ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

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DKT/CASE NO. 84-5743

TITLE BRIAN KEITH BALDWIN, Petitioner V. ALABAMA

PLACE Washington, D. C.

DATE March 27, 1985

PAGES 1 thru 47

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - - - - -x

3 BRIAN KEITH BALDWIN, :

4 Petitioner : No. 84-5743

5 v. :

6 ALABAMA :

7 - - - - - - - - - - - - - - - - - - -x

8 Washington, D.C.

9 Wednesday, March 27, 1985

10 The above-entitled matter came on for oral

11 argument before the Supreme Court of the United States

12 at 2:00 o'clock p.m.

13

14 APPEARANCES:

15 JOHN L. CARROLL, ESQ., Montgomery, Ala.;

16 on behalf of Petitioner.

17 EDWARD EARL CARNES, ESQ., Assistant Attorney General

18 of Alabama, Montgomery, Ala.; on behalf of

19 Respondent.

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

2 CHIEF JUSTICE BURGER: Mr. Carroll, I think
3 you may proceed whenever you're ready.

4 ORAL ARGUMENT OF JOHN L. CARROLL, ESQ.
5 ON BEHALF OF THE PETITIONER

6 MR. CARROLL: Thank you, Mr. Chief Justice,
7 and may it please the Court:

8 The Petitioner in this case, Brian Keith
9 Baldwin, is an Alabama death row inmate who was tried,
10 convicted, and sentenced to death under the 1975 Alabama
11 death penalty law that was the subject of this Court's
12 opinion.

13 In Beck versus Alabama, this Court dealt with
14 what came to be known as the lesser included offense
15 provision, that is, the provision of this statute which
16 forbade the jury from returning a verdict which would
17 have comported with a lesser included offense. Today we
18 are before this Court to discuss the sentencing
19 provisions of that particular statute.

20 By way of information, it would be helpful at
21 this point in time to review exactly what the statute
22 says on its face. A jury, upon deciding that a
23 defendant is guilty of capital murder, under this
24 Alabama law is mandatorily required to sentence that
25 defendant to death.

1 There is a mistrial provision which the State
2 relied on in great measure to save the defect this Court
3 identified in Beck, which allows a jury that cannot
4 agree on a verdict of guilt to return a verdict of
5 mistrial, and also allows a jury who cannot agree on a
6 sentence of death to return a verdict of mistrial.
7 Once the jury has reached this decision that
8 the State has proven beyond a reasonable doubt that a
9 defendant is guilty of capital murder, it mandatorily
10 sentences that defendant to death. The trial then holds
11 a sentencing hearing, wherein he decides what the
12 sentence ought to be. And the statute specifically
13 requires the trial judge to weigh, along with the
14 aggravating and mitigating circumstances, this
15 mandatorily imposed standardless jury sentence of death,
16 and therein Petitioner contends lies the constitutional
17 flaw with the Alabama sentencing scheme.
18 QUESTION: Mr. Carroll, has the scheme been
19 changed since that in effect at the time this all took
20 place?
21 MR. CARROLL: It has, Justice Blackmun. The
22 scheme no longer exists and has not been utilized by the
23 State of Alabama since 1980. Following the decision of
24 this Court in Beck v. Alabama, the Supreme Court of
25 Alabama rewrote this law in a case called Beck versus

1 the State.

2 What the rewritten law says is that there are

3 now lesser included offenses in capital trials under the

4 Beck procedure, that the sentencing authority is the

5 jury, that the jury hears evidence of aggravation and

6 mitigation separate and apart from its decision on the

7 issue of guilt.

8 And then, should the jury return a verdict of

9 death in a case, that verdict is then again reviewed by

10 the trial judge. If the jury returns a verdict of life

11 imprisonment without parole, that is the sentence which

12 is imposed.

13 So the State of Alabama rewrote the procedure

14 to comport essentially with Georgia and Florida, and

15 then in 1981 the Alabama legislature enacted an entirely

16 new death penalty scheme, again which incorporated in

17 the main the procedures of Florida and Georgia. Again,

18 the guilt-innocence determination is separate from the

19 punishment determination, and it is a statute in line

20 with the decisions of this Court.

21 QUESTION: Let me back up a little bit. When

22 the jury is considering the sentencing only, the

23 punishment, what are the options?

24 MR. CARROLL: The options that the jury has

25 are, they may, if they find that a defendant is guilty

1 beyond a reasonable doubt of capital murder, then they
2 must mandatorily sentence the defendant to death.
3 QUESTION: In a separate proceeding?
4 MR. CARROLL: In the same proceeding, Mr.
5 Chief Justice. Now we're talking about the old law, the
6 law that is before this Court. The jury decides
7 sentence and guilt in the same proceeding, and that was
8 again one of the defects that this Court identified in
9 Beck, although it did not specifically address the
10 constitutionality of that provision.
11 That provision has since been changed by both
12 the legislature and the Alabama Supreme Court to comport
13 with the decisions which require guilt, innocence, and
14 punishment to be determined in separate proceedings. So
15 Mr. Justice Blackmun is exactly correct; this procedure
16 simply does not exist any more and has not been in
17 existence since December of 1980, when the Alabama
18 Supreme Court issued its opinion in Beck versus the
19 State.
20 The State's response to what the Petitioner
21 contends is obvious unconstitutionality is in essence a
22 four-pronged argument. The first prong of the argument,
23 the State tries to compare the sentencing process under
24 this statute with the sentencing processes under the
25 Georgia, Texas, and Florida schemes by saying, well, the

1 sentencing authority is required to weigh aggravating
2 and mitigating circumstances, the sentencing authority
3 is required to sentence to death if the aggravating
4 outweighs the mitigating.

5 All those things are true, but what that
6 argument ignores is, this is not the Georgia, Florida,
7 or Texas statute, because none of those statutes require
8 the sentencing judge, as part of the process for
9 determining whether a defendant lives or dies, to take
10 into account a standardless, unguidelined and arbitrary
11 jury sentence of death as a factor in making that life
12 or death decision.

13 So plainly the argument that this is similar
14 to other statutes fails, because it plainly is not.

15 QUESTION: Well, the jury doesn't have any
16 standards to apply in imposing the death penalty. It's
17 told, if you find the defendant guilty you impose it;
18 you have no discretion whatsoever.

