Supreme Court of the United States

October [redacted] TERM, 1969

In the Matter of:

Docket No. 270

ROBERT M. BRADY,

Petitioner,

vs.

UNITED STATES,

Respondent.

Place Washingto , D. C.

Date NOvember 18, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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Petitioner

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Washington, D. C.
November 18, 1969

The above-entitled matter came on for hearing at 10:07 o'clock a.m.

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

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 270 Brady against the United States.

ORAL ARGUMENT BY PETER J. ADANG, ESQ.

ON BEHALF OF PETITIONER

MR. ADANG: Mr. Chief Justice and may it please the Court: I represent the Petitioner, Robert M. Brady, in the case of Brady against the United States, which is on writ of certioriari in the United STates Court of Appeals for the Tenth Circuit.

This case involves a denial of a motion to vacate sentence made under Title 28, Section 2255 of the United States Code. I believe that this case presents three issues for resolution by this Court. These are first: whether the decision of this Court in the case of the United STates against Jackgon will be given retroactive application to prior guilty pleas under the Kidnapping Act; secondly, if the decision is to be given such retroactive application, the question is what test will be formulated to determine when such guilty pleas were involuntary prior to that decision.

And, finally, assuming that the Court does make Jackson retroactive as suggested, and does formulate an appropriate test, how the facts of the Petitioner's case fit within that test.

I would like to depart somewhat from the orthodox

procedure on oral argument and address myself initially to the first issue which I havementioned, and that is the retroactivity of the Jackson decision. And the reason I'd like to do this if the Court will allow me, is that I feel that this is a question which can and should be determined as an abstract proposition of law without reference to the facts of this case or any particular case, for thatmatter.

Also, I would like to say at this time that since we only received the Government's answer brief last Monday we were unable to have an opportunity to file a reply brief, and therefore I would like to try to concentrate on attempting to rebut the arguments which appear in the Government's answer brief.

The Government has taken a position on retroactivity which we feel is essentially a negative argument, which, as a practical matter, would allow very little or possibly no retroactive application of the Jackson decision. The Government quite rightly points out in its answer brief that there are apparently two underlying purposes for Jackson: First to prevent the discouragement of guilty pleas -- or encouragement of guilty pleas and discouragement of the exercise of the right to a jury trial.

And secondly, to stop penalizing those defendants who do assert their constitutional rights to a jury trial and to plead not guilty.

Essentially, then, the Government's argument is that you can only apply Jackson retroactively to those cases in which a defendant has pled not guilty and been tried, convicted and sentenced to death. We, of course, take the position that the first purpose, which we believe is inherent in Jackson, should also be given retroactive application.

And we have briefed three arguments in support of these contentions, as alternative arguments for retroactive application of the decision to prior guilty pleas under the Kidnapping Act.

The first of these arguments, we believe, is that it is implicit from the language of the case itself, that it should be given such application retroactively. This Court held in Jackson that the evil in the selected death penalty provision of the Kidnapping Act was that it tended to discourage of the right to plead not guilty and deterred exercise of the right to a jury trial.

Now, this evil, while it wasn't necessarily coercive, was held to be needlessly encouraging of guilty pleas and this, the Court said, had a killing effect upon the exercise of constitutional rights; that killing effect being unnecessary, was therefore, excessive.

We submit, therefore, that the rationale behind Jackson or the implicit rationale was that if the selected death penalty provision had been allowed to remain in the

Kidnapping Act there would have been a potentiality in the future for involuntary guilty pleas and we submit that if that is recognized then there has to be a recognition of the implicit corollary and that is that guilty pleas prior to Jackson might also have been involuntary. And if that presumption is accepted, then I feel that Jackson has to be given retroactive application to prior guilty pleas automatically, because this Court has held in the past that involuntary guilty pleas are subject to collateral attack.

Q I realize yours is a Federal case, but in your retroactivity argument do you think that whatever rule is appropriate here is also appropriate in the application of the actions of the states?

