ORIGINAL

In the

Supreme Court of the United States

UNITED STATES, Petitioner,	)	
v.	)	No. 78-744
CHARLES TIMMRECK, Respondent.	)	

Washington, D.C.
April 16, 1979

Pages 1 thru 53

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner, v. CHARLES TIMMRECK, Respondent.	No. 78-744

Washington, D. C.

Monday, April 16, 1979

The above-entitled matter came on for argument at 2:18 o'clock 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 PAUL STEVENS, Associate Justice

APPEARANCES:

KENNETH S. GELLER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioner

KENNETH M. MOGILL, ESQ., 1455 Centre Street, Detroit, Michigan 48226; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in 78-744, United States v. Timmreck.

Mr. Geller, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The issue is whether a defendant is entitled to collateral relief for his conviction under 28 U.S.C. 2255 merely because the District Judge failed to follow the formal requirements of Rule 11 of the Federal Rules of Criminal Procedure in accepting his guilty plea.

We believe that under this Court's consistent interpretation of the scope of habeas corpus for non-constitutional errors, the respondent was not entitled to section 2255 relief as a result of this violation of the rule and that the Court of Appeals therefore erred in reversing the District Court's order denying the writ.

The facts may be briefly summarized as follows: The respondent was one of twenty-two defendants named in a narcotics conspiracy indictment filed in the Eastern District

of Michigan in May 1972. After extensive plea bargaining, the respondent agreed to plead guilty to the conspiracy count of the indictment. In return, the government agreed to drop the remaining 17 substantive counts and also agreed not to pursue an unrelated bail jumping charge against him.

The District Court then conducted a Rule 11 proceeding at which it questioned respondent prior to determining whether to accept his plea. There is no dispute that the court's inquiry at this proceeding fully complied with Rule 11 in every respect except one. Although the court mentioned that the respondent pleaded guilty, he could be sentenced to 15 years in prisonment and a $25,000 fine, the court neglected to add that the respondent would also be subject to a mandatory special parole term of at least three years.

Four months later, the respondent was sentenced to ten years in prison, five years special parole, and to a $5,000 fine. Now, the respondent did not appeal his conviction, nor during the following two years did he signal his displeasure with any other aspect of his plea in any way.

In August 1976, however, the respondent moved to vacate his sentence under section 2255, alleging for the first time that the District Court had violated Rule 11 by failing to mention the special parole term at the time of his plea.

The motion is set out at page 11 of the joint

appendix. It alleges only that Rule 11 was violated. It doesn't expressly state that the respondent was actually unaware of the special parole provisions when he pleaded guilty, and more important, it doesn't claim that the respondent wouldn't have entered the exact same guilty plea if the judge had notified him on the record of the special parole requirement.

In fact, the motion doesn't allege that the respondent was prejudiced in any way by a violation of the rule. And the same can be said for the respondent's allegations in his memorandum in support of his motion, which is set out beginning at page 14 of the appendix, and the oral argument at the hearing on that motion, which begins at page 18 of the joint appendix, no allegation of actual prejudice.

Now, the District Court denied respondent's 2255 motion. The court acknowledged that it hadn't complied fully with Rule 11 in taking respondent's plea, but it concluded that the respondent hadn't been harmed in any way by the technical error and that he therefore wasn't entitled to section 2255 relief. The court noted that there was strong indications in the record that the respondent had been informed by his attorney of the consequences of his plea prior to pleading guilty, but that even if he hadn't, in light of all the other factors involved in the plea bargain, knowledge of the special parole provisions wouldn't have influenced the

respondent's decision to plead guilty.

The Sixth Circuit reversed and remanded with instructions to vacate respondent's conviction and to allow him to plead anew. The Court of Appeals didn't dispute any of the District Court's fact findings, but it held, relying primarily on this Court's decision in McCarthy v. United States, that since Rule 11 had been violated, the respondent was automatically entitled to withdraw his plea without regard to whether he was actually prejudiced by the defect or whether he had raised the Rule 11 violation on direct appeal or on collateral attack.

Now, I think it would be helpful for me to begin my discussion by explaining the limits of the government's submission in this case. We certainly don't contend that a defendant who pleads guilty is therever foreclosed from ever attacking his guilty plea. The defendant has a number of adequate remedies.

He can move to withdraw his plea before sentencing, and under Rule 32(d) withdrawal for virtually any reason is to be freely allowed at that stage. And after sentence has been imposed, the defendant may appeal his conviction and may, of course, raise any objections he may have to the plea taking procedure or to the plea itself. And even after the time for appeal has run and the conviction has become final, a defendant unquestionably may always attack his conviction

collaterally under section 2255 if the plea was involuntary or otherwise constitutionally defective.

Our contention here is simply that a defendant who foregoes all of these remedies is not entitled to collateral relief from his conviction. Often as in this case, years after his guilty plea, when all that he can show is that some portion of Rule 11 was not complied with when his plea was accepted. We believe that on collateral attack there must also be some showing of substantial prejudice to the defendant either in the sense that the Rule 11 error materially affected the defendant's decision to plead guilty or because for any other reason it would be manifestly unjust to hold him to his plea.

This standard of collateral review of non-constitutional errors is one that this Court has frequently applied. And perhaps the case closest in point is Hill v. United States, 368 U.S. That case, like this one, involved a motion to vacate sentence under section 2255 by a defendant who claimed that his conviction had been entered in violation of the rule of criminal procedure. The rule involved there was Rule 32(a) which gives a defendant an absolute right to make a statement prior to sentencing.

Although the court acknowledge in Hill that the right guaranteed a defendant by Rule 32(a) was an important one and that the defect would have required vacation of the

defendant's sentence if it had been raised on direct appeal, the court denied collateral relief saying that the error was not a fundamental defect that "inherently results in a complete miscarriage of justice."

QUESTION: Mr. Geller, was there anything said in Hill about prejudice? I read Hill to simply mean this is not the kind of thing for which you can have collateral relief, period.

MR. GELLER: Well, the court could have decided Hill I think on the ground that not having appealed Hill was foreclosed from getting collateral relief. But it went on, it didn't go off on that ground, it went on to discuss what requirements are for getting collateral relief for non-constitutional plea, and it set forth the standard that we rely on here which is that there must be a fundamental defect that inherently results in a substantial miscarriage of justice.

QUESTION: But is it because the nature of the fundamental defect is such that the defect will inevitably in every case result in a denial of justice, or is it a question of prejudice case by case?

