ORIGINAL

In the

Supreme Court of the United States

GILBERT FRANKLIN BECK,

PETITIONER

V.

STATE OF ALABAMA,

RESPONDENT.

No. 78-6621

Washington, D. C.
February 20, 1980

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Petitioner,

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Respondent.

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Wednesday, February 20, 1980

The above-entitled matter came on for argument at 10:16 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DAVID KLINGSBERG, Esq., 425 Park Avenue, New York, New York 10022; for Petitioner.

EDWARD E. CARNES, Esq., Assistant Alabama Attorney General, 250 Administrative Building, 64 North Union Street, Montgomery, Alabama 36130; for Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first in Beck against Alabama.

Mr. Klingsberg, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID KLINGSBERG, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on writ of certiorari for the Supreme Court of Alabama, which upheld a death sentence based on a conviction for the crime of robbery where the victim was intentionally killed. The grant of certiorari was limited to the narrow question of whether a sentence of death constitutionally may be imposed after a jury verdict of guilt of a capital offense where a jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense and when the evidence would have supported such a verdict.

As to the second condition in Your Honors' grant of certiorari, the state has conceded that there was sufficient evidence to support the conviction of a lesser included offense either of robbery or felony murder, both of which are non-capital offenses in Alabama.

The evidence supporting the lesser offense, briefly

stated, is as follows. Petitioner confessed that he and another man named Roy Clements participated in a robbery in which the victim was killed. Petitioner, however, took the stand on his own behalf and testified that he did not do the killing, that Mr. Clements did the killing, that when Mr. Clements did do the killing, petitioner immediately protested, "Oh, my God, what did you do?" at which point he left the premises. He denied having any weapon. He denied intending to kill. He said that even though there was a discussion prior to the robbery, tying up the victim, there was no discussion or intention of harming or killing the victim.

The principal evidence against the petitioner was the testimony of the woman who was described by petitioner as an accomplice and a lookout, which she denied. She testified that petitioner had been sharpening a knife before the robbery. That was also denied by petitioner and contradicted by other evidence.

The trial judge, following the dictates of the statute in Alabama, did not charge the jury that it could find petitioner guilty of a lesser included offense. Moreoever, the trial judge told the jury that if it acquitted the defendant, he could never be tried for anything that he did to the victim. The Alabama circuit court, intermediate court, said that this instruction was in accordance with the

Alabama statute. We contend principally--

Q You went also to the Supreme Court of Alabama on the case?

MR. KLINGSBERG: Yes, Your Honor.

Q And what question did you raise there?

MR. KLINGSBERG: The petition for writ of certiorari--which, incidentally, was not originally in the record, but we had it sent up, a certified copy--said that the statute violates the Constitution of the United States of America in that it violates provisions in the Constitution under the Eighth, Sixth, and Fourteenth Amendments to the Constitution of the United States and is in fact a mandatory death sentence. The arguments which had been made below in a motion to quash the indictment on similar grounds, indicating that the procedure was akin to or in the nature of a mandatory death sentence, specifically referred to the choice which the jury was given of either, one extreme, acquitting the defendant or, the other extreme, convicting of the capital offense. It is true that unfortunately even though extensive arguments were made in the circuit court directly on the point of the lesser included offense, that that was although in the petition, not in the brief to the Supreme Court of Alabama. However, the Supreme Court of Alabama did affirm on the basis of its decision in the Jacobs case, which dealt only with federal constitutional issues, dealt

at length with the lesser included offense issue, and there were two dissents which also incorporated and referred directly to their decisions in Jacobs which dealt practically entirely with this lesser offense question. So, I think there is not any doubt that this was considered by the Alabama Supreme Court. And the question has been preserved. Moreover, the state does not challenge that, at least on the due process question, only on the equal protection argument.

Q Getting back to the facts, Mr. Klingsberg, I correctly or not got the impression from you or your statement of the facts that your client was just along, just present. But is it not a fact that he held the victim while the attacks were going on?

MR. KLINGSBERG: Yes, Your Honor, that is correct. The petitioner testified that they did have an intention to tie up the victim and that he in fact had grabbed the victim from behind in order to tie him up and that at that point Mr. Clements suddenly and to the petitioner's surprise attacked him with a knife.

Q Any evidence in the case about two knives being present, the one that was said to have been sharpened by Beck?

MR. KLINGSBERG: No, Your Honor, there was no such testimony. The critical point from the point of view of the legal issue presented here I think is that there was a very sharp issue, very hotly contested issue on the question of

intent to kill. This made it particularly important that the lesser-included-offense verdict be given to the jury as an option because the jury without it was placed in an impossible position. The jury was faced, on the one hand, with the possibility of convicting of a capital offense, and the only alternative was acquittal of a defendant who was admittedly and confessed to a very serious crime. And we say that under these circumstances, the jury would plainly have veered away from acquittal in its deliberations, particularly when attempting to resolve this delicate issue of intent to kill. If the jury's thoughts drifted toward the possibility of no intent, finding of no intent, then they would have to think, "Well, we have to acquit this defendant." And the idea of acquitting a defendant who was guilty of a very serious crime, guilty of a crime of robbery in which a victim was killed, would be so repulsive to the jury that that would upset and steer off course the accuracy of their finding on the issue of intent to kill.

Q Mr. Klingsberg--

MR. KLINGSBERG: Yes.

Q --let me get back a moment to that earlier question I asked you. In the opinion of the Supreme Court of Alabama, which I take it was delivered by Mr. Justice Maddox, he starts out saying, "Petitioner Beck raises only one issue here," and then there is a colon. Then he says,

"Whether the Alabama Court of Criminal Appeals erred in its finding that the Alabama death penalty statute is not in violation of Article III, Section 43, Article V, Section 124, and Amendment 38 of the 1901 constitution of Alabama." Do you disagree with that characterization of the--

MR. KLINGSBERG: Yes, Your Honor, I disagree with that because of the petition for certiorari to the Alabama Supreme Court which explicitly refers to the Eighth, Sixth, and Fourteenth Amendments. And I disagree with it because I think the court actually considered that in light of its reference and incorporation of the Jacobs case.