19 MR. CARROLL: That's exactly correct.

20 QUESTION: That's not standardless.

21 MR. CARROLL: Well, it's standardless in the
22 sense --

23 QUESTION: That's about as clear a standard as
24 I can imagine. If you find him guilty, you enter a
25 sentence of death. It's a sort of a ministerial act.



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1 MR. CARROLL: Well, it is but then again it
2 isn't, because it suffers from the flaws that mandatory
3 death sentences have suffered from in the past when this
4 Court --
5 QUESTION: But then the judge has another
6 crack at it, doesn't he?
7 MR. CARROLL: The judge does indeed have
8 another crack at it, Mr. Chief Justice.
9 QUESTION: And the judge knows the system. He
10 knows why the verdict has been brought in. The jury has
11 to bring it.
12 MR. CARROLL: Well, he does, but then again he
13 doesn't. You're referring to what I've identified as
14 the third argument that the State presents, and that
15 is: Look, everybody ignores this statute. The judge
16 knows that it's a mandatory death sentence, so therefore
17 he doesn't take it into account.
18 And I think, quite simply, that that argument
19 is just flawed. What the argument of the State in
20 essence is, we've got this statute that everybody
21 ignores and therefore you should hold it to be
22 constitutional.
23 Let's take for example, suppose it were not a
24 mandatory jury sentence of death that was at issue, but
25 suppose the Alabama statute said, in sentencing a

1 defendant to death the trial court must take into
2 account the defendant's race. If you take the State's
3 argument to its logical conclusion, all the State would
4 then have to do is come before this Court and say: Hey,
5 look, the trial judges in Alabama know that they really
6 shouldn't take into account that race of the defendant,
7 so you should uphold that kind of a statute because they
8 really don't follow the statute.

9 The State's argument is an invitation for this
10 Court to uphold the constitutionality of this statute on
11 the grounds that everybody ignores it.

12 QUESTION: Well, I think we all recognize that
13 it's a most curious statute, the product of some
14 legislator's convoluted mind, I would think.

15 MR. CARROLL: I think you are being kind when
16 you call it curious, Mr. Justice Blackmun. It is indeed
17 a one of a kind. No other state has ever enacted one
18 like it. No other state every will.

19 But I think it's a dangerous precedent to set
20 if we say that, because everybody ignores it, it's
21 constitutional. I think it's further compounded by the
22 fact that there's no indication that everybody ignores
23 it. In fact, the specific legislative mandate requires
24 that the judge take the jury sentence of death into
25 account in weighing the aggravating and mitigating



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1 circumstances.

2 Another argument that the State presents with
3 this Court is an argument that there has been a
4 reinterpretation of this statute. The State has
5 artfully, ten years after the statute was enacted, come
6 up with some reasons why this mandatory jury sentence of
7 death, which is clearly aberrational, is in the
8 sentencing phase.

9 And it argues two points. It says it serves a
10 function in that it conveys into the sentencing stage
11 the jury's fact-finding that an aggravating circumstance
12 exists; and it also says, the State, expresses
13 legislative policy that death is appropriate unless
14 there are mitigating circumstances to outweigh.

15 Well, the answer to that argument is plainly,
16 you don't need a mandatory jury sentence of death to do
17 that. Under Alabama law, a finding of guilt conveys to
18 the sentencing stage the jury's fact finding that an
19 aggravating circumstance exists.

20 So this sentence of death exists over and
21 above that particular function, and we can only assume
22 if the legislature put this in the statute that they
23 meant that it ought to have some effect. It's not
24 necessary to do what the State says it does. A simple
25 finding of guilt would do the same thing.



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1 And that's exactly the way the statute
2 operates now. A finding of guilt allows a death penalty
3 case to get into the sentencing phase, so that the jury
4 can then decide whether the punishment ought to be life
5 or death.
6 The second argument is the same, that it
7 expresses this legislative policy that death is the
8 appropriate punishment where an aggravating circumstance
9 exists, unless the trial judge finds the mitigating
10 circumstances outweigh it. And again, the mandatory
11 jury sentence of death is not necessary to perform that
12 function. Again, because that language is not necessary
13 to perform any function under the statute, we have to
14 assume that the legislature intended that the trial
15 judge do exactly what the statute requires him to do,
16 take into account the mandatory jury sentence of death.
17 Had the legislature not wanted the mandatory
18 statute -- the mandatory death sentence to mean
19 something, they would not have included it in the
20 statute. And the fact that they included it in the
21 statute indicates that we cannot ignore the fact that it
22 is there.
23 Again, it is the height of irony to say that
24 this Court should uphold the constitutionality of this
25 statute on the basis of the fact that everybody ignores



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1 its existence.

2 Finally, the Appellant -- I'm sorry. Finally,
3 the Respondent raises the issue concerning the appellate
4 review process under the statute and, coupled with that,
5 raises a harmless error kind of argument. The appellate
6 review process under this particular statute is, as the
7 State describes it, very elaborate. The State goes into
8 great detail talking about this independent weighing of
9 the aggravating and mitigating circumstances that
10 exist.

11 It goes on in great detail about how the
12 appellate courts perform their function under this
13 statute. But when you sift through all of this
14 verbiage, you come down to the hard, cold fact that the
15 Alabama appellate courts in their history in construing
16 not only this death penalty statute but the ones that
17 have come after it have set aside one death sentence
18 based on this independent weighing of aggravating and
19 mitigating, and that death sentence was imposed on a 20
20 year old retarded black man who was a non-trigger man in
21 the case, who had an IQ of 45.

22 I think the fact that he was sentenced to
23 death under this statute indicates how the statute
24 operates and the importance of the fact that the trial
25 judge takes into account this mandatory jury sentence of

1 death. Again --

2 QUESTION: Excuse me, counsel. When you said

3 the appellant here was not the trigger man -- is that

4 what you said?

5 MR. CARROLL: No. If I did say that, Mr.

6 Chief Justice, I misspoke. I was referring to the one

7 case that the Alabama appellate courts have set aside a

8 death sentence in, which is a case styled Lewis versus

9 the State, where the individual in that case I believe

10 was the non-trigger man and had an IQ of 45.

11 Again, though, the existence or non-existence

12 of an appellate weighing process is not the answer to

13 the constitutional dilemma that this particular statute

14 poses, because this is an unconstitutional sentencing

15 factor, and it is a sentencing factor upon which a

16 sentencing authority may not take evidence because of

17 its unconstitutionality.

