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Recent Cases

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RECENT CASES

Criminal Procedure—Federal Rules of Criminal Procedure—Rule 11 Statements Concerning Voluntariness of Guilty Plea Not Conclusive Against Contradictory Petition for Post-Conviction Relief Under 28 U.S.C. § 2255

I. Facts and Holding

Petitioner, a federal prisoner, filed a motion under 28 U.S.C. § 2255[1] seeking to vacate his conviction and sentence resulting from a guilty plea.[2] Alleging a threat by law enforcement officers against his pregnant wife and an unkept promise of a reduced sentence by his attorney,[3] petitioner contended that his plea had been coerced[4] in violation of Rule 11 of the Federal Rules of Criminal Procedure,[5]

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1. 28 U.S.C. § 2255 (1970) provides in part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of . . . laws of the United States . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence . . . .
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

Petitioner had filed two previous § 2255 motions, both of which had been denied. An appeal was taken only upon the second denial but was dismissed for failure of petitioner to prosecute.

2. Petitioner had pleaded guilty to one count of bank robbery. Two additional robbery counts were dismissed.

3. Petitioner alleged that he had been threatened with the arrest of his pregnant wife if he refused to plead guilty. In addition, petitioner alleged a promise by his attorney that upon pleading guilty, he would receive a nominal sentence to a center for treatment of his heroin addiction. Petitioner also alleged a promise of dismissal of the two other counts against him in exchange for a plea of guilty to one count. *See* note 53 *infra*. After entry of his guilty plea, the two additional counts were dismissed and petitioner was sentenced to 15 years in prison.

4. Petitioner also alleged (1) that the plea had been induced by an unconstitutionally obtained confession and (2) that the trial court had erred in failing to order sua sponte a determination of mental competency after having been advised that the accused was a drug addict. The court disposed of the first claim by holding that once petitioner had admitted his guilt of the offense with which he was charged, he could not raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the plea. The court disposed of the second issue by holding that, since the trial judge had determined after careful questioning and close observation that the accused was not under the influence of drugs and that his plea was voluntary, the Rule 11 record was conclusive as to petitioner's mental capacity at the time of the plea.

5. At the time of petitioner's plea in 1969, Rule 11 of the Federal Rules of Criminal

which requires a voluntary and knowledgeable plea. Relying upon the record of the Rule 11 hearing, which revealed extensive questioning by the presiding judge as to the voluntary nature of petitioner's plea,[6] the United States District Court for the Central District of California denied the motion. On appeal to the United States Court of Appeals for the Ninth Circuit, *held*, remanded.[7] Statements concerning the voluntariness of a guilty plea made by an accused at a hearing conducted in full compliance with Rule 11 of the Federal Rules of Criminal Procedure are not conclusive against subsequent contradictory allegations of involuntariness made in a motion pursuant to 28 U.S.C. § 2255 to vacate an erroneous sentence. *Mayes v. Pickett*, 537 F.2d 1080 (9th Cir. 1976).

Procedure provided in part:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea . . . . The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual hasis for the plea.

FED. R. CRIM. P. 11 (1968).

6. The Rule 11 record revealed an extensive colloquy hetween Mayes and the presiding judge. Prior to accepting the guilty plea, the Rule 11 judge enumerated Mayes' constitutional rights and explained that such rights would be waived by a plea of guilty. Mayes was asked if he understood the nature of the charge against him and the maximum penalty for the offense, and he answered in the affirmative. The court then advised Mayes of the maximum penalty that could be imposed. Asked if any threats had been made against him or his family, Mayes responded in the negative. Asked if any promises of leniency or of a reduced sentence had been made to induce his plea, Mayes responded in the negative. Asked if his attorney had told him what sentence the court would impose as a result of a guilty plea, Mayes responded in the negative.

Asked if he were under a doctor's care or if he were regularly taking any medication or if he had ever been under a psychiatrist's care, Mayes answered in the negative. The court was informed by defense counsel that Mayes was a heroin addict. When informed by counsel that petitioner had been advised of the possibility of hospitalization, the court specifically informed Mayes that counsel's statement did not constitute a promise in exchange for a plea of guilty and that sentencing was left entirely to the court.

The presiding judge questioned both Mayes and his attorney to determine that an adequate factual basis existed for Mayes' plea. Mayes' counsel denied that his client was pleading guilty because of any illegally obtained evidence. Finally, the court asked Mayes if he believed that he bad had ample time to confer with his attorney and if he were satisfied with his representation, and Mayes answered in the affirmative.

After this extensive exchange, the court found that Mayes' plea was made voluntarily with full knowledge of the charge against him, that there had been no promises of any kind made to him by anyone, and that no threats or coercion had been exerted upon him in any manner. *See* Mayes v. Pickett, 537 F.2d 1080, 1083-86 n.1 (1976).

7. The case was remanded for an evidentiary hearing by the district court on the merits of petitioner's motion. *See* 28 U.S.C. § 2255 (1970).

II. LEGAL BACKGROUND

Responding to an increase in the number of habeas corpus petitions filed by federal prisoners in the district courts whose jurisdictions included federal prisons,[8] Congress in 1948 enacted 28 U.S.C. § 2255.[9] The statute's purpose is to provide federal prisoners with an expeditious remedy for correcting erroneous sentencing without resort to habeas corpus.[10] In an effort to restrict the number of evidentiary hearings required, section 2255 provides for denial of petitions in which the motion, files, and records of the case conclusively demonstrate that the prisoner is entitled to no relief.[11] Since approximately two-thirds of all federal criminal prosecutions are disposed of by guilty pleas,[12] one of the allegations most often advanced in connection with a section 2255 claim is that the guilty plea was involuntary and thus insufficient to support the sentence imposed.[13]

In addition to the post-conviction relief available to federal prisoners under section 2255, safeguards against an involuntary guilty plea are available when the plea is entered. Since 1946, federal plea proceedings have been governed by Rule 11 of the Federal Rules of Criminal Procedure. Rule 11 requires that, before accepting

8. Since habeas corpus applications had to be filed in the district of confinement, relatively few federal district courts were required to handle an inordinate number of habeas corpus actions. In fiscal year 1945-1946, 7 district courts heard 69.6% of all habeas corpus petitions, an increase from 61.9% for the same districts in fiscal year 1940-1941. *See* Speck, *Statistics on Federal Habeas Corpus*, 10 OHIO ST. L.J. 337, 341 (Table 1) (1949). The total number of habeas corpus petitions filed in the district courts by both federal and state prisoners increased from 598 in fiscal year 1940-1941 to 1,291 in fiscal year 1945-1946. *Id.* Despite such an increase, the number of releases by writs of habeas corpus remained constant. The proportion of petitioners successfully securing release declined, for example, from 10.4% in fiscal year 1936-1937 to 3.2% in fiscal year 1945-1946. *Id.* at 357 (Table 9). *See also* Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1948); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171 (1949).

