Court has heard all our arguments on these motions.

BY THE COURT:

Let's see Mr. Barnett, I believe, made a motion orally at the conclusion of all the testimony for a judgment of acquittal and I reserved decision on that to await the outcome. You now have one formally in writing?

BY MR. ALFORD:

Formally now in writing, the same thing.

BY THE COURT:

I don't believe I need an argument on that unless you think you can throw more light on it.

BY MR. ALFORD:

Your Honor, in behalf of anything that I could say for this defendant I would like to have an opportunity to do so, either here in chambers.

BY THE COURT:

Well I think it would have to be here.

BY MR. ALFORD:

I think so too Your Honor. His participation in it seems to revolve around that colored church out there on that evening when they, uh when some of them were beat up out there.

BY MR. ALFORD:

That was the testimony of or rather that appears

in the record, Your Honor.

BY THE COURT:

Was that the substance of it?

BY MR. ALFORD:

Yes sir.

BY THE COURT:

I don't remember anything else, of course, the jury must have thought it was pretty potent because they couldn't agree on a verdict, well if you want to say something about it I'll let you do it.

BY MR. ALFORD:

I don't want to burden the Court if the Court has its mind made up.

BY THE COURT:

No, I don't have my mind made up, I'll listen to you.

BY MR. ALFORD:

If your Honor please we submit in this case to Mr. Barnett that that was the only testimony made one colored witness there, that testified about some incident there at the church after services.

BY THE COURT:

That was a colored woman?

BY MR. ALFORD:

A colored woman at the church who said it appeared to be him, you remember she counted down four on one side and said she truly believed that to be him, and they told her to look all around the room and she counted down four again and said I truly believe.

BY THE COURT:

I was thinking about this colored couple and I thought there was a colored man who identified him being out there that night.

BY MR. ALFORD:

Your Honor please, that was a woman, now there was a Wilbur Jones that testified that one Sunday that Mr. Price and Mr. Barnett were riding together and the negro man in the car with the Arkansas tag and when they saw who it was it was a neighbor of theirs that was on a visit there from Arkansas, that was Wilbur Jones who testified about seeing him out there that was in the early part of June or May or sometimes, Your Honor. That's the two that testified about him being in that area. We respectfully submit that there is not enough evidence to sustain a verdict against him in this case, and we would respectfully renew our motion for a judgment of

acquittal in this cause as to Mr. Barnett.

BY THE COURT:

How much time do you want Mr. Buckley?

BY MR. BUCKLEY:

About three minutes, sir.

BY THE COURT:

I'll give you five. Take your time.

BY MR. BUCKLEY:

Your Honor, if it please the Court, they've already said about all I could say and probably a whole lot more, but on behalf of Mr. Bowers I want to bring up one point. My motion is almost identical to Mr. Alford's motion, except for one particular point which I want to bring out. That point being the testimony against Mr. Bowers as I recall there were three witnesses who testified concerning Mr. Bowers. One was Delmar Dennis, the second was Wallace Miller, and the third one was James Jorden. The first two witnesses said they had never seen Mr. Bowers until after the bodies were recovered at the damsite as I recall their testimony. None of them said they had ever personally heard Mr. Bowers mention either one of those individuals. James Jorden mentioned him and specifically testified on cross examination

I don't recall what he testified to on direct examination as to the conversation with Mr. Bowers but he did testify as to what someone had said that Mr. Bowers had said and another was what someone had said Mr. Bowers had said and we did recall specifically that on cross examination Mr. Jorden stated that he never heard Mr. Bowers mention these three people or anything connected with this conspiracy prior to that time.

BY THE COURT:

What was the date of that letter that they had in there, I believe it was to Mr. Bowers, it was a real clever letter that you had to read with a legend.

BY MR. BUCKLEY:

This was one that was alleged to have been from Mr. Bowers to Mr. Dennis and there was one enclosed with it as I recall from Wallace Miller to Mr. Bowers and then back from Mr. Bowers to Delmar Dennis, which as I recall was in October of 1964.

BY THE COURT:

Yes, that's the one.

BY MR. BUCKLEY:

If I recall Your Honor, the substance of it was Mr. Wallace Miller wanted to get back in the Klan

and he wanted to get back into the Klan.

BY THE COURT:

That's right, that was a letter of December 28, 1964 and Mr. Bowers answered it on January 6, 1965.

BY MR. BUCKLEY:

Yes sir, I believe that's right. I don't recall any testimony of what Mr. Bowers said or had been accused of saying during the time the conspiracy was in existence. The other point that I wanted to raise is the point on citizenship. It seems to me that the government, if I recall correctly had the birth certificates for two parties, neither one of whomwas Michael Schwerner. Michael Schwerner, as I recall was the only person that there was any proof of any conspiracy by any party, in other words if it was to be admitted that there was a conspiracy, it would have actually have been Michael Schwerner, these other people just happened to be alone and Michael Schwerner was never proven to be a citizen of the United States of America as I recall, and I don't, uh, as I see it rather, these people and other people that were alleged or were killed, these people would or should have been tried for murder and not conspiracy as I see it, and some of the people who were

named in this indictment and charged with this conspiracy they were not even at the scene or heard of or knew of or never could have talked of Chaney and Goodman before.