MR. GELLER: I think it must be a case by case determination.

QUESTION: Is that the way you read Hill?

MR. GELLER: Well, Hill says that for Rule 32 error,

the only remedy is direct appeal.

QUESTION: You just can't have collateral review for a Rule 32 violation, no matter how badly you are prejudiced by it.

MR. GELLER: Well, except I suppose in the situation of a change in law such as in the Davis situation --

QUESTION: In Davis.

MR. GELLER: -- that made that limited exception, but otherwise I would agree with Your Honor. The court added in Hill that collateral relief, as I said, is not available in that type of situation, and these same statements that the court made in Hill were repeated even more recently in the Davis case, 417 U.S., and again in Stone v. Powell.

In light of these decisions, we think it is rather clear that the respondent's claim, which as the District Court noted, amounts to nothing more than the assertion that Rule 11 was violated when he pleaded guilty is not cognizable under section 2255.

QUESTION: Well, when you include Stone v. Powell along with Hill and Davis, in Stone v. Powell there was a clear claim of a constitutional violation that would, except for some other rule, be cognizable under 2255, wouldn't it?

MR. GELLER: That's right, there were other reasons aside from the scope of the habeas corpus which led the Court in Stone v. Powell not to grant the writ for reasons

that related to the exclusionary rule.

QUESTION: I take it that if the claim was inadequate assistance of counsel, you would have a different view?

MR. GELLER: Yes, that would be a constitutional error, assuming there was no procedural fault which would prevent its being raised on collateral attack we concede would be -- section 2255 relief would be available.

QUESTION: Is there a procedural fault? Certainly pleading guilty doesn't waive an inadequate counsel claim, would it?

MR. GELLER: I would assume not, not an inadequacy of counsel claim.

QUESTION: What procedural fault would bar an inadequate --

MR. GELLER: I assume if new counsel handled an appeal and decided not, for whatever reasons, decided not to raise inadequacy of counsel at the trial on the direct appeal, that might preclude habeas corpus relief later on, but that --

QUESTION: Not until they -- not if they took it back to the state courts and exhausted it.

MR. GELLER: Well, when you are dealing with 2254 relief, there may be questions of comity, but I think in section 2255 that absence of --

QUESTION: Well, if you have exhausted it in the

state courts, you have exhausted it.

MR. GELLER: That's right, but if there is cause for not raising the issue on direct appeal, then it may be allowable to raise the claim on section 2254 or 2255, but that of course is a rule in cases of constitutional errors. The court has always drawn a distinction between constitutional and non-constitutional errors as far as the availability of collateral attack.

QUESTION: What about the failure to inform, assume the failure to inform the client before a Rule 11 hearing that the minimum mandatory was three years before parole can be considered, would the failure to inform the client of that be ineffective assistance of counsel?

MR. GELLER: Well, I hesitate to answer that --

QUESTION: On a whole record of this kind, could you --

MR. GELLER: I would think not. I would think not, that is our argument here essentially, that what is important is whether the defendant would have pleaded guilty nonetheless, if he would have even if he had been given this advice which he says he was not given, then we don't see how he has been prejudiced, and in the absence of prejudice he is not entitled to collateral relief.

QUESTION: Well, the representation at least as the District Judge construed it was that the defense counsel had

represented that he had informed his client of all of these elements. Was that not so?

MR. GELLER: That is correct. The District Court had --

QUESTION: Is there in effect a fact finding that that was so?

MR. GELLER: That is one of the grounds we relied on.

QUESTION: Well, he didn't testify that he had informed him specifically of this --

MR. GELLER: That's correct.

QUESTION: He just said generally his practice is to --

MR. GELLER: Well, there are two things that the District Court relied on.

QUESTION: But he had no specific recollection of advising this person of this particular issue.

MR. GELLER: That's correct, although the District Court relied on two separate statements by defense counsel. One was a statement at the Rule 11 proceeding itsself that he had advised his -- that he was of the view that his client was aware of the consequences of his plea, and then the second statement was the one you just referred to, Mr. Justice White, which is at the section 2255 hearing a few years later when counsel said that it was his practice before allowing a

client to plead guilty, to advise that client of the consequences of the plea although he couldn't say whether in this particular case, two years or so having passed, he had actually done so. But there were two separate statements by counsel that the District Court relied on in inferring that the respondent actually knew of the special parole term, but that wasn't the only string to the District Court's bow and it is not ours. We also allege that the respondent would not have changed his plea from guilty to not guilty if he had been informed of the special parole term. The District Court made that finding also and we think that that finding, which respondent has never challenged, is amply supported by the record in this case.

QUESTION: Are there not a line of civil cases with respect to wills and to some extent some of them notarial acknowledgements that years after the events, where the notary or the witness to a will cannot have any -- says he does not have any personal recollection of the event, that his practice was never to sign a will unless he saw the testator sign it or never to take an acknowledgement unless the person personally appeared before him. That line of cases is that the testimony as to general practice is sufficient to carry the day.

MR. GELLER: Well, I agree that --

QUESTION: How do you apply that? Do you think

that is equally applicable to a criminal --

MR. GELLER: I think it is of probative value that defense counsel stated at the section 2255 hearing that it was his practice not to allow clients to plead guilty before making certain that that client is aware of the consequences of the plea. I think it was certainly open to the District Court to take that into account in making the fact finding which we have relied on here.

Now, as I mentioned --

QUESTION: Mr. Geller, before you go on, if I understand the government's position correctly, the District Court should not even have had a hearing because the allegations really weren't sufficient to raise it.

MR. GELLER: That's correct.

QUESTION: Of course, they did have the hearing here. You attach weight to whether he would have pleaded guilty or not. There were a group of cases about ten years ago on the question of when there is no eligibility for parole. I am sure you have read some of those cases, the failure to advise the defendant of ineligibility. Under your view, would that be grounds for collateral attack?

MR. GELLER: I think you would have to engage in the same sort of inquiry we suggest here, which is that if the defendant had not been told of his ineligibility for parole --

QUESTION: Assume that, a violation of Rule 11, right.

MR. GELLER: -- no, I don't say there would not be a per se rule, you would have to make a determination whether -- oh, excuse me, I am to assume that he wouldn't have pleaded guilty if he had --

QUESTION: No, I just say assume that he was not advised and that there was therefore a violation of Rule 11.