I should also note that there was a rule in the Alabama Supreme Court which was enacted before the appeal but became effective before the appeal was decided, which enabled the Supreme Court to consider any important issues in cases such as this.

Q Counsel, of course there are cases where--we have had them here, and I have had more of them on the Court of Appeals--where defense counsel prefer to have only the most serious presented to the juzy and do away with lesser included offenses in the thought that the evidence is shaky enough that a jury will not convict of the most serious offense where they might opt for a lesser included one. And you do not pursue that here.

MR. KLINGSBERG: I think there is no question, Your

Honor--and the question is not raised by respondent--that this matter was raised very distinctly at the trial court level. And there was a motion to quash the indictment as contrary to rights under the Constitution. There were citations to Gregg and Woodson. And there was specifically in the argument at various points reference to the fact that the jury only has this choice of two things, of convicting of the capital offense and imposing the death sentence or acquittal. It was raised on the motion to quash. It was raised at transcript 527 at the end of the prosecution's case. And there was an exception to the charge also referring to lesser included offenses at transcript 748.

So, I think the matter was definitely raised in the District Court. There was no point in requesting the charge because the statute explicitly precluded it. But it was raised in the motion to quash.

Q To entitle a defendant to a lesser-included-offense charge, do you contend that there need be no evidence at all with respect to some lesser included offense as just an absolute right?

MR. KINGSBERG: We contend that there had to be some evidence, and the state concedes that there was some evidence. And I have described that evidence, which was based principally on the fact that petitioner took the stand in his own behalf. He was the only eye-witness. The

testimony against him was circumstantial. And there was other evidence in addition.

Q You say the testimony against him was circumstantial?

MR. KLINGSBERG: Yes, Your Honor.

Q I thought you just also told us he admitted presence at the crime, the scene of the crime, and holding the victim at the time the victim was, as he says, murdered by someone else, not by him.

MR. KLINGSBERG: On the intent to kill--

Q That is more than circumstantial, is it not?

MR. KLINGSBERG: I am speaking simply of the intent issue.

Q Are you saying that unless the defendant admits that he had the intent to kill, the evidence of his intent to kill is necessarily circumstantial?

MR. KLINGSBERG: No. I think that, for example, if the petitioner did not take the stand at all, it might be argued that there was not sufficient evidence. But there is no question that when the petitioner takes the stand and denies intent to kill, that there was sufficient evidence, for example, under the Alabama law which applies to non-capital cases and in respect of the laws of every other state which provides for lesser included offenses, which requires that charge to be given.

Q But the jury is entitled to disbelief of petitioner.

MR. KLINGSBERG: Oh, yes.

Q But your point is that if they believed his testimony that he was just holding the man and that the other fellow did the cutting with the knife, then he should be found guilty, could be found guilty of some lesser included offense.

MR. KLINGSBERG: That and if they also believed his testimony that both before and during the course of the crime, that he had no intent to harm or kill the victim.

Q I have trouble with this lesser. What lesser included defense did the state agree he could be convicted of?

MR. KLINGSBERG: There were two, Mr. Justice Marshall. One was felony murder, which is not a capital offense in Alabama; and the second was robbery.

Q You mean a man that holds a victim while he is stabbed can be acquitted of homicide?

MR. KLINGSBERG: He can be acquitted of robbery with intent to kill, if the only basis for his holding was, as he testified, to tie up the victim rather than to cause him harm or kill him.

Q Is it not true under these cases the man could not have gotten stabbed if he had not been held?

MR. KLINGSBERG: That may be.

Q That is my problem.

MR. KLINGSBERG: Yes, Your Honor.

Q Is not robbery with intent to kill by definition, if you succeed in the robbery, you are not going to kill the man?

MR. KLINGSBERG: I do not think that is necessarily true.

Q Under Alabama law, robbery with intent to kill means that you plan to first rob him and then kill him?

MR. KLINGSBERG: I do not think it makes any difference what the order is. It has to be robbery where the victim is killed intentionally by the defendant.

Now, if Your Honors please, the absence of the lesser-included-offense instruction and the appalling prospect which the jury was faced with of acquitting the defendant in light of the court's charge, freeing that defendant and putting him in a position where he could never be tried again for the crime of robbery or felony murder was, we say, an injection into this case of an extraneous circumstance. It was an element, a factor, which created and influenced the jury perhaps in a subconscious way, in a subtle way, that did not require that the jurors intentionally decide to disobey their instructions. The jurors who have a feeling of duty to the community, a natural impulse to see that someone pays for a crime such as robbery where

a victim is killed, would naturally be repulsed by the prospect of acquitting and freeing that defendant. And that factor was an influence on the jury's resolution of the doubts regarding the intent issue. Due process should not allow putting the jury in a position where if it does not convict a defendant of a capital offense, the results will be inconsistent with all of the human impulses to do justice.

Q So far then, I take it, this is an argument that is not confined to death cases. I mean, this is, I would suppose you would say on the due process basis that it would lead to inaccurate verdicts in non-death cases.

MR. KLINGSBERG: That is what the Court held in Keeble against United States.

Q Is that your argument?

MR. KLINGSBERG: But it is not my argument.

Q It sounds like it is.

MR. KLINGSBERG: Well--

Q So far it does. When are you going to limit it?

MR. KLINGSBERG: I think that it could be the argument. It could be logically. But I don't think, particularly in light of the narrower question on certiorari, that the Court has to go that far. The Court has said--

Q You have just been going that far though. That is your argument so far.

