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Supreme Court of the United States

October

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Supreme Court, U. S.
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In the Matter of:

Docket No. ~~50~~
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 NORTH CAROLINA, :
 :
 Appellant :
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 vs. :
 :
 HENRY C. ALFORD, :
 :
 Appellee :
 :
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ARGUMENT OF:

P A G E

Jacob L. Safron, Esq., on behalf of
Appellant

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IN THE SUPREME COURT OF THE UNITED STATES

October

TERM 1969

BENHAM

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NORTH CAROLINA,)	
)	
Appellant)	
)	
vs)	No. 50
)	
HENRY C. ALFORD,)	
)	
Appellee)	
)	

Washington, D. C.
November 17, 1969

The above-entitled matter came on for argument at
12:45 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
 HUGO L. BLACK, Associate Justice
 WILLIAM O. DOUGLAS, Associate Justice
 JOHN M. HARLAN, Associate Justice
 WILLIAM J. BRENNAN, Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice

APPEARANCES:

JACOB L. SAFRON, ESQ.
 Office of the Attorney General
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 Raleigh, North Carolina 27602
 Counsel for Appellant

DORIS R. BRAY, ESQ.
 700 Jefferson Building
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 Greensboro, North Carolina 27402
 Counsel for Appellee

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 50. North Carolina against Alford.

Mr. Safron, you may proceed whenever you are ready.

ORAL ARGUMENT BY JACOB L. SAFRON, ESQ.

ON BEHALF OF APPELLANT

MR. SAFRON: Mr. Chief Justice and may it please the Court: This matter is before this Court upon direct appeal in the United States Court of Appeals for the Fourth Circuit.

On the Opinion that Court -- a divided opinion, Chief Justice Haynesworth dissenting -- holding that the statutory scheme for the imposition of capital punishment in North Carolina, in light of the opinion of this Court in United States v. Jackson, is unconstitutional. Therefore, the issue before this Court today is the import and impact of the Jackson opinion upon the laws of the State of North Carolina; the laws of our sister states and of the Federal Judiciary.

On the evening of November 22, 1963, Nathaniel Young, a Negro gentleman who operated a house that could best be described as a "party house" in the City of Winston-Salem, North Carolina, opened -- responded to a knock at the door, opened the door slightly and was cut down by a shotgun blast.

Earlier that evening Petitioner or the Appellee in this case, Henry C. Alford, had come to that house; Henry Alford also is Negro; he had been accompanied by a white girl.

1 They purchased several drinks of liquor by the drink, which
2 under North Carolina prohibition laws is not legal. And then
3 Henry Alford gave Nathaniel Young his last dollar to rent a
4 room in that house. Alford was accompanied by his girl friend
5 into that room and after several minutes they left because
6 Henry Alford no longer had any money.

7 He demanded that this young lady leave with him.
8 Nathaniel Young, the proprietor of this house, said, "She
9 can stay here if she wishes." An argument ensued and Henry
10 Alford ran off with the young lady's coat, being chased by
11 Nathaniel Young and someone else.

12 Approximately 15 to 20 minutes later, there was a
13 knock at the door and Nathaniel Young was cut down by a shotgun
14 blast.

15 Alford was indicted by the Grand Jury of the Wake
16 County Superior Court for murder in the first degree. Counsel
17 was appointed. Counsel thoroughly investigated the case.
18 Counsel investigated every witness named to him by Henry Alford,
19 except one, by the name of "Jap," who could not be found. In
20 each case the testimony of Alford's purported witnesses was
21 contrary to Alford's allegations as tottheir testimony.

22 Upon recall of the case, Alford, through Counsel,
23 entered a plea of guilty to murder in the second degree which,
24 under North Carolina law, carries a maximum punishment of 30
25 years imprisonment. He did not plead guilty to the capital

1 offense which, under the law then in the state, would have
2 carried a life sentence. He pled guilty to second-degree
3 murder.

4 The state then placed on the stand the detective,
5 E. I. Wetherby --

6 Q I didn't get that last statement. Did you say
7 the first degree murder carried only a life sentence?

8 A Upon a plea of guilty; upon a plea of guilty
9 it would carry a penalty of life.

10 Q Yes.

11 A But Alford pled guilty to murder in the second
12 degree, which carries at a maximum a sentence of 30 years.

13 The state placed on the stand after the tender of
14 the plea, Officer Weatherman.

15 If the Court please, I'm not sure whether or not
16 this Court has a copy of the actual trial transcript in that
17 case. I have a copy here that I'd like to file with the
18 Court, of the trial transcript. The appendix does not include
19 the entire trial transcript; it does not include the testimony
20 of the officer and other witnesses.

21 Q If there is, as there was here, a guilty plea,
22 I don't quite see why there is a trial transcript. There --
23 generally on a guilty plea there is no trial.

24 A Well, that's true, Your Honor. However, in
25 order to satisfy the Court of the evidence and also to give

1 the court an opportunity to judge the nature of the crime
2 for the purpose of sentencing. Evidence was presented.

3 Q And that's usual North Carolina procedure?

4 A Yes, Your Honor; it is.

5 Q After a guilty plea?

6 A Yes; the judges presiding at the trial want to
7 know exactly what happened.

8 Now, prior to the entry of a plea counsel obtained
9 this affidavit. The Defendant, Henry C. Alford, after being --

10 Q Now, is this in the record, Counsel?

11 A I'm not sure if this is in the record or not,
12 Your Honor. I'd like to submit a copy of this, also.

13 Q Well, we're getting a little bit outside of
14 the record.

15 A Well, I'd like to show what happened prior to
16 the entry of the plea, Your Honor, because --

17 Q And in what court was this first filed?

18 A This was filed as part of the post-conviction
19 proceedings in the Superior Court of Wake County.

20 Q And that court considered that document?

21 A Yes, Your Honor.

22 Q And then was it considered by another tribunal
23 after that?

24 A Oh, this has gone on and on, Your Honor. I'll
25 describe the routing --

1 Q Well, I just wanted to be sure we weren't
2 getting new material and new matters.

3 A No, this is part of the original post-convic-
4 tion proceeding. "That Attorney Fred G. Crumpler, who was
5 appointed by the court to represent the defendant, has con-
6 ferred with the defendant on numerous occasions. In addition
7 to this, this attorney has consulted on numerous occasions
8 with me in the presence of my sister and various friends in
9 preparation for the trial of this case.