MR. GELLER: Yes, you would still have to engage in the case by case analysis that we suggest here on collateral attack to determine whether that defendant if he had been told that he was ineligible for parole would have changed his plea from guilty to not guilty. I think that arose in the Seventh Circuit cases.

QUESTION: Would you say that anything counsel tells him that the judge needn't tell him even though Rule 11 requires it?

MR. GELLER: Not when the question is has Rule 11 been violated. Certainly, Rule 11 requires the District Court to tell the defendant certain things, but --

QUESTION: Yes, I agree, that would be a violation, but how about --

MR. GELLER: That would be a violation of Rule 11.

QUESTION: But what about collateral attack?

MR. GELLER: On collateral attack, certainly. It is

exceedingly important what the defendant knew and not who told him in determining whether or not there has been prejudice in holding him to his guilty plea. Certainly it would be exceedingly relevant if, although the District Court violated Rule 11 in not telling the defendant certain things, his attorney told him that information.

But as I mentioned here, the respondent has never alleged that he wouldn't have pleaded guilty if he had known about the special parole term, and the District Court expressly found that the Rule 11 error had no effect on his decision to enter his plea, and this fact finding is certainly supported by the evidence. The respondent obtained the dismissal of 17 serious narcotics counts and a bail jumping charge by pleading guilty to the one count in this case, and he unquestionably knew that his guilty plea could result in a sentence of up to 15 years in prison and a $25,000 fine.

Now, I might also add in this regard that at the time the respondent pleaded guilty, several of his co-defendants were undergoing a trial in the Eastern District of Michigan at which the government was presenting devastating evidence against them, evidence that would have been I think equally probative of the respondent's guilt, and that also I am sure entered into the respondent's decision to --

QUESTION: Is that in the record?

MR. GELLER: Yes, it is, during the section 2255

hearing.

QUESTION: The devastating evidence?

MR. GELLER: Yes -- well, actually the court does make certain statements during the Rule 11 proceeding about how the trial was going on at the moment either in that proceeding or in the section 2255 hearing, he does make certain statements about the overwhelming weight of the evidence that was being introduced at that trial.

QUESTION: How did he know about it?

MR. GELLER: Excuse me?

QUESTION: The judge knew about what was going on in somebody else's trial?

MR. GELLER: The judge was trying that case.

QUESTION: Oh.

MR. GELLER: So like the District Court, in light of all these factors, we think it is exceedingly improbable that respondent would have changed his mind about the plea bargain if he had been informed that he could be sentenced to a term of special parole which would not have any appreciable effect upon him unless he were years later to violate the conditions of the parole.

Moreover, there is no manifesting justice in holding respondent to this guilty plea. As I just mentioned, the respondent knew when he pleaded guilty that he could be sentenced up to 15 years imprisonment and his eventual

sentence of 10 years imprisonment plus 5 years special parole is therefore no greater for all practical purposes, it is substantially less than he was told he could receive. Even if the respondent violates the conditions of his special parole and the parole commission determines to send him back to prison for that 5-year period, he can't serve more than the 15 years imprisonment that he knew was his exposure when he pleaded guilty.

Now, perhaps the most important reason in our view why the respondent isn't entitled to section 2255 relief as a result of this non-constitutional violation is that this is hardly a situation where, as the Court said in Hill, the need for the remedy afforded by the writ of habeas corpus is apparent. There is no reason why this Rule 11 defect couldn't have been raised on direct appeal. All the relevant facts relating to the violation are apparent on the face of the record and the respondent, who had the advice of counsel, should have been aware at the time of sentencing that the trial judge had neglected to mention the special parole term when the plea was taken.

This is especially true, I would think, when if a defendant's ignorance of the special parole term truly played a meaningful role in his decision to enter the guilty plea. There is no reason why a defendant such as respondent should be allowed to forego direct appeal and to wait several years

to raise a claim such as this.

QUESTION: This was a guilty plea?

MR. GELLER: Yes.

QUESTION: It used to be considered a little odd for somebody who had pleaded guilty and had been found -- and had been convicted on the basis of his plea of guilty immediately to take an appeal. I guess there is no problem about that any more, is there?

MR. GELLER: McCarthy was a case just like that, direct appeal after a guilty plea. There is no bar to doing it if the violation relates to the plea taking procedures itself rather than some --

QUESTION: Is there any bar anyway?

MR. GELLER: Excuse me?

QUESTION: There is no bar anyway, I guess, any more, is there?

MR. GELLER: Well, a guilty plea waives any antecedent constitutional violations.

QUESTION: Nevertheless you can take an appeal.

MR. GELLER: You can take an appeal, although you won't be very successful, I would assume.

QUESTION: Does the record show when the defendant here first became aware of the special parole term?

MR. GELLER: No, it doesn't.

QUESTION: So we don't know whether he knew it before the time to appeal or not?

MR. GELLER: Well, the fact is he was sentenced to a special parole term.

QUESTION: So I understand, but if it is in writing -- you know, these documents are rather complicated to read, and --

MR. GELLER: He had the advice of counsel. He had the assistance of counsel at this time. If in fact he pleaded guilty because he didn't know anything about a special parole term and he never thought he would be exposed to one, it seems to me that he should have been curious about what it was when he was sentenced, when he was sentenced to it.

QUESTION: But he didn't start to serve it right away.

MR. GELLER: No, but he should have been aware of it at that point and if he thought he got sentence to something greater than he had bargained for, one would assume he would have raised it.

QUESTION: But you just said the record doesn't show whether he became aware of it until after his appeal time had run.

MR. GELLER: That's true, but if he was aware of it at that point --

QUESTION: If he was, but we don't know whether he was or not.

MR. GELLER: That's correct.

QUESTION: I suppose if one were sentenced to ten consecutive terms in open court, he wouldn't start actually serving the tenth consecutive term, say, of five years, for forty-five years.

MR. GELLER: That's right, but presumably he should be aware at that moment if he has been given a greater sentence than he thought he was exposing himself to by pleading guilty.

Now the Court of Appeals didn't necessarily disagree with many of the arguments that I have just made about the scope of collateral attack. In fact, the Sixth Circuit candidly remarked that the Rule 11 violation in this case did not seem to rise to the level of a "fundamental defect which inherently results in a complete miscarriage of justice."

Nonetheless, the court felt that the respondent was entitled to relief because of the presumptive prejudice rule of McCarthy. The court read McCarthy as holding that a Rule 11 violation is per se prejudicial to the defendant and thus satisfies the Hill and Davis test.

