ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: PHILLIP D. TOMPKINS, Petitioner V. TEXAS

CASE NO: 87-6405

PLACE: WASHINGTON, D.C.

DATE: December 6, 1988

PAGES: 1 thru 47

ALDERSON REPORTING COMPANY
20 F Street, N.W.
Washington, D. C. 20001
(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -x

PHILLIP D. TOMPKINS :

Petitioner :

v. : No. 87-6405

TEXAS :

- - - - - - - - - - - - - - - - - - - -x

Washington, D.C.

Tuesday, December 6, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:59 o'clock p.m.

APPEARANCES:

EMMETT B. LEWIS, III, ESQ., Washington, D.C.; on behalf of the Petitioner.

CHARLES A. PALMER, ESQ., Assistant Attorney General of Texas, Austin, Texas; on behalf of the Respondent.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

C O N T E N T S

P R O C E E D I N G S

(1:59 p.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument next in No. 87-64095, Phillip D. Tompkins v. Texas.

Mr. Lewis, you may proceed whenever you're ready.

ORAL ARGUMENT OF EMMETT B. LEWIS, III

ON BEHALF OF PETITIONER

MR. LEWIS: Thank you, Mr. Chief Justice, and may it please the Court:

This case presents, first, whether the trial court's failure to give certain lesser included offense instructions in this capital case violated this Court's opinion in Beck V. Alabama, and secondly, whether the Texas Court of Criminal Appeals misapplied this Court's decision in Batson v. Kentucky in accepting as adequate under Batson the prosecutor's explanation for peremptory challenges of certain black prospective jurors, despite finding that some of those explanations were implausible on their face or were unsupported by the record.

I'd like to discuss the Beck issue first, if I might, and then move on to the Batson issue.

In Beck this Court held that in a capital case, the defendant is entitled as a matter of due

process to a lesser included offense instruction where the evidence would permit a rational juror to convict of the lesser offense and acquit of the greater offense. Beck was premised on this Court's concern that in a capital case where it is clear that a violent crime has been committed but the evidence leaves doubt as to an element of the capital offense, a juror who is -- has only the option of convicting of the capital offense or acquittal is likely to convict of the capital offense even though he may not be satisfied all the elements of that offense have been proved beyond a reasonable doubt.

This risk of unwarranted convictions in capital cases, the Court held, was intolerable under the Constitution.

The facts of this case were that Petitioner bound and gagged the deceased and tied her feet to a tree while he used her automatic bank card to withdraw funds from her bank account through an automatic teller machine. She died as a result of suffocation on a cloth gag that had been placed in her mouth.

Mr. Tompkins was convicted of capital murder, which in Texas requires a finding that the killing was intentional. Intentional in Texas requires a finding that death was the conscious objective of Mr. Tompkins's actions. There was really no question in this case as

to who did it; although there was -- the evidence was wholly circumstantial, there was substantial evidence linking Mr. Tompkins to this crime.

The real issue at trial was whether Tompkins intended to kill the deceased when he left her bound and gagged and tied to the tree, and the evidence left room for doubt on this issue. In closing arguments, Petitioner's counsel pointed to a number of aspects of the evidence from which the jury could have inferred that Tompkins did not intend to kill the deceased.

First, the circumstances of the crime itself are not suggestive of an intent to kill, but rather are subjective of an intent to restrain or prevent someone from crying out for assistance.

Secondly, when Tompkins gagged the deceased, he left her nose free, which a juror could have inferred was inconsistent with an intent to suffocate her.

Third, he had other means at his disposal with which he could have killed her in a more conventional way, had that been his intent. He had a knife, he had a cord with which he could have strangled her.

Fourth, there was evidence that she attempted to escape. There were scuff marks on the tree from which a jury could have inferred that she was alive when he left.

Fifth, the location of the tree, which was in plain view of a nearby road and a nearby house; and sixth, Mr. Tompkins's reaction when he was arrested in Austin a couple of days later. Officer Blanton, who was the arresting officer, testified that when he approached Mr. Tompkins and asked who he was, Mr. Tompkins said I'm Phillip Tompkins, and was cooperative, but when he was told that he was under suspicion of murder, he began yelling no, no, no, he started crying and sobbing, he pounded his head on the hood of the patrol car, and the officer testified on cross examination that he would characterize this reaction as one of surprise.

That testimony is in Volume XX, pages 496 and 498 of the trial record.

We are not arguing here that this evidence singly or together would have compelled a juror to find that Tompkins did not intend to kill the deceased, but certainly it would not have been irrational for a juror to have credited this testimony and have had doubt as to whether Tompkins possessed the necessary intent but conclude that he had acted recklessly or negligently and convicted him of manslaughter or negligent homicide.

QUESTION: [Inaudible] category of murder [Inaudible] capital homicide and reckless homicide? Is there just plain murder?

MR. LEWIS: There is just -- there is capital murder and there is just plain murder which has three categories, Justice White. There is intentional murder, and it is that category of murder coupled with the aggravating circumstances that produces capital murder. There is also a form of murder that is committed by knowingly causing the death of someone through the commission of an act clearly dangerous to human life, and there is a variation of felony murder which is causing death as a result of an act clearly dangerous to human life and --

QUESTION: Well, was there an instruction on one of these noncapital murder?

