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RULE 11 AND THE CONSTITUTIONAL REQUIREMENTS FOR GUILTY PLEAS

INTRODUCTION

The guilty plea has long been recognized as a material ingredient of the American system of criminal justice.[1] Its importance is twofold—quantitative[2] and qualitative.[3] A Presidential Commission in 1967 reported that almost 85% of all convictions were attained through guilty pleas.[4] This massive quantity of guilty pleas gives rise to their qualitative effect upon criminal administration. Cases in which guilty pleas are entered are quickly disposed of, avoid the time, expense, and uncertainty of trials, and free the overburdened courts to attend to other duties.[5] The volume of guilty pleas, however, gives rise to a negative effect upon the administration of criminal justice. Too often guilty pleas are entered by defendants without knowledge of their courtroom rights and realization of the consequences of a guilty plea. The negative effect is caused by judges who hastily and perfunctorily accept such pleas.

The Federal Rules of Criminal Procedure, in pursuit of their general objective of a "just determination of *every* criminal proceeding . . . simplicity in procedure, fairness in administration and elimination of unjustifiable expense and delay,"[6] provide a standard by which federal judges may analyze guilty pleas and accept or reject them accordingly.[7] Rule 11[8] requires four elements: that "[1] the plea is made voluntarily [2] with understanding of the nature of the charge and [3] the consequences of the plea [and that] [4] there is a fac-

1. *See, e.g.*, ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 297 (1947).
2. *See, e.g.*, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE at 1-2 (1968 Approved Draft); NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 1 (1966); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 134-35 (1967).
3. *See, e.g.*, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE at 2-5 (1968 Approved Draft); NEWMAN, *supra* note 2, at 2-6.
4. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 135 (1967).
5. NEWMAN, *supra* note 2, at 29.
6. FED. R. CRIM. P. 2; WYO. R. CRIM. P. 2.
7. FED. R. CRIM. P. 11. Wyoming substantially adopted the Federal Rules of Criminal Procedure on Nov. 21, 1968, effective Feb. 11, 1969. For purposes of simplicity the Federal Rules will hereinafter be referred to instead of the Wyoming Rules.
8. The corresponding section in the Wyoming Rules is Rule 15.

tual basis for the plea.'"[9] A 1966 amendment to the Federal Rules[10] added a fifth element: that the court make the determination of voluntariness and understanding by *personally addressing the defendant.* Rule 11, then, serves a prophylactic function as a guard against acceptance of guilty pleas that are either coerced or unintelligently entered. Wyoming has substantially adopted all of the Federal Rules.[11] Most states have not, and as a consequence there is little uniformity in the guilty plea process. This lack of uniformity, however, does not excuse *any* court from meeting the demands of due process in the fourteenth amendment of the federal constitution.

The purpose of this article will be to explore the language and rulings of the United States Supreme Court and demonstrate how this Court has substantially incorporated the elements of Rule 11 into the due process requirement, so that Rule 11 is now constitutionally binding upon the states. Particular attention will be rendered *Boykin v. Alabama*[12] which incorporated the requirement that a court *personally* address a defendant who wishes to plead guilty as a method for determining whether the plea was entered voluntarily and understandingly. The article will then address itself to the question of *Boykin's* retroactivity. An appendix will follow this article suggesting particular areas in which a judge should make inquiries of a defendant who wishes to enter a plea of guilty.

THE REQUISITES OF VOLUNTARINESS AND UNDERSTANDING

It is certain that the Supreme Court has long demanded that guilty pleas be voluntarily and intelligently made.[13] Until *Boykin* this was all that the Court required. Consequently, trial judges had much discretion and control over the guilty plea process.[14] The Supreme Court has never placed its imprimatur upon any particular set of inquiries which will determine voluntariness and understanding. The guilty plea pro-

9. FED. R. CRIM. P. 11. The requirement that there be a factual basis for the plea was added by a 1966 amendment to the Federal Rules.
10. The Wyoming Rules include the 1966 amendment to the Federal Rules. *See* note 9 *supra.*
11. See note 7 *supra.*
12. 395 U.S. 238 (1969).
13. *See, e.g.,* North Carolina v. Alford, 91 S. Ct. 160, 164 (1970); Von Moltke v. Gillies, 332 U.S. 708, 719 (1948); Kercheval v. United States, 274 U.S. 220, 223-24 (1927) (dictum).
14. *See, e.g.,* NEWMAN, *supra* note 2, at 235.

