In the

Supreme Court of the United States

LEWIS S. TOLLETT, Warden,
Tennessee State Prison,

Petitioner,

v.

WILLIE LEE HENDERSON,

Respondent.

No. 72-95

Washington, D. C.
February 20, 1973

pages 1 thru 29

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v.	:	No. 72-95
WILLIE LEE HENDERSON, Respondent	:	

Washington, D. C.

Tuesday, February 20, 1973

The above-entitled matter came on for argument at 1:52 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:

R. JACKSON ROSE, ESQ., Assistant Attorney General, 414 Supreme Court Building, Nashville, Tennessee 37219
for the Petitioner

H. FRED HOEFLE, ESQ., 409 Second National Building, 820 Main Street, Cincinnati, Ohio 45202
for the Respondent

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-95.

Mr. Rose.

ORAL ARGUMENT OF R. JACKSON ROSE, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case involves a black defendant who was indicted in Davidson County, Tennessee in 1948 by a grand jury which did not and had not for some years before and did not for some years after include a member of the black race.

Mr. Richardson, with the advice and consent of the retained counsel, entered a plea of guilty and accepted a sentence of 99 years in the state penetentiary.

In 1964, Mr. Henderson first came back into the courts when he attacked or alleged that his confession was coerced and that his guilty plea was involuntary. The case was ultimately heard by writ of habeas corpus in the federal district court; the Sixth Circuit denied him relief in this court, denied cert.

Q There was no reference to his complaint at that time. Is that --

MR. ROSE: No, YOur Honor, none. There was reference in the evidentiary hearing in the state court at

this case that he was advised at that time that he could raise this question, advised by the attorney that represented him at that time.

The state court granted an evidentiary hearing in this case.

Q And what year is this, now? You have moved.

MR. ROSE: Then, we have moved to 1967; the state granted an evidentiary hearing and the proof, as I stated earlier, showed that there had been no blacks to serve on the grand jury from 1922 until 1953, when the first black was put on the Davidson County Grand Jury. The selection system from 1947 was that the trial judges, criminal trial judges would take the people that they wanted on the grand jury, no random selection.

The court denied relief, the state court did. Then, ultimately, the Tennessee Appellate Court said that he had waived the right by his failure to object by plea and abatement prior to entering of plea to the indictment.

The rule in Tennessee is substantially the same as the rule 12(B)(2) of the Federal Rules of Criminal Procedure.

He filed a petition of habeas corpus in the Federal District Court and that court granted a relief on the basis of the conclusion of the court that the grand jury was void. It therefore entered a void indictment and that he could not have waived it because no attorney in Tennessee

would have thought of raising the question in 1948, quoting a statement from a concurring opinion in the Tennessee Court of Criminal Appeals by Judge Galbreath.

The Sixth Circuit held that the indictment was not void but voidable, but under the unique circumstances of this case, in light of the fact that one of our judges had stated "no lawywer would have thought of it," of raising this in 1948, that Mr. Henderson was entitled to the relief that it was not a knowing, intelligent waiver.

It is our position that Mr. Henderson waived his right to attack this twice, once, by entering a plea at all, or before raising it and the second time, when he entered a plea of guilty. The first issue, of waiving it by failing to question it prior to entering a plea to the indictment, we follow the same line of reasoning generally, that the government did in the preceding case. The court --

Q Would you say that he had any kind of a waiver in 1964 when he sought habeas corpus release and did not raise the claim?

MR. ROSE: Yes, your Honor, as a matter of fact, I filed a motion to dismiss the petition for that reason in the district court. I did not pursue that issue in the Sixth Circuit Court of Appeals but at least that was my original position in this case.

This Court has, as has been stated here earlier

today, has held that where a defendant is convicted as a result of some illegal evidence or illegal proceedings, that went to the question or the issue of innocence or guilt, that it must be a knowing intelligent waiver.

