Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. 14

NORTH CAROLINA,	
Appellant	
vs.	
HENRY C. ALFORD,	
Appellee	

Place Washington, D. C.

Date October 14, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

TABLE OF CONTENTS

* * * * *

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1970

NORTH CAROLINA, Appellant	:	
vs.	:	No. 14
HENRY C. ALFORD, Appellee	:	

Washington, D. C.
October 14, 1970

The above-entitled matter came on for reargument at 11:40 a.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, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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

DORIS R. BRAY, Esq.
700 Jefferson Building
P. O. Drawer G
Greensboro, North Carolina 27402
Counsel for Appellee

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Case No. 14, North Carolina, appellant, versus Henry C. Alford, appellee.

Mr. Safron, you may begin, if you are ready.

ARGUMENT OF JACOB L. SAFRON, ESQ.

ON BEHALF OF APPELLANT

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

Oral argument was originally heard in this case on November 17, 1969, immediately prior to oral arguments being held in Parker vs. North Carolina and Brady vs. United States.

On May 4, 1970, this Court handed down the trilogy of guilty-plea cases, Parker vs. North Carolina, Brady vs. United States, and McMann vs. Richardson. However, the week prior to handing down these three cases, this Court set the Alford case back on the docket for reargument.

When Alford, Parker and Brady were originally argued, the issue before this Court was the impact in United States vs. Jackson upon statutory schemes authorizing the death penalty only upon a jury trial, and permitting a defendant who pled guilty to receive a mandatory life sentence.

Inasmuch as Parker and Brady now speak directly to this issue and hold that it is not involuntary, that these guilty pleas were not involuntary because induced by the

defendant's desire to limit the possible maximum penalty to less than that authorized when there is a jury trial, I will direct my arguments upon this reargument to the applicability of Parker, Brady and McMann to the facts of this case.

On the evening of November 22, 1963, Nathaniel Young, a Negro, operated an establishment in the city of Winston-Salem, Forsyth County, North Carolina, which can best be described as a "party house."

There was a knock at the door and Nathaniel Young partially opened that door and he was cut down by a shotgun blast.

Earlier that evening, Henry C. Alford had come to that house. Henry Alford also is Negro. Alford had been accompanied to that house by a young white lady. They had purchased several drinks of liquor by the drink, sold in that house, which is illegal under the North Carolina Prohibition law, and then Henry Alford gave Nathaniel Young, the proprietor, his last dollar in order to rent a room for several hours that evening in the house.

Alford was accompanied into that room by his girlfriend. But several minutes later they left, because Henry Alford no longer had any money.

He wanted this young lady to leave this house with him. She didn't want to go. Nathaniel Young, the proprietor, advised Alford that she can stay here.

An argument followed. Henry Alford grabbed the young lady's coat and, while being chased by Nathaniel Young and someone else, he took her coat, ran out the door, and these two followed him.

Q Where do all these facts come from?

A These facts, your honor, are represented to the Superior Court of Forsyth County upon the tender of Henry C. Alford's plea, prior to the acceptance of the plea by the Court.

A complete transcript of the testimony presented by the State is included as an appendix to the State's supplemental brief filed in this case. This brief was a part of the record in the Fourth Circuit Court of Appeals.

Q Yes, now, that is the testimony of Mr. Weatherman, detective in the Police Department?

A The testimony of Detective Weatherman and the testimony of several other witnesses, a young lady who was a girlfriend of the young lady with whom Henry Alford lived testified as to his obtaining the weapon, testimony of the young lady who saw Henry Alford walk down the street with his weapon, the testimony of a gentleman to whom Henry Alford had admitted killing the deceased that night and whom he had originally asked not to reveal his having seen him if the please come looking for him.

Q Is that the standard operating procedure in

your State --- guilty pleas to have a full case put in against the man?

A I wouldn't use the word full case, your honor, but I would say this. In each and every instance, upon the entry of a plea of guilty, there is a presentation of the State's evidence.

Q Is this only in capital cases?

A No, your honor, this is in all cases.

Q All felony cases?

A Yes, your honor. The Court wants to be assured that the State does have a case against the defendant and, of course, at the same time, the Court wants to hear evidence, so that the Court would be in a better position to determine the sentence to impose upon the conviction.

This is a general operating procedure.

Q And is there in addition to this a pre-sentence investigation, a pre-sentence report, or does this perform that function that is performed in other jurisdictions?