BY THE COURT:

I notice that exhibit 15, 16 & 17 were birth certificates of Chaney, Schwerner and Goodman.

BY MR. BUCKLEY:

I'm sorry, I looked through the exhibits at the end of the testimony I never did see but two of them and that was Goodman and Chaney. I just looked through them and saw the two of them the defense or the plaintiff's exhibits and I didn't see those. That's all I have, Your Honor.

BY THE COURT:

All right, Mr. Hauberg;

BY MR. HAUBERG:

If it please the Court and trying to specifically answer some of these points involved I think what Counsel might haveoverlooked is this is a conspiracy case and every conspiracy case the law is and well so, and Your Honor instructed the jury to that effect that any statement or any act or any agreement of any co-conspirator may be in and of itself certainly admissible against

any or all of the co-conspirators, and in a conspiracy any individual can drop out of the conspiracy and others can come in and those comi in after the conspiracy is started they are also bound by whatever acts or whatever statement made by the other co-conspirators that have been going on during the period of the conspiracy Now, if you consider that, some of this argument that was made in connection with various statemer or judicial statements as they call some of them I think that can very easily be explained there because of the fact it is a conspiracy and what one person did at a meeting leading up to the Blc School, being an act done in the presence of the conspiracy, certainly it is admissible against al of the other parties to that particular conspirac Now, if I may go over the particular arguments made by particular attorneys and simplify part of it by consolidating some of it, but I believe the first was Mr. Covington who went into a great dea of discussion about the Miranda case in connectic with this statement and I know Counsel well remembers the testimony that whenever Rask was interviewing Doyle Barnett, the first time he interviewed him they talked about the Klan

activities, the next time he interviewed him it was in connection with this statement. Now, the testimony and the preamble to the statement definitely will show that at each contact or whenever he was contacted, Rask testified that he advised him of his constitutional rights, that he didn't have to say anything and his rights to an attorney. He testified that his interview with him started at 3:00 o'clock and that one minute after three is when he advised him of his rights and he continued talking with him reduced the statment to writing and when they completed the statement it was 8:56 in the evening as I recall. Now, the fact that this was taken as a statement and they argued the Miranda case so the Mirdnda itself spells out the exact kind of statement they were talking about. Doyle Barnett was not in custody at the time he gave this statement. The Miranda Case refers to custodial interrogation and they said in that case by custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action, and then of course they go into an explanation of what kind of safeguards ought

to be placed there. Now, even if we considered this a custodial interrogation which it wasn't, Rask did not take him into custody, he had not been arrested, this wasn't part of the arrest, any arrest in the case came long afterwards, so we say that the Miranda case has no application in this case, it was not a custodial interrogation and for that reason the statement was and it was also testified that it was freely, voluntary, no promises or reward was given to him, of course they brought up the fact that he got a check a little later on but Mr. Rask's testimony, as you may recall, he did not promise him anything for that particular statement and then the other agent got involved into a discussion later on about it and that check was dated way back in December and had nothing at all to do with the obtaining of this statement, because the statement was obtained with the offer of any promise off reward.

BY MR. HAUBERG:

It seems that you didn't tell him that the statement would be used in evidence and Miranda requires you to say that it would be used in evidence. Do you find any such statement as that in Miranda?

BY MR. HAUBERG:

If the Court please, it goes into a discussion of they say they must advise him of his right of silence, and of course a continued opportunity to exercise it, and prior to any questioning to warn him of his rights to remain silent, that any statement that he does make, now listen to the language, may be used as evidence against him. That he has the right to the presence of an attorney either retained or appointed, and that's exactly what happened here. They told him it could be used against him, would, may, or might be used against him, I think it meets the language as used in Miranda when they say the statement may be used as evidence against him. We think that should answer any argument in connection with the Miranda decision in connection with this case.

BY THE COURT:

What was the date of Miranda?

BY MR. HAUBERG:

Miranda was decided June 13, 1966, AND FOUND in 384, United States, page 436.

BY THE COURT:

This interview preceeded that didn't it?

BY MR. HAUBERG:

Yes it did, Your Honor.

BY THE COURT:

Was Miranda or didn't they say Miranda was not to be retroactive it was to be applied prospectively?

BY MR. HAUBERG:

There have been some decisions from various Circuits including the Fifth Circuit that has indicated that it is not retroactive. Now, Mr. Watkins his his argument and also some of the other attorneys I think went into that. They argued at great length about the severance, their argument based upon the particular statement, the Forest case Your Honor, mentioned from the Fifth Circuit I think would not be applicable in this case because the manner in which Your Honor handled this particular case there was nothing at all similar to this case that occurred in the Forest Case.

BY THE COURT:

That's what I was trying to get to, the reference to.

BY MR. HAUBERG:

If the Court please, I don't have the reference of that case before me but I have read it.

BY THE COURT:

That's a slip opinion.

BY MR. HAUBERG:

I think that case has come out in the advanced sheets, but I do not have it available at this time.

BY THE COURT:

That was exactly what I was trying to do was to meet all criticism of Fores in masking those statements.