10 "This attorney has advised me that I am charged with
11 a capital crime and if I plead "not guilty" the possible
12 verdicts of the jury, including the right of a jury to find me
13 not guilty. He has also advised me that if I am convicted of
14 first-degree murder, the law provides for a mandatory life
15 sentence of imprisonment if the jury recommends mercy; or a
16 mandatory death penalty if the jury does not recommend mercy.

17 "He has also advised me of my rights of appeal in
18 allevents, including a final right of appeal for mercy before
19 the Governor of the State of North Carolina.

20 "I hereby authorize Attorney Fred G. Crumpler to
21 tender a plea of guilty to the offense of second degree murder
22 to the court, which decision is of my own free will, made in
23 the presence of my sister and friends, who were also present
24 during the consultation with said attorney. It is my opinion
25 that this attorney is able, experienced and competent. The

1 above affidavit has been both read by me and to me by the
2 undersigned officer of the court." And it was read to the
3 defendant and signed in the presence of R. B. Haskins, Deputy
4 Clerk of the Superior Court of Wake County.

5 Q What was the occasion for that affidavit?

6 A Well, if Your Honor please, Counsel, as you are
7 all aware, is constantly under attack nowadays. Part of this
8 I submit, is Counsel's protection of himself and, of course,
9 this is also a written authorization to counsel to enter the
10 plea on his client's behalf to show that the plea was author-
11 ized. Perhaps in expectation of the Boykin decision of this
12 Court.

13 Q Was this before the Court of Appeals?

14 A Yes, Your Honor.

15 Q And it's not in the Appendix?

16 A I don't believe it is --

17 Q Well, it must be in the original record.

18 This was presented it, wasn't it, to the Court that accepted
19 the guilty plea?

20 A No, Your Honor; this was not. This was part of
21 the counsel's private records, but was then introduced into
22 evidence at the post-conviction hearing.

23 Q At the state post-conviction hearing?

24 A Yes, Your Honor; that's right.

25 Q And that must be here with the original record.

1 We have one copy of the original record.

2 A I haven't seen this with the original records
3 which have been transmitted to this Court, as the record has
4 been built up.

5 Q But you are sure it was before the District
6 Court and the Court of Appeals?

7 A Oh, yes; Your Honor.

8 Q And nobody mentioned it.

9 A It's footnoted, in the Court of Appeals.

10 Q Yes, that's what I mean. It's the only place
11 it's there.

12 A I'd like to read to the Court some excerpts
13 from the original file transcript to show the Court the case
14 the state had against this defendant.

15 "We then contacted Ruby McGill, where Alford
16 been living and Ruby, as a consequence of an interview with
17 her, said that she and Henry had been living together for some
18 three years; that they were at this address about five months;
19 that Henry left around dark, saying he would be back in a few
20 minutes. At about two and a half to three hours later he came
21 back and stated that he was breathing hard. Appeared to have
22 been running and stated 'G.D. s.o.b.'s been running me and I'm
23 going to kill 'em.'

24 "She stated that at that time he said Nathaniel
25 Young and he repeated it a couple or three times; that he was

1 going back and kill the s.o.b. and the other fellow with him,
2 also.

3 "She stated that he got his shotgun out of the ward-
4 robe and four shells; that she and Shirley -- that's another
5 woman who was there at the time -- asked him not to; told him
6 that there was no use in that and said that he kept repeating
7 that he was going back, and went out the door.

8 "We talked to Betty Jean Robinson who stated that
9 she was on the porch of a store at 1202 - 10-1/2 street, which
10 is little better, about half a block from the home, in the
11 direction of Nathaniel Young's home. And she stated that she
12 and Paul Hill were standing on the porch and Henry C. Alford
13 came by them with a gun.

14 "And her statement was: Ruby McGill stated that after
15 he left with the gun thathe came back at approximately 30 to
16 35 minutes and stated that: 'said, I done killed that
17 Nathaniel; I'm going to leave you with the furniture.' She
18 said, 'you don't have no business killing any man.'" And he
19 said, 'yes, I killed that g.d.s.o.b. I'm not going to have
20 anyone to kill me. I went to the door and when I shot him he
21 just turned his head around and fell to the floor.'"

22 The officer's testimony continues:

23 "While we was attempting to pick up Alford in regard
24 to this we went to the home of Sidney Lackey who lives down
25 a couple of houses across the street. And we first went to

1 his house around 11:00 o'clock and asked him if Henry had been
2 there. He said, after waking him, said that he had come in
3 there and told him: 'if the officers come looking for me,
4 tell them I haven't been here.' And I talked with Sidney
5 later and he stated that after we left he went out and found
6 Alford and asked him why we was looking for him and he told
7 him he shot a man."

8 And the testimony continues here with another wit-
9 ness that they found:"the young lady with whom Alford had
10 drinks later that evening, and that they went out and he
11 brought her two drinks of whiskey, for which he paid a dollar
12 and a half for; that he asked he for her address and her full
13 name; said that he had shot a man and that he'd be gone a
14 long time."

15 And the testimony goes on and on.

16 Q Andtthis, too, was also presented for the first
17 time in the post-conviction hearing in the state court?

18 A This is the original trial transcript, Your
19 Honor.

20 Q By "original," do you mean on the guilty plea?

21 A On the plea of guilty; prior to the acceptance
22 of the plea; subsequent to its tender. And the officer con-
23 cluded his testimony: "And the gun, in my opinion, smelled as
24 if it had been recently fired."

