In the

Supreme Court of the United States

DAVID X. FONTAINE,
Petitioner,
v.
UNITED STATES,
Respondent.

No. 71-6757

Washington, D. C.
February 28, 1973

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IN THE SUPREME COURT OF THE UNITED STAETES

DAVID X. FONTAINE, Petitioner v. UNITED STATES, Respondent	No. 71-6757

Washington, D. C.

Wednesday, February 28, 1973

The above-entitled matter came on for argument at 2:27 o'clock p.m.,

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

STEVEN M. UMIN, 1000 Hill Building, Washington, D. C. 20006 for the Petitioner.

SAMUEL HUNTINGTON, Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-6757, Fontaine against United States.

Mr. Umin, you may proceed.

ORAL ARGUMENT OF STEVEN M. UMIN ON BEHALF OF THE PETITIONER

MR. UMIN: Mr. Chief Justice --

MR. CHIEF JUSTICE BURGER: We are running, as you know, a little over, and we will hope that you will move right along with your argument.

MR. UMIN: I will do my best, your Honor.

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

This case here on writ of certiorari challenges the validity of a guilty plea of Federal armed bankrobbery entered by the petitioner David X. Fontaine in Federal Court in November of 1969.

The issues the case raises were each presented pro se by Mr. Fontaine in his motion to vacate sentence under U.S.C. 2255, and with the Court's permission, I would indulge in some oversimplification initially and define those issues as follows:

First, whether 2255 entitled the petitioner to an evidentiary hearing upon his concrete allegations which if true would show that his guilty plea was coerced.

And, second, and even more important, I would

suggest, the threshold issue of whether petitioner's guilty plea is void on the face of the existing record without further evidentiary hearing for want of a valid Sixth Amendment waiver of counsel.

The procedural history of this case is a history of inattention to detail. In the face of the petitioner's concrete allegations of police physical and mental abuse, the United States attorney declined even to answer those specific allegations. The District Court nonetheless denied the petitioner's claims summarily without a hearing, his waiver of counsel point on the ground that the petitioner had participated in a Rule 11 proceeding, a guilty plea, and his voluntariness claim on the same ground.

The Court of Appeals, typical of the inattention paid to this case, affirmed the summary denial below in one sentence, and that sentence contains an error, an error dealing with the ground of decision by the District Court.

This Court granted certiorari and appointed counsel. I mention the appointment only to highlight that the absence of counsel at all prior stages of this case, and most particularly at the guilty plea itself is the critical fact at hand. From arrest, through custody, through plea and sentencing, the absence of counsel raises a pivotal issue. Whether this record, the existing record made at the guilty plea discloses a waiver of counsel compatible with the Sixth Amendment

standards, the issue must be framed precisely. This is not a question of whether at the guilty plea proceeding there was an offer of counsel and a rejection of counsel. We can argue about that. I do believe that the record shows something resembling an offer and something resembling a rejection. But the question is whether even if there was a meaningful offer of counsel and a rejection of counsel, the circumstances of that offer and rejection disclose an understanding and intelligent waiver under the Sixth Amendment. To quote from Carnley v. Cochran, in the absence of an understanding and intelligent waiver, anything less is not waiver.

Let me say one word, if I may, about the position of thatissue in this case. It stands as point No. IV in the petitioner's brief on page 47. In my judgment, and I would respectfully submit to the Court, it's point number one in the case. So I am something in the position of a college debater that I once heard who perhaps overtied to the structure of his own argument had to begin by announcing to his audience, "I have four points to make. Let me make the fourth one first." The waiver of counsel, indeed, is No. IV in the brief, but it's number one in the case. Let me turn to the facts that surround the waiver of counsel point, making two things clear at the outset.

Absolutely nothing about that point depends upon the truth or falsity of the petitioner's allegations pertaining to

police abuse or coercion. Likewise, absolutely nothing about the waiver of counsel claim depends upon the trial court's alleged compliance with Rule 11 at the guilty plea proceeding. The waiver of counsel point depends entirely upon the record made at that proceeding, for it is the record which must disclose whether there was not merely an offer and rejection of counsel, but an understanding and intelligent one. It's the record to which Johnson v. Zerbst, Carnley v. Cochran, and Boykin v. Alabama refer. That record shows that the petitioner was arrested on October 21, 1969, that with the exception of hospitalization, he was in continuous custody. It is undenied on the record that he was never arraigned, at which time he might have been informed of his right to counsel. Even those facts are, strictly speaking, irrelevant.

The first fact which is critical is that during his custody he signed two pieces of paper, alleged waivers of grand jury indictment and counsel. And on November 13, he came to court in the company of a United States attorney without a lawyer and the plea proceeding took place.

I could read all of that proceeding to this Court in approximately 4 minutes at a reasonable pace. Doubling the time -- let's assume that the proceeding took 8 minutes in Federal Court. There is, of course, no time requirement in a guilty plea proceeding. But I would submit that it is some index, the brevity of this proceeding is some index of the

care and attention that was paid to the proceeding as a whole and to the question of the waiver of counsel. And I would read to you only that part of the proceeding that deals with the waiver of counsel, the very beginning of it. I will be very brief.

The United States attorney on page 3 of the appendix, Mr. Chief Justice -- the Assistant United States Attorney, Mr. Zanglin begins: "Your Honor, this is an arraignment on an information charging the defendant with armed bank robbery. He's been given a copy of the Information. He acknowledges that he understands it and knows what the maximum penalty is.

