ORIGINAL

In the

Supreme Court of the United States

STANLEY BLACKLEDGE, WARDEN, CENTRAL PRISON, AND STATE OF NORTH CAROLINA,

PETITIONERS,

V.

GARY DARRELL ALLISON,

RESPONDENT.

NO. 75-1693

Washington, D. C.
February 22, 1977

Pages 1 thru 53

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IN THE SUPREME COURT OF THE UNITED STATES

STANLEY BLACKLEDGE, Warden, Central Prison, and STATE OF NORTH CAROLINA, Petitioners,	:	
v.	:	No. 75-1693
GARY DARRELL ALLISON, Respondent.	:	

Washington, D. C.,

Tuesday, February 22, 1977

The above-entitled matter came on for argument at 11:13 o'clock, a.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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

RICHARD N. LEAGUE, Assistant Attorney General, State of North Carolina; on behalf of the Petitioners.

C. FRANK GOLDSMITH, JR., ESQ., Story, Hunter & Goldsmith, P.A., Post Office Drawer 1330, Marion, North Carolina 28752; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 75-1693, Blackledge against Allison.

Mr. League, you may proceed whenever you're ready.

ORAL ARGUMENT OF RICHARD N. LEAGUE, ESQ.,

ON BEHALF OF THE PETITIONERS.

MR. LEAGUE: Thank you.

Mr. Chief Justice, may it please the Court:

I'm Richard League from Raleigh, North Carolina, to argue this case for the petitioners.

This is a case that hopefully involves the long shot in the criminal justice process, the possibility of a broken plea bargain.

The case began back in January of 1972 in Alamance County, North Carolina. At that time, Gary Darrell Allison entered a plea of guilty to a charge of "safecracking", or attempted safecracking.

In accordance with our state procedure, he was examined to determine whether or not his plea was a voluntary and intelligent act, and as a part of that proceeding, he was asked several questions, one of which determined that he knew the maximum punishment for his crime. Another was designed to determine whether or not there had been any promises made to him in order to secure his plea. He said

there had been none.

At the conclusion of this proceeding, the trial judge accepted his plea and entered sentence of 17 to 21 years for the offense.

Some time after that he began post conviction proceedings in the state court, and ultimately, in March, '73, filed a writ of habeas corpus, or an application for a writ of habeas corpus with the United States Middle District -- United States District Court for the Middle District of North Carolina.

In that writ, he alleged that his plea had been induced by a promise of ten years by his lawyer. This of course was the opposite of what he told the trial judge. He told him that no promises had been made to him to secure his plea.

At first the District Court dismissed the writ. Then it reopened the case. And after some correspondence with the petitioner about substantiating his claim -- he claimed he had a witness to his lawyer's offer to him of this ten year sentence -- the District Court again dismissed his claim for failure to supply an affidavit with regard to this.

On appeal the Fourth Circuit reversed the District Court and held that the form of inquiry that was used, addressing the accused to determine whether or not any

promises had been made him was an unreliable way to go about this. It also condemned the District Court's attempt to have the matter substantiated by way of affidavit.

We are here before you today to assert as the simple thrust of our argument that Townsend v. Sain authorized the District Court to accept the state court findings on this matter; that there were promises made for petitioner's plea; and to adjudicate his habeas corpus petition on the basis of it.

As far as reliability goes, there hasn't been much law developing this aspect of the decision in Townsend v. Sain or the statute that declares the law with regard to it. But it was a sworn proceeding. That somewhat differentiates it from most Rule 11 inquiries, as I understand them. It was a proceeding in which the petitioner himself testified -- it was the sole testimony. It was also a proceeding that covered the matter involved, whether or not there had been a promise for his plea.

With regard to the attacks on this type of inquiry I hope that the Court will understand them to be largely a matter of folklore rather than fact. It developed from impressions made, I believe, in the metropolitan Northeast in the mid-fifties, early sixties. To some extent they're based on a study done in the Midwest in the 1950's; I think a misinterpretation of that study. A gentleman

#137 named Mr. Newman who is frequently quoted with regard to the matter of guilty pleas observed a series of arraignments at that time and found that in none of them did any one, in answer to a response about promises, say that the District Attorney promised him a sentence.

That, of course, I don't believe is a remarkable observation. Because you would not expect that. Certainly you wouldn't expect it in North Carolina.

I would say to you that whatever validity that these observations and attacks on this type of proceeding that we use had at one time, it's pretty far removed in time and space from North Carolina in 1972, the time, of course, when Allison entered his plea.

Since that time, or between the time, ten to fifteen years time difference, you had the Brady decision by this Honorable Court, which specifically incorporated as a part of the definition of the voluntariness of a plea knowledge of the actual value of commitments made to an accused by the state. And of course that was picked up in some of our own cases well before Allison's plea.

One of the reasons asserted for finding that the inquiry was not reliable, made by Mr. Goldsmith, was that the word "promises" was one that was capable of being very narrowly construed by a lawyer with regard to his client, or in advising his client. And the client would

therefore say there were no promises to him. Although he was aware of a deal, he would not consider that as a promise.

But I believe that's incorrect. I believe that ordinarily you would expect a man, no matter how the matter was phrased, no matter whether the word promise was used to him or not, to conceive of a deal as a sure thing, and to conceive of it in terms of a promise, whether or not that word was used.

Also another reason given for not accepting the state's proceeding in this case was the fact that the man might not speak up, might not admit in court that either there was a bargain, or that after it was breached, that it was breached; that he would, for some reason, stay silent.

But again, I would ask your Honors to recall that the men you're dealing with are not specially unassertive people. They are, after all, men who will rob you or kill you, assault you. You can certainly expect that a fair number of them would speak up. And certainly we were able to find a few instances of that, and included them in our brief.

With regard to this particular matter, I think that if the Court were to depart from Townsend v. Sain, and were not to allow the District Court to accept state court

findings in this context, it would significantly undercut one of the basic reasons for two of its subsequent cases, the McCarthy case and the Boykin case. Certainly one of the hopes behind each of those cases was to cut down post conviction work, or to expeditiously handle it. That would, of course, go by the board, and would do so for a type of claim that I don't think a lot of people give much credence to.

In Machibroda v. United States this Court did not describe this type of claim in very high terms. The Courts ofAppeal who have looked at it, and a number of them even in remanding for a hearing, have indicated that they did not think there was a very high likelihood of success with regard to the matter below, at least from the petitioner's point of view.

