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adopted the latter interpretation, but the fact remains that without cross-examination of Williams himself, "the jury was left with only the unelucidated, apparently damning, and patently damaging accusation as told by Shaw."[43]

The Court has labored to discover the reach of the confrontation clause when measured against conflicting demands of the hearsay exceptions. One solution to the dilemma, wholly consistent with the decision in *Barber*, would be to read the confrontation clause as a canon of prosecutorial conduct. So read, the confrontation clause would require prosecutors to make good faith attempts to procure people to testify, and to allow hearsay only when necessity, trustworthiness and fairness—arguably absent in *Dutton*—are present. Interpreted in this fashion, the confrontation clause would bind the prosecutor, notwithstanding that an exception to the hearsay rule would permit admission of the questionable statement.[44] A confrontation clause construed as a standard of prosecutorial conduct might reasonably have resulted in a contrary holding in *Dutton*. In addition, such a construction would afford improved prosecutorial behavior and more ascertainable standards.

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Criminal Procedure—Voluntariness of Guilty Pleas in Plea Bargaining Context

One of the basic purposes of our system of justice is to separate the guilty defendant from the innocent.[1] The formal trial process and the guilty plea process are the only means used to accomplish this end. The formal trial process is laced with procedural, evidentiary, and other safeguards to protect against conviction of the innocent and to ensure that the accused are better able to defend against the power and the resources of the state.[2] However, the guilty plea process contains far fewer safeguards, and the safeguards that do exist vary from jurisdiction to jurisdiction.[3]

[43] *Id.*
[44] Barber v. Page, 390 U.S. 719, 724 (1968).

[1] D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 10 (1966).
[2] See L. MAYERS, THE AMERICAN LEGAL SYSTEM 11-150 (rev. ed. 1963) for a general discussion of the safeguards available at all stages of the procedure.
[3] D. NEWMAN, *supra* note 1, at 10.

In the recent case of *North Carolina v. Alford*,[4] the United States Supreme Court significantly expanded the instances in which a guilty plea may be determined to be voluntary while upholding the constitutionality of the plea bargaining process.

On December 2, 1963, Alford was indicted for first-degree murder, a capital offense in North Carolina.[5] Eight days later, on the recommendation of his court-appointed counsel, he pleaded guilty to a charge of second-degree murder, a noncapital offense.[6] Before accepting the plea, the trial judge heard incriminating testimony from three witnesses.[7] Alford himself testified that he had not committed the murder but that he had pleaded guilty because "they said if I didn't they would gas me for it . . . ."[8] While Alford was on the stand his attorney established by questioning that Alford had been informed of his rights and of the alternatives available to him.[9] At this point in the proceedings, Alford stated, "I'm not guilty but I plead guilty."[10] Then the court asked Alford if, in light of his denial of guilt, he still wished to plead guilty, and Alford replied in the affirmative. Thereupon the trial court sentenced him to thirty years imprisonment for second-degree murder.[11] At the state post-conviction hearing in 1965, Alford's attorney testified that Alford had told the attorney that he was innocent,[12] but the state court found that the guilty plea was "willingly, knowingly, and understandingly made on the advice of competent counsel."[13] Alford's subsequent petition for a writ of habeas corpus was denied in both the district court and the court of appeals on the basis that the plea was voluntarily and knowingly entered.[14] On Alford's second petition for a writ of habeas corpus[16] the Court of Appeals for the Fourth Circuit, relying on *United States v. Jackson*,[15] held that Alford's guilty

[4] 400 U.S. 25 (1970).

[5] N.C. GEN. STAT. § 14-17 (1969).

[6] *Id.*

[7] The general testimony of the witnesses was that on the day of the killing when Alford took his gun from his house he stated that he intended to kill the victim and when he returned home he stated that he had carried out his purpose. 400 U.S. at 28.

[8] *Id.* at n.2.

[9] Brief for Appellee at 4, North Carolina v. Alford, 400 U.S. 25 (1970).

[10] 400 U.S. at 28 n.2.

[11] This was and remains the maximum penalty available for second-degree murder in North Carolina. N.C. GEN. STAT. § 14-17 (1969).

[12] Brief for Appellee at 4.