18 Consequently, it is the kind of factor the

19 inclusion of which requires automatic reversal. The

20 existence or non-existence of an independent appellate

21 weighing process cannot cure this kind of a

22 constitutional defect. And again, if I could analogize

23 to the situation involving a defendant's race. Let us

24 say again that if, instead of the requirement that the

25 trial judge take into account the mandatory jury

1 sentence of death, the Alabama statute said he must take
2 into account the fact that a defendant is black, clearly
3 this Court would not say that the appellate weighing
4 process would cure that constitutional defect and allow
5 that kind of a statute to be continued to be used by the
6 State of Alabama.
7 There's a final argument that the State makes,
8 and that argument's embodied in Appendix A of its brief,
9 where it lists the remaining persons in the State of
10 Alabama who are affected by that statute. What it is is
11 an invitation to this Court to ignore this statute's
12 constitutionality because the only left that are
13 affected by it are people who have committed seriously
14 bad crimes.
15 But that's not something that this Court has
16 ever done. The fact that these people have committed
17 serious crimes should not override the fact that all of
18 these people have been sentenced to death under a
19 process that is unconstitutional, a process that is
20 fatally flawed by the very nature of the Alabama death
21 penalty law.
22 Again, the State asks you to ignore the
23 unconstitutionality of this statute because the
24 remaining individuals left who are affected by it are
25 people who have committed serious crimes.



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1 In conclusion, and I'll reserve the rest of
2 the time for rebuttal, we are not asking this Court to
3 tell Brian Keith Baldwin that he can go out on the
4 street again. We're not asking you to release Brian
5 Keith Baldwin. What we are simply asking you is to say
6 that if the State of Alabama wants to have a death
7 sentence imposed in Brian Keith Bladwin, that they do so
8 in a manner that comports with the federal Constitution,
9 and that the present manner in which his death sentence
10 was obtained was pursuant to an unconstitutional state
11 statute which ought to be reversed.
12 QUESTION: But it is a two-step process, is it
13 not?
14 MR. CARROLL: It is indeed a two-step process,
15 Mr. Chief Justice. Our argument is and was that there
16 is a factor included in the second step of the process
17 which is unconstitutional, therefore making the
18 sentencing scheme unconstitutional.
19 QUESTION: You'd better give that to me again,
20 just to be sure I have it.
21 MR. CARROLL: The statute requires the
22 sentencing judge to take into account the mandatory jury
23 sentence of death.
24 QUESTION: That means he can accept it or
25 reject it, doesn't it?

1 MR. CARROLL: But in the process of accepting
2 it, he is required, in order to impose a death sentence,
3 he is required to weigh the aggravating and the
4 mitigating circumstances, like every other statute in
5 the country.
6 But the Alabama statute includes a requirement
7 that he weigh the mandatory jury sentence of death,
8 which we contend is an unconstitutional factor. Hence,
9 the statute injects into the weighing process a factor
10 that is unconstitutional, that has no place in it,
11 that's irrelevant, that's immaterial for sentencing; and
12 that that makes the statute unconstitutional.
13 QUESTION: What if the statute provided that
14 the judge could ignore a jury recommendation of a life
15 sentence, rather than a death sentence? Would you think
16 that would be more unconstitutional than this one?
17 MR. CARROLL: No, I think the Court's clearly
18 upheld statutes similar to that. But those statutes
19 aren't this statute. This isn't the Florida statute.
20 The Florida statute doesn't require the judge to take
21 into account as part of his sentencing decision a
22 standardless -- I'm sorry -- an unguidelined sentence of
23 death. I almost said it again.
24 QUESTION: Justice White pointed out that the
25 standards are pretty strict here.

1 MR. CARROLL: Indeed he did, and as soon as
2 that word came out of my mouth I regretted it.
3 QUESTION: Also, it seems to me that if the
4 jury is just automatically required to impose the death
5 sentence and the judge knows it, to tell him to take
6 into consideration that the jury imposed the death
7 sentence is like saying take into consideration the fact
8 that the jury found him guilty.
9 MR. CARROLL: I think that that line of
10 reasoning ignores two things: both the flaws of the
11 mandatory sentencing scheme and also the fact that the
12 jury may or may not return this mistrial, which is an
13 option available to them under the statute. And we
14 don't know, quite frankly, how the trial judge views the
15 jury's ability to mistry.
16 And the problem with this case from the
17 State's standpoint is, we don't know exactly what the
18 trial judge thinks about this statute or what he does.
19 We know on the face of it he's required to take into
20 account the mandatory sentence.
21 QUESTION: Mr. Carroll, may I ask a question.
22 Supposing you have a man found guilty. The jury must
23 say sentence him to death. Then you have a separate
24 sentencing hearing before the judge, and the prosecutor
25 says, I'm not going to offer anything else, and the

1 defendant offers nothing else.

2 Is it not true that the judge must then

3 sentence him to death?

4 MR. CARROLL: The judge may conduct an

5 independent analysis into whether or not the aggravating

6 circumstances the jury found exist. So arguably he

7 could find that the jury's verdict of beyond a

8 reasonable doubt did not -- that there was no

9 aggravating circumstance present.

10 So in those circumstances he would not be

11 required to sentence the defendant to death. In fact,

12 in order to sentence the defendant to death he must, as

13 part of his sentencing order, find that an aggravating

14 circumstance is present.

15 QUESTION: And that it outweighs any

16 mitigating circumstances.

17 MR. CARROLL: And that it outweighs any

18 mitigating circumstances.

19 QUESTION: And there can't be a death sentence

20 unless there's an aggravating circumstance proved.

