

ASSISTANT ATTORNEY GENERAL ED CARNES

FROM 1980 TO 1985

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Any tribute to Judge Ed Carnes should include a discussion of his work as a lawyer at the Alabama Attorney General's Office. Unique to this circuit and this State, all of Alabama's active Eleventh Circuit judges served in the Attorney General's Office earlier in their careers.¹ For his part, Judge Carnes was an assistant attorney general from 1975 to 1992, and the head of the office's capital litigation division beginning in 1981.² In fact, since he graduated from Harvard Law School in 1975, Judge Carnes has had only two jobs: Alabama Assistant Attorney General and United States Circuit Judge.

This Essay is about Judge Carnes's first act. Specifically, we recount a series of cases that Carnes argued in the Supreme Court of the United States and their effect on Alabama's criminal justice system: *Beck v. Alabama*, 447 U.S. 625 (1980); *Hopper v. Evans*, 456 U.S. 605 (1982); and *Baldwin v. Alabama*, 472 U.S. 372 (1985). Early in his career between 1980 and 1985, Carnes litigated these cases as part of the State's sustained effort to create a constitutional system of capital punishment after the Supreme Court temporarily halted the death penalty in the 1970s. This history underscores the significant impact that Carnes's litigation work had, and continues to have, on Alabama law. It also hints at the careful jurist and colorful writer³ he would eventually become.

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1. Judge William H. Pryor Jr. was the Attorney General of Alabama from 1997 to 2004 and a deputy attorney general for two years before that. *See Hon. William H. Pryor Jr.*, U.S. CT. APPEALS FOR ELEVENTH CIR., <http://www.ca11.uscourts.gov/judges/hon-william-h-pryor-jr> (last visited Dec. 3, 2017). Judge Kevin C. Newsom was the Solicitor General of Alabama from 2003 to 2007. *See Hon. Kevin C. Newsom*, U.S. CT. APPEALS FOR ELEVENTH CIR., <http://www.ca11.uscourts.gov/judges/hon-kevin-c-newsom> (last visited Dec. 3, 2017).

2. *See Hon. Ed Carnes*, U.S. CT. APPEALS FOR ELEVENTH CIR., <http://www.ca11.uscourts.gov/judges/hon-ed-carnes> (last visited Dec. 3, 2017).

3. One commentator described Judge Carnes's written opinions as "crackl[ing] with personality," "[c]onversational," "often blunt," and "highlighted by biting zingers." Alyson M. Palmer, *Smarts and Zingers*, DAILY REP. (Feb. 12, 2009), <https://www.law.com/almID/1202551783683>.

The Law Before Carnes

In 1972, the year that Carnes started law school, the United States Supreme Court held the death penalty unconstitutional in *Furman v. Georgia*.⁴ The Court's fractured opinion in *Furman* found that the chief constitutional defect in the death penalty was the degree of discretion that then-existing statutes gave to the judge and jury in determining whether the death penalty should be imposed in any particular case. The members of the majority in *Furman* were concerned that "no standards govern the selection of the [death] penalty" such that "the uncontrolled discretion of judges or juries" determines whether a defendant "should die or be imprisoned."⁵ The Court held that "these discretionary statutes are unconstitutional in their operation."⁶

At the time of *Furman*, Alabama's death penalty statute (like almost all others) assigned significant discretion to the jury. Although no one had been executed in Alabama since 1965,⁷ twenty-three people were on Alabama's death row in 1972.⁸ Applying *Furman*, the Alabama Supreme Court held Alabama's statute unconstitutional and commuted these defendants to life imprisonment.⁹

Three years after *Furman*—i.e., the same year Carnes graduated from law school—the Alabama legislature enacted a new death penalty statute that it believed would solve the constitutional infirmities in the old regime.¹⁰ This new statute eliminated the death penalty for all crimes except intentional murder, listed fourteen discrete "aggravating offenses" that would make an intentional murder a capital offense, mandated that the jury that convicted a defendant of one of these offenses "fix the punishment at death" on a special verdict form, and directed a sentencing judge to balance various factors in determining whether to impose a sentence of death or life without parole.¹¹

The year after the Alabama legislature passed this remedial statute, the United States Supreme Court reentered the fray with a series of five cases. A plurality of the Court struck down remedial capital sentencing statutes in *Woodson v. North Carolina* and *Roberts v. Louisiana* because they

4. *Furman v. Georgia*, 408 U.S. 238 (1972).

