NOTES

THE TRIAL JUDGE'S SATISFACTION AS TO VOLUNTARINESS AND UNDERSTANDING OF GUILTY PLEAS

I. INTRODUCTION

Four years ago, shortly after Rule 11 of the Federal Rules of Criminal Procedure was amended, the *Quarterly* published a student note which made a detailed study of the various methods employed by trial court judges, when so required by state and federal law, to satisfy themselves that there is a factual basis for a tendered guilty plea.[1] That article, along with numerous others published throughout the country in the last 10 years, reflected the legal community's growing recognition that guilty pleas, and not trial, serve as the major mechanism for disposition of criminal defendants.[2] The *Quarterly* note revealed, at least in part, that the guilty plea process at that time and on both the state and federal

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1. Note, *The Trial Judge's Satisfaction as to the Factual Basis of Guilty Pleas*, 1966 WASH. U.L.Q. 306. Rule 11 itself 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 plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant 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.

FED. R. CRIM. P. 11.

2. *E.g.*, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE—THE TASK FORCE ON THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967) [hereinafter cited as TASK FORCE: COURTS]; Note, *The Trial Judge's Satisfaction as to the Factual Basis of Guilty Pleas*, 1966 WASH. U.L.Q. 306. The President's Commission stated:

> Most cases are disposed of outside the traditional trial process, either by a decision not to charge a suspect with a criminal offense or by a plea of guilty. In many communities between one-third and one-half of the cases begun by arrest are disposed of by some form of dismissal by police, prosecutor, or judge. When a decision is made to prosecute, it is estimated that in many courts as many as ninety percent of all convictions are obtained by guilty pleas.

TASK FORCE: COURTS 4. *See also* AMERICAN BAR FOUNDATION, LAW ENFORCEMENT IN THE METROPOLIS 97-112, 132-35 (D. McIntyre, Jr. ed. 1967); F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969); D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966); Clark, *An Indorsement of Federal Rules of Evidence*, 5 F.R.D. 305, 307 (1946).

levels was shaped by the vague standards of "voluntariness" and limited, in large measure, only by the broad discretion of the trial judge in accepting tendered pleas.[3] In the abstract, this flexible approach to acceptance of guilty pleas in the neutral atmosphere of a trial court offered seemingly ample protection for pleading defendants. Pragmatically however, flexibility in under-staffed courts with crowded dockets often led to cursory examinations of pleading defendants by trial judges at arraignment, and sometimes, to no examination at all. Although the cause and effect relationship is unclear, appellate courts were at the same time confronting an increasingly large number of appeals and collateral attacks by convicted defendants seeking to invalidate their earlier pleas of guilty.[4] Because the trial records on

3. Note, *The Trial Judge's Satisfaction as to the Factual Basis of Guilty Pleas*, 1966 WASH. U.L.Q. 306.

4. Indeed, the more stringent requirements imposed by the *McCarthy* and *Boykin* decisions in 1969—specifically that voluntariness or compliance with Rule 11 requirements be determined on the record (*see* notes 7-8 *infra* and accompanying text)—were in part motivated by a desire to cure the burden created by these appeals. The majority opinion in *McCarthy*, for example, stated:

> To the extent that the district judge thus exposes the defendant's state of mind on the record through personal interrogation, 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.
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> * * *
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> . . . the more meticulously the Rule is adhered to, the more it tends to discourage, or at least enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.

McCarthy v. United States, 394 U.S. 459, 467, 465 (1969). In adopting nine areas of minimum arraignment inquiry, the Delaware Supreme Court echoed this concern:

> The requisite record can be made with little effort and without wastage of time. *On the other hand, if the record discloses the above the set of facts, appeals such as the current one will be avoided or at least be subject to summary decision, and we suppose that Federal Habeas Corpus proceedings could be more easily disposed of.* Also the making of such a record by the court protects the defense counsel from the charge, easily made but difficult to refute, that the defendant was not sufficiently advised by his counsel of his rights, of the nature of the charge and of the consequences of the guilty plea. (Emphasis added)

Brown v. State, 250 A.2d 503, 505 (Del. 1969). *See also* Aiken v. United States, 296 F.2d 604, 607 (4th Cir. 1961). The choice of an absolute requirement of a record of voluntariness resolved a conflict among federal courts, adopting the rule in Heiden v. United States, 353 F.2d 53 (9th Cir. 1965). Judge Merrill stated in *Heiden*:

> There is no question but that the record [in the hearing granted by the district court on petitioner's motion to vacate judgment and sentence] amply supports the court's findings and supplies a basis for disbelief of the appellant. The question is whether such findings can suffice to eliminate prejudice resulting from failure of the court, at the time of arraignment and waiver of counsel, to make the necessary ascertainment of understanding. In our judgment, they do not.

Id. at 54. Prior to *Boykin* and *McCarthy*, the notion that a "silent record" was "prejudicial as a matter of law"—generally referred to as the *Heiden* rule—was rejected by other courts. *E.g.*,

challenged pleas were largely barren of any affirmative showing of voluntariness, other than perhaps the defendant's unresisting presence before the trial judge, the most unimaginative of convicted defendants was able to make allegations sufficient to, at least, require a hearing.[5] These hearings, which served mostly as arraignments *de novo*, were naturally time-consuming, and frequently required a second appointment of counsel. In addition, they occasionally revealed that the flexibility of the trial court guilty plea process permitted improvident and involuntary pleas to pass through arraignment unimpeded by even the most simple of inquiries to a defendant which might have revealed impermissable pressures or ignorance.[6] The Supreme Court responded to this problem in two landmark decisions in the 1968 Term. In *McCarthy v. United States*,[7] the Court held, ostensibly as a part of their supervisory power over the federal system, that failure of a federal trial judge to comply with the procedural requirements of Rule 11 is automatic reversible error. That Rule, as amended in 1966, requires federal trial judges, before the acceptance of a guilty plea, to "address the defendant personally" and determine "that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." In addition, Rule 11 requires that "The court shall not enter a

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Arnold v. United States, 359 F.2d 425 (3rd Cir. 1966); Brokan v. United States, 368 F.2d 508 (4th Cir 1966), *cert. denied*, 386 U.S. 996 (1967); Weed v. United States, 360 F.2d 568 (5th Cir. 1966); France v. United States, 358 F.2d 946 (10th Cir. 1966), *cert. denied*, 385 U.S. 872 (1967).

But cf. People v. Chasco, 276 Cal. App. 317, ____, 80 Cal. Rptr. 667, 671 (1969), *cert. denied*, 397 U.S. 1052 (1970) (expressing that there is frequently a court interest in expediting trials over avoiding appeals and that, in many cases, "[a] searching factual hearing on habeas corpus is far more likely to establish the true nature of a purported waiver of a constitutional right than are formula responses made during the trial").

5 *See* note 4 *supra*. *Cf.* Machibroda v. United States, 368 U.S. 487 (1962).

6 This occured in spite of a recognition that the arraignment was the most appropriate forum for the determination:

> Little time is required to make the needed inquiry to determine whether the action of the accused is taken voluntarily and with proper understanding. Obviously the best time to conduct the inquiry is, as the rule contemplates, at the time when the right to counsel is being waived or when the guilty plea is offered.

Aiken v. United States, 296 F.2d 604, 607 (4th Cir. 1961). And it occured in spite of a similar recognition that, at least, voluntariness was required of any guilty plea. *See* note 31 *infra* and accompanying text. The generally recognized authority for the notion that voluntariness is a requirement of constitutional due process is Kercheval v. United States, 274 U.S. 220 (1927). It should be noted that this decision antedates widespread modern recognition that due process requirements extend to and limit the states. There is no actual Supreme Court extension of the voluntariness requirement but, rather, widespread state acceptance anticipated the requirement which *Boykin* implicitly recognizes. *See* notes 8-13 *infra* and accompanying text.

7 394 U.S. 459 (1969).

judgment on a plea of guilty unless it is satisfied that there is a factual basis for the plea." Although the Court in *McCarthy* discounted that its decision applied to state procedures, less than two months later the Court, in *Boykin v. Alabama*,[8] imposed similar requirements on state courts. The Court in *Boykin* held that a valid state criminal conviction based on a plea of guilty requires an affirmative showing on the trial court record that the defendant's plea was given voluntarily and with understanding. *Boykin*, while clearly intended to bring some formality and uniformity into the guilty plea process, left several questions unanswered. First, the Court did not state that Rule 11 requirements for on the record determinations were applicable to the states.[9] Thus, because the decision was directed at the voluntariness of the offered plea, there is some doubt whether state courts must inquire into the factual basis of the plea to determine its accuracy.[10] Second, *Boykin* did not involve a deficient on the record examination, but instead, revealed that *no* examination was made of the defendant at the time of the plea. As a result, the Court was required to decide only generally that due process requires:

> . . . the utmost solicitude of which the 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.[11]

Thus, because *no* canvassing was made in *Boykin*, reversal was automatic. No attempt was made in *Boykin* to detail what inquiries should or might be made by a trial court to accomplish an acceptable "canvassing" of tendered guilty pleas. Moreover, *McCarthy* does little to suggest any similar guidelines to federal courts beyond the general language of Rule 11. Both decisions have instead, in effect, delegated to lower trial and appellate courts the responsibility for development of a more comprehensive arraignment inquiry for the acceptance of guilty pleas. *Boykin* does suggest that on the record "canvassing" should accomplish at least two tasks: assure that a defendant does not

8. 395 U.S. 238 (1969).

9. *Id. passim*.

10. *But see Id.* at 244 (Harlan, J. dissenting). Harlan views *Boykin* as ". . . in effect fasten[ing] upon the States, as a matter of federal constitutional law, the rigid prophylactic requirements of Rule 11 of the Federal Rules of Criminal Procedure." *Id.* at 245. Also *see, e.g.*, State v. Sisco, 169 N.W.2d 542, 547 (Iowa 1969). Accuracy determinations have been required in several states without reference to *Boykin, see, e.g.*, People v. Taylor, 383 Mich. 338, 175 N.W.2d 715 (1970) [reversing People v. Taylor, 9 Mich. App. 33, 155 N.W.2d 723 (1968) for failure to adequately inquire as to accuracy].

11. Boykin v. Alabama, 395 U.S. 238, 243-44 (1969).

improvidently or involuntarily waive his constitutional right to jury trial, right to confront witnesses, and privilege against self-incrimination;[12] and, facilitate and deter appellate and collateral proceedings on the plea.[13] This note is, in part, designed to suggest what inquiries ought to be made by a trial judge to best accomplish these tasks.

The body of the note is constructed from three separate studies. First, the *Quarterly* staff made a study of the actual current arraignment procedures used in the acceptance of guilty pleas in both state and federal courts sitting in St. Louis. The value of this empirical data is two-fold: it reveals the average scope of inquiry made of a pleading defendant after *Boykin* and *McCarthy* and thus invites comparison with what appellate decisions suggest should be occuring; and it reveals the impact (or in numerous instances lack of influence) of the Supreme Court's decisions. Second, the *Quarterly*, through the use of a "model arraignment questionnaire", sought out the viewpoints of a large number of persons dealing directly with the guilty plea process, including trial and appellate judges (both state and federal), legal aid lawyers, public defenders, general practitioners, prosecutors and law professors. These individuals were asked to weigh the necessity and value of a number of potential areas of arraignment inquiry. Their responses are, as with the empirical study of the local courts, of two-fold value: they reflect indirectly what is thought ought to be the "law" and additionally permit what is at times a striking comparison of viewpoint between individuals serving in different capacities within the criminal justice system. In large measure, this comparison suggests that the development of any agreed-upon standard for arraignment inquiries into voluntariness of a plea will be a far less simple task than might be supposed. Third, the *Quarterly* made what is hoped to be a near-exhaustive study of the appellate case law deciding or implying what should be generally inquired into by the trial judge. In addition to those cases dealing directly with what must appear in the record under *McCarthy* and *Boykin*, the note includes in its research a large number of decisions decided prior to *Boykin* and *McCarthy*. These cases are included to assist in defining with clarity what the various aspects of a voluntary guilty plea are, which in turn suggests what must or might be canvassed by a trial court when taking a plea of guilty.

At the outset, a word of caution seems necessary. The structure of this

12. *Id.* at 243.
13 *Id.* at 244.

note will probably facilitate the easy development of arraignment questionnaires for trial court use. In fact, to assist in that task, several questionnaires and forms used in a number of trial courts throughout the country are included in an appendix. Use of a questionnaire by a trial judge does not seem to be, in itself, inadvisable. Quite to the contrary, the results of the empirical data collected on the St. Louis courts suggest that the judges are not, but ought to be, using some written guides. The fault of a questionnaire lies in the ease by which its use can slip into a mechanistic, prophylactic procedure with its user becoming an inactive participant.[14] The questionnaire can be no better than the judge using it. The defendant's responses to a set of questions can be relatively meaningless unless the trial judge uses those responses to sense what lies below the surface. Sincerity and competence can not be built into a questionnaire, and no attempt has been made in this note to suggest how that might be done. Finally, this note does not consider what means can or should be used to determine if a factual basis for a plea of guilty exists. That project was accomplished by the earlier *Quarterly* note, and that note should be viewed as the complement to this project.

II. THE MODEL ARRAIGNMENT QUESTIONNAIRE

A. Methodology

A questionnaire, labeled a "model arraignment questionnaire", was mailed in July of 1970 to over 200 persons connected with or interested in the guilty plea process.