A Our statutes do provide for pre-sentence reports. Unfortunately, we have a problem in North Carolina. Judges rotate from District to District. They do not sit in the same District to which they are elected. They move from term to term. The idea is so that they are not bound to the electorate in that District and they don't have immediate friends among the bar in that district.

It is a commendable idea, but unfortunately, because of this operation of rotation, it is very difficult to use pre-sentence reports because, if you are going to put off sentencing in order to obtain the pre-sentence report, in most instances the judge will no longer be sitting.

And so this serves part of that function, your honor.

When Henry Alford was indicted by the grand jury, counsel was immediately appointed, counsel thoroughly investigated the case against Henry Alford, counsel spoke to every witness named to him by Henry C. Alford, except for one who could not be found.

In each instance, the testimony of the purported witness was contrary to Alford's allegations as to what their testimony would be.

When the case was called for trial, Henry Alford, through counsel, entered a plea of guilty to second-degree murder, which carries a maximum sentence of thirty years in prison.

He did not tender a plea to first-degree murder, which would have carried a mandatory life sentence. His plea was to second-degree murder, carrying a maximum of thirty years.

And, as I said, after the tender of the plea, this presentation was made by the solicitor, showing the evidence available to the State.

Prior to the tender of this plea, counsel had obtained

an affidavit from Henry Alford. This affidavit was not originally filed in the records of the case, but was introduced into evidence at the subsequent post-conviction hearing.

Now, this affidavit, which was obtained by counsel prior to tendering the plea, reads: "The defendant Henry C. Alford, after first being duly sworn, deposes and says: that attorney Fred G. Crumpler, who was appointed by the Court to represent the defendant, has conferred with the defendant on numerous occasions. In addition to this, this attorney has consulted on numerous occasions with me, in the presence of my sister and various friends in preparation for trial in this case. This attorney has advised me that I am charged with a capital crime. And if I plead not guilty of the verdicts of the jury, including the right of the jury to find me not guilty. He has also advised me that, if I am convicted of first-degree murder, the law provides for a mandatory life sentence of imprisonment, if the jury recommends mercy; or a mandatory death penalty, if the jury does not recommend mercy. He has also advised me of my rights of appeal in all events, including the final appeal for mercy before the Governor of the State of North Carolina. I hereby authorize attorney Fred G. Crumpler to tender a plea of guilty to the offense of second-degree murder to the Court, which decision is of my own free-will, made in the presence of my sister and friends, who were also present during the consultation with said

attorney. It is my opinion that the attorney is able, experienced, and competent. The above affidavit has both been read by me and to me by the undersigned officer of the Court, and it was sworn to and subscribed before Deputy Clerk, the Forsyth County Superior Court."

Q What was the occasion for getting that affidavit?

A The occasion, your honor, was, number one, counsel wanted something in record to show that he was authorized to tender the plea of guilty to second-degree murder. It was a worthwhile protection for counsel, because, unfortunately, in most post-conviction proceedings, the question arises of the authority of counsel to tender the plea.

And that is the very reason that this Court, in Halliday vs. United States, imposed upon the Federal judiciary and, in Boykin vs. Alabama, the requirements of Federal Rule 11.

This case arose prior to the time, well before the time of Boykin, before the time of Halliday, yet counsel wished to prove his authorization.

Q This procedure is one rather commonly recommended in published manuals on functions of defense lawyers these days, is it not?

A It is a common function. And I know, when I was in private practice, I always obtained a written authorization so as to have hard evidence in the future, if the defendant

ever stated that I wasn't authorized to tender a plea of guilty on his behalf.

Of course, this all goes back to the pre-Boykin days, the pre-Halliday days. Now it doesn't really matter, because the defendant really is interrogated fully as to the voluntariness of his plea.

Q Well, Mr. Safron, I am sure that you didn't put into those affidavits that you were very capable, etc., did you? I mean that last little sentence.

A Well, that, perhaps, would have been egotism, your honor. But the presentation of the State's case on the tender of the plea, I submit revealed a classic case of circumstantial evidence, which could have been handed to the least-experienced member of the solicitor's staff and still unquestionably resulted in Henry C. Alford's conviction of first-degree murder.

The State, as I have reviewed, has the testimony, one, of the young lady with whom he was living and her girlfriend, who were present in the house at the time he came back to get his shotgun. He stated to them that he was going to get Nathaniel Young. They argued with him about it. They saw him get the shotgun and the shells.