QUESTION: Mr. League, can I just ask one question?

MR. LEAGUE: Yes, sir.

QUESTION: Is it your position that if the record does contain a statement by the defendant that no promises were made, that's completely the end of the matter? He may not ever come in later and say, the reason he said that was because his lawyer told him to do it?

MR. LEAGUE: Your Honor, largely, unless he can come forth with some new evidence, that's our position.

That's comprehended by the Townsend v. Sain.

QUESTION: Before a hearing?

MR. LEAGUE: Pardon?

QUESTION: Before a hearing, he has to bring in new evidence?

MR. LEAGUE: Yes, sir, yes, sir, or give some substantial indication of it.

QUESTION: Give me another case where a man's required to -- who makes a valid allegation, which if he proves, he'll win, and he's required to bring in an affidavit from somebody else?

MR. LEAGUE: Well, in any other case that might be where he claimed he had a new witness. I would think that would be the standard way of doing it. Something that wasn't developed previously, something that wasn't before the Court.

QUESTION: He just alleged that here. Didn't he allege he had a new witness?

MR. LEAGUE: Yes, sir, but he failed to come across with any indicia of it, as directed by the District Court.

QUESTION: He has to bring in proof before he gets a hearing?

MR. LEAGUE: Indicia of proof, indicia of proof. Of course, at hearing he could introduce the affidavit.

QUESTION: And what case do you have to support that?

MR. LEAGUE: I believe the Townsend v. Sain supports that, your Honor

QUESTION: Townsend v. Sain was an independent hearing in the state court.

MR. LEAGUE: I still believe --

QUESTION: Wasn't it?

MR. LEAGUE: There was language in that case, your Honor, about newly discovered evidence.

QUESTION: Well, what are you going to do with Santobello? What are you going to do with Santobello? Are you going to get to that?

MR. LEAGUE: I don't believe Santobello comprehended the situation we have here.

QUESTION: Why not?

MR. LEAGUE: It just doesn't deal with a matter of him contradicting what he said under oath on the base of a state court finding.

QUESTION: Well, how about Fontaine?

MR. LEAGUE: Fontaine is a case, your Honor, where an indicia of new evidence was demonstrated.

QUESTION: Did he have to bring in a witness? Did he have to bring in a witness?

MR. LEAGUE: Ultimately to prove his case he would

have, but he --

QUESTION: Yeah, but this one, he had to bring in the witnesses before he had a chance to start to begir to get ready to prove his case.

MR. LEAGUE: A statement from the witness, your Honor. Under oath.

QUESTION: Well, where is a case that he had to get -- give me a case that said that --

MR. LEAGUE: That he had to --

QUESTION: -- when you filed a pleading in court, you have to get affidavits from other people before you can get a hearing?

MR. LEAGUE: That's just an acceptable technique that the District Court -- it's not mandated, it stems from --

QUESTION: All right, if it's an acceptable technique, where else has it been done?

MR. LEAGUE: I wouldn't know.

QUESTION: Well, how can it be acceptable if it's only been done once?

MR. LEAGUE: Well, it's authorized by statute, your Honor. I mean, I can't isolate cases and tell you In Kansas in '55 they did it, or New York in '72 they did it.

QUESTION: You mean the North Carolina legislature

can legislate on federal habeas?

MR. LEAGUE: No, sir. It's in the federal habeas statute.

QUESTION: The federal court statute says that you have to have an independent witness before you can try --

MR. LEAGUE: No, sir; that you can use affidavits.

QUESTION: Sir?

MR. LEAGUE: No, sir; that you can use affidavits.

QUESTION: But does it say you have to have an affidavit? Which section of it is that?

MR. LEAGUE: No, sir. I rely on Townsend v. Sain for the possibility -- or probability -- pardon me, for the allowance of the District Court to utilize this method. The newly discovered aspect of that case.

QUESTION: What's newly discovered here?

MR. LEAGUE: Well, it's newly discovered in the sense of that case.

QUESTION: Well, suppose he had filed a case and said: I had -- my lawyer told me, and the prosecuting attorney told me, that I could only get ten years, and that the judge had agreed to it. Would he have had a hearing?

MR. LEAGUE: If he just said that?

QUESTION: Yes.

MR. LEAGUE: Without prior -- any prior finding in state court?

QUESTION: Yes, sir.

MR. LEAGUE: As a lawyer, I don't think --

QUESTION: In this very case, I'm talking about.

MR. LEAGUE: Well, he had had a prior hearing. No, sir.

QUESTION: If in this very case he had filed the exact same paper, but he had not said that somebody else was a witness, would that have required a hearing?

MR. LEAGUE: No, sir.

QUESTION: Why not?

MR. LEAGUE: Because the state had determined it, and the district court could use the state's findings.

QUESTION: The state doesn't have to do anything?

MR. LEAGUE: Sir?

QUESTION: The state doesn't have to do anything?

MR. LEAGUE: At what point --

QUESTION: Just when he files that, automatically, it's dismissed?

MR. LEAGUE: Well, they could have dismissed it out of hand, or they could have required us to show cause. Of course, they wouldn't have had the state finding without asking us to show cause.

QUESTION: Mr. League?

MR. LEAGUE: Yes, sir.

QUESTION: Let me back up a little bit. Now in

the federal court this is a civil case, is it not?

MR. LEAGUE: Yes, sir.

QUESTION: Governed by the federal rules of civil procedure, even though it arises in a criminal situation?

MR.LEAGUE: Yes, sir.

QUESTION: Under the federal rules of civil procedure, could a -- could the court direct a pre-trial hearing to explore the claims of the -- of a plaintiff in a civil case before setting it for trial?

#270

133

MR. LEAGUE: As far as I know, yes, sir. It's happened in one case.

QUESTION: Are you analogizing what the District judge did here with the magistrate to what a District judge can do in a civil case, a damage case or any ordinary lawsuit, breach of contract, in the way of pre-trial exploration by the pre-trial examiner, if they have one, or by the magistrate, if they do not?

MR. LEAGUE: That would be an acceptable analogy, your Honor. I thought of it really in terms of a hearing without the witness present, a hearing on the basis of records alone. It's sometimes described as a hearing though it isn't a hearing in the same sense that you have live testimony. I believe that in some of the decisions of this Court a hearing has also been described in terms of a

review without live witnesses, perhaps the earlier habeas hearings.