MR. LEWIS: There was an instruction on intentional murder. At the conclusion of the evidence, Petitioner's counsel requested instructions on involuntary manslaughter and criminally negligent homicide, both of which are lesser included offenses of capital murder, both of which are forms of unintentional killing, and also requested an instruction on intentional murder.

The court --

QUESTION: And the intentional murder instruction was given.

MR. LEWIS: The intentional murder instruction

was given, but the Court refused to instruct on manslaughter or negligent homicide or give any other instruction on any form of unintentional killing.

QUESTION: Well, does Beck require instructions on every possible lesser included offense?

MR. LEWIS: Well, I think you could, I think you could probably read Beck as --

QUESTION: Instead of the third choice, you want a fourth and a fifth?

MR. LEWIS: No. I think you could read Beck as requiring an instruction on any offense supported by the evidence, but I think at a minimum what Beck requires is that you have an instruction that addresses each element in doubt in a capital case. The intentional murder instruction conceivably could have addressed a doubt had someone had a doubt as to whether Tompkins was robbing and kidnapping this woman. It did not address the question that a juror might have had as to whether he intended to kill her or not.

QUESTION: Well, that might be a good state rule, but that doesn't follow from the rationale of Beck, it seems to me. A state may well, on its own, decide that when there are a lot of elements in doubt, you have to give an instruction as to every possible offense that the jury could find, but a state may just

as easily say no, we'll leave it up to the prosecutor; he can go for broke. If he wants to go for just the highest and take his chances, and the jury doesn't find the highest, the defendant walks.

All the rationale of Beck required was that the jury have some choice between either sending the person to death or releasing the person, and they were given such a choice here.

MR. LEWIS: I disagree with that, Justice Scalia. I don't think that was the rationale of Beck. I don't believe Beck was concerned with lesser included offense instructions in the abstract. It was concerned with the reliability and rationality of factfinding in cases in which those factual determinations will spell the difference between life and death, and --

QUESTION: Well, you couldn't be concerned with reliability of factfinding because the whole premise of Beck is that the jury is going to disregard the court's instructions. The whole premise of Beck is that a jury which knows that this person is not guilty of the capital offense will nonetheless convict him of the capital offense rather than set him free.

Isn't that the whole premise of Beck?

MR. LEWIS: I don't believe that's the whole premise.

QUESTION: Well, I thought it was.

MR. LEWIS: I believe that Beck was concerned with rationality in factfinding. It's possible that a juror in this case who had doubt as to whether Tompkins had intended to kill the deceased might have viewed the instruction on intentional murder as an escape hatch to avoid having to convict him of the capital crime. We don't know that. But I don't think you achieve rational factfinding by providing jurors with compromise options. You achieve rationality by providing them with coherent, rational options to convict in accordance with their view of the evidence, and there there is an element in the capital crime that is in doubt and there is a lesser included offense instruction that is requested that would permit the juror who had doubt on that element to resolve that doubt in favor of the defendant and not have to acquit him and still be able to convict him of a capital crime, I believe that's what Beck requires, and I believe that those are the types of instructions that achieve the degree of reliability that Beck was seeking to achieve, not compromise options that would allow a juror another way to violate his oath.

QUESTION: Did you ask for the second level of noncapital murder. You described three types of just plain old murder, not capital murder. What was the

second type? That sounded like the one that to me most closely might have fit the defense that was raised here.

Did you ask for that one?

MR. LEWIS: I'm not sure, and the reason I, the reason I --

QUESTION: Well, wouldn't it make a difference? I mean, even if you were entitled to a, to at least one lesser included offense that might have been sustained by the facts, don't you think, don't you think we can say well, maybe you are entitled to one, but it has to be the one that you ask for and the highest, the highest one available.

MR. LEWIS: We did not request an instruction, Justice Scalia, on any of the other offenses, other types of murder denominated as such, and I didn't try the case, and I have discussed this with trial counsel, and I can't give you a definitive answer on it. In the instructions that were requested, which are at page 26 of the Joint Appendix, following the instruction that that's a part of is really the request to charge on capital murder, and as part of that charge, about halfway down the page, after the short paragraph in the middle, there is a paragraph that requests intentional murder, which was the one given by the trial court.

The next paragraph is a little hard to

understand. What it seems to be saying is if you find that Tompkins killed the deceased and he didn't intend to, you can convict him of murder whether he was in the commission of robbery or kidnapping or not.

That was not given by the trial court. I don't know for sure what Tompkins's counsel was attempting to do in that instruction. I think you could read it as asking the trial court to give some instruction on some form of unintentional murder, which was not done.

QUESTION: It's agreed by everybody that intentional murder, under Texas law, is not a capital offense?

QUESTION: Is the Beck rationale applicable where the jury has the sole sentencing prerogative?

This case is different than Beck because in Beck the trial judge was the sentencer. Here the jury was sentencing, so it seems to me the rationale of Beck is inapplicable because of the jury's concern that it has to convict because it doesn't have all of the options, it doesn't have to sentence the defendant to death.

MR. LEWIS: Well, I don't know that I agree with that, Justice Kennedy. I think the risk that you get when you reach the level of a capital conviction is

the protection that the sentencing procedures provide is not necessarily sufficient, if you would never have gotten to that point in the first place had the jury been adequately instructed.

QUESTION: Well, isn't the whole point of Beck that the jury might have to stretch in order to reach a verdict? Beck talks about an impermissible holding, and it gives it an option, but here the option is -- and it applies only in death cases. But here the jury is the sentencer, unlike the judge in Beck.