MR. KLINGSBERG: The Court has said on many

occasions, Mr. Justice White, that higher standards of due process are required in capital cases, that capital defendants should be accorded all procedural safeguards. This is a procedural safeguard, and I think that the Court could decide why--

Q I think you could certainly argue that if it is a capital case, the jury might be even less willing to convict of the greater offense.

MR. KLINGSBERG: Yes, but I think--

Q Because it knows then that there would be a chance of the death penalty even though the jury would not impose it itself. There would even be, I would suppose, there would be less reason for them to convict of the greater offense.

MR. KLINGSBERG: But there would also be, because this is a capital case and because the lesser-included-offense crime is so serious, there will also be a greater abhorrence of letting the defendant go free--

Q Not just because it is a death case.

MR. KLINGSBERG: No, because in this case--and I think probably in most death cases--the next lesser offense down is going to be a very serious offense. And for that reason the jury's reluctance to release and free this defendant for all time--

Q I understand your argument, but I do not see

why it is any more telling in a death case than in any other, and it might even be less.

MR. KLINGSBERG: If Your Honor please, there--

Q Of course I know you disagree with that.

MR. KLINGSBERG: There are two points. One is the legal point that in a death case, because death is irreversible, death is qualitatively different. There is no room for correction.

Q Therefore, the jury would be more reluctant to convict of the greater offense.

MR. KLINGSBERG: I think the court--and the court has said--should be more prone to apply higher standards of due process to do more to minimize the risk of error, to do more to assure that the jury's resolution of doubt is a reliable and accurate resolution of doubt. As a matter of fact, I think that you have to look at the other side and say that the jury's reluctance to acquit and free will be much greater where the lesser included offense is a very serious crime, as it is here.

In Keeble against United States, for example, where the Court said that if a statute was interpreted--in that case the Major Crimes Act--was interpreted to preclude the lesser-included-offense instruction, there would be serious constitutional questions raised under the due process clause. There the crime charged was assault with intent to injure,

and the lesser offense was simple assault. And the Court, through Mr. Justice Brennan, held that it would go out of its way to avoid interpreting that statute to preclude lesser offenses even though the crime of simple assault was not independently within the jurisdiction of the Major Crimes Act. The basis for that decision was that the resolution of doubt and the intent issue, which as in this case was very seriously in dispute, would be affected adversely by the absence of the lesser offense. In this case, where the crime is much more serious than simple assault, I think that the jury's reluctance to resolve doubts on the intent issue in favor of acquittal will be even greater; and, therefore, both as a matter of fact and as a matter of law, I think that there is basis in a capital case for holding that lesser offense instructions are an important procedural protection which rises to the due process level.

Q The Keeble case was not based on a constitutional holding, was it?

MR. KLINGSBERG: The Court avoided the constitutional holding which, it said, would have been presented if it had not interpreted the statute--

Q The holding is not constitutional.

MR. KLINGSBERG: The holding is not constitutional, and there has not been a constitutional holding because every state in the union, going back many years--over a hundred

years--has required lesser included offenses.

I think, if Your Honor please, we can also look--

Q They have the requirement if the defense does not want them.

MR. KLINGSBERG: That is correct, Your Honor, and it is recognized as a right of the defense as a protection which the defense can have if the defense wants it under the applicable statute, the rules of procedure, or common law.

Q I think your response to my earlier question really was not responsive. Well, go ahead. In any event, you want them here.

MR. KLINGSBERG: Yes, Your Honor. I think in respect of your earlier question, the fact that there have been many cases, including cases of this Court on or about the turn of the century involving different degrees of murder, where the Court has said that the failure to give the defendant the benefit of the lesser included offense charge, if the defendant wants it, is a protection, is a benefit, is a procedural right, indicates that--

Q Mr. Klingsberg, what specific provision of the Constitution have you been arguing about so far?

MR. KLINGSBERG: We have been arguing so far, Your Honor, about the Fourteenth Amendment due process clause.

Q But just due process in general in terms of the accuracy of the verdict?

MR. KLINGSBERG: That is correct, Your Honor.

Q Is it a deprivation of jury trial, or what is it?

MR. KLINGSBERG: It is, one, the accuracy and reliability of the fact finding. It has also been held by this Court, not specifically on constitutional grounds--

Q I just want to know what your claims are--

MR. KLINGSBERG: Right. This takes away from the province of the jury the right to determine an important element of the case.

Q So, you say that is interference with the right to jury trial?

MR. KLINGSBERG: That is correct, Your Honor.

Q As well as just generally it risks such inaccuracy that it is a violation of due process?

MR. KLINGSBERG: Yes, Your Honor. It also--

Q Are those the only two--

MR. KLINGSBERG: I think it also takes away the right to have an impartial jury because the jury necessarily becomes biased by facing this appalling prospect of releasing a defendant--

Q These are the only constitutional claims you are making?

MR. KLINGSBERG: No, we are also making a claim in regard to the Eighth Amendment in so far as I believe that

we can look to the Court's post-Furman decisions for guidance on what should be the standards, the standards under the due process clause. I think what the Court did in the post-Furman decisions in saying that there should be rationalization, there should be guidelines, there should be standards, was to look to the standards that have been generally applied in the past at the guilt-finding stage. And I think that all of the standards which the Court has announced in those cases as applicable to the sentencing stage should certainly be applied at the guilt-finding stage as well.

Petitioner contends that the state was attempting to eliminate all discretion or as much discretion as possible, which it reads, Alabama read, misread I think, as the purpose of the Furman decision. And that I think is a quirk--

Q But it is up to the judge to conduct a separate sentencing hearing, I take it.

MR. KLINGSBERG: Yes, Your Honor, there is a separate sentencing in Alabama.