FIGURE 1

MODEL ARRAIGNMENT QUESTIONNAIRE

The following are areas of inquiry, and in some instances specific questions, which *might* be pursued by a judge prior to his acceptance of a plea of guilty—primarily to accurately ascertain whether the defendant is understandably waiving his Constitutional right to an impartial jury trial, his right against self-incrimination, and in the appropriate case, his right to counsel.

Each question is to be rated on a scale of 1 to 5 according to your assessment of the value and appropriateness of the question in determining the voluntariness and accuracy of the plea. 1 represents that class of questions which are so valuable and appropriate as to be absolutely necessary inquiries in every case. 5, on the other hand, designates that category of questions which are never of any value. 2, 3, and 4 designate degrees of value between the two ranges of absolutely necessary and absolutely unnecessary.

Your assessment of each category should not involve any consideration of the possible form of the

14. *See* People v. Taylor, 383 Mich. 338, ____, 175 N.W.2d 715, 733 (1970) (Adams, J., concurring); *cf.* People v. Chasco, 276 Cal. App. 317, ____, 80 Cal. Rptr. 667, 670-71 (1969).

question, but rather, should be solely an evaluation of the relevance and worth of the information sought

GENERAL COMPETENCY

(1) Personal Data (including such things as age, education, employment, and marital status)	(1)__(2)__(3)__(4)__(5)__
(2) Mental Health (for example: whether subject to any prior treatment for a mental disorder)	(1)__(2)__(3)__(4)__(5)__
(3) Addictions, Narcotic or Alcoholic	(1)__(2)__(3)__(4)__(5)__
(4) Prior Convictions	(1)__(2)__(3)__(4)__(5)__

VOLUNTARINESS—KNOWLEDGE OF THE CONSEQUENCES OF THE PLEA

(5) Are you voluntarily and understandably entering this plea?	(1)__(2)__(3)__(4)__(5)__
(6) Threats, Coercion, Duress	(1)__(2)__(3)__(4)__(5)__
(7) Threats of prosecution of others	(1)__(2)__(3)__(4)__(5)__
(8) Promises of sentence concessions	(1)__(2)__(3)__(4)__(5)__
(9) Plea Bargains with prosecutor	(1)__(2)__(3)__(4)__(5)__
(10) Specific Maximum and Minimum Sentence Range	(1)__(2)__(3)__(4)__(5)__
(11) Concurrent and/or Consecutive Sentencing Possibilities (where appropriate)	(1)__(2)__(3)__(4)__(5)__
(12) Parole Eligibility (especially if limited or not available)	(1)__(2)__(3)__(4)__(5)__
(13) Qualification under special sentencing statutes (such as Habitual Offender or Youthful Offender statutes)	(1)__(2)__(3)__(4)__(5)__
(14) Collateral Consequences of Plea (such as loss of voting privilege)	(1)__(2)__(3)__(4)__(5)__
(15) Constitutional Right to Impartial Jury	(1)__(2)__(3)__(4)__(5)__
(16) Constitutional Right to Confront and Cross-Examine his Accusers	(1)__(2)__(3)__(4)__(5)__
(17) Constitutional Right Against Self-Incrimination	(1)__(2)__(3)__(4)__(5)__
(18) Constitutional Right to Compulsory Process for Witnesses	(1)__(2)__(3)__(4)__(5)__
(19) Specific Nature of the Charges in the Indictment	(1)__(2)__(3)__(4)__(5)__
(20) Lesser Included Offences	(1)__(2)__(3)__(4)__(5)__
(21) Circumstances Under Which a Plea May be Withdrawn	(1)__(2)__(3)__(4)__(5)__
(22) Extent of Consultation with Counsel *re* all the Above	(1)__(2)__(3)__(4)__(5)__
(23) Extent of Defendant's Understanding that Judge not Bound to Honor Recommendations of Prosecutor	(1)__(2)__(3)__(4)__(5)__

WAIVER OF COUNSEL (where applicable)

(24) Constitutional Right to Assistance by Counsel	(1)__(2)__(3)__(4)__(5)__

(25) Whether defendant understands that an attorney could better ascertain admissability of evidence against the defendant and is better equipped to prevent the admission of illegally obtained evidence in trial (1)__(2)__(3)__(4)__(5)__

(26) Whether defendant understands that an attorney is capable of discovering other defences to the charges and for the presentation of mitigating circumstances to the Court (1)__(2)__(3)__(4)__(5)__

(27) Any Threats or Promises in Return for the Waiver of Appointment of an Attorney (1)__(2)__(3)__(4)__(5)__

(28) PLEASE LIST HERE AND EVALUATE AS ABOVE ANY OTHER QUESTIONS OR AREAS OF INQUIRY YOU FEEL SHOULD OR MIGHT BE PURSUED:

Addresses were randomly selected from national directories such as Martindale-Hubbell. Selection was designed, however, to include representatives of each state and every federal circuit. The sample, as previously mentioned, consisted of trial judges (state and federal), United States Attorneys, appellate judges (state and federal), Public Defenders, Legal Aid Attorneys, general practitioners in the field of criminal representation, and law professors with teaching experience in criminal justice administration. Each respondent was instructed to classify each area of inquiry listed on the questionnaire into a range between "absolutely necessary" and "absolutely unnecessary". The questionnaire did not include any hypothetical defendant or set of circumstances to guide the respondents. Instead, the respondents were required to assess the value of the inquiries much as a judge might when confronting a defendant in an arraignment for the first time. Each of the five boxes in the absolutely necessary to unnecessary range was assigned a value on a scale from plus two to minus two. Thus, an indication that an area of inquiry was "absolutely necessary" in an arraignment prior to the acceptance of a guilty plea was assigned a value of plus two. An "absolutely unnecessary" response was weighted minus two, and the corresponding classifications between were weighted respectively plus one, zero, or minus one. The averages produced by this assignment of values reflect whether, and how much, that particular area of inquiry was considered necessary to the proper acceptance of a guilty plea. The results of the questionnaire survey are listed in Table 1 below.

TABLE I MODEL ARRAIGNMENT QUESTIONNAIRE RESPONSES

AJ(S)	AJ(F)	TJ(S)	TJ(F)	PD	LA	US	G	F	(ALL)
+1 50	+1.80	+ 79	+ .95	+ .83	+1 50	+1.20	+1.31	+1.40	+1.12
+1.00	+1 83	+ .68	+1 57	+ .58	+1.78	+1.00	+1.64	+1.60	+1.26
+1.00	+1.50	+ .74	+1.14	+ .17	+1.67	+1.00	+1.07	+1.40	+1.00
+1.00	+ .33	+ .61	— .57	— .17	+ .22	+1.00	+ .35	+ .60	+ .19
+2.00	+2.00	+1.53	+2.00	+1.50	+2.00	+2.00	+2.00	+2.00	+1.84
+2.00	+2.00	+1.63	+2.00	+1.58	+2.00	+2.00	+1.62	+2.00	+1.81
+1.75	+1.80	+ .58	+ .90	+ .58	+1.22	+2.00	+1.08	+1.00	+1.00
+2.00	+2.00	+1.74	+1.95	+1.33	+1.44	+2.00	+1.54	+2.00	+1.62
+1.75	+1.80	+1.65	+1.45	+1.25	+1.44	+1.20	+ .78	+2.00	+1.41
+2.00	+1.17	+1.42	+2.00	+1.50	+1.67	+1.80	+1.43	+2.00	+1.64
+1.75	+1.00	+1.12	+ .90	+1.67	+1.56	+1.60	+1.07	+1.20	+1.23
— .75	+ .50	+ .63	+ .10	+1.17	+1.00	+1.60	+ .57	+1.00	+ .62
+1.00	+2.00	+ .59	+1.64	+1.00	+1.56	+1.80	+1.36	+1.80	+1.31
— .75	—1.00	— .42	— .71	— .42	+ .44	0.00	0.00	+1.20	— .28
+1.75	+1.17	+1.63	+1.90	+1.25	+ .89	+1.60	+1.71	+1.40	+1.54
+1.75	+1.17	+1.21	+1.62	+1.17	+1.00	+1.20	+1.50	+1.40	+1.35

GENERAL COMPETENCY

(1) Personal Data

(2) Mental Health

(3) Addictions, Narcotic/Alcoholic

(4) Prior Convictions

VOLUNTARINESS—KNOWLEDGE OF CONSEQUENCES

(5) Are you voluntarily and understandably entering this plea?

(6) Threats, Coercion, Duress

(7) Threats of Prosecution of Others

(8) Promises of Sentence Concessions

(9) Plea Bargains with Prosecutor

(10) Specific Maximum/Minimum Sentence Range

(11) Concurrent and/or Consecutive Sentencing Possibilities

(12) Parole Eligibility (esp. if limited or not available)

(13) Qualification under Special Sentencing Statutes

(14) Collateral Consequences of Plea

(15) Constitutional Right to Impartial Jury

(16) Constitutional Right to Confront and Cross-Examine Accusers

+1.75	+1.17	+1.11	+1.66	+1.09	+1.44	+1.20	+1.43	+1.20	+1.35
+1.75	+1.17	+ .75	+1.28	+ .67	+ .78	+1.00	+1.13	+1.00	+1.01
+2.00	+1.17	+1.60	+2.00	+1.58	+2.00	+2.00	+1.80	+2.00	+1.78
+1.00	0.00	+ .55	+ .28	— .33	+ .78	+ .80	+ .87	+1.80	+ .52
+1.00	— .33	0.00	— .45	+ .17	+ .56	— .40	+ .78	+1.20	+ .16
+2.00	+1.83	+1.16	+1.57	+1.33	+2.00	+1.60	+1.71	+2.00	+1.58
+2.00	+1.40	+1.37	+1.39	+1.75	+1.78	+1.40	+1.07	+2.00	+1.48
+2.00	+2.00	+1.41	+2.00	+1.45	+2.00	+2.00	+2.00	+2.00	+1.82
+ .75	+ .83	+1.20	+1.05	+1.09	+1.78	+1.75	+1.07	+1.00	+1.16
+1.25	+ .83	+1.19	+ .90	+1.18	+1.67	+1.75	+1.29	+1.00	+1.18
+1.25	+1.80	+1.69	+1.47	+1.54	+1.44	+1.75	+1.54	+1.40	+1.55

Key:

AJ(S) = Appellate Judge (State)
AJ(F) = Appellate Judge (Federal)
TJ(S) = Trial Judge (State)
TJ(F) = Trial Judge (Federal)
PD = Public Defender
LA = Legal Aid Attorney
US = United States Attorney
G = General Practitioner
F = Faculty (Law School Professor)
(ALL) = Combined Responses from all Categories

Scale:

+2 +1 0 —1 —2

questions so valuable as to be absolutely necessary — questions of no value and absolutely unnecessary

(17) Constitutional Right Against Self-Incrimination
(18) Constitutional Right to Compulsory Process of Witnesses
(19) Specific Nature of the Charges in the Indictment
(20) Lesser Included Offenses
(21) Circumstances Under Which a Plea May be Withdrawn
(22) Extent of Consultation with Counsel *re* all the Above
(23) Extent of Understanding that Judge not Bound to Prosecutor Recommendation

WAIVER OF COUNSEL (where applicable)

(24) Constitutional Right to Assistance of Counsel
(25) Understanding of Attorney's Competence to Evaluate/Challenge Evidence
(26) Understanding of Attorney's Ability to Discover Defenses/Mitigating Circumstances
(27) Threats/Promises in Exchange for Waiver of Appointment of Attorney

B. The Areas of Inquiry: Their Legal and Pragmatic Necessity

1. Competency

A defendant incompetent to stand trial is, at least conceptually, incompetent to convict himself by a plea of guilty or otherwise. As a result, it is held without exception in the United States that it is reversible error to accept a plea of guilty from a person not competent to waive his constitutional rights.[15] The trial judge considering a tendered plea of guilt has, however, during the short moments of an arraignment, only one means of making this determination; he must question the defendant personally.[16] Questions which will require only a "yes" or "no" response or a nod of the head from a defendant seem ill-suited for this purpose. Instead, the judge should quickly test the state of mind of the defendant with questions designed to elicit conversational responses. Such questions can and should be designed to discover at the same time information about the defendant which may reflect competency. Among factors which may help a judge infer competency are age and education. To the extent that these facts reflect maturity and literacy, these factors should be of some usefulness, and have been approved as clearly relevant for an arraignment inquiry in numerous decisions.[17] It should be noted

15. Pate v. Robinson, 383 U.S. 375 (1966). *See also* Carroll v. Beto, 421 F.2d 1065, 1067 (5th Cir. 1970) (the constitutional right of a mental incompetent not to stand trial may not be waived by a guilty plea); State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969) (the court must itself make and may not delegate the competency determination); 8 J. MOORE, FEDERAL PRACTICE ¶ 11.02 [3] (R. Cipes ed. 1969).

16. *Cf.* State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969).