There is testimony available to the State of his walking up the street having been seen with that shotgun. There was testimony of this young lady when he came back saying that

he admitted to her he had killed that so-and-so. There was testimony of a gentleman to whom he had come asking that he not admit to the police that he had seen him, and telling this man that he had shot Nathaniel Young. There was testimony available of a young lady whom he had poured drinks for later that evening whom after asking her name and address told that he had shot a man and he won't be around for a long time.

The testimony is classic. Alford did take the stand himself after the tender of the plea and the presentation of the State's case. At this point he stated that he consulted with counsel. He stated he had the privilege of seeing counsel and also his sister and his friends and one of those friends, I believe, was a cousin who was a policeman on the Winston-Salem police force.

He stated that counsel had advised him of the various degrees of murder, the difference between first- and second-degree murder. He had been advised of his rights of appeal. He had been advised of his right to go before a jury and the jury might find him not guilty. He affirmed his decision to tender a plea of guilty of second-degree murder.

He had previously stated that "I ain't shot no man," but, upon inquiry of the judge presiding, he reaffirmed his desire to tender a plea of guilty to second-degree murder.

The Court accepted his plea and sentenced him to thirty years in prison.

Approximately three months later he filed a petition for writ of certiorari to the Supreme Court of North Carolina.

That petition was denied, but the Court remanded to the Forsyth County Superior Court for a plenary hearing, an evidentiary hearing, under the North Carolina Post-Conviction Hearing Act.

Counsel was appointed, a hearing was held. Based upon the evidence presented at that hearing, the judge presiding determined that Henry Alford's plea of guilty was freely and voluntarily entered.

Q --- on that petition for certiorari to the State Court and in the State collateral proceeding, was the primary claim the one that we dealt with last term?

A Yes, your honor. He claimed that he was coerced into pleading guilty to second-degree murder, because of the coercive threat of the death penalty.

It was the Jackson-type argument.

Q That was his basic claim ---

A Yes, it was. That he would have been gassed had he pled not guilty, based upon the circumstantial evidence against him. As he had phrased it, the "circumstances that had got against me."

Q There is a little more than Jackson to it ---

A That is right, your honor. This is once removed from the original Jackson argument.

The judge presiding at that hearing entered an order, a pertinent portion of which was incorporated in the Federal Court's order and which I think is important to read, that on December 2, 1963, Mr. Fred G. Crumpler was appointed by the Court to serve as counsel for Henry C. Alford, who is charged in a bill of indictment of the crime of first-degree murder, that Henry C. Alford, through his said attorney, entered a plea of guilty to the offense of murder in the second degree on December 10, 1963, that before the plea was entered, Fred. G. Crumpler ---

CHIEF JUSTICE BURGER: I think we will continue after lunch.

MR. SAFRON: Thank you.

(Whereupon, at 12:00 Noon the argument in the above-entitled matter recessed, to reconvene at 1:00 p.m. the same day.)

(The argument in the above-entitled matter resumed at 1:00 p.m.)

FURTHER ARGUMENT OF JACOB L. SAFRON, ESQ.

ON BEHALF OF APPELLANT

--- It was not within the territorial jurisdiction of the Court. However, a week or two later, he was moved to a prison unit within the Court's jurisdiction and that application was reinstated.

Honorable Eugene Gordon, Judge of the Middle District of North Carolina, subsequently entered an order denying Alford Habeus Corpus release.

Forty-eight days after entry of the order, Alford filed a notice of appeal in the Fourth Circuit Court of Appeals. He also filed an original writ of Habeus Corpus in the Fourth Circuit Court of Appeals.

A panel of the Fourth Circuit determined that the Court had no jurisdiction to note his late notice of appeal. But Chief Judge Haynsworth considered the application for writ of Habeus Corpus filed originally in that Court, and entered an order, a copy of which is in the appendix, concluding that the plea of guilty was freely and voluntarily entered upon the advice of competent counsel.

Chief Judge Haynsworth's order is to be found on pages 19 and 20 of the appendix.

Alford subsequently filed yet another application for writ of Habeus Corpus in the United States District Court for the Middle District of North Carolina. Judge Gordon once again reviewed his contentions and once again denied release.

From that denial, Alford appealed to the Fourth Circuit Court of Appeals. In the interim between the noting of that appeal and the argument, this Court decided, in United States vs. Jackson, and upon that appeal, the Fourth Circuit Court of Appeals decided based upon what now appears to be an erroneous reading of United States vs. Jackson, held that the statutory scheme in North Carolina for the imposition of capital punishment was unconstitutional. And that the incentives supplied by that scheme to offer to plead guilty was the primary motivating force to effect his tender of that plea.

From that opinion Chief Judge Haynsworth dissented.