5. *Id.* at 253 (Douglas, J., concurring).

6. *Id.* at 256–57.

7. *Beck v. State*, 396 So. 2d 645, 652 (Ala. 1980).

8. *Id.* at 653 & n.3.

9. *See id.*; *see also* *Hubbard v. State*, 274 So. 2d 298, 300 (Ala. 1973).

10. *See* Act of Sept. 9, 1975, No. 213, 1975 Ala. Laws 701 (codified at ALA. CODE §§ 13-11-1 to -9 (1975), recodified at ALA. CODE §§ 13A-5-30 to -38 (1975)), *repealed by* Act of Mar. 31, 1981, No. 81-178, 1981 Ala. Laws 203, § 20 (codified at ALA. CODE § 13A-5-57 (1982)).

11. *See* Nathan A. Forrester, *Judge Versus Jury: The Continuing Validity of Alabama's Capital Sentencing Regime After Ring v. Arizona*, 54 ALA. L. REV. 1157, 1166–67 (2003).

attempted to solve the problem of jury discretion by making the death penalty *mandatory* for certain offenses.¹² But, on the same day, a plurality of the Court upheld new statutes from Georgia, Florida, and Texas, which curtailed jury discretion by requiring a finding of an aggravating factor in addition to an intentional murder.¹³ Given that Alabama's statute had features of both the constitutional and unconstitutional regimes, it was only a matter of time before the Court would have to weigh in on its constitutionality.¹⁴

This was the ever-shifting state of the law when a young Ed Carnes began his career as an assistant attorney general. At the Attorney General's Office, Carnes set to work prosecuting various criminal appeals,¹⁵ impeaching a county commissioner,¹⁶ and representing the Judicial Inquiry Commission and the prison system.¹⁷ In 1980, after practicing law for only five years, Carnes also found himself litigating a case on the merits in the United States Supreme Court, which challenged the constitutionality of the 1975 capital punishment statute.

Beck v. Alabama

This brings us to *Beck v. Alabama*—the case that would make Carnes an expert on capital punishment and put his fingerprints on Alabama's capital punishment system in ways that are still with us today. When the Supreme Court granted certiorari in *Beck v. Alabama*, it threatened to undo all the existing capital convictions under Alabama's 1975 statute. The State of Alabama had charged the petitioner, Gilbert Franklin Beck, with committing intentional murder during a robbery—a capital offense.¹⁸ But Beck claimed that his accomplice, not he, had killed the victim during the robbery such that he had committed only felony murder, a lesser included,

12. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

13. *See Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

14. The Alabama courts held that the 1975 statute satisfied *Furman*. *See, e.g., Jacobs v. State*, 361 So. 2d 607 (Ala. Crim. App. 1977), *aff'd*, 361 So. 2d 640 (Ala. 1978), *reh'g denied*, 361 So. 2d 640 (Ala. 1978), *cert. denied*, 439 U.S. 1122 (1979).

15. *See, e.g., Hammond v. State*, 354 So. 2d 294 (Ala. 1977); *Johnson v. State*, 378 So. 2d 1164 (Ala. Crim. App. 1979); *Summers v. State*, 366 So. 2d 336 (Ala. Crim. App. 1978); *Young v. State*, 347 So. 2d 1011 (Ala. Crim. App. 1977). One of the most high-profile criminal cases in which Carnes participated was the appeal from the State's belated prosecution of KKK member Robert Chambliss for murdering four girls at the Sixteenth Street Baptist Church in Birmingham. *See Chambliss v. State*, 373 So. 2d 1185 (Ala. 1979).

16. *State v. Washburn*, 349 So. 2d 20 (Ala. 1977).

17. *Baker v. Baxley*, 348 So. 2d 468 (Ala. 1977).

