ORIGINAL

In the

Supreme Court of the United States

ROBERT J. HENDERSON, Superintendent of Auburn Correctional Facility,

Petitioner,

v.

TIMOTHY G. MORGAN,

Respondent.

No. 74-1529

Washington, D. C.
February 24, 1976

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v.	:	No. 74-1529
TIMOTHY G. MORGAN, Respondent.	:	

Washington, D. C.

Tuesday, February 24, 1976

The above-entitled matter came on for argument at 2:11 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

JOEL LEWITTES, ESQ., Assistant Attorney General of the State of New York, Two World Trade Center, New York, New York 10047, for the petitioner.

JOSEPH E. LYNCH, ESQ., 207 Metcalf Plaza, 144 Genesee Street, Auburn, New York 13021, 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 1529, Henderson against Morgan.

Mr. Lewittes.

ORAL ARGUMENT OF JOEL LEWITTES ON

BEHALF OF PETITIONER

MR. LEWITTES: Mr. Chief Justice, and may it please the Court: This case involves the granting of a Federal writ of habeas corpus to a State prisoner by the United States District Court for the Northern District of New York, wherein the district court vacated a 1965 plea of guilty solely on the grounds that the relater, that is, the respondent here, was not formally advised of each legal element of the crime to which he pleaded where the plea was otherwise unassailable and where the respondent admitted the act charged.

The Second Circuit Court of Appeals unanimously affirmed without opinion the granting of the writ.

Turning to the facts for a moment, the crime was committed on the night of April 6, 1965, whereupon a Mrs. Ada Francisco, a widow, who owned a farm where the respondent was working, was brutally murdered in her home in Fulton County, which is an upstate rural community in New York State, by an assailant who stabbed her more than 40 times. The respondent Morgan was convicted of that murder, which occurred while he was working on the victim's farm.

Mr. Morgan at that time was 18 years old, and the record varies as to his intelligence quotient from a range of 40 to 75. It is noteworthy, as we will refer to later on, that at the time of sentence there was a psychiatric report on the basis of a psychiatric examination at the Utica State Hospital that the defendant, the respondent in this case, was competent to stand trial, was able to understand the nature of the charges, and would be able to assist in the defense.

The underlying altercation which resulted in the commission of the crime here was no doubt the fact that the respondent originally was a resident of the Rome State Hospital, which is a division of the New York State Mental Hygiene Department for young defectives, mental defectives. Apparently --

QUESTION: He was there as a patient.

MR. LEWITTES: He was there as a patient, your Honor, that's correct. And apparently his record was good enough so that he was released out to various farms, and in particular in this case to the farm of the decedent where he worked. Apparently as well, there was a rule on the part of the Rome State Hospital that those that were released would have to be home by 10 o'clock at night each night, and the respondent violated those rules and Mrs. Francisco, the decedent, told the respondent that he must not do that again, must not violate the rule, but yet he did, and she said, "Well, I am going to have to tell the people at Rome State Hospital," and respondent,

fearing, no doubt, that he would be returned to the State hospital, sat, according to the record, brooded about it, and decided that he was going to leave.

He went up to Mrs. Francisco's room with a hunting knife in his hand. It was not a pocket knife, as the record reveals it was a hunting knife 5 inches long. He went into the room, awakened her, the decedent screamed, and thereupon the respondent stabbed her approximately 44 times, ran away with a small sum of money, fled in the decedent's car, drove about 100 miles away, was involved in a head-on collision with another car, and was taken into the hospital, whereupon he was arrested, based upon a description of respondent. They were looking for him. They did find the hunting knife in the car, and confessions were made, the record shows.

He was arraigned about nine days afterwards to the crime of murder in the first degree, at which time the judge at the arraignment proceeding assigned to him two counsel, two lawyers. The indictment murder one was read to him in open court. He was advised that he was entitled to a jury trial and he had a right to subpoena witnesses on his behalf and to produce any evidence necessary for the defense.

The attorneys at the time of the arraignment requested that the respondent be examined psychiatrically. This was granted by the court. The attorneys also informed the court that they would move at that time to obtain copies

of various statements made by the respondent to the police and to the district attorney's office.

That was in April of 1965. On June 8, 1965, respondent in fact pleaded guilty to murder in the second degree upon the recommendation of the district attorney and the request of the respondent. The defense counsel were present at that time, as were members of the family. The trial court was quite aware of the limited intelligence of the respondent, and the record shows, the plea minutes do demonstrate the solicitude taken by the trial judge.

QUESTION: Mr. Lewittes, does New York make what I think of as a customer distinction between the first degree murder and second degree murder that first degree would require a predisposition as well as intent, whereas second degree, intent would be sufficient without predisposition--premeditation?

MR. LEWITTES: That is correct. That is the way the statute read in 1965. It has subsequently been changed, your Honor, but at that time murder in the first degree requires premeditation and deliberation with intent. Murder in the second just required intent to effect the design to kill.