"I have explained to him his right to an indictment by a grand jury. He has waived that right and signed a waiver of rights form.

"He understands that he has a right to an attorney at this time and he informs me that he wants to waive that right and has signed a waiver of that right. Knowing all of these rights he informs me that he intends to plead guilty to the information.

"THE COURT: You are Mr. David Fontaine?

"DEFENDANT FONTAINE: Yes, sir.

"THE COURT: You have received a copy of the information here, the charge here against you for armed bank robbery, is that right?

"DEFENDANT FONTAINE: Right.

"THE COURT: The first thing of consequence is that you have signed also a waiver of grand jury indictment which means you are entitled to have this matter first submitted to a grand jury and a determination made by that body and an indictment returned first."

If the Court please, may I pause there to indicate that the trial court in accepting the plea first emphasizes the waiver of grand jury indictment out of court and then to the extent that it defines waiver at all, defines it exactly erroneously. A waiver of a grand jury indictment does not mean that you are entitled to have this matter first submitted to a grand jury. It means exactly the opposite.

The court then continued: "Do you understand that and the rights you have thereunder? Anyway, that's what you will get if you wanted it to go to the grand jury."

QUESTION: (Inaudible) ambiguity that troubles you about the first part?

MR. UMIN: I think not, your Honor, because all the court does is ask the defendant do you understand that and the rights you have thereunder? If he understood that, that definition of waiver, he would be understanding precisely the opposite of what waiver was.

"Anyway," the court says, "that's what you will get if you wanted it to go to the grand jury.

"DEFENDANT FONTAINE: Yes.

"THE COURT: You have signed a waiver of that right, am I right?

"DEFENDANT FONTAINE: Yes, sir."

There is no indication by the court at that time that the defendant was free at that point to reconsider his waiver. The whole issue of waiver is introduced by the trial court without any suggestion that prior waivers made out of court and in custody can be reconsidered.

And then the court addresses the critical counsel point.

"THE COURT: In addition, you are entitled to be represented by an attorney and, if you are without funds with which to employ an attorney, the Court will appoint one for you. The Court has here before it a waiver of assignment of an attorney. Is it your wish to proceed here without an attorney?

"DEFENDANT FONTAINE: I guess so.

"THE COURT: You have got to know so.

"DEFENDANT FONTAINE: Yes, sir."

I would submit to this Court that that part of the plea proceeding, which is all there is on the question of the waiver of counsel, is deficient in multiple respects.

First, there is no explanation at all in that time of the proceeding or anywhere else as to what a guilty plea is, what rights it waives, and what right exists to plead not

guilty. Under Boykin v. Alabama, a State case but decided under Federal constitutional standards, that alone is sufficient to condemn the plea and force vacation of this conviction. But there is more.

The court gave no explanation that a guilty plea does not entail the waiver of counsel. Indeed the opposite impression is left by the court's indication that, "You have got to know that you want to waive counsel." I don't suggest that's the only implication to come out of that sentence, but it's a fairly likely one. And a layman is all too likely to consider a guilty plea as the equivalent of an abandonment of the lawyer. The lawyer is useful for the fight, for the time of trial. But if you are going to plead guilty, you certainly don't need a lawyer. And I suggest that in order to correct that impression, to make sure that an understanding and intelligent waiver of counsel takes place, it is the obligation of a court accepting a guilty plea to indicate when a waiver of counsel is possible is tendered, that a guilty plea does not entail the waiver. Nor, of course, is there any explanation of the role of counsel at a guilty plea, of his critical role in plea bargaining. This case does not indicate that any plea bargaining took place. Indeed, the sentence of 20 years, maximum 25, suggests that it didn't. And there were also lesser included offenses than Federal armed bank robbery which were never mentioned by the court and which could be very vital

indeed in plea bargaining. The absence of any mention of lesser included offenses is in my judgment sufficient to condemn this plea under McCarthy v. United States where this Court did not quite hold that lesser included offenses had to be mentioned as part of the explanation to the defendant of the nature of the charge that was involved, but it strongly suggests in footnote 20 that where lesser included offenses are involved, a defendant cannot understand the nature of the charge without being told about it. Boykin and McCarthy thus far condemn the plea, but there is still more.

There is no statement by this court that the court thinks that counsel would be desirable, that a waiver of counsel is ordinarily not preferred. Indeed, as this Court has put it on many, many occasions, every presumption is indulged against waiver. The system really has no interest in an uncounseled guilty plea, although it has an interest in guilty pleas generally.

Nor, when the petitioner indicated that he guessed he did not want to proceed with a lawyer, did the court take any concern or pains to clarify that ambiguous rejection, to indicate at that point that he was offering a lawyer for this plea, to do anything at all to suggest to the defendant that this is not the time to guess about whether you want a lawyer or not. If you have any doubt at all, the court advises you to have one.

QUESTION: Isn't there any intimation in the judge's comment, "You've got to know so."

MR. UMIN: It would probably be fair to say, Mr. Justice Rehnquist, that something would depend on how, what kind of tone of voice the trial judge said you've got to know so. If he said you have got to know so, that might mean to a defendant, in order to plead guilty, you have got to know that you don't want a lawyer, which indeed would be the common sense interpretation that a layman might draw. After all, I don't need a lawyer to fight. I'm giving up. So I don't need a lawyer. Or alternatively, it might have meant, "I don't want you to guess."

QUESTION: The whole proceeding statement of the court was addressed to the availability of counsel and not to the plea of guilty, as I read that proceeding, beginning, "In addition, you are entitled to be represented by an attorney."