17. *See, e.g.*, United States *ex rel.* B. v. Shelly, 305 F. Supp. 55, 58 (E.D.N.Y. 1969) ("maturity" is a factor in determining voluntariness); United States *ex rel.* Bolden v. Rundle, 300 F. Supp. 107 (E.D. Pa. 1969) (relevant to a determination of voluntariness); United States *ex rel.* Wakeley v. Russell, 309 F. Supp. 68, 69 (E.D. Pa. 1970) (age and background are among "relevant facts and circumstances" in finding voluntariness); State v. Linsner, ___ Ariz. ___, 467 P.2d 238, 241 (1970) (on appeal, a showing in the record that defendant had one year of college supported the trial court's finding of a voluntary plea); Normand v. People, 165 Colo. 509, 512, 440 P.2d 282, 283 (1968) (age and intelligence relevant to voluntary and intelligent plea of guilty and waiver of counsel); People v. Taylor, 9 Mich. App. 333, 340, 155 N.W. 2d 723, 727 (1968), *rev'd on other grounds*, 383 Mich. 338, 175 N.W.2d 715 (1970) (suggests that age, name and extent of education be asked in an arraignment interrogation); State *ex rel.* Burnett v. Burke, 22 Wis. 2d 486, 494, 126 N.W.2d 91, 95 (1965) [suggests that trial courts determine the extent of defendant's education and general comprehension: made mandatory by Ernst v. State, 43 Wis. 2d 661, ___, 170 N.W.2d 713, 719 (1969)]; *cf.* United States *ex rel.* Miner v. Erickson, 303 F. Supp. 960, 962 (D. S.D. 1969) (in finding in a plea voluntary the court notes with approval an inquiry containing questions as to age and education). Scholars have similarly supported inquiry into areas included here under the general heading of competence—defendant's intelligence, education, prior convictions, mental condition, physical condition and age—as relevant to a determination that the plea is "understandingly" entered. *E.g.*, ADVISOR'S COMMITTEE ON THE CRIMINAL TRIAL—ABA PROJECT ON MINIMUM

that, particularly if a defendant is youthful, a question about the age of the defendant will assist in putting the trial judge on notice that the defendant should be informed of special treatment or sentencing possibilities, such as the Federal Youth Corrections Act.[18]

a. Personal Data

Marital situation, employment history, and family life would seem to be of generally similar worth. Somewhat suprisingly however, they are rarely considered in appellate decisions reviewing alleged incompetent pleas.[19] Their value as a means of reducing improvident pleas nevertheless seems high. For example, if a judge discovers that a defendant is without any close relatives, he may wish to inquire more deeply into the motivations for the defendant's plea.[20] Likewise, the judge may discover through this line of questioning that the plea bargain offered and accepted by a particular defendant is less than that usually offered to similarly situated defendants.[21]

"Personal Data" questions (survey question 1) received responses in the survey which tended generally toward "necessary". Only in the categories of appellate judges (both state and federal) and Legal Aid Attorneys could the responses be interpreted to connote absolute necessity of inquiry [*see* Table 1 *supra*]. The St. Louis court data indicates that age and education are generally asked at the arraignment; homelife less frequently; and employment record seldom [*see* Table 2 *infra*].

b. Mental Health

Mental incompetence to stand trial is not waived by a plea of guilty.[22] A judge may, however, only with difficulty discover a defendant's

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STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 26 (1967) [commentary to § 1.4 (a)] [hereinafter cited as ABA]; Note, *Withdrawal of Guilty Pleas in the Federal Courts*, 55 COLUM. L. REV. 366, 374 (1955).

18. 18 U.S.C. §§ 5005 *et seq.* (1969). *See also* notes 92-93 *infra* and accompanying text.

19. *But cf.* United States *ex rel.* Wakeley v. Russell, 309 F. Supp. 68, 69 (E.D. Pa. 1970) (age and *general background* are among "circumstances" by which the court may evaluate "voluntariness").

20. *But see* United States *ex rel.* Brown v. LaVallee, 424 F.2d 457 (2d Cir. 1970) (on appeal it was alleged that the guilty plea was substantially a yielding to pressure from the defendant's mother and hence involuntary: the conviction was upheld as based on a voluntary plea); *cf.* Endsley v. Cupp, ___ Ore. ___, 459 P.2d 448 (1969).

21. *See* notes 64-78 *infra* and accompanying text.

22. Carroll v. Beto, 421 F.2d 1065, 1067-68 (5th Cir. 1970). *See also* United States v. Kincaid, 362 F.2d 939 (4th Cir. 1966) (defendant brought his mental condition to the court's attention; on

mental disability at the arraignment—particularly with questioning as his only tool. Certain questions suggest themselves as available to key a judge into, at least, the possibility that an accused lacks mental competence to plead. For example: "Have you ever been a patient in a mental hospital or institution?", "Do you now believe or have you ever believed yourself to be mentally ill or mentally incompetent in any respect?",[23] "Have you ever for any reason consulted or has anyone ever suggested that you consult a psychiatrist, psychologist or psychiatric social worker?". Answers to such questions, if affirmative, suggest their own follow-up inquiry.

The survey answers, again, tended toward "necessary" (survey question 2) with five categories—federal appellate judges, federal trial judges, Legal Aid Attorneys, general practitioners, and professors—indicating the inquiry to be "absolutely necessary" [*see* Table 1 *supra*]. Questions in this area were seldom asked at arraignments in St. Louis [*see* Table 2 *infra*].

c. Addictions, Narcotic or Alcoholic

Addiction relates to both competency and voluntariness. Generally, it has not been the pattern to reverse guilty plea convictions on the fact of addiction, absent supporting evidence, when a defendant alleges having been under the influence of drugs at the arraignment.[24] The burden of

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this notice, the court's failure to adequately assure itself of defendant's mental capacity was error); United States *ex rel.* Bresnock v. Rundle, 300 F. Supp. 264 (E.D. Pa. 1969); Ingram v. State, 450 P.2d 161 (Alas. 1969); State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969) (indicating the court's non-delegable duty to determine competence—mental competence in that case); Commonwealth v. Abel, 438 Pa. 423, 265 A.2d 374 (1970) (guilty plea by person without mental capacity to understand his position is subject to attack as not knowingly and intelligently entered); Drake v. State, 45 Wis. 2d 226, 231, 172 N.W.2d 664, 666 (1969) (citing as a "good model" an arraignment interrogation which included a question as to possible prior mental institutionalization); TEX. CODE CRIM. PROC. art 26.13 (1966) (before a plea may be accepted, the defendant must appear "plainly sane"). Also *see generally* Pate v. Robinson, 383 U.S. 375 (1966) (conviction of a mental incompetent violates due process). *But see* People v. Brown, 41 Ill. 2d 230, 233, 242 N.E.2d 242, 243 (1968), *cert. denied*, 393 U.S. 1121 (1969) (since no facts were before the court giving it notice of possible mental incompetence, failure of the trial court to determine sanity is not an allegation sufficient to require a post-conviction hearing). This and other factors of "competency" are discussed generally in ABA at 26 and Note, *Withdrawal of Guilty Pleas in the Federal Courts*, 55 COLUM. L. REV. 366, 373-74 (1955).

23. These questions were suggested by the Minnesota form questions three and four. *See* Appendix II *infra*. Importantly, if a defendant denies such prior history in response to these or like questions, the trial judge may finesse some types of post-conviction claims, *e.g.*, based on a failure to hold a competency hearing. United States v. Cooper, 410 F.2d 1128, 1130, *rehearing denied*, 410 F.2d 1128 (5th Cir. 1969).

24. *See, e.g.*, Grennett v. United States, 403 F.2d 928 (D.C. Cir. 1968) (evidence of narcotics use

proving on later appeal or collateral attack that the plea was made while under the influence of drugs is on the defendant.[25] On the other hand, the burden shifts to the state when misinformation, however innocent, is supplied to the court indicating that the accused is not under the influence of narcotics and the court fails to inquire into possible drug influence.[26] One of the major purposes of on the record inquiry under *Boykin* is to reduce appeals and collateral attacks challenging the validity of prior pleas of guilty. During the last several years, a surprisingly large number of collateral attacks have appeared in Federal Reporters seeking reversal of pleas of guilty because they were made while the defendant was under the influence of drugs. This suggests that trial court judges should consider inquiring more frequently into the drug habits of the defendants before them.

Survey responses indicated that inquiry as to addiction was "necessary" but only Legal Aid Attorneys and federal appellate judges felt there was an "absolute" necessity of such inquiry [*see* Table 1 *supra*]. Questions in this area were asked frequently in state courts in the St. Louis area, but not in federal courts [*see* Table 2 *infra*].

d. Prior convictions

Prior convictions, for purposes of the questionnaire, were included under the heading of competency. The usual relevance of such data is to sentencing alternatives.[27] Inquiry into prior convictions can serve several purposes. In several cases, for example, the experience of a recidivist with the guilty plea process, and with its consequences, was given

is not sufficient to establish incompetency as a matter of law); Manley v. United States, 396 F.2d 699 (5th Cir. 1968) (use of narcotics does not make a defendant per se incompetent); Deese v. United States, 303 F. Supp. 619 (D. S.C. 1969) (allegation of narcotics use, including at arraignment, will not necessarily overcome a record otherwise adequately showing voluntariness). *But see* Manley v. United States, 396 F.2d 699 (5th Cir. 1968) (indicated that, were defendant under the influence of narcotics at the arraignment, he might be found incompetent to plead); Widermyre v. State, 452 P.2d 885 (Alas. 1969) (post-conviction hearing granted because defendant's allegation of being on LSD during the arraignment could not be tested in the record); State v. Waltman, ___ Ariz. ___, 467 P.2d 914 (1970) (defendant alleged he was "agreeable" to plead guilty because on tranquilizers—the court found the evidence supporting the allegation inadequate); *cf.* Cooper v. Holman, 356 F.2d 82 (5th Cir. 1966), *cert. denied*, 385 U.S. 855 (1967) (alleged that the plea was coerced by police threats to deprive defendant of drugs—failure of proof); Pledger v. United States, 272 F.2d 69, 70 (4th Cir. 1959) (incompetence at trial because of drug use required a hearing).

25. Manley v. United States, 396 F.2d 699)5th Cir. 1968). *Cf.* Cooper v. Holman, 356 F.2d 82 (5th Cir. 1966); State v. Waltman, ___ Ariz. ___, 467 P.2d 914 (1970).

26. *See* note 25 *supra*.

27. Eligibility of an accused for such sentencing statutes, in turn, may be important to a finding of a voluntary guilty plea. *See* notes 86-93 *infra* and accompanying text. *Cf.* State v. Sisco, 169 N.W.2d 542, 547 (Iowa 1969); State v. Roach, 447 S.W.2d 553, 554 (Mo. 1969).

considerable weight in finding pleas voluntary and understanding.[28] This result, coupled with the mandates of *Boykin* and *McCarthy* that voluntariness should appear on the record, strongly suggests the necessity of the inquiry. In addition, it should be pointed out that answers to this question can be compared with those prior convictions included in a pre-sentence report. Any substantial variance between the two would immediately put the judge on notice that the defendant was not responding accurately during the arraignment and might, in some instances, call for a refusal to accept the plea.

Survey responses only nominally tended toward necessity and many categories of responses were distinctly negative [*see* Table 1 *supra*]. Questions about prior convictions were asked about half the time in state courts and one quarter of the time in federal courts in the St. Louis area [*see* Table 2 *infra*]. Although knowledge of prior convictions is important,[29] even without inquiry judges normally at least have such information in front of them. The reason for the infrequency of inquiry is apparently the inclusion of such data in pre-sentence reports, etc.[30] The fact that the judge has access to the information after the arraignment should not be decisive, however, primarily because the defendant's own response to the inquiry is the crucial factor in assessing competence.

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28 *See, e.g.*, Corn v. State of Oklahoma, 394 F.2d 478, 479 (10th Cir. 1968), *cert. denied*, 393 U.S. 917 (1968) (two prior felony convictions on pleas of guilty supported a finding that defendant understood the consequences of his plea); People v. Bauta, ___ Ill. App. 2d ___, 260 N.E.2d 306 (1970), State v. Reid, 204 Kan. 418, ___, 463 P.2d 1020, 1023 (1970) (prior imprisonment in reformatory supported finding that petitioner understood the consequences of his guilty plea); Normand v. People, 165 Colo. 509, 512, 440 P.2d 282, 283 (1968). For a case invalidating a guilty plea when the interrogation record did not show inquiry as to prior convictions *see* State v. Fuentes, ___ Ariz. App. ___, 467 P.2d 760 (1970) (this inquiry is mandatory under ARIZ. R. CRIM. P. 180). *Cf.* State v. Roach, 447 S.W.2d 553 (Mo. 1969) (prior record of defendant was not known when the prosecutor offered a recommendation of probation in exchange for the plea and judge by "tenor" and "tone" indicated assent to the bargain; when, because of the prior record, probation was not forthcoming, defendant was allowed to withdraw the plea). The general relevance of prior convictions to understanding is discussed in Note, *Withdrawal of Guilty Pleas in the Federal Courts*, 55 COLUM. L. REV. 366, 373-74 (1955).

Prior convictions for the same charge have been viewed by at least one court as bearing on the determination of a factual basis for the guilty plea. Kress v. United States, 411 F.2d 16 (8th Cir. 1969). This practice seems questionable in view of evidence law sanctions against similar use. As the plea itself does not determine factual basis, a rule similar to that applicable in a trial would seem appropriate, at least to the degree that *McCarthy* requires this determination to be in the record and in situations when other compelling evidence of "factual basis" is not available.

29 *See* notes 27-28 *supra* and accompanying text.