BY MR. HAUBERG:

We think the Court adequately met any issue that may have been raised in the Fores case by the manner in which the statement was handled, because there was a great deal of argument has been levied at the statement and at Mr. Doar when he was reading the statement to the jury in his closing argument. I may say that I don't recall Mr. Doar using the name Price, I do recall Counsel jumping up objecting saying that he said Price and immediately Your Honor ruled on it that he had said that, but the jury was requested and told to disregard it, and they were instructed not to pay any attention to it, and as I say, I don't personally recall him using or reading that particular name.

BY THE COURT:

I worry about the language of Fores, they said that you don't accomplish anything having something prejudicial stated, the Judge simply asked them to disregard it that they are just laymen and they are not schooled in legal matters like that and they don't have the power or capacity and I believe Judge Rives said it was unreasonable to expect that they could perform any such function as removing that from their minds when they heard something prejudicial.

BY MR. HAUBERG:

Your Honor, I don't recall Mr. Doar reading the names of anyone when he read the statement, the first recollection that I have in it or when anything was said about it was when Counsel raised the objection.

BY THE COURT:

I don't remember that either for some reason. I do remember the first two times that the statement wasn't accurately read involved the town of Philadelphia and I forgot what the other involved but I didn't think those were prejudicial. As a matter of fact, I thought I was a little bit extra-cautious in having masked those two things that he did read, but if he said one of

2668

the defendants I would take a different view of that. I don't recall him having done so.

BY MR. HAUBERG:

I just don't have any independent recollectinn of him doing so, my first recollection of it was when Counsel got up and said the word himself. Then, argument was made that you get into the confession that was made, Mr. Watkins was arguing that it was highly prejudicial as to his clients Your Honor I think you adequately instructed the jury during your instructions to the jury and at the time the statement was admitted into evidence your instructions as to the effect that it was admitted into evidence as to the one defendant and not to any of the others, and any references to anyone other than Jordan had been eliminated from the statement and we say that it certainly could not have prejudiced any of the other defendants there. The argument that Counsel ma de in connection with the poll of the jury, we think the Court adequately complied with the rules about the polling of the jury, that the Court has the control of the manner in which a jury would be polled, the jury was adequately asked if that was the verdict of each one of them, but in this

case, something occurred that Counsel cited cases on the other side, in this case each one of the jurprs signed the verdict as the verdict of the jury, and in many other places, only the Foreman signs the verdict of the jury and in those instances that may mean that one of the jurors has not specifically signed their approval to the verdict and in those cases the Foreman of the petit jury speaks for the entire jury, but I think Your Honor had every juror sign it, and immediately after the verdict was read the Clerk inquired of the jurors each one of you is that verdict, so say each one of you, and each one of them asserted that was their verdict, why I think that adequately meets the rule as contemplated by the law.

Now, the question came up about the venue. The United States did prove venue in this case by proving that the conspiracy took place in Lauderdale and Neshoba County, Mississippi, the statute sets up Neshoba County as being in the Sou[illegible]ct of Mississippi, and many references were made to Neshoba and Lauderdale Counties being in Mississippi, and I think that proves venue in connection with this case. Some argument was made about the United States Marshal

asking the hallways to be cleared out.

BY THE COURT:

That was night before the verdict was returned in open Cpurt, I believe it was.

BY MR. HAUBERG:

Yes, Your Honor, as I recall, it also occurred the night before, because of the problem that the jurors were having when they were walking out and the Marshals, as you may recall, had moved a bench over near the elevator because the crowd was so large there at the end of the hallways that some of the defendants and members of their families were standing up near the water fountain and the Coco-Colar machine, and when the jurors in order to come out would have to come right past them immediately to go to the elevator and the crowd, of course, was so large there in the hallways, and the Marshal indicated to the crowd for them to get out of the building just before the jury left. I don't know how long the jurors remained upin their jury room after the crowd had moved out but its common practice to either have the jury go out before the courtroom clears or have the hallways cleared before the jury goes out, and since there was no back stairway

if the Marshals did clear the hallways as Counsel contend they did I think it was merely caution and there should be no question or criticism that anyone could have come in contact with or made any motion or statement to any one of the jurors. It was a matter, as I considered it, of crowd control in order to be sure that the crowds were not pushing in on the jurors as they were going down on the elevator. Counsel argued that the government did not prove these three individuals were citizens of the United States. There were three birth certificates ald three showing place and date of birth of these victims and they were all born in the United States and the Court properly instructed the jury in connection with the law in connection to that and I think that proves abundantly clear there.

BY THE COURT:

That Fores case is Fores vs United States reported in 379, F. 2d, 905.

BY MR. ALFORD:

May I interrupt to ask how you spell that first name?

BY THE COURT:

Yes sir, F L O R E S. Roy Delgardo Flores.

