Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

DANIEL McMANN, WARDEN, et al.,

Petitioners,

vs.

WILLIE RICHARDSON, et al.

Respondents.

Docket No. 153

Place Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

DANIEL MC MANN, WARDEN, ET AL., Petitioners

vs

WILLIE RICHARDSON, ET AL., Respondents

No. 153

The above-entitled matter came on for argument at 11:32 o'clock a.m., on Tuesday, February 24, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 153, McMann against Richardson.

Miss Soloff, you may proceed whenever you are ready.

ORAL ARGUMENT BY BRENDA SOLOFF, ASSISTANT ATTORNEY GENERAL ON BEHALF OF PETITIONERS

MISS SOLOFF: Mr. Chief Justice, and may it please the Court: The principal issue in these cases is whether or not a guilty plea can be opened up to collateral attack in order to test an evidentiary defense which could have been tested at a trial.

These are three habeus corpus petition cases in which the Court of Appeals for the Second Circuit had ordered evidentiary on the petition of state prisoners who are detained by virtue of their pleas of guilty.

The District Courts which initially considered these habeus petitions declined to order such hearings because the primary allegation of each relator that a coerced confession had been obtained from him was not a direct attack on the guilty plea itself.

By its decisions in these cases the Second Circuit has held that confessions which weren't introduced against a relator nevertheless can be attacked collaterally. I will address myself primarily to the nature of the plea of guilty as precluding a subsequent attack on the admissibility of

potential evidence.

Mr. Juviler of the Office of the District Attorney of New York County will also discuss this issue.

In addition to claiming that a coerced confession was used against him, each of the relators makes other allegations on which the Second Circuit has also ordered evidentiary hearings and Mr. Juviler will discuss those allegations as well.

These three men were all convicted in New York State of serious crimes following their pleas of guilty. All three were represented by counsel; all of them pleaded guilty to substantially reduced charges.

Richardson satisfied two first degree murder charges by a plea to one charge of murder in the second degree after a plea to murder in the first degree had been rejected on his behalf.

Dash satisfied an indictment charging him with robbery in tthe first degree by pleading guilty to robbery in the second degree after he personally rejected a guilty plea to the higher charge.

And Williams satisfied an indictment charging robbery and rape in the first degree with his guilty plea to robbery in the second degree.

Q Was the death sentence still on the books in New York?

A Yes, it was at the time of these pleas.

Q Are the proceedings at the time the pleas were taken in the record anywhere?

A The proceedings in the Richardson case are in the record. The proceedings inthe Dash and Williams cases are not in the record because they were not before the Circuit Court. There is some question in the record as to whether or not they were before the District Court. It appears to me from reading each District Court opinion in the cases that they did have those minutes.

Q Don't you think on the issue that we have to deal with that it would be relevant to know what happened at the --

A I think that it is more than relative and I think that this is one of the problems with the Second Circuit decision, that they place absolutely no weight on the one colloquy which they did have before them which was a model of inquiry.

Q That's the Richardson?

A That's the Richardson. It was a most thorough inquiry --

Q Is that among these printed papers, or is that--

A Yes; that's in the appendix at pages 88 through 97.

Q Thank you. Don't stop; I'll look at it.

Thank you.

A No; I would like to follow up that thought for a moment there, because I think that one of the problems in these cases is that no matter how we look at these petitions and at the Second Circuit decision, no colloquy, even the one in Richardson, could ever satisfy the issue raised in these cases.

After the judgments of conviction became final in these cases each of these relators sought collateral relief in New York by coram nobis, which is the post-conviction procedure in New York for testing claims which are not apparent from the face of the record.

Relief was denied in each case without hearing and the denials were affirmed by the State Appellate Courts. Then each relator sought Federal habeus corpus, claiming essentially that he, after his arrest he gave a coerced confession.

After the District Courts had dismissed these petitions the Court of Appeals for the Second Circuit ordered evidentiary hearings in three separate opinions.

The Dash case was part of an en banc decision. Richardson was decided the same day and Williams about a month later. Basically, the majority opinion held in the second Circuit that where a claim is made that evidence was illegally obtained and where it is also maintained that the existence and threatened use of that evidence at a trial substantially

motivated a plea of guilty, a petitioner is entitled to an evidentiary hearing to test his claims; to test his claims that his confession was coerced, that his plea was involuntary and that his plea was substantially motivated by the allegedly coerced confession, the whole range of allegations.

We think thatin rendering these decisions the Court of Appeals has seriously misinterpreted the significance of the plea of guilty.

Q Well, does this contemplate also an inquiry into the voluntariness of the confession?

A Yes; it does.

Q Without any state hearing in any state court on that question?

A The SEcond Circuit contemplates hearings without there having been state hearings; that's right. Or without, certainly, there having been pre-plea state hearings. The question of whether or not the state would open up its doors to these petitioners if this case were affirmed is another issue, I think.

The convictions here, because they are based on pleas of guilty, don't rest on any evidence. No evidence was used against these relators at a trial and this has occurred because each relator, after consulting with counsel, decided to forego a trial and all the contests of fact that that decision by definition involves. Each, instead, deliberately chose to have

their convictions rest fully on their pleas of guilty in open court.

Q Is it true that in each one of these cases there was, in fact, a confession?

A No.

Q That's just an allegation.

A That's just an allegation. We haven't seen any confessions; we don't know if they are written; we -- I believe each one may state that they are written; I am not sure.

Q Under the Court of Appeals' holding, I guess the counsel on the other side agrees that at any hearings it's incumbent upon the petitioner to show that there was a confession and that confession was coerced. And I suppose it's always within the power of the state to say there was no confession.

A If the state can verify this in any way --

Q Well, it's not up to the state to verify it; it's up to the petitioner to prove it; isn't it? That there was one and that it was coerced.

A Well, as a practical matter, I don't know how, beyond his own word a petitioner would establish that he made a confession.

Q Is there any way of knowing whether police departments or district attorney's office and so on, keep the

/

files in cases which have long since been disposed of?

A I don't know what the practice is with respect to each county district attorney, as to how long they keep filed; and I don't know to the extent, for example, the policeman's memo book, which may contain the only statement which was ever made, would be preserved by the policemen or how long is he able to read his notes or if they were ever turned over to the District Attorney. There is a whole initial problem in these cases as to ever establishing that a confession ever existed, let alone the circumstances in which it was given and the scope of the confession, whether it was, in fact, a confession or a half-admission or --

Q But, of course, that's not your problem; that's not the state's problem; that's the petitioner's problem; isn't it?

A Well, it is the state's problem to the extent that wehave to go hold hearings to get all records, to get whatever witnesses are available. It's an extremely difficult thing.

Q Well, to have hearings; yes, but this particular problem is the petitioner's problem, because he has the burden of proof.

A Certainly he wouldhave the burden of proof, but as a practical matter, it would turn back to the State, because the state has whatever records there are, if there are

any.

Q You think the mere assertion would be a problem that the State would have to meet?

A This is one of the questions that the Second Circuit has not answered. They said that other allegations or other affidavits should be necessary, but they didn't require in any of these cases and were already getting petitions which makes very bare assertions on which hearings have been ordered.

Q May I ask you a question to test the scope of what the Second Circuit opinion really is, because I am not sure I understand it. Suppose an allegation were made in these same circumstances in terms of times and criminal acts and the petition alleged that he had been motivated in making his guilty plea by the knowledge that an eyewitness was available, but that this eyewitness was one whose testimony was "tainted" because of improper lineups or exhibitions of photographs, et cetera.

Would you read it as being within the scope of what the Second Circuit has now opened up?

A I think it's entirely possible that it's within the scope of what the Second Circuit has opened up, along with illegally-seized evidence. They claim that evidence was illegally seized along with almost any evidentiary claim which can be made.

I have received a brief from the office of Respondent's counsel, which alleges that he was coerced because of unfair pretrial publicity and it rests directly on the allegation -- th_ allegations are based directly on this case in the Second Circuit. So, that it's ratifications for other kinds of opening up of a plea, I think they are endless.

I think that thisis one of the reasons why once a decision has been made, to rest a conviction on a plea of guilty and to take whatever benefits flow from that plea and after years have passed and the State has relied on this plea in just the ways that we have described, that it should not be the relator's option to repudiate the plea, because then there is no meaning to the plea of guilty. It only becomes a procedural step to the testing of evidentiary claims and it's significant that the independent basis of conviction is completely negated.

Q Do you understand it to be the view of the Second Circuit that a plea substantially motivated by the existence of an involuntary confession is an involuntary plea--

A Yes.

Q -- or whether or not an involuntary plea, it's voidable, even though voluntary, if it was substantially motivated by the involuntary confession. That may be just a matter of semantics, but it may be of some importance and I am not quite sure I understood the rationale of the Second

Circuit.

A Without meaning to be facetious, I have problems with the rationale of the Second Circuit.

Q Well, that prompted my question.

A I think it can be read that if a confession is coerced and if that confession -- not the coercion of the confession itself, the existence of a confession, substantially motivated the plea; that is, taking into account whatever other evidence may have been available; taking into account the nature of the bargain that was struck; taking into account any variety of factors, the District Court now must weigh this and call it "substantial motivation," and decide how substantial it was.

And if it were substantial, and apparently if the confession was coerced, then the plea is to be set aside.

Q Even though the plea itself was a voluntary plea under the normal, conventional standards, was a voluntary plea, i.e., knowing, intelligent, informed plea with the advice of counsel, et cetera. Is that --

A I believe that that's the rationale of the Second Circuit. I think they have run right around the plea of guilty to the confession.