The respondent at the time of plea admitted he had consulted with his attorney and that he knew that he was going to go to prison, and seven days later the sentence was imposed and an indeterminate term of 25 years to life. The actual minimum amount under the statute for murder in the second

degree at that time was 20 years to life.

There was a plea for leniency on the part of the defense, and before passing sentence the court did note, as is required and was required at that time in New York State that prior to sentence the trial judge must have before him a presentence report and a social history report, and he did have the report of a psychiatrist.

It is noteworthy as well that at the time of sentence there was no surprise or disappointment either by defense counsel or by the respondent when sentence was pronounced.

All was quiet for five years, and then five years after the conviction/coram nobis application was commenced by this respondent, and for the first time he now alleged that the plea was involuntary because he was unaware of the consequences of the plea and he was unaware that intent was an element of murder in the second degree.

The Supreme Court in Fulton County denied the writ without a hearing. It determined that indeed it was voluntary, that he did have counsel, that he had spoken to counsel about it, and that it was voluntary and knowingly made.

This State coram nobis denial was affirmed unanimously without opinion by the Appellate Division of the Supreme Court in New York State and leave to appeal was denied by the New York Court of Appeals on July 6, 1972.

Then following the procedure that is quite familiar

in my office, the State inmate then proceeded by way of a Federal writ of habeas corpus, this time in the District Court for the Northern District of New York, and he raised the same issues that he raised in the State coram nobis proceeding, the trial court had failed to ascertain a factual basis for the plea and that he was not told the elements of the crime to which he pleaded, what were the consequences of it.

The district court denied the Federal writ of habeas corpus, not unlike the decision in coram nobis that actually tracked the decision of the State coram nobis in the State court determination, and the district court held that the plea was indeed voluntary.

A certificate of probable cause was granted by the Second Circuit Court of Appeals, and they reversed and remanded I may say without any request for opposition by the State to put in opposition papers on certificate of probable cause.

QUESTION: It was not orally argued, then, to the Court of Appeals.

MR. LEWITTES: It was not.

QUESTION: Did you know about the pendency of the applicable for certificate of probable cause? Did your office know?

MR. LEWITTES: We did not know at that time.

QUESTION: No notice was given.

MR. LEWITTES: That's correct.

QUESTION: Does a statute or rule require notice, I wonder?

MR. LEWITTES: I do not believe that it does. I may say this in all candor, however, that when the certificate of probable cause was granted, we did move for a rehearing of that, which was denied.

QUESTION: Yes.

MR. LEWITTES: The Second Circuit reversal and remand was for an evidentiary hearing to be held in the district court to determine whether or not the allegations raised in the Federal writ of habeas corpus action --

QUESTION: Is there any practice at all relating to notice that you are familiar with?

MR. LEWITTES: I can say, Mr. Justice Brennan, that there is no hard and fast rule. I usually find, my experience is, that where the relator is defended by counsel as opposed to pro se, when he is defended by counsel we do get notice of it. But usually in the pro se applications, it's determined in the first instance by the pro se clerk, and then through the judges, and we don't --

QUESTION: You mean the clerk in the district court or in the court of appeals?

MR. LEWITTES: In the Second Circuit Court of Appeals, and very often we do not get any notice of it until the denial or the permission to so proceed.

QUESTION: Did they ever follow any procedure comparable to an order to show cause directed to your office why relief should not be granted?

MR. LEWITTES: Not when it comes to a certificate of probable cause in most cases.

QUESTION: Does the Court of Appeals on a significant number of occasions grant a certificate of probable cause but not decide the case; set it down for oral argument after granting it?

MR. LEWITTES: No, they usually remand it.

QUESTION: So if they grant a certificate --

MR. LEWITTES: Oh, I am sorry. They do grant a certificate of probable cause, and counsel is then usually assigned if there is no counsel at that time and then the appeal proceeds normally.

QUESTION: So this would be the extraordinary procedure, the one followed here.

MR. LEWITTES: That's correct.

QUESTION: May I ask a question? In your brief and in your petition, as I understand it, you take the position that the Court of Appeals, Second Circuit, adopted a per se rule.

MR. LEWITTES: We do.

QUESTION: And yet if I am reading the district court's opinion correctly, on page 6a of your petition for a

writ, bottom of page 6a, the judge under a caption entitled "The Law" cites Boykin in the first instance and then says, "The standard to be applied to the plea of guilty herein is whether under all of the circumstances the petitioner made a reasoned choice, voluntarily, after proper advice, and with a full understanding of the consequences."

Do you find any fault with that statement of the standard?

MR. LEWITTES: I find no disagreement with the statement at all. My disagreement is with the application thereafter, in spite of that statement, the district court went on and did formulate the per se rule.

QUESTION: The district court may have decided the facts incorrectly, but the court said, and it stated the rule correctly, you have just conceded, so there would be no precedent against you, would there?

MR. LEWITTES: Well, I am afraid I am not in agreement. On page 8a of the appendix, and this is to the petition, the court cites the statement in McCarthy and then says, "Based upon the foregoing, I hold as a matter of law that petitioner's plea of guilty was not intelligently or knowingly entered." So it seems to me that in spite of the general statement at the beginning of the decision, it is clear indeed, and it seems also in light of the fact of the remand order by the Second Circuit Court of Appeals that the holding was indeed that this

was a per se rule, that but for that, it would have been voluntary.