cess does not lend itself to such certainty and absoluteness. It is subject to the vagaries of each individual fact situation. Even Rule 11 of the Federal Rules of Criminal Procedure does not designate the nature of the inquiry a judge should conduct.[15] The Supreme Court in *McCarthy v. United States*[16] expressly recognized this lack of certainty when it stated: "The nature of the inquiry required by Rule 11 must necessarily vary from case to case, and therefore, we do not establish any general guidelines other than those expressed in the Rule itself."[17] The case by case method referred to in *McCarthy* is the formula of the Court has applied in reviewing guilty pleas.

Mr. Justice Butler's oft-quoted utterances in *Kercheval v. United States*[18] are indicative of the Court's continuing concern with guilty pleas. Justice Butler equated the guilty plea to an outright conviction and then stated that "[o]ut of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."[19] Although the validity of a guilty plea was not directly in issue,[20] *Kercheval* provided the prefatory remarks for a long line of cases which established the Supreme Court's surveillance over the guilty plea process. In these cases the Court always separated the voluntariness issue from the question of understanding.

When the Court has been concernd with the issue of voluntariness, the fact situations both before and during the arraignment have usually been the focal points upon which the decisions turned. In *Waley v. Johnston*[21] the Supreme Court was moved by an allegation that an F.B.I. agent threatened to publicize false statements and evidence which would so incite the community that the death sentence would be a foregone

15. *Id.* at 11.
16. 394 U.S. 459 (1969). The basis of the *McCarthy* decision was the Court's supervisory power over the application of the Federal Rules of Criminal Procedure by lower federal courts. Constitutional issues were expressly disregarded.
17. *Id.* n. 20.
18. 274 U.S. 220 (1927). The case was not concerned directly with the validity of a guilty plea. The only issue was whether a withdrawn guilty plea is admissible in the subsequent trial.
19. *Id.* at 223.
20. *Kerchical* was only indirectly concerned with guilty pleas, holding that withdrawn guilty pleas are not admissible as evidence of guilt in the subsequent trial.
21. 316 U.S. 101 (1942).

conclusion if the case ever went to trail. The Court granted the petitioner an evidentiary hearing. In *Machibroda v. United States*[22] the petitioner was awarded a hearing upon his contentions that an Assistant United States Attorney's promises of leniency and threats of prosecution on other charges had induced his guilty plea. *Jackson v. United States*[23] stands for the proposition that statutes which needlessly encourage guilty pleas are wanting in due process. By 1970 the Court was ready to declare a test by which voluntariness could be determined. In *Brady v. United States*[24] Judge Tuttle of the Fifth Circuit was quoted as properly stating the test: a plea is voluntary if made with an awareness of the direct consequences and the value of any promise of leniency and not induced by threats, misrepresentations, or improper promises.[25] *Brady* is significant because it expressly approves plea bargaining as proper and does not render bargained guilty pleas involuntary per se. *Brady* further upholds guilty pleas made to charges which are brought pursuant to statutes disallowing the death sentence only when the defendant pleads guilty. Such statutes, the Court declared, do not on their face make an otherwise voluntary guilty plea involuntary.[26] It is apparent, however, that the *Brady* test does not aid the trial judge in deciphering the subjective state of the defendant's mind in order to determine voluntariness.