Q Yes, but there would have to be a nexus in the confession and the plea, doesn't there?

A I don't believe that that's really so with what

the Second Circuit -- in the Second Circuit rationale.

Q Well, may I ask what you meant when you said a "substantial factor in the making of a plea." What do you mean by that? That means nexus, doesn't it, between the confession--

A That's whatthe Second Circuit said, that there has to be a substantial --

Q Well, that was my question: doesn't there have to be some nexus between the alleged coerced confession and the plea?

A No; because I don't think substantial motivation means that. I think all that substantial motivation means is that there was a confession and for some reason it was coerced, but I didn't test it, instead --

Q I'm assuming the premise that it's a coerced confession.

A All right.

Q I thought that the attack upon the plea depended upon showing that the plea was a consequence of the coerced confession.

A Not at all. I don't believe that that is what the Second Circuit held. I think that what they said was that "there was a confession and it caused me to plead guilty; it induced my plea."

Q Well --

A I'm sorry. I am getting confused.

It substantially motivated --"the existence of a confession substantially motivated my plea."

Q "I would not have made the plea but for my fear that if this confession were successfully used against me I'd come out worse than I would by pleading guilty."

A No.

Q Eh?

A There's no "but for test" announced by the Second Circuit decision. That's the first --

Q Well, there's quite a gap between a "but for test" and a motivation test of influence; isn't there?

A I think that the problem in all of these cases -- I agree that there is a difference, but I think there is substantial motivation or "but for," may come down to the same thing, but the answer is still: this plea was entered in lieu of a trial. There could havebeen a trial and there wasn't. Once the term "induced," or "substantially motivated," and all of these terms predicated on, although all ignored the existence of a trial; they ignored the very nature of a guilty plea; they ignore the fact that no evidence is necessary to support the conviction; that the plea is the independent basis and thatonce you use words like "substantially motivated," or "induced," to reach out to the evidentiary test you have negated the plea of guilty. You simply say: first you plead

guilty and then we'll have this evidentiary hearing, when you demand it, at your request; many years later, perhaps. And you have undermined the plea of guilty for which there are certainly very great justifications.

Q I take it then that you disagree with the Richardson case, too?

A Yes; we do, Your Honor.

Q And you say that it makes no difference that the defendant alleges and makes a specific allegation of the incompetence of counsel in advising him about how to plead?

A I think that the allegation that counsel is ineffective, is certainly a ground on which collateral attack against a plea of guilty can be based. I would never -- would not argue to the contrary -- but --

Q How would you attack the plea of guilty, using that. What would you say? Would you say, "I had an incompetent and ineffective counsel and therefore, what?

A "Therefore, I did not knowingly and voluntarily enter a guilty plea, because he did not advise me of the consequences, not because I had a coerced confession."

Q Right; right; right; but what if he -- what if counsel says, or part of the allegation is: "I told my counsel that I was beaten and he says, ' it doesn't make any difference that you were beaten at all; your confession is admissible and with the confession you're cooked.'"

A And he comes into court and he makes a long list of acknowledgments of guilt, of the knowing nature of the fact -- he made a coerced confession; and counsel didn't attack it. He only attacks counsel on the ground of not having --

Q Oh, he attacks his counsel on the grounds that the counsel said, "that confession is usable against you."

A Well, that's a perfectly competent piece of advice on the part of counsel.

Q All right, if he was beaten?

A He alleges that he was beaten. He was --

Q Well, you wouldn't advise any client you had that a confession that was beaten out of you was usable against you?

A We have no acknowledged coerced confessions in these cases. We have allegations, of course.

Q I understand that.

A It may well be a close case as to whether or not the confession is or is not admissible. This is especially true when we are coming up with the right to counsel and statements as to whether or not warnings were given, the full range of possibility of the admissibility of a confession.

Q Well, what would you say if the allegation was that "it was represented by counsel and then to me that a co-conspirator or co-defendant had confessed, implicating me and would testify against me," and that was false; absolutely

false. The State made the representation and it was a false representation and wouldn't have pleaded except for this fear of having testimony used against me and with that testimony I had no case."

A Once you have a false representation by an office of the state, you have a collateral issue. In fact, we cite a case in our brief in which New York has held that where an officer testified falsely as to the circumstances of the crime --

Q Then what would you say; that the plea was not intelligently made; would you? I mean, you were operating on a false premise.

A That's right.

Q And you have set the guilty plea aside?

A That's right, but where we have a claim of coercion and an available procedure and this is essentially what we are talking about in these cases, then we have --

Q With a guilty plea how can you ever get to learn if the confession is coerced or not?

A You can't, except where you have --

Q So, if there is a coerced confession and for some reason the lawyer and the defendant both say there is no use taking a chance; that's it. Nobody can ever look into it?

A That's right; that's what the plea of guilty --

Q But if there is a coerced confession and a

trial and a conviction and later on you can't get a Jackson and Denno hearing?

A That's right.

Q And the difference being what?

A The difference being that once you go to trial and test a confession the confession becomes a part of the basis of the judgment of conviction. It is evidence which probably led to the judgment of conviction and you're entitled in those circumstances to a determination of whether or not that confession was coerced.

Q So that if the police officers identify the man and they know they are wrong and if they beat a confession out of him -- I'm not even assuming it's this case -- and yet the lawyer tells him, "Look, they are going to believe that police officer and they are not going to believe you." And he pleads guilty; that's it?

A That's right. That is because there is no more point to testing a confession after a plea of guilty than there is at a trial. The same issues of credibility still exist.

Q But suppose at this hearing that the Second Circuit has ordered it's found that there were no confessions. The conviction stands?

A That's right.

Q If the court finds that there were confessions, they were perfectly legal; the conviction stands. If they find

the confession is extorted by force and violence or what have you, then they will more than likely set aside the conviction, and let you go again.

Outside of the problems and difficulties of holding hearings which are normal, what else is wrong with that decision?

A It's no longer a plea of guilty. What you're doing is holding exactly the same trial thatyou would have held before the man pleaded guilty at a time when witnesses may have died, the evidences of guilt may be completely dissipated and the bargain which he struck for a lower charge can be repudiated. This is not the plea of guilty; this is a trial and if --

Q I guess underlying what you're saying is that you should take judicial notice of innocent people who don't plead guilty without lawyers.

A That's right.

Q Isn't that the core of your -- isn't that your unarticulated premise on which you go?

A It is certainly a premise from which we operate.

Q Pretty important one; isn't it?

Q There is a vehicle -- I think you suggested this or intimated it -- there is a vehicle if they want to test that out at that time while it's fresh, to move to suppress any

existing confession and test it out there and if they have not so moved, is it your suggestion that they have permanently waived it?

A That's true, but this is not the case of these three relators who all pleaded guilty before the decision of this court in Jackson against Denno.

Now, the Second Circuit felt it was compelled by the decision in Jackson against Denno to hold that New York did not provide these relators with a reasonable opportunity to test their claims of coercion.

Q And Judge Kaufman, if I understand his pro curiam opinion, thought that these decisions were limited to pre-Jackson v. Denno situations?

A That's right. He felt that another issue on the Second Circuit opinion as to whether that concurrence by Judge Kaufman in which other members of the court concurred, is truly the limiting point.

Q But, at least his view was that these decisions were so limited to pre-Jackson-Denno cases?

A If -- that's correct; and if that's true, then the Second Circuit decision is, in a sense, more limited than many other decisions from the other circuits which never take account at all of the possibility of going to trial. They never regard it as an alternative, and yet it would seemthat the right to go to trial is really what is at issue in these cases.

Now, as I said briefly before, before the Jackson decision the problem in Jackson was that the same jury passed on the question of guilt or innocence and on the question of the voluntariness of the confession; and that procedure was upheld by this Court in 1953 in Stein against New York.

Since the Jackson applied to cases which had already been tried prior to June 22, 1964, the Second Circuit concludes that it applied also to cases in which there was no trial prior to 1964.

But clearly, Jackson does not apply where there never was ajury trial. The problem arising from a case that had already been tried before 1964 is that a confession that the jury had already heard might have been coerced and therefore, the conviction that is the jury's verdict, would have been based on a coerced confession. And so now we have to hold evidentiary hearings to determine whether or not that was the case. But as we said here, the convictions are not based on confessions or any other evidence.

The Second Circuit also found that these relators couldn't be deemed to have entered voluntary pleas of guilty if their pleas were substantially motivated by coerced confessions the validity of which, for practical purposes, they were unable to contest.

But, for this assertion to have any meaning, it would have to be alleged factually that the pre-Jackson procedure in

some way actually motivated the plea of guilty and counsel's advice to a plea of guilty.

In other words, the Stein procedure, as a matter of law, is so bad that it even prompted pleas of guilty, innocent men could plead guilty.

Q We will recess now for lunch.

(Whereupon, at 12:00 o'clock p.m. the above-entitled matter was recessed until 12:30 o'clock p.m. this day).

(After the recess the argument was resumed)

MR. CHIEF JUSTICE BURGER: Mr. Juviler.

ORAL ARGUMENT BY MICHAEL R. JUVILER, ASSISTANT DISTRICT ATTORNEY, AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

MR. JUVILER: Mr. Chief Justice and may it please the Court: As Miss Soloff has pointed off, the applicability of Jackson against Denno retroactive to cases that had already been tried in which confessions were actually introduced to the jury, suggests not one way that the Jackson case is applicable where the conviction rests upon a plea of guilty.