In this case, if I may state to the court, this is typically what -- or shall I say a hypothetical situation. Here is a retained counsel. He has a client who is facing a possible death penalty and he has, really, one thing in mind, the welfare of his client, theoretically. Assuming that this issue crosses, his mind, his client is in jail. His client has made a confession and, taking the feeling of the times in 1948, has a pretty good chance of getting the death penalty, or at least a reasonable chance of getting the death penalty, and the issue of the composition of the grand jury crosses his mind. He is going to arrive at the conclusion that if I raise that, what will happen? I'll be successful and there will be blacks included on the grand jury that will consider the reindictment of him. But this grand jury has a confession in front of them.

It is my position and I don't think anybody would question the fact that in all likelihood a solid black grand jury would have indicted him in the face of this confession.

Now, this would gain him additional time if he wanted additional time but there is no speculation, really, that could come to that conclusion in this case because he

has successfully negotiated a plea.

He had agreed, apparently successfully, at least he eliminated the possibility of the death penalty. The only other reason that an an attorney would have considered waiving it, or raising it at that time would be to further the cause of civil rights on this particular issue to attempt to eliminate this illegal method, but it would have no effect on his client.

Q General Rose, under the Tennessee procedures, at what point was it required to be raised, if it were raised?

MR. ROSE: Before a plea was entered to the indictment, whether the plea be guilty or not guilty.

Q Any time before a plea.

MR. ROSE: Yes, your Honor.

Q What, even though there was a guilty plea in this case, what does the record show? What happened, if anything, before the plea was entered? You keep talking about negotiations on the deal and so on.

MR. ROSE: Just that there was a --

Q You just assume what the record shows.

MR. ROSE: Maybe the record does not show, your Honor. I'm not sure at this point, but, typically --

Q Were there any motions filed of any kind that the record shows?

MR. ROSE: There is no indication that there was, your Honor. This would typically be the situation where retained counsel agrees to enter a plea of guilty --

Q Did the best he could for his client as he saw it by way of negotiation probably with the state.

MR. ROSE, Yes, your Honor.

There is the question of knowing, intelligent waiver. I say, in this case, knowing, intelligent waiver took place. Mr. Henderson's retained counsel apparently and obviously discussed it. There is some question of that that his -- and this was raised by Mr. Henderson in an earlier thing, that his attorney or that he reluctantly did it, that his attorney talked him into entering the plea of guilty.

They have talked about this and they have simply come to the conclusion that to enter a plea of guilty is the best thing. At this point, I think Mr. Henderson knew then; I think the record, the entire record in these proceedings supports this, that from that point on, he had no more standing in court, that he was facing a term of 99 years, that he had eliminated the possibility of a death penalty, that the proceedings were over and, as a matter of fact, they were over for him for some 16 years before he ever came back to court for anything.

The evidence, the circumstantial evidence, points to the fact that he knew, and the court had found earlier,

that it was a voluntary plea of guilty, that he knew at the time he entered that plea, that this was the end of the proceedings. I am sure that he did not know the constitutional law that he had numerous rights which many of us have been years studying those particular things in law schools and after we are out, too.

There is no evidence and I could admit candidly to this court that I am sure that it didn't happen that these were discussed with him. I daresay that there isn't a prisoner in the penal institutions in Tennessee who knows all of his constitutional rights and very few lawyers but his plea of guilty was knowing, intelligent and he knew the consequences of it. He knew that he had had his day in court and that that was the end of the line.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Hoefle.

ORAL ARGUMENT OF H. FRED HOEFLE, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. HOEFLE: Thank you, Mr. Chief Justice, and may it please the Court:

I think we can assume, following counsel's argument, that there is no real question now that the rights of Mr. Henderson to a grand jury of which members of his race have not been systematically excluded was violated. It was

conceded by the State of Tennessee in the District Court. It was conceded in the Court of Appeals in the Sixth Circuit. This Court has held recently that this is prejudicial.

There were no blacks on the Grand Jury from 1922 till 1953. Twenty-five percent of the population of that county in 1948 was black. This was a violation of the Respondent's rights under the Equal Protection Clause, as well as the due process clause that I might point out that any analogy with the federal rules, I think would be ruled out because the Equal Protection clause is not available to federal prisoners. It is a prohibition on the states.