The Supreme Court has been even less helpful to trial judges in their metaphysical quest for a defendant's understanding of a guilty plea. The Court has framed the requisite of understanding in terms of a knowledge of the nature of the charge and the consequences of the plea.[27] *Von Moltke v Gillies*[28] set out the most definitive test of such understanding: (1) knowledge of the nature of the charge, (2) the statutory offenses within the charge, (3) the range of allowable punishments, (4) recognized defenses to the charge, (5) circumstances in mitigation, and (6) all other facts that are essential

22. 368 U.S. 487 (1962).
23. 390 U.S. 570 (1968).
24. 397 U.S. 742 (1970).
25. *Id.* at 755.
26. *Id.* at 745-47. This is so even though a portion of the statute may unconstitutionally encourage guilty pleas as in *Jackson* v. *United States, supra* note 22.
27. *See, e.g.*, Brady v. United States, *supra* note 23, at 756; Pennsylvania *ex rel* Herman v. Claudy, 350 U.S. 116, 120-21 (1956); Smith v. O'Grady, 312 U.S. 329, 334 (1941).

to an understanding of the matter.[28] The *Von Moltke* test does not offer sufficient guidelines to a trial court since "all other facts that are essential to an understanding of the matter" covers a very broad territory.

If *Brady* and *Von Moltke* represent the most definitive tests of voluntariness and understanding, trial judges' discretion and control over the gutliy plea process is intact. The only thing that is clear, is that three elements of Rule 11—voluntariness of the plea, understanding the nature of the charge and the consequences of the plea—are incorporated into the due process requirement. It was not until *Boykin* that the Supreme Court provided a *method* for judges to determine voluntariness and understanding and to consequently avert many post-conviction attacks upon arraignment proceedings.

THE BOYKIN METHODS

The *Boykin* decision presents many problems, most of which are probably the result of the cryptic style in which it is written. One thing is certain after *Boykin,* a court may not accept a guilty plea unless there is an "affirmative showing that it was intelligent and voluntary."[29] The Supreme Court stated that the requirement of an affirmative showing is fulfilled when the record of the arraignment discloses voluntariness and understanding. Edward Boykin's conviction after his plea of guilty was reversed because there was no such disclosure upon the record. The effectiveness of such a requirement standing by itself is questionable since a complete record will not necessarily unveil coercion, threats, improper promises, or even a defendant's personal understanding.

The potential ineffectiveness of a complete record raises the question whether this is all that *Boykin* demands. One possible interpretation of *Boykin* is that the trial judge must *personally* address the defendant to determine voluntariness

28. 332 U.S. 708, 724 (1948). The petitioner in this case waived her right to counsel and pleaded guilty. The Court held that petitioner could not have waived her right to counsel unless she understood the nature of the charge and the consequences of her plea. The test was applied in this instance to determine whether she knowingly waived counsel.
29. 395 U.S. 238, 242 (1969).

and understanding.[30] There is language in the Court's decision to support such an interpretation:

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in *canvassing the matter with the accused* to make sure he has a full understanding of what the plea connotes and of its consequences.[31] (emphasis added)

Taken in context, however, this language could be considered as a mere recommendation of a means to develop a full and complete record.

Nevertheless, there are reasons for viewing this language as a constitutional ruling, demanding that trial courts develop the arraignment record by personally addressing the defendant. *McCarthy* held that it was reversible error for the trial judge to neglect this personal interrogation and that the petitioner should be allowed to plead anew.[32] The Court in *McCarthy,* however, expressly did not reach any constitutional issues, but based the decision on its supervisory power over federal court procedures.[33] The Court expressed two major reasons for its holding: (1) a personal interrogation of the defendant assists trial judges in ascertaining the voluntariness and understanding of the plea, and (2) helps the judge develop a complete record that will discourage unfounded post-conviction attacks and expedite authentic ones.[34] The *Boykin* decision expressed these same two policy factors following its statement that a court should "canvass the matter with the accused".[35] The similarity of the language,[36] policy, and reasoning in the two decisions may be illustrative of a single holding applicable to federal courts in *McCarthy* and state courts in *Boykin.*

30. *See, e.g.,* Commonwealth v. Godfrey, 434 Pa. 532, 254 A.2d 923, 924 (1969); State v. Sisco, 169 N.W.2d 542, 550 (Ia. 1969); Peterson, *A Checklist for Arraignments, Pleas and eSntencings,* 9 TRIAL JUDGES' J. 49, 50 (1970); *The Supreme Court, 1968 Term,* 83 HARV. L. REV. 7, 183-84 (1969).

31. 395 U.S. 238, 243-44 (1969).

32. 394 U.S. 459, 472 (1969).