QUESTION: Are you suggesting that this is comparable to the authority of a District judge to require a plaintiff in a civil case to produce documents in advance of trial for purposes of expediting the trial when it occurred?

MR. LEAGUE: I believe it is. It's based in part, like I say, your Honor, on the Townsend v. Sain situation where a matter that's been determined once before may be reopened if there's an offer of newly discovered evidence in a broader sense than that.

QUESTION: Would you agree that in a criminal case, as distinguished from a civil case, a District judge would have no right to require a criminal defendant to make some prima facie showing of his case, showing his hand as it were and his defense theory?

MR. LEAGUE: Yes, sir.

QUESTION: Will you give me the case, please, where in a civil case a man was ordered to bring an affidavit of a witness before he could file his lawsuit?

MR. LEAGUE: No, I cannot.

I would speak just a little bit further, your Honor, in that regard. Of course the man did file his lawsuit here in advance. And the question was whether or

not the prior determination should have been overthrown or at least reexamined.

And in coming to that determination, there was a claim of new evidence in a broader sense an that somewhat used in civil terms. And the judge merely asked, let's see it. Let's see it in advance.

And I think he had that discretion. I think it was vested in him by Townsend v. Sain. Or at least I hope it was.

And a somewhat comparable situation has been developed by Congress with regard to habeas generally in an authorization to allow affidavits on the merits. Conceivably the judge could have called affidavits from all parties and decided the case on that basis.

QUESTION: But he didn't.

MR. LEAGUE: No, he didn't. No, he didn't. It wasn't faced in a previously -- statement by any other person contrary to what he had said in court, like it was with regard to the petitioner.

Going ahead then, and in conclusion of -- to my argument, I'd just say that the District Court's discretion in this type of case is any less advised than in any other. Certainly the District Courts have practiced with some of these men. They've had them practice before them. Some of the judges have been men that they've practiced under. And

they're able pretty much to decide whether or not a proceeding is reliable in whole or part, either because of the way it's conducted in that area, because of the prejudices of the judges about certain things, or because the parties are a little bit slow. And I certainly wouldn't think --

QUESTION: Mr. League?

MR. LEAGUE: Yes, sir.

QUESTION: Can I ask you a question about the procedure followed in this case?

MR. LEAGUE: Yes.

QUESTION: As I understand it, there was an appeal to an appellate court in the state system, was there not?

MR. LEAGUE: Not on direct review, no, sir.

QUESTION: No appeal on direct review?

MR. LEAGUE: No, sir. In the collateral -- when he attacked it collaterally, of course, he fully exhausted by --

QUESTION: In the state post-conviction proceedings there was a collateral attack --

MR. LEAGUE: Yes, sir.

QUESTION: -- and an appeal from that?

But in the appendix that you filed on page 11 there is a transcript of the plea in the Alamance County Superior Court. How did that get in the record? I'm just

curious. Was that --

MR. LEAGUE: Yes, sir.

QUESTION: -- an exhibit to your motion to dismiss, or how did it get in the record?

MR. LEAGUE: It was filed by me in response -- as an exhibit with my plea.

QUESTION: It was filed as part of your answer --

MR. LEAGUE: Yes.

QUESTION: -- to the complaints --

MR. LEAGUE: Yes, sir. The indictment, the transcript and the commitment, as I recall.

QUESTION: I see. Because your answer, as I read it, doesn't actually make the point that seems to be involved now.

MR. LEAGUE: No, sir. It incorporated by this other answer done by another lawyer in a -- previously -- that the matter had been adjudicated. And that was our sole defense, that --

QUESTION: That the issue of guilt or innocence was adjudicated?

MR. LEAGUE: No, sir. The matter of promises for a plea.

QUESTION: I see.

MR. LEAGUE: It shouldn't be reexamined, I think is the thrust of -- I believe it was Mr. Haskell that did

that answer.

I would go ahead, if there are no further questions from the Court, and let that be my argument.

Thank you very much for your consideration.

QUESTION: Let me ask you just one question --

MR. LEAGUE: Sure.

QUESTION: -- about Santobello. I'm not too clear on the factual situation there. But was it correct that in Santobello there was no dispute about the fact that one assistant prosecutor had made some representations which he hadn't communicated to the other assistant prosecutor, who then in turn did not disclose them to the court? So that there was no dispute over the factual situation as we have here?

MR. LEAGUE: That's correct.

QUESTION: But you couldn't bring that out in this case?

MR. LEAGUE: I beg your pardon?

QUESTION: You couldn't bring that out in this case, because you didn't get a hearing.

MR. LEAGUE: Well, the petitioner did.

QUESTION: The petitioner got a hearing?

MR. LEAGUE: The petitioner didn't get a hearing. Of course, we put forth our position on a --

QUESTION: Well, you don't know what would have

come out if there had been a hearing, do you?

MR. LEAGUE: No, sir, not for sure. But I can, you know, speculate with a fair degree of accuracy.

QUESTION: As a matter of fact, you don't know what the prosecutor did, do we? We don't know --

MR. LEAGUE: As a matter of record.

QUESTION: Yes, sir.

MR. LEAGUE: Only on the basis of what the petitioner said. You know it from that. He said no promises were made to him.

QUESTION: You mean what he said in court?

MR. LEAGUE: That's right.

QUESTION: So now if it was a matter of fact that it was all true, the fact that he did say it in court and was told to say it, he could never bring that up?

MR. LEAGUE: Not without a substantial showing of new evidence prior to getting a hearing.

QUESTION: Like what?

MR. LEAGUE: Like an affidavit from the witness that he claimed he had.

QUESTION: Well, suppose there was no witness there but him?

MR. LEAGUE: He's out of luck.

QUESTION: He's out of luck?

MR. LEAGUE: Yes, sir.

QUESTION: Thank you.

QUESTION: Well, the only issue here is whether or not there should be a hearing, isn't it?

MR. LEAGUE: Yes, sir.

QUESTION: That's the sole --

MR. LEAGUE: At this point.

QUESTION: -- and single issue, isn't it?

MR. LEAGUE: At this point, yes, sir. Now, I did suggest that some form of his proof might not entitle him to relief. It's just between him and his lawyer that that's not presently developed.

QUESTION: All right. And whether he gets a hearing depends upon whether he can meet the statutory standard which the judge appears to have tried to apply here, that on the face of the record it appears conclusively that he's not entitled to relief.