MR. UMIN: That's true, too, Mr. Justice. But it never made clear in that colloquy that by "entitled to be represented by an attorney," the court meant an attorney right here now at this guilty plea. An implication from that is, if you want to go forward with your plea, you have got to know that you don't want a lawyer. If you want to go to trial, then you may want a lawyer.

I don't suggest, Mr. Justice Rehnquist, that that's the only interpretation of this language. I suggest when the

solemn occasion of a guilty plea is before the court, there is no room for ambiguity. I suggest that we hark back to the language of Mr. Justice Black in Johnson v. Zerbst when he said that the tender of an uncounseled guilty plea presents to the court an occasion for the protection of the court, presents to the court an occasion at which the court has to take the greatest care that an uncounseled guilty plea is really the intelligent desire of a petitioner. And a court that would let the kind of colloquy that I have read that is reflected on this record go by with the kind of ambiguities in it, I suggest to you is not the sort of court that has taken the kind of protection to see to it that the defendant understands what it means to have a lawyer at a guilty plea and has then made a voluntary rejection of it.

The Government's answers to these arguments consist of four: That the ... offer and rejection is something that the petitioner does not challenge, although one could say that the offer wasn't all that clear in this respect, that the court was offering a lawyer for this guilty plea proceeding and, indeed, that the rejection wasn't all that clear. The Government says that the ambiguity may have been, ambiguity in the rejection, "I guess so," may have been cured by matters of tone of voice at the pleading, and I don't doubt that either. But the question is not whether there was simply an offer and an unequivocal rejection, although I suggest that

this Court should require absolutely unequivocal waivers of a lawyer.

QUESTION: Are the matters on the bottom half of page 5 and 6 irrelevant to the points you are making now?

MR. UMIN: Yes, they are, your Honor.

QUESTION: Detailed description of the crime?

MR. UMIN: I would submit, your Honor, that the description of the crime is entirely irrelevant to the question of waiver of counsel, but I would also quarrel with your suggestion that it was a detailed description of the crime.

QUESTION: You say it's entirely irrelevant?

MR.UMIN: Yes. The question of whether a man knows whether or not to have a lawyer.

QUESTION: Does it have any bearing on the question ofhis own evaluation of his need for a lawyer?

MR. UMIN: I think not, your Honor. He may feel that he held up a bank or participated in holding up a bank, but he may not know, for example, that if you didn't have the gun, you might be chargeable under 21-113(a) which is a lesser included offense, something a lawyer could help him with, or indeed, if you just leave the bank with someone else's money, you would be chargeable under 21-113(c) punishable by only one year in prison.

QUESTION: By his own statement, he has done all of these things. He had a gun and he took the money.

MR. UMIN: He never specifically says he had a gun. And indeed he doesn't really give a narrative of any kind, your Honor. What he does is respond to the court's questions.

"What did you do on October 8th?"

"I held the bank up."

"THE COURT: What?

"DEFENDANT FONTAINE: I held up the teller.

"THE COURT: You held up a teller?

"DEFENDANT FONTAINE: Yes, sir.

"THE COURT: Did you take from him some $1,400.00 plus?

"DEFENDANT FONTAINE: Yes, sir."

Now, that is certainly an acknowledgement of some of the details of the crime. There is no question about that. Though it's the kind of acknowledgement, I might add, that you would expect from someone who was coerced, it's the response to fill the abstract questions about a bankrrobbery.

QUESTION: What's abstract about the question: "And by the use of a gun, pistol, right?"

And he answers: "Right."

MR. UMIN: I don't see that question here, your Honor.

QUESTION: Three-quarters of the way down. "And by the use of a gun."

MR. UMIN: You are quite right. "And by the use

of a gun, pistol, right?"

Well, I don't mean --

QUESTION: .... repeated that by going from the abstract if you want to describe it that way, to the concrete and said, "What did you do on October 8th?"

His answer was, "I held the bank up."

"What?"

"I held up the teller."

Is there anything ambiguous or evasive or uncertain about that?

MR. UMIN: One of the things this plea proceeding does not include and which I believe is in response to your question also, is that Federal crime requires it be a Federal bank, and for that purpose, although it may have been useful.

Perhaps I should recede to some extent from the notion that the statement what you did on a given day is totally ireelevant to your need for counsel.

QUESTION: Do you now question whether it was or was not a Federal bank?

MR. UMIN: I don't question it, your Honor, but I have no idea whether it was or was not a Federal bank. There is nothing in this record that would suggest it is --

QUESTION: A federally insured bank, not a Federal --

MR. UMIN: Federally insured bank, right. There is nothing in the record suggesting one way or the other, no

mention by the trial court of that issue, which is of course an element of the offense and, since it was not mentioned in the plea, is yet another basis, if this Court needs one, to condemn this case and plea under McCarthy v. United States. It's a rather technical basis, and I think a much more important holding of this Court, if I can presume to suggest one is that waivers of counsel obtained in District Courts ought to be obtained with the greatest care and the greatest concern that a defendant understands what he is doing, that he is told about plea bargaining, that he is told what the elements of defense are, that he is told that a lawyer can be very useful to him indeed at the time of the guilty plea, and that the court is absolutely certain that the defendant understands those things if he wishes to waive --

QUESTION: I suppose your observations would also relate to his response when he explained why he was tendering a guilty plea on the next page, "Well, your Honor, I wish you would accept my plea on the fact that I have never had a past record. I got strung up on the drugs and I started to make some money."

