amendment violation and prejudice must be presumed, or it is a fundamental type of Fourteenth Amendment violation from which prejudice must be presumed.

In addition, even if the Court finds that prejudice is not to be presumed under the circumstances of this case, it is the state's burden to prove that the error in this case was harmless beyond a reasonable doubt, and quite frankly, the points that have just been

raised -- we don't know why he did certain things, we don't know why certain things occurred -- indicate the impossibility of the state carrying their burden of proof that this is harmless beyond a reasonable doubt.

QUESTION: Are you suggesting sub silentio that there was ineffective assistance of counsel here?

MR. CARROLL: We have never suggested that there was, Chief Justice Burger. The counsel was operating within the incredible confines of this Alabama death penalty law, which said you can do anything, you can work, you can do anything, you can put evidence in the record, but the jury cannot consider that.

QUESTION: He was also operating within the confines of that statement which Evans made to the jury that he did it and he would do it again the first chance he got.

MR. CARROLL: And also within the confines of the statement that he gave to the grand jury that it was instinct, that it was reflex, that it was self-preservation, that they never went into the store to harm anybody, and in fact in this alleged crime spree that Evans and Ritter went through, they never harmed anybody during the course of that crime spree. There is no other homicide, and Evans left two live witnesses in the pawn shop. There were two children.

QUESTION: His statement is that he had killed other people.

MR. CARROLL: There is one reference in his statement --

QUESTION: Well, that's enough for that one person, isn't it?

MR. CARROLL: No question, Chief Justice Burger, but this crime spree that the state makes so much about, there were no allegations that another homicide had occurred during that crime spree. Again, what the state asks this Court to do is turn this whole question of harm, prejudice, and who must do what on its ear, and create some new rules because of this case for the questions of how harm and prejudice are to be determined.

Again, this is the kind of violation, either an Eighth Amendment violation or the kind of due process violation, because of its effect on the whole trial process. It's a structural problem. It infected the entire structure of capital cases tried under this particular law.

QUESTION: Well, Beck had the foresight to put in some evidence of a lesser included offense, did he not?

MR. CARROLL: He did, Justice Rehnquist.

QUESTION: And why not hold this defendant to that same standard, if he wants to raise the Beck question?

MR. CARROLL: It seems to me to be a tortured interpretation of the law to say -- to hold somebody to putting evidence in the record when it would have done him no good.

QUESTION: Well, certainly Beck managed to do it.

MR. CARROLL: That was a tactical decision by his counsel.

QUESTION: Well, I take it this was a tactical decision, too.

MR. CARROLL: Again, unfortunately or fortunately, we really can only speculate as to why these things happened. The state has a version of facts as to why they happened. We have a version of facts as to why they happened.

QUESTION: Well, the general rule is that if you want to save a point or put something in evidence and the trial court refuses it, you make a proffer.

MR. CARROLL: And I think what we are into now is a debate over what was the best course of action. Was it to attack the constitutionality of the statute, or was it to put evidence in and say that this was the

result of the statute in this particular case, and I don't think the law requires you to do both. And in fact the statute itself may have compelled some of the behavior in this particular case, the fact that the either-or option, life imprisonment without the possibility of parole or the death sentence, were the only things that John Evans faced in the case. There was no realistic possibility of acquittal.

QUESTION: Again I come back, how do you reconcile what you are now saying with the statement that he made to the trial jury?

MR. CARROLL: There may be no way to reconcile those questions, but they clearly raise an intent issue, an intent issue that the jury should have decided.

QUESTION: How would you get the grand jury testimony before the jury after he made this statement?

MR. CARROLL: By suggesting to the defendant that he testify as he did before the grand jury, or by referencing that in some fashion.

QUESTION: Well, he said here he had talked to the lawyers, is it 20 or 30, or 30 or 40 times about this. You are suggesting that after he made this statement, he may make one that is quite contrary as you see it? Having just said, we intended to do it, we did it, I did it before, and I'll do it again?