[13] 400 U.S. at 29.

[14] *Id.* at 29-30.

[15] 390 U.S. 570 (1968). See discussion pp. 797-98 *infra*.

[16] Alford v. North Carolina, 405 F.2d 340, 347 (4th Cir. 1968).

plea was involuntary because its principal motivation was the fear of death. The Supreme Court reversed, holding that *Jackson* had not established a new test for the validity of guilty pleas, *and* that a guilty plea accompanied by protestations of innocence constitutionally may be accepted if an inquiry into the factual basis for the plea discloses strong evidence of actual guilt.

In *Jackson* the Court held that the death penalty clause of the Federal Kidnaping Act[17] constituted an impermissible burden on the assertion of the constitutional rights to trial by jury and against self-incrimination.[18] Under the Act a person accused of kidnaping, and failing to release the victim unharmed, could avoid the possibility of capital punishment only by pleading guilty or by pleading not guilty and waiving his right to a jury trial. This choice arose as a result of a section of the Act that allowed only the jury to impose the death penalty.[19] The Court reasoned that since the death penalty could apply only to those defendants who contest their guilt before a jury, the statute had a chilling effect on the exercise of the sixth amendment right to a jury trial.[20] The Court further found that the statutory scheme encouraged guilty pleas and in doing so infringed upon the fifth amendment right against self-incrimination. The court of appeals evaluated the North Carolina statute and found that it

> does not permit an accused who pleads not guilty to waive a jury trial. The accused may avoid a jury trial only if he pleads guilty and, by statute, a plea of guilty may not result in a punishment more severe than life imprisonment. Thus a person accused of a capital crime in North Carolina is faced with the awesome dilemma of risking the death penalty in order to assert his rights to a jury trial and not to plead guilty, or, alternatively, of pleading guilty to avoid the possibility of capital punishment.[21]

The court of appeals concluded that though the *Jackson* doctrine did not require the automatic invalidation of guilty pleas entered under the North Carolina statutes, a prisoner is entitled to relief if he can demonstrate that his plea was in fact a product of impermissible burdens of the statutory scheme.[22] However, the Court's own interpretation of *Jackson* does not

[17] 18 U.S.C. § 1201(a) (1964).
[18] 390 U.S. at 572.
[19] 18 U.S.C. § 1201(a)(1) (1964).
[20] "[T]he evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them." 390 U.S. at 583.
[21] 405 F.2d at 344.
[22] *Id.* at 347.

go that far. In *Brady v. United States*[23] the Court determined that *Jackson* does not require the invalidation of every guilty plea induced by a fear of the death penalty. By inference it appears that some guilty pleas induced by fear of the death penalty may be invalidated as coerced. The *Jackson* rationale would seem to support the court of appeals' holding that Alford's plea was the exceptional, coerced type. Since the Court in *Jackson* held the statute unconstitutional because it may tend to coerce guilty pleas, it is reasonable to conclude that the *Jackson* doctrine must apply where the plea was in fact coerced by the presence of the statute. However, in *Alford* the Supreme Court limited *Jackson* to its exact facts and stated that the standard applied by the Fourth Circuit would result in the invalidation of all guilty pleas entered on the fear of a death sentence without regard to the statutory scheme involved.[25]

Having determined that the court of appeals had misconstrued the scope of *Jackson*, the Court found it necessary to inquire into the effect of Alford's contemporaneous protestations of innocence. After noting that state and lower federal courts were divided on the isssue of whether a guilty plea can be accepted when it is accompanied by protestations of innocence and hence contains a waiver of trial but no admission of guilt,[26] the Court gleaned "relevant principles" from two prior dissimilar decisions. In the first case, *Lynch v. Overholser*,[27] a trial judge refused to accept a defendant's guilty plea because the judge had in his possession a psychiatric report which indicated that the defendant possibly was not guilty by reason of insanity. At the subsequent trial, though the defendant did not rely on the defense of insanity, he was found not guilty for that reason and committed to a mental institution. The Supreme Court ordered his release and implied that the judge could have accepted the plea even though he was aware of a defense. The second case relied on by

[23] 397 U.S. 742 (1970).