Now, we have explained in our brief why we think that the automatic reversal rule of McCarthy which was announced in the exercise of this Court's supervisory powers rather than as a rule of constitutional law, may have outlived

its usefulness, especially since there is now a new version of Rule 11, in effect. But whether or not some of the premises of McCarthy should now be reexamined -- and I don't think the Court has to reach that issue in this case -- we believe that the automatic reversal rule has no place in a motion to vacate sentence under section 2255, where the sole relevant inquiry is whether the particular defendant's detention is unlawful.

McCarthy, of course, was a direct appeal and there is nothing in the Court's opinion to suggest that every violation of Rule 11 constitutes the sort of substantial prejudice sort of miscarriage of justice that would entitle a defendant to habeas corpus relief. In fact --

QUESTION: Mr. Geller, couldn't we maintain your position by merely saying that two findings of the District Court were enough and not get into the general rule of how far 2255 goes?

MR. GELLER: I think you can, but I think what you have to confront is what the Sixth Circuit held in this case which is that the automatic reversal rule this Court promulgated in McCarthy has no application on collateral attack. I think you would have to say, which is what we suggest the correct rule is, that on collateral attack there is no such thing as presumptive prejudice, the defendant has to show that he has actually been prejudiced. Now, I think

if the Court adopts that --

QUESTION: It is all right, but as I understand this party himself in District Court said in so many words that he hadn't been prejudiced.

MR. GELLER: He has never alleged that he has been, that is correct.

QUESTION: Well, isn't that enough?

MR. GELLER: Well, except, as I say, if he doesn't have to prove prejudice to be entitled to relief because of a Rule 11 violation, which is what the Sixth Circuit said. We think that the Court should reject the notion that on collateral attack that the presumptive prejudice rule should apply and that it should be up to the defendant on a 2255 motion to show actual prejudice which, as I agree with Your Honor, you can't do in this case.

Now, this Court is well aware of the strong societal interest in the finality of judgments in criminal cases. And while society may be willing to incur the substantial costs associated with collateral attacks in order to correct errors of constitutional magnitude or cases where a prisoner has been greviously harmed, the writ is the only effective means of preserving his rights, we believe that a contrary result is clearly dictated in cases involving non-constitutional violations, especially where those violations could have been raised on direct appeal.

Since the Rule 11 error in this case didn't influence the respondent's decision to plead guilty or otherwise lead to a complete miscarriage of justice, we believe that the respondent should have raised a technical violation on direct appeal or not at all, and the interst of justice is certainly not served by allowing the defendant such as the respondent unlimited time and a free option to undo their convictions by establishing a non-prejudicial omission in their Rule 11 inquiry.

The Court of Appeals in our view therefore erred in holding that the respondent was automatically entitled to vacate his conviction under section 2255, and we submit that accordingly this Court should reverse the judgment below.

Thank you.

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

Mr. Mogill.

ORAL ARGUMENT OF KENNETH M. MOGILL, ESQ.,

ON BEHALF OF THE RESPONDENT

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

At issue in this case is the continuing availability of section 2255 relief to persons who have no other remedy available to them and where in custody in conseqüence of pleas taken without advice of the full penal consequences of their please. Also at issue is the standard of review to be applied

in cases raising such claims.

I think it is important initially to make clear that the statement of facts offered by the government is inadequate and it does not fully represent the facts of the case.

QUESTION: Well, are we free to rely on the colloquy that is in the record that --

MR. MOGILL: Certainly, and I would like briefly however to point out to the Court where the facts offered by the government are insufficient.

QUESTION: But you don't contend that this transcript is inaccurate in any respect?

MR. MOGILL: Certainly not. In fact, I am relying on the transcript. I am pointing out to the Court that at the time Mr. Timmreck offered his plea he specifically affirmatively stated to the District Judge that he was not aware of the consequences of his plea. The District Judge advised Mr. Timmreck that he was subject to a potential 15 years maximum incarceration; the District Judge did not advise Mr. Timmreck that a mandatory special parole term of three years must be applied if a sentence were imposed and that --

QUESTION: Would you suggest that the District Judge's finding that he was informed was not permissible under your representation that that was your practice, to inform

clients but that you didn't have any independent recollection at the time?

MR. MOGILL: I don't think the District Judge made a finding that Mr. Timmreck wasn't informed.

QUESTION: Well, he in effect made such a finding.

MR. MOGILL: I think he concluded that -- well, I think the important --

QUESTION: He concluded that you had adequately informed your client.

MR. MOGILL: The important points here are, one, regardless of whether I informed Mr. Timmreck of the mandatory special parole term. It is clear that at the time he offered his plea, he was not aware of it, he so indicated to the judge. And the second point that is important and is part of the reasoning underlying the particular requirements of Rule 11, is that Rule 11 is designed to insure that the adequacy of the record of a voluntary plea appears from the four corners of the record of the plea and it does not require any fact finding outside of that record.

QUESTION: When, as you say, he responded that he did not understand fully and the judge told him he was subject to a 15-year imprisonment, what was your obligation to the court at that time and to your client?

MR. MOGILL: I'm sorry, I --

QUESTION: What was your obligation to the court

and to your client?

MR. MOGILL: My obligation was the same as that of the Assistant United States Attorney and both of us candidly apparently missed the fact that the District Judge failed to advise him. Had I caught it, it would have been my obligation to advise the court that it had failed to mention it, that a mandatory special parole term of at least three years and possibly up to life was to be imposed in the event of a custodial sentence. It would have also been the Assistant United States Attorney's obligation. I think it was important for the Court to note that both parties, counsel for both parties inadvertently, for the same reason the District Judge inadvertently neglected to advise the respondent of the mandatory special parole term, but that in fact did occur and that the respondent had indicated that he was not aware of the consequences.

QUESTION: Didn't you have several days to talk with your client?

MR. MOGILL: There were no problems in terms of communication with my client.

QUESTION: What I mean -- you mean you forgot it for a whole lot of days? How long were you talking with him before he pleaded guilty?

MR. MOGILL: There is nothing in the record of this case indicating the time period involved of communication

between counsel and --

QUESTION: Well, it was before he walked in the court room?

MR. MOGILL: Certainly.

QUESTION: And before he walked in the court room the attorney advised him as to the law involved, didn't he?

MR. MOGILL: I have no present recollection --

QUESTION: Didn't you?