9. Act of June 25, 1948, ch. 646, § 1, 62 Stat. 967.

10. *See* H.R. REP. No. 308, 80th Cong., 1st Sess. A180 (1947). The purpose was effected by providing that a federal prisoner could file a motion to vacate with the court that imposed the sentence, regardless of the jurisdiction in which he ultimately was confined. 28 U.S.C. § 2255 (1970).

11. 28 U.S.C. § 2255 (1970).

12. *See* 1975 U.S. ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 264 (Table 53); 1974 U.S. ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 289 (Table 76), 291 (Table 77). The percentage reported is derived from analysis of federal criminal cases disposed of by guilty pleas for the period 1967-1975.

13. Collateral attacks on guilty pleas under § 2255 also have been based upon allegations of counsel incompetency and of denial of basic constitutional rights, subjects beyond the scope of the present discussion. *See, e.g.*, Brady v. United States, 397 U.S. 742 (1970); Note, *Post-Conviction Relief from Pleas of Guilty: A Diminishing Right*, 38 BROOKLYN L. REV. 182 (1971).

a guilty plea, the presiding judge must address the accused to determine that the plea is made voluntarily and with understanding of the nature of the charge and the consequence of the plea.[14] Rule 11 was amended substantially in 1975 to identify more specifically what must be explained to the accused and what information must be obtained from him prior to acceptance of the plea. The rule as amended also requires that a verbatim record of the proceedings be maintained to set forth the extent of the court's explanations and inquiries.[15]

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14. *See* note 5 *supra*.

15. Rule 11 as amended provides in part:

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

Since Rule 11 requires an extensive, recorded hearing to determine the voluntariness of a guilty plea, the Rule 11 transcript becomes one of the most important records reviewed for disposition of section 2255 motions alleging an involuntary plea. The standard of conclusiveness to be applied to the Rule 11 record in section 2255 proceedings has provided a difficult and controversial question for the federal courts.

In *Machibroda v. United States*,[16] the United States Supreme Court held that a section 2255 motion for a hearing must be granted when the petition contains detailed factual allegations of occurrences outside and not contradicted by the Rule 11 record which, if true, would warrant relief.[17] In *Machibroda* the petitioner alleged inducement of his guilty plea by threats of subsequent prosecution on other counts and by unkept promises of leniency. The transcript of the Rule 11 hearing revealed that the presiding judge merely had asked petitioner whether he desired to plead guilty and had accepted the plea when petitioner answered in the affirmative.[18] In addition, a detailed affidavit containing the name of the individual alleged to have made such threats and promises and the alleged

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(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

. . . .

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea sball be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

FED. R. CRIM. P. 11.

16. 368 U.S. 487 (1962).

17. *Id.* at 494-95.

18. United States v. Machibroda, 184 F. Supp. 881, 885 (N.D. Ohio 1959).

dates and places when such representations were made was attached to the section 2255 petition.[19] While noting that petitioner's claim for relief was "marginal,"[20] the Court concluded that a hearing was required because the petitioner's allegations of an involuntary plea (1) were not contradicted by any of his statements in the Rule 11 transcript and (2) were of sufficient factual specificity.[21] The United States Courts of Appeals for the Sixth Circuit[22] and for the

19. 368 U.S. at 490-92 n.1. Petitioner's affidavit specified in part:

That affiant was interviewed in the County Jail on or about February 21, 1956, by one Clarence M. Condon who represented himself to be as Assistant United States Attorney in charge of the prosecution of alleged bank robberies committed at the Waterville and Forest Banks . . . .

. . . .

That the said Clarence M. Condon represented to the Affiant that if the Affiant would waive indictment in case no. 10348 and plead guilty in cases Nos. 10345 and 10348 the Court would not impose a sentence in the excess of twenty (20) years in Case No. 10345 and that any sentence imposed in Case No. 10348 would not be in the excess of ten (10) years and would be ordered served concurrently with the term imposed in case No. 10345.

That on the assurance of the said Clarence M. Condon that the sentences would be imposed as heretofore set out . . . , the Affiant agreed to waive indictment in case no. 10348 and plead guilty to both cases. (This interview was held on or about February 21, 1956.)

. . . .

That on or about May 22, 1956, the said Clarence M. Condon again interviewed the Affiant at the County Jail and informed Affiant that because of Affiant's unfavorable testimony at the trial of a co-defendant the Court was vexed and there might be some difficulty in regards to the promised twenty (20) year sentence.

That the said Clarence M. Condon admonished the Affiant that he had tried to warn him during the trial of the co-defendant that Affiant would shortly appear before this Court for sentence.

. . . .

That the Affiant immediately became agitated and hotly informed Mr. Condon that he was going to tell his Attorney the whole story and demand that the Court be informed of the agreement.

That the said Clarence M. Condon assured the Affiant that in the event a sentence in the excess of twenty (20) years was imposed the United States Attorney, himself, would move within sixty (60) days for a reduction of the portion of the sentence in excess of twenty (20) years; that the Affiant had nothing to worry about if he kept his mouth shut; that on the other hand, if Affiant insisted in making a scene in a matter of his own making, there were the unsettled matters of the robberies of the Trotwood and Canal Fulton Banks which would be added to the Affiant's present difficulties.

20. *Id.* at 496.

21. *Id.* at 494-95; *accord*, Sanders v. United States, 373 U.S. 1, 19-20 (1963). In Raines v. United States, 423 F.2d 526 (4th Cir. 1970), however, it was determined that letters, exhibits, and additional evidence available but not previously a part of the record might be considered by a district court in determining the necessity for an evidentiary hearing under § 2255. A similar rule has been followed in other circuits, including the Ninth Circuit. *See, e.g.*, United States v. Tweedy, 419 F.2d 192 (9th Cir. 1969); Austin v. United States, 408 F.2d 808 (9th Cir. 1969).

22. Scott v. United States, 349 F.2d 641 (6th Cir. 1965). Petitioner in *Scott* alleged inducement of his plea by promises of leniency. Examination of the transcript of the Rule 11

Third Circuit[23] subsequently adopted the *Machibroda* standard.

The first indication of a departure from the exacting two-part *Machibroda* standard was provided by the United States Court of Appeals for the Second Circuit in *Trotter v. United States*.[24] In considering petitioner's claim of inducement by promises of a suspended sentence, the court neither examined the Rule 11 record for contradiction nor passed upon the factual sufficiency of petitioner's allegations. While technically basing its decision on the fact that the government had not denied petitioner's allegations in the district court, the *Trotter* court bolstered its holding by noting that, in any event, the Rule 11 record was only "evidential on the issue of voluntariness . . . not conclusive."[25] The United States Court of Appeals for the First Circuit relied upon the language of *Trotter* in *United States v. McCarthy*[26] in granting a hearing when petitioner's allegations of inducement-by-promise directly contradicted the Rule 11 transcript.[27] Although adhering to the "factual allegation" element of the *Machibroda* standard, the District of Columbia Circuit refused to apply the stringent "non-contradiction" element in *United States v. Simpson*.[28] Petitioner's allegations of inducement by promises of a reduced sentence were found to contradict directly the Rule

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colloquy failed to provide a "rebuttal" to petitioner's allegations. *Id.* at 643. Petitioner's accompanying affidavit specified the language of the alleged promises and the times, places, and persons present when the promises allegedly were made. *Id.* at 642. Since both the "non-contradiction" and the "factual allegation" elements of the *Machibroda* standard were satisfied, the court concluded that a § 2255 hearing was required. The concurring opinion in *Scott* cautioned:

> [W]e remand *on the special factual allegations of this case* only because we are unable to say with confidence on which side of the line of Machibroda this 'marginal' case should be placed.