[24] *Id.* at 747. *Brady* is distinguishable on the facts from *Alford* since Brady expressly admitted guilt.

[25] 400 U.S. at 31.

[26] The cases cited by the Court do not support this conclusion. In no case in which a guilty plea was allowed did the defendant declare that he was not guilty as in *Alford*. The true split of authority occurs when the accused is unwilling to deny guilt or assert innocence because of total lack of recall as to the events surrounding the act of which he is accused. *Compare* Hulsey v. United States, 369 F.2d 284, 287 (5th Cir. 1966), *and* State v. Levba, 80 N.M. 190, 453 P.2d 211 (1969), *with* State v. Martinez, 89 Idaho 129, 403 P.2d 597 (1965), State *ex rel.* Crossley v. Tahash, 263 Minn. 299, 116 N.W. 666 (1962), *and* Commonwealth v. Cottrell, 433 Pa. 177, 249 A.2d 294 (1969).

[27] 369 U.S. 705 (1962).

the Court, *Hudson v. United States*,[28] established that federal courts have the power to impose a prison sentence after accepting a plea of nolo contendere. In *Alford*, the Court reasoned that since a prison sentence may be imposed under a plea of nolo contendere an express admission of guilt is not constitutionally required even though a guilty plea normally consists of both a waiver of trial and an express admission of guilt.[29] Thus, the two cases appear to establish that even though a defendant is unwilling to admit guilt he may be sentenced to prison by a judge who is aware of an available defense. However, Alford did more than acquiesce in the entrance of a guilty plea; he affirmatively denied committing the crime of which he was accused. Stating that there is no material difference between refusing to admit commission of a criminal act and affirmatively denying it, the Court held that, in view of the overwhelming evidence against Alford, he had made an intelligent choice between a trial for first-degree murder and a plea of guilty to second-degree murder.[30]

It appears that both the trial court and the Supreme Court placed too much reliance on the presentation of facts at the trial. In a situation such as that in *Alford* where there is real doubt as to the voluntariness of the plea, it is at best questionable to allow the balance to tip in favor of acceptance of the plea on the basis of unchallenged testimony, when the counsel for the defense neither cross-examined the witnesses nor presented a rebuttal of their testimony. The primary purpose for the evidentiary inquiry is to determine if there is a factual basis for the plea of guilty.[31] It is suggested that the defendant's denial of guilt should negate any probative value of the testimony received. A contrary conclusion results in a determination of guilt when there is a genuine dispute between the state and the accused without the constitutional and procedural safeguards inherent in a formal plenary trial.

It is submitted that the cases from which the Court derived its guidelines are distinguishable not only in fact but also in principle. *Lynch* is

[28] 272 U.S. 451 (1926).
[29] 400 U.S. at 37. *See* Brady v. United States, 397 U.S. 742, 748 (1970).
[30] 400 U.S. at 37. See note 7 *supra*.
[31] FED. R. CRIM. P. 11. The term "factual basis" is ambiguous. It could possibly be held to mean that the factual situation is clear in the mind of the accused. However, the broader and more generally accepted definition is that it is the relationship between the acts and the law and the determination that the accused's conduct falls within the charge. *Compare* McCarthy v. United States, 394 U.S. 459, 467 (1969), *with* Griffin v. United States, 405 F.2d 1378, 1380 (D.C. Cir. 1968). See also Note, *Criminal Procedure—Requirements for Acceptance of Guilty Pleas*, 48 N.C.L. REV. 352 (1970).

qualified by the fact that the defendant did not want to rely on the defense of which the judge was aware, whereas Alford appeared to have been willing to assert any defense available. *Hudson* means simply that if a defendant is unwilling to admit guilt, but does not desire to contest the assertions of the state, he may be treated as though he is guilty.[32] Alford, too, was unwilling to admit guilt, but his contemporaneous statements indicate that he did, in fact, wish to contest the assertion of the state that he was guilty. It is difficult to accept the Court's conclusion that there is no difference between a plea which refuses to admit guilt and a plea that expressly denies guilt. If there were in fact no difference, there would have been no reason for the development of the plea of nolo contendere.[33]