MR. CARROLL: There was again a question which we contend was resolvable by a jury. Somebody had to make that decision. Which was the correct statement? Was it that he went in with no intent to kill and as a reflex action shot the individual, or was it the question of what he testified at trial? That is precisely the problem. A jury should have decided this question of intent, and that is really all that we are saying, is that because of the lesser included offense preclusion, the jury did not have the opportunity in this case to decide, as it must decide under Alabama law, whether or not John Evans was guilty of felony murder or capital murder.

QUESTION: Has the Alabama Supreme Court decided this question?

MR. CARROLL: The Alabama Supreme Court decided this precise question?

QUESTION: Yes.

MR. CARROLL: It has not, Justice White.

QUESTION: Well, has it -- either way, has it said that Beck requires -- must be applied in a case like this? It hasn't decided that?

MR. CARROLL: It has said nothing about this particular case. When Beck came back on remand from this Court, the Alabama Supreme Court rewrote the

Alabama death penalty law to allow for lesser included offense instructions and to put a jury as the sentencing authority.

QUESTION: Right. Right, but I suppose no pre-Beck cases could get before it.

MR. CARROLL: No pre-Beck cases could get before it. This was the --

MR. CARROLL: On a collateral relief or anything.

MR. CARROLL: This was the only case that had gotten outside of the state court system. It was in federal habeas, and the only one of all the capital cases that was in federal court.

QUESTION: But if the Attorney General is right, there is no collateral relief available in Alabama to get this question up on a pre-Beck case.

MR. CARROLL: That is a possible interpretation. Quite frankly, the law surrounding the writ of error coram nobis in Alabama is quite murky.

QUESTION: Do you know whether there are any cases like that still in the state system?

MR. CARROLL: Any cases like this?

QUESTION: Pre-Beck cases.

QUESTION: Well, Mr. Carroll, aren't there about ten that were pre-Beck cases that we sent back at

the time we sent Beck back, and as to all of those I thought the Alabama Supreme Court said, whether right or wrong, that they read Beck as requiring a new trial in all these cases.

MR. CARROLL: That's exactly right. I misunderstood your question.

QUESTION: Well, then, did they ever explain why they said that?

MR. CARROLL: They eventually on remand in the Ritter case from this Court said that they based their decision to order new trials on federal constitutional grounds.

QUESTION: Well, they must have then rejected, A, harmless error, B, rejected the notion that there hadn't been cause and prejudice for failing to object to the instruction.

MR. CARROLL: They must have done all those things.

QUESTION: They must have done all those things.

MR. CARROLL: Finally, this is a capital case, and as this Court recently said in the Eddings case, where there are doubts, and clearly in this case there have to be doubts, again, all that can be given to this Court are the suppositions of both sides as to what

happened and why certain things weren't done, why certain courses of action were taken. In those kind of cases, what the proper remedy to do is remand this case for a new trial, and that is exactly what the United States Court of Appeals for the Fifth Circuit did in this case.

QUESTION: And is that what the Alabama Supreme Court has done?

MR. CARROLL: The Alabama Supreme Court has ordered new trials in all of the pre-Beck capital cases.

QUESTION: Except this one?

MR. CARROLL: Except this one, but it was not in front of them at the time.

QUESTION: Yes. So if there had been a certification, this case wouldn't be before us.

MR. CARROLL: If there had been a certification?

QUESTION: Yes.

MR. CARROLL: I don't think that's true, Justice White. I think --

QUESTION: Well, I don't know why not. They would have answered the case themselves, wouldn't they?

MR. CARROLL: The issues that the state sought to have certified did not involve any unsettled issues of state law.

QUESTION: Of state law. Well, I don't know. There is a question of whether he should be stuck with the failure to object to the instruction.

MR. CARROLL: That has never been raised as an issue in any proceeding in this case, that I know of.

QUESTION: Well, it is right on our table now.