25 There was also presented at this original hearing,

1 upon the tender of the guilty plea, the testimony of Shirley
2 Wright, who is the young lady's girl friend who was in the
3 house at the time.

4 And she stated: "After he came in and got the gun,
5 I left." 'Well, describe exactly what happened when he came
6 to get the gun.' 'Well, when he come and got the gun I had
7 went to the back room and I had come out and he had got the
8 gun, you know, and he said, 'I'm going to kill that (blank).'
9 'So, he didn't say who and I didn't ask him. I just told him,
10 no, you know, don't do it. That's all he said to me.'"

11 Now, this is what was tendered to the court by the
12 detective at the time of Henry C. Alford's tender of his plea
13 of guilty to second-degree murder.

14 He then took the stand himself and, as appears in the
15 record, denied that he -- "ain't shot no man. From the
16 circumstances they say I'm guilty." He was sentenced to 30
17 years in prison.

18 Approximately three months later he filed a petition
19 for writ of certiorari in the North Carolina Court of Appeals.
20 The North Carolina Court of Appeals rejected the petition for
21 writ of certiorari, but remanded the case to the Superior
22 Court of Wake County for a plenary hearing under the North
23 Carolina Post-conviction Hearing Act.

24 In due course, with court-appointed counsel, the
25 hearing was held and the post-conviction judge found that the

1 tender of the plea was freely and voluntarily made.

2 Several weeks later Alford filed a petition for
3 writ of mandamus with the Clerk to the Wake County Superior
4 Court, the purpose of which, I'm really not sure. And that
5 was denied.

6 The next step was the filing of an application for
7 writ of habeus corpus with the Clerk of the United States
8 District Court of the Middle District of North Carolina. The
9 Court dismissed the petition at that time because Alford was
10 not within the jurisdiction of the Court, but within a week or
11 two he was transferred to a prison/unit that was in the jurisdic-
12 tion of that court and that court reinstated the application.

13 Subsequently, the Honorable Eugene Gordon, United
14 States Court Judge for the Middle District for North Carolina,
15 entered an opinion denying habeus relief.

16 Forty-eight days after the entry of Judge Gordon's
17 order, Alford filed notice of appeal. He also filed an
18 additional writ of habeus corpus, directly with the Fourth
19 Circuit Court of Appeals. A panel of the Fourth Circuit held
20 that the court did not have jurisdiction due to the late
21 filing of the notice of appeal; but that an additional applica-
22 tion of habeus corpus had been filed originally in that court.

23 Chief Justice Haynesworth of the Fourth Circuit,
24 entered an order concluding upon the original application in
25 that court that that plea of guilty was freely, voluntarily,

1 and understandingly entered.

2 Alford subsequently filed yet another application
3 for writ of habeus corpus with the United States District
4 Court for the Middle District of North Carolina and Judge
5 Gordon once again reviewed his contentions and denied relief.

6 From that denial, Alford once again appealed to the
7 Fourth Circuit Court of Appeals. And the Fourth Circuit Court
8 of Appeals, in reviewing that application concluded that the
9 statutory scheme in North Carolina, for the imposition of
10 capital punishment, was unconstitutional in light of the
11 United States v. Jackson. The Jackson decision, having been
12 decided in the interim between Judge Gordon's denial of habeus
13 relief, and the filing of the appeal.

14 Until 1949 in the State of North Carolina, upon a
15 conviction of a capital crime, the four capital crimes are:
16 murder, rape, arson, first-degree burglary. The death penalty
17 was automatically imposed.

18 In 1949 the legislature amended the various acts to
19 permit a jury to recommend mercy; and upon that recommendation
20 the defendant would be sentenced to life imprisonment.

21 In 1953, yet another statute was passed: 15-162.1,
22 which provided that upon the tender of a plea of guilty to a
23 capital crime, in writing and represented by counsel, if that
24 tender is accepted by the Solicitor of the State and approved
25 by the court, then life imprisonment would be mandatorily

1 imposed.

2 In view of that scheme, the Fourth Circuit concluded,
3 in light of Jackson, that the North Carolina statutory scheme
4 was invalid and held that Alford, who had tendered a plea of
5 second-degree murder, was coerced.

6 Early this year the legislature of North Carolina
7 repealed MCGS 15-162.1, the provision permitting the entry of
8 a plea of guilty to a capital offense.

9 It is of interest to note that at the present time
10 in North Carolina there are 11 defendants under sentence of
11 death. These 11 commence from sentences of death initially
12 imposed in February of 1963 to the present. From February of
13 1963 to March of this year, prior to the repeal of the statute
14 there are six defendants under sentence of death.

15 Q Can a defendant who pleads guilty in North
16 Carolina appeal from the judgment entered upon his plea of
17 guilty?

18 A Your Honor, it happens in just about every case
19 nowadays. A guilty plea, as you are well-aware, hardly stops
20 appellate procedures.

21 Q But, by statute is there an appeal? I'm not
22 talking about collateral attack; I'm talking about --

23 A We have had -- not in capital cases yet, but in
24 the typical guilty plea situation, our office is inundated
25 with direct appeals from guilty pleas.

1 Q Has your Supreme Court ruled on it, as to
2 whether or not there is an appeal?

3 A They, as I say, in this capital situation --

4 Q I am talking about that here.

5 A I am not familiar with a ruling, but we have
6 had innumerable situations. Each week we are flooded with
7 appeals which are noted from guilty pleas. So, I would assume
8 due to the vast volume of these appeals that there is no
9 question about it.

10 Q I don't quite understand your reference. Did
11 you say eight capital cases since 1850 --

12 A No, Your Honor; it was this: since February,
13 1963, in 11 instances, juries have refused to recommend mercy.
14 Of these 11, six were for the time period between February of
15 1963 through March of this year; subsequent to the repeal of
16 a statute permitting a capital defendant to enter a plea of
17 guilty. Now, all capital defendants are required to stand
18 trial before a jury.