QUESTION: You are suggesting that the court has held any time you fail to advise a person of an element of a crime, that automatically means the plea is not voluntary.

MR. LEWITTES: That is our understanding of the case.

QUESTION: If the word "fact" had been substituted for the word "law" in the passage you read us, you wouldn't be so sure that it was a per se rule, would you?

MR. LEWITTES: Well, I might be because if it read, "I hold as a matter of fact that petitioner's plea of guilty was not intelligently or knowingly entered and was, therefore, involuntary," I still would fear that that mere fact rather than the use of the word "law" still could render a guilty plea involuntary.

QUESTION: Well, based on your submission, it would have been an erroneous factual determination in this case. But if the district court's opinion contained, as my brother Powell pointed out it did contain, a statement of the proper general principles to be applied, this would then be a single erroneous case, in your submission.

MR. LEWITTES: Yes.

QUESTION: I am not assuming it was erroneous, but you say it was.

MR. LEWITTES: There was this evidentiary hearing

on the basis of the remand where the relator, the respondent here, did testify, the two defense counsel testified, the district attorney testified, and although technically not made part of the rule 52(a), conclusions of law and findings of fact, the court did note that indeed there was a factual basis for the plea, but did hold, as mentioned a moment ago, that the mere fact, in essence, that the element of the crime was not told to the respondent, the plea was involuntary as a matter of law.

The district court --

QUESTION: Do you read the district court's opinion, the Court of Appeals' opinion as reading out any possibility of harmless error in a situation like this? I would think where the defendant had stabbed the victim 40 times, whether he knew as a matter of law that intent had to be proved or not might be fairly immaterial since I would think a jury confronted with that evidence would virtually inevitably conclude that there was intent.

MR. LEWITTES: I have a feeling they read out the harmless error here.

QUESTION: You mean you read this as in effect a holding that the omission to mention any element means the guilty plea must be vacated.

MR. LEWITTES: Yes, that is the way we read this decision, and that is the evil of this decision, we feel.

Now, the decision itself in the district court is quite odd, it seems to me, particularly when they commence their discussion of the law, citing Boykin v. Alabama, and they claim it's not applicable to the instant because Boykin is not retroactive, and yet they rely upon the McCarthy case which was held not to be retroactive in the Halliday decision in this Court, and yet they base their reliance upon McCarthy v. United States, which was, of course, decided under the supervisory powers of this Court,so that it is a strange decision even on that basis.

QUESTION: Do you think there is some possibility that Judge Port may not have been entirely persuaded by the Court of Appeals?

MR. LEWITTES: No, I think the opposite was true, Mr. Justice Rehnquist. I think that he was very much influenced by the circuit court.

QUESTION: He reversed and he decided (Inaudible) come out the other way.

MR. LEWITTES: In my judgment that's correct.

QUESTION: Do you have intent to use these in relying on the McCarthy case?

MR. LEWITTES: I think if we look at page 8a of the appendix to the petition for writ of certiorari --

QUESTION: That's what I was looking at. I wanted you to give me your view of it.

MR.LEWITTES: It says there that, citing McCarthy, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

QUESTION: What does New York State have in the way of a counterpart of Rule 11 of the Federal --

MR. LEWITTES: We don't.

QUESTION: So what they were doing was applying Rule 11 as apparantly a judicially constructed --

MR. LEWITTES: Very much so. And I believe that the fear that Justice Harlan related in the Boykin case in his dissent that no weapon was -- excuse me.

QUESTION: I take it you would be making the same argument if this was a Boykin case?

MR. LEWITTES: Yes.

QUESTION: I gather -- I judge the district court said this is a pre-Boykin case and be judged by pre-Boykin standards.

MR. LEWITTES: Yes, I would make this argument even if it were post-Boykin because I think that we can't isolate one single element and fashion a per se rule. And I think the court decisions in Brady and McMann v. Richardson and in the Alford case tell us that we have to look at all the relevant circumstances.

QUESTION: So you wouldn't say that it's never a violation of the Boykin rule to put on the record reasonable --

and make a reasonable showing on the record that a plea is intelligent and voluntary to -- you wouldn't say it's never a violation of that rule to fail to inform him of an element of a crime.

MR. LEWITTES: No.

QUESTION: When is it?

MR. LEWITTES: I think that it's a violation of the Boykin rule when there is no factual basis for the plea in conjunction with not understanding the nature of the plea, plus the fact that it must be intelligently and knowingly made. So what I am saying in essence is that it must be a voluntary statement, it must be consentual.

QUESTION: It must be consentual, but how about not knowing an element of the crime that you are pleading guilty to?

MR. LEWITTES: I don't think--if we set it forth that way, we have a problem, because we can communicate to a defendant in essence the element of a crime without formally using the statutory phrase.

QUESTION: If after Boykin, or before, I gather you think would be true -- I guess you think the rule's the same after as before Boykin.