A I feel that it is, Your Honor, assuming that we are talking about a statute with the same kind of a sl selective death penalty provision.

Q You're not concerned with that, I recognize, but --

A Well, I believe that it should be applicable, postulating that if we had the same kind of a statute and the same kind of aselected death provision I would submit that it sheuld be applicable to the states.

The Government has made an argument inrebuttal to our contention on retroactivity that when this Court stated in the Jackson decision that not every defendant who pleads

guilty under the Kidnapping Act to a capital indictment, does soinvoluntarily.

This Court implicitly rejected any contention that prior guilty pleas should be open to collateral attack. We feel that that conclusion hardly follows from the language of the case. We feel that all the case says is that the Court is not going to say that the selected death penalty provision was not necessarily coercive, because that would have meant invalidating all prior guilty pleas automatically. We submit that the Court merely was recognizing that some guilty pleas could be involuntary in the future, had the selected death penalty provision been left in the Act.

And, as I stated before, I think the implicit corollary is that some guilty pleas in the past could also have been involuntary. And for that reason, we submit that Jackson should be, under the language of the case, applied retroactively to prior guilty pleas.

Now, an alternative argument which we have made is that under the doctrine of absolute retroactive invalidity of an unconstitutional statute there should also be retroactive application to prior guilty pleas. And because of the time limitation on this argument and the fact that the Government hasn't made any response to this contention, I am going to skip over it unless the Court has some questions.

Another argument which we made is, again, an

alternative argument. The Court has heard it yesterday, and that is that under prior decisions of this Court on the retroactivity question, Jackson should also be applied retroactively to prior guilty pleas. These decisions are discussed in detail in our brief in chief on pages 28 to 32 and I am sure they are more familiar to the Court than they are to me, so I am not going to discuss them in any detail, except to mention that the Court did say in the case of Linkletter against Walker that there are three tests for determining retroactivity prior decisions and that these tests are:

First, the purpose to be served by thenew rule. Secondly, the extent of reliance upon the old rule by law enforcement authorities and finally, the effect upon the administration of justice of the retroactive application of the new decision.

In Desist against the United States, this Court held that the most important of these considerations is the purpose to be served by the new rule and it has been further held that when the purpose of the new rule is to assure fair trials and reliable verdicts. In other words, to insure integrity of the fact-finding process, then that consideration is paramount andother considerations, such as reliance by law enforcement officials, or an adverse effect upon the administration of justice, deserve little consideration.

And we submit thatunder that philosophy, that the

Jackson decision must also be given the retroactive effect which we suggest.

The effect of the selective death penalty provision in the Federal Kidnapping Act, in inducing individuals to plead guilty in order to avoid imposition of the death penalty was not merely to denial them a fair trial, but it was to deny them any trial at all. And we submit, therefore, that it is obvious thatthe implicit purpose of Jackson was to ensure fair trials if individuals wanted trials and ensure reliable verdicts if they are going to plead guilty.

And I feel, therefore, that because of this and because of the authorities cited, Jackson should be given retroactive application to prior guilty pleas.

Now, the Government has made to arguments in response to this. First the Government has said, "If we give Jackson such retroactive effect, we are probably going to have a substantial adverse effect upon the administration of justice." But in the cy next breath the government says:"Well, there are only about 120 Federal prisoners now in custody under guilty pleas or bench trials under the Kidnapping Act. And then it further admits that not all of these individuals are incarcerated under capital indictments.

And, as I will show the Court later, we are only concerned with capital indictment situations. So, the number of individuals that we are dealing with is something less than

120 under the Kidnapping Act. Even if we add to this number those individuals who are incarcerated under the Federal Bank Robbery Act or similar state statutes having select death penalty provisions, we submit to the Court that the number we're talking about really isn't that great; and even if every one of these cases were to be reviewed onthe collateral attack we don't feel that there would be a substantial adverse effect upon the administration of justice; especially, when compared to the potential adverse effect that there would have been had this Court made Miranda or Griffin or Mapp retroactive. Had one of those decisions been made retroactive the effect would have been that there would be thousands of prior convictions as opposed to the mere handful of cases we are talking about here.

