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Travis W. Moon

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Richard L. Grier

Criminal Procedure—Requirements for Acceptance of Guilty Pleas

A recent study estimates that in some jurisdictions as many as ninety per cent of all criminal convictions are obtained through guilty pleas.\(^1\) The Supreme Court has set forth explicit standards that must be followed by both state and federal judges before a guilty plea can be accepted. The holding in *McCarthy v. United States*\(^2\) binds federal trial judges to the requirements of rule 11 of the Federal Rules of Criminal Procedure. And if the dissent in *Boykin v. Alabama*\(^3\) is correct, the majority opinion in that case compels state courts to follow the basic requirements of rule 11. The rule provides:

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 a plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily and with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea (*as amended effective July 1, 1966*).

In *McCarthy* the defendant was prosecuted for tax evasion in a federal district court in Illinois and entered a plea of guilty to one of three counts. The court accepted this plea after McCarthy's counsel stated that he had advised the defendant of the consequences of the plea. The defendant expressed his desire to plead guilty and acknowledged his understanding of the consequences of such a plea with respect to the waiver of jury trial and the punishment involved. At the insistence of the prosecutor, the defendant further stated that the plea had not been induced by threats or promises.\(^4\) McCarthy was convicted and appealed to the Court of Appeals for the Seventh Circuit on the ground that his guilty plea

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\(^1\) *President's Commission on Law Enforcement and Administration of Justice, the Challenge of Crime in a Free Society* 134 (1967).
\(^3\) 89 S. Ct. 1709 (1969).
\(^4\) *United States v. McCarthy*, 387 F.2d 838, 840 (7th Cir. 1968).
should be set aside because the trial court had failed to follow rule 11. The court of appeals, holding that the district court judge had complied with rule 11, affirmed the conviction.\textsuperscript{6}

The Supreme Court reversed and remanded on the ground that the trial judge had failed to determine that there was a factual basis for the plea.\textsuperscript{6} In the majority opinion Chief Justice Warren pointed out that strict adherence to the requirements of rule 11 aids the trial judge in that "he not only facilitates his own determination of a guilty plea's voluntariness, but he also facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary."\textsuperscript{7} Failure to comply with the requirements of the rule, the Court held, required setting aside the defendant's plea and affording him an opportunity to plead anew.\textsuperscript{8}

Having explicitly interpreted rule 11, the next step taken by the Supreme Court was to demand adherence by the states to many, if not all, of its requirements. In \textit{Boykin} the defendant in the state court entered pleas of guilty to five counts of robbery and was sentenced to death. On appeal to the Alabama Supreme Court, he argued that the punishment of death was "cruel and unusual" within the meaning of the United States Constitution.\textsuperscript{9} The Alabama court unanimously rejected this contention, but three justices dissented on the ground that the record was inadequate to show that petitioner had intelligently and knowingly pleaded guilty.\textsuperscript{10} On certiorari, the United States Supreme Court reversed the conviction on the ground that it was error for the trial judge to accept the guilty plea without first determining that the plea was intelligent and voluntary. The Court further emphasized the necessity, for the benefit of both the defendant and the state, of establishing a record disclosing that the plea was voluntarily and knowledgeably entered.\textsuperscript{11}

Before \textit{McCarthy} and \textit{Boykin}, state and federal law was inconsistent in setting standards for the acceptance of a guilty plea. In general, however, most courts refrained from accepting a guilty plea without first determining that it was fair to the defendant under the circumstances of the case.\textsuperscript{12}

\begin{itemize}
\item \textsuperscript{6} \textit{Id.} at 842-43.
\item \textsuperscript{6} 89 S. Ct. at 1171.
\item \textsuperscript{7} \textit{Id.}
\item \textsuperscript{8} \textit{Id.} at 1172-74.
\item \textsuperscript{9} U.S. Const. amend. VIII.
\item \textsuperscript{10} \textit{Boykin v. State}, 281 Ala. 659, 207 So. 2d 412 (1968).
\item \textsuperscript{11} 89 S. Ct. at 1712.
\item \textsuperscript{12} Annot., 97 A.L.R.2d 551 (1964.)
\end{itemize}
The ultimate question, not yet resolved, is how much procedural for-
mality and regularity the plea of guilty process will be given and, in
this regard, to what extent formality will be consistent with the other
objectives of guilty plea process.\textsuperscript{13}