This Court has also held recently that it is a presumption of prejudice. That is, he doesn't have to show actual bias or actual harm, but there is a presumption of prejudice when his grand jury, when members of his race have been excluded from his grand jury.

I point to the case of Alexander versus Louisiana, cited last year, where a timely motion was filed to object to the grand jury, but no objection was raised as to the petit jury. He went to trial with the petit jury and was convicted and this court nevertheless reversed because it felt that the denial of members of his race from the grand juries was sufficiently important that it could not be cured even though he were tired by a constitutionally acceptable jury.

Q Do you think his taking more than 20 years to assert the right is a factor in the case?

MR.HOEFLE: Well, I think it is a pathetic factor, your Honor. I think it only indicates that he didn't find out that he had this right for 20 years. In the previous case, Mr. Justice White asked the question about holding something in reserve. Well, I know I have got this right. I'll see how I do in my trial. If the sentence is light or I get acquittal, forget it. If I'm convicted, then I'll raise it. That can't be applied here because Mr. Henderson wouldn't wait 20 years to raise it. He might wait six months or a year and then bring it up. But this has been 20 years. The testimony --

Q Do you think the law has changed since then?

MR. HOEFLE: I don't think the law has ever changed on this point, your Honor, since Fay, as far as the exclusion from --

Q Yes, but Fay isn't 20 years old.

MR. HOEFLE: No, but since 1880, this has been a violation of --

Q You don't think it changed since he was convicted?

MR. HOEFLE: I don't think so. There was a case in 1945, the name escapes me, your Honor, I believe it was Rice versus Olson, where a similar waiver wasn't to a grand

jury, was raised.

Q Well, is there anything to impeach in this record, to impeach the validity of his guilty plea?

MR. HOEFLE: I think the fact that he was unaware of the right to object. There is an affidavit in the record.

Q I know, but that might indicate that he might not have known of his right to object to the composition of the jury, but how about, were there any allegations that his guilty plea wasn't accurate?

MR. HOEFLE: He alleged, and has alleged, that his guilty plea was more or less forced out of him. His attorney was not present when he was taken from jail about four days before the plea, taken to the prosecutor's office --

Q Does he allege his attorney was incompetent?

MR. HOEFLE: No, he alleges his attorney was not there at the time the arrangement was made for the plea.

Four days before his trial, they took him out, in a meeting with the prosecutor and the police and threatened him with the chair. At that point he said he decided to plead guilty. His lawyer wasn't even at that meeting, if we can believe him.

Q The is also some evidence that there was no corpus delecti, that there was no murder by anybody, that the so-called "victim" died of pneumonia.

MR. HOEFLE: Of pneumonia, that's correct. So I

think he would have a proximate cause defense there and that would be a good reason not to waive this right had he known it because a properly constituted grand jury might have felt, pneumonia, maybe we can't indict him at all. Or maybe armed robbery or aggravated assault or whatever they call it in Tennessee, assault with a deadly weapon. There are many things and this Court has also said recently, in jury exclusion cases, it is impossible to speculate on what the jury would have said or done and this would apply to a grand jury as well as --

Q I've been looking at his testimony at page 85 of the record. Is this all there is?

"Mr. Henderson, you plead guilty, is that right?"

"Sir?"

"You plead guilty?"

"Plead guilty."

"Was it in this courtroom here?"

"I was tried in Division One."

"Did you sit down at the table and stand up and say you plead guilty?"

"No, sir."

"Did your lawyer say you plead guilty?"

"My lawyer, Mr. Tom Ed Murray, all I know that happened, I was in a little room and came out and they said he is guilty of first-degree murder. That's all I know and

they gave me ninety-nine years. That's all I know and I didn't plead guilty. I didn't plead at all."

Has the state any record of the proceeding or anything else?

MR. HOEFLE: THis is all I have, your HOnor, it was in the --

Q Isn't there a transcript of the proceeding extant at all?