33. *Id.* at 464.

34. *Id.* at 465-67.

35. 395 U.S. 238, 244 (1969).

36. Comment, *Criminal Procedure—Requirements for Acceptance of Guilty Pleas,* 48 N.C. L. REV. 352, 357-58 (1969).

The complete record that *Boykin* assuredly demands[37] can only be developed by inquiries made of either the defendant or his attorney. The Court in *Boykin* at least hinted that the petitioner's attorney at the arraignment had performed inadequately when it noted in its opinion that Edward Boykin's attorney engaged only in *cursory* cross-examination of alleged eyewitnesses and did not present testimony of Mr. Boykin's character when there was no indication that he had a prior criminal record.[38] Additionally Boykin pleaded guilty to a capital offense despite the fact there could have been no bargained-for reduction of sentence. The sentence in Alabama is determined by a separate jury whenever a defendant pleads guilty.[39] The Supreme Court noted that a guilty plea may be desirable as a matter of trial strategy, but that the record was silent in this regard.[40] It is hard to imagine a plea of guilty to a capital offense as being any strategy at all. Perhaps the Court, then, recognized a need for proof of the adequacy of counsel in the guilty plea process. If so, it would be a recognition that defendants who plead guilty are sometimes represented by court-appointed counsel who do not always treat the interests of such defendants as being foremost.[41] This proof of a competently advised defendant can only be sustained by a personal inquiry of the defendant concerning all the advice his attorney has provided. If this was the Court's thinking, their statement that the trial court should "canvass the matter with the accused" was an affirmative holding and not mere dictum. Such a ruling would certainly be more likely to confirm the voluntariness of a plea and a defendant's understanding. In bypassing counsel and addressing the defendant a trial court would have a fully developed record which would more easily survive collateral attack. Thus, the two policy factors set out in *McCarthy* and *Boykin* would be attained. Furthermore, such an inquiry would rebut any post-conviction allegation of incompetency of counsel. At the arraignment

37. *See generally* Brady v. United States, *supra* note 23, at n. 20. This footnote to the *Brady* decision states that the new element added by *Boykin* is a complete record. A negative inference might be drawn from this. The inference may be that this is all that *Boykin* demands and that a personal interrogation of the defendant is not an element added by *Boykin*.
38. 395 U.S. 238, 240 (1969).
39. ALA. CODE tit. 15 § 277 (1958); *see* Boykin v. Alabama, *id.* at 240; *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 187 (1969).
40. 395 U.S. 238, 240 (1969).
41. *See, e.g., The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7, 187 (1969).

the trial judge would be either testing the adequacy of a defendant's counsel or be providing his own legal advice to a defendant who had properly waived his right to counsel.[42]

Mr. Justice Harlan, with whom Mr. Justice Black joined in a dissenting opinion, interpreted the *Boykin* decision as making Rule 11 of the Federal Rules a constitutional mandate upon the states.[43] Prior to *Boykin* only two elements of Rule 11 were not yet incorporated into the due process clause of the fourteenth amendment. Of these two, only the requirement that a court personally address the defendant was discussed in *Boyikn.* The only conclusion is that Justices Harlan and Black considered the *Boykin* majority to have constitutionally required a judge to personally address a defendant to ascertain the voluntariness and understanding of his guilty plea. Moreover, the dissenters discussed the *McCarthy* decision in such a way as to equate it with *Boykin.*

Besides incorporating another element of Rule 11 into the constitutional requirements of due process, *Boykin* has additional significance. Both *Boykin* and *McCarthy* recognized that inherent in a guilty plea is a waiver of three federal constitutional rights—the privilege against compulsory self-incrimination, the right ti trial by jury, and the right to confront one's accusers.[44] The *Boykin* opinion stated that a waiver of these three rights cannot be presumed and must appear in the record.[45] If the proper interpretation of *Boykin* requires the trial judge to ascertain the voluntariness of the plea and the understanding of the defendant by personally addressing him, the waiver of these three rights, which is a consequence of the guilty plea and thus directly related to a defendant's understanding, must come from the lips of the defendant.