Assuming that there is sufficient precedent to justify acceptance of a guilty plea accompanied by protestations of innocence, the question of the voluntariness of the guilty plea in *Alford* remains. Under the North Carolina statutory scheme as it existed at the time of the plea, Alford had a choice of going before a jury under what his counsel called "aggravated circumstances" and receiving what Alford considered a certain death penalty[34] or pleading guilty and facing a maximum penalty of life imprisonment.[35] The added influence of an apparent promise by the prosecutor that he would accept a plea to a lesser offense and the constant urgings by counsel combined to create an irresistible decision by Alford that if he did not plead guilty he would face certain death.[36]

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[32] It should be noted that the Court in *Hudson* did not consider whether a plea of nolo contendere would be accepted if accompanied by protestations of innocence. The same arguments that apply to not allowing a plea of guilty in those circumstances also apply to a plea of nolo contendere. Under the Federal Rules of Criminal Procedure the judge need not determine if there is a factual basis for a plea of nolo contendere. FED. R. CRIM. P. 11. However, North Carolina does require that the trial judge examine an accused and insure that he is aware of the consequences of his plea. State v. Payne, 263 N.C. 77, 138 S.E.2d 765 (1964).

[33] City of Burbank v. General Elec. Co., 329 F.2d 825, 835 (9th Cir. 1964) (dictum). For a discussion of the development of the plea of nolo contendere see Lenvin & Meyers, *Nolo Contendere: Its Nature and Implications*, 51 YALE L.J. 1255 (1942).

[34] The alleged killing took place after an argument over a white woman who was accompanying Alford at the time. Since both Alford and the decedent were Negroes, Alford's attorney advised him that a jury in the southern city where the incident took place could include prejudiced persons. Supplemental Brief for Appellee at 3, North Carolina v. Alford, 400 U.S. 25 (1970). See L. MAYERS, *supra* note 2, at 117.

[35] Ch. 616, [1953] N.C. SESS. L. 461, which allowed a plea of guilty to capital offenses, was repealed by ch. 117, [1969] N.C. SESS. L. 104.

[36] Alford did have considerable knowledge of the sentencing process based on his long criminal record, which included one conviction for murder, nine for armed robbery, and various other convictions. 400 U.S. at 29 n.4.

The Court did not specifically mention the apparent promise by the prosecutor. However, it did, through its language to the effect that Alford had a choice of alternatives, recognize that the agreement probably was made. Apparently the Court assumed that the widespread practice of plea-bargaining[37] is constitutional and was concerned merely with the extent of its application.[38] It is unquestionably sound policy that allows a person accused of a crime to plead guilty after rationally considering the alternatives available to him.[39] However, it is submitted that the Court should have considered all of the elements affecting this rationality in combination as an aggregate force instead of weighing each one separately. This mode of analysis would have provided a realistic appraisal of whether the accused's plea was in fact voluntary. The combination of a questionable statute, constant urgings of counsel, and a tempting offer of a lesser charge with the constant, unequivocal assertions of innocence should convince a court that a plea was not voluntarily rendered.

It is submitted that the *Alford* decision is due at least in part to the crowded-docket anxiety, the fear that the courts will be overwhelmed unless the instances in which the plea of guilty is allowed are increased. But the cure for the problem of the crowded docket is legislative and administrative reform, not an undermining of the very rights that the courts are designed to protect. The logical result of *Alford* is that in the future it will be virtually impossible for a defendant to show coercion. It will be of no avail to show that he was forced by statute to face a death penalty in order to receive a jury trial. It will do him no good to show that he did not want to plead guilty and that he protested his innocence from the outset. If an accused is told by his counsel that there is a possibility of a death sentence, that the situation is aggravated, and that the prosecutor is willing to accept a guilty plea to a lesser charge and he is compelled by this to plead guilty, he will have no recourse in the courts of the United States.

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[37] See generally Comment, *Guilty Plea Bargaining: Compromises By Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964).

[38] For a thorough discussion of the major objections to plea bargaining and the alternatives available, see Comment, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970). A discussion of the broader ramifications of bargain justice appears in Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P. 780, 790 (1956).

[39] Note, *Criminal Procedure—Requirements for Acceptance of Guilty Pleas*, 48 N.C.L. REV. 352, 359 (1970).