30 *See generally* R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE (1969). *Cf.*, Note, *Use of the Presentence Investigation in Missouri*, 1964 WASH. U.L.Q. 396, 401 n.24.

2. Voluntariness

As the fifth area of inquiry, the model questionnaire listed the following question: "Are you voluntarily and understandingly entering this plea?" Responses to the questionnaire were practically unanimous in declaring that this question is absolutely necessary to a properly conducted acceptance of a guilty plea by a trial court [*see* Table 1 *supra*]. In both state and federal St. Louis courts, however, the inquiry was seldom made in this form [*see* Table 2 *infra*]. The absence of this pointed inquiry in St. Louis courts apparently reflects a view that this question would be superfluous if linked to various other more specific questions relating to voluntariness, *e.g.*, inquiry into threats or promises. The survey responses and the St. Louis practice do illustrate that an inquiry limited to this question alone would be woefully inadequate, although pre-*Boykin* appellate decisions sustaining the voluntariness of a plea reveal that frequently the trial judge asked no more. This sudden change in philosophy may merely attest to the persuasive influence of the Supreme Court's decisions on criminal matters. On the other hand, it may independently reflect the discovery by some connected with the guilty plea process that more extensive, sincere inquiries by trial court judges will occasionally uncover a confused or poorly advised defendant. In any event, it is difficult to determine whether this specific question should be asked by the trial judge to the defendant. Under normal circumstances, a well-rehearsed defendant will undoubtedly respond affirmatively. The question can, nonetheless, serve to assure the very young, the uneducated, the confused and those receiving their first taste of the guilty plea grist-mill that the court is a neutral party serving as a check on police and prosecutor action rather than as a rubber stamp for it. Observations of arraignment procedures in St. Louis strongly suggest that the ultimate value of this type of inquiry depends not on the content or intent of the question, but instead on the method of delivery by the questioner.

Substantive requirements that an accused understand the charge and that the plea be voluntary antedate both *Boykin* and Rule 11, and are generally viewed as crucial elements of due process.[31] *Boykin*, rather

31. Kercheval v. United States, 274 U.S. 220, 223 (1927) (". . . plea shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."); Smith v. O'Grady, 312 U.S. 329, 334 (1941) (the true nature of the charge is the "first and most uiversally recognized requirement of due process. . . ."). These two cases are considered to be the Constitutional foundations for Rule 11. *See* Comment, 48 N.C. L. REV. 352, 354 (1970).

Although the matter of a record is new through *Boykin*, the voluntariness requirement is widely

than an exposition of new or latent rights, declares only the procedural means by which those rights are to be protected—by requiring a showing on the record of voluntariness.

Voluntariness and understanding contain three essential elements: the assent to plead guilty by the defendant,[32] an understanding of the nature of charges,[33] and an understanding of the consequences of the plea.[34] Although none of these elements are new notions, their content remains suprisingly unsettled.

a. Threats, Coercion and Duress

Threats, coercion and duress which induce a plea of guilty, as a general proposition, invalidate that plea.[35] There are, however, outer

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recognized. *E.g.*, Machibroda v. United States, 368 U.S. 487 (1962); Kercheval v. United States, 274 U.S. 220, 223 (1927); Brown v. State, 250 A.2d 503, 505 (Del. 1969); Silverberg v. Warden, Maryland Penitentiary, 7 Md. App. 657, 658-59, 256 A.2d 821, 822 (1969); People v. Taylor, 9 Mich. App. 333, 155 N.W.2d 723 (1968), *rev'd on other grounds*, 383 Mich. 338, 175 N.W.2d 715 (1970); Woods v. Rhay, 68 Wash. 2d 601, 605, 414 P.2d 601, 604 (1966); FED. R. CRIM. P. 11; ALAS R. CRIM. P. 11 (voluntary with understanding of the nature of the charge); COLO. R. CRIM. P. 11; FLA. R. CRIM. P. 1.1750; KY. R. CRIM. P. 8.08; 2 LA. CODE CRIM. P. art. 556 (1967); ME. R. CRIM. P. 11; MO. R. CRIM. P. 25.04; MONT. REV. CODE ANN. § 95-1606 (e) (cum. supp. 1969); NEV REV. STAT. § 174.035 (1969); PA. R. CRIM. P. 319(a); S.D. COMP. L. § 23-35-19 (1967) (defendant must be apprised of his rights and be found acting of his own "free will and accord"); TEX CODE CRIM. PROC. art. 26.13 (1966) (defendant must be admonished of consequences, appear "plainly sane" and "uninfluenced by fear, persuasion or delusive hope of pardon"); WYO. R. CRIM. P 15. *Cf.* Hansen v. Mathews, 424 F.2d 1205, 1208 (7th Cir. 1970), *cert. denied*, ___ U.S. ___, 90 S Ct 1404 (1970); United States States *ex rel.* Fear v. Pennsylvania, 423 F.2d 55 (3d Cir. 1970); United States *ex rel.* Crosby v. Brierley, 404 F.2d 790, 793 (3d Cir. 1968), *cert. denied*, 395 U.S. 924 (1969); Brown v. Beto, 377 F.2d 950 (5th Cir. 1967); Hinton v. Henry, 311 F. Supp. 652 (E.D. N.C. 1969); Luckman v. Burke, 299 F. Supp. 488, 492 (E.D. Wis. 1969); United States *ex rel.* Heath v. Rundle, 298 F. Supp. 1207 (E.D. Pa. 1969); Semon v. Turner, 289 F. Supp. 803, 805-06 (D. Utah 1968); Lockard v. State, 92 Idaho 813, 451 P.2d 1014 (1969); People v. Thomas, 41 Ill. 2d 122, 126, 242 N.E.2d 177, 179 (1968); People v. Wright, 32 App. Div.2d 847, 300 N.Y.S.2d 367 (1969). For a general discussion of this *see* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 22-31 (1966).

32 D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 22-31 (1966). *See also* Machibroda v. United States, 368 U.S. 487 (1962).

33 *See* note 112 *infra* and accompanying text. *See also* Smith v. O'Grady, 312 U.S. 329, 334 (1941).

34 *See* notes 79-103 *infra* and accompanying text. *See also* Kercheval v. United States, 274 U.S. 220, 223 (1927).

35 Machibroda v. United States, 368 U.S. 487 (1962). *Machibroda* is the leading statement of this proposition and is, in its general sense at least, universally followed, *see, e.g.*, United States *ex rel* Brown v. LaVallee, 424 F.2d 457 (2d Cir. 1970); United States v. Thomas, 415 F.2d 1216, 1218 (9th Cir. 1969); Townes v. Peyton, 404 F.2d 456 (4th Cir. 1968), *cert. denied*, 395 U.S. 924 (1969); Bailey v. MacDougall, 392 F.2d 155, 159 (4th Cir. 1968), *cert. denied*, 393 U.S. 847 (1968); Luse v. United States, 326 F.2d 338 (10th Cir. 1964); Aiken v. United States, 296 F.2d 604, 607 (4th Cir. 1961); Semon v. Turner, 289 F. Supp. 803, 806 (D. Utah 1968); Gibson v. Boles, 288 F. Supp. 472,

limits to the general proposition. Threats to prosecute others are not considered sufficiently coercive to invalidate the guilty plea of one not

474 (N.D. W. Va. 1968); United States *ex rel.* Perpiglia, 221 F. Supp. 1003 (E.D. Pa. 1963); State v. Linsner, ___ Ariz. ___, 467 P.2d 238, 241 (1970); Brown v. State, 250 A.2d 503, 505 (Del. 1969); People v. Thomas, 41 Ill. 2d 122, 126, 242 N.E.2d 177, 179 (1968); State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969); People v. Taylor, 9 Mich. App. 333, 338, 155 N.W.2d 723, 726 (1968), *rev'd on other grounds*, 383 Mich. 338, 175 N.W.2d 715 (1970); Woods v. Rhay, 68 Wash. 2d 601, 605, 414 P.2d 601, 604 (1966); State *ex rel.* Burnett v. Burke, 22 Wis. 2d 486, 494, 126 N.W.2d 91, 95-96 (1964).

Beyond the theoretical level, there are several matters at issue as to threats and coercion. First, must there be actual coercion? *Compare* Townes v. Peyton, 404 F.2d 456 (4th Cir. 1968) (which indicates that any subjective perception of threat may invalidate the plea as long as there is some supporting objective evidence) *with* People v. Thomas, 41 Ill. 2d 122, 126, 242 N.E.2d 177, 179 (1968) (which discusses physical and psychological coercion, presumably questions of fact, as the limit of constitutional interest in the area of voluntariness). The latter position, though an extreme statement, probably better represents the law at this moment. The threats or coercion inquiry seems to fit within the category of things measured by "objective" criteria (*see* notes 44-51 *infra*). This conclusion seems even more logical in view of the likelihood that it is official conduct which is to be deterred (*see* notes 45-51 *infra* and accompanying text). To the degree that *Townes v. Peyton* may be read as emphasizing the subjective perception of a defendant (as opposed to the probability of official misconduct which combining subjective perception and "some" objective facts would provide), its result is inconsistent with the general case law in this area. Further support for the view that the "threats" inquiry is designed to curtail official misconduct may be found in cases which, although threats are obviously present, do not sanction the threat or find the plea involuntary: threats of prosecution of others (*see* note 41 *infra*); threats to prosecute defendant on other charges (*see* note 38 *infra*); and more generally coercion and pressure from theoretical "allies" of the defendant such as family (*see* note 39 *infra*) or counsel [*see, e.g.*, United States *ex rel.* Brown v. LaVallee, 424 F.2d 457 (2d Cir. 1970); Decker v. Sigler, 310 F. Supp. 588 (D. Neb. 1969)], from situations (*see* note 37 *infra*) or from mere fear of a more severe sentence (*see* note 40 *infra*). That a person normally bears a heavy proof burden in overcoming his denial of threats at the arraignment [*see, e.g.*, Raymond v. State, 251 A.2d 509 (Me. 1969)] but that, when "official" threats are involved, a hearing is normally required [*see, e.g.*, Brumley . State, 224 So. 2d 447 (Fla. App. 1969)] further ratefies the "objective" characterization of judicial interest in "threats".

The conspicuous problem area as regards "threats, coercion, duress" is illegal evidence and its impact on the voluntariness of the plea. Usually illegal evidence, combined with fear of its use, which induces the guilty plea renders the plea invalid as not voluntary. *See, e.g.*, United States *ex rel.* Vaughn v. LaVallee, 318 F.2d 499 (2d Cir. 1963), *overruled as to defendants with counsel*, United States *ex rel.* Glenn v. McMann, 349 F.2d 1018 (2d Cir. 1965); Turner v. Cox, 312 F. Supp. 207, 208 (W.D. Va. 1970); United States *ex rel.* Wakeley v. Russell, 309 F. Supp. 68, 72 (E.D. Pa. 1970); Quillien v. Leeke, 303 F. Supp. 698 (D. S.C. 1969); United States *ex rel.* Heath v. Rundle, 298 F. Supp. 1207, 1211 (E.D. Pa. 1969); State v. Sisco, 169 N.W.2d 542 (Iowa 1969); People v. Taylor, 9 Mich. App. 333, 338, 155 N.W.2d 723, 726 (1968); State *ex rel.* Parks v. Tahash, ___ Minn. ___, 170 N.W.2d 448 (1969); Commonwealth v. Hollaway, 215 Pa. Super. 136, ___, 257 A.2d 308, 309 (1969); State v. Biastock, 42 Wis. 2d 525, 532, 167 N.W.2d 231, 235 (1969). The limiter is the demonstration of a causal relationship between the improper evidence or illegal procedure and the plea; *i.e.*, a mere demonstration of the defect will not suffice, the defect must induce the plea. For cases recognizing the principle but finding the causal relationship inadequately demonstrated *see, e.g.*, Turner v. Cox, 312 F. Supp. 207, 208 (W.D. Va. 1970) (here the petitioner failed to allege the relationship); Quillien v. Leeke, 303 F. Supp. 698, 706 (D.S.C. 1969); United States *ex rel.* Heath v. Rundle, 298 F. Supp. 1207, 1211 (E.D. Pa. 1969). In *United States ex rel. Wakeley v. Russell*, the

directly the object of such threat;[36] an aura of coercion—*e.g.*, a community climate of racial hatred—has been held not to affect vountariness;[37] knowledge that other charges may be brought or prosecuted will not invalidate a guilty plea to a given charge;[38] family pressure to plead guilty will not invalidate the plea as coerced;[39] and a defendant's fear of more severe sentences if he stands trial cannot invalidate an otherwise voluntary plea.[40] Several of these exceptions are,

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district court indicated four questions to be utilized in evaluating a claim of involuntary plea grounded on unconstitutional evidence:

(1) did the plea of guilty waive the right to challenge the evidence? The measure is the *intentional relinquishment* of a *known right*. This clearly supports inquiry at trial into the possibility of such evidence being behind the plea and, when found, supplying a defendant with indications of the possibility of suppressing it. *See also* People v. Taylor, 9 Mich. App. 333, 338, 155 N.W.2d 723, 726 (1968) (one of five areas of inquiry seen as mandatory is whether there was a confession or admission and what its relation is to the plea); Note, *Withdrawal of Guilty Pleas in the Federal Courts*, 55 COLUM. L. REV. 366, 370-71 (1955) (advocating such a determination on the record).