Boykin can easily be dismissed as a particularly appealing fact situation—a poor black man, charged in an Alabama court with five separate counts of common law robbery, who pleaded guilty to these five capital offenses upon the advice

42. A defendant has a right to counsel at an arraignment proceeding regardless of his plea. Von Moltke v. Gillies, *supra* note 13, at 723.
43. 395 U.S. 238, 245 (1969).
44. *Id.* at 243; 394 U.S. 459, 466 (1969).
45. "We cannot presume a waiver of these three important federal rights from a silent record," 395 U.S. 238, 243 (1969).

of his attorney and was sentenced to die on each count. Nevertheless, *Boykin* should be viewed positively as representing a constitutionally mandated method whereby a trial court can more easily determine voluntariness and understanding. The method, however, is undermined if trial courts either no not interpret the decision as demanding *personal* inquiries to be made of the defendant or completely dismiss *Boykin* as a Supreme Court reaction to precipitant justice. Even an interpretation that *Boykin* demands only an affirmative arraignment record is nonsensical if not combined with the requirement of a personal exchange between judge and defendant. *Boykin,* then, should be viewed as an incorporation of one more element of Rule 11 into the requisites of due process of law and an addition of the waiver of the three constitutional rights to those things which constitute consequences of a guilty plea.

It is noteworthy that *Boykin* was an outright reversal of the petitioner's conviction. The Court did not intervene by merely granting an evidentiary hearing to determine whether his plea was voluntarily and understandingly made. Instead the remedy was more extreme with the effect that Alabama would have to bring new charges against Boykin. This should be ominous to trial courts. All they must do is determine the validity of a guilty plea by personally addressing the defendant in something more than a mere ritualistic and mechanical manner. Appellate courts will then be less inclined to command prosecutors to initiate new arraignment proceedings after evidence has grown stale and memories have become foggy with the passing of time.

LIMITED RETROACTIVE APPLICATION OF BOYKIN

When the Supreme Court interprets a federal procedural rule, the application of the holding is restricted to federal courts. This was the situation in *McCarthy. Halliday v. United States*[46] was the sequel to *McCarthy* and determined the extent of the prior case's retroactivity. The Court ruled in *Halliday* that *McCarthy's* retroactivity was limited only to that particiular case and would not vitiate any guilty plea which was accepted prior to the decision in *McCarthy. Halli-*

46. 394 U.S. 831 (1969).

day, although it was a ruling upon the applicability of the Federal Rules of Criminal Procedure, will probably serve as authority for deciding any case which seeks to apply *Boykin* only to guilty pleas accepted after that case was decided. Certain language in *Halliday* is illustrative of the Court's utilization of *constitutional standards* to determine *McCarthy's* retroactivity.[47] Consequently, the same factors that determined *Halliday* would probably be accepted in applying *Boykin* only to those guilty pleas which were accepted after that decision. The *Halliday* decision turned on many factors: applying *McCarthy* only to guilty pleas accepted after the decision does not deprive defendants of any other post-conviction remedies, reliance upon the old standard for accepting guilty pleas was pervasive, and many valid convictions were based upon guilty pleas without complete compliance with Rule 11 prior to *McCarthy.*[48] The same factors would most likely apply *Boykin* only to guilty pleas accepted after the decision,[49] notwithstanding the fact that other constitutionally commanded rules of criminal procedure have been applied retroactively.[50]

RULE 11's FACTUAL BASIS REQUIREMENT

Rule 11 requires federal judges to be satisfied that there is a factual basis for a plea of guilty. It is significant that this requirement applies only to guilty pleas and not to pleas of *nolo contendre.* The Advisory Committee on Criminal Rules stated that the factual basis may be determined by "inquiry of the defendant *or* the attorney for the government, *or* by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment"[51] (emphasis added). This statement gives a court alternative means of satisfying itself that there is a factual basis for the plea. The Advisory Committee

47. "[I]t is appropriate to analyze . . . that decision's retroactively in terms of the same criteria we have employed to determine whether constitutionally grounded decisions that depart from precedent should be applied retroactively." *Id.* at 832.

48. *Id.* at 833.