MR. LEAGUE: Yes, sir.

QUESTION: Now, the face of the record -- was the record that the judge, the federal judge, referred to the record in the state court on his guilty plea?

MR. LEAGUE: Yes, sir.

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

MR. LEAGUE: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Goldsmith.

ORAL ARGUMENT OF C. FRANK GOLDSMITH, JR., ESQ.,
ON BEHALF OF THE RESPONDENT.

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

My name is Frank Goldsmith, Jr., and I represent the respondent prisoner in this matter, Gary Darrell Allison.

If it please the Court, I would like to go over several additional facts to those which counsel for the petitioner has stated.

QUESTION: Mr. Goldsmith, were you in this at the trial level?

MR. GOLDSMITH: No, sir, I was appointed at the Fourth Circuit level.

QUESTION: Well, do you agree that that record that got in there about that plea, how it got into the record?

MR. GOLDSMITH: I agree that that's an accurate transcript of the plea proceedings.

QUESTION: No, but how did it get in the record? You don't know?

MR. GOLDSMITH: Well, I wasn't present when it was put in the record. I think Mr. League is correct, that it was furnished as an answer to the state's -- as an attachment to the state's answer to the petition for a writ of habeas corpus. And I believe it was certified to be an

accurate record by the clerk of the Superior Court of Alamance County.

I don't have any quarrel with the accuracy of the record itself. I have a great deal of quarrel with the sufficiency of that record as a basis upon which the federal District Court could deny this man a hearing in this matter.

I think it must be remembered that this is the only record -- the record actually occurs in this form, which is reproduced in the appendix at page 11. It's a simple form on which the clerk of court merely records the answers, yes or no answers, to the questions posed to the defendant by the judge.

The only question that we're concerned with, and the only one that could possibly have any relevance to the issue of a plea bargain or the existence of a plea bargain in this case, is question number eleven: has a solicitor or your lawyer or any policeman, law enforcement or law officer or anyone else made any promise or threat to you to influence you to plead guilty in this case? And the only space provided is for a yes or no answer. There is no space provided for the terms of a plea bargain if one existed. And furthermore, on the reverse of the form, the trial judge is required to find -- because it's printed on the form that he find -- that the plea was entered voluntarily and without promise of leniency.

So, impliedly, on the very form itself, under the old -- and I stress this is the old North Carolina procedure -- there could have been no finding of any promise of leniency. The plea would have been stricken.

And therefore it's not unreasonable to suppose that a defendant would be expected to answer no to this question of whether there'd been any promises or threats made to induce him to plead guilty.

And I think it's significant, the wording of "promises or threats". The two are coupled together, as though that is an impropriety that could be expected to be denied. And I think that's in fact how the North Carolina procedure was conducted during this period of time prior to the Fourth Circuit decisions and the later legislation which changed our proceeding.

It's not unreasonable at all to expect a defendant in that situation to answer no to that question. This is not simply a matter of my speculation on this part. There is authority cited in our brief -- there is authority in fact cited in the petitioner's brief in this case -- to support the proposition that an answer like that is routinely given, and even counseled to be given, by a defense attorney in order to have a plea accepted.

It's been substantiated, I believe, in two articles, at least two articles, which include empirical

research, interviews with judges and lawyers, one in the
318 Yale Law Journal, a 1975 article by Professor Alschuler entitled "The Defense Attorney's Role in Plea Bargaining", at 84 Yale Law Journal 1179. Another one in the 1970 Washington Law Quarterly, page 289, "The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas".

In both of these articles, evidence is cited tending to support what is well known to any practitioner at that time in North Carolina that plea bargains were never disclosed in response to such a question on such a form. Plea bargains were routinely made and entered into. There was nothing improper about plea bargains. But they simply did not ever appear on the record. They were never disclosed in response to that question.

There is another fact that I think is significant in this case, and that is the fact that this plea colloquy and the sentencing of the defendant occurred only 37 days after this Court's decision in Santobello. And to the extent that Santobello legitimized plea bargaining, or was viewed by the defense bar and by -- well, by the bar in general as having legitimated plea bargaining, then I think it's not unreasonable to assume that Santobello had not had time to take effect in North Carolina, and that these plea bargains were not normally made a part of the record.

I would further point out that the only record of this matter, the state of the record now, is simply this sheet of paper, and that that is simply not an adequate compliance with the requirement, not necessarily of Townsend v. Sain but also of the congressional requirement that there exist an adequate record to permit review.

QUESTION: Go back to the question I put to your friend --

MR. GOLDSMITH: Yes, sir.

QUESTION: -- for the state: in a civil case, not a habeas corpus civil case but any kind of a civil case, which has been tried, has gone to judgment, whether by a jury or the judge as the sole fact finder, and the losing party comes in with a motion for a new trial on the grounds of newly discovered evidence. Would it be appropriate for the District Judge to require the moving party seeking a new trial on these grounds to state what that newly discovered evidence is before he determines he's going to go -- whether the judge is going to proceed with it?

MR. GOLDSMITH: I certainly agree that he would be entitled to do that.

QUESTION: Now, I take it that your friend was analogizing that situation to this; whether it is or not, you may disagree. Where do you think the analogy is faulty?

MR. GOLDSMITH: I think the analogy is misplaced primarily in the fact that in the situation posed by your Honor, there has already been a trial on the merits. There has been -- I'll bite at the apple -- an opportunity to offer proof.

QUESTION: Has there not been a determination -- a determination as distinguished from a trial -- on the merits on the submission of the guilty plea?

MR. GOLDSMITH: I would argue not, that this -- the only thing that could be --

QUESTION: How could the judge accept the guilty plea if he didn't make a determination on the merits of the plea?

MR. GOLDSMITH: Well, I think the judge makes the determination generally that it's a voluntary plea.

QUESTION: You're speaking now of course of the state court judge.

MR. GOLDSMITH: Yes, sir, I am speaking of the state court judge. But I would submit that under this prior procedure, unlike current procedure, the state judge does not make any determination, or even any inquiry, into the existence of a plea bargain or not. And that is the hearing which under 2254, the federal habeas corpus statute, that is the claim that must be determined in state court at some point if a hearing in federal habeas corpus is to be avoided.

And there's been no such hearing in any state court, or in federal District Court.