So, we don't feel, for this reason that the argument of the Government on a substantial adverse effect is really supported by the facts which the Government cites.

In addition to this, the Government has made another argument and this is that the purpose of Jackson doesn't require that we give it retroactive effect to prior guilty pleas. The Government says, and I pointed this out previously --

Q Mr. Adang, wouldn't the decision in your favor on retroactivity have impact far beyond the Kidnapping Act.

A I don't believe it would, Your Honor. Well, the Kidnapping Act and the Federal Bank Robbery Act and state

statutes where we do have select death penalty provisions.

Q Well, that may be in six or seven or eight state, but when you start counting up numbers you can't just talk about the Kidnapping Act.

A Well, that is a possibility but I don't think that the Government has --

Q Possibility?

A I believe so, Your Honor. As I stated --

Q Wouldn't it be stronger than that?

A Well, I don't know how many cases we're talking about. Certainly I don't believe it would be the kind of effect that we would have had Miranda been made retroactive.

Q But we don't know, so you can't just say it's 120.

A Oh, I didn't say -- I didn't mean to imply that, Your Honor; I'm sorry. But all I'm saying is that the Government's argument on a substantial adverse effect simply isn't supported by the facts which they cite in their brief and therefore, we have the nebulous question.

As I was stating, the Government has made a second argument on the purpose of Jackson and they state that Jackson should only be applied to those cases in which an individual has pled not guilty and been tried and convicted and sentenced to death.

Q That was the holding in Jackson, wasn't it?

A No, it wasn't, Your Honor, because --

Q The holding in Jackson was that the death penalty provision of the Federal so-called Lindbergh Law was unconstitutional, period. Isn't that true?

A I believe that that is correct. And I think that while the facts of Jackson were very limited, I think that because of the holding it encompasses our argument on retroactivity.

I think that the Government's argument is, as I pointed out, simply a negative argument because unless the Government has found some magical formula for resurrecting the dead, I don't think that there would be very much retroactive application under their theory. I don't, again, have all of the figures on the death penalty convictions, but as I understand it, there have only been six of them under the Federal Kidnapping Act. And I understand also that all of these people have already been executed. Even again, if we take into consideration the possibility that there are some people now under death penalty sentences under the Bank Robbery Act, which I don't believe there are, because theonly case that has come up in the last year has been Pope against the United States. And individuals who may be sentenced under state statutes on death penalty, we're probably not talking about a very great number of individuals and I think it's really infinitesimal. And I feel, therefore, that essentially the

Government's argument for retroactivity is that there wouldn't be any retroactivity or very little, in any case.

Q Does the rationale you are urging on us have any possibile application to the situation where defendant enters a total plea to, let us say, any lesser offense: manslaughter on a second-degree murder charge, where no death penalty is involved; where he is giving up his jury trial and in order to avoid a heavier penalty.

A I don't believe that it does, Your Honor; and if I may, I will address myself to this argument, because the Government has raised it in its answer brief.

The Government takes the position that even if we have needless encouragement in this case or in any case we're dealing with of a guilty plea that doesn't equate with involuntariness or coercion and therefore, evidence of needless encouragement is irrelevant. So, the Government cites, in factual support of this, the situations involving multi-count indictments or several indictments against the same individual or the lesser degree of the same crime. And the Government says that in this situation an individual might very well be encouraged toplead guilty to a lesser degree of crime in order to have some counts dropped against him or some indictments dismissed or to get a lesser degree to avoid a harsher penalty

Q Isn't that the whole idea underlying the concept of plea negotiations and discussions?