49. *See, e.g.,* Moss v. Craven, 427 F.2d 139, 140 (9th Cir. 1970); Del Piano v. United States, 427 F.2d 1156, 1157 (3rd Cir. 1970).

50. *See, e.g.,* Stovall v. Denno, 388 U.S. 293 (1967).

51. 2 ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 11:73, at 147 (1966).

further states that this portion of Rule 11 is designed to protect the defendant who does not realize his actions do not fall within the charge.[52]

Unlike the other elements of Rule 11, the factual basis requirement has never been incorporated as a constitutional prerequisite to the acceptance of a guilty plea. The Supreme Court indirectly considered this issue in *Alford v. North Carolina*.[53] Instead of adopting this final element of Rule 11 as a requirement of due process, the Court related the facts of the *Alford* case to the constitutional requisite that a guilty plea be intelligently entered. Henry Alford's plea of guilty at the arraignment was accompanied by his own protestations of innocence. In upholding Alford's conviction the Supreme Court noted that a guilty plea ordinarily includes an admission by the defendant that he committed the acts which constitute the crime in the indictment.[54] The Court, however, refused to label Alford's plea as being either a guilty plea or a plea of *nolo contendere* and stated that any such distinction was of no constitutional significance in the issue before it. The Court then ruled that an express admission of guilt is not constitutionally required in order to impose criminal sanctions.[55]

If the facts of the *Alford* case had arisen in a court which was bound by Rule 11, the factual basis requirement would have emerged as an issue. Even though Alford's assertions of innocence negated any admission of guilt, a judge might have been satisfied that there was a sufficient factual basis for the plea by relying upon one of the alternative methods for such a determination. The specific alternative methods set out by the Advisory Committee on Criminal Rules are an examination of the presentence report or inquiries made of the attorney for the government.[56] The State had a very strong case against Alford. Its overwhelming evidence against the defendant would be determinative of a factual basis. Furthermore, the factual basis requirement was not designed to shield defendants like Alford. It was meant to protect the

52. *Id.*
53. 91 S. Ct. 160 (1970).
54. *Id.* at 164.
55. *Id.* at 167.
56. 2 ORFIELD, *supra* note 51.

defendant who *does not realize* his actions do not fall within the charge.[57] Alford realized that the acts he would not admit were exactly those actions the charge alleged.

The *Alford* decision, however, presents a further problem, i.e., whether an additional constitutional requirement is present when a defendant proposes to plead guilty without admitting his guilt. The language of the Court implied that something more is needed:

> If Alford's statements were to be credited as sincere assertions of his innocence, there obviously existed a factual and legal dispute between him and the State. *Without more,* it might be argued that the conviction entered on his guilty plea was invalid, since his assertion of innocence negatived any admission of guilt[58] (emphasis added).

The Court seemed to suggest a strong prosecution case with substantial evidence of guilt would supply the additional requirement. The Court then related the abundance of the prosecution's evidence against Alford to the ordinary proverbial constitutional requirement that a guilty plea be intelligently entered.[59] Such a relationship raises the question whether *Boykin* would consequently require that the State's trenchant evidence affirmatively appear on the record of the proceedings. The *Alford* decision did not answer this. A trial judge might anticipate a holding which would require such a record. A cautious judge, when encountered by a defendant pleading guilty while asserting innocence, would spread upon the record either the prosecutor's evidence or the presentence report. If the same judge were also governed by Rule 11, he would thereby not only avert constitutional problems but also authenticate his use of a sanctioned method for determination of a factual basis for the plea.

CONCLUSION

The *Boykin* decision culminated the Supreme Court's substantial incorporation of Rule 11 into the due process commands of the fourteenth amendment. This injection of uni-

57. *Id.*
58. 91 S. Ct. 160, 165 (1970).
59. *Id.* at 167.

formity into the guilty plea process, however, will not terminate post-conviction attacks upon the acceptance of guilty pleas. There will be a continuing case by case development of what facts are necessary to comprise voluntariness, what facts constitute knowledge of the nature of the charge, and what are the consequences of a guilty plea. This development will continue because the Supreme Court refuses to paint itself into a corner by announcing a specific set of inquiries to be made of a defendant entering a guilty plea. The Court has only provided *methods* by which the courts may more easily satisfy themselves of the voluntariness of a plea and the understanding of the defendant.