MR. LEWITTES: That's correct.

QUESTION: So it doesn't make any difference whether Boykin is retroactive.

MR. LEWITTES: No, it does not, except that I think many of the cases that have followed Boykin assume -- some of the cases assume -- that they are constitutional requirements, although they flow out of Boykin to McCarthy.

QUESTION: One difference Boykin made, though, was the requirement of having it on the record.

MR. LEWITTES: Yes. There was no record at all in the Boykin case.

QUESTION: Now, suppose you believe after Boykin or before, suppose you agree that it's been shown that the defendant was actually ignorant of one of the element of the crime to which he was pleading guilty.

MR. LEWITTES: I don't think that in itself would change my view, because if the motivation behind the plea was, for example, that he -- and there were several reasons why one pleads guilty, but one may be that he still felt that he wants a shorter sentence and sentence is a very important motivation and perhaps the most important motivation--I think that even if he did not understand the element, that he understood that he would get a lower sentence and there would be less penalty imposed, and he pleaded because of that, I do not believe the guilty plea would be infirm.

QUESTION: What was the maximum that he could have gotten under New York law -- life?

MR. LEWITTES: He could have had a mandatory sentence

of life on a murder one conviction at that time.

QUESTION: This was a plea of guilty to second degree murder.

MR. LEWITTES: That is correct.

QUESTION: What was the maximum sentence that could have been imposed?

MR. LEWITTES: The maximum was life, but the minimun was 20 years. He received 25 here.

QUESTION: Twenty-five years to life.

MR. LEWITTES: To life.

QUESTION: Did the State argue in the Court of Appeals that the error, if any, was harmless beyond a reasonable doubt?

MR. LEWITTES: I do not believe that they did.

QUESTION: But you suggest now, at least I got an inference, that with 44 stab wounds the intent element is really not an element in the case, that any trier of fact could reasonably assume if you stab somebody 44 times, you intended it.

MR. LEWITTES: I believe as well, Mr. Chief Justice, that that was the assessment of his counsel, that that would be the problem if he had to go to trial,that no jury would believe that there was no intent here.

QUESTION: Is the impact of this holding now that all the State courts in the Second Circuit are bound by Rule 11?

MR. LEWITTES: It would appear to be. Yes, it would. And I am disturbed by that for many reasons, because I think that Rule 11 goes to some extent to the tools to be used by a judge. These are tools in ascertaining voluntariness. They do not necessarily go to voluntariness itself.

But this case, of all cases, we believe, is the perfect example not to have any per se rule. This was a case where the man was very happy to get away with what he did sentencewise. He entered the room with a knife, and the multiple stab wounds. And to permit a per se rule here would not only do substantial harm, as far as criminal administration is concerned, but I should like to tell the Court, and I am sure you are well aware, that there is hardly a guilty plea entered or has been entered where the legal elements were necessarily told to the defendant. So I can imagine the plethora of Federal writs of habeas corpus that will succeed after this.

QUESTION: If you prevail, what do we do with this case?

MR. LEWITTES: I think we --

QUESTION: Do we tell them the standard -- you were right and we read it as you have suggested it should be read. We say, no, there is no per se rule, it's the totality of circumstances.

MR. LEWITTES: And this is one of the circumstances.

QUESTION: Then what do we do, send it back and let

them apply the rule?

MR. LEWITTES: I think you could reverse.

QUESTION: Just plain --

MR. LEWITTES: Just plain reverse.

QUESTION: Which is to say it's a totality rule and we have to apply the rule. Is that it?

MR. LEWITTES: Yes.

QUESTION: Do we usually do that?

QUESTION: Many times we have.

MR. LEWITTES: Yes, I think you do.

QUESTION: Usually?

MR. LEWITTES: In a case where there was evidentiary hearing, I think yes.

QUESTION: We have five courts that have passed on this now, haven't we? A pretty good record made.

MR. LEWITTES: That and the fact that the relator waited five years before he suddenly discovered this.

QUESTION: You said he seemed to be--- he was satisfied. He was satisfied for a while with his sentence, but not after a while.

MR. LEWITTES: That's correct.

MR. CHIEF JUSTICE BURGER: Mr. Lynch.

ORAL ARGUMENT OF JOSEPH E. LYNCH ON BEHALF OF RESPONDENT

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

Court: Sitting in the courtroom on portions of the last two days, I have been struck by what seems to me to be a significant difference between this lawsuit and the cases I have heard and I suppose many of the cases that come here. In those cases the parties are in disagreement about what the law is. There is no such disagreement here. We all recognize that under our system of justice and probably under any enlightened system of justice, for a plea of guilt for a crime to be valid, it must be an intelligent act, it must be done by a person who realizes the significance and consequences of that.

Both parties also agree that when the question is whether a particular plea meets that standard, that the judge charged with determining that question must look at all of the circumstances that surround the plea.

QUESTION: Then you adopt the totality of circumstances rule?

MR. LYNCH: I do, your Honor.

QUESTION: You think the Second Circuit did?