Q And the judge determines the penalty.

MR. KLINGSBERG: That is correct. But I think the very same standards which this Court has applied, rationalizing, providing guidelines, focusing on the particular circumstances of the offense, can all be applied to the lesser-offense instruction and be incorporated into the due process requirements for the lesser-offense instruction. The lesser-

offense instruction does not, as Alabama initially thought, provide for a discretionary action by the jury. The jury is not asked to exercise discretion but rather is instructed to find the correct level of guilt consonant with the evidence. The evidence, the level of the evidence is the standard, and the lesser-offense instruction is the guideline.

Q You do not think that due process is satisfied, I take it, by the fact that after the jury's verdict, the defendant, the accused has another shot at it if he can persuade the judge that the jury verdict was too harsh on the basis of the evidence.

MR. KLINGSBERG: Your Honor, I think the same standards which the Court has applied and the same careful scrutiny which the Court has applied to the sentencing stage of a death-penalty case should, in the case of guilt finding, also be applied.

Q But the jury's verdict is not final, is it, on the issue of life or death?

MR. KLINGSBERG: No, Your Honor, it is not.

I would like to reserve time for rebuttal, if I may.

MR. CHIEF JUSTICE BURGER: Mr. Carnes.

ORAL ARGUMENT OF EDWARD E. CARNES, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Because of all the questions about the facts and

the Alabama law and the procedural posture of the case, I would like to devote approximately five minutes to that topic before I turn to the merits. The petitioner was not indicted, tried, and convicted for the capital crime of robbery, during the course of which the defendant was intentionally killed. That is how the statute said. But the state gratuitously averred that the victim was murdered in the first degree by the defendant. And the Alabama Supreme Court has said when we aver it, we have to prove it. It is not a variance between the statute and the indictment, but nonetheless we are stuck, so to speak, with what we say in the indictment.

The elements of that crime, as defined in Ritter v. State--and that is the important case of the Alabama Supreme Court on what the elements are--was robbery, which the defendant admitted. First degree murder of the victim during the robbery, which the defendant admitted by admitting facts sufficient to constitute felony murder, first degree murder.

And the third element, the crucial element, the one which was in some dispute at the trial, was defined in Ritter as related to the intent and culpability. Ritter said that even though the defendant did not have to actually do the killing himself, he nonetheless--a non-trigger man or non-knife wielding defendant as in this case--either had to have had some kind of particularized intent that the killing

take place, or he had to have been a knowing accomplice to the intentional killing itself, not the robbery, but the intentional killing. Ritter went on to define "accomplice to the intentional killing itself" as meaning that the defendant either sanctioned or knowingly facilitated the crime. And the facts in this case, the defendant and the co-defendant Clements both admitted they went there and both participated in a robbery. They both admitted that when they left, both victims were dead. They of course disputed who committed the murder, the actual stabbing or throat cutting. Each one blamed it on the other one and said, "Oh, I was just shocked, I was appalled, I had no idea. I was just sick at heart when I found out what happened. And I immediately repudiated it."

In other words, both of them admitted robbery. Both of them admitted first degree murder. And both of them denied the third crucial element in Ritter. And the evidence on that third disputed element at trial was this. Beck admitted that he was 12 years older than Clements. Beck admitted that it was he who drove to and from the crime. Beck admitted that it was he who disposed of the victims' wallet and purse. Beck also admitted that he held the victim down while the victim's throat was being cut.

Q Mr. Carnes, just so I understand the thrust of your comments, you are saying there is very strong evidence supporting the intentional killing here.

MR. CARNES: Overwhelming.

Q Are you denying, however, the fact it would have been consistent with the evidence for the jury to have accepted some of what the defendant said and found a lesser included offense?

MR. CARNES: It depends on how you define the word "consistent." Consistent as a matter of Alabama state law because we have such a broad lesser-included-offense permissibility?

Q Right.

MR. CARNES: In terms of the Berra and Sansome rational or reasonable basis, there is a very real question. But what we concede in Section 8 of our brief is that if it had not been for preclusion as a matter of Alabama state law, the jury would have been instructed, not necessarily it would have been under Berra and Sansome and certainly not that they would have been constitutionally entitled to it. But--

Q But had there not been this special rule for death cases, the defendant would have been entitled to a lesser-included-offense instruction as a matter of Alabama law.

MR. CARNES: No question about it.

Q I know you say not as a matter of federal constitutional law.

MR. CARNES: No question about it.

Also Beck admitted that his clothing was so blood

stained with the blood of the victim that he had to burn it. He admitted that he had the victim's blood on his pants, shirt, jacket, and boots. Another witness whom Beck disputed testified at trial that Beck was sharpening his knife before they went to commit the crime.

A second witness, whom Beck admitted was telling the truth about everything she testified to, testified that after they got back, Beck said, quote, "We did it." And Beck specifically admitted she told the truth about everything. Beck himself, even though he said, "Well, I'm the one that was surprised. I'm the one who was shocked," he testified concerning Ritter's condition after the crime, emotional condition. And this is very pertinent to who was surprised and who was shocked. Beck himself testified, quote, "Roy was white as a sheet, shaking all over like a wet cold bird dog freezing to death." There was no testimony in the evidence that Beck himself was so visibly shaken. So, there was from the undisputed evidence, also the only way Beck could have planned to get away with this robbery was by killing the victim because the victim, Roy Malone, knew Beck on a name basis, knew where he lived and could identify him. Of course Beck said, "I was planning on going to Florida." But the State of Alabama has very good extradition relationships with the State of Florida, and Beck could not have imagined in any way he could have evaded such a serious crime by merely going

across the state.