MR. UMIN: Indeed it would, your Honor. That language suggests that the defendant may have confused a plea of guilty with a plea for mercy. The state of his mind isn't entirely clear at that point at all. And I think that at that stage, it was an obligation of the court to investigate

the question of drugs and to find out, for example, whether this defendant was mentally incompetent, as he alleges, because of drugs. Instead the court with characteristic inattention ignores the issue altogether. If the defendant had a lawyer at that point, he may indeed have been of some use both to the defendant and to the court on that question.

QUESTION: Is there anything in the record of what the U.S. attorney told him?

MR. UMIN: Only the abstract statement at the beginning.

QUESTION: Obviously, they had been together and they had been discussing it because he already had two waivers signed, right?

MR. UMIN: At least the U.S. attorney had been with him. I presume it's the petitioner's allegation that the waivers were signed back in the police station when State and Federal police were grilling him. Even if we had, however, the clearest kind of information related by the U.S. attorney to --

QUESTION: Could this be classifed as one-sided plea bargaining?

MR. UMIN: One-sided plea bargaining, if any plea bargaining at all. All I want to say on that point is that even if --

QUESTION: It isn't in the record. It's just

assumptions that we can make.

MR. UMIN: Just assumptions, pardon me?

QUESTION: There is nothing in the record that the U.S. attorney discussed this case outside of the court with the petitioner.

MR. UMIN: Not as plea bargaining. There is something in the record suggesting that the U.S. attorney had advised him of certain rights.

QUESTION: That's what I meant.

MR. UMIN: Even if that advice had been given, however, this Court has never accepted non-adversary advise as a representation of counsel within the meaning of the Sixth Amendment, Andrews v. California being an instance of that.

The petitioner has asked the Court to vacate the guilty plea or to order that it be vacated by the District Court as void then on a number of grounds. First, on the ground that there was no intelligent waiver of counsel, that this record does not disclose any intelligent waiver of counsel, and that no remand is required for that purpose, Carnley and Boykin standing for that proposition.

Second, that the nature of the guilty plea was inadequately explained, and that Boykin alone condemns the plea on that ground.

Thirdly, that for a technical and, if you will,

spiritual reasons, the Rule 11 was not complied with either in a technical sense or in terms of its spirit in that the trial court failed to spell out four of the elements of the offense and failed to inform the petitioner as to lesser included offenses.

On any one of those grounds, this Court should remand to the District Court for a vacation of the plea without further evidentiary hearing.

QUESTION: Did you say the defendant was -- after he was arrested, was he taken before a commissioner or --

MR. UMIN: He alleges that he was not, your Honor, and the United States attorney never denied it. To this date no one has denied that he was never taken before a United States Commissioner.

QUESTION: But he was never left bound over?

MR. UMIN: I don't know what happened. The record does not illume how he got from his home on October 21 to the courtroom on November 13, save to say that he alleges continuous custody, abuse of continuous custody, never got before a magistrate, and did in fact appear in court on November 13, aperiod of some 3 weeks. Whether he was bound over by any -- certainly not by a grand jury. We know that he waived indictment.

QUESTION: (Inaudible)

MR. UMIN: Ultimately, yes, an information substituted

for a grand jury. We know no grand jury bound him over, and there has been no denial that no United State Commissioner bound him over, or that he waived either grand jury indictment or preliminary hearing. There is nothing in the record on that point whatsoever.

QUESTION: And the record does show that during part of that period he was in the hospital.

MR. UMIN: Yes. But no indication that that hospitaliz tion in any way broke the custody or the chain of coercion which he alleges.

It's to that chain of coercion that I would now turn for the second point in the case, which was featured in the petition for certiorari and may have been the reason for this Court's grant of it. And that is petitioner's contention that 2255 of Title 28 of the United States Code guarantees him an Evidentiary Hearing on concrete allegations of coercion which if true, would show that his guilty plea was coerced, unless the files and records of the case conclusively show that he is not entitled to such a hearing.

On this wing of the argument, let me make clear if I can what is not in dispute. It is not in dispute here that petitioner's allegation was sufficient to show coercion if true. It is not in dispute that such allegations were traditionally heard in Federal habeas corpus. It is not in dispute that 2255 and its"conclusively" language was enacted against the

background of the habeas corpus cases and carries forward the understanding of those cases. The cases of Waley v. Johnston and Walker v.Johnston are conspicuously absent from the Government's brief, and that is because they stand for the proposition later embodied in the conclusively language, the trial court on a 2255 motion, save in cases of inherent incredibility, has no credibility function to perform until it holds an evidentiary hearing.

Likewise, it is not in dispute that subsequent to the enactment of 2255 in Machibroda v. United States and Sanders v. United States, this Court confirmed that save for cases of inherent incredibility, an evidentiary hearing must be held upon allegations which are sufficient to grant relief.

Nor is it in dispute Kaufman v. United States this Court applied the Townsend v. Sain criteria to the question of when an evidentiary hearing should be held and indicated that those criteria were fully applicable under 2255.

The Government's arguments instead to justify the denial of a hearing in this case are twofold. First, that by participating in the guilty plea proceeding in alleged conformity with Rule 11, and I submit Rule 11 was not complied with, the petitioner in effect forfeited his right to an evidentiary hearing. That argument has two principal characteristics. It's an old one and it's a bad one. It's an old argument because it was an advance in substance in

Waley v. Johnston. Waley, who was represented by counsel at a guilty plea later alleged that he had been coerced to plead. The Court of Appeals held that his participation in the plea proceedings with counsel in effect waived his right later to attack that plea. The Solicitor General at that point confessed error, and this Court held that if the coercion was sufficient to taint the plea, surely it is sufficient to negate any suggestion that at the plea proceeding the petitioner waived his right later to attack it.