(2) was the confession coerced? This, of course, may be expressed in terms of whether the procedure was unconstitutional. *See, e.g.*, Commonwealth v. Holloway, 215 Pa. Super. 136, 257 A.2d 308 (1969) (illegal line-up).

(3) if coerced, did it induce or taint the guilty plea?

(4) if it did not induce the plea, was the plea otherwise voluntary?

United States *ex rel.* Wakeley v. Russell, 309 F. Supp. 68, 72 (E.D. Pa. 1970).

The continuing validity of the above lines of cases as to counselled defendants is, however, extremely questionable. *See* McMann v. Richardson, ___ U.S. ___, 90 S.Ct. 1441 (1970); Brady v United States, ___ U.S. ___, 90 S.Ct. 1463 (1970); Parker v. North Carolina, ___ U.S. ___, 90 S Ct. 1458 (1970); Ernst v. State, 43 Wis. 2d 661, 170 N.W.2d 713 (1969); LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 547 (1970).

36 *E.g.*, Kent v. United States, 272 F.2d 795, 798 (1st Cir. 1959) (threat to prosecute defendant's fiancee and hold family members as material witnesses did not render the plea involuntary); *cf.* Drake v. State, 45 Wis. 2d 226, 233, 172 N.W.2d 664, 667 (1969) (defendant knew his wife was suspected of the crime he plead guilty to—the court refused to sanction the underworld code of "Omerta, or Death to the Informer" indicating that if coercive, it was self-imposed coercion "which does not weaken the voluntary and knowledgeable aspect of an act based on it"). *But see* Crow v. United States, 397 F.2d 284 (10th Cir. 1968) (indicating that, as the petitioner alleged his plea was prompted by the threat to prosecute third persons, a voluntariness hearing was required).

37 Townes v. Peyton, 404 F.2d 456 (4th Cir. 1968) (racial bias in community caused defendant to fear trial). Other coercive situation cases indicate that it is "official" involvement in the coercive situation which will determine that a coercive situation hasmade the plea involuntary, but *compare* Bland v. State, 451 S.W.2d 699 (Tenn. Crim. App. 1969) (petitioner alleged that confessions of co-defendants coerced his plea—finding the plea voluntary and indicating that all guilty pleas are the result of some coercion or influence but that only some types of coercion render pleas involuntary) *with* Commonwealth v. Velasquez, 437 Pa. 262, 263 A.2d 351 (1970) (counsel pressed defendant to plead guilty and the court would not give defendant a continuance to retain other counsel—his plea was held involuntary).

38 *E.g.*, State v. Abodeely, 179 N.W.2d 347 (Iowa 1970).

39 *E.g.*, United States *ex rel.* Brown v. LaVallee, 424 F.2d 457 (2d Cir. 1970) (a guilty plea alleged to be the response to defendant's mother's pressure was not involuntary).

40 *E.g.*, White v. Gnann, 422 F.2d 1306 (5th Cir. 1970); United States *ex rel.* Amuso v.

nonetheless, fraught with coercive elements and, as such, in contravention of the policy stated above. For example, the allegation of a threat to prosecute the accused's fiancee as an accessory in *Kent v. United States* seems undeniably capable of inducing a plea.[41] On appeal, the First Circuit stated:

> We are not prepared to say that it can be coercion to inform a defendant that someone close to him who is guilty of a crime will be brought to book if he does not plead. If a defendant elects to sacrifice himself for such motives, that is his choice, and he cannot reverse it after he is dissatisfied with his sentence, or with other subsequent developments.[42]

Although in some respects a shocking result—particularly in view of the *Machibroda* doctrine that any threats or promises which remove voluntariness invalidate the plea[43]—it is not difficult to reconcile these seemingly clashing doctrines. *Machibroda* directs attention to the improper removal of choice from the defendant. Thus, the *Kent* court's discussion in terms of "choice" to sacrifice moves toward a reconciliation of the doctrines.

A better explanation lies in the "objective" and "subjective" tests of voluntariness outlined in *United States ex rel. Thurmond v. Mancusi*.[44] The "objective test" is designed, *Thurmond* indicates, to deter official misconduct.[45] Although, therefore, the ultimate issue is the defendant's state of mind—*i.e.*, voluntariness—that issue will only be met if a threat or element of coercion is indicated *and* is indicated to flow from some sort of official misconduct. Threats or promises calculated to overwhelm a defendant's ability to choose his trial course rationally render a plea of guilty involuntary as a matter of law.[46] The "objective test" thus parallels the kind of policy choices represented in the *Miranda*[47] and *Escobedo*[48] decisions, the "silver platter" decisions,[49] and others.[50] Threats, coercion and duress are generally viewed only in terms of the

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LaVallee, 291 F. Supp. 383 (E.D. N.Y. 1968); *cf.* United States v. Wiley, 267 F.2d 453 (7th Cir. 1959), *remanded with directions*, 278 F.2d 500 (7th Cir. 1960), *followed*, 184 F. Supp. 679 (N.D. Ill. 1960).

41. Kent v. United States, 272 F.2d 795 (1st Cir. 1959).
42. *Id.* at 798.
43. Machibroda v. United States, 368 U.S. 487, 493 (1962).
44. 275 F. Supp. 508 (E.D.N.Y. 1967).
45. *Id.* at 515-16.
46. *Id.* at 516. *See also* Machibroda v. United States, 368 U.S. 487, 493 (1962).
47. Miranda v. Arizona, 384 U.S. 436 (1966).
48. Escobedo v. Illinois, 378 U.S. 478 (1964).
49. Elkins v. United States, 364 U.S. 206 (1960).
50. *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (searches and seizures).

"objective test": whether the plea is voluntary is thus, in this area, apparently of secondary importance; paramount importance and attention being drawn to the role of law enforcement officials. This is reflected in various decisions which discuss the alleged coercion in terms of the legitimacy of the prosecutor's actions rather than the coercive aspect of his actions.[51]

It is clear from the case law that inquiry must be made at arraignment regarding threats, coercion and duress. The function of the inquiry is to determine the legitimacy of official conduct, and only incidentally the state of mind of the pleading defendant. Whether inputs of coercion, whatever their lawfulness, ought to be permitted in this phase of the criminal justice process is inadequately explored by courts to this point—at least from the view of the accused's free will. St. Louis federal courts in all cases and state courts in thirty percent of the arraignments viewed asked whether there were threats leading to the plea [*see* Table 2 *infra*]. In none of the arraignments was there inquiry as to threats of prosecution of others [*see* Table 2 *infra*]. Survey responses did not completely reflect the dichotomy seen in the case law and the St. Louis arraignments. Threats, coercion, and duress were seen as absolutely necessary inquiry by all categories of survey respondents (question 6); threats of prosecution of others (question 7), on the other hand, were seen as absolutely necessary by only responding U.S. Attorneys, and state trial and appellate judges [*see* Table 1 *supra*].

b. Promises of Sentence Concessions

Promises of sentence concessions (survey question 8) represents inquiry which probably may not be avoided. Under *Machibroda v. United States*, any threats or promises which induce a plea of guilty invalidate that plea.[52]

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51. *See, e.g.*, Lassiter v. Turner, 423 F.2d 897 (4th Cir. 1970) (even though the prosecutor was not aware of the forbidden character of the action with which he threatened defendant, the impropriety of the threat rendered the plea invalid); Ford v. United States, 418 F.2d 855 (8th Cir. 1969) (threat to prosecute under habitual offender provisions, which would lead to longer sentence, did not invalidate the plea as coerced); O'Neill v. United States, 315 F. Supp. 1352 (D. Minn. 1970) (plea of guilty to federal crime prompted by threat to prosecute for a more serious state offense was not involuntary); State v. Abodeely, 179 N.W.2d 347, 353 (Iowa 1970) (the county attorney's threat to file notice of additional incriminating evidence was not prohibited coercion).

52 368 U.S. 487, 493 (1962) (". . . a guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void."). *See, e.g.*, United States v. Thomas, 415 F.2d 1216, 1218 (9th Cir. 1969); Bailey v. MacDougall, 392 F.2d 155 (4th Cir. 1968); Aiken v. United States, 296 F.2d 604, 607 (4th Cir. 1961); Gibson v. Boles, 288 F. Supp. 472, 474 (N.D. W.Va. 1968); Hinton v. Henry, 311 F. Supp. 652, 654 (E.D. N.C. 1969); McClure v. Boles, 233 F. Supp. 928

In relating promises to voluntariness, the "objective" test may again be employed.[53] Under the objective test, and if a promise induces the plea, it must be kept.[54] If a promise is not kept, the plea is as a matter of law involuntary.[55] Again, the reason for the inquiry and the rule is to deter certain types of official misconduct[56] and does not directly relate to the defendant's state of mind or free will. Obviously, if the defendant's state of mind was in question, the fulfillment of the promise would be irrelevant. The standard here is instead often characterized in terms of "fairness"[57]—it is deemed "unfair" to induce a plea with a promise which is not kept, obtaining waiver of important constitutional rights by what is in essence a fraud. It is reversible error to do so.[58]

(N.D. W.Va. 1964); Hulett v. Sigler, 242 F. Supp. 705 (D. Neb. 1965); State v. Carpenter, ___ Ariz. ___, 467 P.2d 749, 751 (1970); Brown v. State, 250 A.2d 503, 505 (Del. 1969); State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969) (adopts A.B.A. *Minimum Standards Relating to Guilty Pleas*); People v. Taylor, 9 Mich. App. 333, 155 N.W.2d 723 (1968), *rev'd on other grounds*, 383 Mich. 338, 175 N.W.2d 715 (1970); State v. Roach, 447 S.W.2d 553, 556 (Mo. 1969); State *ex rel.* Burnette v. Burke, 22 Wis. 2d 486, 494, 126 N.W.2d 91, 95-96 (1964); Ernst v. State, 43 Wis. 2d 661, 674, 170 N.W.2d 713, 719 (1969); TEX. CODE CRIM. PROC. art. 26.13 (1966) ("uninfluenced . . . by any persuasion or delusive hope of pardon . . . ."); A.B.A. § 1.5.

53. *See* notes 44-51 *supra*.

54. *See, e.g.*, Hansen v. Mathews, 424 F.2d 1205 (7th Cir.) *cert. denied*, 90 S. Ct. 1404 (1970); People v. Smith, 34 App. Div. 2d 621, 309 N.Y.S.2d 101 (1970); State v. Roach, 447 S.W.2d 553 (Mo. 1969); People v. Delles, 69 Cal. 2d 906, 447 P.2d 629, 73 Cal. Rptr. 389 (1968); *In re* Valle, 364 Mich. 471, 110 N.W.2d 673 (1961); *cf.* Machibroda v. United States, 368 U.S. 487 (1962); United States v. Finney, 242 F. Supp. 112 (W.D. Pa. 1965) (a kept promise not to foreclose on defendant's father's house as a result of defendant's forfeiture of bond).

55. *See, e.g.*, Hansen v. Mathews, 424 F.2d 1205 (7th Cir.), *cert. denied*, ___ U.S. ___, 90 S. Ct. 1404 (1970); United States v. Thomas, 415 F.2d 1216, 1218 (9th Cir. 1969); State v. Wolske, 280 Minn. 465, 160 N.W.2d 146 (1968) (unkept promise to dismiss other charges); State v. Krois, 74 Wash. 2d 404, 445 P.2d 24 (1968) (unkept promise of medical treatment); People v. Cassiday, 90 Ill. App. 2d 132, 232 N.E.2d 795 (1967) (promised probation and fine; received prison term); *cf.* Dillon v. United States, 307 F.2d 445 (9th Cir. 1962) (if prosecutor knows sentence recommendations will not be requested by judge, and yet induces a guilty plea by a promise to recommend leniency if requested, his promise is wholly illusory, violates due process, and requires automatic reversal). Several courts have suggested—or held—that *any* bargain renders the plea involuntary regardless of its performance. *See* Shelton v. United States, 242 F.2d 101, *rev'd on rehearing*, 246 F.2d 571 (5th Cir. 1957) (*en banc*), *rev'd on confession of error*, 356 U.S. 26 (1958) (*per curiam*); People v. Byrd, 12 Mich. App. 186, ___, 162 N.W.2d 777, 780 (1968) (Levin, J., concurring); Application of Buccheri, 6 Ariz. App. 196, 431 P.2d 91, (1967). The remedy for an unkept promise has not always been reversal and vacation of the plea of guilty. If the failure to perform the promise is viewed as "unfair" rather than as a factor rendering the plea involuntary, the remedy is fulfillment of the promise rather than reversal. *See* People v. Smith, 34 App. Div.2d 621, 309 N.Y.S.2d 101 (1970).

56. *See* note 59 *infra*. *Cf.* United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D. N.Y. 1966).

57. *See, e.g.*, State v. Roach, 447 S.W.2d 553 (Mo. 1969); People v. Smith, 34 App. Div. 621, 309 N.Y.S.2d 101 (1970).

58. *See, e.g.*, cases cited in notes 54-55 *supra*; United States v. Graham, 325 F.2d 922 (6th Cir.