19 We have had five instances in seven months where
20 juries have refused to recommend mercy. And along the same
21 line I should note that the Judicial Council of the state of
22 North Carolina, official advisory body on matters of legal
23 policy, this very week-end -- in fact in yesterday's paper,
24 recommended that the provision added in 1949 permitting the
25 jury to recommend mercy, be repealed and make it solely an

1 issue of law -- excuse me -- solely an issue of fact for the
2 jury to determine guilt or innocence, and permit the law,
3 solely to impose the punishment.

4 Q What punishment?

5 A Death.

6 However, may it please the Court: In the Alford
7 case we're really not concerned with this, because although
8 the Fourth Circuit used Alford as a form to completely strike
9 down capital procedures of North Carolina. Alford entered a
10 plea of guilty to second-degree murder, which completely
11 insulated him, not only from the death penalty, but also
12 from the imposition of life imprisonment.

13 The Jackson case decided in light of the Federal
14 Kidnapping Act, was in light of the Federal criminal procedure
15 in which a Federal criminal defendant could waive a jury trial
16 and be tried by a judge, in North Carolina, by constitution,
17 a criminal defendant cannot waive his right to a jury trial
18 and a criminal defendant who pleads not guilty must be tried
19 by a jury. A bench trial is constitutionally impermissible.

20 Q Mr. Saffron, to go back to what you said a moment
21 ago, that the effect that the United States Court of Appeals
22 for the Fourth Circuit in this case, used this case as a
23 vehicle by which to completely strike down and invalidate the
24 procedures for capital punishment in your state?

25 A Yes, Your Honor.

1 Q I hadn't read the opinion that way; I just
2 thought they had reversed the conviction in this case because
3 they found it was involuntary.

4 A This is one aspect --

5 Q Am I mistaken?

6 A That's one aspect in the case, Your Honor. But
7 the opinion states quite clearly that in the present posture
8 of the North Carolina statutes the various provisions for the
9 imposition of the death penalty are unconstitutional, hence
10 capital punishment may not, under Jackson, be imposed under
11 any circumstances.

12 Q I'm afraid -- I have the appendix. What page
13 was that? I missed that.

14 A It appears to be on Page 34, I believe, of the
15 appendix, Your Honor.

16 The Supreme Court of North Carolina, in state
17 repeal has considered the United States v. Jackson and the
18 Supreme Court of North Carolina had concluded that Jackson is
19 not applicable to our procedures. For the Federal system and
20 the various statutes under consideration, upon conviction, the
21 law fixed a maximum of life or a term of years. However, the
22 jury could, in these various situations, recommend capital
23 punishment, thereby upgrading the punishment permissible by
24 law.

25 I see, Your Honor, that my time is very quickly

1 coming to a close in this. I would like to quickly point out
2 Chief Justice Haynesworth's dissent, in which he pointed out
3 that this is actually a situation of plea bargaining; that
4 -- and I would like to point out to this Court that in
5 Halliday versus United States, this tribunal noted that 80
6 percent of all convictions of the Federal system are upon
7 pleas of guilty or nolo contendere. And various researchers
8 have noted that 90 percent of all convictions nationally are
9 upon pleas of guilty of nolo contendere.

10 If plea bargaining in its various forms is to be
11 struck down, it would be almost a mortal blow to the administra-
12 tion of criminal justice in the United States.

13 Additionally, we come to the very issue of whether
14 or not this opinion should be retroactive. I think this is
15 absolutely vital. In North Carolina, as of February 1st of
16 this year, there were 448 defendants serving life -- terms of
17 life imprisonment. We have termed that 68.8 percent of these
18 defendants entered pleas of guilty because at the time they
19 were brought to trial the state had overwhelming proof of
20 their guilt and they pled guilty.

21 Now, we reach the weird paradox that the stronger
22 the case the state had to present against the defendant, the
23 stronger his argument would possibly be under Jackson. The
24 weaker the state's case, then of course, the weaker would be
25 the defendant's argument, that he was coerced to save his life.

1 The various Federal Courts which have considered
2 this up until now have almost uniformly held that that would
3 be devastating.

4 In the State of New Jersey, in which Justice
5 Brennan is well aware, the non-vult procedure has been in
6 effect since 1893. The effect in New Jersey would be
7 absolutely devastating if every murderer who pled not vult,
8 could now say the plea was involuntary.

9 In North Carolina, counsel has submitted an opinion
10 from New York State this week in which New York State statutes
11 were held unconstitutional, in light of Jackson and Alford,
12 by District Court there. The effect upon the State of New
13 York would be devastating.

14 In the Federal system you have --

15 Q Oh, I didn't understand the Court of Appeals
16 to say it would be automatic in every case. I thought it
17 said that if something was the primary or major factor in the
18 plea.

19 A Granted, Your Honor, but still I submit this:
20 that at the present time I have already been involved in more
21 than a dozen such cases. All the Petitioner does is say,
22 "Well, I was afraid of the death penalty." Unless you accept
23 the fact that you have to retry the case in this collateral
24 hearing and show that the state evidence was so overwhelming
25 that what was available to the state at the time was truly the

1 basis of the man's plea of guilty. However, I submit this,
2 that we reached the conclusion that the stronger the state's
3 case, frankly the defendant says, "If I had to be tried --
4 if the case was that heinous, it may very well have emotional
5 overtones. That's the very reason that there have now been
6 five capital convictions in the last seven months. The
7 heinous crimes that previously the defendant insulated himself
8 through the device of a guilty plea. These defendants are
9 now having to stand trial and have their cases submitted;
10 have it be submitted to juries.

11 Q But I understood that a defendant under your
12 laws that existed at the time of this trial, did not have a
13 right -- an absolute right to plead guilty, and had to be --

14 A The right is not absolute, Your Honor.

15 Q -- that it had to be accepted by both the
16 prosecutor and the court.

17 A That's true.

18 Q And presumably, in the most flagrantly and
19 outrageously heinous offenses of which you are speaking, if
20 that provision means anything, probably the prosecutor and the
21 court would not have accepted the guilty plea; isn't that
22 fair to assume?