Now, both the Brady and Parker cases cited by this Court this last spring, involved the question of the validity of pleas of guilty entered to capital offenses under which circumstances the plea guaranteed that the accused would escape the possible imposition of the sentence of death.

The issue presented, as stated by this Court in Brady, was whether it violates the Fifth Amendment to influence or encourage a guilty plea by the opportunity or promise of leniency, and whether a guilty plea is coerced and invalid if influenced by fear of a possibly higher penalty to the crime charged,

if a conviction is obtained after the State has been put to its proof.

In both Brady and Parker, this Court denied relief, holding that an otherwise valid plea is not involuntary because induced by defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial.

In so holding, this Court rejected the contention that United States vs. Jackson, which had previously held invalid a provision in the Federal Kidnapping Act, holding the death penalty to be invalid under the statutory scheme under the Federal Kidnapping Act, that under that, under United States vs. Jackson, that the guilty plea would be rendered inoperative, that the death penalty which only could be imposed upon a jury trial, rendered invalid the defendant's tender of a plea of guilty to the offense.

As this Court stated in Brady, a plea of guilty entered by the expectations of a completely counseled defendant that the State will have a strong case against him, is not subject to later attack because the defendant's lawyer correctly advised him with respect to then existing law as to possible penalties.

Based upon the Parker and Brady cases, the United States Court of Appeals of the Fourth Circuit on July 15, 1970, decided en banc the case of Kincaid Wilson vs. United States--excuse me, Kincaid Wilson vs. North Carolina--rejecting in

Wilson its former holding in Alford, except for the caveat contained in a footnote to be found on page 6 of that opinion--excuse me, it is page 7, footnote 6.

For our purposes here, the discussion is limited to the case of defendant against whom a legitimate prosecution is brought in good faith and who has admitted his guilt to the offense charged.

The propriety of accepting a plea of guilty from a defendant who contemporaneously asserts his innocence may be subject to additional considerations.

In the Wilson case, the Fourth Circuit rejected the former holding in the Alford case that is now before this Court as to the application of United States vs. Jackson, except for this caveat in this particular situation.

From a reading of Parker, Brady and Wilson, it becomes clear that the basis for the original holding of Fourth Circuit in Alford is no longer viable.

In Parker this Court rejected the contention that a guilty plea to the capital charge carrying a sentence of life imprisonment was involuntary because it was induced by a statute governing, that is, by a statute providing a maximum penalty in the event of a plea of guilty lower than the penalty authorized after a verdict of guilty by a jury.

In Brady this Court held that an otherwise valid plea is not involuntary because induced by defendant's desire to

limit the possible maximum penalty to less than that authorized if there is a jury trial.

As Justice White stated in McMann vs. Richardson, the third case of the guilty-plea trilogy, the decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then, the truth will often be in dispute.

In the face of unavoidable uncertainty, defendant and his counsel must make their best judgments as to the weight of the State's case.

Counsel must predict how the facts, as he understands them, will be viewed by a court, if proved, those facts convince a judge or jury of defendant's guilt.

In McMann Justice White concluded, in our view a defendant's plea of guilty based upon reasonably competent advice is an intelligent plea, not open to attack on the grounds that counsel may have misjudged the admissibility of the defendant's confession.

Justice White goes on to say ---

CHIEF JUSTICE BURGER: I think that since you are cutting into your rebuttal time now, we have in mind pretty well what the substance of this case ---

A All right, your honor. The Fourth Circuit Court

of Appeals has recently also considered a case by the style of United States vs. Tucker. In Tucker ---

CHIEF JUSTICE BURGER: Is that after Wilson?

A It was prior to Wilson, your honor. And it is cited in our supplemental brief.

In Tucker, the defendant charged under the Federal Kidnapping Act had previously tendered a plea of guilty and was later given opportunity to plead anew.

At the second proceeding he again pleaded guilty, but at the same time professed his innocence.

In Tucker the Fourth Circuit remanded for determination of whether the plea had been entered voluntarily and knowingly.

Therefore, based upon this Court's decisions in Parker, Brady and McMann, and the lower courts' previous determinations that Henry C. Alford's plea of guilty was freely and knowingly and intelligently entered, the State of North Carolina submits that the decision of the Fourth Circuit Court of Appeals in this case should be reversed, and the opinion of the Middle District of North Carolina reinstated.

CHIEF JUSTICE BURGER: Thank you, Mr. Safron. Mrs. Bray?

ARGUMENT OF DORIS R. BRAY, ESQ.