MR. LYNCH: Yes.

QUESTION: In this case?

MR. LYNCH: In this case. Very definitely, your Honor, if I may explain.

QUESTION: How do you explain relying on Rule 11 in the McCarthy case?

MR. LYNCH: I don't think that this case stands for the proposition as counsel has suggested it.

QUESTION: The authority is cited in the opinion, isn't it?

MR. LYNCH: The opinion says that the plea must be voluntary. What I am saying, your Honor, is this: As I read Kercheval and Machibroda, the plea must be voluntary, that in deciding whether it's voluntary the court can and must look at the circumstances surrounding it, and they say that's what they did here.

QUESTION: What would you say are the crucial elements of the totality of circumstances? Starting, I suppose, with the fact that he had counsel, you would concede that was --

MR. LYNCH: It would be pertinent, very definitely, your Honor.

QUESTION: I think -- would you have to inquire whether this was experienced counsel?

MR. LYNCH: Yes.

QUESTION: Do you think it passes those two tests here?

MR. LYNCH: Yes. I have no quarrel with the conduct of the defense counsel here. They did certainly as good a job as I could have done, and while that may not be a very adequate standard, it compels me to say that they did a good job.

I think the other circumstances that are included here

and that were before the court and which I say that the court must have taken into consideration was the age of the accused, the fact that prior to this particular problem he had had no serious brushes with the law and therefore was not presumably familiar, as hardened criminals are, familiar with the judicial process. And, of course, very importantly, the diminished intellectual quotient of the accused.

QUESTION: Mr. Lynch, Judge Port originally found that it had been a voluntary and intelligent plea, didn't he? And then the Second Circuit reversed.

MR. LYNCH: That's correct, your Honor.

QUESTION: And at page 10 -- that very short opinion of the Second Circuit, at page 10a of your petition, "The case is remanded to the district court to conduct an evidentiary hearing on the issues raised by petitioner, including whether, at the time of his entry of his guilty plea, he was aware that intent was an essential element of the crime."

Now, doesn't that suggest that the Second Circuit thought that fact might have been dispositive?

MR. LYNCH: It certainly suggests that the Second Circuit thought it was important, but it does not mean, I believe, that in deciding this case Judge Port looked only at that issue. See, I think where the parties part company, or where the disagreement arises, is that the petitioner says to this Court that there was only one factor that decided the

outcome of this case, namely, the fact that this young man did not know that intent was an element of the crime.

Let me say, so I don't forget it, parenthetically, I would agree with you that there is all kinds of intent in this case. If this went to a jury, a jury clearly could have found intent in the number of wounds.

QUESTION: Let me interrupt you, then go ahead and answer.

Judge Port originally found it to be voluntary and advised. It goes up to the Second Circuit, the Second Circuit says take it back and consider whether he knew intent was an essential element of the crime and whether he was advised of the scope of the punishment. It goes back to Judge Port. Judge Port says he was advised of the scope of the punishment. He did not know that intent was an element of the crime, and Judge Port releases him.

Now, to Judge Port that was dispositive, what the Second Circuit said about intent.

MR. LYNCH: I respectfully disagree, your Honor, because in Judge Port's original decision, there had been no evidentiary hearing. After the Second Circuit decision, there was an evidentiary hearing; for the first time the judge saw this young man. He heard testimony not only from this young man but from the other people, and it is this type of thing that creates the additional circumstances which I contend he

took into consideration.

QUESTION: It doesn't say he did, though.

MR. LYNCH: No, that's true. Well, he does not say that he did except insofar as he says, "I am going to apply the totality of circumstance rule." When he talks about the law that he is going to apply, he says that he is going to use the very standard that the petitioner says he should use.

You see, what the petitioner says here, as I understand his argument on reading his brief, everything he says is premised on one simple conclusion, and that conclusion is that since the opinion talks about nothing except intent, of necessity it must be only intent that dictated the decision.

Now, I think that is logically wrong and unpersuasive when the court says, I am not just going to consider this on the element of intent, but I am going to look at all the surrounding circumstances. I think it is also significant when those circumstances are as important and as significant as they are here, and of course I'm thinking about the intellectual level of this young man particularly.

Really, that premise, that if it's not cited, it's not considered, I suppose has a corollary that says that if you are writing a decision, you must put in the decision what you consider to be significant, because if you don't, it will be assumed that you haven't considered it. While I think the premises are logical, I think the corollary is potentially

catastrophic, and I would assume makes the writing of opinions even more chancy than I suppose they are without that corollary.

QUESTION: Of course, you can say it's just the other side of the coin on guilty pleas. You are supposed to put on the record the elements that go into a guilty plea.

MR. LYNCH: Under the Federal rules as I understand them, that's correct.

QUESTION: He's under Boykin, too.

MR. LYNCH: Yes.

QUESTION: So may we assume that the judge put of record the elements that he relied on in overturning the guilty plea? He was supposed to.

MR. LYNCH: Yes, I think you may assume that. I would like to have you also assume what I think is a valid assumption, that when a judge says, "I am going to take into consideration all of the circumstances," that is what he does.