A "subjective" test may also be occasionally employed in gauging the relationship between promise and plea to find voluntariness.[59] Here the test requires a consideration of the probable effect of a promise on the ability of an accused to choose how he shall plead. Unlike the objective test, which aims at the propriety of official conduct, promises by almost anyone, under the subjective state of mind test, may, if acted upon, render the plea involuntary. Thus, for example, a promise by a defendant's counsel of a given case disposition—when that disposition is not forthcoming—may render the plea involuntary.[60] There are checks on this process: first, a mere intuition about a probable disposition will not render the plea involuntary—the promise must be of a specific sentence;[61] second, reliance on the existence of the promise must be

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1963); United States v. Schneer, 105 F. Supp. 883 (E.D. Pa. 1951); State v. Hovis, 353 Mo. 602, 183 S.W.2d 147 (1944).

59 *See, e.g.*, Townes v. Peyton, 404 F.2d 456 (4th Cir. 1968) (requires some objective evidence to support the belief); United States v. Lester, 247 F.2d 496 (2d Cir. 1957); United States *ex rel.* Thurmond v. Mancusi, 275 F. Supp. 508 (E.D. N.Y. 1967); TEXAS CODE CRIM. PROC. art. 26.13 (1966); *see generally* Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964). *But see* LeFebre v. State, 40 Wis. 2d 666, 162 N.W.2d 544 (1968) (holding that no "subjective test" may be applied, defendant's belief, absent an actual bargain does not render a plea involuntary).

60 *See* Gilmore v. People, 364 F.2d 916 (9th Cir. 1966); United States *ex rel.* Wilkins v. Banmiller, 325 F.2d 514 (3rd Cir. 1963); Semon v. Turner, 289 F. Supp. 803, 808 (D. Utah 1968); United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D. N.Y. 1966); State v. Rose, 440 S.W.2d 441, 443 (Mo. 1969); Davidson v. State, 92 Idaho 104, 437 P.2d 620 (1968) (McFadden, J., dissenting). *Contra* People *ex rel.* LaFay v. McMann, 33 App. Div.2d 1102, 308 N.Y.S.2d 253 (1970) *But cf.* People v. Walls, 3 Mich. App. 279, 142 N.W.2d 38 (1966). *See generally* Enker, *Perspectives on Plea Bargaining*, in TASK FORCE: COURTS 108.

If the lawyer merely tells his client that he expects a lighter sentence if the defendant pleads guilty, but does not imply that his expectation is on the basis of any "agreement" or "deal", the plea will generally not be considered involuntary merely because the defendant's expectations are inaccurate. *See, e.g.*, Wellnitz v. Page, 420 F.2d 935 (10th Cir. 1970); United States v. Berry, 309 F.2d 311 (7th Cir. 1962); Dewey v. United States, 268 F.2d 124 (8th Cir. 1959); Floyd v. United States, 260 F.2d 910 (5th Cir. 1958); Meredith v. United States, 208 F.2d 680 (4th Cir. 1953); United States v. Johnson, 269 F. Supp. 767 (S.D. N.Y. 1967); State v. Andrews, 79 N.J. Super. 17, 190 A.2d 201 (1963); Jacobs v. Warden, Maryland Penitentiary, 232 Md. 627, 192 A.2d 786 (1963); Commonwealth v. Guthier, 435 Pa. 353, ____, 257 A.2d 586, 587 (1969). *But see* Wilson v. Rose, 366 F.2d 611 (9th Cir. 1966).

There is no general requirement that the promises be made by a state official, such as the prosecutor. *See* Everett v. United States, 336 F.2d 979, 980 n. 3 (D.C. Cir. 1964). Thus, questioning at arraignment should not be limited to "promises by the prosecutor", but should include an inquiry *re* promises by "anyone". *See, e.g.*, ABA § 1.5; Brown v. State, 250 A.2d 503, 505 (Del. 1969)

61 *See, e.g.*, Semon v. Turner, 289 F. Supp. 803, 808 (D. Utah 1968); United States v. Johnson, 269 F. Supp. 767, 769 (S.D. N.Y. 1967). *But cf.* People *ex rel.* LaFay v. McMann, 33 App. Div. 2d 1102, 308 N.Y.S.2d 253 (1970).

convincingly proven to an appeal court—this has sometimes been adequately demonstrated by immediate protest of the sentence.[62]

Inquiry as to promises (question 8) of sentence concessions was seen by all save two categories in the survey as absolutely necessary inquiry [*see* Table 1 *supra*]. In a majority of arraignments viewed in St. Louis—including all federal arraignments—the accused was asked whether the plea was the result of any promises [*see* Table 2 *infra*]. Both questionnaire responses and the St. Louis practice conform with the common law requirement of a promises inquiry.

c. Plea Bargains

Plea bargains present a very special problem. Some scholars have argued that any plea bargain is *per se* unconstitutional.[63] Recent Supreme Court decisions, albeit in what might be characterized as dicta, seem to legitimize bargains, at least when the bargaining defendant has the benefit of counsel.[64] For some reason, perhaps because of the ambiguous constitutionality of plea bargaining, the process has remained hidden in most arraignments.[65] This sub rosa approach has

62. *Cf.* United States *ex rel.* Thurmond v. Mancusi, 275 F. Supp. 508 (E.D. N.Y. 1967) (defendant wrote judge immediately after sentencing).

63. *See, e.g.*, Shelton v. United States, 242 F.2d 101, *rev'd on rehearing*, 246 F.2d 571 (5th Cir. 1957) (*en banc*), *rev'd on confession of error*, 356 U.S. 26 (1958) (*per curiam*); People v. Byrd, 12 Mich. App. 186, ___, 162 N.W.2d 777, 782 (Mich. App. 1968) (Levin, J., concurring); Application of Buccheri, 6 Ariz. App. 196, 431 P.2d 91 (1967); *cf.* Heideman v. United States, 281 F.2d 805 (8th Cir. 1960); Shupe v. Sigler, 230 F. Supp. 601 (D.C. Neb. 1964); People v. Hoerle, 3 Mich. App. 693, 143 N.W.2d 593 (1966). *See generally* Comment, *Voluntariness of Plea of Guilty Made in Response to Promise of Leniency*, 35 N.Y. U.L. REV. 284 (1969).

64. *See* Brady v. United States, ___ U.S. ___, 90 S.Ct. 146 (1970); McMann v. Richardson, ___ U.S. ___, 90 S.Ct. 1441 (1970); *cf.* Parker v. North Carolina ___ U.S. ___, 90 S.Ct. 1458 (1970). Justice White states in *Brady*:

> We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser pelanty rather than face a wider range of possibilities extending from acquital to conviction and a higher penalty authorized by law for the crime charged.
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> We cannot hold that it is unconstitutional for the state to extend a benefit to a defendant who in turn extends a substantial benefit to the state and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind which affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

Brady v. United States, ___U.S. ___, 90 S.Ct. 1463, 1470, 1471 (1970).

65. The system usually operates in an informal, invisible manner. There is ordinarily no formal recognition that the defendant has been offered an inducement to plead guilty. Although the participants and frequently the judge know that negotiation has taken place, the prosecutor and defendant must ordinarily go through a courtroom ritual in which they deny that the guilty plea is the result of any threat or promise.

TASK FORCE: COURTS 9. At least one defendant, attempting to demonstrate that his plea of guilty

occurred in spite of the prevelance of the practice. As one state-trial judge indicated in his survey response: "As a practical matter I know of no pleas in my court where they are not the result of plea bargaining. I no longer even pretend that the plea is not the result of at least an understanding that a certain recommendation is going to be made."[66] Many courts have in fact recognized both the existence and legitimacy of plea bargains,[67] although only a few have required their exposure on the record. Inquiry about the existence of a bargain operates similarly to the "promises" inquiry. As such, it is designed to expose both objective and subjective difficulties with a plea's voluntariness. Promises and plea bargains are intimately connected, and the difficulties with each are parallel. By remaining sub rosa inducements to guilty pleas, neither objective criteria (is the bargain "fair"?[68], is it fulfilled?,[69] is election to take the prosecutor's offer a free will decision or coerced?,[70] etc.) nor subjective criteria (is there a bargain at all?,[71] what effect does the bargain have on defendant's decision?[72]) are brought to the attention of

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was involuntary, argued that his negative response to the trial judges question concerning promises, when in fact there was a bargain, evidenced his confusion over what was occurring at his arraignment. *See* Holmes v. State, 283 Minn. 520, 166 N.W.2d 715 (1969).

66 Letter from a public defender to *Washington University Law Quarterly*.

67 *See* McMann v. Richardson, ___ U.S. ___, 90 S.Ct. 1441(1970); Jones v. United States, 423 F.2d 252 (9th Cir. 1970); United States v. Thomas, 415 F.2d 1216 (9th Cir. 1969); Gilmore v. California, 364 F.2d 916, 918 (9th Cir. 1966); Cortez v. United States, 337 F.2d 699, 701 (9th Cir. 1964); Semon v. Turner, 289 F. Supp. 803, 806 (D. Utah 1968); State v. Carpenter, ___ Ariz. ___, 467 P.2d 749 (1970); Commonwealth *ex rel.* Kerekes v. Maroney, 423 Pa. 337, 223 A.2d 699 (1966).

One reason for the general approval and widespread use of plea bargaining is the criminal justice system's reliance on a large percentage of guilty pleas. As such, offers of concessions to induce guilty pleas are a necessity. *See* TASK FORCE: COURTS 9; D. Newman, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 78 (1966); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964). *But see* People v. Byrd, 12 Mich. App. 186, ___, 162 N.W.2d 777, 780 (1968) (Levin, J., concurring). The bargaining system, especially when conducted *sub silentio*, has been criticized as an unsatisfactory mechanism for processing accused. *See* Newman, *Pleading Guilty for Consideration: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P. S. 780, 790 (1956); Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385 (1951).

68 *See generally* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 32-44 (1966).

69 *Cf.* People v. Montogomery, 27 N.Y.2d 601, 261 N.E.2d 409 (1970).

70. *See* Lassiter v. Turner, 423 F.2d 897 (4th Cir. 1970); Jones v. United States, 423 F.2d 252 (9th Cir. 1970).

71. *Cf.* Dillon v. United States, 307 F.2d 445 (9th Cir. 1962); Commonwealth v. Culbreath, 439 Pa. 21, 264 A.2d 643 (1970). "Even where there have been no explicit negotiations, defendants relying on prevailing practices often act on the justifiable assumption that those who plead guilty will be sentenced more leniently." TASK FORCE: COURTS 9.

72 *Cf.* United States *ex rel.* Brown v. LaValle, 424 F.2d 457 (2d Cir. 1970).

the judge. The response of the American Bar Association in its *Minimum Standards Relating to Guilty Pleas* was advocacy of an open, on the record judicial review and approval of plea bargain terms.[73] Active judicial participation in the bargaining process, even if limited to post-bargaining review as suggested by the ABA Minimum Standards, will undoubtedly shift a portion of the prosecutor's burden of public accountability to the trial judge. The recent adoption or approval of the ABA position by several courts[74] is strong authority for the argument that the advantages of a judicial safeguard on an otherwise hidden practice outweigh any negative aspects of pressing trial courts with increased responsibility.[75] If arraignment procedure for guilty pleas continues without a reform of this type, judges will be required to entertain the legal fiction that an on the record showing of voluntariness under *Boykin* need not include any consideration or even mention of the principal motivating cause for a large percentage of guilty pleas entered in this country. It must be conceded, however, that current arraignment procedures are built around just this fiction.

> Our rules require the defendant, upon entry of his plea, to indicate that there have been no promises made to him. As a practical matter, such promises are made, but not necessarily with regard to sentence, but particularly with regard to eliminating counts of [an] indictment where sentencing would no doubt be concurrent. Examination of the New Jersey

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73. ABA §§ 1.5, 1.8, 3.1. *See* TASK FORCE: COURTS 12-13 ("Experience with a plea bargaining system in which negotiations are open, visible and subject to judicial scrutiny should help to identify the risks involved in the system . . ."). For a sharp criticism of the ABA approach, *see* People v. Earegood, 12 Mich. App. 256, 162 N.W.2d 802 (1968).

74. *See* Jones v. United States, 423 F.2d 252 (9th Cir. 1970); State v. Sisco, 169 N.W.2d 542, 547 (Iowa 1969); State v. Tyler, 440 S.W.2d 470 (Mo. 1969); People v. Taylor, 9 Mich. App. 333, 338, 155 N.W.2d 723, 727 (1968), *rev'd on other grounds*, 383 Mich. 338, 175 N.W.2d 715 (Mich. 1970); *cf.* N.Y. CODE CRIM. PROC. § 342-a (McKinney supp. 1970); Weintraub & Tough, *Lesser Pleas Considered*, 32 J. CRIM. L.C. & P.S. 506 (1942).

75. The open bargain, however, has been criticized as demeaning of courts. As one judge stated:

> . . . both the judicial and public consciences may well be outraged where defendant's conduct, truthfully related on the record, constitutes a serious offense and, also related on the record, that defendant is allowed to enter a guilty plea to a less serious offense.
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> . . . much of the public would object to some agreements which in the past have been allowed. And so once again, at least as to those judges and the more "delicate" cases, the parties will have to resort to pre-plea secret negotiations and prearranged answers bearing no necessary relationship to what has in truth occurred. Nothing could be more calculated to destroy the integrity of the judicial process and to denigrate respect for law and order among those brought to he bar of justice . . .

People v. Byrd, 12 Mich. App. 186, 213-14, 162 N.W.2d 777, 791-92 (1968) (Levin, J. concurring).