MR. LEWIS: Well, I think the -- I think the rationale of Beck is that before we are going to allow the state to convict someone of a capital crime, we are going to require the state some degree of confidence that the state has proved beyond a reasonable doubt each of the elements of that crime, and where there is a lesser included offense instruction that would give some assurance that a juror who had doubt on one of the elements had an option to reach a verdict consistent with his view of the evidence, we re going to require that, and that will give us some assurance that the state has in fact proved the elements required before the case can be considered a capital case.

I con't think you can blink at that and say well, it will be taken care of on sentencing. I think

the risk is too great with a human life at stake to take that kind of risk.

QUESTION: So that the jury would be irresponsible in finding guilt but not in imposing the sentence? It would then follow the law?

MR. LEWIS: Well, I think that once they had imposed the sentence, I think the jury -- I mean, once they had found a conviction, that the jury is instructed on sentencing, and I think they will follow their instructions.

QUESTION: Mr. Lewis, while you are interrupted, you -- I may have misunderstood you earlier, but the charge that you call our attention to was requested by the defendant.

MR. LEWIS: Yes, sir.

QUESTION: The one on intentional murder.

MR. LEWIS: Yes, sir.

QUESTION: And then on the next page, pages 28 and 29, there's a requested charge on involuntary manslaughter and negligent homicide.

Wasn't that also requested by the defendant?

MR. LEWIS: yes, sir, it was.

QUESTION: I thought you had indicated they had not requested it.

MR. LEWIS: No, I'm sorry. In answering

Justice White's question, I thought I -- I meant to say that they did request involuntary manslaughter and criminally negligent homicide, and the court refused to give those.

So there was no instruction on any form of unintentional killing in this case.

QUESTION: Did you object to the failure to give those? I don't recall your brief objecting to the failure to give those. Your brief just objects to the failure to give the other ones.

MR. LEWIS: I'm sorry, I don't know which ones you are talking about when you say those.

QUESTION: The requested charge on other types of, on other types of intentional, on other types of murder other than intentional murder.

MR. LEWIS: We didn't object to that in our brief, Justice Scalia, because the counsel that handled the case on appeal didn't raise that on appeal. The only issue raised on appeal was the failure to give the instruction on involuntary manslaughter, and then the Court of Appeals itself addressed the failure to give the instruction of negligent homicide in addition to that.

The question presented is, of course, whether the failure to give those instructions violates Beck,

and I intended today to focus primarily on the state's argument that the giving of the instruction on intentional murder was sufficient to satisfy Beck, and that the failure to give these others was harmless error. I think I have responded to most of that in questions today.

Just to sum up, we believe that Beck required that a juror who had doubt as to Tompkins's intent be given the option to conclude that while this was a horrible crime, it was unintentional, and convict Tompkins of a lesser included offense in conformity with his view of the evidence rather than having to acquit.

QUESTION: May I just ask one other question that is prompted by Justice Kennedy's question, that in the special interrogatories at the time of the sentencing hearing, one of them goes to the deliberateness of the crime, and they did find squarely there that it was deliberate.

MR. LEWIS: Yes sir, but I -- I know that you're aware because of the Texas cases that have been up here, that the Texas courts have -- first of all, they don't instruct jurors on what the meaning of the term "deliberate" is in a sentencing procedure. They have said that it's not the equivalent of intentional, although I think semantically it's difficult to make the

distinction, but having found Tompkins guilty of a capital crime, I think that finding, to the extent it represented a finding on intentional killing in the absence of these instructions, might well have tainted the jury's finding in sentencing when it was asked, asked to find if it was deliberate.

They have already found, made a finding that they think would be perceived as finding it was intentional, and now they are asked to make a finding that it was deliberate. I think that the taint on the earlier finding doesn't give any reliability to the second. If the first one was unreliable, the second one was unreliable.

QUESTION: Res judicata applies to jury deliberations.

If there are no further questions on Beck, I'd like to move on to the Batson issue.

The Petitioner is black, and his victim in this case was white, and at the outset of trial the prosecutor challenged all 13 blacks from the venire. Eight of those challenges were for cause, and five were peremptory.

At the time of the trial, which was in 1981, the relevant precedent in this area was this Court's decision in Swain, and Petitioner's counsel moved to

quash the jury under Swain, and that motion was denied without inquiry. While the case was on appeal, this Court decided Batson, and the case was returned to the trial court for a Batson hearing, following which the trial court found that the Petitioner had established a prima facie case of purposeful discrimination but that the prosecutor had adequately explained each of the five peremptory challenges at issue.

The Court of Appeals agreed, albeit for different reasons in some instances, and even though it found some of the reasons implausible on their face or unsupported by the record.

QUESTION: It tended almost to disparage some of the trial court's findings, didn't it?

MR. LEWIS: Yes, Mr. Chief Justice, it did.

The question is whether the Court of Appeals misapplied Batson in these instances.

There are three challenges at issue before this Court. I would like to focus, if I could, on two of them, the Green challenge and the Thomas challenge. Mr. Green was the Postal Service employee that the Court of Appeals refers to as the fifth venireperson. The Court of Appeals found that the sole reason Mr. Green was challenged was because he was a Postal Service employee, and while admitting that caused a great

concern because it saw no relevance between his occupation and his qualification to serve on the jury, and the state had provided no explanation, it nonetheless accepted that reason as an adequate reason for the challenge under Batson, stating that it found it was a "racially neutral explanation and it is not the office of this court to judge the credibility of the prosecutor."