21 MR. CARROLL: That's true.

22 QUESTION: And found by the jury.

23 MR. CARROLL: That's also true.

24 QUESTION: Beyond a reasonable doubt.

25 MR. CARROLL: Beyond a reasonable doubt.

1 QUESTION: Then if the judge thinks the jury
2 went off on the wrong tangent, he can correct that
3 error, can't he?
4 MR. CARROLL: He has the ability to correct
5 that error, that's correct, Mr. Chief Justice. But
6 again, to rehash the argument, he's still required, in
7 sentencing somebody to death, to take into account that
8 jury verdict.
9 QUESTION: But if he thinks they're dead
10 wrong, how much weight do you suppose the judge will
11 give to it?
12 MR. CARROLL: If he thinks they're dead wrong,
13 then arguably he would have the ability to set aside
14 that sentence. But I think the comment that this Court
15 made in the Beck opinion and also the statistics as to
16 how the statute operates bears out the fact that that
17 rarely, if ever, happens.
18 Thank you.
19 MR. CARNES: Mr. Chief Justice --
20 CHIEF JUSTICE BURGER: Mr. Carnes.
21 ORAL ARGUMENT OF EDWARD EARL CARNES, ESQ.,
22 ON BEHALF OF RESPONDENT
23 MR. CARNES: Mr. Chief Justice and may it
24 please the Court:
25 The issue in this case is whether this statute

1 as a whole, as interpreted and applied by the trial
2 court in this case and by the Alabama appellate courts
3 in this and other cases, provides sufficient reliability
4 in the sentencing process. The issue is not whether the
5 statute as interpreted by my friend is constitutional or
6 whether the statute as this Court might have interpreted
7 it on initial review is constitutional, or even whether
8 the statute as written in its plain language is
9 constitutional.

10 One of the most fundamental propositions of
11 this Court's jurisprudence is it must take state
12 statutes as they have been interpreted by state courts,
13 and you held that in Proffitt v. Florida. And indeed,
14 Jurek v. Texas is the best proof of that, because the
15 Texas statute as written did not provide for any
16 mitigating circumstances. Indeed, the plain language
17 precluded that. However, the Texas court, the Court of
18 Criminal Appeals, interpreted mitigating circumstances
19 into the statute, and accordingly this Court upheld it.

20 The Alabama Supreme Court has not interpreted
21 the statute the way Mr. Carroll does, nor did the trial
22 court. The State is not arguing that everybody ignores
23 this statute, and it is not asking this court to set a
24 precedent that if everybody ignores a constitutional
25 defect it is okay.



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1 Instead, the State is saying, asking this
2 Court to reaffirm its precedents that statutes have tc
3 be judged by this Court as they've been interpreted and
4 applied by the trial courts and the appellate courts of
5 the State.
6 One of the most fundamental disagreements that
7 Mr. Carroll and I have is his statement that under the
8 statute the jury mandatorily sentences the defendant to
9 death. The Alabama appellate courts have repeatedly
10 held that what the jury does is not sentence the
11 defendant to death.
12 Of course, the State has no quarrel with the
13 proposition that if the jury exercises sentencing power
14 then it should be permitted to consider mitigating
15 circumstances and should be given guidelines. But the
16 jury under this statute is not given any guidelines
17 because it has no sentencing power.
18 The jury is not permitted to consider
19 mitigating circumstances because it's not a sentencing
20 authority. The jury is neither forced to nor permitted
21 to make a sentencing decision. It does not say what the
22 sentence should be.
23 Instead, the sole decision the jury makes is
24 whether or not the defendant is guilty of the aggravated
25 homicide capital offense with the serious aggravating

1 circumstance defined into it which he is charged in the
2 indictment with. If the jury finds the defendant
3 guilty, then it is true that, as a matter of law and
4 automatically, the jury must return a verdict form
5 containing formal language "fixing the punishment at
6 death."
7 But every time the Alabama appellate courts
8 have looked at this procedure they have said, that's not
9 a sentence, that is just a necessary consequence of the
10 guilt verdict, and what it means is that the jury has
11 found him guilty.
12 Mr. Carroll argues, and quite properly so,
13 that one of the most important things is how the trial
14 court interpreted the statute, because I will be candid
15 with this Court: All the decisions we cite in our brief
16 save one came out after the trial court acted in this.
17 But this Court need not speculate how the trial court
18 interpreted it, because the sentencing order the trial
19 court entered on page 18 of the joint appendix indicates
20 that the trial court, after finding the aggravating and
21 mitigating circumstances, the trial court said:
22 "The court having considered the aggravating
23 circumstances and the mitigating circumstances, and
24 after weighing the aggravating and mitigating
25 circumstances, it is the judgment of the court that the

1 aggravating circumstances far outweigh the mitigating
2 circumstances and that the death penalty as fixed by
3 this jury should be and is hereby accepted."
4 As the Alabama Supreme Court explained in this
5 very case, saying that the death penalty as fixed by the
6 jury is hereby accepted or rejected if it's a life
7 without parole sentence, it simply necessarily follows
8 as a matter of form and as a matter of semantics from
9 the fact that the decision the judge enters either
10 agrees with or disagrees with the verdict form language,
11 not with any sentence imposed by the jury, because the
12 jury doesn't impose one.
13 QUESTION: May I ask this one question. Your
14 brief's been very helpful in this case. If the jury
15 finds that there was an aggravating circumstance -- in
16 this case I guess it was robbery, at least it was one of
17 them, in connection with the crime -- and therefore it
18 was appropriate to return, then they must return the
19 death sentence, then if the judge at the sentencing
20 hearing -- whether you call it a sentence or not, that's
21 what the verdict form says.
22 But then the judge at the sentencing hearing,
23 first he has to find out whether there was in fact that
24 aggravating circumstance. And say he finds it was.
25 There's no doubt about the fact robbery was present.



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1 And then assume there's nothing else put into the record
2 except that finding.
3 Is it not true that on those circumstances as
4 a matter of law he must impose the death sentence?
5 MR. CARNES: It depends on whether there is
6 any mitigating circumstance established either by the
7 evidence at the guilt stage or by the evidence at
8 sentence stage. Now, of course there is not an inquiry
9 into mitigating circumstance at the guilt stage, but
10 sometimes it could come in anyway.
11 For example, if there was an insanity defense
12 and the defendant didn't quite make the insanity
13 defense, but showed he was emotionally disturbed at the
14 guilt stage, the judge could consider that as a
15 mitigating circumstance.
16 However, if there are no mitigating
17 circumstances, statutory or nonstatutory in the broadest
18 sense of the term, then the legislature has directed, in
19 part through this verdict form language, that the
20 sentence should be and must be death.
21 And that's one of the functions of the verdict
22 form. It conveys from the legislature to the judge --
23 the jury is merely the messenger, merely performs a
24 ministerial duty -- that the penalty should be death if
25 the judge agrees there's a statutory aggravating