Now, there is no question that he wrote solely in terms of intent.

QUESTION: The first time or the second time?

MR. LYNCH: The second time.

QUESTION: Those were all of the circumstances, as far as he was concerned.

MR. LYNCH: Well, you see, I find difficulty accepting that, your Honor.

QUESTION: I gather that.

MR. LYNCH: Because -- well, stop and think a second. Isn't in any adversary proceeding, isn't one of the most significant things that takes place throughout the proceeding, isn't it the presence of the witnesses, the appearance, the impression they create, their integrity, their ability to honestly call and relate? That is present in every proceeding, and it was present here, and it seems to me that to say that this stands for the proposition that the decision rests only on the element of intent overlooks the fact that this judge saw these witnesses, came to the conclusion as to what their testimony was and to what the facts were and factored it into the decision that he rendered here.

QUESTION: But that had been twice. He did that twice, and the first time he came out black and the next time he came out white.

MR. LYNCH: No, if I may disagree, Mr. Chief Justice. The first time there was no hearing. All he had in front of him on the first occasion were papers. On the second --

QUESTION: The papers probably showed that this man stabbed the victim 44 times.

MR. LYNCH: True.

QUESTION: A pretty important element of intent, is it not? You have already conceded --

MR. LYNCH: I have conceded on the issue, Mr.

Chief Justice, it's vital if it went to a jury for determination. There is no question they could have found intent.

QUESTION: Isn't it vital in the appraisal of the defendant and his lawyer as to how he should plead?

MR. LYNCH: Yes. But that is not the issue here. As I understand the issue here, it's not whether he had the intent, but it's whether he knew that the State had to prove that he had the intent. He says that he did not -- and I think that is a very different proposition.

QUESTION: Well, if you concede that without any doubt, as you apparently have, that the State could make a case of intent, --

MR. LYNCH: No question.

QUESTION: -- then -- how is the degree of his understanding of this, a layman's understanding of this, assuming a perfectly average intelligent person, not a subnormal, as he is, what would that have to do with it?

MR. LYNCH: Doesn't it really go to the very question we are trying to resolve, whether the plea is voluntary and intelligent?

In other words, how can a person make an intelligent decision as to what he should do under these circumstances if he doesn't know that one of the problems that the people face here is that they must prove that he had intent.

QUESTION: As a realistic matter mustn't such a person, a layman, on that kind of an issue depend almost entirely on his counsel?

MR. LYNCH: Yes, but you see here, your Honor, the counsel quite candidly admitted -- and I don't denigrate them for this -- one counsel said that he had not told the accused that intent was an element of this matter, and the other counsel said he thought but he couldn't be sure, and the accused himself testified that he had never been told.

QUESTION: Isn't that one of the things that counsel would just pretty well write off in assessing the defense of this kind of a case when you stab 44 times. You don't dwell to any great length with your client on how we are going to disprove the element of intent.

MR. LYNCH: I agree with that. I wouldn't dwell on it, particularly where, as here, my client had very limited ability to understand. But that doesn't mean that -- I might not dwell on it. I think I would have to tell it to him. So there may be some inconsistency in saying that an accused who was someplace between an idiot and a moron must be told -- I am not saying he has to be told the element of the crime. I think he has to be told the substance of the crime. And I think that that wasn't told to him here, and I think that's one of the circumstances that resulted in this decision.

QUESTION: Yet he was found capable of standing trial.

That decision was never challenged.

MR. LYNCH: That's true, and we are not saying in this proceeding that he was not capable of understanding. In fact, the irony of this --

QUESTION: Mr. Lynch, did I ask -- you say the defendant has to be told the substance of the crime.

MR. LYNCH: Yes.

QUESTION: Suppose his lawyer tells him that if the jury finds (a) that you are mentally competent and (b) that you stabbed this lady 44 times, they will find you guilty. Wouldn't that be substantially true?

MR. LYNCH: Ah -- I don't think it would be technically true, but I think it would be possibly sufficient.

QUESTION: So as soon as you admit that all they have to tell him is the substance of the crime, it seems to me you have confessed error.

MR. LYNCH: But you see, they didn't tell him that, your Honor.

QUESTION: Oh, yes. The only thing the judge found was that he wasn't aware of this concept of intent, which may mean that he thought, well, I didn't really mean to kill her. That would be a defense.

MR. LYNCH: You see, that's what I am really saying. Perhaps my answer to your original question was ill-conceived. But what I am saying here is it's my understanding of the law

that the plea must be an intelligent plea. Now, that obviously assumes that the person making that plea has some knowledge, I mean, if Mr. Morgan were from another planet and came down and was charged and had no knowledge of our society or our rules whatsoever, I take it that we would have to impart some knowledge to him.

Now, the question turns what kind of knowledge must you impart for the plea to be an intelligent act? And what I suggest is that what you must tell an accused for his plea to be an intelligent act is the substance, the essential substance, of the crime with which he is charged.

Now, I don't wish to get into --

QUESTION: What is the difference between that and telling him the specific legal elements of the crime?