The criteria established by Townsend v. Sain incorporated into the statute by Congress have not been met. There's been no full and fair hearing pursuant to an adequate fact finding procedure that found the material facts and determined the issues tendered by the defendant.

To say that at the arraignment itself the Court did all those things I think would be to stretch unrealistically the purpose of the arraignment procedure under form North Carolina law.

And so we submit that Townsend, far from being authority for the position of the petitioner in this case, is authority for our position, particularly insofar as it has been incorporated into a statute.

QUESTION: What, if any, impact does the new North Carolina have on this case?

MR. GOLDSMITH: On this particular case it has none, I would say, your Honor. On the issue presented by this case, I would submit that it has a great deal of potential impact. Because if, as this Court has previously said, if there is a flushing out of these claims at the trial level, and an attempt made to resolve them there, to the extent that that is successful, there should be fewer of these claims arising on appeal later on.

But as to Allison's own facts, of course, that occurred prior to this change. And I would submit that he is entitled to a hearing.

I think the real issue here is whether the North Carolina procedure embodied in this particular question is a full satisfaction of the requirement that there be an adequate state court determination. And we would submit that that is not the case.

QUESTION: But you say it's just a special situation in this particular case and cases like them? Or could today there be an adequate inquiry at the time of accepting the plea so that there would be no need for a hearing when a later habeas corpus is brought?

MR. GOLDSMITH: I would say that today there would be certainly a fuller inquiry under the North Carolina procedure.

QUESTION: No, that isn't what I asked you. I just asked you, can you make the kind of an inquiry and have the kind of determination at the time of accepting the plea that would insulate the plea against a habeas corpus attack?

MR. GOLDSMITH: I don't believe you can, your Honor. I believe that no matter what, the fullness of the inquiry --

QUESTION: Well, then, are you expanding the

Townsend test for when you get a hearing?

MR. GOLDSMITH: I think --

QUESTION: If there's been a full and fair hearing in the state court, you don't get a hearing, do you?

MR. GOLDSMITH: Correct.

QUESTION: Unless there's been some mistake of law. Isn't that right?

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

I think there are several problems to Townsend. One is that there be an adequate fact finding procedure.

QUESTION: Yes, yes.

MR. GOLDSMITH: This reform would take care of that element of Townsend.

QUESTION: Yes, yes.

MR. GOLDSMITH: But there also in Townsend is a requirement that the issue tendered by the defendant actually had been determined in the state court.

QUESTION: Well, the judge determines. He tells the defendant, here are the issues, voluntariness, and whether there's a basis in fact for your plea. No, if you've had any plea bargains, we want to know it now. And if there haven't, I want you to tell me there haven't. It gives him every opportunity to make any kind of a claim that he wants to claim. And they hear everything he's got to say. Now, what's inadequate about that?

MR. GOLDSMITH: Well, I submit that would be a
417 much harder case, if that had happened, to develop his case.

QUESTION: Well, that's what I'm asking you about.

MR. GOLDSMITH: I understand that.

QUESTION: I just want to know what your basis, what your position is.

MR. GOLDSMITH: My only position -- Mr. Justice White, my only position is that there ought to always be a continuing availability of a mechanism for relief, which is what the Court said in Kaufman v. United States.

QUESTION: Well, so you would like to put a number five on Townsend v. Sain, or seven or eight, another situation in which a hearing would be required?

MR. GOLDSMITH: I think what I would prefer is that there be such a mechanism, because I think there are situations conceivably --

QUESTION: Well, aren't you going -- in taking this position, aren't you going beyond Sain?

MR. GOLDSMITH: Yes, sir, I think that's probably right. I think it could be viewed that way. Of course, we also have the congressional statute in addition to Townsend v. Sain. I don't know whether I'm going beyond the statute or not, and it's speculative on this case.

QUESTION: Oh, you think the statute goes beyond Sain?

MR. GOLDSMITH: It doesn't -- I think it incorporates most of the criteria of Sain. It does go beyond it in some respects. I just simply think that there are situations where a defendant might be able to show that he was, in fact, coerced into entering his plea despite such an inquiry. And if he can show that -- and I think that would be a much harder burden to show -- and perhaps then a District Court judge would be justified in requiring him to furnish some additional proof.

QUESTION: You say this case is different in any event --

MR. GOLDSMITH: Yes, sir.

QUESTION: -- because at the time everybody had the notion that you shouldn't confess to plea bargains in open court?

MR. GOLDSMITH: That's correct, your Honor. I believe that to be the fact, and I think that's been demonstrated by some empirical studies to have been the fact at that time.

QUESTION: Mr. Goldsmith, can I just ask one question analogizing this to normal civil cases?

Did the state file anything comparable to a motion for summary judgment supported by any affidavit in this case, denying a plea bargain?

MR. GOLDSMITH: NO, your Honor, I would submit

they did not. They verified their answer to the habeas corpus petition. But it was verified simply by the attorney representing the state in that matter. There was no affidavit by the prosecuting attorney in the trial court or the defense attorney or any other witness that knew anything about the facts in this particular matter. There was no motion made for summary judgment.

And I would submit that on the issue of affidavits that, in any event, it's improper to resolve what's essentially a question of credibility on the submission of affidavits. That's why we --

QUESTION: But by filing an affidavit, the state could have put the burden on the plaintiff to come forward with a countervailing affidavit.

MR. GOLDSMITH: Yes, sir. In a normal situation, that could have been done. I think the Fourth Circuit found -- and we submit that it's correct to find -- that to put that burden on an indigent prisoner confined in the prison unit apart from his codefendant from whom he seeks the affidavit is an unrealistic burden.

QUESTION: Well, I don't think the fact of indigency would make any difference if the state had filed its own affidavit, which would require response in the normal summary judgment procedure. But as I understand it, the wrinkle here is that the state didn't file a motion for

summary. They rather said that you've got to deny in advance, which is, of course --

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

QUESTION: -- an unusual practice.

MR. GOLDSMITH: It is unusual.

QUESTION: But you would not question the fact that if the state had filed an appropriate motion for summary judgment supported by appropriate affidavits, then your client would have had the burden of coming forward with an affidavit, even though indigent and difficult and all the rest of it?

MR. GOLDSMITH: Yes, your honor, although I submit that his own affidavit would have been sufficient to rebut -- to raise the issue of material fact sufficient to rebut a summary judgment. I don't think it would be proper to require him to get an affidavit from a possibly hostile witness in another prison unit upon penalty of having his claim dismissed.