So, the overwhelming evidence was that Beck either committed the murder himself, had a particularized intent to do so, or knowingly facilitated or sanctioned it. Nonetheless, as a matter of Alabama state law, because Beck got up and said, "Notwithstanding all the evidence, I deny that I knowingly facilitated it. I facilitated it, yes, but I did not know it, and I deny that I knew that it was going to take place," Alabama law, under the Davis decision specifically cited in that case, says that if there is any evidence barring preclusion, statutory preclusion, if there is any evidence whatever, quote, "however insufficient or lacking in credibility," end of quote, only an entire absence of evidence can you preclude it common law. And because of that, we concede as a matter of Alabama state law that had it not been for the statutory preclusion clause, the instruction would have been given enabling the jury to convict on those lower offenses. But now it is important to distinguish between determining that a lesser included offense occurred and convicting on the lesser included offense.

The Alabama capital punishment statute does not preclude the jury from determining that the defendant was only guilty of a lesser offense. Instead, what the Alabama statute does is preclude them from convicting on that lesser offense and say, "If you determine that he is guilty of only

the lesser offense, you acquit him of that higher capital offense."

On the issues question--

Q Mr. Carnes, before you leave that last one, how does one know whether a jury--say a jury acquitted a defendant. How would one know whether they found him not guilty of anything or determined, as you describe it, that he was guilty of the lesser included offense?

MR. CARNES: One would not know.

Q Then what is the legal significance of their ability to reach a totally meaningless and irrelevant conclusion then?

MR. CARNES: Your Honor, I was simply trying to stress that the jury was not permitted--was not prevented from considering the fact that he may have just been guilty of a lesser included offense. In other words, their argument is in order to have fact finding, an impartial jury, into--one of their arguments is in order to fit the facts to the crime, the jury ought to be able to determine whether he was guilty of a lesser offense or not. They can determine that. They just cannot convict him of it. Perhaps I can give more weight to that distinction--

Q I really do not understand the force of the argument. But that is all right. I do not want to take your time.

Q How did the jury know about the lesser included offense?

MR. CARNES: They were instructed on the elements of first degree murder and first degree robbery as part of the higher crime, and they were told--they were also instructed on intent not as clearly--

Q My question was the lesser offense. How did the jury know about the lesser offense?

MR. CARNES: They are told. These are the elements of first degree murder. These are the elements of robbery. Unless you find both of these elements, you cannot find him guilty of the higher offense.

Q Did they say anything about the ingredients of any other offense?

MR. CARNES: Other than murder and robbery, no, sir, except the intent--

Q Then how could the jury have found him guilty of any lesser offense if they did not even know what the offense was?

MR. CARNES: Your Honor, if they--

Q Did you not say they could?

MR. CARNES: They could not return a verdict convicting him.

Q But they could find it, you say.

MR. CARNES: Yes, sir.

Q And I am asking, how could they find it if they did not even know about it?

MR. CARNES: If they found he was guilty of murder and of robbery but not of the intent element, then--

Q You consider murder plus robbery as being a lesser offense?

MR. CARNES: No question about it.

Q It is a lesser offense?

MR. CARNES: It is lesser than the capital offense defined in Ritter. There is no question about it.

Q It is less than murder? Murder plus robbery is less than murder?

MR. CARNES: No, sir. Murder plus robbery is less than a capital offense in Alabama.

Q Oh, that is different from what you said.

MR. CARNES: Ritter is the--I apologize for--

Q You do not have to show intent to kill, do you, in your felony murder statute?

MR. CARNES: Intent to kill, no, sir. The statute specifically bans felonies.

Q And you do in your ordinary first degree murder statute.

MR. CARNES: Most--well, felony murder is defined as one of the four--

Q I know. In felony murder you do not have to show intent to kill, do you, in Alabama?

MR. CARNES: No question. Yes, sir.

Q And in first degree murder, non-felony murder, you do.

MR. CARNES: Yes, sir.

Q Do you not, in Alabama?

MR. CARNES: Yes.

Turning now to the issues on the merits, all of the constitutional issues involved in this case depend actually on the answer to one question, and that question is essentially, Does preclusion in the special context of the Alabama statute jeopardize the reliability of fact finding and undermine the reasonable doubt standard in cases tried under that statute? If this Court determines, viewing the statute and its particularities, if this Court determines that the answer to that question is yes, then the preclusion clause is unconstitutional and should in fact be struck down.

However, if this Court determines that the answer to that crucial question is no, then just as clearly and just as certainly the preclusion clause should be upheld and the statute's validity affirmed.

It is our position that preclusion does not undermine the reasonable doubt standard and does not jeopardize the reliability of fact finding, at least not in the context of Alabama's statute, which has special procedural safeguards, three of these. The first is the requirement that the jury,

in its verdict form, fix the penalty of death even though the jury has no role in the sentencing process and the judge and not the jury sentences. The requirement that the jury fix the penalty at death--and no defendant can be convicted of a capital offense in Alabama unless that jury verdict form says, "And we fix the penalty or punishment at death"--is for the specific purpose of calling upon the jury's historical reluctance and caution, some of which Mr. Justice White mentioned earlier, in capital cases. And the historical evidence we have set out in our brief on pages 17 to 21 shows the jurors in capital cases are extremely reluctant to convict when death appears to be the result. They resolve all doubts on guilt or innocence--on guilt or innocence--in favor of the defendant, not the state. It is different from non-capital cases. And the evidence shows that if they do disobey their instructions, it is to favor capital defendants and not the state.

This Court in the cases we cite in our brief has relied upon that difference in capital as versus non-capital cases in decisions in the past.

Q Are you saying that under the Alabama system the jury that had any inclination to find a lesser included offense or a lesser consequence would simply have returned a verdict as they did but with no recommendation on the death sentence?

MR. CARNES: No, sir. They might have done that, and that would indicate to the trial judge that his instructions had not been--

Q And there would be nothing for the judge to veto.