MR. HOEFLE: This I don't know. It would not be -- I was appointed by the Sixth Circuit and I have never had access to the Tennessee records down there, your Honor. I also would like to point out while we are in here, the affidavit of the attorney on page 95 and 96 of the single appendix, I believe I don't see a date on it. Yes, it was 1968 when he filed this affidavit. He was not aware, he had never been aware of any irregularity in grand jury selection. He never advised his client. He never discussed about it. If the Petitioner, which is Mr. Henderson, had any knowledge of it, he certainly didn't talk to Mr. Murray, his attorney.

Q Mr. Murray does rather fully indicate that the Petitioner did plead guilty, doesn't he?

MR. HOEFLE: Yes, there is no question that there was a plea of guilty. He also sensed, you Honor, by a --

Q What do you mean, there is no question there was a plea of guilty?

MR. HOEFLE: There was a plea of guilty. Whether he pleaded guilty, this, what Justice Brennan has said, raises a question. Unfortunately, it was not raised. I feel that I am limited in this proceeding to defending the Sixth Circuit's opinion and the Sixth Circuit has said that they didn't even reach that issue because Henderson didn't raise it in the district courts, so here we are. It does disturb me, but I think that it can be affirmed on ample grounds.

Q Isn't there some connection between these two issues as to whether -- I mean, his conviction rests on his plea of guilty.

MR. HOEFLE: Yes, your Honor and also the other issues.

Q And when he was represented by counsel.

MR. HOEFLE: I think -- I'm sorry.

Q Now, other rights to go to trial or rights to be indicted by some other kind of a jury, they may have existed, but he pleaded guilty with advice of counsel.

MR. HOEFLE: But he says he didn't.

Q With advice of counsel.

Q But if the issue -- if the issue of whether he pleaded guilty or not wasn't raised, if the case proceeded on the assumption that, yes, there was a valid plea of guilty, then aren't you in a little bit of trouble raising some of these other issues?

MR. HOEFLE: I don't think so, your Honor.

Q Aren't there Mann and Parker and Brady and those cases?

MR. HOEFLE: Well, first of all, those cases all evolved about, there was consultation between counsel and client in those cases. These cases also --

Q Is that issue here?

MR. HOEFLE: I think that has got a lot to do with it as far as the grand jury because there was no consultation. Henderson didn't know about it. The lawyer didn't know about it, so how could he waive it if he didn't know it? I feel that this comes completely within the purview of Fay and Johnson versus Zerbst. Now, the circuits, I think five of them to date, have distinguished the McMann case on --

Q So you are saying the reason for -- it isn't barred by McMann and that line of cases because this was an incompetent counsel case?

MR. HOEFLE: Well --

Q If he didn't know about this right, he was incompetent and the fellow wasn't advised.

MR. HOEFLE: That is part of it. That's part of it and also another part is, was it really voluntary? He didn't attack that. But these were all facets of the same thing.

Q He didn't attack the voluntary plea.

MR. HOEFLE: No, but I think it is almost implicit in-

Q Although here, at least, he testified he never pled guilty at all.

MR. HOEFLE: That is true.

Q Well, obviously, a plea of guilty was entered.

MR. HOEFLE: These are all part of the same thing. I have chosen to base my argument on the, what I feel is plain clear law, Humphrey versus Cady , Peters versus Kiff, Alexander versus Louisiana, which this Court has decided in the last term.

Q I noticed at the end here, at pages A 128, in fact, there are excerpts of proceedings in 1948, largely, though, dealing with selection of the jury. There doesn't seem to be, or I couldn't find any here, any minutes of the proceedings at which he is said to have pled guilty.

MR. HOEFLE: There is, your Honor, at A 137.

Q A 137?

MR. HOEFLE: Yes. It's not a transcript, however. Pardon me, 135. It is more or less, I guess, a journal entry, setting forth the fact that "It came on for hearing on a plea of guilty and that these jurors were sworn to --"

Q Right.

MR. HOEFLE: I assume they were all white also, but he didn't make objection.

Q Was there any colloquy between the judge and

this Petitioner when his plea was entered?