QUESTION: Why not?

MR. GOLDSMITH: Well, simply because in a normal setting of a plaintiff in summary judgment procedure his own affidavit is sufficient.

QUESTION: No, but he's in the position of contradicting a statement he made in open court to a judge in response to a very relevant question which comes about

as close to perjury on his present situation as you can come without having perjury.

MR. GOLDSMITH: Yes, sir, I'll admit, it comes close to perjury, yes, sir. I simply submit that it's an unrealistic requirement. This codefendant --

QUESTION: Why unrealistic?

MR. GOLDSMITH: Well, because this codefendant is the one who had changed his plea originally to induce Allison to plead guilty. There's evidence in the file from letters from Allison and so on that the codefendant was very reluctant to make any statement at all because he was trying to get work release privileges and other benefits in the penal system, and he feared he may be penalized for that.

I think it's simply unrealistic forthe magistrate to have assumed that their interests were identical, and that this would be a willing witness who would willingly furnish an affidavit for the plaintiff in this case, the petitioner.

QUESTION: Well, he's going to have to furnish something some day if you prevail in this case, isn't he?

MR. GOLDSMITH: He certainly is, and of course compulsory process is available to require him to come into court and be examined under oath and cross-examined by the state. We feel that's the way this matter ought to be resolved.

QUESTION: Taking the statutes, the federal statute, on its literal meaning, would you say that on the face of the record -- bearing in mind the implications of those terms -- on the face of the record, it conclusively appeared that the petitioner was entitled to no relief?

MR. GOLDSMITH: Well, of course, your Honor, that's the standard for federal motions to vacate sentence under 2255.

QUESTION: That's why I emphasize, for the federal.

MR. GOLDSMITH: I would submit that in essence, they are -- they boil down to the same standard. And that this record would not conclusively show that he's entitled to no relief for the same reasons that it's not an adequate state court determination on the merits of his claim.

To say that it's conclusive, and forbid any further attempt by him to ever impeach it I think would simply be an unrealistic position in light of the practicalities of our plea taking procedure.

QUESTION: Well, if the federal judge believed what this gentleman had stated to the state court judge at the sentencing plea, then it would conclusively appear on the face of the record, would it not?

MR. GOLDSMITH: If the word "promise" in the context of this sentence were construed to have meant a plea bargain, yes, it would. We submit that it was not in-

tended that way, it was coupled with threat, and that it was not ever understood by any party to the proceeding to contemplate the disclosure of plea bargains.

QUESTION: I take it you concede that if this had been a federal case purely -- not state habeas corpus in a federal court, or federal habeas corpus on a state case -- that the judge would have been justified in saying that on the face of the record it conclusively appears he is entitled to no relief, if the District Judge, in so doing, were relying on the transcript of the Rule 11 hearing?

MR. GOLDSMITH: On these facts, presented by this case, I would respectfully disagree. I would say that were this a federal prisoner, and this were the only question that were asked him at the Rule 11 proceeding, that that would not conclusively establish that no plea bargain had been made. And there are, I think, federal cases -- I know -- federal cases cited in the briefs for both sides supporting that proposition. Just as Machibroda was able to bring his allegation despite its incredibility, so we submit that any federal prisoner who's simply asked whether any promises or threats were made to influence you to plead guilty is not thereby precluded from ever asserting that there was a plea bargain, and under the cover plea bargain.

QUESTION: What else should the federal District judge at sentencing proceeding do, what should he ask, to

comply with Rule 11, which you say this record would not meet Rule 11 standards?

MR. GOLDSMITH: It would not. Rule 11, of course, has been amended in 1975. And now, I think, inquiry is made, specifically in the Fourth Circuit, the Third Circuit, the Fifth Circuit, by direction of those circuits. Federal District judges are specifically required to inquire into the matter of plea bargaining, much as the North Carolina statute now requires that inquiry to be made.

In addition, the new federal Rule 11 requires that pleading negotiations be disclosed in open court to the judge --he can accept or reject them -- and that they be spread on the record. And I think that that is a very salutary development, and to the extent that that's followed in federal courts and in states like North Carolina that have their own procedure, these claims shouldn't arise any more. I think it's unlikely that they will.

As I said in response to Mr. Justice White's question, I think there ought to be a mechanism where they could be heard if they did arise.

QUESTION: As I understand your position, you could always plead yourself into a hearing, no matter what happened in the state court?

MR. GOLDSMITH: I think that -- yes, sir, in essence.

QUESTION: All he has to do is say what his own lawyer told him.

MR. GOLDSMITH: Yes, sir, if he alleges coercion and alleges that he was required to cover up and offer some reason -- this is a requirement established by the Fourth Circuit too -- that there must be allegations why he should be permitted to contradict his earlier statement in the state court. And if he makes those allegations --

QUESTION: And if the state responds to the petition with an affidavit of the attorney saying, no, and he responds with his own affidavit saying, yes: hearing. You have to get him before the court.

MR. GOLDSMITH: I would say so. Because it's a question of credibility. And I think it needs to be resolved by cross-examination of witnesses.

QUESTION: It probably isn't relevant for the disposition of this case now, but let me ask you this question: suppose you had a hearing, suppose you got the relief you wanted --

MR. GOLDSMITH: Yes, sir.

QUESTION: And then the matter proceeded on from there. Would his false statement to the state court District Judge seats subject him to some kind of a penalty for contempt of court or possibly perjury in the state court for having misled the state judge?

MR. GOLDSMITH: That's a possibility, your Honor. I'm not prepared to answer whether it would under North Carolina law or not. I would urge that it not be considered as contempt in view of the traditional concepts in which that question is asked as relating to any impropriety really is what the question gets at, any promises or threats to influence the plea.

QUESTION: You've conceded, if I understood you correctly, that he did deliberately mislead the state court judge by a false statement.

MR. GOLDSMITH: Deliberately, in response to his counsel's advice, yes, sir. That's what he alleges.

QUESTION: Well, he deliberately misled the state court. What his motives were at the moment are irrelevant.

Under North Carolina law would that subject him, do you think, to some kind of a sanction?

MR. GOLDSMITH: I suppose it might.

QUESTION: Would it also subject the lawyer?

MR. GOLDSMITH: I suppose it would -- certainly if it subjected him to anything, it ought to subject the lawyer to the same penalty.