A plea of guilty has many consequences, one of which is to forego the benefit of any subsequently announced procedural right affecting a trial. For example, as was suggested on one of the questions from the bench, if a defendant pleaded guilty prior to the Bruton decision he may not now come forward and say that he was induced to plead because he expected that his co-defendant's confession would be introduced and the jury would hear it and that would prejudice him.

Q Well, I would think in the Second Circuit he could.

A It's difficult tounderstand precisely how far the Second Circuit would go, but I think thatis a logical outcome of much of the reasoning of the Second Circuit. I think itis an intolerable outcome.

Q Could I ask you whether in New York there is going to be a pretrial hearing about the admissibility of a confession?

A Yes. New York State appears to be the only jurisdiction in America in which there can be a pretrial hearing as to admissibility of confessions and the defendant may preserve his claim of coercion on appeal after a plea of guilty.

Q And if the Upper Court reverses the decision that it was admissible he may replead?

A He has the option of withdrawing his plea and going to trial or negotiating a lesser plea, but at his option the judgment of conviction is vacated.

Q Any time limit on that in New York?

A Yes; the time limit is thenormal Appellate process.

Q In other words, he can't do this by collateral attack 15 years later?

A No.

Q How long has this right been?

A This was enacted by the Legislature in 1965, about six months after the Jackson decision.

Q You don't understand the so-called "omnibus" hearing, pretrial hearing in some jurisdictions includes a confession hearing?

A Yes. The hearings include the issue of

confession I would assume, in every jurisdiction, but only in New York is that issue preserved on appeal after a plea of guilty.

Q I see; I see.

A And the logical outcome, perhaps, of the Second Circuit opinion read in its broadest sense, it to acquire the New York procedure as a matter of constitutional law to be enacted in every jurisdiction, because the logical outcome, indeed, of the Second Circuit position, and apparently is the relator's arguments is that if evidence is obtained by the police in an illegal manner, there reallyis no way that a contested hearing on issues of fact can be avoided, even if the defendant pleads guilty.

Here we have merely allegations of coercion of the confessions, unsupported by anything outside of the petitioner's own motions, but even assuming the truth of these allegations, there is no connection; there is no nexus in a constitutional sense between this alleged coercion and the plea of guilty, so long as the defendant has a reasonable opportunity prior to the entry of judgment to raise these constitutional claims and indeed, the expansion of the list of these claims as to the admissibility of evidence, requires that we maintain the time-honored, orderly procedures for presenting these claims, whether they involve confessions or tangible evidence or eye-witness identification.

There is no suggestion of a nexus in the allegation that a plea of guilty was induced by the threatened use of a coerced confession. Thatis merely a legal fiction which states the conclusion to be reached, but that is not a step in the reasoning. There is no claim, factually, in these cases that the relators were told by any public official that these confessions known to be coerced by the State were going to be used against them and for that reason they had better plead guilty.

These were self-motivated pleas of guilty.

Q Well, I suppose that if they were admittedly or clearly coerced confessions that counsel wouldhave advised them of that and he wouldn't have taken it into consideration considering whether to believe?

A Yes. And that brings us to the second possible nexus between coerced confession and the plea of guilty. And that is the suggested nexus of incompetency of counsel. If the attorney consulting with his client, as is admitted to have occurred in each one of these cases, consulting with his client as to the prospects for suppressing this confession, knowing, as is admitted in each of these cases by the relators that they had a procedure by which they could keep this confession out of evidence, and if after those deliberations the defendant and his attorney reached a considered judgment that it would be to the best interest of the defendant to accept an offer of a

lesser plea and to forego the trial, then that decision should be binding. That is what a plea of guilty is all about.

Q What do you mean by a nexus, Mr. Juviler; a connection?

A Well, I think the problem here is thatthe relators are striving to find some kind of a constitutionally acceptable theory on which they can connect this confession --

Q I mean what is the theory or meaning of that particular word to you? Do you find that in the opinions of this Court, typical of Justice Frankfurter, but it is a Latin word. Do you mean connection?

A I suggest it has been used in many contexts and I'm just trying to --

Q That's the reason I'm asking: what do you mean by it?

A I would say that a nexus is some constitutionally acceptable reason why the plea of guilty should not be considered binding --

Q That's not a definition you would find in the dictionary, "nexus?"

A No. And I think that such a nexus would include the following: One would be that the --

Q No; I don't mean that such a nexus -- what do you mean by the word "nexus," n-e-x-u-s?

A It's just a statement of a conclusion. Nexus

means under what circumstances will we allow a defendant to have an --

Q It means relationship; doesn't it?

Q Doesn't it mean a connection?

A It could mean a factual connection.

Q Well, what does it mean to you?

A I think it means a factual connection; it means a continuation of the coercion that was addressed in the stationhouse to the defendant; a continuation of that coercion into the courtroom and that is not alleged in these cases.

And, as long as there is nothing other than that to take out of this case the dispositive fact that these defendants had attorneys who, with the relators, made a choice to forego their constitutional channels, as long as there is nothing to remove that, then the plea of guilty should mean what it says: "I am guilty." You don't have to prove it.

Now, it seems apparent from the decisions in the State and in, I would say, all of the circuits, that this is assumed to be the case with search and seizure claims, where there is an attack, post-conviction proceedings on the admissibility of tangible evidence, after a plea of guilty and I don't see why there should be any difference when we come to the confession claim, other than the perhaps emotionally-significant fact that both the plea of guilty and the confession are oral; but if there is a break in the chain of events between

the stationhouse interrogation and the plea of guilty, as there is in each one of these cases, then that fact that these are both oral is completely immaterial. There is an independent act of free will exercised by these defendants when they decided to forego their trial. The cat was not out of the bag when they allegedly confessed in the stationhouse.

Now, if the defendant is coerced into confessing by the police and subsequently, while in custody, he makes another confession, that second confession may be admissible at a trial, even though, in a sense, the cat is out of the bag, if the facts establish that there was a break in the chain of events. And that the second confession was voluntary and came after the defendant was aware of his rights, where in our case, the confession -- the cat is not out of the bag at all, because the defendant, aided by counsel, still armed with the power to try to keep that cat in the bag, he says that "It's not worth my trying," for various reasons, and so long as the State or the Federal Government does not unnecessarily discourage the opportunity of the defendant to challenge these pieces of evidence, then his decision not to do so should be binding.

Q How did Jackson and Denno figure in it at that point?

A It could enter into the picture if the defendant and his attorney are actually factually motivated to enter

a plea of guilty on the feeling that they just can't get a fair trial; they just can't get a fair hearing.

Q Well, wouldn't that come out in the hearing that the Second Circuit proposes: yes or no?

A I think that the first obligation is to allege it before such a hearing should be ordered. We cannot just presume it. I think, indeed, it would be unreasonable, Mr. Justice, to presume that, because I think in common sense, as Judge Friendly pointed out in his dissent: "There is no reason to believe it's purely speculative to say that this difference between the Stein procedure, pre-Jackson procedure and the post-Jackson procedure compelled this defendant or unnecessarily encouraged him to forego a trial.

Q Didn't Judge Kaufman slow you down a little on that?

A He tired and he prevailed in the Second Circuit, but I think, with all respect to the opinion of Judge Kaufman, it is not persuasive and it does not overcome the fact that there was no factual allegation; it just doesn't overcome the dissent.of Judge Friendly.

Now, the relators here in this Court, the way their brief is written, urge on the Court this factual connection, this actual factual motivation entering into the minds of counsel that they sat down with their defendants and they said, "Well, the Stein procedure is not fair; we just can't get a

fair shake." But I do not see that in the petitions themselves, and even if they were in the petitions, because all they have in the petitions is citations to Jackson against Denno, except for Richardson, who doesn't even make this claim, so in his case it's not before the Court.

But if they were, a resourceful defendant were to listen to my argument and to come back into a Federal Court with these factual allegations, I would say again, these are immaterial, because these convictions were based upon pleas of guilty, not upon evidence, and when these defendants pleaded guilty it was understood by everyone in the courtroom, including every member of this Court that the New York procedure was not fundamentally unfair.

Now, the problem is raise, well perhaps an innocent man might be coerced into a plea by some improperly obtained evidence, and we can't tolerate having people in prison under those circumstances. Perhaps the police deliberately perjured themselves in testifying at a preliminary stage of the case. And, faced with that the defendant had no choice but to plead guilty.

Now, I would say that under those circumstances where we would have merely allegations, those are the reasons we have trials, and either we maintain the practice of accepting pleas of guilty or we have trials in every case. If there is a risk of an innocent man --

Q Did I understand you to say that if it was perjured testimony?

A Yes. I think it was Your Honor who asked or suggested that --

Q Well, you say if there were perjured testimony by a police officer and as a result of that, and for no other reason the man said, "I can't take a chance," that he is still convicted and there is no way to reach him?

Certainly you don't have to go that far.

A Then I think that the plea should be vacated. But, I'm talking about a case where the man admits his guilt and he pleads guilty because after consulting with his counsel he comes to the conclusion that he is guilty; he will admit it in court; his conviction will be based on that plea and it's just isn't worth a contest and that brings us to the other allegations in these petitions.

First, that of Mr. Richardson, because he attempts, in a way, to get under this rubric and say that his attorney just completely failed to protect him against the use of a coerced confession.

When Mr. Richardson pleaded guilty the colloquy precluded the dangers suggested in your question, Mr. Justice Marshall, as reflected at pages 90 and 91 of the appendix.

The Court inquired of Mr. Richardson: "Did you discuss this case fully with Mr. McCoe and Mr. Rosner?" Those

were his assigned counsel.