So the first or forfeiture argument is an old argument that this Court has already rejected.

The second argument is likewise a poor argument, I would suggest for a couple reasons. First, it ignores that the petitioner in this case, although he did participate in a Rule 11 proceeding at which time he indicated that his plea was voluntary, has alleged that in fact he was coerced to plead. And the argument of the Government ignores that the coercion alleged applies not only to the guilty plea itself, but to the statements made thereafter, including the statement that the plea was voluntary.

The Government suggests that in certain circumstances it may be reasonable to suppose that a defendant would not raise the issue of coercion at a plea, such as where he has been told by the prosecutor not to reveal his promises to the judge or his own lawyer, such as Machibroda. But in the

ordinary case when a defendant participates in a plea, he should not later be allowed to attack the plea as involuntary if he didn't object to voluntariness at the time of the plea.

First of all, this petitioner does tender the allegation that the plea's coercion extended not only to the plea itself, but to the plea proceedings. And so we have suggested a special reason for not having mentioned voluntariness in the courtroom.

Moreover, however, the Government's suggestion that participation in plea proceedings breaks the chain of coercion, in effect, and thus insures that a statement of voluntariness at a plea proceeding is a valid one, which cannot later be attacked, the Government's suggestion that the chain of coercion has been broken by that kind of participation in a plea proceeding assumes the very question that an evidentiary hearing is designed to test, whether in fact there was any break in the chain of alleged coercion if coercion did in fact take place, whether the plea proceeding was effective in enabling the defendant to come forward and say, "No, your Honor, I was coerced, it's not voluntary." And, indeed, certain kinds of plea proceedings might be one which this Court could trust when defendants made expressions of voluntariness therein as being the kind of plea proceedings which would later bar him from attacking the plea collaterally, such as a plea proceeding in which the defendant is represented

by counsel or a plea proceeding in which the Rule 11 procedure is not engaged in in the form of ritual, as it was here, but is a genuine inquiry by the trial court into the nature of the charge, the defendant's understanding of it, and his voluntary participation in the plea proceeding.

QUESTION: Do you remember, was the District Judge that heard, Judge Kaess who wrote the opinion in the habeas corpus, was he the sentencing judge?

MR. UMIN: Yes, he was, your Honor.

That's not a new circumstance in cases under 2255. In Machibroda, for example, the same judge who took Machibroda's plea was the sentencing judge and this Court did not find that sufficient to enable, for example, the charges, to say, "Well, I saw him at the plea, and I know it was voluntary."

QUESTION: Doesn't the statute require, if he is available, to have the same judge?

MR. UMIN: No, your Honor, it does not.

QUESTION: Maybe it's just the practice.

MR. UMIN: I think it frequently is.

Finally, the Government argues that the files and records of this case conclusively show in effect that the petitioner was a liar. They allege that it took him 18 months to file a petition under 2255. He also filed a brief of law in conjunction with it. He was 26 years old at the time and it might take someone 18 months to file the kind of

brief he did in fact file.

The Government alleges that in exaggerating his illnesses, his hospital appearances, the petitioner confused one hospital record with another as if to say no evidentiary hearing is necessary because the hospital records refute the petitioner's claims. The hospital records, I submit to this Court, should be investigated quite carefully. None of them were written at the time of the events they purport to describe, the first one three days after the petitioner left the hospital, the second one three months after the petitioner left the hospital. So that, for example, it is no indication of the petitioner's incredibility whatsoever that his first hospital record does not show, as he alleged, that he bled from a gun wound. It does show that he had a gun wound. It does not indicate that he arrived at the hospital bleeding. But the record itself does not show that the person who wrote it three days after, not after the petitioner arrived at the hospital, but three days after he left the hospital, was even the doctor who examined him first and therefore would have been in a position to check a matter like whether his wound was bleeding.

Thirdly, the Government suggests that the petitioner admitted guilt at sentencing and indeed he did so, but he alleges that not merely his plea of guilty, but his admissions at the plea were coerced.

And finally the Government says that his allegations he didn't understand the jargon at the plea proceedings is absurd because the court used only simple terms like banks, guns, etc. The court also used some not simple terms, like waiver, a term that the Government fails to include in its list of simple terms, and to the extent indeed that it explained waiver, it explained it wrongfully. And indeed the Government's argument on the jargon gets us back to what I do believe is in fact the main issue in this case, that there was no valid guilty plea under Boykin v. Alabama, that there was no valid guilty plea under McCarthy v. United States, and that this record does not disclose an understanding and intelligent waiver of counsel as this Court's cases, Johnson v. Zerbst to Carnley require.

Accordingly, this Court should remand to the District Court with directions to vacate the guilty plea without further evidentiary hearing, or in the alternative, for an evidentiary hearing.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Umin.

Mr. Huntington.

ORAL ARGUMENT OF SAMUEL HUNTINGTON ON

BEHALF OF THE RESPONDENT

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

The Government's position is that the files and records in this case conclusively show within the meaning of 28 U.S.C. 2255 that petitioner was competent at the time he pleaded guilty to armed bank robbery, that his plea was voluntary, and that he validly waived counsel before entering the plea.

The District Court was therefore warranted in denying petitioner's collateral attack on his plea without a hearing.