MR. CARROLL: Well, Alabama has a plain error rule which does not require objection. There is a question, Rule 39(K), which is the Alabama plain error rule, was not in effect at the time.

QUESTION: Yes.

MR. CARROLL: There is a question as to whether it could retroactively be applied to him.

There is one decision that is worth mentioning, and that is the Lane decision, which the state mentions in its brief. The Alabama Supreme Court recently held that in a guilty plea case where there is a plea bargain in a capital case, that a guilty plea in those situations which results in a sentence of life imprisonment without the possibility of parole waives all jurisdictional defects. We disagree as to the interpretation of that case. Mr. Carnes seems to say that somehow resolves the issue, but it's clear that applies only to cases where the sentence is to life imprisonment without the possibility of parole and would

not apply to this particular case.

Again, this is a capital case. I think there are some significant doubts as to what harm and prejudice came to the defendant. We contend you need not reach that, because this is the kind of case where prejudice, the kind of constitutional violation where prejudice ought to be presumed, or at a minimum, that the state must prove harm or lack of harm beyond a reasonable doubt.

As this Court said many years ago in Chessman versus Teaks, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution, he is entitled to the protections of the Constitution.

QUESTION: How many pre-Beck cases are still unresolved? There is this one.

MR. CARROLL: There are now -- there is this one, and five cases where cert has been filed in this Court.

QUESTION: From --

MR. CARROLL: From the Alabama Supreme Court's decision to order retrials.

QUESTION: Four, five?

MR. CARROLL: Six.

QUESTION: Six. And there have been some cases, pre-Beck cases that were retried on --

MR. CARROLL: I have tried two pre-Beck cases myself already, and there -- the great, great majority --

QUESTION: Because they were remanded by the Supreme Court of Alabama?

MR. CARROLL: Because they were remanded by the Supreme Court of Alabama for new trials. Those retrials have occurred, and they are now in the process of going back for --

QUESTION: There weren't cert in those cases?

MR. CARROLL: There weren't cert in any of those cases.

Thank you.

CHIEF JUSTICE BURGER: Thank you.

Do you have anything further?

ORAL ARGUMENT OF EDWARD E. CARNES, ESQ.,
ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. CARNES: Yes, Your Honor. The reason --

QUESTION: Mr. Attorney General, do you agree with those figures?

MR. CARNES: The figures are roughly --

QUESTION: I thought you said -- I thought there was a difference of one.

MR. CARNES: There is. It is my understanding we've got this case plus the Ritter case, five other cases I mentioned in Footnote 5 of Ritter, plus a subsequent cert case, Timothy Charles Davis, that, and plus two in the Alabama Supreme Court. There is either nine or ten. I'm sorry.

QUESTION: But there were some cases that were ordered to be retried by the Alabama Supreme Court on which cert wasn't taken.

MR. CARNES: Yes, Your Honor, and those cases when we didn't take cert were cases in which there was lesser included offense evidence presented at trial and it was clear under this Court's decision in Beck that they were entitled to it. We didn't dispute it. That's the vast majority of them. Somewhere between 80 and 90 percent presented lesser offense evidence at trial.

QUESTION: Well, has the Alabama Supreme Court decided that it doesn't make any difference whether or not there is evidence of the lesser included offense?

MR. CARNES: The Alabama Supreme Court decided -- the Fifth Circuit convinced it, and they cited the Fifth Circuit Evans that the "in every case" language of this Court's Beck opinion meant in every case literally and not --

QUESTION: Whether or not there is evidence or

not.

MR. CARNES: Yes, Your Honor, but they have emphatically stated that that is a federal constitutional holding, and if the state has any complaint with it, we should take it before this Court.

QUESTION: I see. So what you --

QUESTION: Which is what you have done in these other four or five cases.