The federal courts have long strived to avoid either an excess of for-
mality on the one hand or the hurried acceptance of guilty pleas without
proper interrogation of defendants on the other.\textsuperscript{14} The decisions prior to
\textit{McCarthy} fall into two rather indistinct groups. Most courts, while recog-
nizing the need for some certainty of fairness in the acceptance of guilty
pleas, did not require any specific set of inquiries to be made. A small
minority stated that a more explicit procedure should be followed.

In \textit{Waddy v. Heer}\textsuperscript{16} the Court of Appeals for the Sixth Circuit de-

clined to hold that due process requires compliance with a particular
procedure when a plea is accepted from a defendant represented by coun-
sel. The court did say that the preferred practice would be to have the
fact that the accused comprehended the effect of his plea appear on the
record at the time the plea is entered.\textsuperscript{16} Even less stringent is
\textit{Stephens v. United States},\textsuperscript{17} in which the court stated that failure to comply fully
with rule 11 is not fatal to the entry of a guilty plea.\textsuperscript{18} At least one court
has noted the need for “something more than the presence of counsel
and the statement that the defendant pleads guilty. . . .”\textsuperscript{19} Several courts
have allowed the determination of the voluntariness of the plea to come
from sources other than the trial judge’s questioning of the defendant.\textsuperscript{20}

Foremost in the line of decisions of the distinct minority of federal
courts that demanded stricter adherence to rule 11 is \textit{Heiden v. United

\textsuperscript{13} D. Newman, \textit{Conviction—The Determination of Guilt or Innocence
Without Trial} 52 (1966) [hereinafter cited as Newman]. See also 20 Syracuse
L. Rev. 109, 111 (1968).

\textsuperscript{14} Protection of the defendant who pleads guilty is not a recent idea. The con-
stitutional foundation of rule 11 was indicated in \textit{Smith v. O’Grady}, 312 U.S. 329
(1941). The Court indicated that notice of the true nature of the charge is “[t]he
first and most universally recognized requirement of due process. . . .” \textit{Id.} at 334.
Earlier, in \textit{Kercheval v. United States}, 274 U.S. 220 (1927), the Court said:
“Out of just consideration for persons accused of crime, courts are careful that a
plea shall not be accepted unless made voluntarily after proper advice and with
full understanding of the consequences.” \textit{Id.} at 223.

\textsuperscript{15} 383 F.2d 789 (6th Cir. 1967).

\textsuperscript{16} \textit{Id.} at 795.

\textsuperscript{17} 376 F.2d 23 (10th Cir. 1967).

\textsuperscript{18} \textit{Id.} at 24.

\textsuperscript{19} Rimanich v. United States, 357 F.2d 537, 538 (5th Cir. 1966).

\textsuperscript{20} Dorrough v. United States, 385 F.2d 887 (5th Cir. 1967), \textit{discussed in}
\textit{Gentile, Fair Bargains and Accurate Pleas}, 49 Boston U.L. Rev. 514, 519-23
(1969); United States v. Rizzo, 362 F.2d 97 (7th Cir. 1966); United States v.
Davis, 212 F.2d 264, 267 (7th Cir. 1954).
States,\textsuperscript{21} relied on in part by the majority in \textit{McCarthy}.\textsuperscript{22} According to \textit{Heiden}, "[p]rejudice ... is established when lack of understanding in a specific and material respect is sufficiently alleged and such asserted lack, if it existed, would have been disclosed by a proper examination by the trial judge."\textsuperscript{23} Several courts expressly or impliedly rejected \textit{Heiden}'s rationale.\textsuperscript{24}