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1 circumstance and if there are no mitigating
2 circumstances, which we see as substantively -- not
3 procedurally, but substantively -- indistinguishable
4 from the Florida statute that this Court upheld in
5 Proffitt.
6 Indeed, Justice White's opinion points out in
7 Proffitt that the Florida statute had been interpreted
8 -- it must be accepted as interpreted -- as requiring a
9 death sentence if there was an aggravating circumstance
10 not outweighed by mitigating. That's not a unique
11 provision there. That substantive judgment, 15 state
12 statutes embody it.
13 And also, it really only makes common sense,
14 because an aggravating circumstance, as you all have
15 limited them in Zant v. Stephens, has to be something
16 that reasonably justifies the imposition of the death
17 sentence and sets this defendant apart from all of the
18 others.
19 If you've got that proven beyond a reasonable
20 doubt, the jury and the judge both agree that that was
21 proven, and there is no reason under Lockett, as broadly
22 applied in this asnd other cases, there is no reason not
23 to impose the death penalty --
24 QUESTION: Well, were there mitigating
25 circumstances in this case?

1 MR. CARNES: There was only one mitigating
2 circumstance.
3 QUESTION: Well, but nevertheless there was
4 one and the judge weighed it?
5 MR. CARNES: Yes, Your Honor.
6 QUESTION: So we're not dealing with a case
7 where there is no mitigating circumstance?
8 MR. CARNES: No, Your Honor, we are not. In
9 fact, as in most cases --
10 QUESTION: And the judge here would not have
11 been required to impose the death penalty.
12 MR. CARNES: No, Your Honor, he certainly was
13 not. And the weighing process -- and the Alabama
14 Supreme Court made this clear in the Cook case and other
15 cases -- the weighing process is not a numerical tally.
16 There are no assigned weights, as in Florida.
17 Instead, once there is a mitigating
18 circumstance and an aggravating circumstance, what the
19 statute requires is a guided, individualized
20 determination in the judge's discretion, but with
21 guidance, as to whether the death penalty should be
22 imposed or not. And the judge makes that decision.
23 The other function that the verdict form
24 language serves in addition --
25 QUESTION: Was that also considered by the

1 jury?

2 MR. CARNES: No, Your Honor, the jury does not

3 make any sentencing determination and does not

4 consider --

5 QUESTION: The judge -- the jury didn't

6 consider the mitigating circumstances?

7 MR. CARNES: Absolutely not, Your Honor.

8 QUESTION: And when the jury sentenced to

9 death, that was it.

10 MR. CARNES: No, Your Honor. When the jury

11 returned a verdict form containing this language, that

12 was the end of the guilt stage, and that proved only

13 that the jury had found a serious aggravating

14 circumstance set out in the indictment beyond a

15 reasonable doubt.

16 The other function that the verdict form

17 serves is to convey -- and this is why the Alabama cases

18 say, they talk of it as an advisory fixing of the

19 penalty of death or an advisory indication -- it conveys

20 into the sentencing stage the fact that the jury has

21 found that aggravating circumstance, the definitional

22 one, which is essential, beyond a reasonable doubt.

23 And indeed the judge is not bound by it.

24 We've had cases, cited in the brief, where the judge has

25 said: The jury found it but I don't; I've heard some



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1 other stuff in this sentence hearing and I'm not going
2 along with it.
3 Indeed, we had one case where the judge said:
4 Well, I don't dispute the fact that there was sufficient
5 evidence for the jury to find this beyond a reasonable
6 doubt to convict. But we're talking about the death
7 penalty here and I just don't think it goes beyond a
8 reasonable doubt plus some, which I require for the
9 death sentence, and accordingly I'm going to sentence
10 him to life without parole.
11 Mr. Carroll says, you don't need the verdict
12 form requirement to embody these two purposes.
13 Obviously you don't. The State doesn't contend that you
14 do. But the State does contend that merely because this
15 procedure or odd or convoluted or unique or unnecessary
16 doesn't make it unconstitutional. Instead, that
17 determination has to be on whether it adversely affects
18 any rights recognized by this Court that the defendant
19 has, and we maintain that it does not.
20 Of course, if unique provisions made
21 provisions unconstitutional I would imagine that
22 Spaziano would have come out the other way, so would
23 Jurek. Nobody has -- talk about an odd procedure. The
24 Texas three-question procedure is not only unique, but
25 it comes close to Alabama's in terms of being weird.

1 The statutory provision that the judge may
2 enter a mistrial on the failure of the jury to agree on
3 the verdict of guilty or not guilty or on the fixing of
4 the penalty of death does not indicate that the jury has
5 a choice about fixing the penalty of death. Instead,
6 that is simply a safeguard to prevent the jury from
7 coming up with an unjust acquittal should it rebel at
8 the legislative directive that it include the language
9 in there. And indeed, in this case the jury was not
10 instructed on the mistrial provision, although they were
11 in the Beck case.
12 Mr. Baldwin through Mr. Carroll makes an
13 argument in his brief that the jury is forced to play a
14 hobbled and distorted role, and the jury is torn between
15 frustration and temptation. But of course, the issue is
16 not whether serving in one of these cases is a
17 meaningful life experience for the jury. Instead, the
18 question is whether this procedure, odd as it may be,
19 adversely affects any rights of the defendant.
20 Now, the verdict form language Mr. Carroll
21 argues affects the jury's guilt determination and in
22 fact, because of the verdict form provision, it may
23 indeed appear to the jury and may have appeared to the
24 jury in this case that if it convicted the defendant the
25 death penalty would inevitably follow from that. But

1 that could only have benefited Mr. Baldwin.

2 The opinions in Woodson and Roberts establish
3 that if it has any effect at all, it makes the jury more
4 reluctant to convict and more willing to acquit. The
5 State is willing to concede that we took too much of a
6 burden on ourselves and made it too difficult for us to
7 convict Mr. Baldwin. But in fact we did convict him,
8 and surely he is not entitled to a new sentencing
9 procedure because the guilt stage procedure made it too
10 likely that he would be acquitted.

11 Now, Woodson and Roberts did hold that under
12 some systems, if the jury feels the death penalty is
13 inevitable upon conviction, as they may have in this
14 one, there could be so many unjust acquittals as to skew
15 the sentencing pattern. But that was the prediction or
16 the assumption for those systems.