18. *Beck v. Alabama*, 447 U.S. 625, 627 (1980).

noncapital offense.¹⁹ The problem for Beck was that the 1975 statute said that, when a defendant is charged with a capital offense, the “offense[] so charged with said aggravation shall not include any lesser offenses.”²⁰ Of the thirty or so states that had enacted post-*Furman* death penalty statutes, Alabama was the only one with a bar on lesser included offenses. Applying this statute to Beck’s case, the trial court instructed the jury that it had a binary choice: it could either convict Beck and impose the death penalty or it could set Beck free subject to the state’s ability to reindict him for a lesser offense. The jury convicted.²¹

In the Supreme Court, Beck argued that Alabama’s 1975 statute was based on “an erroneous reading of this Court’s *Furman* opinions” because it did not solve the central problem of inconsistency in the death penalty’s application.²² The “essence” of Beck’s argument was that “by forcing capital juries to render all-or-nothing verdicts in cases (like petitioner’s) where the evidence points to a defendant’s guilt of a serious noncapital crime (here, felony murder or robbery), Alabama’s law subjects capital juries to unwarranted pressure to return a verdict of guilt on the capital charge.”²³ In other words, barring lesser included offenses did not diminish inconsistency; it heightened it.

Representing the State, Carnes defended the challenged provision as a key piece of Alabama’s post-*Furman* remedial scheme. He argued that “preclusion of lesser included non-capital offenses by Alabama’s capital punishment statute serves to promote rational and consistent sentencing in capital cases by removing an historically proven source of de facto discretion.”²⁴ The point of the statute, as Carnes argued, was to prevent compromise verdicts when juries were divided over the issue of imposing the death penalty and, instead, to force a retrial of those cases. This system, Carnes argued, actually worked to the defendant’s benefit by making it impossible for the jury to convict him of anything without truly unanimous agreement that the defendant was guilty of a crime that warranted the death penalty.

But Carnes also took issue with *Furman* itself. He called on the Court to “give full weight to principles of judicial restraint” in capital cases instead of “strain[ing] the evidence and even the law to spare a defendant’s

19. *Id.* at 629–30.

20. *Id.* at 629 n.3.

21. *Id.* at 630.

22. Brief of Petitioner at 16, *Beck v. Alabama*, 447 U.S. 625 (1980) (No. 78-6621), 1979 WL 199844.

23. *Id.* at 15 (footnote omitted).

24. Brief of Respondent at 12, *Beck v. Alabama*, 447 U.S. 625 (1980) (No. 78-6621), 1980 WL 339414.

life.”²⁵ He recounted “the confusion and uncertainty which have existed in the post-*Furman* era”²⁶ and noted the “supreme irony” that “[t]here has been no greater source of arbitrariness and capriciousness in the post-*Furman* era than the uncertainty and unpredictability of the law.”²⁷ Carnes explained that *Furman*’s immediate effect was that “some 600 persons escaped capital punishment simply because the states had understandably not predicted *Furman*.”²⁸ And he argued that the situation had not improved over the intervening years:

[O]nly one person has been executed against his will in the seven and a half years since *Furman*, and literally hundreds have escaped execution because of the uncertainty and confusion about what the Constitution requires. This resulting situation seems even more arbitrary and capricious than the one that *Furman* was intended to remedy.²⁹

Carnes’s brief made two other points that would prove prescient. First, Carnes suggested a distinction between cases where there is some evidence of a lesser included offense—like Beck’s—and other cases where there is no such evidence. Accordingly, even if the Court ruled for Beck, Carnes argued for “[t]he possibility of a different rule for cases in which there is no evidentiary basis whatsoever for a lesser included non-capital offense verdict.”³⁰ Second, Carnes argued that Alabama’s system as a whole was “not a mandatory death penalty act”³¹ because, even though the jury was required to “fix the punishment at death” on a special verdict form, a sentencing judge could nonetheless impose a life-without-parole sentence.³² The ability of the *judge* to exercise sentencing discretion, Carnes argued, was a key element of Alabama’s statute that kept Alabama’s statute constitutional regardless of the discretion that might be afforded to the jury.

The Supreme Court ruled against Alabama in *Beck*.³³ For the first time since *Furman*, a majority of the Justices joined a single opinion on the constitutionality of the death penalty—perhaps an implicit recognition of the confusion caused by the splintered *Furman* opinion. The Court agreed with Beck that Alabama’s statute relied on the same erroneous view that led the states of North Carolina and Louisiana to enact the mandatory death

25. *Id.* at 71, 73.

26. *Id.* at 71.

27. *Id.* at 74.

28. *Id.* at 74–75.

29. *Id.* at 75.

30. *Id.* at 77.

31. *Id.* at 54.