Federal courts also differed on how far the trial judge must go in informing the defendant of the consequences of his plea. Prior to \textit{McCarthy} the rule seemed to be that merely informing the defendant of the direct consequences of the plea was sufficient.\textsuperscript{25}

Before \textit{Boykin}, the state courts employed a variety of procedures to achieve some protection similar to that intended by rule 11. Today, states can draw from the American Bar Association's \textit{Project on Minimum Standards for Criminal Justice}\textsuperscript{28} to establish uniform rules governing acceptance of guilty pleas. While a detailed analysis of current state procedures is not feasible in this note, examples selected from a few states point out the disparity in their procedures for accepting guilty pleas. Missouri requires some questioning of the defendant by the trial judge to determine whether the plea is voluntary.\textsuperscript{27} The Supreme Court of Tennessee reached the opposite result in a similar situation.\textsuperscript{28} Several states

\textsuperscript{21} 353 F.2d 55 (9th Cir. 1965), \textit{noted in} 41 \textit{Temp. L.Q.} 491, 497-501 (1968).
\textsuperscript{22} 89 S. Ct. at 1172-73.
\textsuperscript{23} 353 F.2d at 55.
\textsuperscript{24} Stephens v. United States, 376 F.2d 23, 24-25 (6th Cir. 1967); Halliday v. United States, 380 F.2d 270, 272 (1st Cir. 1967); Brokaw v. United States, 368 F.2d 508, 510 (4th Cir. 1966).
\textsuperscript{25} Trujillo v. United States, 377 F.2d 266 (5th Cir. 1967) (no need to inform of ineligibility for parole); Meaton v. United States, 328 F.2d 379 (5th Cir. 1964) (no need to inform of loss of civic privileges); Smith v. United States, 324 F.2d 436 (D.C. Cir. 1963) (non-availability of probation and parole not a "consequence"); United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963) (no need to inform of loss of voting rights). \textit{But see} Munich v. United States, 337 F.2d 356 (9th Cir. 1964). \textit{See also} 41 \textit{Temp. L.Q.} 491 (1968).
\textsuperscript{26} ABA \textit{Project on Minimum Standards for Criminal Justice, Pleas of Guilty} §§ 1.4-7 (Approved Draft 1968). The provisions are quite similar to \textit{Fed. R. Crim. P.} 11; section 1.4 provides for the questioning of the defendant by the trial judge in order to insure that the defendant fully understands the charge against him and the consequences of the plea; section 1.5 is aimed at insuring that the plea is voluntary; section 1.6 requires that there be a factual basis for the plea; section 1.7 requires that a record be made of the guilty plea proceedings.
\textsuperscript{27} State v. Rose, 440 S.W.2d 441 (Mo. 1969). The court pointed out that proper inquiry at the trial level lessens the need for such post-conviction hearings. \textit{Id.} at 445-46.
\textsuperscript{28} Richmond v. Henderson, --- \textit{Tenn.} ---, 439 S.W.2d 263 (1969). The court acknowledged that counsel deliberately misrepresented certain facts to the defendant, but refused to overturn the acceptance of the guilty plea. The court apparently felt that misconduct of defense counsel must be so obvious as to attract
have statutes bearing on the question. Michigan, for example, requires that:

Whenever any person shall plead guilty to an information filed against him in any court, it shall be the duty of the judge of such court, before pronouncing judgment or sentence upon such plea, to become satisfied after such investigation as he may deem necessary for that purpose respecting the nature of the case, and the circumstances of such plea, that said plea was made freely, with full knowledge of the nature of the accusations, and without undue influence.

In fact, this requirement is followed only in murder cases.