2672

BY MR. HAUBERG:

If the Court please, one case in connection with the polling of the jury that I would like to mention to the Court is United States vs. Grosso case, found in 358 F. Reporter, Second Series, beginning at page 154, but a portion of it is on 160, and the Court of Appeals in that case, I believe from the Third Circuit, the Court of Appeals stated that the idea of the jury poll is to give each juror an opportunity before the verdict is recorded to declare in open court their assent to the verdict which the foreman has returned and thus enables the reporting parties to ascertain the certainity that the verdict was unanimous a nd in fact had been reached and that no juror has been coerced to get to agree to a verdict to which he has not fully assented, and that's the law in connection with that from that Circuit and it goes on to cite some more cases there, it cites the Humphrey case, and it does mention the Miranda case the ones that the other attorneys have cited and one of the sentences in that same paragraph...since each of the jurors assented to the verdict as reported by the foreman the verdict should not be set aside in the absence

2673

of proof that coercion in fact existed. So, we say that decision, along with the other decisions to that rule are adequate there. Now, some question came up in Mr. Alford's argument in connection with Mr. Price, and as to what evidence was available as against him. Again I think Counsel has overlooked the fact that this being a conspiracy case that the act of Posey when he stopped on that highway inquiring for Price is an act that would bind Cecil Price and the other co-conspirator to this conspiracy. But, we go back and recall what the evidence was Cecil Price was the man who turned the key. Cecil Price was the man who turned the key to have them locked up and kept them in jail over a long enough period of time so that this plot and this plan could have its final determination getting them in there, who would carry out this ultimate disposition or elimination of Schwerner or either one of these other two individuals. Now, Price then turned the key, Price was there on that night, also Price was out on another exposition on the 14th day of June, and Hop Barnett was along on that occasion too, and they went up in that area and they thought there was a white man

riding in that automobile, and they went up there to investigate that. There's a good bit of proof there that connects Hop Barnett with that situation as well as connecting Hop Barnett up with the Bloomo School incident, and further, Jorden testified that Hop Barnett was the individual that they saw at Philadelphia who told them to stay right where they were that someone would come and show them where to go, and Jordan's testimony was to that effect and that was on the night of the 21st, and then Hop Barnett left and shortly thereafter, according to Jorden, here came Killen up there, he directed them where to go and park their cars, and then another officer came up and told them they would have to go down toward the way to Meridian. Now, we think that all of these actions by various co-conspirators are certainly part of the conspiracy, and would be just like an overt act in the regular type of conspiracy, any overt act of one conspirator binds all other conspirators done in furtherance of the conspiracy, and we say there is ample evidence in connection with the argument made on that proposition. Question about the Jencks Act statement. We think the

only way they can ask for them when the witness has taken the witness stand. I asked them some questions as to whether or not they had gi en statements but in this particular case the lawyers that asked for the statements went much further than that. They even asked the witness if they had given contradictory statement and they even asked some of the witnesses if they had testified before the Grand Jury and the testimony before the Grand Jury if it was any different from the testimony given there. Now they wanted to get that before the jury and just because they asked for whether or not any other statement was given under the Jencks Act we don't think there was any error of the Court to exclude the jury for that purpose, because we say when you come up with the Jencks decision, that the rule provide or the statute provides that they can't get that statement until the witness has taken the stand and testified on direct examination and then they by question bring out that he has given a statement or adopted thd statement, and request or ask for the statement that he is entitled to under the Jencks Act.

BY THE COURT:

I haven't read Judge Wright's opinion in that case cited by Counsel but it would not seem reasonable to me that the Court could be put in error for not retiring the jury unless Counsel for the defense put the Court in error by requesting the jury be allowed to retire and I remember no such request.

BY MR. HAUBERG:

No, Your Honor, no such request was made.

BY THECOURT:

I think you have to give a trial Judge a chance to commit error before you can put him in error.

BY MR. HAUBERG:

Now, some argument was made of the fact that Mr. Doar was testifying about the backroute. I don't think Mr. Doar was testifying about that. He was commenting on the testimony of Jim Jordan because as I recall Jordan's testimony was after the killing the bodies were loaded in the station wagon and it proceeded back straight to the edge of Philadelphia and took some back road over to where the dam was and that the testimony was before the jury as to that and by using the pointer showing the general direction which way it was going was certainly not error in arguing or

commenting on the evidence in this case.

BY THE COURT:

Counsel on the other side are complaining about names being used in the course of argument and I brushed those aside as I believe proper to do because a great latitude is afforded Counsel in arguing and oftentimes they make statements in variance with the views of opposing Counsel but the Court doesn't anticipate in those discourses between Counsel and you've got a jury to decide what's facts, and I don't think its proper for the Court to inject itself in dispute like that with Counsel about what the facts are.

BY M.R HAUBERG:

Now, if the Court please, there are certain other points that Counsel raised and I'm not certain whether it was definitely determined that they would submit affidavits in connection with the clearing of the courthouse, I will say this in connection with that, Your Honor, certainly no prejudiced, or they have shown no prejudiced here in connection with it they certainly could have obtained a statement from the Deputy Marshal and the defendants there if they had wanted to do so as to what was done. They made no exception

to the Deputy Marshal as I recall, and in the absence of showing any prejudice to any of their clients, I certainly think that argument is of no material bearing in connection with this case. I don't know where Your Honor wants me to go into the reply to the argument made in connection with Hop Barnett, I don't believe that has come to the proper attention of the Court, I do know that Counsel has made some argument ----

BY MR. ALFORD:

Your Honor, we did make an argument to the Court.

BY MR. HAUBERG:

I'm sorry.

BY THE COURT:

Well, he was granted a mistrial, I believe.

