THE TRIAL JUDGE'S SATISFACTION AS TO THE FACTUAL BASIS OF GUILTY PLEAS

An estimated ninety per cent of criminal convictions in state and federal courts are based on guilty pleas.[1] This single fact demonstrates the dominant role of the guilty plea process in the administration of criminal justice and emphasizes the importance of insuring the accuracy of such pleas. Defendants who plead not guilty and stand trial are protected by a multitude of safeguards designed to avoid conviction of the innocent.[2] Modern procedures for accepting guilty pleas should also be designed to prevent the conviction of innocent defendants; however, the guilty plea process is characterized by less elaborate procedures which often ignore the issue of guilt or innocence.[3]

An innocent person may plead guilty for a variety of reasons. He may be unaware of his innocence because of an erroneous belief that his conduct constitutes the crime charged,[4] or an erroneous belief that he committed certain acts.[5] On the other hand, a defendant who is confident of his innocence may plead guilty because of mental disability, or because he fears he will be unable to establish his innocence. When informed of many courts' practice of giving lighter sentences to defendants who save the state the expense of a trial,[6] an innocent person may be unable to resist a prosecutor's offer of a reduced charge in exchange for a guilty plea.[7]

One method of preventing false pleas is judicial inquiry into the facts supporting the charge. Professor Newman, in his definitive study of adjudication by plea of guilty, has observed that some trial judges do make a factual inquiry before finally accepting guilty pleas,[8] although those who do so appear to be in the minority.[9] Some procedures aimed primarily at

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1. NEWMAN, CONVICTION 1 (1966).
2. *Id.* at 10.
3. *Ibid.*
4. 34 F.R.D. 411, 418 (1964).
5. See State *ex rel.* Crossley v. Tahash, 263 Minn. 299, 116 N.W.2d 666 (1962).
6. *E.g.,* United States v. Wiley, 278 F.2d 500 (7th Cir. 1960); Euziere v. United States, 249 F.2d 293 (10th Cir. 1957); Note, 66 YALE L.J. 204, 220-21 (1956). See generally 26 F.R.D. 231, 285-89 (1959).
7. Shelton v. United States, 242 F.2d 101, 115 (5th Cir.) (dissenting opinion), *rev'd on rehearing,* 246 F.2d 571 (5th Cir. 1957), *rev'd,* 356 U.S. 26 (1958); see NEWMAN, *op. cit. supra* note 1, at 237.
8. NEWMAN, *op. cit. supra* note 1, at 20-21.
9. It appears that only a handful of state courts are making any type of formal investigation or findings as to the factual basis of guilty pleas. Notes 33-61 *infra* and accompanying text.

accomplishing other goals indirectly result in such examinations; for example, a presentence investigation may turn up facts which cast doubt on the defendant's guilt. However, with few exceptions, judges at most need inquire only into the voluntariness of guilty pleas and assure themselves that the pleas were made with understanding of the possible consequences.[10] This note is a review of state and federal procedures used to determine the facts in cases in which guilty pleas are entered.

I. Guilty Pleas in the Federal Courts

The federal courts are considered separately because recent changes in their rules for accepting guilty pleas will probably influence procedures in many states. Currently, federal courts are governed by Rule 11 of the Federal Rules of Criminal Procedure, which directs district courts to determine that all guilty pleas are entered "voluntarily with understanding of the nature of the charge."[11] A new Rule 11, which goes into effect July 1, 1966, requires federal judges to satisfy themselves that the facts support the plea.[12] To put the new rule in proper perspective, the current practices in federal courts are examined first.

A. *Current Rule 11*

1. *No Requirement That District Courts Look Into the Actual Basis of Guilty Plea*

The current rule is a codification of *Fogus v. United States*.[13] Though language in that opinion could have been read as compelling an inquiry into "facts on which it [the plea] is founded,"[14] the case was not given that interpretation. With but one short-lived exception,[15] the courts have held

10. *E.g.*, Johnson v. Commonwealth, 254 Ky. 775, 72 S.W.2d 472 (1934); State v. Banford, 13 Utah 2d 63, 368 P.2d 473 (1962); Ill. Ann. Stat. ch. 38, § 113-3 (Smith-Hurd Supp. 1965); Utah Code Ann. § 77-24-6 (1953); Ariz. R. Crim. P. 183.

11. Fed. R. Crim. P. 11.

12. 34 F.R.D. 411, 417 (1964).

13. 34 F.2d 97 (4th Cir. 1929).

14. *Id.* at 98.

15. La Fever v. United States, 257 F.2d 271 (7th Cir. 1958), was a short-lived exception to the position that courts, in accepting guilty pleas, need not look into the question of the accused's guilt or innocence. The case held that since the defendant had not in fact committed the crime charged, the district court lacked jurisdiction to accept his guilty plea. The court labeled the circumstances of the crime "jurisdictional facts," and it is clear that the court was investigating the issue of guilt or innocence. For a discussion of the confusion surrounding the use of the term "jurisdictional facts" in *La Fever* see 62 W. Va. L. Rev. 268 (1960). The case was quickly overruled by United States v. Hoyland, 264 F.2d 346 (7th Cir.), *cert denied*, 361 U.S. 815 (1959). The court in *Hoyland* held that since the guilty plea admits all essential allegations, a

that Rule 11 does not require an inquiry into the factual basis of a guilty plea.[16] Because the trial judge is under no obligation to interrogate the defendant as to either the voluntariness of the plea or his understanding of the charge,[17] it is not likely that an accused will have any opportunity to present his version of the case. Thus, procedures under the present Rule are not likely to expose the events of alleged offenses.