In so doing, we believe the Texas court failed to properly apply Batson. Batson requires that the prosecutor's explanation be neutral and that it relate to the case to be tried. That's a two-part test. Here the Texas court cited the first part of the test -- this was certainly a facially neutral reason -- but ignored the second part of the test. It admitted that it bore no relevance or it could see no relevance between this reason and Mr. Green's qualifications to sit on the jury.

QUESTION: Mr. Lewis, what if, what if this particular prosecutor had some experience and simply concluded that he had had three or four prior Postal Service employees on juries and he had talked to jurors, and these people were always holding out for acquittal?

MR. LEWIS: That might be a different case, Mr. Chief Justice, but that's not this case.

QUESTION: Yes.

MR. LEWIS: There was no such explanation here, and we're not saying that Postal Service employees or that a person's occupation could never be an adequate reason under Batson. We point out in our brief at Footnote 13 that in the Biaggi case this was precisely the explanation that was offered for peremptory challenges for some witnesses in that case that were Postal Service employees, and the explanation was adequate because there the prosecutor explained that Mr. Biaggi himself had once been a Postal Service employee and had been a champion of civil servants and thought that those jurors might harbor some bias toward him and so they struck them for that reason.

QUESTION: What if the prosecutor here had just said, you know, at the hearing, I've just had bad experience with Postal Service employees --

MR. LEWIS: Well, I can't --

QUESTION: -- in the past.

MR. LEWIS: First of all, that's not what she said.

QUESTION: I understand.

MR. LEWIS: She said --

QUESTION: Suppose she said that? Is that enough?

MR. LEWIS: I'm not sure it would be, Justice

Scalia. I think it would be a close question, but I think the reason --

QUESTION: I mean, how long can these hearings go on? Would she have to bring in the instances and you'd have to dig out the court records and find out there was indeed such a challenge, and you'd have to give the defense time to figure out whether that was accurate and what not?

This can go on forever.

MR. LEWIS: I think it depends upon how plausible or how rationally related the reason appears to be. If it were a social worker, for example, in some areas of society it might -- social workers might be perceived as having some sort of bias toward defendants. There might be a closer, plausible relationship between that sort of reason and this, but a postman --

QUESTION: It's sort of hard to give rational reasons for peremptory challenges. That's what troubles me. I mean, sometimes it's just, I got a -- have a gut feeling that I don't want this juror.

MR. LEWIS: Well, I think this Court crossed that bridge in Batson because were talking about a very limited situation here. We're talking about only those situations in which the Petitioner has established a

prima facie case of purposeful discrimination. In those limited instances this Court said the prosecutor has got to explain, and his explanation has got to be neutral, and it has got to relate to the case to be tried.

The credibility of the prosecutor standing alone is not going to be enough. If that had been enough, this Court would have allowed a simple disavowal of discriminatory intent to satisfy Batson, and you expressly said that's not sufficient. I think the Court was looking for something in the explanation that gives it some sort of discernible logic, rational relationship to the case. It's something that peremptory challenges historically have not had to stand the scrutiny of, but where a prima facie case of discrimination has been established that's a pretty small price to pay for protecting the constitutional right of the defendant.

QUESTION: It is not clear to me where you come out in your brief on the Court of Appeals differences with the trial court. At one point you chastise the Court of Appeals for interfering with the findings of fact, and on the other hand you accept what the Court of Appeals has done and attack its rationale.

Which is it?

MR. LEWIS: I think the way we come out is this, Justice Kennedy. I think it's hard -- we accept

their rejection of the trial court's findings. We think there is adequate record, support in the record for that, and we believe this Court is bound by the findings on which the Court of Appeals grounded its decision.

That finding, that is, that Mr. Green -- that the sole reason for the Green challenge was because he was a Postal Service worker we think is deficient in a number of respects. One, we don't think it meets the Batson test, even assuming that is the reason. We think it's hard to find in the record support for that being the reason.

The prosecutor equivocated even as to that reason in her testimony. She said she had had bad luck with Postal Service workers. Then she said she'd had good luck with Postal Service workers. Then she said that wouldn't be the only reason she'd challenge someone.

So our position was one, it doesn't satisfy Batson, but in any event, it's difficult to find record support for it.

QUESTION: [Inaudible] court below followed the wrong rule, you think.

MR. LEWIS: Yes, sir.

QUESTION: It followed just a neutral explanation is enough by itself.

MR. LEWIS: Yes, exactly, yes, sir.

QUESTION: So you say that there should be case relationship?

MR. LEWIS: Yes, sir.

QUESTION: And that therefore we should remand to redo the case on the right standard?

MR. LEWIS: I don't believe -- I don't believe remanding would do any good, Justice White, because --

QUESTION: Well, I don't know, give them the right rule and ask them and say is there case relationship here? Why should we have to go through that routine?

MR. LEWIS: Well, the record is not going to change, though. I think what you would have would just --

QUESTION: Well, I know, but they'll do the, they'll go through the record.

MR. LEWIS: Well, I believe, I believe this Court's precedent requires reversal in this situation, Justice White.