BY MR. HAUBERG:

Yes, Your Honor, he was granted a mistrial due to the fact the jurors were unable to agree on a verdict as to him. But what I was going to say briefly was that on June 14th, there was testimony that he went out with I believe Cecil Price another individual to see or check on a white peron being in this automobile and actually stopped the automobile up there on June 16th, the witness Dennis puts him at the Bloom School

reporting guards were up there at this church, and Dennis also testified that Hop Barnett left up there along with Posey and Wayne Roberts and other individuals to go up there, and that they then returned from the Bloomo School, and we construe that that was certainly done in the furtherance of carrying out this plan of either looking for Michael Schwerner or some other white individual because the testimony will show that they got into an argument as to whether or not they had beaten up everyone that came out and someone said no white people came out and I didn't beat up anybody because no one but negroes came out. Then Beatrice Cole testified I believe that she saw him up there that night and identified him by the oncoming headlights of an automobile that was coming toward them and just for a few meoments he was in the range of the headlights on June the 21st at Philadelphia, Mississippi, he was waiting there for that group near the court-house there and that's when the incident occurred that Killen was going to come up and tell them where to go and who to look for when they were leaving. Of course, a mistrial has been entered as to defendant Hop Barnett, and insofar as the

motion for acquittal is concerned, we do not think the motion for acquittal would be proper in this case as far as Hop Barnett is concerned.

BY THE COURT:

Was Mr. Barnett's official position at that time a Deputy Sheriff?

BY MR. HAUBERG:

Your Honor, I don't think he was a member of any police official or the Sheriff's Department. He had been Sheriff previous to that.

BY THE COURT:

Before Mr. Rainey's term?

BY MR. HAUBERG:

That's correct, Your Honor. Now, one thing, I believe that all of the attorneys had a great deal to say about was the Allen charge which your Honor granted after the jury had been out almost ten hours, or had been deliberating almost ten hours, the next day after the case had been submitted to the jury, and it seems to me that there is really nothing to the argument about the Allen chagge, although some Courts do not like or approve of it particularly, now on the Fifth Circuit Court in the Thygand Case, found in 254, F. 2d, at page 735, but the portion that

I mention is on page 739, the Court indicated that they had sometime reluctantly approved the Allen charge. Now, in the ~~Fank~~ Thygurd case in footnote is set out the entire charge which the Court gave as the Allen charge and the Fifth Circuit has approved it in this particular case. The Fifth Circuit said this: That/it is still a permissible charge to be given in proper circumstances in this Circuit, and they go further and they say they have approved the charge while carefully assuring ourselves that there are not ingrafted upon it any partial or one-sided comments. We note that the charge given here by the trial Court contained none of the objectionable language in our case or the Huffman case or in the Green case, the Green case I believe was cited by Counsel on the other side, nor was it one-sided as was the case in the Fourth Circuit, such a charge, so long as it makes plain to the jury that each member of the jury has a duty conscientiously to adjere to his own honest opinion and avoids creating the impression that there is anything improper questionable, or contrary to good conscious for a jury to cause a mistrial it is still a permissible charge to be given in proper circumstances

in this Circuit, and we contend Your Honor, the instruction which you gave the Allen charge in modification contained the safeguard, and contained the modification, it was not a one-sided comment, but left up to the jury still and I recall part of the language and it was so clear that the jury could not have misunderstood it and they could not have been misled by it, and I certainly think that the manner in which His Honor gave the Allen charge would meet any of the objections that may have been made in those cases. Incidentally they did approve the Allen charge in the Billy Sol Estes, Estes vs. the United States, 235, F. 2d, 607, and certiorari was denied in that case. This was denied in the United States Supreme Court.

BY THE COURT:

What do you say about Counsel's statement about a supplemental or recharge in there to the effect that they could find one or more of these defendants guilty or not guilty, that's not a part of the Allen charge, but it was in there with the Allen charge but they said that was a supplemental charge, it was a restatement of a charge regiven without restating all of the charges and therefore

highlighted all of the other charge.

BY MR. HAUBERG:

If the Court please, I think in the manner in which that instruction was given was perfectly satisfactory and was not error and I don't think they have any grounds to complain of.

BY THE COURT:

Of course, that was a procedural instruction more than one of substance.

BY MR. HAUBERG.

And if the jury had asked for some clarification of instruction your Honor would have tiven it as a clarifying instruction. It still would not have considered to be in error. I certainly think it was appropriate, it was proper in this case and I think it went right along with the entire instructions which the jury had had. Of course, they made some comment about some of the various instructions which Your Honor had given on reasonable doubt and items of that kind, but if I recall Your Honor gave the reasonable doubt instruction which they asked for as well as one or two that Your Honor had been using in previous cases as a guide and from all of the instructions given in this case I found nothing

that I could construe anyway being any error or detrimental or prejudicial to these defendants.

BY THE COURT:

About three fourths of the instruction of reasonable doubt was lifted almost completely and almost intact out of a decision of the Supreme Court of the United States.

BY MR. HAUBERG:

I listened very intent to those instructions and frankly, Your Honor, I can see nothing wrong with any of the Court's instructions. One other thing that they did argue was that Your Honor granted all of the governmentths objections to certain questions and overruled all of theirs, but that's not in the record. The government did object to some of the questions, the government got sustained on some and overruled on others, and the same thing happened for the defendants that was something else Counsel argued about that I don't feel has any bearing or place here in arguing these motions.

BY THE COURT:

Well I don't keep any scores, I don't know what the score was.