2. *The Extent to Which Federal Courts Examine the Factual Basis of Guilty Pleas of Their Own Volition*

It is difficult to determine from the case reports the extent to which federal courts voluntarily conduct inquiries into the factual basis of guilty pleas.[18] Numerous federal opinions, which discuss procedures for accepting

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judgment may be entered without conducting an independent inquiry or hearing to determine "jurisdictional facts."

In Julian v. United States, 236 F.2d 155 (6th Cir. 1956), the defendant's attorney made admissions in court which were tantamount to a plea of guilty. In reversing the conviction, the Sixth Circuit Court of Appeals pointed out that the trial judge should have investigated the accused's felonious intent. Inquiry as to the defendant's intent goes a long way toward determining the factual basis of his plea. However, it was probably because of the peculiar manner in which the plea was entered—the defendant's attorney in stipulations made admissions of fact which constituted a guilty plea—that the court found an obligation to examine the intent of the defendant. It is unlikely that the court would have required this had the trial court complied with Rule 11.

Two judges, in a dissenting opinion in United States v. Shelton, 246 F.2d 571, 577 (5th Cir. 1957), *rev'd per curiam,* 356 U.S. 26 (1958), criticized the failure of federal courts to look into the factual basis of guilty pleas. They pointed out that the "primary matter to be determined is the guilt or innocence of the accused," and deplored the court's inquiring instead into whether or not a good bargain had been made between the defendant and the prosecutor. *Id.* at 580.

16. *E.g.,* Kadwell v. United States, 315 F.2d 667 (9th Cir. 1963); Adkins v. United States, 298 F.2d 842 (8th Cir.), *cert. denied,* 370 U.S. 954 (1962); Heideman v. United States, 281 F.2d 805 (8th Cir. 1962).

17. Johnson v. United States, 301 F.2d 631 (8th Cir. 1962); Barber v. United States, 227 F.2d 431 (10th Cir. 1955); Taylor v. United States, 182 F.2d 473 (9th Cir.), *cert. denied,* 339 U.S. 988 (1950). The rule establishes no procedure for accepting guilty pleas. *E.g.,* Turner v. United States, 325 F.2d 988 (8th Cir.), *cert. denied,* 377 U.S. 946 (1964); Kennedy v. United States, 249 F.2d 257 (5th Cir. 1957), *judgment on remand aff'd,* 259 F.2d 883 (5th Cir. 1958), *cert. denied,* 359 U.S. 994 (1959).

18. Eleven appellate opinions indicate that the lower court determined that the accused in fact committed the offense charged. Since district courts which follow this procedure will probably have few of their guilty plea verdicts challenged by appeals, there may be many other district courts which conduct such inquiries. However, over thirty cases were found which apparently indicate that no examination into the facts occurred.

A survey or poll of district courts would probably render accurate statistics as to the use of factual inquiries. However, this type of survey is obviously impractical since no trial judge is likely to admit that he sentences defendants without satisfying himself of their guilt.

guilty pleas, are devoid of any indication of an investigation into the facts of the alleged offense.[19] However, one author believes that such inquiries are standard procedure in "many federal courts."[20] The present study has uncovered few cases which clearly indicate that factual examination took place.[21]

The manner of inquiry in these cases varies widely. For example, in a district court in Louisiana, the attorney for the government calls his witnesses,[22] who then testify. The defendant is given a chance to ask them questions and to contradict their stories. A similar procedure is followed by a Florida district court,[23] except there is apparently no interrogation of witnesses by the defendant. Other federal courts simply allow defendants to explain the facts of their offenses in detail before their guilty pleas are accepted.[24] Sentence hearings are also utilized to ascertain the factual basis of pleas.[25]

3. *Appellate Review of Guilty Pleas*

On appeals from guilty pleas, federal courts will not consider the question of guilt or innocence since the plea itself is considered decisive of this issue.[26]

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19. *E.g.*, Turner v. United States, 325 F.2d 988 (8th Cir.), *cert. denied*, 377 U.S. 946 (1964); Kadwell v. United States, 315 F.2d 667 (9th Cir. 1963); Bone v. United States, 305 F.2d 772 (8th Cir. 1962), *rev'd and remanded per curiam*, 374 U.S. 503 (1963), *aff'd on rehearing*, 351 F.2d 11 (8th Cir. 1965); Domenica v. United States, 292 F.2d 483 (1st Cir. 1961); Reed v. United States, 291 F.2d 856 (4th Cir. 1961); Kennedy v. United States, 249 F.2d 257 (5th Cir. 1957), *judgment on remand aff'd*, 259 F.2d 883 (5th Cir. 1958), *cert. denied*, 359 U.S. 994 (1959); United States v. Swaggerty, 218 F.2d 875 (7th Cir.), *cert. denied*, 349 U.S. 959 (1955); Unites States v. Denniston, 89 F.2d 696 (2nd Cir.), *cert. denied*, 301 U.S. 709 (1937).