MR. CARNES: That is not a permissible verdict form. If the jury comes back with that form in Alabama, that is not a resolution of the case.

Q What if they split?

MR. CARNES: If they split, there is a mistrial.

Q Any one juror can refuse to vote for the death penalty?

MR. CARNES: Yes, sir.

Q And then it will just be a new trial.

MR. CARNES: Yes, sir, which is a safeguard, the second safeguard in our statute, because the statute says if there is a mistrial either because of a failure to agree on guilt or innocence, or because somebody does not want to write, "Fix the penalty at death"--

Q If all 12 of them do not want to fix the penalty at death, there is going to be a new trial.

Q There is a mistrial, and there is the possibility the reindictment option--the statute specifically provides that after a mistrial because of the failure of the jury to agree, the state can go back and reindict on a non-

capital lesser included offense. And the jury in this case was specifically instructed about that possibility. And one of the defendant Beck's two retained attorneys at trial even mentioned or alluded to it in his oral argument. He said, "Look, do not be stampeded. Do not be rushed into this thing. If I have any possibility under a reindictment or otherwise to take my man before the bar of justice and plead him guilty to these lesser offenses of murder or robbery, I will do it. I will do it, but do not be stampeded."

And then the judge told them if they returned a failure to agree on the penalty of death, on guilt or innocence, that there would be a possibility of the reindictment. Of course the state controls the reindictment option. The state determines that. But just by telling the jury that there is a possibility of that, the importance is it is a safeguard. They say the jury, if he is guilty of a serious non--a lesser included offense such as robbery or murder, the jury may feel compelled to convict an innocent man, innocent of the capital offense, just to keep from letting him go.

Q Mr. Attorney General, what happens if the jury came in and said, "We convict him of second degree murder"?

MR. CARNES: The judge would say, "No, you do not. You cannot do that." He would either interpret that as an acquittal, which there would be very strong arguments for, or

declare a mistrial, depending on whether his instructions had been clear or not. The importance of the mistrial option is that if the jury does disobey the instructions--they say, "Okay, the guy--we've got a reasonable doubt of the capital offense but we do not want to let him go," it gives them a way out. It is a safeguard, a stop measure.

And the Keeble case was different. The dictum or the reasoning in the Keeble case was different on these two particularities. There was no verdict form convicting the man in setting his penalty or his punishment at death. There was no calling upon the traditional reluctance and caution of jurors in capital cases. Also there was no mistrial and reindictment option.

Of course the jury in that case could have mistried, as any jury can. But they were not told that if the guy was guilty of only a lesser included, he could be reindicted. And in distinguishing our case--

Q Of course he could not. The reason they were not told so in Keeble was I think even the court opinion did not indicate that he could have been indicted in the first instance for the lesser included offense--

MR. CARNES: Exactly.

Q --in a federal district court since that court had only the jurisdiction conferred upon it by the Congress.

MR. CARNES: And as the district court and court of appeals interpreted, he could not have been convicted of a

lesser included; so, there was no way up until Keeble--

Q Right.

MR. CARNES: --under that.

Q He certainly could not have been originally indicted for that.

MR. CARNES: Yes, sir. In distinguishing the language of Keeble, we rely heavily upon Parker v. Randolph type analysis where this Court or a plurality of this Court said, "We held one thing in Bruton. We are holding a different thing here because every case should be decided upon the circumstances and the facts unique to the procedure in question there. Change of one fact, change of one circumstance may tip the constitutional scales the other way." And that is what--even accepting the reasoning in Keeble, which was not a constitutional decision, that is what we feel distinguishes.

There is a third safeguard built into the statute to ensure that a person who is not guilty of the capital offense is not executed, and that is the judge's sentencing authority. The separation of the judge's determination of sentencing from the trial jury's determination of guilt or innocence. The judge is not in any way bound, as in the Tomlin decision from the Court of Criminal Appeals that we cite in our brief makes clear, by any fact finding. The judge can find the facts in the sentence hearing entirely different than the jury did, and the Court of Criminal Appeals sanctioned

that in Tomlin. But even if the judge accepts the jury's fact finding on guilt, he can say, "All right, it was enough to convict a man. But I am not going to sentence a man to death because it just was not enough for me. It is beyond a reasonable doubt to the jury." And that is exactly what the trial court did in Neal v. State.

Q Mr. Carnes, could I go back to a problem that Mr. Justice Blackmun's question of your adversary has raised? And that is that sometimes it is advantageous for the defendant and sometimes disadvantageous to have the lesser included offense instruction. I suppose for both sides it kind of increases the gamble. Say there is about a 90 percent chance of conviction of an intermediate offense and maybe a 50/50 chance of conviction of the greater offense, in which event you only submit the greater offense. It is kind of you are really rolling the dice in the case. What is the state interest in this particular statute denying the lesser-included-offense instruction in any situation?--because sometimes the state would be better off obviously to have the man convicted of the intermediate offense and go scott free.

MR. CARNES: Not on the--

Q What state interest does the statute vindicate?

MR. CARNES: The state interest is the purpose behind the statute. It is their contention that--

Q No, I do not want their contention. What is

your explanation of it?

MR. CARNES: Our contention is that the purpose of the statute is to reduce arbitrariness, capriciousness, and discrimination in sentencing even beyond the amount the Constitution would tolerate.

Q But it seems to me in the example I gave you--how does that reduce arbitrariness where you increase the gamble, the 50/50 case but where you could get a sure conviction in the--I do not understand--

MR. CARNES: The underlying judgment is that if there is a 50/50 gamble, that in itself is something of capriciousness or arbitrariness. The Alabama statute focuses on sentencing results in capital cases and says, "Okay, in Gregg, Jurek, and Proffitt the Court said you do not have to preclude. You can reduce to the level the Constitution will tolerate the amount of arbitrariness, discrimination, and capriciousness by other means." But what Alabama has done is say, "We want to go beyond that. We want to reduce it even further. And even though we have a post-Furman and pre-Gregg statute, we think that that is the evident purpose behind the statute because of the chronology of some of the legislative developments."