An apparently explicit standard governing the acceptance of guilty pleas now exists, at least in the federal courts. A federal trial judge must follow McCarthy's interpretation of rule 11 and can no longer "resort to 'assumptions' not based upon recorded responses to his inquiries." The defendant in pleading guilty must relinquish a "known right or privilege." Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

In addition to directing the judge to satisfy himself that the plea is intelligent and voluntary, McCarthy requires a determination that there is a factual basis for the plea. All of these inquiries into the defendant's understanding of the plea must be demonstrated "in the record at the time the plea is entered." Relying heavily on Heiden the Court noted in McCarthy that "rule 11 is designed to eliminate any need to resort to a later fact-finding proceeding 'in this highly subjective area.'"

the immediate attention of the trial court: "At relator's trial there would have been nothing apparent to the court which would have indicated the underhanded method in which the attorney shirked his duty to his client and procured a guilty plea." Id. at 266.

E.g., Conn. Gen. Stat. Ann. § 54-60 (1958) (no provision for the questioning of the defendant included); N.C. Gen. Stat. § 15-4.1 (1965) (plea must be voluntary but no requirement that there be a factual basis for it). Several states presently have procedural rules that closely resemble rule 11: e.g., Fla. R. Crim. P. 1.170(a); Mo. R. Crim. P. 25.04. Neither of these two rules require that there be a factual basis for the plea.


Newman, supra note 13, at 11-12. Both Wisconsin and Michigan employ procedures other than direct questioning by trial judge. Id. 13-21.


9 S. Ct. at 1171.

Id. at 1173 (emphasis by the Court).

Id. at 1172.
GUILTY PLEAS

In the future, failure to comply with the requirements of the rule will result in affording the defendant the "opportunity to plead anew."37

The impact that Boykin will have on state courts is not so clear. If one views Justice Harlan's dissenting opinion as setting forth the unequivocal interpretation of the decision, there is little room for disputing the contention that rule 11 now applies to the states. "The Court thus in effect fastens upon the states, as a matter of federal constitutional law, the rigid prophylactic requirements of rule 11..."38 But it is difficult to read such an interpretation into the majority opinion in light of the fact that rule 11 is never mentioned. It is perhaps significant that the case was brought to the Supreme Court on the question of cruel and unusual punishment; reversal of the decision below can be viewed as a means of correcting the wrong at hand while avoiding the more controversial issue of the constitutionality of the death penalty.

In Boykin, after stating that the right to trial by jury, the right to confront one's accusers, and the privilege against self-incrimination are simultaneously waived when a defendant pleads guilty,39 the Court simply held that "we cannot presume a waiver of these three important federal rights from a silent record."40 The opinion also held that there must be an affirmative showing that the plea was intelligently and voluntarily entered.41 In order to contend successfully that Justice Harlan's interpretation is the correct one, it will be necessary to look beyond the opinion itself since he gave no concrete reasons for the assertion that rule 11 now applies to the states.

The soundest manner in which to support the dissenting opinion's contention is to analyze Boykin in conjunction with McCarthy. The decisions are apparently dissimilar; the majority in McCarthy refused to discuss the constitutional issues involved42 while the majority in Boykin resolved them. A close reading of McCarthy, however, discloses that these constitutional questions were prominent in the minds of the justices voting in the majority:

These two purposes have their genesis in the nature of a guilty plea. A defendant who enters such a plea simultaneously waives sev-

37 Id. at 1174.
38 89 S. Ct. at 1713 (dissenting opinion).
39 Id. at 1712.
40 Id. The Court, quoting McCarthy, stated: "'Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.'" Id. at 1712 n.5.
41 Id. at 1712.
42 89 S. Ct. at 1169.
eral constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers.\textsuperscript{48}

The similarity of the above language to the following excerpt from \textit{Boykin} is obvious:

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the states by reason of the Fourteenth. ... Second is the right to trial by jury. ... Third is the right to confront one's accusers. ... We cannot presume a waiver of these three important federal rights from a silent record.\textsuperscript{44}

Further, in perhaps the most significant portion of the \textit{Boykin} decision the Court stated:

What is at stake for an accused facing death or imprisonment demands utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure that he has a full understanding of what the plea connotes and of its consequences. When the judge discharges that function, he leaves a record adequate for any review that may be later sought.\textsuperscript{45}

According to \textit{McCarthy}, the two primary reasons for strict enforcement of rule 11 are protection of the accused and the establishment of a record adequate to sustain post-conviction attacks.\textsuperscript{46} Since the protection of the accused is the primary aim in both state and federal courts and since the same constitutional rights are involved, state courts will apparently be compelled to comply with the requirements of rule 11.