32. *Id.* at 21.

33. *Beck v. Alabama*, 447 U.S. 625 (1980).

penalty statutes that were struck down in *Woodson* and *Roberts*. Forcing a stark binary choice on a jury, the Court held, was not an appropriate way to ensure the consistent application of the death penalty because it “makes the guilt determination depend, at least in part, on the jury’s feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue.”³⁴

After the Court’s decision in *Beck*, Carnes and his colleagues at the Attorney General’s Office set about reforming Alabama’s death penalty statute again. Carnes convinced the Alabama Supreme Court on remand that the “preclusion clause” could be severed from the rest of the statute.³⁵ But the court rejected Carnes’s position that the court should also strike the verdict form clause and remove the jury from the sentencing decision completely. Instead, the Alabama Supreme Court remedied the perceived constitutional problem with the verdict form clause³⁶ by (1) making the jury’s sentencing decision discretionary, (2) requiring bifurcation between a guilt and penalty phase, and (3) ordering that the jury in the penalty phase consider the same balancing of factors that the law at the time imposed solely on the sentencing judge.³⁷ The Alabama Supreme Court made clear, however, that the sentencing judge need not follow the jury’s penalty-phase recommendation and, in a later case applying this judicially reformed statute, held that the sentencing judge could impose a sentence of death even if the jury recommended leniency.³⁸

About six months after the Alabama Supreme Court created this judicially reformed system, the legislature changed the text of the statute itself. Carnes helped to draft the bill that became the new statute,³⁹ which in large part codified the Alabama Supreme Court’s decision in *Beck*.⁴⁰ It established a bifurcated proceeding in which a penalty-phase jury recommended a sentence, but the sentencing judge kept ultimate sentencing

34. *Id.* at 640.

35. *Beck v. State*, 396 So. 2d 645, 648 (Ala. 1980).

36. Carnes argued that “[w]hile the verdict form requirement was not unconstitutional so long as the preclusion clause was in operation, now that the preclusion clause has been ruled out and must be severed from the statute, the verdict form requirement also be struck and severed because it is unconstitutional absent the preclusion clause.” Brief of Appellee State of Alabama at 57, *Beck v. State*, 396 So. 2d 645, 648 (Ala. 1980) (No. 77-530). Carnes’s position was that requiring the jury to sign a special verdict of death upon the conviction of a capital offense could lead to erroneous convictions for a lesser included offense, although the facts did not warrant it. *Beck*, 396 So. 2d at 660.

37. *Id.* at 660–63.

38. *Ex parte Hays*, 518 So. 2d 768, 775 (Ala. 1986).

39. *See, e.g.*, Ronald Smothers, *Court Nominee’s Death-Penalty Role Is Debated*, N.Y. TIMES (Mar. 27, 1992), <http://www.nytimes.com/1992/03/27/news/court-nominee-s-death-penalty-role-is-debated.html?pagewanted=all>.

40. Act of Mar. 31, 1981, No. 81-178, 1981 Ala. Laws 203 (codified at ALA. CODE §§ 13A-5-39 to -52 (1982)).

authority based on a balance of aggravating and mitigating factors.⁴¹ Ten jurors were required to vote in favor of death to recommend that punishment; a bare majority of jurors could recommend a sentence of life without parole.⁴² With only modest and relatively recent changes, this is the same statute that governs capital punishment in Alabama today.

Hopper v. Evans and Baldwin v. Alabama

At the same time Carnes was helping to write a new capital punishment statute, he was also working to salvage capital convictions the State had secured under the defunct 1975 regime. In *Hopper v. Evans* and *Baldwin v. Alabama*, the Court granted certiorari to address the additional questions that Carnes had asked the Court to leave open in his brief in *Beck*: (1) whether the unconstitutionality of the preclusion clause invalidated every conviction under Alabama's 1975 statute, and (2) whether the requirement that the jury "fix the punishment at death" on a special verdict form rendered the 1975 sentencing regime a mandatory death penalty.⁴³