MR. LYNCH: Let me explain. There are a number of cases, as I am sure your Honors are aware, where pleas have been set aside because the accused didn't understand the nature of what he was doing. Now, these have tended to fall, and may exclusively fall, under the conspiracy area. The courts have said in those matters, because the accused didn't know what he was doing, he didn't know in effect what a conspiracy was, we are not going to accept his plea, and we are going to send it back for repleading.

I take those cases to mean that for an accused to plead intelligently in accordance with the constitutional

requirements of due process, he must know the essential substance of the crime. The essential substance of conspiracy, I take it, is that two or more people get together to commit a crime. The essential --

QUESTION: But that's a good deal more subtle than whether 44 stab wounds affords a basis for inference of intent.

MR. LYNCH: Well, it may be more subtle. In fact, the petitioner has suggested that the conspiracy cases that have set aside pleas should be considered -- he doesn't phrase it this way, but I gather is sort of an aberration in the system, that those are complex cases and therefore can be understood only in that light. I would prefer to think of them as, as I think they are, not an aberration, but an actual practical example of the principle of the rule which says that the accused must know.

Now, a conspiracy case, complex as it may or may not be, the plea of such a charge may not necessarily have to be set aside because the accused isn't told. In fact, as I recall, I think it's the Podell? case. There the case went through partly to trial. The accused was an attorney. He pleaded guilty and then he moved to set the plea aside on the grounds he didn't -- not that he didn't understand, but that he wasn't told the elements of conspiracy, and the court had no problems, they said, well, this is a sophisticated and intelligent man, he doesn't need --

QUESTION: By that same analogy, the court might have reached that conclusion very properly if this young fellow had been pleading guilty to a conspiracy, given all the other facts. But when he is pleading something very much less subtle than conspiracy, isn't the explanation to be tailored to the nature of the crime?

MR. LYNCH: I think it's to be tailored to the nature of the accused, because I think that a sophisticated accused may need no explanation, certainly the attorney, the example I just mentioned, requires no explanation. The unsophisticated, or the mentally deficient, I think, need a lot more.

If the standard is the complexity of the crime, doesn't that necessarily presuppose that you make a list of the crimes in order of complexity and that seems to me like an unworkable judicial rule.

QUESTION: I wonder if your suggestion about the intelligence of the accused may not cut the other way. Isn't it possible that the more ignorant the man, the more important it is that he have the advice of counsel on which to rely.

MR. LYNCH: I would accept that.

QUESTION: Here you do have two trained counsel who in effect made the decision for him.

MR. LYNCH: That's true.

QUESTION: So isn't it reasonable to assume, then, they made an intelligent decision?

MR. LYNCH: Let me say quite candidly that they made the decision I am sure I would have suggested be made. There is no issue there. But the issue really is not whether they did what was right or wrong, but whether this was an intelligent plea.

Now, there are problems both ways. I mean, here you have a young man of very limited intellectual ability, and I suppose it can be said, with such a person isn't it really unwise to say you must tell him in great deal what the substance of the crime is. On the other hand, as has been pointed out, he has been found able to stand trial, he is able to understand enough apparently to go to trial, and it seems to me that the due process provisions of our Constitution say that under those circumstances if his plea is to be an intelligent one, it has to be made on the basis of some knowledge. He is not just a chip in a whirlwind of legal knowledge here, he has to make an intelligent decision of his own, and he has to --

QUESTION: What if the trial judge had asked him, "Did you stab the lady 44 times?"

MR. LYNCH: I think he should have gone on, if he had asked such a question --

QUESTION: Let's assume that he asked him and he said, "Yes."

MR. LYNCH: I would not consider that giving him the

information that he needed.

QUESTION: Or intent?

MR. LYNCH: That's correct.

QUESTION: Why not?

MR. LYNCH: Because when I talk of substance of the crime, your Honor, I am talking about the element without which the crime would not be the same. Now, when you are talking about murder second, the very thing that distinguishes it from the lesser degrees of homicide is the intent to cause the death --

QUESTION: You think, Mr. Lynch, that the lawyers, the two of them, should have said to him, "Now, look, young fellow, second degree is the plea that they are asking you to make. And let me tell you what that's all about. It involves intent, it involves this, it involves that, or it involves the other thing. Now, in this case 44 stab wounds are enough to establish intent, the jury can find intent on the basis of that. Now there you are. That's the whole thing. Now do you want to plead? You can get 20 years to life." Is that what they should have done?

MR. LYNCH: I think that's the least they should have done.

QUESTION: And you don't suppose in Judge Port's initial findings it suggested that's exactly what they said to him?

MR. LYNCH: No. You see, I would hope the Court not go off on the original decision. The original decision was decided on papers submitted --

QUESTION: I agree, Mr. Lynch, but Judge Port did in his initial opinion lay out the things that he found had been done at the plea hearing by everyone concerned, the lawyers, the accused, and the judge. There are a couple of paragraphs there.