A That's correct, Your Honor, I think there is a definite distinction. I think that in the plea bargaining situation it is implicit that the penalties which the state can create for the various degrees of crime are all valid and consitutional penalties. In other words, the state can create a crime of first-degree murder and make the death penalty the sentence and create a crime of second-degree murder and make 20 years the maximum sentence and in that situation the indidual is definitely encouraged to plead guilty to the lesser degree to avoid the harsher penalties.

But, as I stated, the distinction is that there the Government or the State can't create the alternatives and therefore the choice that derives from those alternatives is not unnecessarily compelling. In other words, I would submit that there the encouragement is only incidental to the fact that there was a choice available and that encouragement is not unnecessary and it's not excessive, whereas in the death penalty situation it's inherent in the opinion of Jackson that the fact that there is a choice available, is itself, unconstitutional.

There the Court was implict in the essence of that decision that the state cannot create two different penalties for exactly the same degree of crime, and impose the harsher penalty only when an individual chooses to assert his constitutional rights. So, therefore, in that situation, because there is a choice which is compelled and that choice is unnecessary

and avoidable the encouragement which results from that choice is also unnecessary and excessive. And yet, I believe it is sufficient to make a guilty plea involuntary.

So, what we end up with is a situation: in the plea bargaining case we have a choice available, but that choice is one which can be imposed by the state; the encouragement which derives fromthat choice is, therefore, not unnecessary and not excessive and not illegal.

However, in the Jackson situation or the Kidnapping Act situation the fact that there is a choice is in itself unconstitutional and therefore the encouragement which derives from that choice is unnecessary and excessive and can be avoided in the words of the Government.

So, I don't think that if you were going to make Jackson retroactive, as we suggest, that it necessarily going to affect the plea bargaining situations.

Q What about the situation where there is a bargain -- or a plea without bargain for a lesser degree or another crime or included offense, just a straight charge and a plea of guilty in return for a recommendation of only a certain sentence? Then you are right back in Jackson; aren't you, as you read it?

A To some extent, but in that situation it's obvious that the recommendation is not binding on the Court, so there is really no guarantee.

Q Oh, I know, but the Court accepts it.

A Pardon me?

Q The Court accepts it and what if it weren't acceptable? What if he pled guilty and the bargain wasn't kept?

A Well, again, I don't think that would invalidate the plea, because the courts have always held, and in this kind of a situation the recommendation of the United States Attorney or the prosecutor in the case is not binding upon the Court. So, I don't think that in that situation the claim that the plea was involuntary would be necessarily upheld.

Q But if it were accepted, the court followed the recommendations; the court asked the prosecutor what he recommends -- perhaps that isn't good practice, but assume it did, and the prosecutor made a recommendation and it was taken and accepted and it was a plea of guilty.

A Well, again, I think all I can say about it is that you get down to a negotiating situation or bargaining situation and we've always held that plea bargaining is not itself invalid. Whereas, in the situation of the death penalty provision, that's there in the statute and it, itself, creates a compulsion.

Another analogy might be the situation where a judge on arraignment says to the defendant: "If you plead guilty we're going to give you 20 years imprisonment; if you plead not

guilty and are convicted, I'm going to give you 50 years imprisonment." And I think in that situation it's fairly obvious that the guilty plea, if one results, is invalidated; it is involuntary.

And I think our situation here, instead of the judge saying that, the statute says it: To plead not guilty the maximum penalty is the death penalty; whereas if you plead guilty the most you can get is life imprisonment.

Well, I feel that that is a more consistent analogy with the situation and it does support our argument.

I was going to say previously, that in addition the Government's theory, if one thinks about it, would be to punish the potentially innocent individual and reward the guilty individual. In other words, the Government would say, "Let's reward those people that were tried and convicted and sentenced to the death penalty by reducing their sentences, but let's not go into prior guilty pleas on collateral attack and thereby, I think we would potentially punish individuals who might be innocent or who might be incarcerated because of a clear violation of their constitutional rights.