If I could, in the time I have left, move on quickly to the Thomas challenge, which presents a slightly different problem. There the prosecutor explained that he was concerned with Ms. Thomas's answers to some of his questions on circumstantial

evidence, and although she indicated she could follow the law of circumstantial evidence, his concern became decisive because his entire case was based on circumstantial evidence, he didn't have any direct evidence.

Trial court accepted this explanation at face value, but the Court of Appeals noted that at the time of this challenge, the prosecutor's case was not based entirely, if at all, on circumstantial evidence. He had the Petitioner's confession, which was only suppressed at a later date, and as a result, the Court of Appeals said that it would find that this explanation was totally shocking and would not permit a rational finder of fact to support the -- to find that as an adequate explanation under Batson without more.

Well, the more the Court of Appeals found was an explanation that it provided itself. It said, well, the prosecutor might have been concerned that the confession didn't rule out circumstantial evidence. He might have been concerned that circumstantial evidence would become relevant, and in fact, it did become relevant, and so we'll accept this explanation as adequate.

We don't believe it's the role or the function of a Court of Appeals to supply explanations for

prosecutors in a Batson context. The purpose of the Batson hearing is to test the explanation given to see if it is pretextual or genuine, and that requires that the actual explanation that's given be tested, not one supplied by the Court of Appeals.

QUESTION: Well, if the -- let's assume the trial court says the question is pretextual or not. I say it is not pretextual. It's -- it's a neutral ground and there's relationship, and I don't think it's pretextual at all. Does the court, the reviewing court then apply a clearly erroneous standard or a de novo standard?

MR. LEWIS: I think they should apply a clearly erroneous standard, Justice White, and I think that's --

QUESTION: That's the most, then, you think the Eighth Amendment would require.

MR. LEWIS: Yes, sir.

I'd like to reserve the balance of my time.

QUESTION: Very well, Mr. Lewis.

We will hear now from you, Mr. Palmer.

ORAL ARGUMENT OF CHARLES A. PALMER

ON BEHALF OF RESPONDENT

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

At the outset I'd like to apologize to the Court. In Texas we pronounce some of these legal terms differently than the Court is used to, and if our pronunciations sound odd to the Court, I'm sorry for that.

I would also like to first discuss the Beck issue.

QUESTION: You've argued cases here before, haven't you?

MR. PALMER: I beg your pardon, Your Honor?

QUESTION: Have you argued cases here before?

MR. PALMER: Yes, but I've never had to use the word "voir dire," for instance.

QUESTION: Okay.

(Laughter.)

QUESTION: So it's not a general admonition, but just about voir dire.

MR. PALMER: Tompkins first complains that the trial court violated Beck by refusing his instructions on involuntary manslaughter and negligent homicide, even though it did grant his requested instruction on intentional murder.

I would offer the Court three reasons why this argument should be rejected. First is that adverted to by Justice Kennedy, the difference between the Texas and

Alabama statutes. The Alabama statute in Beck required the jury to answer only one question, whether or not they should acquit or convict the defendant. After that determination was made, the punishment hearing was held before the trial court which then weighed the aggravating and mitigating evidence and either accepted or rejected the jury's death verdict.

The only opportunity the jury had to determine whether or not death would be an appropriate sentence would be at the guilt phase. On that basis, Beck required that a third option be given to ensure the jury's not being unduly inclined to convict of a capital offense, and to ensure the reliability of the factfinding process.

In Texas, the system is very different. The jury has two opportunities to either accept or reject death as the appropriate sentence, at the guilt-innocence phase. In Tompkins's case, for instance, the jury was instructed that it could acquit the defendant or convict him of either capital murder or the noncapital offense of intentional murder.

After that determination was made, the punishment hearing in Texas is also held before the jury, and they are required to answer two special issues, the first of which is whether the defendant's

conduct was deliberate and with the reasonable expectation that death would result; and the second of which is whether the defendant will commit future acts of criminal violence that will constitute a threat to society.

So unlike the Alabama scheme, in Texas the jury is given two opportunities to pass on whether or not the defendant should be sentenced to die. For that reason, the failure to instruct on a lesser included offense, we would submit, is less likely to skew the reliability of the factfinding process as it would be under the Alabama scheme.

Second, as has been suggested by questions from the Court this morning, Beck stands only for the proposition that the jury be given a third option. We do not read Beck to hold that a jury must be allowed to convict of every lesser offense raised by the evidence.

QUESTION: Mr. Palmer, could I ask you this question about that?

I wonder if this instruction really gave the jury a third option? That's one of the things I wonder about because they're asking if there was any doubt about the fact that the killing was committed in the course of a robbery, then they might find the lesser degree of murder, but on the evidence there's no way in

the world they could fail to conclude that the robbery was part of the transaction, was there?

MR. PALMER: Well, Your Honor, the defendant requested that instruction on that basis.

QUESTION: Right.

MR. PALMER: And he argued to the jury that the murder did not occur during a robbery or kidnapping. He argued to the jury that the defendant was not guilty because he was not linked with the crime. He questioned identification procedures. He tried to intimate the defendant's girlfriend had committed the murder. He argued at length that the defendant was not guilty at all. He argued in the alternative, he was guilty only of intentional murder because it was not during the course, and then his third theory was this theory about lack of intent.

So he spoke out of three sides of his mouth at the same time during final argument.

QUESTION: I see.