MR. CARNES: Exactly what we've done, and the Alabama Supreme Court will, of course, be bound by this Court's ruling. So there haven't been any pre-Beck cases retried that there wasn't any lesser offense. This case would still be here even if certification had been granted --

QUESTION: I see.

MR. CARNES: -- for that particular reason. Their instinctive self-preservation argument is, we contend, frivolous --

QUESTION: Well, you don't urge that the Wainwright against Sykes rule applies.

MR. CARNES: No, sir, but this case is here on federal grounds, we are glad to have it here, and we make no contention at all about that. Their instinctive self-preservation argument boils down to the fact that because he didn't want to kill anybody unless he had to,

and because he thought Nassar was going for a gun, somehow in Alabama that would give him a right to a lesser included offense instruction, that is absolutely, flatly contrary to Alabama law. Alabama law is that if you intend to kill somebody instead of accidentally, and it is in the course of one of the capital offense situations, it doesn't matter what the reason for it was.

The only time an Alabama court has ever been presented with somebody who had the temerity to argue, I was killing in self-defense in this robbery murder case, was Reiner v. State, which is an Alabama Court of Criminal Appeals decision in 1977, and they said, quite frankly, this is the most novel claim that has ever been made. They dismissed it out of hand. It is simply -- Alabama law is simply clear. There was no lesser offense evidence in this case.

QUESTION: Well, the court of appeals said that it violates the fundamental notions of due process to say that he didn't present the evidence when there was a rule of law in Alabama that said there was no such thing as a lesser included offense instruction. Now, that is a brand of Wainwright against Sykes. You are saying -- He is arguing that I could have presented evidence but I was deterred from it, and the court of

appeals said that denies him due process.

MR. CARNES: The court of appeals said that initially. Then when we came back and said, wait a minute, you forgot the record, we will prove to you by citing the record that he would not have done it otherwise. We think the burden's on him, but we can prove it beyond a reasonable doubt. Look at Page this, that, and the other of the record, his comments, what he said.

QUESTION: All they did is extend their opinion. They never changed a word in their prior opinion.

MR. CARNES: But in response to our argument in that regard they said, however persuasive this argument might otherwise be, we are foreclosed by "in every case" language. Our position here is that if this preclusion clause had any effect at all on Evans, it actually encouraged him to present lesser offense evidence. Through his own sworn testimony, he told everybody who would listen, from the grand jury, to the trial jury, to the DA, to the New York Times, I want to be free or die. Let me go free or die. I do not want to go to prison. The preclusion clause guaranteed him that if he followed a lesser offense strategy, he would have nothing to lose. He would go free or die. Now,

those are the cases they might be able to argue, and we would have a tough time rebutting it. They will come up and say, will it enhance the risk of conviction? So that is why I didn't do it. Read Mr. Justice Stevens' opinion.

Our reply to that is simply, it is absurd for them to argue that he was so afraid of getting convicted of a capital offense by presenting lesser offense evidence that he actually went up there and admitted the capital offense and asked to be executed. Their contention that the evidence would have supported lesser offense instructions had it been presented at trial is rebutted by the fact that the three Alabama justices who applied Alabama law to the record all found on the Ritter case on remand, the three dissenters found that there was absolutely no evidence to support any lesser included offense, and that none should have been given otherwise. Chief Justice Tolbert concurred with them. He said, I'll go with the majority, that "in every case" language seems to compel it, but don't get confused, lower courts, you don't have to give an instruction if there's no evidence to support it, implying that there wasn't in this case.

Everybody who has ever reviewed it, Alabama has said, there is no evidence to support it, and we

asked the Fifth Circuit, we said, if there is any question, don't muck up Alabama law. Send the question over to the Alabama Supreme Court, and they refused to do so.

Thank you, Your Honor.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 3:11 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

JOSEPH S. HOOPER, COMMISSION, ALABAMA DEPARTMENT OF CORRECTIONS AND JAMES D. WHITE, WARDEN vs. JOHN LOUIS EVANS, III # 80-1714

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Reese Hammond