20. Hoffman, *What Next in Federal Criminal Rules?*, 21 WASH. & LEE L. REV. 1, 11 (1964).

21. *E.g.*, Meaton v. United States, 328 F.2d 379 (5th Cir. 1964), *cert. denied*, 380 U.S. 916 (1965); Steffler v. United States, 143 F.2d 772 (7th Cir.), *cert. denied*, 323 U.S. 746 (1944); United States v. Cuff, 211 F. Supp. 680 (E.D. La.), *aff'd*, 311 F.2d 185 (5th Cir. 1962).

22. United States v. Cuff, *supra* note 21.

23. Meaton v. United States, 328 F.2d 379 (5th Cir. 1964), *cert. denied*, 380 U.S. 916 (1965).

24. Pelletier v. United States, 350 F.2d 727 (D.C. Cir. 1965); Everett v. United States, 336 F.2d 979 (D.C. Cir. 1964); Steffler v. United States, 143 F.2d 772 (7th Cir.), *cert. denied*, 323 U.S. 746 (1944).

25. United States v. Semel, 347 F.2d 228 (4th Cir.), *cert. denied*, 382 U.S. 840 (1965); Cortez v. United States, 337 F.2d 699 (9th Cir.), *cert denied*, 381 U.S. 953 (1964); Gawantka v. United States, 327 F.2d 129 (3rd Cir.), *cert. denied*, 377 U.S. 969 (1964); United States v. Finney, 242 F. Supp. 112 (W.D. Pa. 1965).

26. *E.g.*, Adam v. United States, 274 F.2d 880 (10th Cir. 1960); Richardson v. United States, 217 F.2d 696 (8th Cir. 1954); Bloombaum v. United States, 211 F.2d

This position has drawn sharp criticism from some members of the judiciary,[27] and a short-lived exception to the rule succeeded in circumventing it temporarily.[28] This refusal by the appellate courts to examine the facts behind guilty pleas accentuates the importance of providing safeguards at the district court level.

B. *New Rule 11*

New Rule 11 provides that a federal district judge must satisfy himself as to the factual basis of guilty pleas before entering judgments.[29] While the new rule directs the judge to address "the defendant personally" in determining whether the plea was made voluntarily and with understanding of the charge, no such procedural guideline is set out for the factual inquiry. However, the Advisory Committee's comments to the new rule recommend that the trial judge interrogate either the defendant or the attorney for the government, or examine presentence reports to satisfy himself that the accused in fact committed the crime charged.[30] This lack of specific procedural standards could cause wide diversity in the nature and scope of inquiry conducted by the various courts. For instance, an Illinois district court recently complied with the new rule voluntarily. The court interpreted the rule as calling for an inquiry, in appropriate cases, into whether the defendant had discussed such technical issues as the statute of limitations with his attorney.[31] Other courts may not agree that the new rule requires an exploration of possible technical defenses.

II. Investigation of the Factual Basis of Guilty Pleas in State Courts

In the discussion of state procedures, a distinction is drawn between direct and indirect investigations or inquiries. Direct investigations are those conducted solely to determine the existence or absence of a factual basis for the plea. Indirect inquiries are conducted primarily for some other purpose, such as fixing punishment, but involve an exposure of facts which may confirm or discredit a guilty plea.

944 (4th Cir. 1954); Friedman v. United States, 200 F.2d 690 (8th Cir.), *cert. denied,* 345 U.S. 926 (1952).

27. Shelton v. United States, 246 F.2d 571, 577 (5th Cir. 1957) (dissenting opinion), *rev'd per curiam,* 356 U.S. 26 (1958).

28. La Fever v. United States, 257 F.2d 271 (7th Cir. 1958). See the discussion of the *La Fever* case in note 15 *supra.*

29. 34 F.R.D. 411, 417 (1964). Under new Rule 11, federal appellate courts must obviously now consider the issue of guilt or innocence.

30. *Id.* at 418.

31. Cerniglia v. United States, 230 F. Supp. 932 (N.D. Ill. 1964).

A. *Direct Investigations*

A survey of the cases in which convictions based on guilty pleas have been appealed indicates that only a handful of state courts are making any type of direct investigation of their factual basis. The bases for these investigations are found in state constitutional provisions, statutes, court rules, and judicial decisions. Moreover, some judges act on their own volition. Though the vast majority of state courts conduct no factual inquiry, only a few have specifically ruled that one is not mandatory when an accused pleads guilty.[32]

1. *Formal Trial of Case After Entry of Guilty Plea*

The greatest protection to defendants pleading guilty is offered by Virginia, where a formal trial is conducted. This trial is required by a constitutional provision[33] which is self-executing[34] and cannot be waived by the accused.[35] The form of the trial is dictated by a statute which directs the trial judge to hear the case without a jury.[36] Apparently, therefore, the entry of a guilty plea merely has the effect of waiving a jury trial, since the prosecutor presumably must prove every element of the crime beyond a reasonable doubt. Failure to conduct such a trial is reversible error even if asserted for the first time on appeal.[37] In *McGrady v. Cunningham*,[38] the defendant sought a federal writ of habeas corpus on the ground that a Virginia court had failed to inquire as to his understanding of the charge. Noting that the trial had resulted in exposure of all the facts of the crime, the federal court refused the petition. Obviously, such a trial obviates any danger that an accused is pleading guilty when there is insufficient evidence to convict.