So, I think for all of these reasons Jackson should be be given the retroactive application which we request.

Now, with that, assuming that the Court does adopt that argument, I'd like to give a brief statement of the facts of this case to present the framework for the remaining arguments

which we have in our brief.

Now, Brady here was indicted under the Federal Kidnapping Act on January 27, 1959 and it was a capital indictment. He was arraigned on the following day and he pled not guilty.

On April 30, 1959 he was again brought before the judge and he changed his plea from "not guilty" to "guilty." On May 8, 1959 he was sentenced to 50 years imprisonment which was later reduced by Executive clemency.

On September 20, 1967 he filed his motions to vacate sentence and, as I stated, he contended that his plea was coerced and not entered freely and voluntarily. And the argument he made was essentially the argument which appeared in the Jackson case. There were other claims in themotion but they are not the issue in this proceeding.

On March 20, 1968 his case came on for hearing and evidence was introduced on all of the claims and the evidence on the influence of the death penalty provision was set out in our brief and I'm not going to try togo into it; it's quite detailed; but I believe that the Government has admitted in its answer brief that Brady was undoubtedly encouraged andmotivated to plead guilty by fear of the death penalty and his desire to avoid the inquisition of that penalty.

After allof the evidence was in the District Court denied the motion on all the grounds stated and it held that the

Federal Kidnapping Act was constitutional. And I feel that it implicitly held that because the statute was constitutional Brady's claim that fear of the death penalty coerced him was without any merit.

On April 8th of last year this Court handed down the decision in the Jackson case and the denial of Brady's motion was appealed. And the Tenth Circuit on December 17, 1968 affirmed the decision.

Now, the Tenth Circuit apparently held that the decision in the Jackson case should be applied retroactively to the guilty pleas but it went on to state that the existence of the proscribed provision did not necessarily imply that all individual prior to Jackson who had pled guilty, did so involuntarily. And therefore, it affirmed the District Court's conclusion that Brady's guilty plea was influenced and encouraged by factors other than the death penalty provision. It held that -- that was supported by substantial evidence.

In the second point in our brief in chief we have proposed a test to be utilized by District Courts in determining when prior guilty pleas are involuntary. Now, as I stated before, we're only concerned here with cases where the death penalty was a reasonable possibility and that would be only those cases where there was a capital indictment. Once that requisite is satisfied, the next question is: what kind of evidence will be necessary to show that a guilty plea is

involuntary.

And I submit that the only practical and reasonable test that can be formulated is a simple test and rather undefined and that is that if the District Court can find from the evidence that fear of the death penalty and the desire to avoid the imposition of that penalty was a definite factor; a substantial factor in motivating the guilty plea, then that should be sufficient to invalidate the guilty plea.

Q Would there always be a definite factor? How could it not be?

A Well, I think that you can probably postulate situations, Your Honor, where it wouldn't be. For example, I think maybe in the situation where an individual was indicted under the Kidnapping Act and also was indicted under a state charge of first degree murder you might conceivably, very well, plead guilty to the kidnapping charge to have the state charge against him dropped and you might not even consider the possibility of the imposition of the death penalty under the kidnapping act.

But, really, that kind of argumentation doesn't lend anything to the question; it kind of obfuscates the issue. I think that there certainly can be cases where an individual would plead guilty, not out of fear of the death penalty, but out of a motivation -- a genuine sense of guilt. The practical question is that in every one of these cases an individual is

going to claim that he was afraid of the death penalty and you get involved in an evidentiary problem and the question is: how do you resolve that?

And I think that the only way to do that is to give tbe District Courts this general test and let them go from there; because I think as a practical matter, the District Courts aren't going to believe the testimony in every case of the defendant himself, that he was afraid of the death penalty. I think they are going to require that there be some more independent, objective evidence of the influence of the death penalty.