Id. at 643-44. The Sixth Circuit subsequently denied a § 2255 petition supported only by general allegations of involuntariness. Legg v. United States, 350 F.2d 945 (6th Cir. 1965).

23. Masciola v. United States, 469 F.2d 1057 (3d Cir. 1972). Petitioner alleged that an erroneous sentence prediction by his attorney had induced his guilty plea. The Rule 11 transcript revealed that petitioner had answered affirmatively the presiding judge's questions about his knowledge of the charges and his understanding of the maximum sentence that could be imposed. When questioned petitioner had responded that he had received no threats or promises to induce his plea nor any understandings as to what sentence he would receive. Denying petitioner's motion, the court held that when the Rule 11 record shows clearly that petitioner was questioned as to the voluntariness of his plea, there is no need for an evidentiary hearing to reconsider the voluntariness issue when the only claim is that counsel inaccurately predicted the sentence. *Id.* at 1059.

24. 359 F.2d 419 (2d Cir. 1966).

25. *Id.* at 420, quoting United States *ex rel.* McGrath v. LaVallee, 319 F.2d 308, 314 (2d Cir. 1963).

26. 433 F.2d 591 (1st Cir. 1970).

27. *Id.* at 593; *accord*, Correale v. United States, 479 F.2d 944 (1st Cir. 1973); United States v. Pallotta, 433 F.2d 594 (1st Cir. 1970).

28. 436 F.2d 162 (D.C. Cir. 1970).

11 transcript. Petitioner, however, challenged the authenticity of the transcript itself on the ground that the judge's questions had been devised to conceal promises made to the accused outside the courtroom. Finding petitioner's allegations sufficiently documented to satisfy the "factual allegation" element of *Machibroda*, the court concluded that, since the authenticity of the record itself was at issue, a hearing was required despite the *Machibroda* standard's "non-contradiction" requirement.[29]

The Ninth Circuit subsequently adopted a view similar to that of the District of Columbia Circuit. After a series of cases apparently adopting a rule incorporating both elements of the *Machibroda* standard,[30] the Ninth Circuit ostensibly retreated from the "non-contradiction" element of *Machibroda* in *Diamond v. United States*.[31] Diamond alleged, in a detailed description, that law enforcement officials had starved, beaten, and raped him.[32] The court

29. *Id.* at 164-65; *accord*, United States v. Curtis, 459 F.2d 1362 (D.C. Cir. 1972). On remand, the district court rejected petitioner's claim, and the District of Columbia Circuit affirmed in United States v. Simpson, 475 F.2d 934 (D.C. Cir.), *cert. denied*, 414 U.S. 873 (1973).

30. In Jones v. United States, 384 F.2d 916 (9th Cir. 1967), the Ninth Circuit essentially adopted both elements of the *Machibroda* standard. Petitioner charged a coerced plea based upon alleged threats against himself and his family and upon an undisclosed plea agreement. The Rule 11 record revealed that while petitioner had denied that any force or threats of any kind had induced his plea, no specific reference had been made to threats against his family. The court concluded that compliance with Rule 11 does not bar a subsequent § 2255 collateral attack on the plea based upon allegations of factual matters outside the Rule 11 record "which cannot be conclusively resolved by reference to that record." *Id.* at 917.

In Castro v. United States, 396 F.2d 345 (9th Cir. 1968), petitioner alleged a misinformed plea based upon erroneous information provided by his attorney. Accompanying the § 2255 petition was an affidavit from petitioner's trial counsel stating that he had erroneously advised his client about the nature of the sentence that might result from a guilty plea. *Id.* at 347. The court applied both *Jones* and *Marchibroda* and determined that a hearing was required. Relying upon both elements of *Machibroda*, the court concluded that petitioner's allegation of a misinformed plea raised factual matters outside the Rule 11 record which could not be resolved by reference to that record. *Id.* at 349.

31. 432 F.2d 35 (9th Cir. 1970). The decision represented the culmination of a series of Ninth Circuit decisions denying for lack of specificity § 2255 motions alleging coercion and unkept promises. *See* Meeks v. United States, 427 F.2d 881 (9th Cir. 1970); United States v. Mills, 423 F.2d 688 (9th Cir. 1970); Macon v. United States, 414 F.2d 1290 (9th Cir. 1969); Richerson v. United States, 411 F.2d 656 (9th Cir. 1969); Earley v. United States, 381 F.2d 715 (9th Cir. 1967).

32. Petitioner alleged that the abuse had begun on January 3, 1966, while he was confined in the Los Angeles County Jail. The petition further specified:

> [P]etitioner was for no reason put in displinary confinement, he was starved, forced to sleep on a cold cement fioor, without any blankets, and each day he was taken out and viciously beaten, Officers would put bars of soap in a sock and beat petitioner about the head and back, on one occasion petitioner was striped knecket and an officer forced a trustee to sexual entercourse petitioner in the rectum, while they stood looking on, dranking liquor and making mockery, they informed petitioner if he did not let said

provided no indication of whether petitioner's allegations were consistent with the Rule 11 record. Nevertheless, concluding that a hearing was required, the court held that when a petitioner's allegations are of sufficient factual specificity,[33] a section 2255 hearing may be warranted apparently without regard to the Rule 11 record.[34]

The movement away from the two-part *Machibroda* standard culminated in the United States Supreme Court decision in *Fontaine v. United States*.[35] Petitioner challenged the voluntariness of his plea by alleging illness and coercion by physical abuse at the time of the Rule 11 hearing. Petitioner's allegations, while contradicted by the Rule 11 record, were fully documented.[36] The Court

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trustee entercourse him in the rectum, they would kill petitioner, Petitioner was released from displinery confinement on Jan. 15, 1966 . . . . he pleaded guilty under coercion to wit: That, because of the consentent beatings and rape of petitioner he was in fear of his life.

432 F.2d at 40-41 & n.4 [orthography uncorrected].

33. *Id.* at 40. The court in *Diamond* established specificity criteria that had to be met before § 2255 motions would be granted. Allegations were to include (1) the names or descriptions of persons involved; (2) an account of the relevant acts or conduct of such persons; (3) an account of the time and place where such acts or conduct took place; and (4) a statement of how such acts of conduct prejudiced the petitioner.