While the Virginia procedure provides the most thorough investigation of the factual basis, it is costly and time-consuming. Since the real value of the guilty plea is in avoiding unnecessary litigation, the Virginia solution's drawbacks may be as significant as its advantages.

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32. People v. Kontopoulos, 26 Ill. 2d 388, 186 N.E.2d 312 (1962); Cox v. State, 398 P.2d 538 (Nev. 1965), held that the defendant could not explain his version of the circumstances of the crime to the jury after entering a guilty plea.

33. VA. CONST. art. 1, § 8.

34. Thornhill v. Smyth, 185 Va. 986, 41 S.E.2d 11 (1947).

35. Dixon v. Commonwealth, 161 Va. 1098, 172 S.E. 277 (1934).

36. VA. CODE ANN. § 19.1-19.2 (1950) provides that: "Upon a plea of guilty . . . , the court shall hear and determine the case without intervention of a jury."

37. Dixon v. Commonwealth, 161 Va. 1098, 172 S.E. 277 (1934).

38. 296 F.2d 600 (4th Cir. 1961), *cert. denied*, 369 U.S. 855 (1962).

2. *Evidence Presented To Establish Defendant's Guilt*

While requiring less than a full trial on the issue of guilt or innocence, several states do require the prosecutor to support his charge with the testimony of witnesses or other evidence before judgment is entered.

A Texas statute provides that the prosecutor must present sufficient evidence to support the charge when defendants waive a jury trial and plead guilty in non-capital cases.[39] The evidence must establish all elements of the offense. Reversals have resulted from failures to prove intent in a conviction for assault with intent to kill,[40] to prove the corpus delicti in a burglary case,[41] to show the requisite value for grand larceny,[42] and to prove possession in a narcotics conviction.[43]

The type and amount of evidence that will be considered adequate to support a guilty plea are closely regulated by the Texas appellate courts. The uncorroborated testimony of an accomplice has been held inadequate,[44] as has a prosecutor's report that a capsule found in the accused's possession contained heroin.[45] In the latter case, the Texas Court of Criminal Appeals held that since the chemist who tested the capsule did not testify, such evidence was hearsay.[46] An extrajudicial confession alone has been held insufficient;[47] however, the uncorroborated testimony of the accused in court has been accepted.[48] These two cases are not inconsistent; judicially supervised admissions are more free of potentially coercive influences than are confessions out of court. Moreover, the judge can personally question the defendant to clear up any discrepancies in his testimony. Texas courts have accepted extrajudicial confessions when bolstered by affidavits of witnesses,[49] but these affidavits can be introduced only when approved by the defendant.[50] Excerpts from the report of a previous case in which an

39. TEX. CODE CRIM. PROC. art. 1.15 (1966).

40. Burks v. State, 145 Tex. Crim. 15, 165 S.W.2d 460 (1942).

41. Franklin v. State, 140 Tex. Crim. 215, 144 S.W.2d 581 (1940).

42. Price v. State, 165 Tex. Crim. 326, 308 S.W.2d 47 (1957).

43. Martinez v. State, 170 Tex. Crim. 266, 340 S.W.2d 56 (1960).

44. Hancock v. State, 141 Tex. Crim. 568, 150 S.W.2d 385 (1941).

45. Braggs v. State, 169 Tex. Crim. 405, 334 S.W.2d 793 (1960).

46. *Ibid.*

47. Franklin v. State, 140 Tex. Crim. 251, 144 S.W.2d 581 (1940).

48. Alvarez v. State, 374 S.W.2d 890 (Tex. Crim. App. 1964).

49. King v. State, 170 Tex. Crim. 435, 341 S.W.2d 654 (1961); *Ex parte* Bruinsma, 164 Tex. Crim. 358, 298 S.W.2d 838, *cert. denied,* 354 U.S. 927 (1956).

50. Griffith v. State, 391 S.W.2d 428 (Tex. Crim. App. 1965); TEX. CODE CRIM. PROC. art. 1.15 (1966); see *Ex parte* Keener, 166 Tex. Crim. 326, 314 S.W.2d 93 (1958). Without his client's permission, defense counsel cannot agree to a stipulation as to what the defendant would testify. Crawford v. State, 161 Tex. Crim. 554, 278 S.W.2d 845 (1955).

accused was convicted of rape have also been held sufficient to support a later plea of guilty to a lesser offense.[51]

Curiously, Texas law demands a greater inquiry into the factual basis of guilty pleas in non-capital than in capital cases; in the latter, evidence is introduced only on the issue of assessing punishment.[52]

A similar Alabama statute provides that when there has been no grand jury indictment or preliminary hearing, witnesses may be called to convince the court of the defendant's guilt.[53] This statute, therefore, is restricted to a relatively small area. Apparently, the Alabama legislature concluded that a sufficient factual inquiry occurs during grand jury investigations and preliminary hearings.