ON BEHALF OF APPELLEE

MRS. BRAY: If it please the Court: I would first

like to point out that what the Fourth Circuit decided in this case was that the record showed that, as a matter of fact, this guilty plea was involuntary.

In this case we have all of the facts in the record and the Fourth Circuit ---

Q Do you suggest that a finding of fact by a court of appeal should override a finding of fact by an original trier?

A Well, where it is clearly erroneous, yes, sir.

Q I am speaking of this kind of a record, where all the facts are reviewed. Go ahead.

A I might point out that that question was discussed in my brief in the Fourth Circuit and was decided by the Fourth Circuit, but has never been discussed or briefed by the State, the question whether the court ought to review and make an independent determination of the facts.

Q Do you read that holding of the Court of Appeals as proceeding on the basis of the findings of fact in the trial court were erroneous or that the opposite result was required by Jackson against the United States?

A I think that what the Court of Appeals said was that Jackson does not dictate a reversal of every guilty plea decided under the unconstitutional statutory scheme for imposing the death penalty in North Carolina.

However, they said that their own independent view

or, rather, review of the facts indicated that this plea was in fact involuntary, considering Jackson as a factor.

And this Court, in Bray, recognized that the statutory scheme is in fact a legitimate factor to be considered.

Q So you think they did reverse the trial court on its findings?

A Yes, sir, I think they did. The District Court simply reviewed the findings of the State Court and made no independent findings itself.

The critical facts in making these determinations are these. Alford is a Negro, he has very little education. His attorney advised him to plead guilty and advised him that the circumstances were aggravated, that the jury would not look favorably upon the facts of the case. And he denied saying that he would get the death penalty. However, the record is clear that Alford never thought anything else, but that he would surely get the death penalty if he did not plead guilty.

Q Well, do you suppose that the prima facie case demonstrated by the State in the manner that was outlined by your friend this morning had some influence on his decision, too, as to what the State was going to show on the trial?

A Well, I think the prima facie case could have some influence on it. I think that the record clearly shows in this case, however, that that didn't influence him, that the only thing he recognized was that he was going to get the

death penalty if he didn't plead guilty.

Q Would you think that that was not a strong case the State was going to make against him on the facts?

A Well, surely, if the State had no strong case, there would have been no problem.

Q Those recitals add up to an overwhelming case against the defendant, do they not?

A The evidence as related by the investigating officer, yes, sir. But the fact is that the unconstitutional statutory scheme for imposing the death penalty is what Alford had in mind, and I think that it is a mistake for anyone else to impose his own judgement into the case, as Judge Haynsworth seemed to do in his dissent.

Judge Haynsworth read the record and concluded that this man was guilty, that he was well-advised to plead guilty, and that he ought to plead guilty next time he got any trial.

Well, that is imposing the judgement of an independent observer over the judgement of the defendant, and what is important in determining whether or not a guilty plea is voluntary is not what we think he should have done and whether we think he made the privy decision, but what was his state of mind at the time he entered that plea.

Q Mrs. Bray, you want us to set up the rule that in a case where the plea is made of this type and the petitioner in Habeus Corpus says that I did this because of the fear of

capital punishment, that that has to be upset without more. What do you have more than his word?

A Well, we have more than that in this case.

Q What?

A What we have is the man's continuing pronouncements of his innocence at the very trial at which he pleaded guilty, and his continuing compulsion never to let that guilty plea enter unqualified.

Q But what do we have other than his word that the only reason for his pleading guilty to second-degree was threat of the death penalty? You have nothing other than his word.

A Perhaps not. But we have nothing to indicate that there was any other reason.

Q What about the affidavit of the lawyer?

A Sir?

Q What about the affidavit of his lawyer?

A His lawyer testified at the post-conviction hearing that he was not certain of what the, well, you know the affidavit that he signed?

Q Yes, ma'am.

A I am sure that the lawyer advised him of the consequences of his plea. That seems to be well-established by the record.

However, just the advice of the lawyer, it seems to me, doesn't insulate the coercive effect of this statutory

scheme on this defendant.

All the advice in the world is no good if the defendant is incapable, because of the overwhelming fear of the death penalty, of making any sort of a rational evaluation of advice he has received.

Q You keep saying the overwhelming fear of the death penalty. There was also an overwhelming fear of this evidence against him, wasn't that present, too?

A Well, I suppose that is necessarily present, because there could be no fear of the death penalty without the State having substantial evidence, which would substantiate a conviction.