The Supreme Court announced its faith in the guilty plea process when it stated in the *Brady* opinion:

> Our view . . . is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged.[60]

If American courts meet these expectations they will create a more efficient and just guilty plea process, will free themselves from embarassing post-conviction attacks, and attain the most sublime goal of criminal administration—"an accurate and fair separation of the guilty from the innocent."[61]

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APPENDIX

The inquiries that a court should make of a defendant before accepting a guilty plea will necessarily vary with each fact situation. Both the form and the substance of such inquiries should vary with the background and educational level of a particular defendant. Regardless of the defendant's background, however, a court should be assured of two factors: (1) that its inquiries are not muddled in legalese, being framed

60. 397 U.S. 742, 758 (1970).
61. NEWMAN, *supra* note 2, at 4.

in a manner understandable to a layman,[62] and (2) that the defendant has sufficient time to consider his plea in light of the court's inquiries.[63]

The following is a list of suggestions which a court should consider in addressing a defendant to ascertain the voluntariness of a guilty plea and the defendant's understanding of the nature of the charge and the consequences of the plea. The list assumes that the inquiries can only be satisfied by the defendant *personally,* regardless of whether he is represented by counsel. Some of the elements of this list have been merely suggested by secondary authorities or courts of very limited authority. Others have been openly rejected by courts. Consequently, the absence of some of these inquiries will not *necessarily* render a guilty plea invalid. Nevertheless, compliance with this list should assure a judge that the record will demonstrate a defendant's voluntariness and understanding to the extent any record can do so. Furthermore, the list suggests areas that are open for possible development and expansion by the courts. Some of these elements may never be incorporated as requisites for a valid guilty plea. Courts, however, should be aware of these elements in developing a more just guilty plea process. Such awareness, morever, will aid courts in anticipating decisions of appellate courts and will lessen the sting of surprise in the event all these elements are eventually added to the requirements of a valid guilty plea.

1. A court should determine whether the plea was induced by threats or promises of any nature.[64]

2. A judge should not enter into the plea bargaining process.[65] The court, however, should determine whether plea discussions have taken place. The court should then spread upon the record its statement that any plea bargaining resulting in a reduction of charges, dismissal of charges, or commit-

62. *See, e.g.,* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PLEAS OF GUILTY at 26 (1968 Approved Draft).

63. *See, e.g., id.* at 21-25; NEWMAN, *supra* note 2, at 33-35.

64. *See, e.g.,* Brady v. United States, *supra* note 23, at 755.

65. *See, e.g.,* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PLEAS OF GUILTY at 71-73 (1968 Approved Draft); *cf.* United States *ex rel* Elksnis v. Gilligan, 256 F. Supp. 244, 254-55 (S.D.N.Y. 1966).

ments for leniency in sentence is *solely* between the prosecutor and defendant.[66]

3. A court should determine whether the prosecutor has made any promises of favor[67] or leniency of sentence to the defendant. The court should then warn the defendant that any such promise is not binding upon it nor upon any court before which the defendant may appear in the future.[68] To be assured of a complete record, the judge should make such warnings to the defendant regardless of allegations that no promises have been made.

4. The court should dispel any notion that a guilty plea implicitly or by its nature necessarily disposes a court to be more lenient in applying a sentence.[69]

5. The judge should explain the elements of the offense to the defendant so that he has an understanding of the law in relation to the facts.[70] Furthermore, the defendant should be informed of any possible included offenses within the charges.[71]

6. The court must satisfy itself from an inquiry of the defendant, the prosecution's evidence, or the presentence report that there is a factual basis for the plea.[72]

7. The judge should be satisfied that the defendant is aware of all possible defenses (e.g. unlawfully acquired evidence or confession, irregularities in arrest, insanity, self-defense).[73]