Though there is no requirement that trial judges make factual inquiries before accepting guilty pleas in Wisconsin, an instruction to trial judges recommends that "the court take evidence of defendant's guilt."[54] Professor Newman has reported that a post-guilty plea hearing is being used increasingly by Wisconsin trial judges to insure the accuracy of convictions.[55] These hearings are similar to the Texas procedure in non-capital cases except that the defendant may call witnesses of his own. The state must present a prima facie case of guilt. When the evidence is inconsistent with the plea or raises doubts of the defendant's guilt, the judge entertains a motion for withdrawal of the plea and orders a trial or a new arraignment on a "more accurate charge."[56] The Wisconsin hearing not only protects the defendant, but also provides a full record which can protect the trial judge, the prosecutor, the police, and defense counsel from later charges of misconduct.[57]

Though Maryland case law indicates clearly that trial judges are under no duty to examine evidence when defendants plead guilty,[58] defendants

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51. Isaacs v. State, 391 S.W.2d 421 (Tex. Crim. App. 1965).

52. However, hearings to assess punishment do offer some protection against false pleas in capital cases in Texas. Harris v. State, 76 Tex. Crim. 126, 172 S.W. 975 (1915); Fite v. State, 163 Tex. Crim. 279, 290 S.W.2d 897 (1956) (dictum).

53. ALA. CODE tit. 15, § 264 (1958):

> Upon the date fixed for the formal plea of guilty by the defendant, the court shall proceed to hear the testimony of any witnesses who may be summoned or offered either by the state or by the defendant, or whom the court may direct to be summoned, and must hear also the testimony of the defendant; and, if, after hearing such testimony, the court *believes beyond a reasonable doubt that the defendant is guilty* . . . the court shall thereupon receive and enter the plea . . . . (Emphasis added.)

54. NEWMAN, CONVICTION 12 (1966).

55. *Id.* at 19-21.

56. *Id.* at 20.

57. *Ibid.*

58. Hanks v. Warden of Md. Penitentiary, 232 Md. 661, 194 A.2d 445 (1963); Lowe v. State, 111 Md. 1, 73 Atl. 637 (1909).

have been allowed to relate their versions of crimes[59] and witnesses have been called.[60] It is the practice of one West Virginia judge to refuse all guilty pleas and hold trial until a certain amount of evidence has been brought out.[61]

3. *Informal Inquiry Made by Judge at Time of Accepting Plea*

In Michigan, investigations into the facts of cases are actually courtroom discussions between defendants, prosecutors, and judges.[62] There are no cases which indicate that witnesses are called or other evidence introduced upon pleas of guilty. While the practice of conducting these discussions is apparently widespread in the state,[63] it is doubtful that they are mandatory. A statute[64] originally passed in 1875[65] provides that "whenever said judge shall have reason to doubt the truth of such plea of guilty, it shall be his duty to vacate the same, direct a plea of not guilty to be entered and order a trial of the issue thus formed." This statute lacks an express command to investigate the facts of alleged offenses. A court rule, drafted some 70 years later, requires interrogation of defendants concerning the voluntariness of their pleas and their understanding of the charge.[66] There is no mention of interrogation to establish guilt, and the omission appears to be significant. Case law on the necessity of a factual inquiry also leaves the issue in doubt. Forceful language in an early case[67] and dicta in a 1959 decision[68] seem unequivocally to require an investigation. However, the state supreme court, in 1953, rejected an attempt to overturn a conviction on the ground of failure to make such an inquiry,[69] and there have been apparently no re-

59. Brown v. State, 227 Md. 389, 390-391, 177 A.2d 257 (1962); Brown v. State, 223 Md. 401, 402, 164 A.2d 722, 723 (1960).

60. Brown v. State, 223 Md. 401, 402, 164 A.2d 722, 723 (1960).

61. Beckett v. Boles, 218 F. Supp. 692 (N.D. W. Va. 1963).

62. *E.g.*, People v. Barrows, 358 Mich. 267, 99 N.W.2d 347 (1959); People v. Banning, 329 Mich. 1, 44 N.W.2d 841 (1950); People v. Strick, 292 Mich. 173, 290 N.W. 369 (1940); People v. Hunn, 1 Mich. App. 580, 137 N.W.2d 275 (1965); see People v. Bencheck, 360 Mich. 430, 104 N.W.2d 191 (1960); People v. Merhige, 212 Mich. 601, 180 N.W. 418 (1920).

63. See, *e.g.*, People v. Barrows, *supra* note 62; People v. Morrison, 348 Mich. 88, 81 N.W.2d 667 (1957); People v. Banning, *supra* note 62.

64. MICH. STAT. ANN. § 28.1058 (1954).

65. Mich. Pub. Acts 1875, no. 99.

66. MICH. GEN. CT. R. 785.3(2). This rule was enacted in 1945.

67. Edwards v. People, 39 Mich. 760, 763 (1878).

68. People v. Barrows, 358 Mich. 267, 272, 99 N.W.2d 347, 350 (1959).

69. People v. Coates, 337 Mich. 56, 59 N.W.2d 83 (1953). The defendant appealed his conviction on the ground, *inter alia*, that the court at no time questioned him as to the facts of the alleged rape. Although there was an extensive interrogation of the ac-

versals solely on the basis of failure to examine the circumstances of the alleged offense.[70] Though this issue has not been resolved, it is clear that if an investigation is made and reveals the possibility of innocence, the court must either inquire further and clear up the inconsistencies[71] or refuse the plea.[72]

The Advisory Committee which drafted new Rule 11 recommended a Michigan-type procedure for the federal courts.[73] They apparently felt that the informality of the procedure was no obstacle to determining the truth. This technique should be as accurate as the Virginia, Texas, and Wisconsin procedures, if the trial judge carefully discusses the offense with the defendant and the prosecutor, and less likely to crowd dockets. However, the Michigan approach lacks specific guidelines; it allows trial judges great latitude in determining the scope of inquiry. Consequently, some courts have sedulously investigated the facts of alleged crimes,[74] while the efforts of others have been, at best, cursory.[75]

A recent New York case requires that if trial judges voluntarily explore the facts of an alleged offense to any extent, all elements of the crime must

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cused at the time of the plea, the accused was correct in stating that the facts of the rape were never examined in the courtroom. The supreme court would not allow the plea to be withdrawn, discussing the issues of the defendant's understanding and the voluntariness of his plea without ever fully answering the charge that the circumstances of the rape were not exposed.