One year after *Beck*, the Court granted certiorari in *Evans* to address the first question. After being paroled from prison in Indiana, John Evans and his co-defendant, Wayne Ritter, went on a crime spree through multiple states, which included the murder of a pawn shop operator in Alabama.⁴⁴ Evans confessed to these crimes and, "[a]gainst his attorneys' advice," explained to the jury that he "would rather die by electrocution than spend the rest of [his] life in the penitentiary."⁴⁵ For that reason, Evans personally asked the jury "very sincerely that [it] come back with a positive verdict for the State."⁴⁶ After Evans's mother filed a habeas petition on his behalf, the Fifth Circuit held that *Beck* compelled a new trial, concluding that every case in Alabama, no matter its facts, was "inevitably influenced" by "[t]he peculiar nature of the offensive statute."⁴⁷

Carnes told the Supreme Court that the Fifth Circuit's ruling threatened ten convictions under the 1975 statute that would otherwise not have to be retried.⁴⁸ Carnes also argued that, nationally, the Fifth Circuit's reading of *Beck* would "invalidate[] virtually every capital punishment statute in this country" because no such statute allowed an instruction on a lesser

41. *Id.*

42. ALA. CODE § 13A-5-46 (1982).

43. Brief of Respondent at 13, *Beck v. Alabama*, 447 U.S. 625 (1980) (No. 78-6621), 1980 WL 371769.

44. *Hopper v. Evans*, 456 U.S. 605, 607-08 (1982).

45. *Id.*

46. *Id.*

47. *Evans v. Britton*, 628 F.2d 400, 401 (5th Cir. 1980).

48. The State had already conceded that about fifty cases needed to be retried in light of *Beck* because lesser included offenses could have been raised in those cases.

included offense when the facts did not warrant it.⁴⁹ In the same witty, punchy style that he later cultivated as a judge, Carnes explained that “there was not one jot, speck, or iota of evidence to support any lesser included offense instruction” in Evans’s case.⁵⁰ Instead, “[t]he record shows that the single-minded course of conduct which Evans followed throughout the state court proceedings was caused not by the preclusion clause but rather by his desire for notoriety and his preference for death over a long prison term.”⁵¹ Evans’s “determination to be free or die,” not the unconstitutional preclusion clause, resulted in “the capital conviction and death sentence which he had so actively sought and so richly deserved.”⁵²

Evans’s attorney, John Carroll,⁵³ defended the lower court’s reasoning about the preclusion clause. But his lead argument was that, “even if Evans was not harmed by the preclusion clause, his case was clearly prejudiced by the application of the other unconstitutional provisions identified and criticized by this court in *Beck*.”⁵⁴ Specifically, Carroll argued that Alabama’s 1975 requirement that the jury “fix the punishment at death” on a verdict form resulted in a mandatory death penalty like those found unconstitutional in *Woodson* and *Roberts*.⁵⁵ He contended that “there is no difference between Evans’[s] case and Beck’s in the way in which the mandatory verdict form infected the jury’s guilt determination” and “there is no difference between their cases in the improper pressures brought to bear on the sentencing judge as a result of the mandatory verdict form.”⁵⁶

The Court ruled unanimously for the State on the question presented. The Court held that “due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction.”⁵⁷ This decision cleared the way for Evans’s execution in 1983—the first Alabama execution since 1965.

The Court in *Evans* ignored Carroll’s lead argument about the mandatory nature of the verdict form, but the Court could not avoid the verdict-form question for long. Carroll continued to press this argument in the lower courts on behalf of other defendants. The federal courts agreed

49. Brief for Petitioners at 11, *Hopper v. Evans*, 456 U.S. 605 (1982) (No. 80-1714), 1981 WL 390009.

50. *Id.* at 16.

51. *Id.* at 12.

52. *Id.* at 12, 16.

53. Carroll later became a magistrate judge in the Middle District of Alabama and the Dean of Cumberland School of Law at Samford University. Carroll was also on the briefs in *Beck v. Alabama* but was not counsel of record.

54. Brief for Respondent at 13, *Hopper v. Evans*, 456 U.S. 605 (1982) (No. 80-1714), 1981 WL 390014.

55. *Id.* at 17–18.

56. *Id.* at 17.

57. *Hopper v. Evans*, 456 U.S. 605, 611 (1982).

with Carroll in the case of Evans's co-defendant, Wayne Ritter,⁵⁸ but the Alabama Supreme Court disagreed in the case of Brian Keith Baldwin.⁵⁹ This split of authority compelled the United States Supreme Court to take Baldwin's case and resolve the last question that Carnes had suggested the Court leave open in *Beck*: whether the judge's sentencing discretion saves the statute from being a mandatory death penalty statute akin to those in *Woodson* and *Roberts*.