23 A Actually, Your Honor, I don't believe that
24 really is fair to assume, because --

25 Q What was the purpose of giving the prosecutor

1 and the court the power to veto a guilty plea?

2 A I believe most prosecutors are happier to
3 accept a plea and have the case end there and then, rather
4 than having to go have lengthy trials and all the various
5 other collateral attacks which do occur.

6 Q The law now, as I understand it, is that a
7 person indicted or charged with a capital offense, cannot
8 plead guilty in your state.

9 A That's right.

10 Q Under any circumstances?

11 A Under no circumstances, to a capital offense.

12 Q Could he plead guilty in a case such as this
13 one today, to second-degree murder.

14 A Yes, he could, Your Honor. He could plead
15 guilty to the lesser-included offense. Of course, that's part
16 of the issues presented in this case. If, of course, the
17 plea were freely, voluntarily and understandingly entered and
18 in each instance the evidence was adduced upon the tender of
19 the plea for the court to review.

20 Q But not after the Court of Appeals judgment?

21 A I'm sorry, Your Honor, I --

22 Q Well, the Court of Appeals decided here that
23 this kind of plea is invalid.

24 A Well, in this particular instance, Your Honor,
25 I don't think they really said that. What they said was this:

1 you have a situation where, although --

2 Q Well, let me -- maybe you didn't understand
3 -- the North Carolina Court has repealed some statutes or the
4 legislature has repealed some statutes. But, if the Court of
5 Appeals' decision stands would -- could the state rely on a
6 plea in a case just like this one in the future?

7 A In a case such as this one, YOUR Honor, where
8 the defendant gets up after tendering his plea and then starts
9 saying, "I ain't shot no man," would come directly within the
10 Alford opinion.

11 However, I say this, that if a defendant tenders a
12 plea and the court is satisfied it is freely, voluntarily and
13 knowingly entered and you don't -- and the defendant is
14 admittedly guilty --

15 Q So that the -- in spite of the repeals in the
16 statutes, the Court of Appeals decision or opinion would still
17 apply in a case like this?

18 A In a case like this it would, Your Honor. But
19 if the defendant were admittedly guilty; it would not.

20 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Safron.

21 MR. SAFRON: Thank you.

22 MR. CHIEF JUSTICE BURGER: Mrs. Bray, before you
23 get started, perhaps you can clear something up for me. I
24 have not found in your brief any discussion of what transpired
25 at the time of the guilty plea and sentencing; that is

1 the disclosure of the case against Alford, which has been
2 discussed by your friend. Have you covered that, if not,
3 will you at some point in your argument, at your own con-
4 venience, give us your view of the effects of that testimony
5 as relates, for example, to compliance or substantial com-
6 pliance with the general requirements of Rule 11 of the Federal
7 Rules.

8 MRS. BRAY: The transcript from which he read --

9 MR. CHIEF JUSTICE BURGER: Could you raise your
10 voice a little bit; we have some difficulty hearing you.

11 MRS. BRAY: Yes, sir.

12 The transcript from which Mr. Safron read is the
13 transcript at the time when the guilty plea was tendered. It
14 had been a part of the record, I believe, since the District
15 Court's consideration of the last habeus petition -- there was
16 a prior habeus petition, also. But this transcript was not
17 available in the prior consideration in this case by the
18 Court of Appeals.

19 The procedure in North Carolina, upon tender of a
20 guilty plea is that the state in verity form (?) presents
21 what it contends is its evidence; that it's a hearsay, sort
22 of narrative by the state which is subject to no rules of
23 evidence and the defendant puts on no evidence. I presume
24 that this is for the benefit of helping the judge in sentencing.

25 CHIEF JUSTICE BURGER: This is so that the judge

1 will not accept the plea of guilty unless there is some
2 evidence that shows him in a very substantial way that the
3 state has a case; is that not true?

4 MRS. BRAY: I think that's true.

5 MR. CHIEF JUSTICE BURGER: Well, is that not very
6 important in this whole process? Is it not, indeed, the key
7 to the whole problem?

8 MRS. BRAY: Perhaps. Because it tends to -- I
9 suppose you are suggesting that that tends to establish that
10 defendant is pleading guilty for some other reason than
11 because of the unconstitutional statutory scheme. Is that
12 what you are suggesting?

13 MR. CHIEF JUSTICE BURGER: Well, with a second-
14 degree murder plea he was not confronted with any possibility
15 of the death sentence; is that not true?

16 MRS. BRAY: But Your Honor, the second-degree murder
17 plea was a plea of guilty. The prisoner was never given the
18 option to plead "not guilty" of the second-degree murder. His
19 choice always was between risking the death penalty and plead-
20 ing guilty. He never had an opportunity to plead "not guilty"
21 to anything but first degree murder.

22 MR. CHIEF JUSTICE BURGER: Well, in this equation,
23 do you say we must -- the Court in dealing with it must weigh
24 the statement of the case against him against his current
25 statement -- his later statement that he was not guilty?

1 MRS. BRAY: No, sir; I think not. I think what the
2 defendant -- the only thing that the defendant wants to
3 establish is that his guilty plea is a result of the coercive
4 effect of the statutory scheme which has been held uncon-
5 stitutional.

6 MR. CHIEF JUSTICE BURGER: Well, of course --

7 MRS. BRAY: And in one sense, the stronger the case
8 for the state, the more coerced he is, because the more fear
9 he has of the possibility of the death sentence.

10 MR. CHIEF JUSTICE BURGER: Then you will agree that
11 the stronger the state's case against him by way of evidence
12 the greater the coercion, as you characterize it?

13 MRS. BRAY: I think that's true, as a matter of
14 fact, in this case. And this is what the defendant's attorney
15 continued to stress.