34. *Id.* at 39-40. Because the *Diamond* court failed to indicate whether there had been a clear contradiction of the Rule 11 record in the case before it, the status of the "non-contradiction" element of *Machibroda* remained uncertain. The court granted a § 2255 motion in Lopez v. United States, 439 F.2d 997 (9th Cir. 1971), on grounds that petitioner's allegations of misleading promises by his attorney were sufficiently specific and that the Rule 11 record contained nothing tbat specifically contradicted his charges. *Id.* at 1000. While indicating some reliance upon the "non-contradiction" element in *Lopez*, the court in Reed v. United States, 441 F.2d 569 (9th Cir. 1971), placed great reliance upon the "factual allegation" standard. Without indicating whether petitioner's allegations of promises of leniency by his court-appointed attorney contradicted the Rule 11 record, the court merely granted a hearing because the allegations were sufficiently specific. *Id.* at 572. When the court denied petitioner's motion in Forrens v. United States, 504 F.2d 65 (9th Cir. 1974), it implied that the Rule 11 record was to he conclusive unless subsequent allegations of sufficiently factual particularity warranted otherwise. Under oath at the Rule 11 hearing, petitioner had denied inducement of his plea by any plea agreement, promise, or threat. The court concluded that his subsequent claim that a promise had in fact been made had to be supported "by stronger contentions" before the court would grant a hearing. *Id.* at 67. Since the court's analysis in *Lopez*, *Reed*, and *Forrens* centered more upon the factual particularity of petitioners' allegations than upon the consistency of such allegations with Rule 11 statements, the standard that eventually emerged from *Diamond* apparently permitted the granting of a § 2255 hearing even when the Rule 11 record was contradicted if petitioner could make sufficiently detailed factual allegations of occurrences outside the courtroom.

35. 411 U.S. 213 (1973).

36. *Id.* at 214-15. Petitioner's descriptions of physical abuse by police, mental illness, and illness from a recent gunshot wound requiring hospitalization all were supported by hospital records. Records also showed that a month after his plea, petitioner was hospitalized again for heroin addiction and other illnesses. Petitioner further alleged prolonged interrogation prior to his plea and claimed that under the circumstances, his confession, waiver of counsel, and uncounseled guilty plea had been coerced.

reasoned that, while a defendant ordinarily may not repudiate express statements made at the Rule 11 hearing that the plea was voluntary, the record before it was not so conclusive as to require denial of petitioner's documented claim for relief. Relying solely upon compliance with the "factual allegation" element of *Machibroda*, the Court concluded that a section 2255 hearing was required even though the petitioner's allegations contradicted his Rule 11 statements.[37]

Subsequent decisions by the lower federal courts have not followed *Fontaine*'s reliance upon the "factual allegation" element in the face of direct contradiction of the Rule 11 record by the section 2255 petition. In *United States v. Huffman*,[38] the first federal circuit court decision rendered on a section 2255 motion after *Fontaine*, petitioner's allegation of plea coercion based upon a promise of probation directly conflicted with acceptance of petitioner's plea as voluntary by the Rule 11 judge who had been made aware of the alleged promise at the time the plea was entered.[39] Unlike either *Machibroda* or *Fontaine*, petitioner set forth no detailed factual allegations of occurrences outside the Rule 11 record.[40] The Eighth Circuit affirmed the district court's denial of petitioner's motion, implying, at least, that the Rule 11 record was conclusive as to those matters raised at the hearing.

The Fifth Circuit in *Bryan v. United States*[41] similarly refused to follow the broad implications of *Fontaine*. Petitioner alleged an involuntary plea based upon collusion between himself, his attorney, the United States attorney, and the presiding judge in negotiating a plea agreement. In a factual situation similar to that in *United States v. Simpson*,[42] petitioner in effect challenged the authenticity of the Rule 11 transcript, alleging that the court and all parties to the plea agreement had developed a false record of a voluntary guilty plea by ritualistically reciting that no agreement or promise had produced the plea.[43] Petitioner's allegations clearly contradicted the Rule 11 record,[44] but only his own affidavit was submitted

37. *Id.* at 215.

38. 490 F.2d 412 (8th Cir. 1973).

39. Petitioner's alleged conversation with a probation officer had been revealed at the Rule 11 hearing, and the officer had submitted at that time a statement presenting his version of what had taken place. *Id.* at 414.

40. *Id.*

41. 492 F.2d 775 (5th Cir. 1974).

42. *See* notes 28 & 29 *supra* and accompanying text.

43. 492 F.2d at 777.

44. In a more extended exchange than the standard colloquies that had occurred in *Machibroda* and *Fontaine*, Bryan had responded in the negative when asked by the Rule 11

to support his assertions.[45] The court concluded that, since the possibility of a plea agreement had been raised and decided during the Rule 11 colloquy, the record was conclusive against subsequent challenges to the voluntariness of the plea in which petitioner merely contradicted his Rule 11 statements.[46] Thus by considering both the extent of the inquiries at the Rule 11 hearing and the factual specificity of petitioner's allegations, the *Bryan* court adopted a conclusiveness standard that was essentially a modified version of the two-part *Machibroda* analysis. The *Bryan* test required both (1) non-contradiction of a record demonstrating scrupulous compliance with Rule 11 and (2) detailed factual allegations of occurrences outside the courtroom.[47] The *Machibroda* standard, as expanded by *Bryan* to require examination of the scope and extent of Rule 11 questioning, has been adopted by the Fourth,[48] Seventh,[49] Eighth,[50] and Tenth[51] Circuits.

III. The Instant Opinion

In confronting the split of authority between its earlier decisions and those of the other United States Courts of Appeals, the instant court expressed a preference for a standard requiring both

judge if a plea bargain had induced bis plea. The court emphasized that in neither *Machibroda* nor *Fontaine* had petitioners been questioned about the existence of a plea agreement; hence, no explicit denials appeared in the records for those cases. *Id.* at 780. The transcript of the Rule 11 colloquy involved is reproduced in the court's opinion. *Id.* at 776-77.

45. *Id.* at 779-80.

46. *Id.* at 780.

47. The Fifth Circuit suhsequently has adhered to the *Machibroda-Bryan* standard. It has affirmed district court denials of § 2255 motions when Rule 11 transcripts have revealed scrupulous inquiries by the Rule 11 judge and when petitioners' allegations merely contradict the record. Moore v. Estelle, 526 F.2d 690 (5th Cir. 1976); Johnson v. Massey, 516 F.2d 1001 (5th Cir. 1975); Jackson v. United States, 512 F.2d 772 (5th Cir. 1975); Frank v. United States, 501 F.2d 173 (5th Cir. 1974). The Fifth Circuit granted a § 2255 motion in Dugan v. United States, 521 F.2d 231 (5th Cir. 1975), when petitioner's allegations of an unkept plea agreement were supported by third-party affidavits that raised a substantial inference that such an agreement had in fact been made. *Id.* at 233.

48. Crawford v. United States, 519 F.2d 347 (4th Cir. 1975). Crawford alleged an involuntary guilty plea based upon a plea agreement, but the Rule 11 transcript revealed that petitioner had responded in the negative to a direct question ahout the existence of such an agreement. Further, the court noted that the presiding judge had inquired specifically about petitioner's understanding that the court was not bound by any such agreement. The court held that the accuracy and truth of an accused's statements at a Rule 11 proceeding are conclusively established "unless and until he makes some reasonable allegation why this should not be so." *Id.* at 350; *accord*, Courtney v. United States, 518 F.2d 514 (4th Cir. 1975).