The Court granted certiorari in *Baldwin v. Alabama* two years after deciding *Evans*. *Baldwin* would be Carnes's third and final argument in the Supreme Court defending the approximately ten remaining convictions under the 1975 statute. In a section of his brief titled "What the Issue Is and Is Not," Carnes argued that "[t]he issue in this case is not whether the legislature could have chosen some other procedure to serve the legitimate functions of the verdict form provision," "not the uniqueness of the verdict form provision," and "not whether the pre-*Beck* sentencing procedures . . . are perfect."⁶⁰ "Instead, the issue is whether petitioner was constitutionally sentenced to death."⁶¹ And, as to that issue, Carnes argued that the verdict form provision was not akin to a mandatory death penalty because "[t]he trial court judge is the sentencing authority" in Alabama, not the jury.⁶² Although the jury in Evans's case was "given no discretion about the matter," the judge was.⁶³

The Court agreed with Carnes 6–3. In a clear reference to the "What the Issue Is" section of Carnes's brief, the Court explained that the verdict form provision was constitutional even though "[t]he wisdom and phraseology of Alabama's curious 1975 statute surely are open to question."⁶⁴ Because the jury's mandatory sentence was not "the dispositive sentence" and "does not stand alone," the Court reasoned that this aspect of Alabama's scheme did not violate *Woodson*.⁶⁵ Justice Stevens, who thanked Carnes for his "very helpful" brief at oral argument,⁶⁶ wrote the main dissent in which he argued that the Constitution required jury sentencing in death penalty cases.⁶⁷ This was the last time the

58. See *Ritter v. Smith*, 726 F.2d 1505, 1515–17 (11th Cir. 1984), *cert. denied*, 469 U.S. 869 (1984).

59. *Ex parte Baldwin*, 456 So. 2d 129, 139 (Ala. 1984), *aff'd*, 472 U.S. 372 (1985).

60. Brief for Respondent at 44, *Baldwin v. Alabama*, 472 U.S. 372 (1985) (No. 84-5743), 1984 WL 565926.

61. *Id.*

62. *Id.* at 25.

63. *Id.* at 14.

64. *Baldwin v. Alabama*, 472 U.S. 372, 389 (1985).

65. *Id.* at 379–80, 386.

66. See *Baldwin v. Alabama*, OYEZ, <https://www.oyez.org/cases/1984/84-5743> (last visited Feb. 25, 2018) (recording of oral argument at 25:50 mark).

67. *Baldwin*, 472 U.S. at 394 (Stevens, J., dissenting).

Supreme Court addressed Alabama's defunct 1975 statute, and it cleared the way for Evan's co-defendant Ritter to be executed in 1987.

The Continued Carnes Effect

As the *New York Times* wrote upon his nomination to be a judge, "Death penalty law in Alabama bears the imprint of Mr. Carnes more than that of anyone else."⁶⁸ Even the brief, early period we have surveyed here has had long-lasting effects on the law and the State.

First, after eighteen years without an execution in Alabama, Carnes's successes in court revived the death penalty with the execution of Evans on April 22, 1983.⁶⁹ Since then, Alabama has executed sixty-one people.⁷⁰ This number includes seven defendants who were convicted under the defunct 1975 statute and had their convictions and sentences affirmed only because of the Supreme Court's decisions in *Evans* and *Baldwin*.⁷¹

Second, the capital punishment statute that arose out of this period of intense legal uncertainty is the same basic statute that judges apply in Alabama today. The legislature's decision to codify the Alabama Supreme Court's post-*Beck* creation—a penalty-phase trial before an advisory jury, but with ultimate sentencing authority in the trial judge—has made Alabama's capital sentencing statute relatively unique for the last thirty-five years.⁷² Nonetheless, hundreds of defendants have been convicted and sentenced under this statute, and there are currently more than one hundred inmates on Alabama's death row because of it.⁷³

Third, we can trace the practice of judicial override—the power of Alabama judges to sentence defendants to death despite a jury's leniency recommendation—back to this period in Carnes's career. The Alabama Supreme Court allowed for judicial override under the procedure it created on remand from *Beck*, and the legislature expressly provided for it in the remedial statute that Carnes helped to draft. In 1995, based at least in part on the arguments Carnes developed in *Baldwin*, the United States Supreme

68. Smothers, *supra* note 39.

69. Garry Mitchell, *Killer Executed in Alabama's Electric Chair*, BOSTON GLOBE, Apr. 23, 1983, 1983 WLNR 32898.

70. See *List of People Executed in Alabama*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_people_executed_in_Alabama (last visited Dec. 3, 2017).