17 This is a different system that this Court
18 need not predict or assume anything about, because the
19 system is closed. As has been pointed out, every case
20 that will ever be tried under this system has been
21 tried. The results are in and they show, and it is
22 undisputed, that there was only a four percent acquittal
23 rate. Therefore, there can have been no unjust
24 acquittals.

25 Of course, any argument that the verdict form



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1 may have caused unjust convictions would not only run
2 contrary to Woodson and Roberts and the common sense
3 historical evidence, but would also be contrary to this
4 Court's decision in Hopper v. Evans. The verdict form
5 language does not harm the defendant in front of the
6 judge either, because the provision that the judge is to
7 weigh or consider it means only the two things that I
8 have said, that he is to consider as substantive advice
9 that the jury found the aggravating circumstances
10 defined into the capital offense and that he is to
11 consider, not weigh but consider, the legislative
12 determination that if there are no mitigating
13 circumstances then death must follow.
14 It can't mean that the jury -- the judge is to
15 consider it as a recommendation that aggravation
16 outweighs mitigation. The judge knows the jury didn't
17 consider that. Or as to what the sentence should be.
18 The judge knows the jury didn't consider that.
19 Mr. Carroll's arguments that the judge may or
20 may have in this case considered it that way run
21 contrary to the Alabama Supreme Court cases about how it
22 should be interpreted, also run contrary to the judge's
23 own sentence order. He said: I'm imposing the death
24 penalty because the aggravating circumstances far
25 outweigh the mitigating circumstances. And that is

1 precisely what he's supposed to do.

2 Mr. Carroll's argument would also assume that

3 the judge is ignorant of the fact that the jury had no

4 choice. Yet he in fact instructed him that they had no

5 choice.

6 The fact that -- there is some troubling

7 language, troubling for our side, in Beck v. Alabama --

8 I prefer to call it dictum -- that the jury's verdict

9 must have had a tendency to motivate the judge to

10 motivate the death sentence because in such a

11 substantial number of cases there was a death sentence

12 imposed, two-thirds in fact.

13 But with all due respect to the Court, that is

14 a classical example of the logical fallacy of assuming

15 that because something comes after a fact it is caused

16 by the fact. It is, with all due respect, not fair to

17 assume that, because what has happened in this case is

18 we have narrowed the field down tremendously at the

19 guilt stage.

20 The only people entering the sentence stage

21 are those in which a very serious aggravating

22 circumstance has been found beyond a reasonable doubt.

23 QUESTION: Mr. Carnes, refresh my

24 recollection. Did not one of the members of your

25 Supreme Court in one of the dissenting opinions make the

same argument to the same effect as the comment from the Beck opinion, that there was a kind of a psychological tendency to follow the jury verdict, even though logically you don't have to?

MR. CARNES: Yes. Justice Jones of our State Supreme Court, contrary to the other eight members, did say that he thought that there was a danger that there would be public pressure from the announcement of the jury verdict form and it would somehow pressure the judge or could pressure the judge.

Of course, the majority answered that by saying that the very judge that you say has been unfairly criticized we note has continued to impose life without parole sentences. And indeed, the case he pointed out as an example of unfair criticism, when it got up to the court of criminal appeals, the court of criminal appeals looked at the case and also criticized the judge for imposing a life without parole sentence in that, because they said the aggravating circumstances indicated it should have been death.

But to argue that in a sense demeans the judicial office, because we call on judges every day. Every day a judge has a serious trial. He is forced to make decisions which may be unpopular. To assume that they won't be willing to do so because of public clamor

1 or comment is not really a fitting assumption.

2 Also, that would assume that the public is

3 ignorant of the fact that the jury had no choice. Yet,

4 if it is a high profile, highly publicized case, the

5 public will know that.

6 In any event, the majority of the Alabama

7 Supreme Court pointed out that, be that as it may, there

8 was a safeguard to prevent any undue effect from that,

9 and the safeguard was that, whatever the judge did, they

10 were going to independently redetermine whether the

11 sentence of death was proper or was unproper.

12 Appellate review of death sentence cases in

13 Alabama is enhanced by three special rules: search the

14 record, the plain error rule, and two-tier. No death

15 sentence leaves our system unless both the court of

16 criminal appeals and the Alabama Supreme Court uphold

17 both the conviction and the sentence.

18 I point out and I would direct the Court's

19 attention to the fact that the Alabama appellate courts

20 have taken their duty very seriously. In fact, we've

21 had cases, Mr. Evans' case, where he said: I don't want

22 to appeal my case; I want to die. And the Alabama

23 Supreme Court said: We don't care whether you want to

24 or not; we're not going to -- we're going to see. It's

25 our responsibility that the death penalty is imposed in

1 this State only for the utmost of compelling legal
2 reasons, and we're going to review these cases. We're
3 going to go over them with a fine tooth comb whether
4 it's requested or not.
5 And in fact, of the pre-Beck cases, before
6 Beck v. Alabama and when the preclusion clause defect
7 led to the reversal of so many cases, up to that time
8 and not including the preclusion clause defect there had
9 been 34 cases reviewed at one stage or another of the
10 Alabama appellate process.
11 The convictions were reversed in 18 percent of
12 those capital cases. The death sentences were reversed
13 in 44 percent of those cases. So that the conviction or
14 death sentence, one or the other or both were reversed
15 in 62 percent of the cases.
16 In only 38 percent of the cases, including
17 this one, were both the capital convictions and the
18 death sentence affirmed on the basis of the initial
19 trial guilt stage and the initial sentence proceeding
20 before the judge.
21 Appellate review of the propriety of the death
22 sentence itself is the point which we stress. It has
23 three facets under our system. Both appellate courts,
24 not just one but both appellate courts, determine
25 whether the death sentence is imposed under the



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1 influence of passion, prejudice, or any other arbitrary
2 fact. That's like the Georgia system. And both of them
3 determined in this case that it was not.
4 They also determine, secondly, whether the
5 death sentence is excessive or disproportionate to the
6 penalty imposed in similar cases. That's the so-called
7 cross-case proportionality analysis that you held in
8 Pulley was not constitutionally required, but certainly
9 was nice if the State had it.
10 Well, they do have it. We do have it and both
11 states -- both appellate courts held that it wasn't
12 excessive, and they cited other cases. The Alabama
13 Supreme Court particularly cited the co-defendant case.
14 The third facet -- and this is the important
15 one -- there is an independent weighing by the appellate
16 courts themselves of the aggravating and mitigating
17 circumstances to determine whether death is the proper
18 sentence in this particular case. In other words, they
19 in effect re-sentence. If aggravation outweighs
20 mitigation, then they affirm the death sentence. If
21 mitigation outweighs aggravation, then they remand for
22 new sentencing.
23 Now, Mr. Carroll points out that there has
24 only been one case under this system where they remanded
25 and ordered a new sentence. But the whole story shows