MR. PALMER: Now, as to whether or not the lesser offenses were raised by the evidence, the Court of Appeals found that we were not -- found that they were not, and we are in complete agreement with the Court of Appeals. We view the record very differently than does Mr. Tompkins.

Contrary to what the Court might assuming from reading Mr. Tompkins's brief and listening to the recitation of the evidence here this afternoon, the record shows the Petitioner abducted his victim, tied her to a tree, bound her and stuffed her mouth completely full of bedsheet material. The testimony from the medical examiner was it would have been impossible to force any more material into her mouth than was done. Her tongue was thrust back into her throat by the force of the material that was used.

The notion that because a piece of cloth was not placed over her nose the jury might have found a lack of intent we would submit is ill-founded at best. The nasal passages go into the mouth, and if the mouth is full of gag material, a person is going to suffocate regardless of whether their nose is bound, and that in fact is what happened in this case.

We believe a fair reading of the opinion of the Court of Appeals in this issue is that the evidence of intent to kill was so overwhelming that no rational jury could have found a lack of intent to kill absent some affirmative evidence to that effect, and there was none in this case. Not only do we have the record evidence that I've just described to the Court, we also have the jury's finding at the punishment phase of trial

that Tompkins's conduct was deliberate and with the reasonable expectation that death would result.

QUESTION: [Inaudible] -- your case here, is it on the Beck issue?

MR. PALMER: Well, Your Honor, I'm arguing three different reasons, and this is the third of them.

QUESTION: All right.

So it isn't critical?

MR. PALMER: Isn't critical?

QUESTION: It isn't critical, the third.

MR. PALMER: No, only if the Court chooses to reach it, but with respect to this third issue, we'd merely cite the Court to the line of cases beginning with Sansone, where the Court held that an instruction that tells the jury it must presume an element of the offense is unconstitutional. Well, subsequently, in Rose v. Clark, the Court held that Sansone error can be harmless; the Court cited the Hopper and based its holding on a overwhelming evidence of intent, and we would submit to the Court that is what we have here.

As for the Batson issue, Tompkins claims that the prosecutors excluded prospective jurors on the basis of race. Tompkins does not argue that the prosecutor's stated reasons for their strikes showed any racial bias, nor does he fault the findings of the trial court as

showing any racial motive for the peremptory strikes.

Instead, he simply asks this Court to entirely discount and completely ignore the testimony adduced at the Batson hearing as well as the findings of the trial court, and indeed focus only on the inferences drawn by the Court of Appeals.

I would offer the Court four reasons why it should not review this question in the manner suggested by Tompkins.

First, the Court of Appeals review of this case was made on the very same cold record which is before this Court, and neither the Court of Appeals nor this Court was in any position to second guess the trial court as to its credibility determinations and its findings as to the reasons for the prosecutor's strikes.

Second, as a matter of state law, the Court of Appeals is not allowed to find the facts differently than did the trial court. And in fact, in this case it did not. The Court of Appeals did not reject the trial courts findings or find them clearly erroneous. It merely ignored them, looked at the record, and made it so the emphasis is to why the prosecutors used their strikes.

QUESTION: Well, I don't know if it's exactly fair to say it ignored them. It tended to disparage

them a little bit, I thought, in its opinion.

MR. PALMER: Well, in the sense that it found other reasons and did not credit those reasons found by the trial court, but it made no finding that they were not supported by the record; they are otherwise clearly erroneous.

QUESTION: Well, do you think it's just enough for the prosecutor to come forward with a, what's called a -- what everybody would say is a neutral reason, or must that reason have some connection with the case?

MR. PALMER: Well, Your Honor, the language of Batson is the reason be rational in relating to the case. Certainly if Batson requires only that the reason be rational and nonracial, we are in a much better position, but regardless of which standard the Court applies, we believe we would prevail on that issue.

QUESTION: Well, do you think the, do you think the appellate court really accepted the notion that it had to be case related?

MR. PALMER: Well, Your Honor, I think the only thing the Court found which might be questionable on that part has to do with venire member Green, where the Court found he was struck because he was a postal worker.

Well, now, we of course reject that as the

reason why he was struck. The prosecutor gave four reasons, and those four reasons were credited by the trial court. But even if the Court focuses only on what the Court of Appeals found, we would submit that that was related to the case in the sense that Justice Scalia suggested earlier.

I will refer the Court to page 10 of the appendix of our brief which contains the prosecutor's testimony at the Batson hearing. Down near the bottom of the page she testified, I noticed that he had two years of college but had worked for thirteen and a half years as a messenger for the U.S. Postal Service which, if nothing else, in his favor or against him, is kind of an alert to me, because I have not had very good luck with postal employees.

That was her answer based on the prosecutor's --

QUESTION: What is wrong with a postal employee?

MR. PALMER: Your Honor, I don't know, but obviously this woman thought something was.

QUESTION: Can you imagine anything that makes him unfit to sit as a juror?

MR. PALMER: Well, the question propounded by the Chief Justice was what if the prosecutor

testified --

QUESTION: Well, wouldn't that be well to say that's the reason, not the reason that he's a postal employee?

MR. PALMER: Your Honor, she said I have not had very good luck --

QUESTION: Well, suppose he say that I have found Negroes to be unsatisfactory, so I strike all of them, would that be all right?

MR. PALMER: That would be a Batson violation, Your Honor.