And I think that this kind of evidence could come from the lawyers who were involved or possibly from other witnesses who were involved at the time who would have less of a motivation to fabricate a story than the accused himself.

Q If there is a complete implementation of Rule 11 and the judge who takes the plea and makes an inquiry which develops all the facts, which cumulatively would make for guilt, would you then say that that satisfies the test that you have advanced?

A That's postulating leaving the selective death penalty in, I suppose and I would say no it would not. Because I think that question has already been dealt with in Jackson.

Q If it gives a complete demonstration on the record at the time of the plea that the man was guilty. You

You say that would not be enough under Jackson?

A Well, I don't know how you make a complete demonstration on the record at the time of the plea thathe is guilty.

Q Well, isn't that the purpose and thrust of Rule 11? The new Federal Rules of the amended rules?

A The purpose and thrust is to determine whether he's making his plea voluntarily, not whether he's --

Q And whether there is a factual basis for the plea; that's the language of the rule; isn't it?

A Well, yes, that's true. I stand corrected on that. That is the basis of it, to determine whether there is a factual basis and whether there -- but the factual basis is a practical matter as determined by the defendant standing there and saying, "Yes, I did it," which is his guilty plea. In other words --

Q Well, if the District Judge -- if the trial judge is doing his task the way it should be done, he will not accept that. He will ask the man to recite what he did and develop on the record the full statement of all the facts -- a summary of the facts that would be in the case against him.

A All right, adopting the Court's line of reasoning, assuming there is some factual basis for the plea, that still does not necessarily rule out that here the death penalty would motivate and encourage that guilty plea.

In other words, a factual basis does not necessarily mean that the man is, in fact, guilty.

Q Your argument almost carries us to the point that you can't have a guilty plea in these circumstances.

A Well, with the death penalty provision in there I would say that is correct. If we take the death penalty provision out then we would alleviate the problem. And that's the crux of the matter, the death penalty provision is the fly in the ointment and I think if we take that out then we alleviate the problem.

I see that my time is rapidly coming to a close and I would just like to summarize our last point briefly and that is that it is clear on the record that Brady's guilty plea was encouraged andmotivated by fear of the death penalty and that it was a substantial factor in his plea. His lawyers testified to this; other witnesses testified to this and there was evidence on the statements made by the Court to him at the time of his plea and at the time of all of these proceedings. And the Government had admitted that there was encouragement of his guilty plea.

And I feel, therefore, that because of this evidence Brady's guilty plea should be vacated and his motion to vacate sentence should be granted.

The Government's argument is that even if we show encouragement of a guilty plea under our test that wouldn't be

enough to invalidate a guilty plea, because it wouldn't be involuntary. And the Government cites cases which ostensibly hold that an individual can only show that his plea is involuntary if he is able to demonstrate that fear overcame his capacity to make a rational decision.

Now, I believe that these cases are really not in point. They all involve the plea bargaining situation which I have discussed previously with the Court and it's always been held in the plea bargaining situation that guilty pleas bargained for are not involuntary. And I see that my time has run out and I --

Q Supposing you didn't have Jackson on the books at all; what would be your position? Would you be here at all?

A I don't quite understand the question.

Q Suppose the Jackson decision had never been made.

A Well, if the Court's decision had never been made I think eventually, if not this case, some other case would have -- obviously this case was based upon Jackson because it was cited in themotion.

But if Jackson hadn't been decided I think eventually a case would have gotten here anyway. Because I really believe that this is an invalid procedure and I think that it does induce involuntary guilty pleas.

Q Given Jackson, Mr. Adang, what if your client

had not pleaded guilty but had waived a jury trial and requested to be -- pleaded not guilty and requested a trial before a judge and is sentenced to 50 years in the penitentiary, as your client was, would you be here trying to set that aside? Using the reasoning of Jackson?