There is one provision of rule 11 that arguably does not apply to the states. \textit{Boykin} does not mention any need to determine whether there is a "factual basis"\textsuperscript{47} for the plea. In \textit{McCarthy} the Court gave two reasons

\textsuperscript{42} \textit{Id.} at 1171.
\textsuperscript{44} 89 S. Ct. at 1712.
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} 89 S. Ct. at 1170-72.
\textsuperscript{47} The meaning of "factual basis" was discussed in \textit{McCarthy}:

The judge must determine "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." Requiring this examination of the relation between the law and the acts the defendant admits having committed is designed to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the
in support of the factual inquiry required by the rule. First, such a finding by the trial court weighs against post-conviction attacks on the plea. Second, this safeguard protects a defendant against pleading guilty to a charge for which he could not be convicted. 48

But even the most well-advised defendant may harbor doubts as to whether his particular acts were sufficient to fall within a particular statutory definition of a crime. Why should a defendant with such doubts be forced to undergo the ordeal of jury decision, which is sometimes inaccurate, if he is willing to accept lenient sentencing for a lesser offense? It is this type of defendant to whom the plea-bargaining process will be most attractive. Assuming that the defendant is represented by a lawyer interested in achieving the best results for his client, the question becomes whether all parties concerned will best be served by waiver of trial and acceptance of a more lenient sentence. If defense counsel feels that his client’s chances at trial are poor enough to warrant a guilty plea, then the defendant should have the opportunity to make the choice, even though there may be no definite "factual" basis for the plea.

The plea-bargaining process offers something for both the courts and the defendant: By pleading guilty and waiving trial, the defendant saves the judicial process a tremendous amount of time; 49 and most judges impose more lenient sentences than would be given for conviction after a full trial. 50 There are two general types of "bargain" made between prosecutor and defense counsel in the typical plea-bargaining situation. The one less common is the plea of guilty to a lesser non-included offense—an offense that has no substantial relationship to the acts committed by the defendant. The factual-basis requirement should now eliminate such pleas in the federal courts. The more common plea arrangement is that charge but without realizing that his conduct does not actually fall within the charge."

89 S. Ct. at 1171 (quoting rule 11).
48 Id. at 1170-72.
50 See id. 869-70. See also Gentile, Fair Bargains and Accurate Pleas, 49 Bosron U.L. Rev. 514, 548 (1969), in which the author, after noting the prevalence of the practice of discrimination in sentencing in favor of defendants who plead guilty, states:

In this light, justification for discriminatory treatment based on the method of guilt determination needs little elaboration. The guilty plea is only secondarily a means of guilt determination. It is primarily a means of law enforcement. Without the "carrot" and "stick" of discrimination, guilty pleas would not be offered with desirable frequency. . . . In fact, it is the overriding interest of society in effective law enforcement which justifies the discrimination.
in which the defendant enters a plea of guilty to a lesser included offense. Under a factual basis requirement, even pleas of guilty to lesser included offenses may well be rejected if the judge cannot find from the facts before him a close relation to the substantive elements of the crime to which the plea of guilty is entered. In order to accept such pleas the judge often will be forced to conduct an extended hearing, and it is not likely that this result is what the Court deciding *McCarthy* had in mind when it stressed the need for a factual determination. At any rate, state courts should not follow a rigid factual-basis test for guilty pleas until the Supreme Court makes clear that this requirement is specifically binding upon them.