QUESTION: Huh?

MR. PALMER: That would be a violation of Batson, Your Honor.

QUESTION: Well, suppose he says all people with red hair? Would that be good enough?

MR. PALMER: It would be nonracial, Your Honor.

QUESTION: Would that be good enough?

MR. PALMER: I do not believe it would be related to the case.

QUESTION: Is that any different between that and being a postal employee?

MR. PALMER: Yes, it is, Your Honor.

QUESTION: And it is? What is the difference?

MR. PALMER: The testimony in this case was

not simply that he was a postal employee, but that she'd had bad luck with postal employees.

QUESTION: That's enough?

MR. PALMER: In this case, the defense --

QUESTION: That's enough?

MR. PALMER: If the Court chooses to reach that issue, Your Honor, we would submit it is. We do not choose to defend the judgment of the Court of Appeals on that ground, however.

We believe the proper inquiry of this Court is to review the reasons actually testified to by the prosecutors, the findings made by the trial court which presided over the trial and heard the prosecutor's testimony, and --

QUESTION: [Inaudible] -- case comes to us, don't we -- should we, should we read the Court of Appeals, the appellate court, as saying this fellow was struck because he was a postal worker, is that it?

MR. PALMER: Well, that's what the Court of Appeals's opinion says, Your Honor.

QUESTION: Yes, well, it read the record, and shouldn't we accept that or not?

MR. PALMER: No, Your Honor, and I was attempting to tell the Court the reasons why it should not when we got off into these other areas.

QUESTION: Good.

MR. PALMER: I've advanced two reasons already. The third reason is that, as we state in our brief, we're entitled to defend the judgment of the Court of Appeals on any ground which the law and record support.

Now, Tompkins has tried to claim that that means only any legal theory which supports the judgment of the Court of Appeals. We do not read the cases that way. We certainly do not read the cases which he cites that way.

QUESTION: Well, now, why do you think the Court of Appeals nevertheless affirmed, even though it said this person was struck because he was a postal worker?

MR. PALMER: Well, Your Honor, they obviously found that to be a rational, nonracial reason, and given the prosecutor's testimony, related to the case also.

QUESTION: And related to the case.

MR. PALMER: Finally, Your Honors, we would call the Court's attention to the federal habeas statute. No area of the law more than federal habeas or factual determinations of trial courts afforded respect by reviewing courts, by federal habeas courts. Under the statute, 2254(d), facts found by state courts, be

they trial courts or appellate courts, are presumed correct, yet even that statute which mandates a presumption of correctness provides eight exceptions to that presumption, one of which is that factfindings of state courts may be ignored or discounted if they are not fairly supported by the record.

And it is our submission today that the findings of the Court of Appeals are not fairly supported by the record. Again, I think it is important to keep in mind that the record the Court of Appeals reviewed is the same record before this Court. It enjoyed no advantage over this Court in determining these matters, and it was at a distinct disadvantage to the trial court in determining the truthfulness of the prosecutor's testimony.

QUESTION: Yet, in applying our "clearly erroneous" rule to findings of facts by district courts within the federal system we've held that the fact that something may be on the cold record does not change or alter the responsibility or the authority of an appellate court, even on the basis of a record, to say this finding is clearly erroneous, even though the appellate court didn't hear the witnesses.

MR. PALMER: That, well, that is true, Your Honor, but again, the Court of Appeals did not say they

were clearly erroneous. It went, merely went off on its own way and made its own inferences.

Now, what -- the case we have cited in our brief is Smith v. Phillips where the Court said the Respondent may defend the judgment of the court below on any grounds supported by the record and the evidence.

That is a notion that's been advanced over the years in a number of decisions of this Court. There is a formulation that I would prefer to that of Smith v. Phillips on an offer to the Court today in two cases decided in the 1930 term, Langness v. Green and Parchment Paper Company. The formulation used there is the respondent may defend the judgment of the Court of Appeals based on any matter in the record, even if it calls into question the reasoning of the Court of Appeals or involves matters that were ignored or overlooked by the Court of Appeals.

QUESTION: I think you are undoubtedly correct technically, but I think you would be in better shape here if the Court of Appeals had simply affirmed the findings of the trial court rather than cast doubt on them.

MR. PALMER: Well, certainly that's true, Your Honor, but I'm attempting to defend the case as it comes to the Court.

The second thing Tompkins asked the Court to do is consider certain comparison evidence which he claims --

QUESTION: Before you get on to something else, what would your position be if sort of the opposite had occurred from what occurred here, that is, you had pretty poor reasons given by the, given by the trial court, and then the Texas Court of Appeals disparages those and comes up with a better reason, and the Texas Court of Appeals's reason maybe does have some support in the record, how do we review that one?

MR. PALMER: Well, I, in my argument so far I've been distinguishing between the facts known by the trial court and the Court of Appeals.

QUESTION: Right.

MR. PALMER: I think perhaps a better distinction would be between what the testimony is, what the record shows, and what the facts found by the various courts are.

I think any finding that is supported by the record can be credited, whether it is made by the trial court or the appellate court, but I think in the case --

QUESTION: Now, wait. What do you mean credited?

Go back to the hypo I just gave you. We have

findings by the Court of Appeals that are really pretty good.

MR. PALMER: Mm-hmm.

QUESTION: And they seem to be substantiated by the record, but findings by the trial court that are just ridiculous, they just aren't at all. Do we -- what do we do?