A I think I would, Your Honor, because I think that deterred exercise of his right to a jury trial -- but I think that in this case that's not a consideration because here there is evidence in the Appendix that the District Court, prior to the plea had indicated that he would not allow a bench trial.

Thank you.

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

Mr. Connolly.

ORAL ARGUMENT BY JOSEPH J. CONNOLLY,

ASSISTANT TO THE SOLICITOR GENERAL ON

BEHALF OF RESPONDENT

MR. CONNOLLY: Mr. Chief Justice and may it please the Court: Post-conviction hearing in this case disclosed the following facts which should be emphasized:

Petitioner was 24 years old when he pleaded guilty to the charge of kidnapping a young woman. An element of the charge and of the Government's case is that Petitioner and his co-defendant, raped their victim several times during the abduction.

Petitioner was represented by competent and experienced counsel. After thoroughly investigating the case, Counsel concluded: "That we just couldn't go to a jury; it would be almost sure conviction."

Petitioner's co-defendant, Tafoya, had given a confession which fully implicated the Petitioner. Therafter Tafoya decided to plead guilty and seek leniency from the Court onthe ground that the Petitioner was the instigator and principal actor in the crime.

Faced with the testimony of his victim and other witnesses and including, possibly, his co-defendant, Petitioner with the concurrence of his counsel, entered a plea of guilty.

Petitioner now contends that his conviction must be set aside on the authority of the United States versus Jackson. He does not argue that his guilty plea was involuntary in the traditional sense, which I will discuss in a few minutes.

Rather, his argument rests entirely on the Court's finding in Jackson that the death penalty provision needlessly encouraged guilty pleas and jury waivers.

We must assume that such encouragement was present in this case, but the issue here is whether the needless encouragement so far undermines the validity of the guilty plea that Petitioner is thereby entitled to release on habeus corpus.

The function of the writ of habeus corpus as the Court said in Faye versus Noya, is to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Is continued incarcerations under a needlessly encouraged guilty plea, an intolerable restraint?

We submit thatit is not.

In our brief we consider two theories under which the validity of the guilty plea might be affected by the needless encouragement rationale of Jackson.

The first theory which I will discuss in more detail here is that Jackson announced a new standard to be applied in determining the voluntariness of a guilty plea. This is the approach taken by the Fourth Circuit in the Alford case, which was argued yesterday.

The second theory is unrelated to the concept of voluntariness. The elements of this theory are: (1) that Jackson established, in essence, a right to be free from needless encouragement and (2) that this right should be applied retroactively so other defendants who had previously pleaded guilty are entitled to automatic release on habeus corpus.

We turn to the involuntariness theory. It is our submission that the determination of the voluntariness of the guilty plea to a kidnapping indictment is not affected by the decision in Jackson. Even before Jackson was discarded a defendant's extreme fear of the death sentence after trial, who

had been shown to establish the involuntariness of his guilty plea.

The fact that the statute created a needless encouragement added nothing to its coercive effect. It has long been held that an involuntary guilty plea is invalid and subject to collateral attack. Continued incarceration under such a plea is, in the language of Noya, tolerable restraint.

We borrow from a more developed body of law concerning confessions for a statement of the test of voluntariness. That is: whether the fear or inducement to which the defendant was subjected was sufficient to overcome his capacity tomake a free and rational decision.

But more important than a statement of the test is an understanding of the policy considerations which underlie the rule.

The first of these considerations is the overridng purpose of all our rules of criminal procedure to ensure the reliability of criminal convictions. We reject guilty pleas that are the product of compulsive pressures because of our concern that suchpressure may have caused the conviction of one who is not, in fact, guilty of a crime to which he pleaded.

The second consideration which underlies the requirement of voluntariness is our concern for preserving the dignity and integrity of the individual in the criminal process. This is the fundamental principle enforced through the Fifth

Amendment privilege against compulsory self-incrimination. It is inconsistent with our adversary system of justice, to subject the individual to compelling pressures which overcome his determination to make the state prove its case against him.