70. People v. Barrows, 358 Mich. 267, 99 N.W.2d 347 (1959), contains broad language which unequivocally requires investigation of the factual basis of a guilty plea:

> The direct questioning of a defendant by the trial judge on a plea of guilty is required by the rule (785.3) for the purpose of establishing the crime and the participation therein of the person pleading guilty. This is a precaution against involuntary or induced false pleas of guilty and subsequent false claims of innocence. *Id.* at 272, 99 N.W.2d at 350.

The court rule, which does not expressly call for a discussion with a defendant as to the facts of the crime charged, was construed as requiring just that. However, when the defendant entered his plea of guilty, the trial court accepted it without determining whether he understood the nature of the charge and whether the plea was voluntary. Hence, the actual grounds for reversal included failure to inquire into these factors as well as failure in inquire into the details of the offense.

71. People v. Strick, 292 Mich. 173, 290 N.W. 369 (1940); People v. Hunn, 1 Mich. App. 580, 137 N.W.2d 275 (1965).

72. People v. Morrison, 348 Mich. 88, 81 N.W.2d 667 (1957); People v. Strick, *supra* note 71; see People v. Bencheck, 360 Mich. 430, 104 N.W.2d 191 (1960); People v. Ruckner, 254 Mich. 342, 236 N.W. 801 (1931); People v. Merhige, 212 Mich. 601, 180 N.W. 418 (1920).

73. 34 F.R.D. 411, 417-18 (1964).

74. *In re* Valle, 364 Mich. 471, 110 N.W.2d 673 (1961); People v. Bumpus, 355 Mich. 374, 94 N.W.2d 854 (1959); People v. Funk, 321 Mich. 617, 33 N.W.2d 95 (1948).

75. People v. Wurtz, 1 Mich. App. 190, 135 N.W.2d 579 (1965); People v. Reed, 1 Mich. App. 60, 134 N.W.2d 374 (1965).

be shown.[76] This decision has been qualified by a more recent case which held that a defendant need not be specifically interrogated as to any element which can be clearly inferred from his testimony.[77] Evidence adduced at these inquiries cannot be used to increase the charge to a higher degree of crime.[78]

Though fewer trial courts appear to be making voluntary factual inquiries in Minnesota than in Michigan or New York, reversals have occurred when defendants' statements concerning their conduct were inconsistent with the charges.[79] Courts in other states merely allow defendants pleading guilty to explain the circumstances under which the crime was committed if they request to do so.[80]

Several states seem to require that certain questions be asked of defendants before their guilty pleas may be accepted. Some courts ask defendants if the allegations in the indictment are true;[81] another asks them if they are pleading guilty because they are "in fact guilty."[82] Though they were apparently designed to insure the accuracy of pleas, these questions have become perfunctory formalities.

B. *Indirect Investigations*

When a defendant pleads guilty, there is often a hearing or investigation to determine the degree of crime committed or the extent or type of punishment proper under the circumstances. A by-product of these proceedings may be a finding that there is doubt as to the defendant's guilt.

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76. People v. Serrano, 15 N.Y.2d 304, 206 N.E.2d 330, 258 N.Y.S.2d 386 (1965). N.Y. CODE CRIM. PROC. §§ 308, 332 (1958) require only that an accused be informed of his right to counsel before pleading guilty. It is interesting to note that New York is one of several states with statutes providing that guilty pleas cannot be entered in capital offenses. These statutes reflect a basic distrust of guilty pleas. *E.g.*, N.J. REV. STAT. § 2A:113-3 (1951); N.Y. CODE CRIM. PROC. § 334 (1958); see LA. REV. STAT. § 15-262 (1950).

77. People v. Rutigliano, 24 App. Div. 2d 875, 264 N.Y.S.2d 432 (1965). The court held that under People v. Serrano, *supra* note 76, intent to burglarize was properly inferred when the defendant sufficiently described his breaking, entering, and stealing of certain property.

78. People v. Griffin, 7 N.Y.2d 511, 166 N.E.2d 684, 199 N.Y.S.2d 674 (1960); People v. Ayiotis, 23 App. Div. 2d 760, 258 N.Y.S.2d 554 (1965).

79. State *ex rel.* Dehning v. Rigg, 251 Minn. 120, 86 N.W.2d 723 (1957). *But see* State *ex rel.* Crosley v. Tahash, 263 Minn. 299, 116 N.W.2d 666 (1962). In *Crosley*, the fact that the defendant was fully informed of his right to trial and his persistence in pleading guilty counterbalanced the inconsistency, and the conviction was affirmed.