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66. *See, e.g.*, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PLEAS OF GUILTY at 71-76 (1968 Approved Draft).
67. *E.g.*, a promise of early parole. Bailey v. MacDougall, 392 F.2d 155 (4th Cir. 1968).
68. *See* Brady v. United States, *supra* note 23, at 755; ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PLEAS OF GUILTY at 29-30 (1968 Approved Draft).
69. *See* 22 ALA. L. REV. 76, 86-87 (1969); *but see* Holland v. United States, 406 F.2d 213, 216 (5th Cir. 1969).
70. *See* McCarthy v. United States, 394 U.S. 459, 466-67, 471 (1969); Munich v. United States, 337 F.2d 356, 359 (9th Cir. 1964); *but see* United States v. Lowe, 367 F.2d 44, 45 (7th Cir. 1966).
71. McCarthy v. United States, *id.* at n. 20; Peterson, *supra* note 30, at 52.
72. FED. R. CRIM. P. 11; 2 ORFIELD, *supra* note 51.
73. *See, e.g.*, Von Moltke v. Gillies, *supra* note 13, at 724; United States v. Lester, 247 F.2d 496, 500 (2d Cir. 1957); Snell v. United States, 174 F.2d 580, 582 (10th Cir. 1949).

8. The court should explain any circumstances in mitigation.[74]

9. The judge should briefly explain to the defendant that he has a constitutional right to trial by jury. The defendant should then be made aware of the significance of this right (e.g., presumption of innocence, trial by peers, prosecution's burden of proof beyond a reasonable doubt, defendant's privilege not to testify, defendant's right to confront his accusers, inadmissibility of wrongfully acquired evidence and confession, inadmissibility of prior convictions as probative of guilt).[75] The judge should next impress upon the defendant that a guilty plea waives the right to trial by jury, the privilege against compulsory self-incrimination, and the right to face one's accusers.[76]

10. The court should, furthermore, inform the defendant that a plea of guilty waives all non-jurisdictional defenses (e.g. unlawful searches and seizures, irregularities in arrest, double jeopardy, any statute of limitations).[77]

11. The court should explain that a conviction may involve a loss of civic privileges in certain jurisdictions (e.g. disenfranchisement, privilege to testify in civil proceedings).[78]

12. The court should inform the defendant of the range of possible penalties.[79] Included in this explanation should be a warning that incarceration for separate offenses may run consecutively.[80]

13. The judge should warn the defendant of any limitations imposed by statute on suspended sentences, probation, or eventual parole.[81]

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74. Von Moltke v. Gillies, *id.*; United States v. Lester, *id.*; Snell v. United States, *id.*
75. Peterson, *supra* note 30, at 52.
76. Boykin v. Alabama, *supra* note 40, at 243; *see* McCarthy v. United States, *supra* note 69 at 466-67.
77. *See, e.g.*, Rice v. United States, 420 F.2d 863, 865 (5th Cir. 1969); 2 ORFIELD, *supra* note 53, § 11:44, at 114-16.
78. *But see* French v. United States, 408 F.2d 1027, 1028 (5th Cir. 1969); United States v. Cariola, 323 F.2d 180, 186 (3rd Cir. 1963).
79. Von Moltke v. Gillies, *supra* note 13, at 724; *see* Burch v. United States, 359 F.2d 69, 73 (8th Cir. 1966).
80. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PLEAS OF GUILTY at 28 (1968 Approved Draft).
81. Munich v. United States, 337 F.2d 356, 361 (9th Cir. 1964); *but see* United States v. Caruso, 280 F. Supp. 371, 373 (S.D.N.Y. 1967).

14. The court should explain any possible additional punishment that might be imposed upon the defendant as a result of his status (e.g., longer sentences imposed upon youths than upon adults,[82] additional sentences for multiple offenders or habitual criminals).[83]

82. *E.g.*, Federal Youth Corrections Act 18 U.S.C. §§ 5005-5017; *see, e.g.*, Combs v. United States 391 F.2d 1017 (9th Cir. 1968); Pilkington v. United States, 315 F.2d 204, 208-9 (4th Cir. 1963).

83. *See* Hinton v. United States, 232 F.2d 485, 487 (5th Cir. 1956); People v. Schulman, 13 App. Div. 2d 441, 216 NYS 2d 998, 1000-1 (1961); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PLEAS OF GUILTY at 27-28 (1968 Approved Draft).