49. Faulisi v. Daggett, 527 F.2d 305 (7th Cir. 1975).

50. Sappington v. United States, 523 F.2d 858 (8th Cir. 1975).

51. Hedman v. United States, 527 F.2d 20 (10th Cir. 1975).

"non-contradiction" and "factual allegation" in a section 2255 motion, yet determined that the records and files in the case failed to show conclusively that petitioner was not entitled to relief.[52] The court explained that while petitioner's allegations of a coerced guilty plea contradicted his Rule 11 statements, such charges specified occurrences entirely outside the Rule 11 record.[53] Relying upon prior Ninth Circuit decisions,[54] the court concluded that such allegations warranted a section 2255 hearing. Without subjecting petitioner's allegations to the factual specificity test articulated in *Diamond*, the court concluded that even though the charges contained in the section 2255 motion contradicted Rule 11 statements made by petitioner concerning the voluntary nature of his plea and despite full compliance with the inquiry requirements of Rule 11, the Rule 11 record was not conclusive.[55]

The dissent maintained that precedent in the Ninth Circuit simply permitted the granting of section 2255 petitions that alleged specific factual matters outside the Rule 11 record.[56] The dissent asserted that in the earlier decisions there had been either no specific contradiction between petitioners' allegations and the Rule 11 transcripts or, in the case of *Diamond*, no indication of whether such contradiction was present.[57] In contrast to the allegations made in those decisions, the dissent maintained, each of the present claims of coercion had been raised specifically and disposed of at the Rule 11 hearing.[58] The dissent asserted that petitioner's allegations were not outside the record but were mere contradictions of specific statements appearing in the Rule 11 record.[59] The dissent concluded that

52. 537 F.2d at 1083.

53. *Id.* Mayes' allegations included in part:

> Petitioner further alleges that his plea of guilty was unconstitutionally induced by threats and promises. Petitioner was coerced into entering a plea of guilty as a result of threats of and by the Los Angeles city police and the F.B.I. agents who interrogated him . . . by stating that if he did not sign a confession and plead guilty, his wife would be arrested and would have her baby in the penitentiary . . . .
>
> . . . .
>
> In addition to the threats, counsel had stated, that if Petitioner would plead guilty, two counts of the three count indictment would be dropped, and he would receive a small sentence to Fort Worth, Texas, drug center where he could be cured.

Id. at 1089-90.

54. *See* notes 30-34 *supra* and accompanying text.

55. 537 F.2d at 1083.

56. *Id.* at 1088 (Wright, J., dissenting).

57. *Id.* at 1089.

58. *Id.* at 1090-91. The dissent noted that the plea agreement, dropping 2 of 3 counts against petitioner in exchange for his plea to the remaining count, had been disclosed at the hearing. *Id.* at 1090 n.8. Petitioner also had been questioned specifically about threats to his family and about promises of leniency and had responded in the negative. *Id.* at 1090.

59. *Id.* at 1091.

the accuracy and truth of such allegations should be resolved conclusively by the Rule 11 record.[60]

IV. COMMENT

In openly rejecting a "non-contradiction" requirement and in failing to subject the petition before it to the factual specificity requirements of *Diamond*, the instant court completely abandoned the *Machibroda-Bryan* standard without providing any substitute. The potential effect of such a decision is two-fold. First, adherence to the instant holding likely would result in an increase not only in the number of section 2255 applications filed,[61] but also in the number of such applications that would require the granting of an evidentiary hearing. Since the Rule 11 colloquy in the present decision was extensive and probative and since petitioner's allegations provided far less specificity than that provided by petitioners in either *Machibroda* or *Diamond*,[62] it is difficult to determine what allegations would *not* be sufficient to warrant a section 2255 hearing under the present holding.

Secondly, the decision undermines the goal of a somewhat final determination at the Rule 11 hearing of whether a guilty plea has been made voluntarily. The Rule 11 judge's extensive questioning of petitioner complied not only with the guidelines set forth by Rule 11 at the time of the decision in the instant case but also with the more stringent inquiry requirements of the 1975 amendments to Rule 11.[63] Under the present decision, a final determination of voluntariness seldom would emerge from even the most scrupulous of Rule 11 colloquies.

Two apprehensions underlie the reluctance to accept the *Machibroda-Bryan* standard. First, when allegations of unkept promises and plea agreements have been presented, decisions granting an evidentiary hearing[64] apparently have responded to an appre-

60. *Id.*

61. The number of § 2255 petitions filed in the district courts tripled between 1961 and 1975. In fiscal year 1961, 560 such petitions were filed. 1971 U.S. ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 135 (Table 17). In fiscal year 1975, the number of such filings reached 1,690. 1975 U.S. ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 207 (Table 24). For examples of the continuing concern among federal judges with the burdens imposed by § 2255 petitions see Oliver, *Postconviction Applications Viewed by a Federal Judge*, 39 F.R.D. 281 (1966); Pope, *Suggestions for Lessening the Burden of Frivolous Applications*, 33 F.R.D. 409, 414-21 (1963).

62. *Compare* notes 19 & 32 *supra, with* note 53 *supra.*

63. *See* note 15 *supra.*

64. *See* Reed v. United States, 441 F.2d 569 (9th Cir. 1971); Lopez v. United States, 439 F.2d 997 (9th Cir. 1971); United States v. Simpson, 436 F.2d 162 (D.C. Cir. 1970); United

hension that the exacting *Machibroda-Bryan* standard may deny post-conviction relief when fear of revealing the details of plea agreements renders the accused silent for fear of jeopardizing the agreement or when the parties to such an agreement take advantage of an unsuspecting defendant to effect a "conspiracy of silence."[65] Rule 11(e), however, has removed the incentive for silence in such instances by requiring full disclosure of all details of plea agreements at the Rule 11 hearing.[66] Underlying the addition of subsection (e) in 1975 was the recognition of the plea bargain as both an inevitable and an essential component in the federal judicial system and a concomitant desire to prevent abuse of plea discussions and agreements by providing appropriate and adequate safeguards.[67] As an incentive for disclosure, Rule 11(e)(3) provides that if the court accepts the terms of the plea agreement, it must inform the defendant that the judgment and sentence will reflect the agreed upon disposition.[68] Similarly, should the court refuse to accept the agreement, Rule 11(e)(4) provides that the court must advise the defendant personally that the court is not bound by the terms of the agreement and afford him an opportunity to withdraw his plea.[69] Furthermore, in order to prevent exertion of undue pressure upon the accused to waive his right to trial, Rule 11(e)(1) prohibits the court itself from participating in plea discussions.[70] Violation of subsection (e)(1), which probably would not appear from the Rule 11 record, would subject the authenticity of the Rule 11 hearing itself to post-conviction collateral attack under section 2255.

Secondly, when allegations of physical abuse or threats of harm, death, or prosecutorial retaliation have been made, decisions granting an evidentiary hearing[71] have recognized that even the

States v. McCarthy, 433 F.2d 591 (1st Cir. 1970); Castro v. United States, 396 F.2d 345 (9th Cir. 1968); Trotter v. United States, 359 F.2d 419 (2d Cir. 1966); Scott v. United States, 349 F.2d 641 (6th Cir. 1965).