MR. MOGILL: The record indicates that --

QUESTION: Well, don't you usually find out what the law is?

MR. MOGILL: -- and it reflects that I indicated to the District Judge at that --

QUESTION: And this time you didn't?

MR. MOGILL: I have no recollection whether I did or not. The point is --

QUESTION: And if you did have a recollection, your client would be out of court?

MR. MOGILL: Not if my client did know regardless of whether he was advised by counsel.

QUESTION: I said if you happened to recollect that you did tell him, your client would be out of court.

MR. MOGILL: Not necessarily.

QUESTION: Well, what --

MR. MOGILL: Justice Marshall, I think the important

point here is that regardless of whether he is advised by counsel, the important inquiry is whether he was advised on the record at the time of the plea and whether he knew on the record at the time of the plea. The fact is he didn't know on the record at the time of the plea, he indicated as much to the District Judge. The government has never alleged and I don't take it to be alleging now that anyone's memory conveniently lapsed or anything like that and as an officer of the court I suggest that --

QUESTION: Mr. Mogill, your statement or your conclusion that he did not know about the mandatory special parole term is based on his statement that when he was told it could be as much as 15 years in jail, he said I know it now?

MR. MOGILL: And immediately prior to that, when the judge asked him are you aware of the consequences of your plea, he affirmatively said no.

QUESTION: Well, you think that necessarily forecloses the possibility that he did know about the mandatory special parole term?

MR. MOGILL: I think it indicates to anyone reading that record that he was not aware of the consequences of his plea.

QUESTION: Of all the consequences.

MR. MOGILL: And a mandatory special parole term is

a direct consequence, in fact the government concedes it to be a direct consequence.

QUESTION: Yes, but the no doesn't mean he didn't know about any of the consequences of the plea.

MR. MOGILL: I think it speaks for itself in whatever interpretations --

QUESTION: All right. Anyway, that is what you are relying on?

MR. MOGILL: Yes.

QUESTION: For the District Court to say are you aware of the consequences of your guilty plea, and the defendant saying no, and neither the judge nor any of the two lawyers present say anything, is that what the --

MR. MOGILL: Again, the record speaks for itself in that regard.

QUESTION: But is that all we have to go on?

MR. MOGILL: I believe that hopefully what the Court will be doing in part in this case is addressing itself to the standard of review to be followed.

QUESTION: Well, what I am concerned with is not what this Court is doing but what the District Court was doing, what you were doing and what the Assistant U.S. Attorney was doing.

MR. MOGILL: I think all the parties were interested in seeing that the Rule 11 proceedings were adequate. The

District Judge I assume inadvertently neglected to advise Mr. Timmreck that a mandatory special parole term of at least three years and as much as life was involved. Counsel for the government neglected to catch the error and defense counsel neglected to catch the error.

QUESTION: I can see that. But I gather from what you say, that somewhere in the record there is a Q and an A and the Q is from the District Judge, is "Are you aware of the consequences of your plea?" and the A is "No, I am not."

MR. MOGILL: That's correct, Your Honor.

QUESTION: And nothing further was said by either the judge or the --

MR. MOGILL: No. The next thing that happened was the judge informed Mr. Timmreck that he was subject to up to 15 years. The judge did not say that if a custodial sentence was imposed for the violation to which he was pleading guilty, there must also be a mandatory special parole term of at least three years and possibly up to life.

QUESTION: So the judge didn't just leave it hanging after the client responded no?

MR. MOGILL: No, but he did not fully inform Mr. Timmreck and in fact he misled him by failing to advise him of the mandatory special parole term.

QUESTION: Mr. Mogill, if the trial judge has asked the defendant, "Are you aware of the consequences of your

guilty plea?" and the defendant had said, "Yes, I am," that wouldn't have been any indication or any proof that he was in fact, was it?

MR. MOGILL: That is correct, and again it goes to the underlying purpose of the rule to make a record at the time of the plea.

QUESTION: And the rule imposes a duty upon the trial judge to advise him, whatever the response is, doesn't it?

MR. MOGILL: And regardless of whether counsel has advised him or not.

QUESTION: Because even if the defendant says yes, I am, he might be quite misinformed of the consequences.

MR. MOGILL: That is correct. Even if he was accurately informed, the District Judge has the same obligation.

QUESTION: Have you ever raised at any stage or has it been suggested at any stage that there was ineffective assistance of counsel on your part?

MR. MOGILL: It has not been.

QUESTION: Did you recommend to your client that that was one issue that could be raised, a constitutional issue?

MR. MOGILL: I do not believe that that issue came up. I might point out to the Court, however, that at the time

the 2255 petition was initially filed in this case, the government conceded the applicability of a Sixth Circuit case, Wolak, and virtually conceded the merit of the 2255 petition. The argument the government is raising today was filed in a supplemental -- was first raised in a supplemental memorandum filed the day of the --

QUESTION: Mr. Mogill, they conceded the applicability of that rule in the Sixth Circuit, it was not the rule of other circuits in the United States.

MR. MOGILL: No, this case --

QUESTION: And it was not the rule in the Seventh Circuit.

MR. MOGILL: No.

QUESTION: But Rule 11 doesn't put any requirement on the defense counsel at ahl.

MR. MOGILL: That's correct.

QUESTION: Well, where does that obligation arise?

MR. MOGILL: I'm sorry, sir, which obligation?

QUESTION: The obligation of counsel to give the client full advice?

MR. MOGILL: I think it is part of counsel's general obligation to render effective assistance.

QUESTION: Is it a constitutional issue, effective assistance of counsel?

MR. MOGILL: Certainly.

QUESTION: So it arises out of the relationship of client with counsel and linked with the constitutional Sixth Amendment right, does it not?

MR. MOGILL: Yes. The purpose of Rule 11, one of the purposes of Rule 11 though is to avoid these kinds of inquiries, is to insure that the record at the time of the plea reflects that the defendant was fully advised and made a fully knowing waiver so the kind of collateral inquiries that became involved in this case are unnecessary.

QUESTION: On page 9 of the abstract you were asked by the court at the plea hearing, are you of the opinion there is a factual basis for the plea, and you said yes, and then and that your client knows full well the consequences of a guilty plea might be, that's correct. So you were of the opinion then that he was fully advised?

MR. MOGILL: Clearly. I had missed the fact that the judge had missed advising Mr. Timmreck of the mandatory special parole term.