16 MR. CHIEF JUSTICE BURGER: You have cleared up the
17 points that were troubling me, so you may proceed.

18 MR. JUSTICE BLACK: I don't quite understand what
19 you are arguing. Did I understand you to say that the coercion
20 here is, in effect, that a man charged with murder is not
21 allowed to plead guilty to murder in the second-degree?

22 MRS. BRAY: No, sir; that statute was a result of
23 this case in the Fourth Circuit at the time that this
24 defendant was charged. He could plead guilty and avoid the
25 death penalty.

1 MR. JUSTICE BLACK: And is that what's said to be
2 coercive?

3 MRS. BRAY: Yes, sir.

4 MR. JUSTICE BLACK: Well, isn't that the rule in
5 every State in the Union?

6 MRS. BRAY: No, sir. I think it's the rule in six
7 or seven states. Some states have recently changed the rules.
8 I think the states affected are about eight.

9 MR. JUSTICE STEWART: Well, in every State in the
10 Union I suppose plea bargaining is not unknown.

11 MRS. BRAY: Yes, sir.

12 MR. JUSTICE STEWART: So to that extent your answer
13 to my brother Black's question would be "yes," just as a
14 generality?

15 MRS. BRAY: Yes, because plea bargaining isn't
16 coercive in the same way that the North Carolina statutory
17 scheme for capital punishment is coercive. There is a vast
18 difference in degree because under the North Carolina law
19 you had to risk your life in order to plead not guilty and to
20 have a jury trial. And normally in plea bargaining you are
21 just bargaining for a number of years and not for your life.

22 MR. JUSTICE STEWART: But, suppose, if we should
23 accept your argument, that which is the -- which is also the
24 basis for the majority opinion in the Court of Appeals, the
25 logical result would be, would it not, to find that in every

1 case where there was plea bargaining you would have to find
2 that there had been a coerced plea of guilty? That's what
3 I understood you to suggest.

4 MRS. BRAY: I suggest that that's a possible inter-
5 pretation of the United States v. Jackson. I say --

6 MR. JUSTICE BLACK: As I understand it what has been
7 and
8 held is that when a crime is charged/there can be lower crimes
9 involved in it, indictment for murder in the first degree;
10 murder in the second degree; manslaughter; manslaughter in the
11 second; assault and battery, that anything when there is any
12 plea rendered beneath the first degree that that's automati-
cally coercive and such a law unconstitutional.

13 MRS. BRAY: I think that probably if the defendant
14 is, in fact, indicted for first degree murder or any other
15 capital crime and he has never been given any opportunity to
16 plead not guilty to any other crime other than the capital
17 crime, then, under Jackson, his plea is coerced by the --

18 MR. JUSTICE BLACK: But, he was guilty and pleaded
19 second; didn't he?

20 MRS. BRAY: Yes, sir; but he was only given the
21 opportunity to plead "guilty" to second-degree murder. He
22 could never plead not guilty to it and have a trial and at the
23 same time avoid the death penalty.

24 MR. JUSTICE BLACK: It's unconstitutional unless a
25 defendant -- if a defendant's charged with first-degree murder

1 it's unconstitutional to plead guilty to any other offense
2 because it's coercive, lesser offense.

3 MRS. BRAY: Well, I think it's unconstitutional in
4 the same way that it's unconstitutional if you let him plead
5 guilty to first-degree murder.

6 MR. JUSTICE MARSHALL: Well, suppose it had been
7 manslaughter?

8 MRS. BRAY: Well, the Fourth Circuit said that when
9 you plead guilty to the lesser-included offense then that puts
10 a greater burden on the defendant to show that his plea was
11 a result of the coercive nature of the statute.

12 MR. JUSTICE MARSHALL: Suppose the first-degree
13 indictment had been withdrawn and second-degree indictment
14 had been filed?

15 MRS. BRAY: Then I wouldn't have a case.

16 MR. JUSTICE MARSHALL: What's the difference?

17 MRS. BRAY: The difference is that he can assert
18 his right to have a trial and to have his guilt or innocence
19 found by a jury and still not risk the death penalty.

20 MR. JUSTICE MARSHALL: No, I think we misunderstood--
21 A person indicted for first-degree murder, they can't bargain,
22 so they withdraw the first-degree indictment and put in a
23 second-degree indictment and he pleads guilty to the second-
24 degree indictment. I understood you to say that's all right.

25 MRS. BRAY: Because the penalty for second-degree

1 murder is the same regardless of whether he pleads guilty or
2 innocent.

3 MR. JUSTICE MARSHALL: So that would be all right.

4 MRS. BRAY: The unconstitutional --

5 MR. JUSTICE MARSHALL: He's still get the same 30
6 years.

7 MRS. BRAY: Yes, sir; but under the first-degree
8 murder statutes as they stood at the time that this defendant
9 was tried, if he pleaded not guilty he got the death penalty;
10 if he pleaded guilty he only got life imprisonment. And what
11 I understand U. S. v. Jackson says is: that you can't set up
12 two different penalties depending upon whether a man asserts
13 his rights to a trial by jury or whether he doesn't. That's
14 the coercive offense.

15 MR. JUSTICE STEWART: I think you've in a sentence,
16 insofar as a sentence can do so, have described the holding in
17 the Jackson case, but the Jackson case had nothing to do with
18 the plea; did it? It had to do with putting a penalty on a
19 person who exercised his right to a jury trial.

20 MRS. BRAY: That's true.

21 MR. JUSTICE STEWART: And it was decided on a motion;
22 that is, there had been no trial; there had been no plea;
23 isn't that correct?