Q That is my problem. I don't see how he can separate in his own mind which was the overwhelming influence, as between the threat of the death penalty and the amount of evidence against him, and the fact that he didn't have anything to defend himself with.

A Well, I doubt if he did separate it in his own mind. But they are so intertwined that I don't think the Court can separate them either.

If those two elements are separated, then I can't see how Jackson or the statutory scheme could ever have a coercive effect, as Jackson stated it did, because there would never be a real fear of the death penalty if the State did not have a substantial case against the defendant.

If there was no substantial case, then the chances are there would have been no indictment for first-degree murder. So it seems to me that it is impossible to separate the two and that the overwhelming evidence doesn't in any way dissipate the coercive effect of the fear of the death penalty.

Q Suppose he had been sentenced to life imprisonment and that he had been afraid of life imprisonment. Would that be enough to set aside the judgement?

A Well, your honor, it seems to me that the death penalty is such a different sort of thing.

Q It is death, of course, but a life sentence to some people is more threatening than the death sentence. Are we to draw a distinction between the fear that is generated in the human mind, the fear of being executed, and of the life term? That is what we have to do, isn't it?

A Yes, sir, I think that is what you have to do. Even at the trial, Alford could never allow this guilty plea to go in uncontested. After he took the stand, at his own request, and related his own view of the facts, he stated "I pleaded guilty on second-degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me, and that is all."

His attorney was understandably upset by this, and

asked him if he had not given him advice as to the possible verdicts, etc., which he acknowledged he had.

He said do you reaffirm your intent to plead guilty? He responded "Well, I'm still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence, that the jury will prosecute me on--on the second. You told me to plead guilty, right. I don't--I'm not guilty, but I plead guilty."

Q What is the meaning of "you all"?

A Well, I think that means the attorney and the sister. They were the primary influence.

Q Do you think it was a plea bargain?

A Do I think it was a plea bargain? No, sir, I don't think it was a plea bargain. I think that the record shows that the facts of the second-degree murder guilty plea just have nothing to do with this case, and I don't think it made any difference in his mind whether he got life imprisonment and ---

Q When you say that he meant that the solicitor got him to plead guilty ---

A I don't think that he meant that.

Q I thought you just said the solicitor and the attorney.

A His sister.

Q Oh, I beg your pardon, his sister and his

attorney, not the solicitor.

A No, I don't think so.

Q Mrs. Bray, if you sent this back for retrial, what do you think would happen? Do you think he would stand trial for murder, first-degree?

A No, I don't think that is possible.

Q Doesn't it end up that you just can't try this man?

A I think you could try him for second-degree murder. I don't think you could try him for first-degree.

Q And he could get thirty years.

A Yes, sir, he could get thirty years, but he would have had a trial.

Q Why do you think he couldn't be tried for first-degree?

A Well, I think that Price vs. Georgia and Grain vs. United States, that would be impermissible.

Q Where was his jeopardy here? He entered a guilty plea. Jeopardy never attaches ---

A Well, that is true. Well, I think it did attach attach because he was charged with first-degree murder. He was convicted of second-degree.

Q Well, that could be a considerable extension of any holding this Court has ever made, would it not?

A Well, I am not sure. In the first instance, if

you have enough to indict a man for first-degree murder and the State chooses to indict for second-degree murder, the State surely cannot go back and re-indict him once he has been tried for second-degree murder.

Q Not if he has been tried, that is right. He hasn't been tried here.

A Well, a guilty plea was entered and a judgement was entered, so in effect he has been tried. He has been tried for second-degree murder.

Q We conceivably might adopt that doctrine some day, no one can predict. Can you cite us a case on that? That a guilty plea and a judgement pursuant to it is equivalent to jeopardy on a full-scale trial?

A I think there is one case that I have seen in California, which was decided by Mr. Justice ---, although it was based on the California Constitution, not the United States Constitution.

Q Mrs. Bray, following up my question, that there is no trial of this case after he said I didn't do it, and I'm not guilty of it, etc., etc., suppose the judge had said all right, I will not accept your plea of second-degree murder and we will go to trial on second-degree murder, I would assume the same judge would give him the same thirty years?

A Well, he never, however, had that choice.

Q He never had the chance to go to the jury, is

that your point?

A Yes, sir. He never had a chance to have a trial at all.

Q For second-degree murder. He has had an opportunity to have a trial for first-degree murder.

A Yes, sir, correct. But there never was any indication that the State would permit him to plead not guilty to second-degree murder. For that reason, I don't think that plea bargaining is a reall issue at all in this case.