"Yes, sir; I did."

"Did you understand them when you spoke to them about your case?"

"Yes, sir."

The Court then established that there were no threats made to induce the plea and no promises from a long list of public officials.

Now, the Court inquires: "Did you commit this crime?"

"Yes, sir."

"Now, did you, on or about March 24, 1963, in the County of New York, willfully and feloniously, strike Rosalyn Smith with a knife, thereby causing her death?"

"Yes, sir."

If we have a danger of innocent men pleading guilty, then the way to attack that is in the colloquy of pleadings, to protect the pleading procedure, as has been suggested in the Boykin case by this Court and inthe McCarthy case, interpreting Rule 11 of the Federal Rules of Criminal Procedure. But, in neither of those cases is there one whit of a suggestion that this colloquy, this protection of the defendant, must include any inquiry whatsoever from the court as to the admissibility of evidence.

With respect to the other allegations in these petitions, which include ineffective assistance of counsel and

a judicial threat to induce a plea.

Our basic position is that the Court of Appeals deprived the District Court of a sound discretion when it overruled the denial of these allegations without a hearing.

And if there is to be no finality in criminal cases, no end to litigation after a conviction, then there should be no end to the sound discretion of the District Courts, who are on the front lines, and their colleagues in the state courts, reviewing post-conviction claims for relief.

It is established that if a claim in post-conviction proceedings, is vague, conclusory, or palpably incredible, then it can be denied without a hearing,and that is overlooked by the Court of Appeals in these three cases.

Without dwelling at too great length on the specific facts, Mr. Richardson, who claims ineffective assistance in counsel, in objecting to this coerced confession, in his petition in the District Court merely made conclusory allegations at pages A-78 and A-82 and surely there is nothing stated there which overcomes the colloquy which I read to Your Honors.

The Court of Appeals did not say otherwise; they didn't order a hearing on the petition for habeus corpus filed in the District Court. They ordered a hearing on a supplementary affidavit that was attached to the Appellate brief in the Second Circuit in complete disregard for the orderly procedures of Federal habeus corpus, and this was over the objection of

the State.

We reassert in this Court that this matter in the supplementary affidavit was not presented to the District Court and it was not presented to the State Court and therefore, the relator had not exhausted his available state remedies.

Q This was submitted at the Appellate Court of Appeals?

A Yes. It was attached to the Appellate brief in 1968. The habeus corpus petition was denied in 1965. Now, in 1966 we gather from the briefs that Mr. Richardson applied to the Second Circuit for certificate of probable cause and there for the first time he made an allegation that -- which is repeated in the supplementary affidavit. His attorney told him that by pleading guilty he would not give up his claim to coerced confession.

I dont have th t; it is not reproduced in the Appendix, but it is still part of the Appellate process that was not before the District Court.

Now, our position --

Q Well, that would be correct advise today in New York; wouldn't it?

A I'm sorry?

Q Thatwould be correct advice todayin New York, as I understand it.

A Yes; that's why, as I was about to say, even if the allegations in the supplementary affidavit were true, and not that they present the picture of an outstanding member of the Bar, but if they are true, they still do not state a claim for Federal relief, because they do not show that this man was completely without the effective assistance of counsel. And the length of deliberations and consultations with his counsel, which are alleged to be too short, are not the test of the effective representation.

Not only that, but the supplementary affidavit is contradicted by the letter; it is contradicted by the pleading minutes and there is no explanation why Mr. Richardson, after allegedly having been told by his attorney that he could contest his confession by a writ of habeus corpus, waited for a minimum of two-and-a-half years before attempting to do so in the Federal Courts.

Mr. Dash was granted an evidentiary hearing by the Second Circuit on an allegation that when he appeared in court for pleadings the judge threatened him, off the record, with the maximum sentence if he went to trial and was convicted.

Now, if that were true it would establish a ground in New York City for a hearing -- for relief. New York is very, very careful to preclude judicial threats, but eleven New York State judges before the District Court, passed on that petition and said that there is not enough substance here for a

hearing. That included the coram nobis court, five judges of the Appellate Division and five of the seven judges of the New York Court of Appeals, and this was a sound exercise of discretion, because the defendant had waited for more than three years before he brought this claim; it was totally unsubstantiated by any affidavit from his attorney and it was contradicted in the state proceedings by the affidavit of the District Attorney in charge of the case.

Q You say there was a split decision on that?

A Yes; there were two dissents in the New York Court of Appeals in the Dash case on this issue of the allegations as to threat. The Court of Appeals was unanimous in holding that there was no need for a hearing as to the claim of the coerced confession and in that they were reversed by the court opinion --

Q Was there an opinion written in that case?

A There was a brief opinion written which reaffirmed longstanding New York law.

Q Who were the dissenters?

A Judges Fold and Burke, I believe.

And it was clear why Dash brought this petition, as he explained in his motion papers. His co-defendants, Waterman and Devine who had elected to go to trial, received ultimate relief on appeal, because the New York Court of Appeals changed the law relating to the right to counsel after

-- and during interrogation.

There was no finding that these confessions of Waterman and Devine were coerced, but the Court of Appeals anticipated the Messiah decision of this Court.

Now, both men, Waterman and Devine, had the opportunity before Jackson against Denno. They contested their convictions and they won in the Court of Appeals.

Q But not on the basis of the coerced confessions?

A No. They attempted that, but they did, at least establish a record and they won. And Mr. --

Q Is the claim made here that the confession was made after indictment?

A Yes.

Q So, it therefore would not -- the claim is that it was not only a coerced confession, but also one that is inadmissible because it violates the New York rules that antedated the Messiah case?

A Yes; but the New York rule was not applied, I don't think at this time it was applied retroactively, and to my knowledge, the Messiah case has not been either, so that I don't think that would give Mr. Dash his relief.

But, in any event, it's academic; he pleaded guilty.

The Williams petition was held sufficient for a hearing on a claim which is quite remarkable, at Page 50 in the

footnote to this habeus corpus petition. It's introduced by our information that six years after the plea of guilty, Mr. Williams' assigned counsel was disbarred for overzealousness in a divorce case.

Now, when that disbarment was published, this claim was raised in the state court and then in the Federal Court that Mr. Davison had, just prior to theplea, so advised the relator that the charge to which the D.A. was allowing the plea was a misdemeanor, not a felony; and that relator did not discover the fact until sentenced on the felony.

Now, he was sentenced to 7-1/2 to 15 years for robbery in the second degree. It is palpably incredible that he would, knowing at sentencing, discovering then that this was not a misdemeanor, wait for six years before informing us as to this advice from counsel, particularly a man who was no stranger to the criminal law.

The alibi claim on which the Second Circuit appears independently to have ordered an evidentiary hearing is also vague and palpably incredible. This claim is that Mr. Williams told his attorney that he had an alibi; that he was out of the jurisdiction and the attorney disregarded this. There is no statement as to where Mr. Williams was; there is no corroborating affidavit.

Williams waited, in this instance, eight years before he first informed anyone of this alibit. Now, if this attorney

had suggested a trial on such an alibi then Mr. Williams would be here saying that the attorney was incompetent. What is the hearing going to be into in the Williams case on this alibi? What is the purpose of this hearing?

And I think these three petitions with these additional allegations on which hearings have been ordered, raise a very serious question of the administration of justice. How much are we going to ponder over past cases when the administration of criminal justice is currently in crisis. The wolf is at the door and the Court of Appeals for the Second Circuit has said that we have to go poking in the chests in the attic to see whether there is something amiss there and I think the ordering of hearings on these allegations weakens and deprecates the great writ.

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

Mrs. Oberman.

ORAL ARGUMENT BY GRETCHEN WHITE OBERMAN, ESQ.

COUNSEL FOR RESPONDENTS

MRS. OBERMAN: Mr. Chief Justice, and may it please the Court: There are two primary things that I would like to address myself to, because I feel that there has been either misstatement or confusion about, first of all, the facts in the case, and secondly, just precisely what the court below did do in each of these cases and what it did not do.

First and foremost, I think that it is clear the

Second Circuit did not announce a new rule of law in any of these cases. It merely reinterpreted and severely limited one of its own cases: United States ex rel. Glenn v. McMann. Now, this was a very long overdue step, because the Glenn decision was at odds with decisions in this Court, as well as with the decisions in the Courts of Appeals of at least five other circuits.

Secondly, the court below, in limiting this Glenn decision acknowledged that under certain circumstances the existence of a coerced confession could coerce a guilty plea. The surprising thing about this recognition is that it came so late.

But, it cannot be stressed enough that the Second Circuit did not hold that the bare allegation that a confession was coerced entitles a habeus petitioner either to a hearing or to relief. A certain specified cause and effect relationship has to be alleged and has to be proved. And the cause and effect relationship varies in each one of these cases.

In the Richardson case and to an extent, in the Williams case, the reason that the defendant was prevented from raising his confession claims at trial was because he was represented by counsel who was incompetent or negligent and refused to lift a finger to help him, according to the allegations. Now, we're on the pleadings here and this is not a question of what has been proved. These are uncontroverted

allegations.

In the Dash case the cause and effect relationship between the coerced confession and the guilty plea was that counsel was unable to do anything meaningful to prevent the coerced confession from being used to convict the defendant at trial and the reason for this was Jackson against Denno, or Stein against New York, I should say.