QUESTION: Not necessarily because you could have advised him and your statement would still have been a hundred percent accurate.

MR. MOGILL: Right, but even if it was, it was clear that Mr. Timmreck had forgotten that or didn't know it or hadn't paid any attention at the time of his plea.

QUESTION: That is a matter of interpreting, what

we have talked about before.

MR. MOGILL: Yes.

QUESTION: Yes.

MR. MOGILL: The sentence that was imposed in this case subjected Mr. Timmreck to a potential combined custodial and parole, incarceration and parole custody for in excess of 15 years. In fact, the combined sentence here subjected him to a possible combined custody of 20 years less one day and that is so because of the unique nature of the mandatory special parole term. Mr. Timmreck was sentenced to ten years in custody under his initial sentence and five years mandatory special parole. Because of the unique provisions of the mandatory special parole term, he could serve four years and eleven months and 29 days and if he violated on the last day he still would be sentenced to five years, the full five years in custody.

QUESTION: Now, you represented at page 9, when the court said to you, "Mr. Mogill, are you of the opinion there is a factual basis for this plea," and you answered, "Yes, I am." "And that your client knows full well the consequences of his guilty plea might be?" "That's correct." You were surely representing to the court there affirmatively, not by inference but affirmatively that you had fully, full well informed your client of the consequences of the plea.

MR. MOGILL: The record speaks for itself in that

regard.

QUESTION: Yes, but on the next page, the next couple of pages, you took that back. You said that if you failed that you didn't really mean to represent that you remembered that you had --

MR. MOGILL: The statement to which you are referring to, Mr. Justice White, was from the hearing on the 2255 and, yes, I would agree --

QUESTION: That is two years later.

MR. MOGILL: That is correct.

QUESTION: But at the time of the Rule 11 hearing, which is the fulcrum here, it is perfectly clear that you represented to the court that your client had been fully informed.

MR. MOGILL: That's right.

QUESTION: And it does not do for me individually as a member of the Court to have you say the record speaks for itself.

MR. MOGILL: The only point I wish to make, Mr. Chief Justice, is that I have no specific recollection at this point in time what my conversations were with my client.

QUESTION: In any event, the government as I understand it concedes that there was a Rule 11 violation.

MR. MOGILL: Yes, it does. Yes, it does.

QUESTION: But this colloquy that I am referring to

conceivably might have at least raised a question in your mind whether you could appropriately continue to represent this man without letting some other counsel come in and raise the question of ineffective assistance of counsel which might or might not be a stronger case, being a constitutional violation.

MR. MOGILL: That was certainly Mr. Timmreck's choice and he chose to retain me on the 2255 petition. At the time Mr. Timmreck was sentenced in this case, he was not advised that he had a right to direct appeal, and it is also important to note that in terms of this Court being fully advised of the facts, the government below not only initially conceded that the Sixth Circuit case, Wolak, controlled in the Eastern District of Michigan at that time, but also the government didn't allege that Mr. Timmreck would have continued with his plea had he been advised of the mandatory special parole term, the government didn't allege that he deliberately bypassed his right to appeal, the government didn't allege that there was intentional delay and the government didn't allege that its ability to reprosecute was in any way impaired by the passage of time involved.

QUESTION: Well, as of the time your client was sentenced, was there an obligation on the District Court in taking a guilty plea to advise the defendant that he had a right to appeal?

MR. MOGILL: No. Federal Rule of Criminal Procedure 32(a)(2) to this day does not require a District Judge to advise a guilty pleading defendant of a right to appeal.

QUESTION: I would hope not.

MR. MOGILL: At the same time, however, for the government to argue that direct appeal is an adequate remedy is somewhat undercut by the fact that there was no likelihood that a guilty pleaing person is in fact going to know that remedy in time to make use of it, and it is for that reason that it is significant to remind the Court that 32(a)(2) --

QUESTION: Unless his attorney advises him.

MR. MOGILL: That's correct.

QUESTION: And isn't it reasonable to infer that if there had been a dramatic difference between the actual sentence and the anticipated sentence, that that proposition would have been considered?

MR. MOGILL: Not necessarily. I don't like being in the position of suggesting that certain inferences should or should not be drawn. However, if the purpose of Rule 11 is, what it plainly is, to avoid colloquy outside of the record, I think that those kinds of inferences have to be avoided because they require speculation as to facts outside the record. There is nothing on the record to indicate whether or not Mr. Timmreck was advised of his right to appeal, whether or not he was advised of collateral relief,

whether or not he was surprised at the length of the sentence.

The fact is I think that if we are going to engage in inferences, I think that it is a very real inference that a person who had no criminal record before and who has just been sentence to a very lengthy prison term is going to be very much taken aback by that and may not be in a position to think clearly about whether or not to request advice from counsel as to remedies until the initial shock wears off, and by that time the time for appeal may well have passed.

QUESTION: Have there been cases holding that the failure to advise about this particular special parole provision is a violation of Rule 11?

MR. MOGILL: I think it is conceded by the government --

QUESTION: That isn't what I asked you.

MR. MOGILL: The Sixth Circuit, the Ninth Circuit, the --

QUESTION: The government can't concede what the rule means.

MR. MOGILL: I'm sorry, Justice White. The Ninth Circuit, the Sixth Circuit obviously, the First Circuit and the Third Circuit and I believe the cirtuis not only hold that but also find collateral relief available.

QUESTION: The Sixth Circuit agrees with you on this point, doesn't it?

MR. MOGILL: That's right. The finish to the answer was that the circuits which do not find collateral relief available also I believe unanimous agree that this is a direct consequence of the plea, too, and that the failure to advise would be a violation.

QUESTION: Of Rule 11?

MR. MOGILL: Of Rule 11. They disagree as to whether or not collateral review would be available.

QUESTION: Counsel, when the judge announced the sentence, exactly what did he say?

MR. MOGILL: He pronounced sentence of ten years incarceration, five years mandatory special parole and a $5,000 committed fine.

QUESTION: So at that point your client knew about the mandatory parole?

MR. MOGILL: At that time those words had been uttered, yes.

QUESTION: Whether or not he knew it was mandatory is another question.

MR. MOGILL: Whether or not he knew the significance of it --

QUESTION: The judge used the word "mandatory"?

MR. MOGILL: That's correct.

QUESTION: Yes.