MR. HOEFLE: There is no record and another thing, the requirements of Boykin about the fact that the judge must satisfy himself.

Q Yes, but this was back in 1948.

MR. HOEFLE: Right.

Q There doesn't seem to be, at least, any transcript of any proceedings involving any kind of colloquy with the court when his plea of guilty was entered.

MR. HOEFLE: I could find out, your Honor, there are transcripts of testimony that occurred at the habeas corpus hearing in the state court which was what was relied upon in lieu of a hearing by the federal district court.

Q Well, did you allege in your federal habeas that the plea of guilty was involuntary?

MR. HOEFLE: Henderson did, your Honor. It was per se. I didn't get into it until the circuit court level.

Q What was the district court's ruling on that aspect of his petition?

MR. HOEFLE: He declined to consider it. He indicated, I believe, that first of all, he went forth on the systematic exclusion issue and did not consider the others. But --

Q The journal entry, as you call it, indicates that after a guilty plea, a jury was impanneled to sentence.

MR. HOEFLE: Yes, to sentence.

Q That is a little alien to the way it is done in most jurisdictions, isn't it, if there is a guilty plea.

Q That was for the punishment, wasn't it?

MR. HOEFLE: That was just for the punishment.

Q Is that right?

MR. HOEFLE: The --

Q And that stayed, at least at that time in jury until they had assessed the punishment.

MR. HOEFLE: I assume they were all white, too and deliberated --

Q Although the indication was, from General Rose, that the punishment had been kind of agreed upon, beforehand.

MR. HOEFLE: It would seem that there had been some discussion, but I don't see how we can infer that.

Q No.

Q Well, it says that they found the defendants guilty of murder in the first degree.

Q And that was after a guilty plea.

MR. HOEFLE: Yes, I guess based on the plea, they determined the guilt and went on from there.

Q Was this like the British one where the jurors are struck if you find a man guilty of stealing a watch, go out and consider your verdict? Is that what this is?

MR. HOEFLE: I'm not sure. It doesn't say. I'm

not familiar with Tennessee procedure, your Honor, I'm sorry. It definitely is -- um --

Q Would it be fair to say that Mr. Henderson might have had a little luck here? Suppose his counsel had raised the point back in '48? Suppose there had been a new indictment by a validly-selected grand jury and he had been tried and convicted? He might have been executed, might he not?

MR. HOEFLE: Yes, he might have. I think that was a distinct possibility. But, again, as Mr. Justice Stewart pointed out, the record that we have indicates that the decedent died of pneumonia. Perhaps it was caused by the gunshot wound, perhaps it wasn't. It's hard to say.

Q Mr. Hoefle, do you know, did Tennessee practice at that time, when the guilty determined punishment after the entry of a guilty plea, was it limited to giving him- or was a death penalty then excluded?

MR. HOEFLE: That I don't -- not by statute, I don't believe. I know some states have excluded it, but --

Q You mean he pleaded guilty and he might still have got the death penalty?

MR. HOEFLE: I believe that is correct, your Honor, but I really -- I don't want to give you a definitive answer on that.

Q Is it possible or reasonable in this kind of

a negotiation for a plea that the prosecutor would then, in going to the county jury, make certain that the plea negotiation was carried out?

MR. HOEFLE: I assume it is possible.

Q It is possible that he could.

MR. HOEFLE: I assume it is possible, your Honor.

Q That is, he would ask for only a light sentence, not for the death penalty.

Q The only thing is, again, in one of your recent cases last year, I don't remember which one, but it was stated rather emphatically that it is impossible to tell what the jury would have done. Who knows what the grand jury would have done in the face of the fact that the decedent died of pneumonia. It is obviously prejudicial. They had been doning this at that time for 68 years down in Tennessee. The -- Mr. Henderson was totally ignorant of his right to object for 20 years. His lawyer didn't tell him. His lawyer came in and testified and the state did not challenge his lawyer, as they could have. What did you talk about besides the fact that you didn't talk about the fact that he had a bad grand jury?