24 MRS. BRAY: Yes, sir; which is why one of the issues
25 now is retroactivity of that decision.

1 MR. CHIEF JUSTICE BURGER: Mrs. Bray, suppose the
2 trial in this case had started and the Government -- the
3 prosecution put on its entire case and had five or six eye-
4 witnesses and the witnesses to whom he had threatened the
5 crime in advance and the witnesses to whom he had admitted
6 the crime after the offense; and then the State rested. And
7 then he decided to enter a guilty plea to second-degree; would
8 you say he was coerced by this overwhelming, undisputed
9 evidence against him or coerced by this same problem that you
10 say exists in the statute?

11 MRS. BRAY: Well, if the Jackson opinion is com-
12 pletely retroactive then he would be coerced in any event or
13 he would be presumed to be coerced and he would be entitled to
14 some sort of relief.

15 MR. CHIEF JUSTICE BURGER: Well, as Mr. Justice
16 Stewart just pointed out, Jackson dealt with a case where the
17 man had a trial. Now, I'm giving you a hypothetical case
18 where the trial started with undisputed, overwhelming, con-
19 clusive testimony against him, eyewitnesses and all. Now, of
20 course he is under pressure; isn't he? No one would dispute
21 that. But do you say that that's an impermissible kind of
22 coercion that society is exercising on him, because the facts
23 destroy his possibility of getting an acquittal?

24 MRS. BRAY: The dissent in Jackson took the position
25 that I think you are getting at, and that is that the statute

1 should not be declared unconstitutional; rather there should
2 be a burden on the court to determine that the coercive nature
3 of the statute had nothing to do with the plea; but that was
4 the dissent. And the majority in Jackson held that the
5 statute was unconstitutional because it set up two different
6 penalties, depending on whether you pleaded guilty or innocent.

7 MR. JUSTICE STEWART: Well, that is not quite true,
8 if I can make at least a slight correction. It didn't have to
9 do with whether or not you pleaded guilty or innocent; it had
10 to do with whether or not you asked for a jury trial. And in
11 the Federal statute you could have had a bench trial, pleading
12 not guilty and the Federal statute involving Jackson -- and the
13 statute was not held unconstitutional -- only one part of it
14 was, the death penalty part -- because that death penalty was
15 put on as a punishment for anybody who exercised his con-
16 stitutional right to a jury trial.

17 And the holding in Jackson simply was that that part
18 of that Federal statute was unconstitutional; and only that
19 part which provides for a death penalty. It didn't involve
20 anybody who had pleaded either guilty or not guilty, because
21 that case was decided on a motion attacking the constitution-
22 ality of the statute. And the

23 And the District Court had held the entire statute
24 unconstitutional. We reversed that holding and held simply
25 that the death sentence part of the statute was unconstitutional.

1 But it didn't involve pleading guilty of not guilty. It
2 involved simply the exercise of the right to a jury trial.
3 Am I wrong in my recollection of that?

4 MRS. BRAY: I thought it involved both whether you
5 pleaded guilty or not guilty and whether or not you wanted a
6 jury trial.

7 In North Carolina the jury trial alone cannot be
8 waived. You have to waive everything or nothing. So, the
9 question is whether you plead guilty and in doing so, also
10 waive your right to a jury trial, or whether you pled not
11 guilty.

12 The North Carolina statute is not severable; at
13 least has never suggested any manner in which it could be
14 severable, because of the structure of the statute. The
15 statute imposes death unless the jury recommends life. And
16 then another statute sets up the ability of a defendant to
17 plead guilty and save an automatic life sentence.

18 MR. JUSTICE BRENNAN: May I ask a question, Mrs.
19 Bray, if the Court of Appeals judgment stands, I gather
20 Alford has to be retried?

21 MRS. BRAY: Yes, sir.

22 MR. JUSTICE BRENNAN: And do I understand if he's
23 found guilty under the present sentencing statutes of North
24 Carolina he automatically gets the death penalty?

25 MRS. BRAY: Unless the jury recommends mercy.

1 MR. JUSTICE BRENNAN: I thought that power to --

2 MRS. BRAY: The jury still may recommend mercy do
3 they not plead guilty. And a guilty plea carries an automatic
4 life imprisonment. The guilty plea was treated as a guilty--

5 MR. JUSTICE BRENNAN: So, on the retrial if the jury
6 doesn't recommend mercy then this is rather a pyrrhic victory
7 for Alford; isn't it?

8 MRS. BRAY: Well, that depends on whether the recent
9 case of North Carolina against Pierce applies. And also,
10 Pennsylvania against the United States.

11 I would suggest that the state has made an election
12 to charging second-degree murder and they probably precluded
13 a retrial under first-degree murder.

14 MR. JUSTICE STEWART: Well, I suppose if this court
15 is right, he couldn't plead guilty to second-degree murder,
16 could he?

17 MRS. BRAY: Well, if he is -- this is only -- there
18 is a problem. If he has no -- if he can plead not guilty the
19 second time around and not risk the death penalty then I think
20 he could also plead guilty. Because then he woulddhave the
21 same exposure either way.

22 MR. JUSTICE STEWART: On the second degree charge?

23 MRS. BRAY: Yes.

24 MR. JUSTICE STEWART: Is that what we are talking
25 about?

1 MRS. BRAY: Yes, sir. And if he had ever been
2 given that option then I wouldn't have a case.

3 MR. JUSTICE BLACK: I thought under the Court's
4 opinion he couldn't even plead guilty to manslaughter; it
5 would be presumed to be coercive.

6 MRS. BRAY: Well, I don't believe the Court said it
7 would be presumed to be coercive in this case.

8 MR. JUSTICE BLACK: They just said it would be;
9 didn't they, and set it aside.

10 MRS. BRAY: Yes, sir; but the Fourth Circuit found
11 that as a matter of fact, this guilty plea was coerced. And
12 they said that if the defendant pleads guilty to the lesser
13 included offenses then you have a greater burden to show that
14 his plea of guilty was a result of the unconstitutional
15 coercive effect of the statutory scheme.

16 So, I suppose if you kept going down under the
17 Fourth Circuit's rule then at some point the coercion effect
18 of the statute would lose its strength.