MR. LYNCH: Insofar as that was --

QUESTION: I know he doesn't use the word "intent." I agree. But he talks about what the lawyers did. He lays down, as I read it here, he says, "On the taking of the plea the court made a special effort to emphasize to the defendant the gravity and importance of this change of plea. The court asked the defendant whether he understood that he was accused of killing the victim, that a plea of guilty was the same as being convicted after a jury trial, and that he would be sentenced to prison. The defendant answered in the affirmative to each of these questions."

MR. LYNCH: That's correct, your Honor.

QUESTION: And then he asked him in addition if he fully understood what he was doing, if he was doing this voluntarily and upon the advice of counsel. The defendant again responded in the affirmative. Further, defendant's mother and two brothers were present within the courtroom when

he changed his plea to guilty.

So that's a recital, at least, of what Judge Port found on the basis of only the papers had occurred at the taking of the plea.

MR. LYNCH: That's correct, your Honor. The reason that the decision was different on the second occasion, in my judgment, is ironically enough the presence of the defense counsel testifying on behalf of the people of the State of New York. I think it's very possible that those counsel had not been present, and if the court had not had an opportunity to see the witnesses, it would have come to a different resolve.

QUESTION: You mean, so even if there were some suggestion in what I have just read you that the issue of intent had been discussed between counsel, that after hearing the lawyers, the judge concluded, no, he was wrong.

MR. LYNCH: I think that after hearing not only the lawyers, but the accused himself, the court had a complete picture of not only what went on, what was in the record originally, but he could better understand the intellectual deficiency of the accused and could recognize, as I think he did recognize, based upon that deficiency, that the accused didn't know that intent was an element.

You know, it's very well for us to say that he should have known, I mean, that intent was so obvious, and it is obvious here, but this young man testified at the

evidentiary hearing that he didn't intend to kill this woman.

Now, you know, --

QUESTION: It would be quite possible to read that testimony, though, as confusing intent and premeditation, wouldn't it? He testified as he went up the stairs he didn't have the intent to kill her.

MR. LYNCH: That's a possibility -- that's one possible explanation of the testimony, your Honor, that's true. I think it's also possible to interpret that testimony to mean that he actually believed he didn't intend.

QUESTION: That he didn't intend not only at the first stab wound but at the 44th to --

MR. LYNCH: That's what he said. And when you are dealing -- Now, if this were a perfectly rational human being, normal human being, I would agree that testimony is incredible as a matter of law. I am not sure it is incredible when you are dealing with a person of this intellectual level, or lack of it, really.

I think that the --

QUESTION: Not at the level of one competent to stand trial is what you are saying.

MR. LYNCH: He was competent, found to be competent, and I can say candidly that I was surprised in my discussions with him at the level of his understanding at that time. I think that if he had been told that intent was an element of

the crime, I am sure he could have understood it. He says he wouldn't have pleaded if he had been so told.

QUESTION: I gather you are suggesting to us that we ought not to make these decisions on the cold record when a judge who actually had him before him --

MR. LYNCH: That's correct, your Honor.

QUESTION: -- asked the questions, heard his answers, and --

MR. LYNCH: That's correct, your Honor. I feel that this is clearly a question of fact. In fact I have cited the Bierly case with the proposition that the question of the voluntariness of a guilty plea is always a question of fact and that obviously only the judge that sees the witness and hears the testimony is in a position to make that judgment.

I would ask that you affirm the judgment of the lower court. Unless you have any other questions --

QUESTION: If the sentence were reduced to 20 years, would that wash this case out?

MR. LYNCH: Well, it might wash the case out, but I don't think it would do anything to the principle, your Honor.

QUESTION: But that's all he is complaining about is that he got 25 instead of 20 years, isn't it?

MR. LYNCH: Well --

QUESTION: As a result of what --

MR. LYNCH: Actually I am not sure he is even complaining about that, in all honesty. I have just been advised that he is on the street on parole.

But, you see, I don't think this stands for the proposition, this decision, that there has to be a legalistic, mechanistic, formalistic recitation of every element of a crime to an accused. At the very most, this decision stands for the proposition,if you say he didn't consider another single thing, at the very most it stands for the proposition that when a person is charged with murder in the second degree, he must know that intent is an element of that crime and that he must not -- that that information may not come to him from the horrendous nature of the crime. It's got to come to him by someone who is in a position to tell him this is the element. It's the only element that was talked about here. There are cases, as the Court realizes, where people, for example, have been found guilty of postal robbery and they attempt to set -- not found guilty, pleaded guilty to postal robbery and they attempt to set the plea aside on the grounds that it was not explained to them that to commit this crime you have to put life in danger, you have to use a dangerous weapon to put life in danger. And there are certain presumptions as to whether a weapon is dangerous or whether it's not. The court had no problem with that. They said you don't have to know all that, you don't have to be told all that. But that, I take it, is

different when you are talking about the element of intent in a murder second charge.

Thank you very much, your Honors.

MR. CHIEF JUSTICE BURGER: Do you have anything further, counsel?

MR. LEWITTES: No.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 3:04 p.m., the arguments in the above-entitled matter were concluded.)