Q If the prosecutor was faced with a rule such as you suggest, I doubt if he would ever have accepted a plea of second-degree murder in this case. He had a strong case, he had strong evidence.

A Perhaps.

Q And he would know that if the guilty plea were ever set aside, he might have a problem.

A Well, that may very well be, but I question whether that has much to do with whether the plea was guilty or not, I mean was voluntary or not.

The other essential fact is that the defendant has never admitted his guilt either to the Court or to the attorney. This is clear from the record, from the post-conviction hearing. He has just never admitted his guilt to anyone.

And, in fact, all the Courts that have considered the question have determined--even Judge Haynsworth in the original

denial of the write of Habeus Corpus in the Fourth Circuit.

Q Is guilt, as you use the term, a legal or a factual conclusion?

A Guilt is a factual conclusion.

Q Are you sure of that? A man traditionally may be guilty in fact--this is an ancient aphorism of the law--but not guilty in law. Guilt is a legal conclusion, is it not?

A I suppose so. I don't think that is what the defendant here meant when he said I am not guilty. I suppose certainly there are some cases where the question of guilt is very much a legal question, so that it is not the same question in the mind of the defendant as it is in the mind of the Court. For example, where somebody is an accessory before the fact in a murder and doesn't actually pull the trigger, he may very well think he is not guilty, but in law he is guilty.

In this case, though, the defendant believed he was not guilty because he didn't believe that he was involved in the crime.

Q The defendant said I never shot the man. His statement was a factual statement, true or false.

A Yes, sir. The record is clear that all during the process, prior to this trial, of determining what the plea, of what to plead, the defendant continually wavered back and forth. He said I don't want to plead guilty, he said I am innocent, and the attorney called in his sister and his cousin,

the policeman, and they talked to him. And his sister said you should plead guilty, because you won't die and I will come to see you in jail. Finally, the attorney said, you have got to make up your mind and do something, this case is being called. And finally he wound up pleading guilty, but after continually wavering.

And the attorney stated at the post-conviction hearing that he had to have several conferences because he wasn't sure that the defendant understood.

Then at the trial itself, when the defendant continually protested that he was innocent, the attorney sort of washed his hands of the matter and said "Your honor, I don't know what to do with the man."

The Court then said he says you want to plead guilty, is that right? Alford says yes, sir. Do you still want to plead guilty? Alford said on the circumstances that he told me. The Court then dropped the inquiry completely, and that was the end of the inquiry of the Court into the question of voluntariness.

Q Supposing Jackson vs United States was not on the books and had never been decided, would your position in this case be any different?

A I think not. I think that this plea of guilty was involuntary under traditional tests.

Q What I am suggesting is that I don't see what

bearing Jackson vs. United States has on this case at all.

A Well, I don't think that I need Jackson in this case. I don't think that we need Jackson to hold that this plea is involuntary. I think this is the exceptional case, where the facts are so blatant, that it is just violation of due process to deprive this man of a trial and to accept his guilty plea.

Q Well, what would you have the trial judge do when the accused insists I am innocent, but nevertheless I will plead guilty to this lesser offense? What do you think the trial judge ought to do?

A I think that if that is the final word of the defendant, he ought not to accept the plea.

Q Just tell him he has to go to trial?

A Yes, sir.

Q Was not the presentation of evidence that was recited to us this morning, which I had characterized as an overwhelming case to you a little while ago, was not that the equivalent of the inquiry into the factual basis of the plea that we now have under Rule 11 in the Federal Rules?

A That may have been the inquiry into the factual basis of the plea. It wasn't the inquiry into the state of mind of the defendant and as to whether he was voluntarily entering the plea, and that is the question.

Q At the moment he was standing before the Court at

the time of the plea, he was presenting both sides. He was saying I am guilty, but I "didn't kill no man." He was saying both, wasn't he?

A Well, he was saying I am guilty only in the most technical sense. He was saying I plead guilty, but I am not guilty.

Q He denied he shot him.

A That is right.

Q I think the term he used was I "didn't kill no man."

A He said both, I think. He said "I ain't shot no man."

Q Yes, top of page 20, "there is too much evidence, but I ain't shot no man, but I take the fault for the other man."

A Then later he said I am not guilty, but I plead guilty. At the post-conviction hearing, the attorney was asked about his statement that he didn't know what to do with the man. This, I believe, is on page 5 of the appellee's supplemental brief.

"Q. Now, at anytime did you make a statement to the Court that you didn't know what to do with the man?

"A. I certainly did.