65. *See* Bryan v. United States, 492 F.2d 775, 783 (5th Cir. 1974) (Goldberg, J., dissenting); Walters v. Harris, 460 F.2d 988, 993 (4th Cir. 1972); United States v. Williams, 407 F.2d 940, 949 n.13 (4th Cir. 1969).

66. FED. R. CRIM. P. 11(e); *see* note 15 *supra*.

67. *Proposed Amendments to Federal Rules of Criminal Procedure for the United States District Courts, Advisory Committee Note*, 62 F.R.D. 271, 281-83 (1974); *see* Note, *Revised Federal Rule 11: Tighter Guidelines for Pleas in Criminal Cases*, 44 FORDHAM L. REV. 1010, 1012 (1976).

68. FED. R. CRIM. P. 11(e)(3); *see* note 15 *supra*.

69. FED. R. CRIM. P. 11(e)(4); *see* note 15 *supra*.

70. FED. R. CRIM. P. 11(e)(1); *see* note 15 *supra*.

71. *See* Fontaine v. United States, 411 U.S. 213 (1973); Machibroda v. United States, 368 U.S. 487 (1962); Diamond v. United States, 432 F.2d 35 (9th Cir. 1970); Jones v. United States, 384 F.2d 916 (9th Cir. 1967).

most scrupulous attempts to achieve disclosure of abuses outside the courtroom are likely to be unsuccessful since the incentive for silence is concern for the safety of self or family. Thus if the petitioner is able to allege facts with specificity sufficient to indicate to a reviewing court that physical abuse or threats did occur, the courts have been less inclined to be bound by a Rule 11 record that contradicts the petition.

The conclusiveness standard for the Rule 11 record should differentiate between challenges to the voluntariness of guilty pleas based upon allegations of unkept promises or plea agreements and those based upon allegations of physical abuse or threats of retaliation. When allegations of unkept promises are involved, adoption of a standard requiring both "non-contradiction" and "factual allegation" now would seem appropriate, given the safeguards of Rule 11(e). When a petitioner alleges physical abuse or threats of retaliation, statements as to voluntariness or even explicit denials of such threats or abuses appearing in the Rule 11 record should not be conclusive when challenged by allegations of occurrences outside the record which meet at least the factual specificity requirements of *Diamond*.[72] Such a standard would address legitimate apprehensions about the fate of meritorious post-conviction applications while serving the policy interests of Rule 11 in achieving finality and in discouraging frivolous section 2255 petitions.

THEODORE BROWN, JR.

Torts—Products Liability—Obvious Defect in a Product Does Not Bar Recovery Against the Manufacturer As a Matter of Law

I. FACTS AND HOLDING

Plaintiff, a printing press operator who was injured while removing a foreign object from the plate of an operating[1] printing press, sued defendant manufacturer on theories of negligent design

72. *See* note 33 *supra*.

1. The performance of such tasks while the machine was in operation was customary in the industry because of the economic inefficiency of stopping the press. Plaintiff, who had been employed as a printing press operator for 8 months prior to the accident, was aware of the dangers involved. Defendant, through observation of operations at the plant of plaintiff's employer, had knowledge of the industry practice.

and breach of implied warranty.[2] Defendant argued that it had no duty to protect plaintiff from obvious dangers and that plaintiff's contributory negligence precluded his recovery. The jury found for the defendant on the issue of negligent design and for plaintiff on the issue of breach of implied warranty,[3] but the trial court set aside the verdicts and ordered a new trial.[4] The Appellate Division reversed, reinstating the jury verdict on the negligence issue and directing a verdict for defendant on the warranty claim.[5] The New York Court of Appeals *held*, reversed. In a products liability action based on negligent design, the obviousness of the danger or defect does not bar recovery as a matter of law, but may be considered in evaluating plaintiff's contributory fault. *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

II. LEGAL BACKGROUND

The development of the law of products liability has been characterized by an expansion of the scope of the manufacturer's liability for injuries caused by defective products. The early rule requiring privity of contract between seller and consumer was rejected in *MacPherson v. Buick Motor Co.*,[6] and later decisions extended liability to injured users, bystanders, and passengers as well as purchasers.[7] Other limitations on the seller's liability remain, although they have been restricted in some jurisdictions. The rule of nonliability for a product that had been misused has been modified to allow recovery for reasonably foreseeable unintended use.[8] Contributory negligence and assumption of risk generally remain defenses

2. Plaintiff presented expert testimony showing the existence and availability of safety devices, which, when installed on a press, prevented injuries without impeding the operator's task.

3. The jury found defendant negligent, but recovery was barred due to a finding that plaintiff was contributorily negligent.

4. Defendant had moved to set aside the verdict on the breach of implied warranty claim. Because of the decision of the Court of Appeals in Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), upholding the defense of contributory negligence in both strict liability and breach of warranty actions, the trial judge set aside the verdict in the interest of justice, as the charge may have been confusing to the jury.

5. The Appellate Division based its decision on Campo v. Scofield, 301 N.Y. 468, 95 N.E.2d 802 (1950), which held that a manufacturer is not liable for injuries due to obvious dangers. *See* text accompanying notes 10-14 *infra*.

6. 217 N.Y. 382, 111 N.E. 1050 (1916). *MacPherson* held that the manufacturer of an automobile with a defective wheel owed a duty to the ultimate consumer to use reasonable care in the manufacture and inspection of chattels which, if defective, would endanger the user.

7. W. PROSSER, THE LAW OF TORTS § 100 (4th ed. 1971).

8. *Id.* at § 102.

to negligence actions; the courts are split, however, as to the applicability of these affirmative defenses to strict liability claims.[9]

In *Campo v. Scofield*[10] the New York Court of Appeals enunciated the rule that the manufacturer of a product is under no duty to protect users and others from open and obvious dangers; liability exists only for injuries caused by latent defects. The plaintiff in *Campo* was injured when his hands became trapped between the rollers of an onion topping machine that lacked safety devices. The court, noting that the law did not require a manufacturer to make an absolutely safe or foolproof product, held that the manufacturer was "under no duty to guard against injury from a patent peril or from a source manifestly dangerous."[11] Basing its decision on *MacPherson v. Buick Motor Co.*,[12] the court emphasized that liability in that case and others had been predicated upon hidden defects and concealed dangers.[13] The narrow holding of *Campo* is that the plaintiff's complaint must allege the existence of a latent defect. The language of the opinion, however, is inconclusive as to whether the dangerous defect must have been actually perceived and appreciated by the injured party, or if it is sufficient that the defect was merely "apparent to the casual observer."[14]

The *Campo* doctrine has been both influential and controversial as a limitation on the manufacturer's duty.[15] In *Inman v. Bing-*

9. *See* note 34 *infra*.

10. 301 N.Y. 468, 95 N.E.2d 802 (1950).

11. *Id.* at 472, 95 N.E.2d at 804.

12. 217 N.Y. 382, 111 N.E. 1050 (1916).