19 MR. JUSTICE BLACK: How could you figure that?
20 You're just trying to get away from a jury trial --

21 MRS. BRAY: Yes, sir; I think that's right.

22 MR. JUSTICE BLACK: Better to be hung?

23 MRS. BRAY: Yes, sir.

24 MR. JUSTICE BRAY: I don't see what degree would
25 have to do with it, whether it's manslaughter, or as it is in

1 my state he could be tried for -- Alabama -- he could be
2 convicted also for assault and battery or simple assault.

3 MRS. BRAY: If --

4 MR. JUSTICE BLACK: Is that true in North Carolina?

5 MRS. BRAY: Yes, sir, I'm afraid that is true.

6 The Fourth Circuit said that the burden was on the
7 defendant to show that his guilty plea was, in fact, coerced
8 by the death penalty.

9 And I suppose that if he's proven guilty and the
10 state's willing to let him get off with an assault charge that
11 maybe the fear of the death penalty really wasn't the motiva-
12 ting force in his pleading guilty. If the state's willing to
13 accept that low a degree of the included offense, then the
14 state probably doesn't have a very good case for obtaining the
15 death sentence.

16 MRS. BRAY: I'd like to emphasize that this Court
17 inmost of its decisions on the question of retroactivity of
18 a constitutional principle, has established that in any case,
19 even though a particular constitutional principle is declared
20 to be perspective only in its application, any defendant who
21 can show that the facts of his case actually show an abuse of
22 due process is entitled to relief.

23 For example in the case of Davis against North
24 Carolina. This court held that Davis's confession was, in
25 fact, coerced, even though the Court had just held that

1 Miranda and Escobedo were not retroactive. And the Court held
2 that the principles established in Miranda and Escobedo were
3 relevant to the question of whether or not Jackson's coerced
4 confession was, in fact, coerced.

5 This is the case of a coerced guilty plea and it
6 seems to me that the principle laid down by the Court in
7 United States v. Jackson is relevant to the issue of whether
8 or not this guilty plea was, in fact, coerced. Now, in this
9 record there seems to be no other conclusion one can reach
10 than that the defendant pleaded guilty in order to escape the
11 death penalty. He has never, so far the record shows, ever
12 admitted his guilt to anyone, not even his attorney. His
13 attorney testified at the first conviction hearing that the
14 defendant always said that he was innocent, but that he would
15 plead guilty in order to avoid the death penalty.

16 MR. JUSTICE STEWART: Well, according to what was
17 introduced at the trial he admitted his guilt, or at least he
18 admitted that he shot a man to the woman with whom he was
19 living when he returned; am I wrong about that?

20 MRS. BRAY: But I point out that is only what the
21 state said it has as evidence. The woman was not at the trial.
22 There was no evidence as such. He was never given --

23 MR. CHIEF JUSTICE BURGER: It's true unless it's
24 refuted; isn't that the whole purpose of that presentation?

25 MRS. BRAY: I'm not sure that the defendant had any

1 right to refute it. I think that the procedure is that the
2 state simply narrates what it contends is its evidence.

3 MR. CHIEF JUSTICE BURGER: And is the defendant in
4 the courtroom at the time that narration is given in the
5 record?

6 MRS. BRAY: Yes. And after the narration the
7 defendant said, "I ain't guilty; I ain't killed no man and I'm
8 only pleading guilty because they told me they were going to
9 gas me if I didn't."

10 And the record shows that it took a great deal of
11 persuasion ever to get him to plead guilty, that his attorney
12 approached his sister and his cousin, who was a policeman, and
13 that they prevailed upon him to plead guilty because the
14 attorney said he couldn't win the case and because the attorney
15 said that the facts were aggravated because he had been out
16 with a white woman just before the murder.

17 I'd like to say a few words about the retroactive
18 effects of United States v. Jackson. The principles which
19 this Court has set up in determining activity are: the
20 purposed to be served by the new standards; the effect of
21 reliance by law enforcement officials; and the effect of the
22 decision of retroactivity on the administration of justice.

23 Now, in one of the more recent cases on this subject,
24 Desist against the United States, the Court pointed out that
25 the purpose to be served by the new constitutional rule is

1 paramount; that only if the purpose -- and does not clearly
2 dictate retroactivity or nonretroactivity, do you go to the
3 second and third points: the reliance factor and the effect
4 on the administration of justice.

5 Now, in this case under North Carolina law in order
6 to avoid the coercive nature of the capital punishment pro-
7 visions of the statutes you have to plead guilty; you may not
8 have a bench trial; you have no choice but to completely waive
9 your right to a trial at all, which means that you waive your
10 right to a trial, you waive your right to have your guilt
11 proven by the state. You waive your right to cross-examine
12 and confront your witnesses; you waive your right to a jury
13 trial.

14 Now, if the fact is to be considered in determining
15 whether or not a constitutional principle is retroactive is
16 whether or not the defendant has been deprived of a fair trial
17 and whether or not the new constitutional principle really
18 purifies the fact-finding process of the Court. Now, if the
19 right of counsel is important enough to retroactivity then
20 surely the right to any trial at all is important enough.

21 And it's very possible, it seems to me that in a
22 situation where a man with a first-grade education is told by
23 his attorney that he can't win the case and that the facts are
24 aggravated and the jury are therefore not going to be favor-
25 able toward his position that he may very well plead guilty,

1 when in fact he's innocent, because he's being forced to
2 gamble with his life. And it seems to me there is a real
3 possibility of a danger of an innocent person being convicted
4 under this sort of coercive statute.

5 If there are no further questions.

6 MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Bray.
7 I think your time is up, Counsel. Thank you for your sub-
8 missions and Mrs. Bray, you acted at the appointment for the
9 Court. We thank you for accepting the appointment and your
10 responsibilities.

11 Case is submitted.

12 (Whereupon, at 1:43 o'clock p.m. the argument in the
13 above-entitled matter was concluded)