The third thing that I wouldlike to point out is that the decisions below do not automatically call into question the validity of all guilty pleas, no matter how painstaking and how complete the colloquy at pleading has been or despite the fact the defendant has been represented by counsel. The Second Circuit merely held, as I think virtually every other court in the country, that in certain instances where you have off-the-record or allegations of off-the-record facts in a petition, even a full colloquy of pleading and even representation by counsel do not create an irrebutable presumption of voluntariness of the plea.

Moreover, the Second Circuit recognized that both these factors, the completeness of the colloquy and representation by counsel are entitled to great weight in the ultimate assessment of the voluntariness of the plea. And in this connection it should be noted thatthe Circuit held that both the burden of pleading, that is the burden of going forward to make a showing to get a hearing and the burden of proof at the

hearing of each and every allegation in the petition, not upon the habeus petition.

Now, it must also be stressed that each of these cases came up for review on the pleadings and the issue for decision in each case was whether the facts alleged in each petition stated claims which had proved at a hearing, either in State of Federal Court would entitled petitioners to relief under the 14th Amendment. And the Second Circuit gave New York the option of holding the hearing that it envisioned, because the matter was remitted to the District Court and the District Court was tohold a hearing only if New York did not hold a hearing.

In each case the Circuit has held that if the allegations were proved at a hearing the pleas in each case were involuntary and for this reason a hearing had to be held. It should be noted here that the State's position in all of these cases where they took a position, because at least in one case no response was filed in the District Court, was that the allegations even if proved at a hearing would not entitle the respondents to relief.

Q As I understand the Court of Appeals' opinions, if it were merely alleged by a petitioner that a confession was coerced from him and that that coercement and that confession motivated his plea because he thought it would be usable against him, and that therefore, his guilty plea was coerced;

if those were the allegations, as I understand the Court of Appeals' opinions, there -- he would be entitled to a hearing.

Let's put aside -- I know there are other allegations in these cases. But, as I read their opinions, even if there weren't any allegations of incompetency in counsel, as long as they alleged there was a coerced confession and that coerced confession motivated or caused his plea and without the confession he never would have pleaded guilty; as long as he alleges that he can get a hearing?

A Yes; I would have to amplify that just to a certain extent. The Circuit in its burden of proving, put upon the petitioner the obligation to come forward with whatever affidavits --

Q He would have to prove his case.

A No, no; in order to get the hearing, so that the bare allegations as you have outlined --

Q Sure. Well, assuming he makes detailed allegations as to why he thinks the confession was involuntary and assume he says the state had no other evidence, no substantial evidence but the confession?

A Well, he made a powerful showing -- I think that's the only way I can express it, that his confession was coerced and that the confession, for reasons specified, was the factor which induced his plea of guilty.

Q That's all he has to allege?

A Yes.

Q And then in Richardson you have the additional factor of allegations of incompetency of counsel; don't you, in connection with advising the plea?

A In Richardson you have the factor of the incompetency of counsel which, I think, comes to bear in two places: that it is an independent ground or claim for relief, beyond the coerced confession claim, and vis-a-vis the coerced confession claim, counsel's failure to investigate and counsel's wrong advice, and it was clearly wrong, under New York law and under Federal Law at that time, about the time for raising the confession, was the reason, the nexus, the causal connection --

Q Well, if you win, his advice was right.

A Well, that's a fortuitous circumstance that I don't think should have anything to do with the decision here.

Q But, I take it that on my previous question that you just alleges a coerced confession and that caused his plea, he gets a hearing even though he clearly conceded that his counsel was competent?

A Well, I'm afraid I have todivide that question into two parts and then answer each one.

I think that before the decision in Jackson against Denno, if there is no challenge to the competence of counsel, that -- but there is the allegation that the reason that the

confession issue was not raised at trial was because of the Stein procedure and all of the chilling effects that that procedure had upon -- the distorting effects that that procedure had upon the fact-finding process and the guilt determination.

The fact that the defendant was represented by competent counsel, under the point of view that the Circuit Court took, doesn't preclude him from a hearing. Now, after Jackson against Denno you have a different kind of problem. As Mr. Juviler has pointed out, in New York, anyway, you have the full hearing on voluntary confession that's held prior to trial at that point the defendant has the option of --

Q Suppose he takes advantage of it?

A Yes. And after Jackson against Denno the deterrent effect -- there is no unconstitutional procedure which could deter a defendant from going to trial or --

Q As I understand the Court of Appeals took, it did not make incompetency of counsel a critical matter in, or a necessary item in ordering these hearings. It wasthe allegation it was a coerced confession and the connection between the confession and the plea.

A Yes, Your Honor, but I believe in the Richardson decision, which was not an en banc decision, and a separate decision in which one of the dissenters in the en banc wrote the majority, the connecting factor between the coerced confession

and the inability to raise the confession issue at trial was the allegation of incompetency of counsel and counsel's --

Q Exactly. That was the factor in the Richardson case.

A Yes, but in Dash it was pointed out by the Second Circuit that there was no allegation of incompetent representation by counsel, so then the next question was: "Well, if you have a claim that you consider a valid claim; if you feel that your confession was coerced and you had competent counsel to represent you at trial; you had a champion, why didn't you present that claim at trial? And if you didn't present it at trial can we say that under those circumstances there has been a waiver, because you have failed to present the claim in an acceptable state procedure."

The answer to that was Stein against New York, that even competent counsel, before the decision in Jackson against Denno, would think long and think hard about taking his defendant to trial with a coerced confession claim,under that procedure, and I cannot stress enough the detrimental effect, the coercive effect that that procedure had, both to counsel and to a defendant confronted with a coerced confession claim and the possibility of trial or plea.

Q Mrs. Oberman, may I ask: If this hearing goes forward -- this is in the Dash case, and not the Richardson case -- Dash is where there is no allegation of incompetent

counsel, and it is established by Dash that, indeed, the confession was beaten out of him, then are you suggesting that any advice of counsel -- because he was represented by counsel -- then becomes irrelevant to his right to relief?

A No, Your Honor; I am not.

Q Well, what is the relevancy, of advice of counsel?

A I think the Circuit viewed it in terms of prime motivative factor, other circuits have talked about --

Q Well, excuse me, but let me make a concrete hypothetical. Suppose, in fact,what counsel did was to say, "Now, you say this was beaten out of you and you have some corroborating proof that it was beaten out of you, but there were two police officers involved and there is going to be a question of credibility, because thoseofficers are going to deny that they beat it out of you and your witnesses are going to say they did, and there is always the chance that, being a fact question, that the issue of credibility will be resolved in in favor of the officers' story.

"Therefore, I suggest to you that if that should happen you may go to the electric chair, and the better thing for you to do under the circumstances, then is to plead guilty, if we can get a second degree plea."

Suppose those were the facts as to the advice of counsel--

A Yes. Taking your hypothetical strictly on its facts, I think the Circuit has answered the question in its opinion, by saying, "even there the confession is coerced." A defense counsel may properly advise the defendant to plead guilty, say if there is substantial evidence, or if the possibility of proving a claim is minimal, because of the caliber of the witnesses and so on --

Q But is that quite the question I put to you?

A Well, perhaps I --

Q Well, what I'm trying to get at now is the reasons you told me initially, a hearing on the -- on whether or not the confession was coerced, and it is decided, factually, and the officers testify and -- I am speaking now of the habeus hearing -- and here the issue is resolved in favor of the petitioner and said, "Yes, it was coerced," and yet the counsel had said to him at the time, before he pleaded guilty, "These are the chances that we take. This issue of credibility, and if you go to trial maybe it will be resolved against you."

Does that -- what I'm trying to get at is, if that's what develops, notwithstanding the finding at this habeus hearing was that the police did beat it out of him, and it was coerced; but counsel has just told him what the chances were before he pleaded guilty and he had pleaded guilty; would you think he would be entitled to relief?

A Well, the Ninth Circuit says, "no," in a very

recent case, and I would say, "no," also, under the decision of the Circuit, because there are two elements --

Q No; he is not entitled to relief?

A Yes; there are two elements that have to be proved: not only the fact that the confession was coerced, but the fact that the confession was the substantial or the prime, or the main motivating force behind entry of a plea of guilty.

Now,there are only --

Q Well, of course, a confession is, in my hypothetical, is that what's involved is he's getting advice from the lawyer whether or not he should take a chance on the issue of credibility as it bears on his claim of coerced confession.

Q And he was afraid of the confession and that's why he pleaded guilty. Suppose that's established in the habeus corpus hearing?

A Well, I think that your hypothetical was that he was not -- perhaps I divide it in my own mind a little bit too finely, but he was afraid of the coerced confession, but he was afraid that his proof of coercion would not be accepted --

Q Well, the lawyer told him frankly, as I would expect that a good lawyer would, that, "Look, this -- whether or or not a confession was beaten out of you is going to turn on whether the fact-finder believes you and the witnesses, or believes the police."

"And that's the chance, if we go to trial on this,

and they believe -- the fact-finder believes the police, you may end up in the electric chair, and I think you'd better not take that chance. You had better plead to second degree if we can get such a plea."

A Well, I think the only way I can answer that question, Your Honor, is the fact -- and I believe as I read the Second Circuit decision, that the defendant would lose, given your hypothetical, because then this could be a situation, possibly, where a lawyer could properly advise a defendant to plead guilty despite the confession.

I think that there are other courts, as we have pointed out in our brief, that do not take this hard and fast line and feel that, or have granted relief in cases where the attorney and/or the defendant, or both, had to take the confession into account as one factor in determining the strategy of whether to plead or go to trial; and to this extent --

Q Well, I want to get this very clear. At least it's not your position that the Second Circuit has said that a finding at the hearing it has ordered that a confession that was coerced, in and of itself, entitles the petitioner to have his conviction on the guilty plea set aside?