The one thing I do want to mention about the McMann cases also, number one, as has been pointed out, the act of waiver in Tennessee is the entry of a plea. It doesn't matter. If he had pleaded not guilty, under

Tennessee law, it would have been as effective a waiver as had he pleaded guilty.

Q If he had pleaded not guilty without having made a motion.

MR. HOEFLE: Yes.

Q Once he pleaded to the indictment, he waived the right to make any motion challenging the grand jury. Is that your point?

MR. HOEFLE: That's my point, your Honor. I don't think the fact that the plea was guilty can be said to be a separate ground. In the Post-Leary and cases dealing with the narcotics transfer tax and the firearms tax, five circuits have held that people, defendants who have pleaded guilty prior to these decisions, they have not waived, by pleading guilty, their right to object to the self-incrimination things, aspects that this court found invalid. The circuits that have decided this are unanimous. They are saying, we are not attacking the fact that the plea was voluntary. We are just saying he did plead guilty voluntarily but even in doing so there, he did not intend to waive his right to raise this objection had he known about it.

Now, even there, there would have been some inkling, I would think they knew these cases were on their way upstairs, but I don't think Mr. Henderson even had that much benefit.

The Fifth Circuit, in at least six cases, and in one case particularly, they took judicial notice of the fact that white lawyers representing black defendants in the south rarely to the point of never, raised these objections at the proper time, if ever and I don't see -- I think this case squarely falls within Fay v. Noia and Johnson versus Zerbst and I am afraid that if the Court does reverse, that the impact of these cases is going to be lost and it will all go back to the state courts and they will have to determine federal rights.

Q And in this case, in the state supreme court you had concurring opinions stating just what you have said, didn't you, no lawyer would have thought of bringing this up.

MR. HOEFLE: That's correct, yes, and I believe that was the court of criminal appeals and then in the Tennessee Supreme Court I believe, another opinion said, rather regretfully, declined Henderson the relief and said, perhaps it's overdue. It should come from someone higher than us. And here we are.

Q I think you were spreading it a little far when you said "no one." I know one who did.

Q Well, successfully.

Q A lawyer in Chatanooga, Tennessee did raise it and he was white. So there was at least one.

MR. HOEFLE: I see. Well, these objections have

been raised.

Q Well, you said none. You said none.

MR. HOEFLE: I'm sorry.

Q I don't think you have to go as far as "none." That's all I'm saying.

MR. HOEFLE: I'm sorry, I was quoting the Fifth Circuit and I guess they were talking for their circuit, which Tennessee is part of the Sixth Circuit.

Q The Fifth Circuit was talking about Mississippi.

Q Well, according to the brief, there was another lawyer who did, too, in an adjoining county.

Q Well, I don't think there was.

MR. HOEFLE: Yes, there was, I believe.

I might point out in that situation, on the Kennedy case, that there is a distinction. The Maurie County Grand Jury was perhaps disproportionally represented with blacks but it did have some blacks on it. This county had none.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Did you have anything further, Mr. Rose?

MR. ROSE: Yes, your Honor.

REBUTTAL ARGUMENT OF R. JACKSON ROSE, ESQ.,

ON BEHALF OF THE PETITIONER

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

Q What's the historical rule for 99 years in Tennessee?

MR. ROSE: Thirty years.

Q Thirty?

MR. ROSE: The same -- any penalty, you're entitled a maximum of thirty years.

As there was some question about whether the guilty plea was raised , the voluntariness of the guilty plea, this question was raised earlier. It was decided, in the case of Henderson, it would be Henderson in the Sixth Circuit, number 1785 in 1968, and cert was denied in 391 U.S. 927 by this Court according to the -- and this is in my petition for certiorari in the Appendix page 2A in the footnotes to the Sixth Circuit opinion. In those early pro se petitions, he did claim that his confession had been coerced and that his guilty plea was therefore involuntary. He also asserted that he had been denied the assistance of counsel.