> Rules will indicate that no mention of this can be made at the time of plea. Some means of bringing this onto the record should be provided.[76]

This practice, as described in New Jersey and prevalent in most states, requires the judge, the defendant, and the attorneys in the courtroom to play a dishonest game. Without empirical data, it is impossible to assess the number of defendants who, as a consequence, view the entire arraignment in like fashion.[77]

Survey responses were, in general, highly favorable toward this area of inquiry [*see* Table 1 *supra*]. In St. Louis courts a specific question about the existence of a plea bargain or negotiated plea was never asked in the arraignments viewed [*see* Table 2 *infra*]. In addition, none of the defendants pleading in those arraignments responded affirmatively when asked if any promises had been made. One federal arraignment witnessed revealed an informal method of judicial involvement in the bargaining process. In that case, a young woman appeared before the judge with appointed counsel and tendered a plea of guilty to all of the six original counts brought against her. The judge was visibly troubled by the plea, and proceeded to question the defendant at some length. Through his questioning, he discovered that the defendant's counsel had been appointed that same morning when the woman's original appointed counsel failed to appear. Although the word "bargain" was never mentioned, the judge refused to accept the pleas and made it clear that he thought a "conference" between the newly appointed counsel and the United States Attorney was in order. Following the conference which then took place in the corner of the courtroom, the United States Attorney moved to dismiss four of the original six counts. The motion was granted immediately and the defendant's plea to the remaining two counts accepted, following her recitation that no promises had been made to her concerning the plea.[78] It should be noted that the judge was noticably angered at the failure of both attorneys to work the matter out prior to their appearance before him.

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76 Letter from a state trial judge to the *Washington University Law Quarterly*.

77 The defendant is expected to "follow the rubric of telling the court no promise has induced the plea, and while this game is played the prosecutor and defense counsel mutely corroborate the defendant's false statement." United States v. Jackson, 390 F.2d 130, 138 (7th Cir. 1968) (Kiley, J., dissenting); LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 542 (1970) *Cf.* J. RUBIN, DO IT! 158 (1970).

78 Student transcribed arraignment on file at *Washington University Law Quarterly*.

d. Consequences of the Plea

An appreciation by the defendant of the consequences of pleading guilty is an essential element of a "voluntary and understanding" plea.[79] This universally includes knowledge of the maximum sentencing possibility.[80] When, by statute, there is a minimum sentence, this minimum is likewise a "consequence" of which the accused must be aware.[81] It is error to inform defendant of a given maximum and then sentence him following a subsequent guilty plea to a longer term of imprisonment.[82] *Boykin's* on the record requirement is best facilitated in this area of inquiry by simply addressing the defendant and appraising him accurately of the possible sentencing ranges following conviction.

Most survey responses recognized the necessity of this inquiry [*see* Table 1 *supra*]. In St. Louis courts the accused was informed of potential

79. Kercheval v. United States, 274 U.S. 220, 223 (1927). *See generally* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 32-33 (1966).

80. *E.g.*, Grant v. United States, 424 F.2d 273 (5th Cir. 1970); Chavez v. Wilson, 417 F.2d 584 (9th Cir. 1969); United States *ex rel.* Crosby v. Brierley, 404 F.2d 790 (3d Cir. 1968); Trujillo v. United States, 377 F.2d 266 (5th Cir. 1967); Meaton v. United States, 328 F.2d 379 (5th Cir. 1964), *cert. denied*, 380 U.S. 916 (1965); Aikin v. United States, 296 F.2d 604, 607 (4th Cir. 1961); Hinton v. Henry, 311 F. Supp. 652, 653 (E.D. N.C. 1969); Matthews v. United States, 308 F. Supp. 456, 457 (S.D. N.Y. 1969); Semon v. Turner, 289 F. Supp. 803, 807 (D. Utah 1968); Ware v. State, ___ Ala. App. ___, 219 So. 2d 910, 912 (1969); Ingram v. State, 450 P.2d 161 (Alas. 1969); State v. Carpenter, ___ Ariz. ___, 467 P.2d 749, 751 (1970); Brown v. State, 250 A.2d 503, 505 (Del. 1969); People v. Thomas, 41 Ill. 2d 122, 242 N.E.2d 177 (1968); State v. Sisco, 169 N.W.2d 542, 547 (Iowa 1969); Duvall v. State, 5 Md. App. 484, 248 A.2d 401 (1968); People v. Taylor, 9 Mich. App. 333, 338-39, 155 N.W.2d 723, 726 (1968), *rev'd on other grounds*, 383 Mich. 338, 175 N.W.2d 715 (1970); Copenhaver v. State, 431 P.2d 669, 674 (Okla. Crim. Ct. App. 1967); Nealy v. Cupp, 467 P.2d 649 (Ore. Ct. App. 1970); Commonwealth v. Culbreath, 439 Pa. 21, 264 A.2d 643 (1970); State *ex rel.* Burnett v. Burke, 22 Wis. 2d 486, 494, 126 N.W.2d 91, 95-96 (1964); MONT. REV. CODE ANN. § 95-1606 (e) (cum. supp. 1969); TEX. CODE CRIM. PROC. art. 26.13 (1966); W. VA. CODE ANN. § 62-3-1a (1966). Most of the above cases do not focus exclusively on the maximum sentence but implicitly include *mandatory* minimum sentences with such language as "the range of punishment". Sometimes the inclusion is explicit, as where the requirement is said to be that the court determine if defendant understands the "maximum and minimum sentencing possibilities". The statement must be definite. *See* People v. Terry, 44 Ill. 2d 38, 253 N.E.2d 383 (1969) (the plea was held invalid because the trial court, informing of an "indeterminate" sentence of "not less than one year", did not fully apprise defendant of the consequences of his plea); People v. Medley, 122 Ill. App. 2d 290, 258 N.E.2d 392 (1970).

81. *E.g.*, State v. Sisco, 169 N.W.2d 542, 547 (Iowa 1969). *See also* ABA § 1.4 (c)(ii). Statement of the minimum without statement of the maximum penalty will not adequately inform the accused of the consequence of his plea; thus, the "minimum sentence" statement only adds to, when there is a statutory minimum, the broader requirement noted in footnote 80 *supra*. *See* People v. Terry, 44 Ill. 2d 38, 253 N.E.2d 383 (1969). The ABA Project also indicates that statement of the minimum may not always be required. ABA 28.

82. *E.g.*, Nealy v. Cupp, 467 P.2d 649 (Ore. Ct. App. 1970); *cf.* Luckman v. Burke, 299 F. Supp. 488, 492-93 (E.D. Wis. 1969).

sentence ranges in 53% of state and 75% of federal arraignments viewed [*see* Table 2 *infra*]. Since most defendants in the arraignments viewed had counsel, it is possible that in many arraignments the defense counsel is still assumed to have apprised defendant of the consequences.[83] Such an assumption in the federal courts, while perhaps accurate, is nonetheless in violation of Rule 11.

e. Concurrent and Consecutive Sentencing Possibilities

Concurrent and consecutive sentencing possibilities are similarly necessary; that is, the defendant must understand their implications for his sentence.[84] The information is, however, implicit in an accurate maximum/minimum sentence range apprisal. Thus, in a normal case, the maximum sentence statement should incorporate cumulative sentence possibilities. It should be noted that a misstatement or non-statement of potential sentencing ranges invalidates a plea only if the error misleads the defendant to his detriment.[85] For example, a defendant sentenced to 15 years on a guilty plea after a judge's statement that the charge had a maximum 15 year penalty has little to complain about, even though the statute may indicate an actual 30 year maximum.

Few categories of survey respondents felt this to be an "absolutely necessary" area of inquiry (state appellate judges, U. S. Attorneys, Legal Aid Lawyers and public defenders, however did) [*see* Table 1 *supra*]. This information was not presented to defendants in any arraignments viewed in St. Louis [*see* Table 2 *infra*]. This absence reflects that concurrent/consecutive sentences may be, as noted above, inferentially stated in terms of the maximum/minimum sentence range faced by an accused. The problem in the St. Louis courts, however, was a frequent failure to inform the defendant of *any* sentencing range.

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83. Such continued reliance on the assumption is however, improper under the rules of either court, since Missouri's rule for the acceptance of guilty pleas substantially reproduces the requirements of federal Rule 11. Certainly both rules require that the judge himself make the "voluntary and understanding" determination to which consequences are key. FED. R. CRIM. P. 11; MO. R CRIM. P. 25.04.

84 *E.g.*, Luckman v. Burke, 299 F. Supp. 488, 492 (E.D. Wis. 1969). *See also* State v. Sisco, 169 N.W.2d 542, 547 (Iowa 1969); ABA § 1.4 (c)(i).

85. *E.g.*, Luckman v. Burke, 299 F. Supp. 488, 492 (E.D. Wis. 1969). Since the principal impact of consecutive or concurrent sentence will usually be on the parole timetable, the rather stringent standards applicable to the necessity of that inquiry (*see* note 89 *infra*) indicate that there are few instances when absence of the inquiry will make for an involuntary plea. That is, there will be few cases showing necessary impact beyond what failure to understand the maximum penalty connotes.

f. Parole Eligibility and Special Sentencing Statutes

The next two areas of inquiry indicated in the questionnaire, parole eligibility and special sentencing statutes, are not generally necessary areas of inquiry. If, however, either may have an impact on the potential sentence a defendant must *serve*, they do become absolutely necessary and mandatory. Limited parole eligibility was at one time considered a "collateral consequence"[86] of a conviction on a plea of guilty—once characterized as a matter of "legislative grace" rather than "judicial consequence."[87] As such, it was usually held that a defendant pleading guilty need not be informed before acceptance of his plea that he would be ineligible for parole.[88] More recent decisions, however, require the trial court to apprise the defendant of parole ineligibility, or limited right to probation.[89] One court holding the contrary has recently retreated.[90] The key here is *ineligibility*—no case has held that the judge must explain at length the parole system as it may apply to the defendant. Thus, as phrased in the questionnaire ["Parole Eligibility (especially if limited or not available)"], the area of inquiry is necessary *when* parole eligibility is limited or not available.

If a special sentencing statute will have an impact on length of sentence to be served on a guilty plea conviction, it is an essential inquiry. A guilty plea is invalid, for lack of understanding of the consequences, if the defendant is sentenced under provisions of which he is not aware.[91] The familiar example is the Federal Youth Corrections

86. *E.g.*, Trujillo v. United States, 377 F.2d 266 (5th Cir.), *cert. denied*, 389 U.S. 899 (1967); Smith v. United States, 324 F.2d 436 (D.C. Cir. 1963); Fimmano v. United States, 308 F. Supp. 938 (S.D. N.Y. 1970); *cf.* Fong v. United States, 293 F. Supp. 79 (D.C. Ore. 1968); Anushevitz v. Warden, Nev. State Prison, ___ Nev. ___, 467 P.2d 115 (1970).

87. Smith v. United States, 324 F.2d 436, 441 (D.C.Cir. 1963).

88. *See* cases cited in note 86 *supra*.

89. *See, e.g.*, Bye v. United States, ___ F.2d ___, 8 Crim. L. Rep. 2077 (2d Cir. 10-14-70), Durant v. United States, 410 F.2d 689 (1st Cir. 1969); Berry v. United States, 412 F.2d 189 (3d Cir. 1969); Alomino v. United States, 420 F.2d 965 (9th Cir. 1969); Munich v. United States, 337 F.2d 356 (9th Cir. 1964).

90. Spradley v. United States, 421 F.2d 1043 (5th Cir. 1970) (adopting *Durant*, the court limited *Trujillo* to its facts).

91. *E.g.*, Hansen v. Mathews, 424 F.2d 1205, 1209 (7th Cir.), *cert. denied*, ___ U.S. ___, 90 S. Ct. 1404 (1970) (recidivist statute); Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963) (Youth Corrections Act); McCullough v. United States, 231 F. Supp. 740, 741 (N.D. Fla. 1964); People v. Levi, 33 App. Div. 2d 566, 305 N.Y.S.2d 745 (1969) (36 months of custody as an addict); State v. Sisco, 169 N.W.2d 542, 547 (Iowa 1969). *Contra* Kelley v. United States, 299 F. Supp. 1367 (S.D.N.Y. 1969) [finding eligibility for recidivist statute a collateral consequence (*see* notes 95-103 *infra*)].

There appears in some cases to be a limiter on this, *i.e.*, that the rule applies to quantity not

Act under which a "youth" may receive, because of his status, a greater sentence than would an adult offender.[92] As in the case of parole, the key is potential impact on the length of sentence. Thus, a judge who explains sentencing possibilities for adults and those under the Federal Youth Corrections Act, without stating which he would apply, was held to have adequately informed the defendant of the consequences of his plea.[93] Recidivist statutes are other familiar examples and, if they apply, an inquiry must be made to demonstrate that the defendant understands their importance to him.