80. Jurgenson v. State, 166 Neb. 111, 88 N.W.2d 129 (1958); State v. Leckis, 79 N.J. Super. 479, 192 A.2d 161 (App. Div. 1963).

81. *E.g.*, State *ex rel.* Crosley v. Tahash, 263 Minn. 299, 116 N.W.2d 666 (1962); State v. Williams, 391 S.W.2d 227 (Mo. 1965).

82. People v. Kontopoulos, 26 Ill. 2d 388, 186 N.E.2d 312 (1962).

1. *Presentence Investigations*

Most presentence investigations are conducted to aid the judge in determining the proper punishment, including whether the accused should be granted probation. Such proceedings are mandatory in many states[83] but discretionary in others.[84] Therefore, no such hearing occurs in many cases.[85] In felony cases in Tennessee and capital cases in Texas, though the guilty plea is treated as an admission of all the facts charged, a jury hears the evidence in assessing punishment.[86] Evidence raising doubt of the accused's guilt has served as a basis for withdrawal of a guilty plea in the latter state,[87] but no Tennessee cases allowing withdrawal could be found. In Minnesota, trial courts must reject guilty pleas when presentence investigations turn up exculpatory or mitigating evidence.[88] Such evidence is also ground for allowing the withdrawal of a plea in Arizona,[89] and has caused reversal of a conviction in California.[90]

The use of presentence reports to determine the accuracy of guilty pleas in Michigan has been studied in detail by Professor Newman.[91] He observes that "a primary function of the pre-sentence investigation in these . . . courts is to gather evidence that either supports or contradicts the plea of

83. *E.g.*, CAL. PEN. CODE § 1203; COLO. REV. STAT. ANN. § 39-7-8 (Supp. 1963); IDAHO CODE ANN. § 19-2515 (1948); ILL. ANN. STAT. ch. 38, § 1-7(g) (Smith-Hurd 1964); ARIZ. R. CRIM. P. 336.

84. *E.g.*, FLA. STAT. § 909.12 (1961); ME. REV. STAT. ANN. tit. 34, § 1552(4) (1964); MD. CT. R. 761(c); MO. SUP. CT. R. 27.07(b).

85. See Note, 1964 WASH. U.L.Q. 396, 399.

86. TENN. CODE ANN. § 40-2310 (1955); TEX. CODE CRIM. PROC. art. 502 (1948). In capital cases in Texas, an accused may not waive a jury. Houston v. State, 162 Tex. Crim. 551, 287 S.W.2d 643 (1955), *cert. denied,* 351 U.S. 975 (1956). If the defendant pleads guilty before a jury, this plea constitutes an admission of all alleged facts, and evidence brought in by the state is said to be for the purpose of fixing punishment. Burks v. State, 145 Tex. Crim. 15, 165 S.W.2d 460 (1942); Howell v. State, 140 Tex. Crim. 627, 146 S.W.2d 747 (1940) (dictum). See generally Johnson, *Problems in Accepting Guilty Pleas and Pleas of Nolo Contendere,* 26 TEX. B.J. 827 (1960).

87. Harris v. State, 76 Tex. Crim. 126, 172 S.W. 975 (1915); Richardson v. State, 164 Tex. Crim. 500, 300 S.W.2d 83 (1957) (dictum); Fite v. State, 163 Tex. Crim. 279, 290 S.W.2d 897 (1956) (dictum).

88. State v. Jones, 267 Minn. 421, 127 N.W.2d 153 (1964); State v. Jones, 234 Minn. 438, 48 N.W.2d 662 (1951). In another Minnesota case, evidence introduced at a presentence hearing was held sufficient to show guilt in fact. State v. Ware, 267 Minn. 191, 126 N.W.2d 429 (1964).

89. State v. Triplett, 96 Ariz. 199, 393 P.2d 666 (1964).

90. People v. Rosenberg, 212 Cal. App. 2d 773, 28 Cal. Rptr. 214 (1963). California courts, like New York courts, will not allow information gathered at such hearings to be used to increase the charge. People v. Bravo, 237 Cal. App. 2d 459, 46 Cal. Rptr. 921 (1965). See note 78 *supra* and accompanying text.

91. NEWMAN, CONVICTION 14-18 (1966).

guilty."[92] In many cases the "approach is investigative rather than diagnostic," with half or more of the report focused on the facts of the offense.[93] The report sometimes recommends a finding of guilt or innocence.[94] If the evidence raises doubt as to the guilt of the defendant, the plea may be dismissed.[95]

Courts in some states have ignored inconsistencies between the offense charged and the facts revealed in presentence hearings or reports. Illinois cases call such evidence "irrelevant,"[96] and a South Carolina court rule forbids any challenge of the facts in indictments through affidavits in mitigation of the offense.[97] Because of this difference in attitude in the various states toward the trial judge's responsibility when factual issues are raised, it is difficult to generalize about the extent to which courts employ presentence investigations to guard against false guilty pleas.

2. *Degree-of-Crime Hearings*

Because hearings to determine the degree of offense committed are needed for only a few crimes, they occur far less often than presentence reports. Such hearings are required in several states.[98] Obviously, the courts must scrutinize the facts of the alleged crime, but the scope of this inquiry varies greatly. Pennsylvania courts often hear the Commonwealth's entire case in homicide prosecutions,[99] while Florida requires only that witnesses be called.[100] In California, an accused's testimony as to what occurred has been held sufficient.[101] Only Pennsylvania cases indicate that the court is under a duty to reject guilty pleas when the evidence adduced raises doubt as to the validity of the charge.[102] Because only a few crimes have degrees, this form of inquiry is of limited significance.