71. The defendants who were convicted under the 1975 statute and eventually executed are: Evans, Wayne Eugene Ritter (Evans's co-defendant), Walter Hill, Edward Horsley, Herbert Lee Richardson, Freddie Lee Wright, and Brian Keith Baldwin. Compare *id.* with Brief for Petitioners, *Hopper v. Evans*, 456 U.S. 605 (1982), 1981 WL 390009.

72. When the Supreme Court upheld the constitutionality of Alabama's statute in 1995, only three other states had arguably the same structure: Florida, Delaware, and Indiana. See *Harris v. Alabama*, 513 U.S. 504, 516 (1995) (Stevens, J., dissenting).

73. *Alabama Inmates Currently on Death Row*, ALA. DEP'T OF CORRECTIONS, <http://www.doc.state.al.us/DeathRow> (last visited Dec. 2, 2017).

Court held judicial override constitutional.⁷⁴ Nonetheless, over the intervening decades, judicial override has been intensely criticized by commentators,⁷⁵ public interest groups,⁷⁶ and judges.⁷⁷ Concerns about the fairness of this procedure ultimately led to the first substantial change in Alabama's capital punishment statute when, in 2017, the Alabama legislature ended judicial override going forward.⁷⁸

Fourth, even today, Alabama courts must continue to address new issues that arise from the statute's bifurcated procedure. For example, after the United States Supreme Court held that the Sixth Amendment requires a jury to find any "aggravating circumstance necessary for imposition of the death penalty,"⁷⁹ the Alabama courts had to provide for a suite of appropriate procedures to ensure that a jury that recommends death also finds at least one aggravating circumstance in the guilt or penalty phase.⁸⁰ Although the statute itself provides that the jury's finding of an aggravating factor in the guilt phase also counts as the finding of an aggravating factor in the sentencing phase,⁸¹ some guilt-phase aggravators have no corresponding sentencing factor.⁸² Especially in these cases, trial courts must employ special verdict forms or jury instructions to make the statute work in practice.⁸³

By discussing these three cases from 1980 to 1985, we have only scratched the surface of Carnes's service to the state. Over the seventeen years he worked in the Alabama Attorney General's Office, Carnes obviously litigated many, many more cases than these three. But his efforts between 1980 and 1985 were almost certainly the most consequential—for the state, for the law, and for Carnes's own development as a lawyer.

74. See *Harris*, 513 U.S. at 514–15. Justice Stevens was the only dissenter, arguing as he did in *Baldwin* that the Constitution requires jury sentencing in capital cases. *Id.* at 519–23.

75. E.g., Editorial Board, *When Juries Say Life and Judges Say Death*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/16/opinion/when-juries-say-life-and-judges-say-death.html>.

76. E.g., *The Death Penalty in Alabama: Judge Override*, EQUAL JUST. INITIATIVE (2011), <https://eji.org/sites/default/files/death-penalty-in-alabama-judge-override.pdf>.

77. E.g., *Woodward v. Alabama*, 134 S. Ct. 405 (2013) (mem.) (Sotomayor, J., dissenting from denial of certiorari).

78. Act of Apr. 11, 2017, No. 131, 2017 Ala. Acts 131 (codified at ALA. CODE §§ 13A-5-45–47.1 (2017)).

79. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

80. *Ex parte McGriff*, 908 So. 2d 1024, 1036–40 (Ala. 2004).

81. See ALA. CODE § 13A-5-45(e) (1982).

82. For example, intentionally murdering someone under the age of fourteen is a capital offense, *id.* § 13A-5-40(15), but the victim's age is not an aggravating circumstance for purposes of sentencing, *id.* § 13A-5-49.

83. See *Ex parte Bohannon*, 222 So. 3d 525, 532 (Ala. 2016); *Ex parte McNabb*, 887 So. 2d 998, 1006 (Ala. 2004).