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1 that in fact 44 percent of the death sentences were
2 reversed on other grounds. And in addition, Georgia's
3 system --
4 QUESTION: Well, what would the other grounds
5 be? Questions as to guilt?
6 MR. CARNES: No, Your Honor. The death
7 sentences would be reversed because of a defect in a
8 misapplication of an aggravating circumstance.
9 QUESTION: So 44 percent of the death
10 sentences were reversed for flaws in the sentence, not
11 the guilt.
12 MR. CARNES: Flaws in the sentence and flaws
13 in the sentencing process. It could have been something
14 wrong in the judge's sentencing order or in the
15 hearing. He didn't let the defendant introduce hearsay
16 evidence, which is admissible; or he mischaracterized an
17 aggravating circumstance; or he failed to find a
18 mitigating circumstance.
19 QUESTION: Or he just, he didn't weigh them
20 correctly.
21 MR. CARNES: Didn't weigh them properly.
22 And admittedly, some of these when they went
23 back, when the judge corrected his error he reimposed
24 the death sentence. But in some of them he didn't.
25 QUESTION: Do these include cases that were

1 sent back after Beck was decided?

2 MR. CARNES: No, Your Honor. After Beck there

3 were just a whole host. All but ten cases have been

4 reversed because of that. These are exclusive of Beck,

5 and I thought in the analysis it was only proper to

6 exclude Beck because of that.

7 QUESTION: In how many were the death

8 sentences changed?

9 MR. CARNES: By or under direct order of the

10 appellate court, as opposed to as a result of a

11 correction when it got back, only one.

12 QUESTION: No, I'm talking about after it gets

13 corrected.

14 MR. CARNES: After it gets corrected, Your

15 Honor, I do not know. I know in addition to the one in

16 which the appellate court said --

17 QUESTION: Well, isn't that rather important?

18 MR. CARNES: It is, Your Honor, except that if

19 death is determined to be a proper sentence after the

20 errors are corrected, I would admit that -- I would

21 contend that that's what the Constitution requires. I

22 know there's been at least one where the judge corrected

23 the error and said, well --

24 QUESTION: Now we go from 44 to one.

25 MR. CARNES: No, Your Honor.

1 QUESTION: Well, that's my figures I get from
2 what you said.
3 MR. CARNES: Your Honor, I did not mean to
4 imply that the Alabama Supreme Courts weren't letting
5 anybody be sentenced to death under this, simply that
6 they were very careful in the way they applied the
7 review of the death sentence.
8 I would also point out that Georgia's
9 much-vaunted system, according to the statistics that
10 you put, I believe in the Pulley opinion --
11 QUESTION: Well, I'm not hearing the Georgia
12 case this afternoon.
13 MR. CARNES: Yes, sir. But I would like to,
14 if I may, respond to Mr. Carroll's argument that the
15 Alabama Supreme Courts haven't reversed enough death
16 sentences. Georgia has reversed seven death sentences
17 and ordered them to be reduced, but five of those were
18 in non-homicide cases, rape or robbery with no killing,
19 which couldn't even be a capital offense in Alabama.
20 One of the remaining ones was where the defendant had
21 been sentenced to life without parole the first time, a
22 classic Bullington problem.
23 There's only been one case in Georgia in ten
24 years, in spite of the fact that they had two and a half
25 times as many people on death row as we did at the time

1 of Beck, there's only been one case where they ordered a
2 comparable sentence reduced.
3 Both Alabama appellate courts expressly
4 determined in this case that the death sentence was
5 proper because the aggravating circumstances in their
6 own opinion "greatly outweighed," was the phrase they
7 used, the lone mitigating circumstance. There's been no
8 evidence, suggestion, or even hint that what Mr. Carroll
9 calls the arbitrary factor of the jury's verdict was
10 considered by them.
11 The language in Zant v. Stephens that says
12 that if a State treats as an aggravating circumstance
13 something constitutionally irrelevant or impermissible
14 harmless error analysis doesn't apply is not applicable
15 here because all the aggravating circumstances were
16 proper and permissible.
17 In any event, we're not arguing at this point
18 harmless error. What we're saying is that you have to
19 consider, as you have in the past, the system as a
20 whole. And when you consider the system as a whole, one
21 important part of it is the appellate review, the
22 re-sentencing, in effect, at the appellate level.
23 This Court has often held in the past that the
24 whole system has to be considered because what counts is
25 the final result. The only death sentence or the only

1 sentence that matters is the one on the case when it
2 leaves the appellate system.
3 What we are saying is that this system in
4 substance -- substance over form -- this system in
5 substance has provided a constitutional way to reliable
6 determine which murderers should be sentenced to death
7 and which should not.
8 Now, Mr. Carroll points out that I have
9 included in Appendix A to my brief citations and
10 summaries of the nine of other pre-Beck death sentence
11 cases. He misinterprets the reason I did so. I didn't
12 say that these folks ought to be executed simply because
13 they're bad people. I've been before this Court too
14 many times to know -- to think that this Court would buy
15 an argument like that.
16 Instead, the reason I put that up there is to
17 say: This is a unique opportunity; this case is
18 different from every one this Court has ever had, not
19 just because of the nature of the procedure, but because
20 this is a closed system. You don't have to predict and
21 assume how it will apply, how it will result in future
22 cases.
23 You've had to do that ever other post-Furman
24 case you've ever decided. You've had to make some kind
25 of prediction or assumption. You don't have to do it

1 here. All you have to do is look at this case and the
2 nine other in the appendix cited.
3 And the State thinks that when you do that you
4 will agrre with the state that, whatever its oddity,
5 whatever the procedural quirks, and however the language
6 of the statute may be written, there can be no doubt
7 that this system has operated in a rational bottom line
8 manner so that the ten people left on death row under it
9 are some of the most heinous murderers, some of the most
10 vicious murderers, and have committed some of the most
11 heinous crimes that have ever been committed in our
12 State.
13 And that is, after all, the whole point of
14 Furman and the two dozen some-odd cases since then, to
15 ensure that the ones we separate out and make eligible
16 for the death penalty are those who are truly deserving
17 to die. If we assume that anyone is to be sentenced to
18 death, then what we want to do is to separate out a
19 group through some procedure of the folks most deserving
20 to die.
21 And the State submits that that has been
22 done. This particular case is a paradigm example of
23 that. Eight years ago, Mr. Baldwin escaped from prison
24 while he was serving a robbery sentence and kidnapped,
25 robbed, raped, beat, sodomized, choked, ran over, and

1 stabbed an innocent young girl. Then he locked her,
2 naked and bleeding, in the trunk of the car while he
3 drove across four states.