Q Could one infer that maybe California--or, rather, Alabama--thought it was necessary to do this to comply with Furman? But if they were writing on a clean slate, it

is hardly a very reasonable way to approach the problem.

MR. CARNES: One could certainly infer that, particularly in view of the fact that there is no reported legislative history in the form of committee reports and hearings.

Q And Alabama's policy in non-death cases is directly to the contrary.

MR. CARNES: Yes, sir, Your Honor, but as Furman posed, capital sentencing is different from all other sentencing either as a minimal constitutional requirement or as taking the values and policies of Furman even further. And there is a very strong indication that Alabama did write on a clean slate after Gregg, Proffitt, and Jurek made it clear preclusion was not constitutionally required because in 1977, a year after the '76 cases from this Court, Alabama passed a new criminal code which totally restructured and redefined everything from trespassing to homicide. And in that new criminal code a year after Gregg, Proffitt, and Jurek, the Alabama legislature incorporated by reference and thereby readopted the Alabama capital punishment statute, including the preclusion clause. And we think that evidences that the purpose--at least as of 1977 and arguably as early as '75 when the statute was originally enacted--was to go beyond the requirements of Furman. Otherwise, why would they not have left it in there after this Court made clear in '76 it was

not constitutionally required? And everything is geared in the statute towards the preclusion of lesser included offenses. It is especially important in Alabama statutes because, for example, the verdict form requirement--that is the way where you insist that the jury proceed as cautiously and as reluctantly as possible to protect the reliability of fact finding. But if you do not have preclusion and you have got a verdict form where the jury says, "We fix his penalty at death," absent preclusion, where are you? You are back at Roberts. You are back at Woodson, where this Court said there would be--or the joint opinion said there would be a risk of arbitrariness and capriciousness through nullification, through the mechanism of lesser included offenses.

Q Well, now, Roberts against Louisiana in which that point was made, as I remember--and the only one of those three cases in which that was made because only in Louisiana did the practice exist of requiring an instruction on lesser included offense in every single case, whether or not there was any justification for it. That is quite different from this case, is it not?

MR. CARNES: It is different, except when you take the Alabama common law rule or even the federal rule on a reasonable, rational basis, you are going to have--all the defendant has to do to get a chance at jury emotion, jury prejudice, jury bias in his favor is take the stand and say,

"Yes, but I do not kill. What happened? I did not intend to do it." That is in essence Roberts because however incredible in Alabama, the evidence is it goes to the jury. And the tendency of trial court judges is to interpret lesser includeds really broadly, not so much, one would suppose, to protect the defendant. It is just to protect themselves against any chance of reversal. Unless the defendant objects to it--and in some cases it would be in the defendant's interest not to have the instruction as--

Q There are some cases--not only hypothetical cases, but real cases--where it is either first degree murder perpetrated by this defendant or he is absolutely innocent. In other words, if you have a hundred eyewitnesses to a brutal, premeditated, intentional killing and his defense is "That was not me, that was my twin brother," then he is either guilty clearly of first degree murder, or he is entirely innocent. There is no room for a lesser included offense in a case like that, is there?

MR. CARNES: No, sir. And those cases are the rare exception generally.

Q But they do exist.

MR. CARNES: Yes, sir, and we point out two examples under the Alabama statute in Section 8 of our brief, one case of which is pending before this Court on certiorari, of Ritter v. State, one where the Alabama Supreme Court

promulgated the elements or announced the elements. In that case, the non-trigger man said, "We talked about it, we planned on doing it. The only reason I did not do it is because my co-defendant was in my way. I am glad we did it. I do not have any remorse. Too bad if you do not agree with me." In that case, even in Alabama, he would not have got a lesser included.

Q Right.

MR. CARNES: And the same thing with the co-defendant case.

Q Clarify for me again, if the jury had made no recommendation of death, what was--

MR. CARNES: The defendant would not be convicted of a capital--that has never happened. In terms of the statute, in terms of the Alabama appellate courts' statements about the statute, that would not convict him of the capital offense. They would be told--

Q There would be nothing for the judge to do then.

MR. CARNES: Nothing. There is no way that the man--they have to fix the penalty at death. That is just put in there so the jury--"Well, now, look, you have been here in court today. You have had your time off from your job. But this is serious business. A man could die if you are not careful."

Q I thought you did suggest that the jury might disagree on the death penalty.

MR. CARNES: If they disagree on the death penalty--

Q They are violating their instructions if they disagree.

MR. CARNES: Not necessarily, no, sir.

Q They are told that if you find the defendant guilty, you must fix the death penalty.

MR. CARNES: Yes, Your Honor.

Q Is there any rule in that instruction for the jury to split on the death penalty? It does not sound to me like there is.

MR. CARNES: One would not assume so from that.

Q I have Jacobs against State before me. It says that under the Alabama scheme, if the jury refuses to follow the legislative mandate and does not fix the penalty at death, the statutory scheme acts as a form of safety valve favorable to the accused because if one single juror refuses to follow the legislative mandate and refuses to fix the penalty at death, the trial court may grant a mistrial, and that is what the statute says too. What does that "may" mean?

MR. CARNES: I think it reads--

Q What can the judge do?

MR. CARNES: It may mean shall.

Q What does a judge do if they bring back a verdict and they have not fixed a death penalty because one juror will not agree? Does he say, "Go back and do your job"

or what does he do?

MR. CARNES: I do not know. I think it would depend on the individual judge. But it is clear that until they do that, there is no way you can have a capital conviction and sentence in Alabama because--

Q If the jury just will not do it, then he either acquits them or has a mistrial.