QUESTION: Depending on the court's determination, he might subject the lawyer to some disciplinary proceeding if he found one way --

MR. GOLDSMITH: Yes, sir.

QUESTION: -- if he found the other way he could subject Allison to some --

MR. GOLDSMITH: Yes, sir.

QUESTION: -- sanction.

MR. GOLDSMITH: In fact, I think in McAleney v. United States in the First Circuit the court did instruct, or strongly suggest, that disciplinary proceedings be instituted in just such a case against the attorney.

QUESTION: Just focusing on the lawyer for a moment, would you tell me, with respect to the practice that prevailed at the time of this plea, and also with respect to the practice in North Carolina today, was it then or is it now customary to make any inquiry of counsel for the prosecution or counsel for the defense as to whether there was a plea bargain?

MR. GOLDSMITH: It is not; it was not then.

The new plea transcript form requires the attorney to sign and to make a statement that he thinks that the plea is voluntary himself. It's not nearly as detailed a disclosure as that required by the defendant personally. There is no -- usually, no colloquy between the court and the defense counsel. It's simply a case of the defense counsel signing the statement.

The practice, however, varies. Some judges may inquire of counsel whether there is any plea bargain. And

normally when that question is reached on today's form, whether there have been any plea negotiations, it's counsel who speaks.

QUESTION: And at the time of this plea, counsel didn't sign the form, did he? It was just signed by the --

MR. GOLDSMITH: That's right, your Honor. Just the defendant and the judge.

QUESTION: And is the form -- was the form at that time customarily executed and filled out in open court or in the clerk's office? How was it handled?

MR. GOLDSMITH: It was customarily done in open court.

QUESTION: It was?

MR. GOLDSMITH: The manner for doing it in open court varied. Sometimes the defense counsel would sit by the defendant and write the answers into the blanks. Sometimes the clerk of court would write the answers into the blanks. Very rarely, if ever, did the defendant actually write the answers. But his oral answers would be put down in the appropriate blanks. It was done in open court.

QUESTION: Without any representation by counsel as to the existence or non-existence of a plea bargain?

MR. GOLDSMITH: That's correct.

QUESTION: But counsel was present when this occurred?

MR. GOLDSMITH: Yes, sir.

QUESTION: Defense counsel.

MR. GOLDSMITH: In this particular case, yes, sir. And any time that the client was represented, of course he would be present.

QUESTION: Right.

MR. GOLDSMITH: The problem here, I think, is that there is no record apart from this form. We don't have the verbatim transcript, if one was made, of the plea proceeding. So we don't know what else might have been said by anyone at the proceeding. We have absolutely no record of what happened at the sentencing three days later. And it's conceivable that the defendant may have raised some objection then. And that's, we submit, properly brought out -- should be properly brought out as relating to his credibility at a hearing, an evidentiary hearing.

But I submit that the state of the record presently is simply insufficient to ascertain that that was determined irrevocably that there would be no plea bargain.

I think one other fact that I want to call the Court's attention that I did not cite in my brief, and that is the official commentary to the North Carolina General Statutes; the statutes themselves are set out in my brief.

The amendment to Chapter 15A of the North Carolina Criminal Procedure Act, which required an open court disclosure

plea bargain. I think it's significant to note the official commentary which is reprinted with those statutes. And that is, the purpose of this statute was to legitimate plea negotiations and, quote, to bring plea negotiations out of the back room. And further on, the writers of the official commentary say that the purpose is now intended to allow the defendant to tell the truth in plea proceedings, implying that perhaps in former times the defendant was not always expected to tell the truth in response to that type of question in plea proceedings.

The same type of comments, I think, are found in the amendments to Rule 11(e) of the federal Rules of Criminal Procedure. I think it simply points out that this is a new day, this is taking pleas out of the dark ages, and that this plea arose in the dark ages of plea bargaining when these things were not brought out in open court, and were not explicitly recognized as being constitutionally sound.

If it please the Court, we submit that unless this Court can honestly say that this procedure was a full and fair hearing in fulfillment of the requirement in Townsend v. Sain, then it's bound to affirm the Fourth Circuit Court of Appeals. And it must be kept in mind that the only relief sought is a hearing at which witnesses who haven't previously testified will be able to be heard.

MR. CHIEF JUSTICE BURGER: We'll resume there at

1:00 o'clock. At that time you can decide if you wish whether you want to use the four minutes remaining to you.

MR. GOLDSMITH: Thank you, your Honor.

[Whereupon, the Court recessed until 1:00 o'clock, p.m.]

MR. CHIEF JUSTICE BURGER: You may continue, counsel.

MR. GOLDSMITH: Thank you, Mr. Chief Justice.

If it please the Court, I would like to take just a moment to explore the suggestion made that affidavits would be appropriate in this kind of case if the appropriate procedure were followed, that is, a motion for summary judgment.

I would hope that the Court would not restrict those claim sthat may be heard in federal habeas corpus to those cases where the plea bargain is witnessed by some outside party. I think that the hypothetical situation posed by Mr. Justice Marshall is appropriate, it's appropriate to ask that question. If Allison had not been so fortunate as to have his bargain witnessed by his co-defendant, then it seems to me that it would be inappropriate to try to resolve his claim on a basis of requiring him to submit further evidence of his claim, and that affidavits don't go very far toward resolving that type of issue where it does resolve on credibility.

QUESTION: I got some intimation from what you said that the gentleman from whom he hoped to get these statements is now in prison somewhere, and it might be difficult for him to get an affidavit, but that he could be compelled to testify.

MR. GOLDSMITH: That's exactly right, your honor.

QUESTION: That's what you're standing on, is it?

MR. GOLDSMITH: That's what I'm standing on. And I'm stating further that it would be inappropriate to fashion a general requirement of other evidence of the claim, because there are situations where maybe only the attorney and his client discussed the plea.

QUESTION: They may have to take his deposition in prison if you prevail in this case in any event.

MR. GOLDSMITH: Yes, sir, they may. Or he may be called to testify at a hearing. I think that would be an option of the District Court judge. But I think some compulsory process must exist for obtaining his testimony and subjecting him to cross-examination by both parties.

QUESTION: Was there any explanation in the record, counsel, for the absence of any affidavit from either attorney?