Now, in contrast to Mr. Umin, I would like to discuss the voluntariness issue first and then come to the waiver issue. And I would like to point out what we think are the pertinent facts as far as the voluntariness issue is concerned.

Petitioner alleged in his motion that he was arrested on October 21st, and the hospital discharge summary attached to his motion shows that on the night, or at least on the 21st, he was admitted to the hospital for a 5-day stay. All of the alleged acts of intimidation and coercion referred to in petitioner's motion took place either immediately after his arrest or during that initial period of hospitalization.

On November 13, or 18 days after his discharge from the hospital, petitioner pleaded guilty to armed bank robbery before Judge Kaess.

QUESTION: Is there anything in the record indicating whether he was taken before a commissioner?

MR. HUNTINGTON: No, there is not. I would suggest

that --

QUESTION: When do you have to waive an indictment? Don't the rules say you have to waive it in open court?

MR. HUNTINGTON: Well, he did waive it in open court here.

QUESTION: I know. That was before his arraignment.

MR. HUNTINGTON: Well, the arraignment, the guilty plea hearing is called the arraignment in the record.

QUESTION: I understand this.

MR. HUNTINGTON: And that's the point when he waived it, we submit.

QUESTION: It wasn't waived before that?

MR. HUNTINGTON: Well, there is some ambiguity at least in my mind as to when he signed this waiver. Mr. Umin suggested that the waiver was signed in custody. There is an allegation in the motion that he signed something in custody, but I would submit that --

QUESTION: Well, normally a defendant would have been taken before a commissioner where he would have been advised of the charges against him and also advised of his right to counsel at that time.

MR. HUNTINGTON: Well, I would suggest that it appears from the record that he was arrested by Detroit police. And it may not have been until some time after he was in custody -- as a matter of fact, in his motion he alleges

that it was while he was at the hospital that the bank robbery charge came up. So it could have been after he was in custody under State charges that the bank robbery came to light and that therefore this was the first judicial proceeding on the bank robbery charge.

QUESTION: The Federal charge.

MR. HUNTINGTON: On the Federal charge.

QUESTION: How long was he with the U.S. attorney?

MR. HUNTINGTON: Well, what we have, simply is what Mr. Umin read to you at the beginning of the guilty plea hearing where he says, "He's been given a copy of the Information. He acknowledges that he understands it and knows what the maximum penalty is." And he says, "... he informs me that he wants to waive counsel."

QUESTION: Do I gather from that that at that period of time, and nobody knows how long it was, this man was in the presence of the U.S. attorney and nobody else, and the only legal advice he was getting was from the U.S. attorney? Am I right?

MR. HUNTINGTON: At the beginning, you mean immediately prior to the --

QUESTION: Do you know how long it was before? You don't. I don't either. But during whatever period of time it was, this man's only legal advice was coming from the U.S. attorney.

MR. HUNTINGTON: That's right. I would not characterize it as legal advice. I think the U.S. attorney -- all that appears here is that the U.S. attorney informed him of what the charges were, gave him a copy of the information, and asked him whether he was going to plead guilty.

QUESTION: He just said, "I will," and these two things he signed?

MR. HUNTINGTON: There is no indication that he --

QUESTION: Well, you know he didn't. Don't you?

MR. HUNTINGTON: He said --

QUESTION: Well, he didn't have the blanks, did he?

MR. HUNTINGTON: The U.S. attorney obviously provided the blanks and gave him the opportunity --

QUESTION: That's right. And that was his legal counse

MR. HUNTINGTON: I don't contest that. All I am saying that the record shows, there is no indication in the record, and petitioner has not alleged that the U.S. attorney put pressure on him.

QUESTION: You don't think that's the kind of legal counsel we meant in Wainwright, do you?

MR. HUNTINGTON: No, we don't contend that this amounts to counsel.

QUESTION: His claim is that -- and it's never been proven one way or the other because there hasn't been a hearing - is that he was getting a good deal of advice, to use a

euphemism, from the policemen --

MR. HUNTINGTON: And that is what I would like to come to now.

QUESTION: -- through brutality and coercion.

MR. HUNTINGTON: We suggest it is our basic position that where there is a substantial period of time between the alleged acts of coercion and the guilty plea, that then unless there are some very specific allegations of objective facts as to why those acts of coercion taint the plea, then in that situation it's reasonable to expect the defendant to answer truthfully to the court's questions at the guilty plea hearing as to whether there were any threats or promises.

Now, I would like to address myself to Rule 11 and the hearing which was held here. Now, Rule 11 requires that the judge personally address the defendant on three matters -- on the voluntariness of the plea, on petitioner's understanding of the nature of the charge, and on his understanding of the consequences of the plea. Now, we suggest that was complied with. A look at the reading of the record shows that that was complied with.

Rule 11 also requires that the judge satisfy himself that there is a factual basis for the plea. And we suggest that that also was complied with here.

With respect to the point about whether the bank was insured by the F.D.I.C., the judge had before him the information

And the information is not in the record. It was attached to the Government's brief in the Court of Appeals, and the information does state the bank was insured by the F.D.I.C. So we believe that Judge Kaess would have been perfectly satisfied that the Federal element of the offense was present here.

Now, we acknowledge that there are situations, and we spell them out in some detail in our brief, where a defendant's answers at a guilty plea hearing that his plea is voluntary should not be binding upon him. Now, one obvious situation would be where he later alleged that he was mentally incompetent at the time of the plea. And another situation would be where a prosecutor expressly warns him not to disclose the terms of a promise of leniency to the court. There are a number of Court of Appeals cases involving this type of situation, and indeed, the Machibroda case was this type of situation. In this type of situation the defendant obviously cannot be expected to answer truthfully having been advised by the prosecutor to answer falsely.