MR. CARNES: Right, in which case the prosecutor had better be thinking about reindicting.

Q But the statute on its face seems to contemplate just such a possibility, does it not?

MR. CARNES: The possibility of a mistrial?

Q Of the jury not agreeing.

MR. CARNES: Yes, sir, it does, and defense attorneys will argue that. "Look, they will tell you you are supposed to, but you do not have to. You can get a mistrial.

Q Mr. Carnes, in the appendix at page 9 at the last paragraph of the page, the trial judge, unless I misread the language of his instructions, he said, "Ladies and gentlemen, all 12 of you must agree before you can reach any verdict in this case." He was following that line of reasoning, was he not?

MR. CARNES: Yes, Your Honor, in this case he did. And also in another case, the Jacobs case which came to cert and was denied last year, the same thing happened. Where

defendants ask in this case for instruction, he got it. He was reading what the--here he was giving his oral charge. But two pages, three pages over, four pages, on page 13 he read to the jury again that same thing exactly what the defense attorney asked, the second to the last paragraph on page 13. So, the jury knew about the mistrial and reindictment option in this case. And we think that is a significant safeguard. Now--

Q On that point, General Carnes, are you familiar with any Alabama reported decisions treating of the situation where a jury found a man guilty of a capital offense but did not fix the penalty at death?

MR. CARNES: No, sir. Your Honor, there are no appellate opinions in which that has happened, and I do not know of any trial court decisions. It is possible there were some of those that just have not reached the appellate stage yet. But under the statute he could not be convicted of a capital offense. And this is part of the strategy that will play into the defense attorney's argument, closing argument. You do not have to. That is what the mistrial is about. I have asked the judge to tell you about it. Listen to it. If you think it is a lesser included offense, come back here and refuse to fix the penalty at death. I just told the judge you cannot decide.

Much boils down to the question of whether or not this Court thinks there is a substantial risk that someone

innocent of a capital crime will be convicted of a capital crime and sentenced to death because of preclusion. We argue because of those safeguards it will not be. They point to the conviction statistics. Ninety-six percent. "My goodness, how can you say innocent men are not being convicted wrongfully? Ninety-six percent." The whole point in that is that preclusion, as this Court recognized in Keeble, was for the purpose of protecting--historically was for the purpose of protecting the prosecutor, not the defendant. And any prosecutor who knows he does not have the protection of lesser included offenses because of that preclusion clause is going to be extremely reluctant and extremely hesitant to bring any case as a capital case unless he is absolutely certain that not only is the man guilty, but he can prove it beyond a reasonable doubt.

MR. CHIEF JUSTICE BURGER: You have a few minutes left, three minutes.

REBUTTAL ARGUMENT OF DAVID KLINGSBERG, ESQ.,

ON BEHALF OF THE PETITIONER

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

The so-called historical evidence which the respondent cites concerning jury's reluctance to convict of a capital crime, based on our reading of the cases in respondent's brief, is only in mandatory capital sentencing.

The implication of the argument is that there should be reduced standards, reduced procedural protections in capital cases. And the Court has consistently said that because of the irreversibility and the absence of any opportunity for correction of error, that there should be greater standards and that there should be greater procedural protections and more reliability in a capital case.

Mistrial is not a substitute for the lesser-included-offense procedure. This postulates a situation where the jurors would say to each other, "We really think the defendant is guilty only of a lesser included offense. So, what we will do is we will go and tell the trial judge that some of us vote to convict, some of us vote to acquit. Then there will be a mistrial. And then maybe, if the statute does not require it, there will be a reindictment, and maybe that reindictment will be for the lesser offense, and maybe there will be a conviction." That sort of speculation on such a tenuous chain of events cannot be a substitute protection.

So far as the interest of the state, which I think is really vital here because we have an interest of the defendant, which is life or death. We have this Court saying in Keeble and other courts saying that there is a substantial risk of interference with the resolution of doubts and fact finding in the event that lesser-included-offense protection

is not given. What is the interest of the state? Respondent says it relates to bias, discretion in sentencing. This has nothing to do with sentencing. The lesser-included-offense procedure has to do with guilt finding. And where the defendant takes the stand and denies his guilt and then the Court instructs the jury, "You are to find the defendant guilty of a lesser included offense in the event that the evidence beyond a reasonable doubt supports it," that is not bias. That is not discretion. That is what this Court has said is the controlled, guided exercise of discretion, which is what is suppose to happen in the guilt-finding stage.

Q But in the guilt-finding stage, does it not at least tend to eliminate the arbitrariness that was criticized in Furman if the jury is forced to fish or cut bait as to whether this man either committed a capital offense or did not commit it?

MR. KLINGSBERG: Not as Furman was subsequently interpreted and clarified in that where the jury is given instructions and told to act on the basis of standards, that is not something which Furman condemned, as the Court indicated in Gregg and the subsequent cases. And it is a misinterpretation of Furman, as the Court said in Jurek and Proffitt.

Q Yes, but that was with respect to the penalty.

Q That was the penalty.

MR. KLINGSBERG: Yes, Your Honor. I think the same thing should apply at the guilt-finding stage.

Q I know you do. I know you do, but none of our cases say that.

MR. KLINGSBERG: I think that Mr. Justice Stewart, for example, in Gregg, when he was talking about why there should be instructions and why the jury should be guided and standardized on sentencing, said that the reason for that is because that is what juries always are asked to do at the guilt-finding stage. And all of those standards, I think, are adopted and imported into the sentencing stage from traditional standards which are applied at the guilt-finding stage. I think that the state has no interest here. Clearly this is something which is a misreading and a misinterpretation of Furman and therefore should be set aside. Thank you.

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

[The case was submitted at 11:16 o'clock a.m.]

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