13. The court also stressed the duty of the legislature to prescribe safety standards for industry; a jury was considered ill-suited for this purpose.

14. 301 N.Y. at 475, 95 N.E.2d at 806. Otber *Campo* language is confusing as to whether the standard is objective or subjective: "[Plaintiff] must allege and prove the existence of a latent defect or a danger not known to plaintiff or other users . . . ." *Id.* at 471, 95 N.E.2d at 803. "[T]he very nature of the article gives notice and warning of the consequences to be expected . . . ." *Id.* at 472, 95 N.E.2d at 804. "[S]everal of tbe cases actually declare that a duty is owed . . . *only if* the defect or danger be not 'known' or 'patent' or discoverable 'by a reasonable inspection.' " *Id.* at 473, 95 N.E.2d at 804. At tbe end of the opinion the court sounds a note of contributory negligence or assumption of risk: "[T]he duty owed by a manufacturer . . . does not require him . . . to protect against injuries resulting from the user's own patently careless and improvident conduct . . . ." *Id.* at 475, 95 N.E.2d at 806.

15. Most law review articles on products liability contain a section castigating *Campo* and its progeny. *See,e.g.*, Marschall, *An Obvious Wrong Does Not Make A Right: Manufacturers' Liability for Patently Dangerous Products*, 48 N.Y.U.L. REV. 1065 (1973); Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 42 TENN. L. REV. 11 (1974); Rheingold, *The Expanding Liability of the Product Supplier: A Primer*, 2 HOFSTRA L. REV. 521 (1974). The following are typical of some of the criticisms directed at the *Campo* doctrine: it is an unrealistic approach to modern working conditions, pitting workers, ill-equipped to avoid the dangers of complicated machinery, against the manufacturer, who holds himself out as an expert in tbe field, *see* Rheingold, *supra* at 541; it is unfair to

hampton Housing Authority[16] and *Sarnoff v. Charles Schad, Inc.*,[17] the courts, citing *Campo*, held the manufacturers not liable since the absence of guardrails on a porch and a scaffolding was open and obvious. In *Jamieson v. Woodward & Lothrop*[18] the court held that the manufacturer of a rubber exercise rope was under no duty to provide safeguards or warnings, even though the device caused serious injuries to a user who followed the manufacturer's instructions.[19] These cases appear to treat obviousness as an objective standard; the opinions do not discuss the problem of a plaintiff who observes the defect, yet does not fully appreciate its danger. *Campo* has also been applied in strict liability actions with the result that the defendant will not be liable for obviously dangerous products even though the plaintiff need not prove negligence. In *Murphy v. Cory Pump & Supply Co.*,[20] the court refused to hold the manufacturer of a lawnmower strictly liable for injuries suffered by a child who fell against its unguarded blades. The court noted that the machine functioned properly for the purpose for which it was designed, contained no latent defect, and caused injury to the plaintiff only because of her own acts and the acts of the user. Similarly, in *Downey v. Moore's Time-Saving Equipment, Inc.*,[21] the court held that the plaintiff must allege the existence of a latent defect to maintain an action in strict liability.[22]

Another approach rejects *Campo's* premise that the obvious-

bystanders, who may not be aware of the "obvious" danger, *see* Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 572 (1969). *See also* Jamieson v. Woodward & Lothrop, 247 F.2d 23, 39 (D.C. Cir.), *cert. denied*, 355 U.S. 855 (1957) (Washington, J., dissenting); Palmer v. Massey-Ferguson, 3 Wash. App. 508, 476 P.2d 713 (1970).

Among the cases applying *Campo* are Messina v. Clark Equipment Co., 263 F.2d 291 (2d Cir. 1959); Blunk v. Allis-Chalmers Mfg. Co., 143 Ind. App. 631, 242 N.E.2d 122 (1968); Albert v. J & L Engineering Co., 214 So. 2d 212 (La. App. 1968); Blankenship v. Morrison Mach. Co., 255 Md. 241, 257 A.2d 430 (1969), as well as those cases discussed in text.

16. 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

17. 22 N.Y.2d 180, 239 N.E.2d 194, 292 N.Y.S.2d 93 (1968).

18. 247 F.2d 23 (D.C. Cir.), *cert. denied*, 355 U.S. 855 (1957).

19. The plaintiff suffered unconsciousness, a detached retina, and permanent partial loss of vision when the exerciser slipped off her foot and snapped across her eyes. The court, affirming dismissal of the complaint, remarked, "[s]urely every adult knows that, if an elastic band, whether it be an office rubber band or a rubber rope exerciser, is stretched and one's hold on it slips, the elastic snaps back." *Id.* at 28.

The dissent in *Jamieson* doubted whether it was reasonable to assume that a user would properly appreciate the danger involved and questioned the wisdom of giving a manufacturer judgment as a matter of law when the injury occurred while the product was being used according to instructions. *Id.* at 34-42 (Washington, J., dissenting).

20. 47 Ill. App. 2d 382, 197 N.E.2d 849 (1964).

21. 432 F.2d 1088 (7th Cir. 1970).

22. *See also* Maas v. Dreher, 10 Ariz. App. 520, 460 P.2d 191 (1969).

ness of a defect affects the manufacturer's duty and considers obviousness relevant only to the affirmative defenses of contributory negligence and assumption of risk. In *Pike v. Hough Co.*,[23] for example, the plaintiff was injured by an earth moving machine whose driver was unable to see the plaintiff because of a blind spot when the machine was in reverse. The court noted that "the modern approach does not preclude liability solely because a danger is obvious"[24] and demonstrated the unfairness of the objective standard of obviousness when the plaintiff is a bystander unable to appreciate the danger.[25] The existence of an obvious danger may be considered by the jury, but should not dispose of the case as a matter of law.[26] In addition, a distinct minority view contends that obviousness should neither relieve the manufacturer of his duty nor be a consideration in the defenses of contributory negligence and assumption of risk. In *Bexiga v. Havir Manufacturing Corp.*[27] the court recognized that contributory negligence and assumption of risk may be defenses to strict liability and negligence, but held that these defenses should be unavailable "where considerations of policy and justice dictate."[28] Thus in some cases the jury will not be permitted to use the obviousness of a danger to limit or bar the recovery of an injured party.[29]

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23. 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970).

24. *Id.* at 474, 467 P.2d at 235, 85 Cal. Rptr. at 635.

25. Courts have been less willing to apply *Campo* when, as in *Pike*, the plaintiff is a bystander. *See, e.g.*, Wirth v. Clark Equipment Co., 457 F.2d 1262 (9th Cir.), *cert. denied*, 409 U.S. 876 (1972). *But see* Stovall & Co. v. Tate, 124 Ga. App. 605, 184 S.E.2d 834 (1971).

26. Other courts have rejected the *Campo* approach by requiring a subjective appreciation of the danger for obviousness to bar recovery. *See, e.g.*, Wright v. Massey-Harris, Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966); Bolm v. Triumph Corp., 33 N.Y.2d 151, 305 N.E.2d 769, 350 N.Y.S.2d 644 (1973). One view holds that obviousness determines the manufacturer's duty only insofar as it affects the creation of an unreasonable risk of harm, a question to be decided by the jury. Byrnes v. Economic Mach. Co., 41 Mich. App. 192, 200 N.W.2d 104 (1972); Palmer v. Massey-Ferguson, 3 Wash. App. 508, 476 P.2d 713 (1970).