MR. PALMER: Well, if the Court of Appeals -- if the findings by the Court of Appeals in that case were not rejected by the trial court on the basis of credibility determinations, we would argue that they could be accepted.

QUESTION: Except do we accept them as clearly, unless they are clearly erroneous? Or do we do a de novo review of them, or what?

MR. PALMER: I'm not sure which standard would be proper, Your Honor, but I think the only time the trial court's findings are binding is when they involve credibility choices, which they clearly did in this case.

QUESTION: Okay.

MR. PALMER: Tompkins also asked the Court to consider what he calls comparison evidence, evidence of other jurors, other venire members who were selected as jurors who, according to him, had similar problems to the black venire members who were struck.

As I'll discuss in just a moment, the comparison evidence which he offers we believe shows nothing of the sort, but before I reach that, I would ask the Court to follow the lead of the Court of Appeals and refuse to consider this evidence simply because of the time honored rule that a reviewing court will not consider matters not presented to the trial court.

The comparison evidence Tompkins has proffered, the only value of it would be to impeach the reasons advanced by the prosecutors, and given that, it's evidence that should have been offered at the Batson hearing in a trial court setting where witnesses are cross examined and otherwise impeached.

He did not offer it there. He offered it for the first time in the Court of Appeals, and they refused to consider it for the reason I've just advanced. Now, in this Court, far removed from the trial court, Tompkins finally wants to consider it. He wants it accepted as gospel without the prosecutor's having an opportunity to rebut or explain it.

But even if the Court chooses to look at these comparisons, they fall far short of showing any racial bias whatsoever, and indeed are, we would submit, of no probative value. Tompkins has not included any portion of these voir dire, these comparison voir dires in the

Joint Appendix. He has not included them as an appendix to his brief. He has not even bothered to set out excerpts from them in his brief, and we think if the Court will go to the record and look at them, they will see they show nothing of the sort.

For instance, at page 41, Footnote 20 of Petitioner's brief, he cites the four venire members who were selected as jurors and asserts that they had as much difficulty understanding the law of circumstantial evidence and other legal concepts as did Mrs. Thomas, a black venire member who was struck by the state.

Well, the Court can look at the volumes and pages cited and make its own determination, but they simply do not do that, Your Honor. So even if the Court chooses to look at that, we would submit that they do not show any racial bias.

Unless the Court has further questions, we would simply ask the judgment be affirmed for the reasons I've advanced here today, as well as those in our brief.

QUESTION: Thank you, Mr. Palmer.

Mr. Lewis, you have four minutes remaining.

REBUTTAL ARGUMENT OF EMMETT B. LEWIS, III

ON BEHALF OF THE PETITIONER

MR. LEWIS: Thank you, Mr. Chief Justice.

First of all, the prosecutor did not say that she had had bad luck with Postal Service workers. As we point out in Footnote 12 of our main brief, she equivocated on that point, and when questioned on cross examination and asked, you haven't had good luck with Postal Service workers, she said sometimes I have, but I'm alert if there are other things about the person I'm concerned about.

Secondly, the Court of Appeals did not find that Mr. Green's occupation was related to the case. Its entire decision was premised and proceeded on the basis that while it could see no relevance in his occupation, it would nonetheless accept that as an adequate reason.

Third, there was no credibility finding with respect to the testimony about Mr. Green's occupation to which the Court of Appeals purported to defer. The trial court apparently gave no credence to that part of the prosecutor's testimony. This was a, this was a determination by the Court of Appeals itself.

Secondly, if facially neutral reasons standing alone are adequate to support Batson, then any nonracial characteristic can be pointed to on any juror, and any challenge can be explained, and Batson will simply be meaningless. There has to be some relationship to the

case to be tried.

The State argues that the Court of Appeals ignored the findings of the trial court with respect to the Green challenge. It did not ignore those findings. It has an extensive discussion in its opinion in which it considered them and simply rejected them as inadequate explanations under Batson because the record incicated that Mr. Green had no greater difficulty with legal concepts than any other juror, and particularly jurors who were not challenged.

With respect to the comparison evidence, that was not new evidence. That was evidence in the record, and the witness comparison that Tompkins's counsel drew, the Court of Appeals was simply arguing that evidence, but even if there was a procedural bar there, the Court of Appeals itself went through precisely that analysis in considering the Green challenge, and we don't believe the Court of Appeals can apply a procedural rule arbitrarily, they can't review the record de novo and accept those portions of it that support its opinion and refuse to consider those portions of it that would not support its opinion.

QUESTION: Counsel, with reference to the Beck claim, the Court found that as a matter of state law, reckless or negligent homicide could not be proven on

these facts.

Can we review that question of state law?

You cite the Jackson case, but that's a question of sufficiency of the evidence.

MR. LEWIS: Well, I believe that was the question here, too, Justice Kennedy. I believe the question was applying the facts to the state law here, and I believe the sufficiency of the evidence to activate a federal constitutional rule for adjudicating a state law crime is a matter of, a matter of federal law, not state law, and is a matter that this Court can incependently determine.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lewis.

The case is submitted.

(Whereupon, at 2:49 o'clock p.m., the case in the above-entitled matter was submitted.)

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:

NO. 87-6405 - PHILLIP D. TOMPKINS, Petitioner V. TEXAS

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman

(REPORTER)