92. *Id.* at 15.

93. *Ibid.*

94. *Ibid.*

95. *Ibid.*

96. People v. Johnson, 28 Ill. 2d 531, 534, 193 N.E.2d 39, 40 (1963); *accord,* People v. Wilfong, 19 Ill. 2d 406, 409, 168 N.E.2d 726, 728 (1960); see People v. Deweese, 27 Ill. 2d 332, 189 N.E.2d 247 (1963).

97. S.C. Cir. Ct. R. 61.

98. *E.g.,* Cal. Pen. Code § 1192; Fla. Stat. § 909.11 (1961); Iowa Code § 690.4 (1962); N.D. Cent. Code § 29-26-16 (1960); Utah Code Ann. § 77-24-9 (1953).

99. See Commonwealth v. Kirkland, 413 Pa. 48, 195 A.2d 338 (1963); Commonwealth v. Kuklinskie, 34 Northumb. L.J. 63 (Northumberland County [Pa.] Ct. 1962); Commonwealth v. Scarsellato, 36 Wash. Co. R. 127 (Washington County [Pa.] Ct. 1955).

100. Fla. Stat. § 909.11 (1961).

101. See People v. Bellon, 180 Cal. 706, 182 Pac. 420 (1919); People v. Gibbs, 188 Cal. App. 2d 596, 10 Cal. Rptr. 581 (1961).

102. Commonwealth v. Metz, 393 Pa. 628, 144 A.2d 740 (1958); Commonwealth v. Kuklinskie, 34 Northumb. L.J. 63 (Northumberland County [Pa.] Ct. 1962).

If indirect methods were used in all states, as are Michigan presentence reports,[103] to test the validity of guilty pleas, they could be an effective protection against false pleas. However, the small number of reversals of guilty pleas on the basis of information elicited at presentence and degree-of-crime hearings indicates that few states follow the Michigan example. These indirect methods seem haphazard, at best, for insuring that false pleas of guilt are discovered.

CONCLUSION

Arguably, the presence of an attorney representing the accused is sufficient protection against false pleas. Though recent Supreme Court decisions guarantee representation to all defendants in felony cases,[104] it is still possible to waive the right to counsel and plead guilty. Even when an attorney is present, however, he frequently does not probe the facts of the case in the same manner as he would if he intended to go to trial.[105] In some instances, the assistance given by counsel is quite minimal.[106] Therefore, the responsibility for a factual inquiry must be assumed by the trial court.

The form and scope of inquiry needed to prevent false guilty pleas must be a compromise between the need to insure accuracy in pleas and the desire to keep administrative costs low. An informal inquiry, of the type practiced in Michigan,[107] strikes such a balance if conscientiously conducted by trial judges. To insure that the inquiry will be more than a token ritual, the trial judge should be required to interrogate the defendant as to the facts of the charge. Merely asking an accused if he is guilty as charged is obviously inadequate, but if the accused is asked to relate the events of the crime, it will be difficult for him to fabricate a false account to support his plea. The trial judge, by observing a defendant as he tells his story, can probably determine credibility with reasonable accuracy from the spontaneity and demeanor of the accused. A defendant's candid forthright account of the crime will ordinarily be sufficient to support the plea. In more complex cases, when the defendant's account fails to substantiate all the necessary elements of the crime, or when seeming inconsistencies are uncovered, some additional evidence will be needed. In these instances, physical evidence may be introduced and witnesses may be called. The rules of evidence need not apply in this type of hearing, since its purpose is merely to corroborate what the defendant already admits. The burden of proof could be either

103. Notes 91-95 *supra* and accompanying text.
104. *E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).
105. NEWMAN, CONVICTION 201 (1966).
106. *Id.* at 200-05.
107. Notes 62-63 *supra* and accompanying text.

guilt beyond a reasonable doubt, preponderance of the evidence, or probable cause to believe that the defendant committed the crime. The former burden does not seem excessive because the defendant is presumably willing to relate his account of the crime—to make a judicially supervised confession. Since probable cause is the standard applied in preliminary hearings and grand jury investigations, it would impose no burden that had not been met earlier in the proceedings. If no specific burden is established, the amount of evidence needed will be dependent upon the diligence of the trial judge. Finally, of course, the avenues of appellate review would have to be kept open to insure that these inquiries were conscientiously conducted. The strength of such a system is that it keeps the focus where it should be —on the guilt or innocence of the defendant. It overcomes the unsatisfactory conclusion reached in many states that a guilty plea forecloses an examination of the facts. To presume guilt is to fall far short of substantial justice.[108]

108. From the time the indictment is presented or information filed to the entry of the judgment of conviction, and throughout all forms of review of that judgment, the primary matter to be determined is the guilt or innocence of the accused. We err grievously when we allow ourselves to be diverted by other inquiries. . . . United States v. Shelton, 246 F.2d 571, 580 (5th Cir. 1957) (dissenting opinion), *rev'd per curiam,* 356 U.S. 26 (1958).