BY MR. HAUBERG:

I believe I have covered all the points that they have brought out unless I have overlooked some or Your Honor has any particular question you care to have me answer I will be glad to try and answer them. Mr. Doar might have a few remarks to make in that connection.

BY THE COURT:

I would like to see what Mr. Doar remembers about that incident before the Jury, I don't recall that. but Mr. Davis, the Reporter, says he recalls something like that.

BY MR. DOAR:

If the Court please, upon my closing argument at the nearing of my closing argument, in reading quickly somehow, reading rather quickly, I may have said Price car rather than blank car, I'm not sure of that, but that's my recollection, if I said it, I had said it before I realized it and Mr. Alford objected and the matter was presented to the Court and a motion was made for a mistrial and the Court had overruled the motion and instructed the jury to disregard anything that might have been said, I don't believe there was any particular focus on whatever was done, was certainly done unintentionally.

BY THE COURT:

I'm sure of that, but what I'm not sure about is whether or not it was without prejudice.

BY MR. DOAR:

Well that's the question that I wanted to address myself to Your Honor. I think the case you were referring to by Judge Rives, he was speaking in terms of the entire confession that had gone to the jury without any of the safeguards Your Honor had given, and he indicated that in their judgment, that in the Court of Appeals' judgment the jury did not follow the instruction in disregarding what they heard in the courtroom. Now I think that that situation is entirely different in this case that Mr. Alford objects to. I say this, that the rule of law in the question of prejudice rests in the sound discretion of the trial Court. The whole question of the admission of the confession under what terms rests in the sound discretion of the trial Court, and I know of no rule that says it is a matter of law that if an attorney inadvertently states something and the Court corrects it and tells the jury about it and the jury is not capable of following the instructions of the Court, this Court is present

during the trial of this case, I say that these defendants received a completely fair trial, fair on the part of the government, and completely fair on the part of the Court, and one-hundred percent fair on the part of the jury, and I think its up to this Court in considering the motions after the verdict in its sound discretion to consider whether or not under all of the circumstances of this case there was such a prejudice in the minds of the jurors of those jurors who deliberated as they did over two two days and returned the verdict as they did, guilty against some, not guilty against others, couldn't decide on others, were prejudiced by this inadvertent statement of others, the Court considered and ruled on right at the time, which is my recollection of what happened.

BY MR. WATKINS:

Your Honor please, may I make three or four statements in response to that? Your Honor please, I would like first to direct my remarks to the government in saying this is a conspiracy case. Certainly it is and I believe on the first point that I made in my motion for a new trial, the indictment in this case inclusive

of its allegation of state action brings the charge of conspiracy under 241 Title 18 of the Code eluding the due process thereof, not the equal protection clause and the evidence must have before the conviction can stand, establish the charge of the indictment by specific intent of each defendant to interfer with the rights of the due process clause only. I mean by that, Your Honor, just to come and throw in to the case everything that they could possibly do pertaining to some type of improper activity, has nothing to do with this type of charge of conspiracy. The only evidence that is proper is that evidence which tends to show a specific intent on the defendants to intimidate or do harm to the named victim. I am encouraged from the government's remarks about the Miranda case because the government seems to incur to it. If there had been custodial interrogation that the points that we have presented to Your Honor would be of importance, now Your Honor please, whether he has been arrested or not is not right, whether or not he's been drprived of his freedom of action and whether or not the investigation has focused upon him and whether or not the information is

sought for evidence or not, its undisputed in this case that the interrogation by Your Honor from the bench of the witness Rask, whether or not this statement was being sought for evidence the affirmative was given the Court from the Court's own question. In regard to the Allen charge, Your Honor, as I stated before, if we were to cover or what we think it does to the free will of the jury the manner in which Your Honor gave it was as good as you could expect but we respectfully submit and we would like to pose this question. Just what is the real basis for the policy of giving the Allen Charge in any case? Is it to bring back the jury and explain some of the previous instructions? Is it to bring back the jury and instruct them at the request of one of the Counsel and instruct them as to something they might haveliked to have given at that time? No, we douldn't have possibly gotten an instruction of any type given for either party, the only purpose is to galvanize the jury into an action that they have already reported time and time again that they were unable to do and we respectfully submit that is the purpose that destroysthe good and free exercise of the jury.

Thank you.

BY THE COURT:

I don't know where the record shows this or not, if it doesn't I'll state into the record, I believe it was the first thing the next morning after the case was submitted to the jury the first communication from the jury was, "May we have a transcript of the testimony in this case." My answer was, "no." That communication may not be in the record because it was sent back in the jury room, but the other four communications are in the record. All right.

BY MR. COVINGTON:

Your Honor please, there is just one more point that I would like to make at this time concerning the Miranda case since there has been a great deal of discussion expecially since Mr. Hauberg dealt with it. Now if it please the Court, the holding in the Miranda decision holds that the safeguards must be given to a defendant before the interrogation begins. Now, my notes and I'm taking this directly from the opinion written by the Court not from a condensed version of the case but the opinion and I would, if I could at this time since it is very short and will not take

but a minute or so to read you what the Court says about these safeguards that they say must be presented to the defendant and I quote...The warning of the right to remain silent must be accompanied by the information that anything said can and will be used against the individual in Court.