27. 60 N.J. 402, 290 A.2d 281 (1972).

28. *Id.* at 412, 290 A.2d at 286. The court noted:

> The asserted negligence of plaintiff—placing his hand under the ram while at the same time depressing the foot pedal—was the very eventuality the safety devices were designed to guard against. It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in no liability for the very injury the duty was meant to protect against.

Id.

29. Some commentators contend that if the manufacturer creates an unreasonable risk of harm by designing and marketing an obviously dangerous product that could have been made safer, he unfairly confronts the user, often an employee, with "a hard choice in which exposure to defendant's negligently created risk seem[s] the lesser evil. . . ." Marschall, *supra* note 15, at 1084 n.88, quoting Keeton, *Assumption of Product Risks*, 19 Sw. L.J. 61, 71 (1965).

In sum, prior to the instant case divergent views existed in various jurisdictions as to the effect of a product's obvious defects and dangers on the manufacturer's liability. The obvious defect doctrine, as formulated in *Campo*, had been severely criticized by commentators and rejected, limited, or distinguished by courts, but was still followed in some jurisdictions and had never been overruled.

III. THE INSTANT OPINION

The instant court first announced its intention to overrule *Campo v. Scofield*. Acknowledging the continuing influence of the *Campo* doctrine, the court also recognized the severe criticism directed at the rigidity and harsh results of its application.[30] Noting that other jurisdictions had adopted a more flexible attitude towards obvious defects,[31] the court demonstrated that logic and public policy compelled the abandonment of *Campo*. The court reasoned that the obvious defect rule lacks logical consistency; a manufacturer owes a duty to provide safe products, yet is relieved of liability for injuries caused by obviously unsafe products. Since the manufacturer is in a better position to recognize defects and provide safeguards, he should bear responsibility for compensating those injured by his defectively designed product. The court emphasized that the duty of reasonable care imposed upon the manufacturer involved balancing the likelihood and seriousness of harm against the burden of providing safeguards.[32] Additionally, the court recognized that the open and obvious nature of the defect may still be used by the defendant in showing the contributory fault of the plaintiff.[33] Thus, although the court did not eliminate obviousness as a

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The defenses of contributory negligence and assumption of risk have been modified in some states by comparative negligence statutes such as New York's enactment, which provides in part:

> In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

N.Y. CIV. PRAC. § 1411 (McKinney Supp. 1975).

30. *See* note 15 *supra*.

31. The cases discussed by the court on this point are those cited at notes 25, 26, & 27 *supra* and accompanying text.

32. 2 F. HARPER & F. JAMES, TORTS § 28.4 (1956).

33. The instant court noted that under the New York comparative negligence statute, N.Y. CIV. PRAC. § 1411 (McKinney Supp. 1975), there are no procedural distinctions between contributory negligence and assumption of risk.

factor to be considered by the jury, it did hold that the existence of a patent defect alone will not prevent the plaintiff from taking his case to the jury.[34]

IV. COMMENT

The instant decision is grounded in persuasive and well-reasoned criticism of the obvious defect rule and is a logical extension of the modern trend in products liability. The *Campo* doctrine is an anomaly in the law at a time when the manufacturer's liability is expanding in recognition of his superior position to recognize defects and provide safeguards; a doctrine that "amounts to an assumption of risk defense as a matter of law,"[35] when the plaintiff's contributory fault need no longer necessarily bar his recovery,[36] is clearly inapposite. The instant court's willingness to overturn a long-established, judicially created rule of law represents a departure from the reasoning of the *Campo* court, which refused to allow the courts to become arbiters of safety, leaving the task to the legislature. The instant decision, it should be noted, is compatible with the comparative negligence statute recently enacted by the New York legislature. Some commentators[37] have suggested that *Campo* had probably already been overruled by the comparative negligence statute; the judicial reversal, however, remains significant because of its probable effect on the development of products liability in other jurisdictions. As *Campo* was usually the principal basis for the obvious defect rule in other jurisdictions, the instant decision undermines justification for continued application of the rule. The abandonment of *Campo* should also check the insidious spread of the obvious danger rule into strict liability, where, as one critic has noted, it does not belong.[38]

The instant court failed to discuss one criticism of contributory fault noted by the trial judge and much discussed by commentators:[39] the inappropriateness of holding that an injured employee's

34. The court stated that the claim based on breach of implied warranty would be better treated under a theory of strict liability in tort. The court adhered to its holding in Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), that a manufacturer is strictly liable for injuries caused by a defective product if the injured user would not by the exercise of reasonable care have averted the injury. Two judges, however, preferred to adopt the RESTATEMENT (SECOND) OF TORTS § 402A (1966) position that it is no defense that the user failed to discover the defect.

35. 39 N.Y.2d at ___, 348 N.E.2d at 576, 384 N.Y.S.2d at 120.

36. *See* note 29 *supra* and accompanying text.

37. 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 7.02 n.1 (1976).

38. Keeton, *supra* note 15, at 572.

39. *See* Marschall, *supra* note 15, at 1107-08.

conduct may defeat or limit his recovery when he realistically has little choice in obeying orders and working with dangerous machinery. The primary purpose of tort liability should be compensation for harm; therefore, once the manufacturer's duty is established, the employee-plaintiff's conduct should not affect the amount of recovery.[40] The effect of employment on the care an employee must exercise for his own safety was noted in *Pike*;[41] many critics of contributory fault contend that the employee is never in a position to consent freely and voluntarily to work with dangerous machinery[42] and that the issue should not even be considered by the jury.

The instant court has taken a moderate approach to the problem of contributory fault which is in accord with the legislature's treatment of the plaintiff's conduct. By retaining obviousness as relevant to affirmative defenses and refusing to reconsider its previous holding that contributory fault remains a defense in strict liability, the court manifests its unwillingness to abolish the affirmative defenses to products liability.[43] There is a danger that courts in jurisdictions that allow contributory fault to bar recovery will continue to apply the *Campo* rationale in the guise of assumption of risk. Such a treatment would violate the intent and spirit of the instant decision, which, when read in the light of New York's comparative negligence statute, holds that obviousness will not bar recovery as a rule of law, although it may be one element considered by the jury in limiting the amount of recovery. By abandoning the obvious defect doctrine, which often represented a troublesome and unfair barrier to recovery, the instant holding is a much-needed step in the process of clarifying and streamlining the law of negligent design and should contribute to the development of uniformity in products liability actions.

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40. *Id.* at 1113.

41. 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970). The court remarked that "[w]here a person must work in a place of possible danger the amount of care he is bound to exercise for his own safety may well be less by reason of the necessity of his giving attention to his work than would otherwise be the case." *Id.* at 473, 467 P.2d at 234-35, 85 Cal. Rptr. at 634-35.

42. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 127 (1972).

43. *See* note 34 *supra*.