A That's --

Q That's not your position and you don't think the Court of Appeals has said that?

A I -- yes, it is not my position and

yes, I don't think the Court of Appeals --

Q But, I gather you also answered that even if, on the habeus hearing it is shown that that coerced confession was a major factor in inducing the plea, that there would not be relief?

A If it were a major factor in the terms that the Second Circuit has spoken of; if the coerced confession were theprime motivating factor and no other claims of considerations then there would be relief. But, I say that the Second Circuit has taken rather a hard line with this, because there are other courts which have granted relief upon a showing that the confession was coerced and that the confession was a factor to be reckoned with in the pleading decision. I thinkthat that -- I believe that the citations to those cases are at page 32, footnote 29, Zachary against Hale, Cuevas against Rundle and Smiley against Wilson, where the courts, in the first two cases in granting relief, say that court-appointed counsel was forced, under the circumstances to give some consideration and weight to an illegal confession.

Q Now you bring me something that I've been wanting to inquire about, if I may.

In order to decide whether it is the primary motivation the court is going to have to hear what other evidence the State had; is that not so?

A Possibly.

Q Well, now we come to this hearing which may be three years, nine years, 12 years, after the trial and the State then is required to show that it had five eyewitnesses and if they can bring him these five eyewitnesses, then I suppose, reasonably, the District Judge might find that the coerced confession -- the alleged coerced confession was not theprimary motivation; is that reasonably a fair conclusion to draw?

A I would have to --

Q Well, now, then, suppose the State says, "Yes, we had five eyewitnesses at the time, but one of them moved to Hawaii and we can't get thetestimony; two have died, and one is in Vietnam."

Now, what kind of a predicament does that put the State in?

A I don't -- the point, I think, that the dilemma that you pose is really not a prosecution or a State dilemma, because it is up to the petitioner to establish that the confession was the prime motivating factor and not --

Q Yes, but the State isn't going to take the risk of just letting him hear all of his evidence, unless it's utterly spurious on its face that they are willing to take that risk. The State's going to really have to prove its case to show how the total evidence balanced with the confession.

A Well, I think the only answer I can give Your

Honor is that the Federal Courts throughout the country have lived with this problem for a long length of time and --

Q "Suffered," would be a better word for it, "suffered with this problem."

A I like to think that whenever a claimant comes into court with a constitutional claim that it is not suffering for a District Judge to hear that claim.

Q Twelve years later?

A Well, in Pennsylvania ex rel. Herman against Claudy was eight years later. I think in the Matthew Broder case it was four or five years later. We're dealing with indigent defendants who are not trained lawyers, who don't wake up right away to violations of their rights, because they don't realize that their rights have been violated.

Q We're dealing now with the cases where they had lawyers; they did have lawyers at the time these pleas were entered. There is no problem of these people being in any different position because of their indigency than any other defendant.

A Well, two of the defendants alleged that court-assigned counsel was incompetent, that court-assigned counsel didn't protect their best interests. And those are the -- the hearing goes forward on the allegations or it doesn't.

Now, I would like just very briefly --

Q Just before this business of what would be

encompassed and involved in the hearings that have been now or before the Court of Appeals, directly.

Wouldn't it be enough for the petitioner to carry the burden of proof and say, "Well, yes, I confessed, and in my opinion, in my view, that was a coerced confession and that's what motivated my plea of guilty,"period.

A No; Your Honor.

Q Why not?

A Well, first of all, the second --

Q He knows better than anyone else in the world what motivated his plea of guilty; doesn't he?

A Well, it's not just a question of motivation.

Q If he says that motivated it, it's pretty hard to disprove; isn't it?

A Motivation is only one of the two aspects that has to -- or oneof the two factors that have to be proved. The defendant must prove a real violation of his constitutional rights, because thereason that he's given relief is not his subjective state of mind; it's because the State coerced a confession from him.

Q But how do you get at that without the subjective tests, Mrs. Oberman?

A Well, I think that --

Q As Justice Stewart suggested, who can say what his motivation was, except himself?

A Yes, but the motivation is not the "be all-end-all." He can say until the cows come home that "The reason I confessed, or the reason I pleaded was because of this confession." If the confession was not extracted by physical brutality or psychological torture, he has no standing to complain.

Q Well, what if he says, "I confessed orally to a policeman only because he was beating me with his club on the head, and this did happen and I did confess orally, and that's the reason I pleaded guilty."

And then the State comes in and says, as far as we can see there never was a confession of any kind: coerced or uncoerced. That doesn't necessarily disprove his case; does it?

A Well, --

Q He says it happened and that he did confess and that the confession was beaten out of him and that's the reason, the only reason, or the substantially-motivating reason that induced his plea of guilty. Hasn't he proved his case? Even though the State says, "We can't find any confession at all."

A I don't think so. I don't think so in the least. Here in this proceeding before a District Court Judge; the District Court Judge couldbelieve the defendant or the District Court Judge could disbelieve the defendant. And it's been my experience, as a defense lawyer, that a defendant has to come in with a little bit more than you said in order to convince --

Q Well, this is a petitioner, not a defendant, and he comes in and he, unlike a defendant in a criminal case, petitioner does have the burden of proof. So, we're talking about a petitioner on this habeus corpus hearing and, all right just change the situation a little bit and say that it is shown that there was a confession which was, arguably, a coerced confession.

By then the State comes back and says, "Yes, but we had these -- and the petitioner says, "And that's the reason I pleaded guilty, this motivating reason or the sole reason."

The State responds like in the Chief Justice's hypothetical case, and says, "We have these eight eyewitnesses." And the petitioner says, "Well, I didn't know that there were any eyewitnesses; that wasn't my reason. I did this because of the coerced confession. I didn't know about any eyewitnesses."

So, the State's showing that there were in fact, eight, doesn't defend against this claim; does it?

A Well, Your Honor, this must seem like a problem in the abstract, but I don't think it is a problem in the concrete situation, because, as I --

Q Well, we're up against a very concrete situation here, and I'm just asking what kind of a hearing is there going to be? There are many hundreds of hearings.

A Well, I would like to answer that by saying that there have been hearings of this sort and perhaps the latest

case is French against the United States, which is a Ninth Circuit case, where, after a Statehearing the District Court Judge found that the confessions were taken in violation of both Miranda and Escobedo, that they were illegal confessions, but also found that the illegal confessions did not induce the plea, because there were a number of other facts in the case.

Q And wouldn't you have to show that the petitioner knew of all those facts?

A I don't --

Q It's not sufficient for the State to show that there were eight eyewitnesses; it has to show that the petitioner knew there were eight eyewitnesses.

A I don't believe that this is -- I don't believe that this is how it has been done. I think that --

Q Well, but that's the theory of the Second Circuit Court of Appeals; isn't it?

A But the --

Q The confession has to have been shown to have been motivated by the existence of a -- the plea has to have been shown to have been motivated by the existence of a coerced confession. And that has to do with subjective motivation, so you would have to show what is in the mind of the petitioner and of what he had knowledge at the time of the plea; isn't that right?

A Not precisely, because I think the theory of

every other case that we cite in the appendix to our brief, is also a substantial motivation theory, but for a substantial motivation prime inducing factor, and we don't have to psychoanalyze the defendant at the hearing to come to the result.

It hasn't proved that much of a problem in practice; I think that that's my only -- the best answer that I can give. Courts have been doing this for along time --

Q Under this standard?

A Yes, Your Honor. I think it is precisely the same kind of standard announced in every other circuit. Substantial motivation, but for prime factor. The language is imprecise and people are struggling with a word that shows cause and effect; prime cause and effect.

Q Well, the old standard was: Is this plea voluntary or involutary; the plea of guilty, not talking about any confession. Is this plea of guilty voluntary or involuntary?

And, generally speaking, the test has been; was it made intelligently, informatively and with the advice of counsel, by a man competent tomake it. And that's been the general test, conventionally. Is that correct or am I all wrong in this?

A Well, I think that the test has been -- yes, whether or not the plea was voluntary, but what is voluntary?

Q Yes; exactly. That's where the horse is buried: what is voluntary? Now, here, the one thing about these cases is, as I understand it, that the Court of Appeals for the Second Circuit has now said, "Even though a plea is made voluntarily, according to the conventional test, with all the information and the facts, with advice of counsel, by a man who is competent, nonetheless, it would be set aside if it was substantially motivated by the existence of an involuntary confession. Have I misread the Court of Appeals' opinion?

A With all deference, Your Honor, I don't believe that was the basis of the decision at all. The genesis of this whole case came from Glenn against McMann.

Glenn against McMann was a decision which says that the guilty plea was a waiver of all prior non-jurisdictional defects, and refused to recognize the other side of the coin, which was that an involuntary guilty plea is a -- and I think that Chambers against Florida and Herman against Claudy, Walker and Johnston, Waley and Johnston. This Court has taken into account the pressures brought to bear upon the defendant to get him to plead, and specifically that one of those pressures could be the existence of a coerced confession.

Q I had understood those other cases with which I am familiar, were posited on the proposition that the coercion continued up until and through the timeof the plea.

A I don't think so --

Q We're saying quite a different thing than that a voluntary plea may, in thelight of the fact that there had been a confession can be set aside.

A But "voluntary" is the conclusion that we're all after, and when you say "voluntary plea" I must take exception with you, because I think all you hve in these cases are pleas of guilty and whether they are voluntary or they are presumtively voluntary, let's say, because you have a presumption of regularity and the earmarks of voluntariness were there.