The district court considered these claims and decided them adversely on the merits and we affirmed. The question of impaneling a jury to impose sentence, this is

done in Tennessee. It may appear to be somewhat of a fiction. Where there will be a negotiated plea, a jury is impaneled. The situation is presented to the jury, typically, by the district attorney general. He says it is the recommendation of the state and we have agreed to a number of years being 99. The jury walks out and comes back in and back at that time, many times there was some evidence introduced to the jury even though there was a guilty plea. This is not necessary now. I'm not sure whether it was necessary then but at any rate it was done and has been done in recent years when I have practiced law.

Q Mr. Rose, did you make certain back in 1948 that the jury would not bring in the death penalty?

MR. ROSE: If it please the Court, that is the problem I have never been faced with. I would say typically when it is presented to them that a guilty plea is going in for a 99 year sentence, do you agree with that? That is about the way it is presented to the jury.

Q You mean the judge addresses the jury this way?

MR. ROSE: Yes, your Honor.

Q Oh, I see.

MR. ROSE: And the jury, in the cases that I had been involved in always came back and did what the judge instructed them to do.

Q Do they do these by vox?

MR. ROSE: Yes, your Honor.

Q They do these --

MR. ROSE: Well, not necessarily. I've seen -- as I recall now, and I didn't realize we'd get into this, I've seen them, they say, "So say you all and will you raise your hand?" Now that I am refreshing my memory on it.

I would like to bring up -- the Parker case was brought up. I'm sure this court was aware of it, but in the Fourth Circuit, did deny Parker relief on -- in December of this past year on his petition for habeas corpus on the same issue that is presented here today and relied on the trilogy of cases, McMann, Brady and Parker previously decided by this court. The number in that court is 71-1925, Parker versus Ross.

This is -- I would like to reiterate further, or in answer to Mr. Hoefle, this is not similar to Noia or Johnson or there is a distinguishing characteristic. That is one, that he knowingly, intelligently made a guilty plea, knowing the consequences of it, had his day in court and knew that it was over and, number two, the constitutional error alleged in this case did not go to the innocence or guilt and was a matter that was curable at that time but that is not curable at this time.

Q Well, what about the allegation that the

lawyer didn't know of his right at all?

MR. ROSE: The record does not say that. The lawyer filed an affidavit in this record. He said "I did not know that blacks were systematically excluded in 1948. I didn't know that, on the grand jury. I don't know today that they were excluded.

Q Yes, and then he said he didn't think of doing so and so. What did he say?

What did he say?

MR. ROSE: No, your Honor --

Q What about the right to object?

MR. ROSE: I'm sure he -- I mean, I have to concede that this was not discussed and from the record, was not entertained in the mind of the attorney or the defendant, Mr. Henderson, at that time.

I say it is a knowing, intelligent waiver, even though they didn't directly say, we're going to waive this. He knew --

Q You think it was a knowing, intelligent plea of guilty and that is all you need?

MR. ROSE: Well, knowing, intelligent plea of guilty and that it was a conclusion of his --

Q Which is a waiver of a right to go to trial.

MR. ROSE: Waiver of the right --

Q And I would say that's about all you need.

MR. ROSE: Yes, your Honor, in a curable defect that exists at this time.

His affidavit was just that he had no knowledge that they were excluded at that time from the grand jury, from the petit jury on page A 95 of the Appendix and A 96. He did not say that he was unaware of the right to attack the composition of the grand jury on the basis of systematic exclusion of blacks.

Really, it is not the question of systematic exclusion of blacks as much as it is the systematic exclusion of anybody, or the illegal composition of a grand jury. A black has no more right to a legally-constituted grand jury than any other person in court. And, such as in Shotwell -- Shotwell had the same right to a constitutional grand jury that Mr. Henderson had.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Rose, the case is submitted.

Mr. Hoefle, you appeared here by our appointment and at our request and --

MR. HOEFLE: Yes, your Honor.

MR. CHIEF JUSTICE BURGER: -- on behalf of the Court, I want to thank you for your assistance to your client and your assistance to the Court.

MR. HOEFLE: Thank you, your Honor.

(Whereupon, at 2:32 o'clock p.m., the case was submitted.)