BY THE COURT:

That's your language, isn't it Counsel?

BY MR. COVINGTON:

No sir, this is the opinion of the Court according to my notes, sir. The warning is needed not only to make him aware of his privilege but also of the consequences of foregoing it. It is only through the fairness of these consequences that there can be any assurance and any real understanding and intelligence exercised of the privilege. Moreover this warning may serve the individual more acutely aware that he is faced with the phase of the adversary system that he is not in the presence of persons acting solely in his interest. Further, if it please the Court, accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and have the lawyer with

him during the interrogation of the system for protecting the privilege we delinenate today and with the warning of the right to remain silent and that anything stated can be used in evidence against him this warning is an absolute pre-requisite to interrogation. No amount of circumstial evidence that the person may have been aware of this right will suffice to stand in its stead only through such a warning is there an ascertainable assurance that he was aware of this right. Your Honor, and this is the language of the Court and I quote again. To summarize we hold that when an individual is taken into custody or otherwise deprived of his freedom by authorities and subjected to questioning his privilege to self discrimination is jeopardized Procedural safeguards must be employed to protect the privilege and unless other fully effected means are adopted to notify the person of his right to silence and to assure that the exercise of the right will be scrupulously honored the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that

he has the right to an attorney, that if he can not afford an attorney one will be appointed for him prior to being questioned if he so desires. The opportunity to these rights must be afforded to him throughout the interrogation. After such warnings have been given and such opportunity afforded him the individual may knowingly and intelligently waive these rights and agree to answer the questions or make a statement, but unless or until such warnings are made or demonstrated by the prosecution at trial no evidence obtained as the result of interrogation can be used against him.

BY THE COURT:

It seems to me that you haven't reckoned in this case that this Mr. Barnett was not in custody.

BY MR. COVINGTON:

If it please the Court, I believe it would be a play on words as to what is custody and what is not custody. Under the Esobeda decision and I do not have a brief with me to refresh my memory the Miranda was an applicable case or a continuous of the Escebedo and in that decision the Court said and I believ this is correct and I'm quoting strictly from memory, that when the investigation

2694

focused on an individual, when the finger of suspicion pointed at him it was at that point in the proceeding that he must be warned of the procedural safeguard in the violation of the Fifth Amendment privilege, and I submit that under the uncontradicted testimony that both agents testified that at the time Doyle Barnett was interrogated he was under suspicion, Mr. Rask testified that he left Meridian to go to Louisiana to get a statement from him concerning his activities on this night. There is no question that at this time the finger of suspicion was pointed at him and he should have been warned, and I believe that under the law that we have today that the safe guard that is set out under Miranda the one that I have quoted to the Court should have been afforded to Doyle Barnett. I don't believe under the tesfimony that the government presented that a proof or that they met the burden of proof that they made an intelligent of his rights to him. I just don't believe, if Your Honor please that the mere fact that they did not have the man behind bars could go as to whether or not he was in custody. Both agents testified that they had their guns, that they took him to their motel room

2695

and that they kept him there or he stayed there with them until at such time that they themselves terminated the interrogation.

BY THE COURT:

I don't believe there is any fair inference in this record strain as you may to find it to show that these fellows were being armed, if they were it didn't have anything to do with this man's testimony he was not under arrest, and nobody was trying to arrest him. I couldn't see anything but a free and voluntary act as to what he was doing. He did it understandingly, intentionally, and its my recollection that he made some changes in the statement was the reason they were so long and so late getting the statement out because he was so understandingly and particular about his statement that he made changes in it.

BY MR. COVINGTON:

Yes sir, if the Court please, the recollection that I have to that the preamble or the five prerequisite they cover in Miranda is no question about it, the point I'm trying to point out is where Mr. Barnett understandingly, knowingly knew what he was doing when he signed this statement, if he had been furnished with the safeguard

or whether he had not been furnished with the safeguard and the language of the Court and the decision is that the defendant shall or whoever the interrogator is shall go far to make sure that the man knowingly and intelligently waives his rights. I don't mind in this instance that the mere recitation of a few sentences is a preamble of words that he was prepared in such a way.

BY THE COURT:

It looks like these agents were investigating at the time, I don't recall that he had been accused of anything, I don't believe it could be accurately said that he was in the accusatory stage rather than just in the investigatory stage although I believe that officer did answer a question for the Court that he was.

BY MR. COVINGTON:

Yes sir, that was the point that I was urging that he did answer such a question, that the time he left Meridian by plane to go to Louisiana that he went there for the specific purpose of obtaining a statement.

BY THE COURT:

Well, I might have asked him a trick question, I don't know, maybe he didn't understand that [illegible]

Judge Rives says that some of these folks can't get these things out of their mind.

BY MR. COVINGTON:

Of course, I'm basing my argument on my best recollection of what the question and answers have been.

BY THE COURT:

I believe he did say he was trying to get evidence.

BY MR. COVINGTON:

Yes sir.

BY THE COURT:

But I don't know whether or not he tried to put it in a dot as to whether or not it was investigatory or accusatory.

BY MR. COVINGTON:

That's all I have, if the Court please.