Now, even in your two confession cases, the second confession can have all the earmarks of respectability, but something might have happened to that defendant before that made it impossible for him to do anything except to utter the second confession of guilt. And that's our understanding of the rationale behind the Circuit decision.

Pleas don't come out of thin air; pleas are fairly -- just as jury verdicts don't come out of thin air -- jury verdicts are predicated upon what goes before the jury. Pleas are predicated on what happens to a defendant between the time he was -- between the time he comes to court and he --

Q Well, doesn't it sometimes have to do with whathappened before he was arrested? I don't quite follow your statement, that it flows from the time that he was arrested and the time he enters his plea of guilty.

A Well, taking --

Q Suppose you have -- this may seem a very elementary question, but it needs to be cleared up.

Suppose the man robs a supermarket and 29 people have seen him and all 29 are ready to come into court. His lawyer interviews all these witnesses, whose names are given to him by the Prosecutor and they all say, "Yes, this is the man and I can identify him." So, his advice to the man is he had better plead guilty. He is coerced; is he not?

A No.

Q By the facts he is compelled to come to the conclusion that he had bettertake the best plea he can get; is he not?

A Nc; he has a perfectly free choice at that point. He can --

Q What's the difference between a free choice in the one case and the other?

A I can't see a free choice when you have an attorney, as in Richardson; the allegations were this: "I was picked up, I was subjected to physical and verbal abuse. I confessed my guilt to a crime I didn't commit just to stop the beating. I wanted to call a lawyer, because I know a lawyer, but they wouldn't let me call a lawyer. I was assigned court-assigned counselto represent me in a capital case. He came in to see me for a ten-minute conference, and he said to me, 'I'll

get the same amount of money no matter what happens to you.'" He talked to him for ten minutes.

When Richardson came to the court, told the attorney he wanted to go to trial; he didn't want the plea that was offered, because he only confessed since the confessionhad been beaten out of him.

The attorney said, "This isn't the proper time to raise the confession. You go ahead and take a plea and save your life and bring it up later by habeus corpus." That was completely wrong advice. If this is a voluntary plea --

Q It turned out to be very good advice; didn't it? As far as the Second Circuit goes.

A Fortuitously only, Your Honor. It could have been a --

Q Couldn't have been better.

A You can't escape the fact that it was wrong advice at the time. The Nicholson case in New York, as we pointed out in our brief, was decided a year before and Nicholson said a guilty plea is a waiver; you can't plead and raise a coerced confession claim.

This man says, "I wanted to tell the court what those police did to me, and my attorney said to me, 'don't do it now. Let's go ahead, you know; let's get it over with.'"

Q Each one, and then it was Richardson, as I understand it, turned down the original offer of a guilty plea

-- opportunity to plead guilty to the greater charge and a negotiated plea -- the bargain was then made that he plead guilty to the lesser charge, lesser degree of the same offense; is that it?

A The offer of a plea or a lesser degree is not an uncommon offer in New York.

Q Or anywhere else.

A But, secondly, it could very well be that everything that Richardson says just won't wash at a hearing. Perhaps the reason thathe pleaded was because offthe offer of the lesser plea. But, the Circuit recognized this; the Circuit said, "This is a question thatcan only be resolved after a hearing. We can't decide this on the pleadings."

But, my point is that --

Q Is there anything in the pleasings that says that New York State was going to use that alleged confession?

A No, Your Honor, and there is nothing in New York State's answers that say that they weren't.

Q Well, you are sort of carrying the burden; aren't you?

A These cases are --

Q Well, let me put it another way: What constitutional right was violated when that policeman beat him up -- assuming that he did? What constitutional right was violated at that stage?

A Well, I believe that there is a -- well, at that stage --

Q Isn't it true that it doesn't become a constitutional right unless it is presented as evidence?

A I don't think so, Your Honor.

Q Well, what right was violated when they beat him up to get a confession?

Q It might be the 1983 action; mightn't it?

Q For what?

A I would --

Q Constitutional right.

A What comes into the mind is the Fifth Amendment, 14th Amendment says that we just can't permit this kind of thing.

Q But that's due process of law. What you can't permit is the admission of a coerced confession in a court of law, by the prosecution.

Q We could have the policeman convicted or you would sue for damages, but what constitutional right is violated if the State never uses the alleged confession?

A But the point here is that if it was a motivating factor to induce a plea the State has the benefit of that wrong its police officers committed in that back room of the stationhouse.

Q Are we going to assume a State is going to use

evidence in violation of the Constitution?

A I don't make a presumption one way or another.

Q I guess the presumption would have to be the other way; wouldn't it?

A I'm sorry, Your Honor; I don't agree. The State made this argument in their brief and our counter-argument to that is that there has been case after case in which they did introduce it.

And I think in this respect --

Q We don't know how many cases there may have been where they didn't, because that would never be a matter of record.

A That's right. And this is something that is pointed out, I think, very cogently by Professor Altshuler in his University of Chicago Law Review article, where he says that sometimes compromise pleas are offered by the Prosecution to cover up constitutional weaknesses in their case.

And I would think that the extent to which it could be shown by a petitioner that he was offered a plea to a lesser agree in his case, because the prosecuting attorney was worried about the legality of his confession. To that extent, bad faith is present.

Q But then, on a close question, a choice is made, why is not that the end of it? You have just posed a hypothetically-close case that may or may not be admissible.

Why isn't the choice then final? Instead of having to have a District Judge review it eight, ten or twelve years later?

A In these cases I think the petitioners themselves cry out as to why the choice is not final. Each man says, "I was coerced into confessing to a crime I did not commit, and I pleaded because I had no other alternative." And if the law's ears are closed to this kind of plea, just for the name of finality, I think that we haven't gained anything.

The other way, okay, we have to work a little bit harder, but it's worth it in order to uncover the one instance of injustice that may exist or the five or the ten or the twenty.

And there are -- the plea is the least circumscribed of all procedures upon which a conviction is predicated. And what goes on behind the scenes may not be that savored.

I would just like to turn to the Williams' petition for a moment, because I think that Mr. Juviler misstated Williams' claims to a certain extent.

Williams alleged that he was 20 years old when he was arrested, that he was held without booking, he wasn't informed of his rights, he was handcuffed to a chair; he was beaten; he had no food or sleep.

Now, because of this he confessed and he alleged that the confession was false. He said that he wasinitially offered a plea, but he refused to plead guilty, but his attorney told

him that the plea was merely to a misdemeanor and Williams alleged that the judge at pleading never told him that the crime he had pleaded to was a felony. Well, the State never produced the Williams' hearing minutes, so we don't know whether or not the trial judge informed him.

Q And what was the offense?

A Robbery.

Q Larceny or burglary?

A Robbery.

Q Robbery under the statutory --

A Now, Williams also alleged that he told his attorney that he had an alibi defense and the attorney refused to raise it at trial. This, as Mr. Juviler referred, was "pulled out of the thin air."

The only fact -- one significant fact that I think we can come forward with was a fact that appears on the so-called "DCI sheet" which the attorney General, annexed to their answer in District Court, which shows that Mr. Williams, in fact, on a prior date had been identified as being in Dayton, Ohio in court on a day when he was in jail -- or in New York City in court on a day when he was in jail in Dayton, Ohio.

And that factor in itself, gives one a little bit of disquiet. So that again, what the Circuit did in this Williams case was to look at the allegations, to say, "Do these allegations state a claim which, if proved at a hearing, would have

entitled the petitioner to relief?" And I think the answer is: if these allegations were proved at a hearing there is not one court in the country that could say that this was a voluntary plea. This was a plea that was produced, not because the defendant clearly and voluntarily acknowledged his guilt, but because of factors outside of his control which were brought to bear and he was left with no alternative.

Q Well, what about the positive statement that he did kill the woman?

A This was Richardson, Your Honor.

Q Yes; what about that one?

A I think --

Q Do you say the coercion went that far? He said said in the plea: "Yes, I'm guilty to everything," but then he's asked a specific crime and he said, "Yes; I did it."

A If that confession was involuntary, and if the confession was the reason that he made this in-court admission, then that in-court admission is tainted, and I think that here I must cite Harrison against the United States, where similar kind of situation was considered, because in that case the defendant had made a confession which was introduced into evidence at the first trial and defendant took the stand in order to counter certain statements that were contained in the confession.

When the confession was rendered involuntary, the

State sought to introduce the in-court admissions at the second trial.

Q Well, we're not dealing with using that statement except in our colloquy between you and me. Could he have said, when they said, "Did you kill this woman?" Could he have said, "no"?

He has admitted guilt to the crime and everything else; could he have said "no?"

A Well, it would be very difficult to say "no," after there is a confession and you have an attorney who is not willing to --

Q But he could have said "no?"

A He couldhave said "no," and the house could have fallen on his head, even harder than it did fall.

Q It didn't have to; the judge still could have accepted the plea; couldn't he?

A I -- in New York that's really not so clear, because New York has a couple of cases which hold that if inconsistent material comes out in the pleadings, then the judge does have a duty to make further inquiry.

Q Well, but he could have? Even if you assumed that all of the other was on one side and this is on the other side; isn't it?

A I'm afraid that I can't make two compartments and say what happened in court was respectable, even though what

happened out of court immediately before was not.

Q Well, would your submission be in trouble so far as I am concerned, if I can put it in two compartments? If I can?

A Well, if the in-court admission is going to be isolated from everything that happened before the statements in court were made, then no collateral attack upon a plea of guilty is possible.