"Q. And in that statement, Mr. Crumpler, did you mean at that time that you were not sure what plea you should

enter for the man?

"A. I meant simply this: that I had advised and consulted with him as far as I thought it best to, and in my opinion as much as I could, that under the circumstances I wasn't sure what the proper course was and I left it up to the Court to make that decision.

"Q. And then, Mr. Crumpler, you were in doubt as to what position you were in as to what plea you were to enter if you left it up to the Court?

"A. Would you repeat that?

"Q. You didn't know what position you were in as to his plea did you?

"A. I had no doubt of my position as to what his plea was at that time. I was doubtful of his position and for that reason I left it up to the Court to determine what his plea was."

Now, it seems to me that if there is any chance which, under Brady, a man cannot be insulated from the coercive effect of a guilty plea, even with competent counsel this is the case.

It is clear from the record that the coercive effect of the statutory scheme was not dissipated by the presence of the counsel and that all of the advice of the counsel just never got through because of this horrible effect that the threat of the death penalty had on the state of the mind of the defendant.

So it seems to me impossible to conclude from this record that this man entered a voluntary guilty plea.

Q What is the coercive effect of the statutory scheme, as you call it, to a plea to the lesser offense? What is the coercive effect?

A Your honor, I think this defendant would have pleaded to first-degree murder as well as to second-degree murder. I think that the record shows that the fact that he was permitted to plead guilty to second-degree murder as opposed to first-degree murder had nothing to do with his decision to plead guilty.

The thing that determined his decision to plead guilty was the existence of the death penalty in the charge of first-degree murder.

The difference between life and thirty years is not much, and criminal lawyers tell me that it very seldom makes much difference to the defendant whether he gets life or thirty years, especially when he is fifty years old and the difference, I think, in probation time is two and a half years under the North Carolina statute. That is all the difference there is.

The Court in Brady said central to the plea and the foundation for entering judgement against the defendant, is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from

being compelled to do so. Hence, the minimum requirement that the plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct. It is the defendant's consent that the judgement of conviction may be entered without trial, a waiver of his right of a trial before a jury and a judge.

Q ---

A I am not sure we have a consent, because the consent was always qualified. So I am not sure that we have any absolute consent in this case.

And we surely don't have any admission of guilt, which is one of the bases of the guilty plea.

The Court has always very carefully looked at any sort of waiver of Constitutional right, and it seems to me that in this case the right to a trial was never completely waived.

Q Do I understand you, though, Mrs. Bray, that in any instance of a guilty plea, that in the absence of some admission by the accused of conduct of the nature charged, which is the basis of the trial, that in the absence of some admission by him that he had committed the conduct, that the conduct in this instance, shooting, amounts to first-degree, second-degree, manslaughter, whatever it may be, that in the absence at least of an admission of the conduct, the judge ought to refuse to accept, whatever the circumstances, a plea of guilty to any offense? Is that what you are telling us?

A I don't know whether I would go that far. I think ---

Q Would you say where, perhaps, he denies it, expressly denies it?

A I would certainly go that far. I think that any defendant who feels in Court compelled to deny it ought not to be permitted to plead guilty.

Q When he says "I ain't shot no man," that is denial, isn't it?

A I think in this case, under these facts, there should never have been a guilty plea accepted.

Q Suppose we didn't have that in this case, in this record, "I ain't shot no man, some other fellow did," we didn't have that statement at all, but we had everything else, would you be here?

A If we had this serious a crime, I think I may. But I think there must be a line somewhere, I am not sure where it is--for example, I think a man ought to be able to plead guilty to a traffic offense, pay his money in Court even if he thinks he wasn't speeding.

Q What if a man just pleads guilty, says I plead guilty, and nothing more, and the record does not show that he expressly admitted shooting the man, just said I am guilty, and then later seeks to upset his guilty plea on the grounds that the record does not show an admission of the act?

A Well, no, I don't think that is enough to upset it in itself.

Q You think that, unless otherwise qualified, saying I am guilty implicitly admits the act?

A As long as it was otherwise voluntary, as long as he had full knowledge of all the consequences.

Q Well, then, you do draw the line at the point where, in this record at least, the accuse denies the --- act?

A Yes.

Q Mr. Safron, do you have some rebuttal you are going to make?

MR. SAFRON: No, your honor.

CHIEF JUSTICE BURGER: Mrs. Brady, on behalf of the Court we thank you for your assistance to the client and your assistance to the Court.

(Whereupon, at 1:40 p.m the argument in the above-entitled matter was concluded.)