4 It was only after he had done all that and
5 only into the second day that he, according to his own
6 testimony, bought the drugs which Mr. Carroll said is a
7 mitigating circumstance. And after she had suffered
8 some 40 hours, he took her out of the trunk, ran over
9 her again, and then chopped her to death with a
10 hatchet.

11 When the court of criminal appeals in this
12 case was doing its own review of the case to determine
13 whether the conviction was proper and whether the
14 sentence was proper, it took the tape recording of the
15 confession which went up with the case and it listened.
16 And they wrote in the opinion, and this was the first
17 opinion back in '78 that the court of criminal appeals
18 issued, that we've listened to this and the Petitioner
19 relates these events and what he did with no more
20 emotion than if he were describing how he changed a car,
21 and he does not express any remorse and has never
22 expressed any remorse for having "treated this
23 unfortunate innocent victim with a brutality not found
24 in animals, and had mercilessly slaughtered this
25 defenseless young girl."

1 Now, we submit that, whatever the procedural
2 oddities, this is the kind of case, this and the nine
3 other cases, some of which come close to rivaling this
4 case in terms of pure viciousness, this is the kind of
5 case that ought to be singled out for the death
6 penalty.
7 Of course, to re-sentence Mr. Baldwin now we
8 would have to in effect retry the whole case before a
9 new sentencing authority and start that long appellate
10 process all over again. Six to eight years from now, we
11 could be back in front of this same court with a new set
12 of lawyers and a new set of issues. And all the while,
13 no one can seriously doubt that, if anyone is to be
14 sentenced to death for his crime, this particular
15 Petitioner deserves it.
16 Of course, if the Constitution requires that,
17 then so be it. But our position is simply that the
18 State of Alabama and its people submit that the
19 Constitution does not require that.
20 CHIEF JUSTICE BURGER: Do you have anything
21 further, Mr. Carroll?
22 REBUTTAL ARGUMENT OF
23 JOHN L. CARROLL, ESQ.
24 ON BEHALF OF PETITIONER
25 MR. CARROLL: I'll be very brief, Mr. Chief

1 Justice.

2 By way of statistical analysis, Mr. Carnes has

3 relied in great measure on how this statute operates.

4 And he in his own brief in a footnote tells the Court

5 there were 65 people that were sentenced under this

6 statute. If you remove from that 65 sample the 13

7 people who pled guilty as a result of a plea bargain,

8 only four sentences of life imprisonment without parole

9 were imposed by trial judges in the State as a result of

10 a contested proceeding.

11 So what Mr. Justice Stevens said in Beck is

12 exactly correct, that this procedure that we have

13 created where the trial judge is required to take into

14 account the death sentence skews the death sentencing

15 process in favor of a death sentence.

16 I'm troubled very deeply by what I sense,

17 that, yes, this is a strange statute, yes, no other

18 court in the country has one like this, but it's okay

19 because we know what the judge knows and how the judge

20 acts. But there is not one jot, speck, or iota of

21 evidence in this record about how trial judges in

22 Alabama treat this statute, other than the fact that we

23 know in the great majority of cases they sentence

24 defendants to death underneath it.

25 This is a facial constitutional attack on this



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1 statute, and I've not heard serious arguments out of the
2 State that there is anything really constitutional about
3 this procedure on its face. What I hear is an argument
4 that the judge knows what it is, ignores it, and
5 therefore everything's fine.
6 And the Court cannot uphold this facial
7 constitutional attack -- or deny this facial
8 constitutional attack on its perceptions or Mr. Carne's
9 perceptions or my perceptions about what judges may
10 think or may not think. We know that on its face this
11 statute says the jury must return a mandatory sentence
12 of death.
13 We further know that the jury has a mistrial
14 provision, so it doesn't really have to return a
15 mandatory sentence of death. And the trial judge, if he
16 reads the statute, knows that the jury may disagree on
17 the sentence of death. So to the trial judge, does the
18 mandatory sentence mean that the jury didn't disagree
19 and therefore I ought to take it into account? The
20 statute requires him to do that.
21 Mr. Carnes makes a great deal about the
22 interpretation that the Alabama Supreme Court has placed
23 on this statute. Well, let's look at the interpretation
24 that the Alabama Supreme Court placed in this very
25 case. It didn't mention anything about the verdict form

1 being a messenger to convey an aggravating circumstance
2 to the sentencing authority or that it embodied a
3 legislative judgment.
4 The Alabama Supreme Court says in this case:
5 "We hold" -- on page 56 of the joint appendix: "We hold
6 the sentence procedure is constitutional. The statute
7 is saved by the fact that the court, which is the
8 sentencing authority, considers the circumstances of the
9 particular offense and the characters and propensities
10 of the offender, the aggravating and mitigating
11 circumstances in a separate and independent sentencing
12 area."
13 It didn't say anything about what the judge
14 knows. What this statute requires the trial judge to do
15 is take into account an unconstitutional factor, and if
16 this Court's opinion in Zant v. Stephens means anything
17 at all it means that a sentencing process where that is
18 required is unconstitutional, and we simply ask the
19 Court to so hold.
20 Thank you.
21 CHIEF JUSTICE BURGER: Thank you, gentlemen.
22 The case is submitted.
23 [Whereupon, at 2:53 p.m., argument in the
24 above-entitled case was submitted.]
25 * * *

CERTIFICATION

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

#84-5743 - BRIAN KEITH BALDWIN, Petitioner V. ALABAMA

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BY Paul A. Richardson

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