But apart from those situations, we suggest that the defendant can be expected to answer these questions. The only connection that petitioner draws in his motion between the acts of coercion and the guilty plea is the statement that the police had conditioned his mind for the guilty plea hearing. This is a purely subjective allegation. There are

no allegations that the police continued to coerce him while he was awaiting arraignment, or that the police expressly warned him not to disclose their threats to the court.

This Court has recognized that coercive conduct may be sufficiently separated from a later guilty plea so as not to affect the voluntariness of the plea. In Parker v. North Carolina, one of the claims made that alleged police conduct in procuring a confession in itself tainted a guilty plea over a month later. One of the claims was that the acting coercing of confession tainted the plea a month later. This Court rejected that claim and it said, "The connection, if any, between Parker's confession and his plea of guilty had become so attenuated as to dissipate the taint."

Now, there is a basic difference. The Court pointed out that in the interim Parker had been represented by counsel and had had an opportunity to discuss the facts surrounding the confession. But the Court also said that after the allegedly coercive interrogation, there were no threats, misrepresentations, promises, or other improper acts by the State.

Now, petitioner in this case has not alleged that there were any threats, misrepresentations, promises, or other improper acts for the almost 3-weeks period before his plea.

QUESTION: Is this the pro se petition at that stage?

MR. HUNTINGTON: Yes.

QUESTION: Well, then, that failure wouldn't be very crucial, would it?

MR. HUNTINGTON: Well, if he --

QUESTION: Haven't we treated the pro se petition as merely the mechanism to get the man into the courtroom?

MR. HUNTINGTON: Well, there still is a requirement that the petition set forth facts which, if true, would entitle him to relief. And there is a requirement that they be set forth with some specificity. In some cases District Courts have appointed counsel to assist the petitioner in drafting his motion, but this has not been required by any decisions of this Court.

Now, in our view, there is a sound basis in this Court's decisions for the general proposition that a defendant should be bound by his responses at a guilty plea hearing. As this Court noted in McCarthy v. United States at 394 U.S., there are two basic purposes for the Rule 11 requirement that a judge personally address a defendant before accepting a guilty plea. First, the rule is designed to assist the judge in making a determination on the voluntariness of the plea. Second, the rule is intended to produce, and I quote from the Court's opinion, "a complete record at the time the plea is entered of the factors relevant to this voluntariness determination to enable more expeditious disposition of post conviction attacks on the constitutional validity of guilty

pleas."

Later in the opinion, the Court observed that Rule 11 is designed to eliminate any need to resort to any later fact-finding proceedings.

Now, we do not contend that compliance with Rule 11 eliminates the necessity for further fact-finding proceedings in every case, and I have referred to some of the situations where it would not. But we do contend that in this case and as a general rule, that the record the defendant makes should bind him against further proceedings.

Now, the cases that --

QUESTION: Does that take into consideration at all the point I have been trying to -- we don't know anything that happened to that man from the time he was picked up by the State until he walked in with the U.S. attorney.

MR. HUNTINGTON: Well, we know he was in the hospital.

QUESTION: Part of the time.

MR. HUNTINGTON: We know he was in custody. We don't know what the terms of custody were, who he saw, or any facts, that's correct. The record is silent on that.

QUESTION: Well, the record, however, contains very serious allegations as to what happened.--

MR. HUNTINGTON: It contains very serious allegations -

QUESTION: -- during that period, but we don't

absolutely know the answer to them.

MR. HUNTINGTON: Yes. But we suggest that the allegations are defective in one critical point. They are very specific up to his confinement in the hospital. But then there is an 18-day period before the plea. And they make no allegations as to what happened then.

Now, we suggest that in bringing a motion for collateral relief, the prisoner has to allege facts which show that he would be entitled to relief. Now, he has not alleged facts which tie together the coercion with his plea.

QUESTION: Yes. I understood your brief to concede that if what he alleges is true, that of course his plea was coerced, but you simply say they are incredible.

MR. HUNTINGTON: No, I am not saying -- but we do say that there is substantial doubt as to whether they are true. But we also say that where you are specifically asked in open court at a time and place removed from the acts of coercion, you are specifically asked by a judge in a Rule 11 hearing were there any acts of coercion and you say, "No." --

QUESTION: You say therefore these allegations are incredible, not true. But I thought that you had conceded, and certainly I am surprised if you didn't, that if what he said happened to him and if in fact everything he said in the courtroom was coerced because of police brutality, I would have thought that you would have conceded that that

made the so-called ... a nullity.

MR. HUNTINGTON: We don't concede that. And I would suggest that a reading of our brief shows that we do make the two arguments. The one I am making now that he should be bound, that given the opportunity to disclose the threats -- and not only given the opportunity, but to be asked by the judge, were there any threats, were there any promises, he says, "No."

QUESTION: Did he know what a threat or promise is? Did he know what coercion is? I mean, this man so far as I know is in a courtroom and there is nobody there but the judge and the prosecutor and him, and not one of them has he considered to be his friend or relative.

MR. HUNTINGTON: That's correct, but the whole purpose of Rule 11 --

QUESTION: Shouldn't somebody be there to hold his hand?

MR. HUNTINGTON: We are not suggesting that that would not be a better procedure if someone was there.