A further problem in complying with the requirements of rule 11 will likely arise when the courts are forced to define "consequences of the plea." Interesting questions arise when one tries to draw a line between results that are direct enough to be considered consequences, of which the defendant must be informed, and those more indirect results of which the defendant need have no knowledge. For example, by pleading guilty a defendant also waives any defenses that he may have. Must the judge therefore explore the merits of any possible defense available to the defendant? Must, indeed may, a judge inform the defendant that one consequence of a guilty plea is the likelihood of a more lenient sentence? Arguably, presenting a defendant with the choice of asserting his innocence or accepting a lesser penalty would have a "chilling" effect on the exercise of his constitutional rights within the meaning of *United States v. Jackson*.

Requiring the trial judge personally to question the defendant shifts a portion of the task of assisting the defendant from counsel to the court. The procedure adopted to carry out this task is crucial. The judge must

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61 For an excellent discussion of typical plea-arrangement situations, see *Guilty Plea Bargaining*, supra note 49 at 866-70.
62 The most obvious example of a situation that may well require hearing on the question of whether there is a factual basis for the plea is that of a crime involving a specific intent. In order to determine with precision that the specific intent existed, the judge may be forced to review past decisions dealing with the specific intent as well as to interrogate the defendant at length. Arguably, the better solution would be to require the judge to determine only that there is a probability that the requisite intent was present.
64 390 U.S. 570 (1968). *Jackson* involved a prosecution under the Federal Kidnapping Act, 18 U.S.C. § 1201(a) (1948). Under the Act, the only way a defendant could avoid risking the death penalty was to plead guilty and thus waive his right to jury trial, his right to confront his accusers, and his privilege against self-incrimination. The Court held that this provision had a chilling effect on the assertion of these rights and was thus unconstitutional.
directly question the defendant to determine whether he understands the significance of what he is doing in pleading guilty. Can one who has not been previously informed of the consequences of a plea of guilty (and it is this type of defendant that the rule was designed to protect) quickly weigh all the alternatives and then make the best decision? Some significant amount of time must be allowed him, the exact amount to be determined by such factors as his intelligence and previous experience.

Certainly the above problems will have to be resolved in order for the requirements of rule 11 to serve the interests of justice. In spite of these difficulties, the decisions in McCarthy and Boykin should benefit all parties involved in the process of guilty plea acceptance. In addition to setting forth a more or less uniform set of rules, the Court has provided significant safeguards for both the trial court and the defendant. By requiring an explicit set of inquiries to be made at the trial stage, the Court assured that future defendants will be better informed and thus presumably more able to make intelligent decisions. Trial court judgments will receive greater protection since a guilty plea under the requirements will likely be upheld against subsequent attacks.

TRAVIS W. MOON

Decedents' Estates—Does North Carolina Law Adequately Protect Surviving Spouses?

Although the policy of freedom to distribute property at death is strong, a state may feel compelled to intervene if inadequate provision is made for the surviving spouse. At common law the surviving spouse was protected by the marital estates of curtesy and dower. But with the advent of an industrial society, most state legislatures have perceived that these common-law protections have become outmoded. Land is no longer the principal asset of most estates, and, when it is, the marital estates often impose a restraint on its alienability thought undesirable by modern critics. States have sought new means to protect a surviving spouse. To this end, North Carolina has enacted the Intestate Succession Act, which purports to promulgate this policy.

*See generally 25 AM. JUR. 2d Dower and Curtesy § 3 (1966).
3 See 1 AMERICAN LAW OF PROPERTY § 5.5, at 332-34 (A. J. Casner ed. 1952); 3 VERNIER, AMERICAN FAMILY LAWS § 189, at 351-54 (1935).
1 See 1 AMERICAN LAW OF PROPERTY § 5.5, at 332-34 (A. J. Casner ed. 1952); 3 VERNIER, AMERICAN FAMILY LAWS § 189, at 351-54 (1935).
2 N.C. GEN. STAT. §§ 29-1 to -30 (1966) (chapter 29). See also N.C. GEN. STAT. § 30-1, -2 (1966), entitled “Surviving Spouses.” These statutes were en-