With these considerations in mind we think that a fear of the death penalty which overcomes the defendant's capacity to make a free and rational decision, renders his guilty plea involuntary. Such a defendant who pleads guilty in a manner which precludes the death penalty is entitled to relief even if the death penalty provisions are entirely constitutional.

But there is no showing in this case of a fear of the death penalty which deprived the Petitioner of his capacity to make a free and rational choice. He was represented by competent counsel; fully investigated the prosecution's case and the possible avenues of defense.

Counsel concluded that there was no reaslistic hope of acquittal if the case went to trial. Petitioner had been counting upon the assistance of his co-defendant, Tafoya in expectation that they would both give consistent and exculpatory testimony. But when Tafoya who had given a confession implicating the petitioner, decided to plead guilty Petitioner concluded that he had no choice but to do the same and seek leniency from the court.

There is no indication here that Petitioner was so moved by ear of the death penalty that he could not realistically assess his chances for conviction or acquittal. This is not a case where the defendant abandoned a substantial defense because of his fear of execution. This is a case where the defendant knew we would be convicted and fully decided that there was no reason to risk a sentence of death.

But the question remains whether Petitioner's guilty plea should be viewed as involuntary because the death penalty was a needless or unnecessary burden on his right to a jury trial.

We believe, as Mr. Justice White recognized in a different context in the Harrison case, that the compulsive effect of the capital punishment provision is not related to the necessity or the validity of the provision. The fact that the death penalty provision was subsequently declared invalid gives no additional reason to conclude that Petitioner's will was overborne. It gives no reason to believe that Petitioner was not, in fact, guilty of the charge.

The needlessness of the encouragement, we submit, is not relevant to the question whether that encouragement produced an involuntary guilty plea.

Q Now, what you are saying, I gather, in your argument is, leaving out the question of retroactivity, that the Jackson decision has no impact at all upon what the issue

is in determining whether a plea of guilty is coerced or not coerced.

A That's right, Mr. Justice.

I will leave to our brief the discussion of the alternative theory on which petitioner might be entitled to relief on the basis of Jackson.

Under that theory Jackson would be viewed as creating a new constitutional right to unencumbered choice. The choice of plea or mode of trial free from needless encouragement. If this right is given retroactive application then Petitioner and all other defendants who pleaded guilty under the Kidnapping Act are entitled to their immediate release.

Although we doubt that the Jackson decision was intended to create such a right, we analyze this theory in our brief and we conclude that retroactive application of such a right is not appropriate because the purposes of the rule do not cast doubt on the accuracy or integrity of prior convictions.

Petitioner's argument that the principle of Jackson was that there was a possibility that there would be involuntary pleas in the future and hence, a possibility that there were involuntary pleas under the Kidnapping Act prior to the invalidation of the death penalty provision is fully answered, as it was in Duncan versus New Jersey by the fact that such

defendants had available to them the vehicle to show their involuntariness of their guilty plea.

Finally, it may be argued that our inquiry had been too limited and that it is difficult to believe that the Jackson decision had no effect whatsoever on previous guilty pleas. In preparation of our brief and our argument we have tried to explore other possible theories on which Jackson would affect past convictions. Indeed, three different theories are presented by the three individuals in these cases argued yesterday and today. But the difficulty in selecting any of these theories, is that the Jackson opinion, if it is to be applied to previous convictions at all, gives no indication as to which defendant should and should not benefit from it.

And the proper retrospective effect of the rule is thus so uncertain we believe that the appropriate course is to decline to release serious offenders without a showing of the involuntariness of the guilty plea under established standards.

For these reasons we submit that the judgment of the Court of Appeals can be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you. Does Mr. Adang have any more time left?

Thank you, Mr. Adang and thank you, Mr. Connolly, and the case is submitted.

(Whereupon, at 10:58 o'clock a.m. the argument in the above-entitled matter was concluded)