BY MR. WEIR:

Your Honor please, just a short comment please in this Green case the Court said that this Allen charge or the dynamite also called third-degree instruction, shotgun instruction and nitro-glycerin charge may not be used coercively and only should remind jurors they should listen with the dispotition to listen to each others argument, that case was decided by the Fifth

Circuit Court of Appeals in 1962 and it appear at the time in which the charge is given would not have anything to much to do with the affect of the charge, and in reversing that decision the Fifth Circuit Court of Appeals said that no matter when the charge was made it gave the jury false notion of the validity and force of the majority opinion. It tendered to lend its full and free discussion in the jury room. It prejudiced the right of an accused to a hung jury and to a mistrial. We submit that as shown by the note of the Fifth Circuit Court of Appeals in this particular decision as shown in 309 F. 2nd at page 852 that that is one of the constitutional rights of a defendant being tried is entitled to, one of the other notes says that I think a mistrial from a hung jury is one of the safeguards to liberty. In many areas it is the sole means by which one or a few might stand out against an overwhelming, temporary public sentiment. Nothing should interfer with its exercise. In the final analysis the Allen charge does not make sense all it might say is there is a duty to consider the views of others, but that a conscioutious person has finally decided to stand by his

conscious. There are other cases. If Your Honor please I would like very briefly to call to the attention of the Court one remark made by the United States Attorney Mr. Hauberg. He admitted to Your Honor that because this jury verdict was signed by the jurors that they might waive this 31-d provision of the Federal Rules about the polling of the jury, but the law is that when a jury is being polled and each individual juror is asked a question, is that your verdict and so on down the line, that even though a juor has returned a verdict and so on, that he can even at that time change his verdict, and therefore, not only in 23 a of Corpus Juris Secumdum is the statement that the proper accused has the right to have each juror polled, and also holding that is this Georgia case Wilson vs. State reported in 91 SC 2nd, 854, 93 Georgia Appeal at 375. I would like to read to you Your Honor the one paragraph from this other Miranda decision. It says that we think that the record conclusively think that the defendant was denied a reasonable opportunity to have the jury polled, it was not enough that the trial Judge had asked the jurors in a body

whether the writtenverdict which had been returned by their foreman but which had not yet been read aloud in their presence was the unanimous verdict of all of them and that their foreman had answered that it was. For the right to poll the jury is the right to poll each juror individual to say publicly his assent to or dissent from the prepared verdict which has been announced in open Court in his presence. Obviously the right can not be exercised intelligently until after the verdict has been announced in open court so that the defendant and all others present may know what it is. Indeed to request prior thereto, would be prematerial. To direct the Clerk to read and enter the verdict and then to immediately record it as was done in this case deprives the defendant the opportunity to exercise his right to poll the jury which Rule 31 d guaranteed to him. If we conclude that the Clerk recorded the verdict immediately after it was read, then we must assume that the trial Judge erred in allowing the defendant a reasonable opportunity to exercise his rights and if the verdict had not been accurately been recorded when Counsel for the defendant addressing the Court immediately

thereafter, requested that the jury be polled it must be concluded that the trial Judge erred in ruling that the request came too late. In either case, the action of the trial Judge constituted a reversible error since the judgment must be reversed and a new trial ordered because of the denial of the right of the defendant to poll the jury, it is unnecessary for us to consider other reasons which he advances for seeking a new trial. The judgement of the District Court will be vacated and the judgment will be set aside and remanded for a new trial. Now that was the case of Miranda vs. the United States and it is reported in 255, F. Reporter 2nd, at page 9, it was decided in 1958, and I submit Your Honor that the only proper way for a jury to be polled is for each jurors to be required individually to answer is that your verdict, yes or no, and one important reason that defendant is entitled to that is not only that there was a hung jury as to some of the defendants, and not only because of other things that have already been mentioned but the law is that even though the jurors had actually signed the verdict and returned it it still could be

changed at that stage of the game, but we just submit that under Rule 31 d there is a certain way for the jury to be polled and the juror be asked individually, is that your verdict, and go down the line individually, and failure to do that is a veversible error according to that Mirdnda error. Your Honor please I do not mean to repeat anything here that has already been said here---

BY THE COURT:

You've just got thourgh saying so.

BY MR. WEIR:

Then Your Honor please we will then submit the affidavits in reference to being what I would say the attorneys being deprived of the right to stay on the second floor and observe the jury room and the defendants having that right, that being part of the trial, and we thank you.

BY THE COURT:

How much time do you gantlemen want to file your affidazvits?

BY MR. WEIR:

May I have just a few moments, Judge to confer?

(Counsel conferred)

BY MR. ALFORD:

2703

BY MR. ALFORD:

If the Court please, may we have ten days to get those affidavits in?

BY THE COURT:

Well I believe that's too long Mr. Alford.

BY MR. ALFORD:

We just wanted to get the right people Your Honor.

BY THE COURT:

Well, I think about three people, because they are going to sign anything the lawyer fixes up anway.

BY MR. ALFORD:

I can assure the Court if I present any affidavits to the Court they are going to be correct.

BY THE COURT:

Well, I shouldn't think there should be any dispute about what happened, and that's why I don't think it would take that long to get about three affidavits and you say the jury kept on deliberating?

BY MR. ALFORD:

They were in that room, but I don't know what if they were deliberating or not.

BY THE COURT:

I wouldn't know any reason why you couldn't get