MR. MOGILL: I think the key word to someone who is

being sentenced is "parole." And the fact that this is a different kind of parole that applies only in drug cases and only since 1970 and does not apply in other circumstances in the federal system might easily escape the person who is being sentenced in terms of the significance and in terms of the differences between the mandatory special parole and traditional parole.

Section 2255 exists to insure the capacity of our legal system to provide substantive justice and to insure a forum for relief in all cases of illegal restraint. It is a flexible remedy and as this Court indicated in language in its opinion in Davis, there is nothing in the holdings, in the prior holdings of this Court to indicate that the availability of 2255 is in any way reduced where the allegation of illegal custody is one grounded in laws as opposed to the Constitution of the United States.

I think that is by way of background, that undercuts the government's argument with respect to the non-constitutional nature of the argument here.

Additionally, I think that it is important for the Court to consider the role of Rule 11 in protecting the adversary system, that in contrast to a trial situation and a collateral attack after a trial such as occurred in Davis, where there is adversary litigation as to numerous questions of law and where there is a full fact finding process, the

likelihood of any one error being prejudicial, of being fundamentally prejudicial is reduced. In a guilty plea proceeding, however, where charges are not disputed and where a person is convicting himself or herself out of his or her own mouth, an error that fails to advise the defendant of an important consequence of the guilty plea assumes much more fundamental dimensions.

When the additional fact that approximately 85 percent of the convictions in the federal system are a result of guilty pleas is taken into account, I think that the significance to the importance to maintaining the principles underlying the adversary system is enhanced. And it is taking those matters into account that I think the government's argument with regard to restricting the scope of collateral review has to be unpersuasive.

I think that the government's argument with regard to direct appeal being sufficient remedy is further undercut by the fact that Rule 32(a)(2) does not require an accused to be advised of the right to appeal. And in point of fact, Mr. Timmreck here was not advised of his right to appeal.

And it is also important to note that the mandatory special parole term is a unique provision which operates very differently from traditional parole and can result in incarceration for the entire period of the mandatory special parole term even if the violation occurs on the last day,

also that the risk of incarceration is not minimal, the statistics would indicate that between 35 and 45 percent of persons placed on parole are subsequently returned to prison for violations and that approximately two-thirds of those violations are technical rather than being for commission of additional felonies.

The government's argument in this case that particular prejudice ought to be shown is similar to its argument in McCarthy that substantial compliance with Rule 11 was sufficient for purposes of direct appeal. The rejection of that argument in McCarthy I think applies with equal force here, because, as this Court noted in McCarthy, a violation of Rule 11 inherently prejudices the accused because it deprives him or her of the rule's procedural safeugards that are designed to facilitate an accurate determination of the voluntariness of the plea.

Similarly, the government's argument that particular prejudice ought to be shown I think would create a standard which is more difficult to administer than the objective standard applied by the Sixth Circuit here. It would involve the District Courts in hearings on the question of particular prejudice, it would involve the courts in -- it would be more time consuming in terms of judicial time, it would be more difficult to achieve uniform results, and it would make it difficult to any defendant, regardless of whether the defendant

would in fact have continued with the guilty plea to meet the burden of proof.

I would hope that the government would concede that persons plead guilty for numbers of reasons, any number of reasons, some of which are beyond the comprehensive of experienced counsel and judges, and that at least in some circumstances persons would not have continued to offer their pleas.

The standard that the government proposes is one which would make it difficult for all persons, including them, to sustain their burden of proof.

An objective test would promote judicial economy by results being determined on the basis of the pleadings, and it would provide an additional incentive not only to defense counsel and to government counsel on the basis of their general ethical responsibility, but provide an additional incentive because of the standard --

QUESTION: If I understand you correctly, you just file a piece of paper and say, "Judge Jones didn't advise me of the special parole," and automatically out.

MR. MOGILL: That is --

QUESTION: Automatically you get out.

MR. MOGILL: More or less.

QUESTION: Don't you need a little more than that?

MR. MOGILL: Prejudice is inherent in a violation

of Rule 11 for the reasons I have indicated and --

QUESTION: Well, you had the hearing here, didn't you?

MR. MOGILL: In District Court.

QUESTION: Yes.

MR. MOGILL: Yes.

QUESTION: Well, why do you say that they are asking for more than that?

MR. MOGILL: No, what I am suggesting is --

QUESTION: He didn't even ask for that one.

MR. MOGILL: Had an objective standard been applied by the District Judge, there would have been no need for a hearing. The pleadings -- the record of the case below would have entitled Mr. Timmreck to relief in --

QUESTION: You are arguing that in a 2255 you file a piece of paper and that is it.

MR. MOGILL: Depending on the circumstances. This has been a violation, that should be sufficient because the violation is one which is so fundamental to the defendant's offering of a knowing and voluntary guilty plea.

QUESTION: But don't you think the government is entitled to a hearing?

MR. MOGILL: If an objective standard were adopted, the government would have an incentive to insure that there would be no need for further litigation because the government

would have an additional incentive, as the Sixth Circuit noted in its opinion here, to insure that mistakes such as the judge and both counsel failed to catch here did not occur.

QUESTION: Mr. Mogill, you don't cite Stone v. Powell at all, do you?

MR. MOGILL: I do not.

QUESTION: Do you just dismiss the government's reliance on that case?

MR. MOGILL: I think that -- I read Stone v. Powell carefully and I don't think that the government other than mentioning it in passing is really relying on it in this case. I think their primary reliance is on Davis and on Hill. I think --

QUESTION: Well, they mentioned it more than once in passing. They cited it about six times.

MR. MOGILL: I think the facts and the issues involved in Stone v. Powell are sufficiently different, dealing as they do with questions of state-federal relations dealing with the question of the exclusionary rule, dealing with the question -- and also turning on the opportunity for full hearing in the state court, that in the preparation of my presentation it did not strike me as a case that would involve itself in this Court's decision here. To the extent, however, Justice Blackmun, that the question does arise, I think that the question of opportunity for hearing as being

critical in Stone v. Powell, is in some respect similar to the fact that here there was no opportunity, there was no advice as to the right of appeal and therefore there was no assurance that the defendant knew of his opportunity to have a new hearing on direct appeal.

QUESTION: Well, if the government wins this case, would it also win a case where the defendant wasn't advised at all of the sentence and pleaded guilty, no appeal, collateral attack saying he wasn't advised of his sentence at all, in violation of Rule 11?