Q Suppose, insteadof just asking the question as was put here: "Did you commit the crime," and getting an affirmative answer, suppose the trial judge, the judge taking the plea, says: "Now, tell me what you did." And the defendant then related in great detail all of the circumstances, how the crime was planned and executed.

Would you make the same arguments with reference to the possibility of an alleged coerced confession, as you now do?

A Yes, Your Honor, because if it --

Q In other words, then the issue does not have anything to do with guilt or innocence, but only with what led the man to decide to make the plea?

A Well, guilt or innocence is relevant to a certain extent, but I don't think it's dispositive because in all cases where the voluntariness or the intelligent nature of the plea is considered, the allegation that a man is innocent

is not critical, because we're arguing due process.

Q We are speaking, though, in the context of the case where it's being tried and the question of the use of the confession is involved. Isn't that quite different when you come to a plea of guilty?

A No, Your Honor, because a plea can be coerced even from a man who is guilty and in such a case the due process clause does not permit that plea to stand. If a plea is coerced because of what a judge tells the defendant: "I know that you're the man who did it and if you go to trial and waste my time, you are going to get 60 years; whereas, if you plead, I'll give you consideration." And the man pleads. That's not a voluntary plea, even though the man might be guilty, and that plea is in violation of due process of law, because we have two values that we're concerned with, but the reliability of the fact-finding process, the pleading process and also the value of making this process one that comports with due process, as well.

Q How does that fact come into play when the man has stood before the judge in open court and spent 15 minutes describing in detail how he committed the crime when there can be no possibility that a policeman or anyone else is going to hit him with a club in the presence of the judge?

A But, his freedom of choice has been removed if he can make no other statement because of what happened to him

before the plea was entered. If, then the in-court admission is as tainted as the out-of-court admission.

And I think that I can only identify this to Harrison because this was the consideration which underlies the Harrison case. There was no question about the truthfulness or untruthfulness of the admissions made upon trial in that case. The question was whether or not those admissions were the fruit of a poison tree.

And this is precisely the way I see the plea situation itself; was the in-court admission at the time theplea was taken a fruit of the poison tree? And the poisoned tree being a coerced confession in all of these cases.

Q What was the evidence, straight evidence upon which you say it was a coerced plea?

A A coerced plea?

Q Yes. What was the evidence to support that?

A Well, in each of the three cases there were independent, separate allegations.

Q I'm not talking about allegations. I'm not talking about allegations; what was the evidence?

A I don't know, Your Honor, because there's never been a hearing. We have only the petitioner's allegations --

Q What was the allegation of coercion, the existence of a fear that he might be convicted because of the coerced confession?

A Well, in -- the allegations vary from case to case, because each case was brought separately. These are not three cases that were brought together; they just came sort of wended their way up together.

So that in Richardson, the first case, you have a man who is on trial for a capital case. He alleged that he was questioned, beaten and that the reason that he confessed to the police was to get them to stop beating him, even though he hadn't committed the crime.

He alleged that he was given court-assigned counsel who refused to do anything to prepare for trial and he also affirmatively misled him about the time for raising the issue of coerced confession.

Now, Richardson said, in effect: "Because of the coerced confession, because my counsel didn't do anything for me, I had no choice other than to plead guilty; therefore, I pleaded and I made the admissions that I made in court.

In Dash we have a defendant who was arrested after he was indicted.

Q So, he put himself up to prove two separate steps. One was that he was beaten and coerced by beating into a confession.

Second, that his lawyer had advised him to plead guilty.

A No; that his lawyer refused to do anything to pre

prepare the case, to take the case to trial.

Q Did he make any complaint about his lawyer to the court?

A No; there was no allegation about complaint, but Mr. Justice, this is -- the complaints to the court are really the exception, rather than the rule. That, with the kind of client that we at the Legal Aid Society of New York City represent, people don't know enough to complain about their rights.

Q What percentage of your people who come to Legal Aid, complain about ineffective counsel, including the Legal Aid. What percentage? About 90; isn't it?

A Oh, I wouldn't think so, Your Honor.

Q Well, of the petitions filed in the Southern District, about how many claim ineffective counsel?

A I haven't seenit that often. I've been --

Q Well, what worries me is in order to sustain your position do we have to say that a charge of ineffective counsel, of itself will get this relief?

A No; you can't make a conclusory allegation of ineffective --

Q Well, what is this; he said he didn't do anything. That's rather conclusory.

A Well, here you had a ten-minute conference; taking the allegations on their face, uncontroverted, the

allegation of a ten-minute conference between an attorney and a client in a capital case. And there are --

Q Well, do you have any doubt that if that was told to any judge in New York State, they would have given a continuance? Have you any doubt in your mind?

A But yet we have a case in the Ninth Circuit where the same thing happened; the defendant didn't complain and he only got his relief on a writ of habeus corpus, years after the fact.

Q I'm talking about in New York. Certainly a judge wouldn't force a man to trial who hadn't seen his lawyer more than ten minutes. You're not going to say that; are you? Force him to trial?

A Well, but still and all no complaint was made and possibly at a hearing the fact that no complaint was made might be considered dispositive either of the truth or falsity of defendant's admissions afterwards, or may not, but that's something to be considered --

Q Was that litigated in the New York courts?

A I beg your pardon?

Q Was it litigated in the post-conviction in the New York courts?

A There was never a hearing in any one of these three cases --

Q Was it alleged?

A Yes; it was. I believe all of these claims were alleged and Mr. Juviler is bringing in a --

Q But is it here in the record?

A Yes, Your Honor.

Q What happened in the New York courts?

A That there were post-conviction remedies sought probably coram nobis in all cases.

Q Well, are the papers here?

A No, Your Honor, the State never made the papers a part of the record below.

Q Well you could have; couldn't you?

A Your Honor, we were assigned in the Circuit Court of Appeals at which point the record was fixed.

Q You didn't make any effort to get them?

A No, Your Honor.

Q So, if we want to see it we will have to find a way?

A The papers were not before the District Court and that's the way the cases came in.

Q Were all three charged with the same crime?

A No, Your Honor.

Q Separate crimes?

A Separate crimes --

Q Separate places?

A Yes.

Q Separate times?

A Well --

Q With all three charging that the lawyer had made the same false statements?

A No, Your Honor. The allegations are different in each case. The allegations that I gave to you before were the allegations inthe Richardson case. The allegationsin the Dash case are completely different because Dash never challenged the competence of his attorney. Dash said that the reason he didn't go to trial and raise the coerced confession claim was because he had the -- the only trial procedure given to him in New York was an unconstitutional one. And that the failure to invoke an unconstitutional procedure is not a waiver.

Williams alleged that the -- that his attorney didn't investigate the alibi defense.

I see that my time is up.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Oberman.

MR. JUVILER: As Mrs. Oberman says, it's very difficult to assess the competency of counsel and it's rarely required that a Federal Court do so, but I wager to say that if Mr. Williams' attorney had attempted to wrest an alibit defense at trial on the defendant's fingerprint record, then the attorney wuld have come to the attention of the Appellate Division long before that divorce case.

This fingerprint record merely shows that two persons

wtih the name William McKinley, or Williams McKinley or McKinley Williams were in custody; one in Ohio and the other in New York and it expressly states that there are no finger-print cards to support this statement.

Nor must we assume that the Richardson petition, even with the supplementary affidavit, establishes ineffective assistance of counsel.

The defendant Richardson was charged with a double killing by stabbing; two first degree murders. The attorney secured for him a plea of guilty to one second degree murder and Your Honors will recall from the pleading colloquy that his client unequivocally admitted his guilt of this crime.

Q What was he charged with?

A He was charged with stabbing to death two people at the same time.

And he admits in his motion papers before this court that the police knew that three men had seen him in the company of the deceased pair before they started an altercation which led to their death. He admits that he had blood on his clothing and he admits that these people who died were his relatives.

And he further acknowledges that he gave the police a false alibi prior to the initiation of the coercive tactics which he now alleges.

And he attributes this false alibi to his desire to avoid getting these three men in trouble.

Further, Mr. Richardson acknowledges that he did have two conferences, although they were brief, with his attorney, respecting the admissibility of these confessions and the attorney came to a reasoned decision that the best -- or that he was not going to succeed if he attempted to keep it out of evidence.

The only defense tendered to any court at any stage of the litigation against Mr. Richardson is that in his District Court habeus corpus petition, which is surely a very weak foundation for a defense to a first-degree murder charge.

At the time of the altercation Mr. Richardson alleges, involving these two persons, his relatives: "I was the only other person present and when they drew knives and started stabbing at each other I tried to stop them and break them apart, but I couldn't. I only succeeded in getting my clothes bloody. They took me to the stationhouse and I tried to explain whathappened as far as I knew, and showed them my bloody clothes. Then they booked me on homicide."

Q That was notin New York City?

A No; that was New York County.

Q Richardson I thought was the North Distirct.

A No; Richardson -- oh, the petition was in the Northern District.

Q Oh, because that's where he was incarcerated?

MR. CHIEF JUSTICE BURGER: I think your time is up,

Mr. Juviler. Thank you for your submission.

Mrs. Oberman, you appeared on behalf of the Legal Aid Society, that while you were not appointed by the Court, your Legal Aid Society fulfilled the function similar to court-appointed counsel and we thank you for your assistance to the Court.

MRS. OBERMAN: Thank you.

MR. CHIEF JUSTICE BURGER: Counsel, we thank you. The caseis submitted.

(Whereupon, at 2:05 o'clock p.m. the argument in the above-entitled matter was concluded)