MR. GOLDSMITH: The only explanation, your Honor, that I can offer is that the case didn't progress far enough to obtain such evidence. I think, in any event, had an

affidavit been obtained, that might not have resolved the issue either. Because if the affidavit from the defense counsel, for instance, denied any suggestion of a plea bargain, there still remains the question of credibility. And I don't think we can be so cynical, as I said in my brief, to suppose that every time there's a contradiction between the client and his lawyer, that the lawyer is invariably right.

It's a question, I think, that has to be resolved by the trier of fact in an evidentiary hearing where credibility can be tested. But no one, to date, has approached, as far as I know, either the defense lawyer or the prosecutor or any other party to the case to ascertain what their version of the facts is.

QUESTION: Your position really is, that an expanded or a full employment of a Rule 11, federal Rule 11, approach will wash this kind of problem out.

MR. GOLDSMITH: I think it will far toward washing the problem out, in that the claims won't be made in the first instance, because they'll be flushed out. And if made, there would be very -- the burden would be hard to sustain, I think, as to why someone ought to be heard to contradict his earlier statement after full inquiry.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Goldsmith.

MR. GOLDSMITH: Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: You have anything further, Mr. League?

MR. LEAGUE: Yes, sir, I would make a couple of comments in rebuttal, if I might.

REBUTTAL ARGUMENT OF RICHARD N. LEAGUE, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. LEAGUE: With regard to the new procedure, the expanded inquiry, I can speak of personal knowledge as to whether or not that has stayed the post-conviction applications on the basis of this type of claim. It has not. Maybe it has made them somewhat easier to deal with, but that's speculative too, at this time.

With regard to the question Mr. Justice Stevens posed about the absence of an affidavit from the attorney or from the district attorney in this case, at the time these cases -- or this case came through, the case was handled to the extent it needed to be handled. Except in the Charlotte division of the Western District, the matters were routinely dismissed on the basis of a showing by the state that this transcript of plea had been gone into -- or, rather, the inquiries made in the transcript had gone into, and the man had said that no promises were made for him.

To be candid, it wasn't expressed, the dismissals weren't expressed in terms of taking a state court finding. I think they were expressed more in terms of being belied

or lacking sufficient credibility to cause the court to move; that is the basis for that.

Certainly, had I had the foresight to know I would be here today, the case would be handled quite a bit differently.

With regard to the matter of the form that was used, the fact that it had no place to include on it any promises that had been made, of course that form was not a maximum inquiry. That form was a minimum inquiry. You see on forms coming through attached to writs sometimes a question which dictates that more questions were asked by the judge. And at that time, you get a verbatim transcript assuming one is available as it usually is, but unfortunately was not in this case.

Frequently you see an answer to the question, yes, are you under the influence of any alchohol, drugs or medicine. Of course the inquiry proceeds to just what you are the influence of; it turns out to be a tranquilizer or some sort of medicine. That's the typical example, where the inquiry -- the minimum inquiry shown by this transcript in expanded on.

QUESTION: What's wrong with a habeas corpus petition that says, I know that I plead guilty, and I know I said there wasn't any plea bargain, but I lied, judge. I was lying at that time. I was making a misstatement, a

false statement. But I made it because my lawyer told me to. He just told me to, advised me that that was the way to do things. Maybe he was right or wrong, but that's why I did it. And he attaches an affidavit of the attorney to that effect, that he did advise him to say that which was contrary to fact.

Is that this case?

MR. LEAGUE: Well, as it's plead, and as far as we know now, that's the facts involved, according to his allegations. It was just between him and his attorney. Of course, I used as one of my supporting arguments, policy
691 reasons, the fact that there's really no question whether that's good enough to get his plea overturned if it's between him and his attorney; that it's not for state action.

QUESTION: Yes, but what if he alleged that his lawyer had advised him -- he alleged that the lawyer advised me as follows, and it turns out that that's wholly false legal advice, and that no competent attorney would give that advice? And the petitioner for habeas corpus makes these allegations, and claims that there's a counsel claim, that he was not represented by competent counsel.

MR. LEAGUE: Ineffective assistance.

QUESTION: Ineffective assistance of counsel. Now you wouldn't say that that claim wouldn't deserve a hearing, would you?

MR. LEAGUE: I'd say he ought to be collaterally estopped.

QUESTION: Well, you mean ineffective assistance of counsel claims are never open on habeas, is that it?

MR. LEAGUE: When they don't involve state action.

QUESTION: Well --

MR. LEAGUE: I mean, I look back over them, your Honor. I see there was the Glasser 704 case about ineffective assistance. But there the government --

QUESTION: Well, that isn't what the guilty plea cases seem to indicate. They seem to indicate that perhaps pleading guilty will close off some issues, but ineffective assistance of counsel isn't one them.

MR. LEAGUE: Well, it wouldn't. But in a case where he had specifically denied what he know says, and uses that as the basis for his claim, then you get the collateral estoppel.

QUESTION: Well, if his lawyer gives him the advice, and he follows his attorney's advice, and his attorney's advice is completely out of bounds, way out of the ballpark.

MR. LEAGUE: It depends on whether he would have misrepresented that to the state -- I mean to the judge on the inquiry. Of course if he hadn't, he's without fault, and shouldn't be penalized.

QUESTION: Okay.

MR. LEAGUE: With regard to the fact that threats or promises are linked together, I don't think that that is something that should have such a sinister cast as Mr. Goldsmith suggests. In the new form they're still linked together: other than the promises above, has anyone made any threats or promises to you. I think originally they were joined because they had the same propensity for wrong. There are some things that a man might be considered -- or that a man might consider a threat or a promise that would be incorrect and couldn't be done legally. There would be some things he'd consider a threat or a promise which would be permissible legally. Typically, he might feel threatened that the state was going to indict him. He might feel coerced because his people came around and tries to talk him into pleading guilty. There's nothing wrong with these. Yet a man could conceive of them as a threat.

And I think it's because of the possibility that both of these things have the same possibilities for affecting a plea that they were joined together.

With regard to plea bargaining and its non-disclosure in the state, that's a matter that varied throughout the state. I can only speak for Wait County, where I lived. It was widely reputed there was no plea bargaining until '71, when we got a new DA there. The old one supposedly never

plea bargained.

As far as judges not liking it, that varied from judge to judge. And again, that's a good reason why you should leave it to the discretion of the District Court. He knows this, and he can evaluate it.

That would be my remarks in rebuttal. Thank you so much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:11 o'clock, p.m., the case in the above-entitled matter was submitted.]

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