QUESTION: Well, this Court, I understand, has said that plea bargaining is all right. This man had one-sided plea bargaining. The U.S. attorney plea bargained with it. And there is no question that he talked to the U.S. attorney. There is no question that the U.S. attorney talked to him. And I don't know what the U.S. attorney told him.

MR. HUNTINGTON: Well, all I can say is that he did -- andI will come to this point in a moment -- he did waive counsel, and this is the provision that is made to give him the advice that might be useful in determining the plea.

QUESTION: Did he sign a waiver of counsel with the U.S. attorney?

MR. HUNTINGTON: Did he sign one?

QUESTION: Yes.

MR. HUNTINGTON: Well, he signed a waiver of counsel, and I think the record indicates --

QUESTION: So he waived it before he got to the judge. Is that right?

MR. HUNTINGTON: And the judge referred to that fact.

QUESTION: I mean, is a waiver outside of a court a good waiver?

MR. HUNTINGTON: Well, it's not even clear it's outside of the court. It could have been right there at the proceeding, just before they walked in.

QUESTION: I understood the record, the U.S. attorney walked in with him and said, "I have these in my hand."

MR. HUNTINGTON: Well, there is no indication he walked in. There is simply an indication that he told the judge that he had talked with him. Whether that was right then or whether it was at some previous time isn't indicated

on the record.

QUESTION: Well, he waived all of his rights in his one-sided advice from the U.S. attorney. Then he is bound by it.

MR. HUNTINGTON: Well, not when -- we believe the judge then went on to --

QUESTION: Did the court say he could disregard that?

MR. HUNTINGTON: Well, I think that is --

QUESTION: Understood.

MR. HUNTINGTON: Yes. We believe a fair inference from the record is that he was offering counsel at the present time. He was saying, "You have a right to counsel. Is it your wish to proceed without counsel?" And at that point he said, "I guess so."

QUESTION: Don't you have to bear the burden here now of meeting the statutory standard which I think is in terms that unless on the face of the record it conclusively appears, and you have to bear the burden of showing that this transcript of this interrogation under Rule 11 conclusively shows that none of these things could be true? Isn't that the posture of the case?

MR. HUNTINGTON: No. The statutory standard is that the --

QUESTION: How does the District Judge avoid a

hearing unless he makes the finding as --

MR. HUNTINGTON: Well, our basic contention is a twofold contention. But our first argument is that as a matter of law, that if he is given the opportunity. I mean, if he is asked in compliance with Rule 11 were there any threats and he says, "No, there weren't," and there are none of the special circumstances present which we concede would relieve him from the binding effect of that answer, then as a matter of law, he is not entitled later on to contradict that record which he himself made. And that is what conclusively shows that he is entitled to no relief.

But we don't rely exclusively on that position. We also say that, as Mr. Justice Stewart pointed out, that if you look at all of the records, that there is enough here to show that he was entitled to no relief in any event. And I would just refer briefly to those. We think the fact that a central part of his allegations are that he was innocent, that he did not rob any bank, that the police convinced him that he was a bona fide bank robber and told him that he had robbed this bank at a certain time, well, we think that the record as a whole refutes this allegation. First of all, in the guilty plea hearing, as you pointed out, Mr. Chief Justice, his answers were very specific. Yes, he had a pistol; yes, he held up the teller, and he took the money. And later at sentencing, he made the statement that he was

under the influence of drugs "when this happened." And that's a clear admission of guilt.

The other factors very important in his allegations are the allegations of brutality when he was arrested. He alleged he was clubbed into an unconscious state of mind at his home, that he was struck several times with fists and open hands at the police station, and that an abdominal gunshot wound was torn open and began to bleed freely. He also asserted he was beaten for asking to see an attorney. And in the brief of law attached to his motion he claimed he had been brutally assaulted, beaten with clubs and blackjacks and kicked. Yet the hospital record pertaining to his period of hospitalization beginning on the night of the arrest makes no references to any bruises or recent bleedings. And surely that would have been in evidence had petitioner suffered the type of mistreatment that he claims he had suffered.

Now, we also would say that the 21-month delay between the guilty plea hearing and the time that he filed his motion is also indicative of the lack of substance. It's certainly not a controlling point, but we think it does, when added together with all the other factors, show that the motion was not well founded.

Now, the question as to whether petitioner was mentally competent at the time is covered in our brief and I won't go into that now.

On the waiver of counsel issue, I would like to just make a couple of points. First of all, petitioner was 26 years old, he had a seventh grade education, and by his own admission, he had a long criminal record and had been proceeded against in numerous criminal proceedings. In his petition at page 11 he admits that he misspoke when he informed the court that he didn't have a record at the guilty plea hearing and admitted that he had a long record, and also he referred to FBI records which would indicate that there had been Federal charges as well.

It is thus highly unlikely that he was confused when the judge advised him of his right to counsel.

Now, we would also point out that in the light of this, in the light of the fact that the U.S. attorney had given him the waiver form, he had signed a waiver form, the waiver of counsel, the U.S. attorney had given him the information, and said that he had acknowledged that he understood it, and the information contained the elements of the offense, so that we say when you look at this record as a whole, it shows that there was an intelligent and knowing waiver of counsel and that therefore at that point there was a valid waiver.

Well, in conclusion, it is our view that the judgment of the Court of Appeals should be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

Mr. Umin, you acted at the request of the Court and by the appointment of the Court. Thank you for your assistance to the petitioner here and to the Court in presenting this case.

MR. UMIN: Thank you for appointing me, your Honor.

[Whereupon, at 3:26 o'clock p.m., the argument in the above-entitled matter was submitted.]