MR. MOGILL: Obviously that would depend in part on the grounds that the Court states in support of its decision. I think that depending on the grounds that this Court were to choose for rendering its decision in this case, that if a subjective standard were adopted such as the government is suggesting, it is entirely possible that a person who was not advised of the penal consequences who, for whatever reasons, did not take an appeal and later challenged their conviction, but who in fact would not have offered a guilty plea, may be out the door even though as a gut matter they should be entitled to relief. That is one of the reasons why the government's position is --

QUESTION: Well, Mr. Geller gave precisely the opposite answer to that question when I asked it, about the mandatory, failure to advise about ineligibility for parole,

he said that would be a different case because there might be prejudice, at least that is what I understood him to say.

MR. MOGILL: There are obviously cases that --

QUESTION: And I think Mr. Justice White's example is even farther removed than that one.

MR. MOGILL: I think --

QUESTION: Maybe you are right, that the Court would go that way, but surely not the argument that Mr. Geller made.

MR. MOGILL: The point is that I think the government, regardless of what the government is saying here today, if this Court adopts the government's proposed test, it is entirely possible that a person who was not advised of a mandatory --

QUESTION: The test, as I understand it, is either if the plea is involuntary or if it is fundamentally unfair, whatever the violation was, fundamentally unfair, then the collateral attack is appropriate. If you say there was no advice whatsoever about sentence and he gets put away for twenty years, that strikes me as being pretty unfair.

MR. MOGILL: I agree with that.

QUESTION: You would, too.

MR. MOGILL: I also would urge on this Court that failure to advise a guilty pleading person that a direct consequence of his or her plea is a mandatory special parole term of three years to life also is a fundamental --

QUESTION: Yes, I understand that. Right.

MR. MOGILL: Right.

QUESTION: Mr. Mogill, on the other hand, if the Court said that based upon your representations at the bottom of page 9 to the court, notwithstanding any other views that the Solicitor General might have about it, based on that there was a finding, the judge said I find on this record, there was a finding and that finding is not clearly erroneous, then you wouldn't have any open door to the kind you have been suggesting.

MR. MOGILL: If I understand the Court's question, I believe that Judge Feikens' language is somewhat inappropriate for the reason that anybody, whether it is a judge or anybody else, is only speculating as to what the defendant would have done.

QUESTION: What you told him I find on this record.

MR. MOGILL: I understand that that is his language. What I am suggesting, and I think that in a concurring opinion in the Paige case, Judge Boreman from the Fourth Circuit says the point I want to make now, and that is that it is pure speculation what the defendant would have done, and for the judge to conclude that Mr. Timmreck would have continued to offer his plea is in fact a matter of opinion and can't be construed as a finding of fact.

QUESTION: Would the clearly erroneous rule apply

to this situation?

MR. MOGILL: I don't believe that the nature of that statement by the judge is a finding of fact, so that I don't believe the clearly erroneous rule would come into play.

Thank you very much.

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

Mr. Geller, do you have anything further?

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. GELLER: Just a few things, Mr. Chief Justice.

First of all, I didn't mean to mislead you, Justice Stevens, with regard to my answer concerning your ineligibility for parole hypothetical. Our approach would be exactly the same, there would have to be an inquiry, if it were raised on collateral attack, as to whether the defendant was actually prejudiced. Our approach would be exactly the same as the approach that you took as a member of the Seventh Circuit.

QUESTION: At least I understood you to say that if he on such a collateral attack proves that he would not have entered the plea had he understood it, then you would agree that was fundamentally unfair and the collateral attack would be --

MR. GELLER: Yes, that's right, but I didn't mean to --

QUESTION: It wouldn't mean automatic.

MR. GELLER: -- suggest that it would be automatic.

Secondly, I think that the notion that it is either not feasible or not seemly to inquire into prejudice when there has been a defect in the guilty plea proceeding and it is raised on collateral attack is rebutted by this Court's decision in Henderson v. Morgan in 426 U.S., which was a case of a defective guilty plea proceeding, and everyone agreed that the defendant in that case had not been told about one of the elements of the crime to which he pleaded guilty, but the Court didn't stop there. It then inquired to see whether he might have had that information from somewhere else.

QUESTION: Mr. Geller, when you are talking about prejudice and whether he would have pleaded guilty anyway, are you talking about at the time he was in court before the judge?

MR. GELLER: Yes.

QUESTION: So there is no automatic answer for you against the defendant if a week ago he was told about the parole term?

MR. GELLER: No, that is correct. You have to measure voluntariness by what he knew at the time he pleaded guilty or what he would have done at the time he pleaded guilty if he had been told what he now claims he should have been told, and subsequent events are only relevant I think in determining whether it is fair to hold him to his plea,

which is a separate sort of an inquiry, although an equal ground for allowing collateral attack.

The final thing I want to say is that Mr. Mogill made the statement a moment ago, I think in an attempt to show prejudice for the first time, since his motion never alleged prejudice, that his client could be imprisoned for longer than he was told or at least subject to supervision for longer than he was told. He can't serve more than 15 years because he got a 10-year prison sentence and a 5-year special parole term. Even if he began to serve his special parole term and after two or three years he violated it, he couldn't be returned to prision for more than five years of his special parole term. That is not unusual. Almost every defendant can make the same claim.

QUESTION: Let me be sure I understand your. If after four years of special parole he violates the parole, can he not then go to jail for five years?

MR. GELLER: That's right, but he would only be in prison --

QUESTION: So he could serve more than a total of 15 years.

MR. GELLER: No, he couldn't serve more than 15 years. He could be under supervision for --

QUESTION: Okay. But he could have 15 years of prison time plus 4 years of parole?

MR. GELLER: That's right, but that could happen to any defendant. Let's assume a defendant who pleads guilty to a 15-year felony, it is not a drug case, let's assume, we don't have a special parole problem, and he gets 15 years, he is told he can get 15 years and he gets 15 years, presumably no Rule 11 violation. After 10 years he is paroled, he then begins to serve his 5-year parole term, after 3 years let's say he violates the conditions of his parole, the parole commission could send him back to prison for 5 years, so that defendant also would serve 15 years in prison and be under supervision for a couple of extra years, and no one has ever suggested that those sorts of nuances have to be explained to a defendant.

QUESTION: What you are saying is there is no obligation to advise about the consequences of violating parole?

MR. GELLER: No one has suggested that is the case.

QUESTION: Yet.

MR. GELLER: Yet.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 3:17 o'clock p.m., the case in the above-entitled matter was submitted.)

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