Survey responses on the parole eligibility inquiry tended toward the mean and even toward "unnecessary" in some categories. Only U.S. Attorneys characterized the inquiry as "absolutely necessary" [*see* Table 1 *supra*]. In view of the phrasing of the questionnaire, these responses must be seen as mainly erroneous. The special sentencing statutes inquiry was seen generally as necessary and by federal judges, U.S. Attorneys and professors as "absolutely necessary." It is instructive to compare the letter with the less positive responses of state judges [*see* Table 1 *supra*]. In neither area of inquiry were questions asked or information given in St. Louis arraignments [*see* Table 2 *infra*]. The absence, of course, reflects the general inapplicability of such inquiry, not a failing of St. Louis courts, except to the extent that those courts failed to inform defendants of any sentencing possibilities.

g. Collateral Consequences

"Consequences of the plea" has been historically divided into "direct" and "collateral" (sometimes "civil") categories.[94] Direct consequences include matters such as potential sentencing ranges, considered above. Collateral consequences, on the other hand, need not

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quality of treatment. *See, e.g.*, State v. English, ___ Kan. ___, 424 P.2d 601, *rehearing denied*, ___ Kan. ___, 424 P.2d 601 (1967) (failure to advise of commitment provisions of a Sex Offenders Act did not render the plea involuntary—commitment was for a definite term equivalent to sentence provisions). Attention to quality in at least one court reached a result that, because commitment of a sex offender was designed to "treat" not "punish", the special sentencing provision was not a consequence. Butler v. Burke, 360 F.2d 118 (7th Cir.), *cert. denied*, 385 U.S. 835 (1966).

92 18 U.S.C. §§ 5005 *et seq.* (1969). *See also* Pilkington v. United States, 315 F.2d 204 (4th Cir 1962); Kotz v. United States, 353 F.2d 312 (8th Cir. 1965); McCullough v. United States, 231 F. Supp. 740 (N.D. Fla. 1964).

93 Combs v. United States, 391 F.2d 1017 (9th Cir. 1968).

94. Advice at arraignment as to the possible penal consequences of a plea of guilty indirectly serves the possibility that the prospect of a short term of imprisonment might induce an innocent man to plead guilty. But advice as to civil consequences [loss of the right to vote and hold public office] seems totally unrelated to the accuracy of a plea of guilty.

People v. Thomas, 41 Ill. 2d 122, 126, 242 N.E.2d 177, 179 (1968).

be understood for the entry of a voluntary plea.[95] Included are such consequences as loss of the right to vote,[96] loss of reputation,[97] loss of the right to hold public office,[98] deportation,[99] and a permanent police record.[100] The non-necessity of inquiry regarding a defendant's appreciation of the collateral consequences of his plea seems well settled. What constitutes a "collateral" consequence remains obscure. For example, parole ineligibility is now characterized as a direct consequence,[101] although once classified as a collateral consequence about which a defendant need not be informed.[102] Other collateral consequences, deportation conspicuously,[103] have chimerical characteristics of "directness" which may eventually lead to a similar shift in classification.

Properly, survey responses generally regarded collateral consequences as an unnecessary inquiry [*see* Table 1 *supra*]. Regretably no effort was made in the questionnaire to explore specific collateral items, such as deportation. No questions in this area were asked in the arraignments viewed [*see* Table 2 *infra*].

95. *E.g.*, United States *ex rel.* Brooks v. McMann, 408 F.2d 823 (2d Cir. 1969), *vacated*, ___ U.S. ___, 90 S.Ct. 1441 (1970); Sanchez v. United States, 417 F.2d 494 (5th Cir. 1969); Meaton v. United States, 328 F.2d 379 (5th Cir. 1964), *cert. denied*, 380 U.S. 959 (1965); Redwine v. Zuckert, 317 F.2d 336 (D.C. Cir. 1963) (*per curiam*); United States v. Parrino, 212 F.2d 919, *rehearing denied*, 212 F.2d 919 (2d Cir.), *cert. denied*, 348 U.S. 840 (1954); Semon v. Turner, 289 F. Supp. 803, 807 (D. Utah 1968); People v. Thomas, 41 Ill. 2d 122, 252 N.E.2d 177 (1968); State v. Medearis, 165 N.W.2d 688 (N.D. 1969). *But see* United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963) [in this coram nobis proceeding the loss of vote was raised—the holding, that it was not reasonable for the trial court to anticipate a move to New York 16 years in the future (in the state where convicted loss of vote would not have been a consequence) infers that collateral consequences may be "direct consequences", at least in the third circuit].

96. People v. Thomas, 41 Ill. 2d 122, 242 N.E.2d 177 (1968). *But see* United States v. Cariola, 323 F.2d 180 (3d Cir. 1963).

97. United States v. Cariola, 323 F.2d 180, 182 (3d Cir. 1963).

98. Meaton v. United States, 328 F.2d 379 (5th Cir. 1964); People v. Thomas, 41 Ill. 2d 122, 242 N.E.2d 177 (1968). *But see* United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963).

99. United States v. Parrino, 212 F.2d 919 (2d Cir. 1954) (the court reached this decision based on the merely collateral nature of the consequence, in spite of its recognition of "the terrific impact on the defendant's life and family of the collateral consequence of deportation").

100. People v. Thomas, 41 Ill. 2d 122, 242 N.E.2d 177 (1968). Among other things found to be collateral consequences are: an "undesirable" discharge from the Air Force, Redwine v. Zuckert, 317 F.2d 336 (D.C. Cir. 1963) (*per curiam*); loss of passport and foreign travel privileges, Meaton v. United States, 328 F.2d 379 (5th Cir. 1964).

101. *See* notes 89-90 *supra* and accompanying text.

102. *See, e.g.*, Smith v. United States, 324 F.2d 436 (D.C. Cir. 1963).

103. *See* note 99 *supra*.

h. Constitutional Rights

Survey questions 15 through 18 relate to those constitutional rights waived by the plea of guilty; the right to trial by jury, to confront and cross-examine accusers, privilege against self-incrimination, and right to compulsory process of witnesses. Of the four, the right to trial by jury as long been held an essential element in the colloquy surrounding the acceptance of a guilty plea,[104] usually asked in terms such as "do you know that you have a right to a trial by jury where you are presumed innocent?" Less frequently, the inquiry may state in addition the alternative availability of trial by judge. Curiously, the other rights have not been the subject of much case law or statute save in cases approving a particular arraignment interrogation.[105] The reason for this disparity is possibly a view that the other rights are included and implicit in the right to trial by jury. An extension of such reasoning however, means approval of such questions as "do you understand your legal rights?",[106] with the question "are you voluntarily and understandingly entering this plea?",[107] use of this question alone is inadequate.

It is of course the law that a waiver of constitutional rights must be voluntary, understanding and knowing.[108] To meet these criteria,

104. *E.g., In re* Tahl, 1 Cal.3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969), Brown v. State, 250 A.2d 503, 505 (Del. 1969); People v. Brown, 41 Ill. 2d 230, 233, 242 N.E.2d 242, 243 (1968), *cert. denied*, 393 U.S. 1121 (1969); Silverberg v. Warden, Md. Penitentiary, 7 Md. App. 657, 658-59, 256 A.2d 821, 822 (1969); People v. Taylor, 9 Mich. App. 333, 155 N.W.2d 723 (1968), *rev'd on other grounds*, 383 Mich. 338, 175 N.W.2d 715 (1969); Copenhaver v. State, 431 P.2d 669, 674 (Okla. Crim Ct. App. 1967); Commonwealth v. Culbreath, 439 Pa. 21, ____, 264 A.2d 643, 646 (1970); COLO. R. CRIM. P. 11. *See also* Resolution of the Judges of the U.S. District Court of the District of Columbia (June 24, 1964) cited in Everett v. United States, 336 F.2d 979, 980 n. 3 (D.C. Cir. 1964); comment of the Criminal Procedural Rules Committee to PA. R. CRIM. P. 319 (Vernon Supp. 1970); *cf.* Gibson v. Boles, 288 F. Supp. 472, 475 n. 4 (N.D. W. Va. 1968) (arraignment question approved by the court); Drake v. State, 42 Wis. 2d 226, 231, 172 N.W.2d 664, 666 (1969); S.D. COMP. L. § 23-35-19 (1967).

105. *See, e.g.*, United States *ex rel.* Miner v. Erickson, 303 F. Supp. 960, 962 (D. S.D. 1969) (citing with approval arraignment interrogation which touched on the right to confront and cross-examine, and the right to compulsory process of witnesses); *In re* Tahl, 1 Cal.3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969) (right to confront accusers; privilege against self-incrimination), People v. Taylor, 9 Mich. App. 333, 340, 155 N.W.2d 723, 727 (1968) (suggesting that the right to process of witnesses be explained).

106. Goodwin v. State, 236 So. 2d 6 (D. Ct. App. Fla. 1970) (following representations of counsel that rights and consequences had been explained to defendant, the court asked: "Do you feel you have a full understanding of all your legal rights?" "Yes, sir." The plea was voluntary).

107. *See* text accompanying note 31 *supra*.

108. *See especially* Silverberg v. Warden, Md. Penitentiary, 7 Md. App. 657, 256 A.2d 821 (1969). *Silverberg* requires a showing on the record that the accused intelligently and understandingly waived his rights (1) to not incriminate himself, (2) to a trial by jury, and (3) to confront and cross-examine his accusers. *Id.* at ____, 256 A.2d at 822.

questions such as "do you understand your right to a trial by jury?" are wholly inadequate because they are devoid of explanation to persons without legal training. More specifically, the state's burden of proof, the presumption of innocence, the right to challenge the testimony of accusers and rebut with a defense, and protection against self-incrimination are facets of a defendant's "legal rights" which he ought to know about. Since the assumption that counsel has informed the defendant may no longer be safely indulged,[109] a defendant should be informed in some detail about the rights he waives before a waiver is permitted. *McCarthy* indicates that the trial judge must personally address the defendant and inform him of these rights during the arraignment and before the plea is offered.[110]

Survey responses generally indorsed the jury trial inquiry as "absolutely necessary" but showed declining interest in the other named rights [*see* Table 1 *supra*]. Although these responses may reflect prior judicial approach to this area of inquiry, in view of *McCarthy* and *Boykin*,[111] the validity of the responses seems short-term. The record of St. Louis courts in inquiring or informing of these rights was dismal. In arraignments viewed, 63% of state and 44% of federal judges discussed the right to a jury trial with the defendant; 33% of state and 19% of federal arraignment interrogations dealt with the right to confront and corss-examine accusers; the privilege against self-incrimination was discussed in 17% of the state and none of the federal arraignments; and no information or inquiry in either system considered the right to subpoena witnesses [*see* Table 2 *infra*]. In short, the St. Louis court practice in regard to these rights was woefully inadequate from the standpoint of the Supreme Court's decisions and the survey responses.

109. *E.g.*, State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969); Ernst v. State, 43 Wis. 2d 661, 674, 170 N.W.2d 713, 719 (1969). Under federal Rule 11 this assumption could probably never be indulged in. *But see* cases cited in note 64 *supra*.

110. McCarthy v. United States, 394 U.S. 459, 466 (1969).

111. *See, e.g.*, United States *ex rel.* Crosby v. Brierley, 404 F.2d 790, 795 n. 6 (3d Cir. 1968), *cert. denied*, 395 U.S. 924 (1969); United States *ex rel.* McDonald v. Pennsylvania, 343 F.2d 447, 451 (3d Cir. 1965); Semon v. Turner, 289 F. Supp. 803 (D. Utah 1968); Ware v. State, 219 So. 2d 910, 912 (Ala. App. 1969); State v. Nestor, ___ Ariz. App. ___, 449 P.2d 315 (1969); Brown v. State, 250 A.2d 503, 505 (Del. 1969); People v. Brown, 41 Ill. 2d 230, 233, 242 N.E.2d 242, 243 (1968); State v. Sisco, 169 N.W.2d 542, 547 (Iowa 1969); Duvall v. State, 5 Md. App. 484, 248 A.2d 401 (1968); People v. Taylor, 9 Mich. App. 333, 338, 155 N.W.2d 723, 725 (1968); State *ex rel.* Burnett v. Burke, 22 Wis. 2d 486, 494, 126 N.W.2d 91, 95-96 (1964) [mandatory by Ernst v. State, 43 Wis. 2d 661, 674, 170 N.W.2d 713, 719 (1969)]; ALAS. R. CRIM. P. 11; COLO. R. CRIM. P. 11; FLA. R. CRIM. P. 1.170; KY. R. CRIM. P. 8.08; 2 LA. CODE CRIM. P. art. 556 (1967); ME. R. CRIM. P. 11; MONT. REV. CODE ANN. § 95-1606 (e) (cum. supp. 1969); NEV. REV. STAT. § 174.035 (1969); W. VA. CODE ANN. § 62-3-1a (1966).

i. Nature of the Charges

It is well settled that a defendant must, as a matter of fundamental due process, understand the nature of the charges against him.[112]

Both the survey [*see* Table 1 *supra*] and the St. Louis court practice [*see* Table 2 *infra*], consistent with the case law, required an inquiry of and explanation to the defendant of the nature of charge to which the plea is offered.

j. Lesser Included Offenses

The principal utility of informing a defendant of lesser included or alternate offenses before acceptance of his guilty plea is to apprise him of his bargaining position.[113] By a plea of guilty, the defendant waives his right to trial by jury and, its concommitant, that a jury may find, at its option, guilt of a lesser offense or of only some counts as well as acquit. These options available to a jury comprise, in part, the range of possible "bargains" available to the defendant. Only if a defendant is fully aware of this range can it be accurately infered that he is aware of the consequence of his bargained plea and his bargaining leverage. At least one decision, *Belgarde v. Turner*, has suggested that the trial court should inform the defendant of alternate charges which might conceivably encompass the acts committed by him.[114]

Quite obviously, this type of information will be known by the defendant's attorney and, under most circumstances, be communicated

112. *See, e.g.*, United States *ex rel.* Crosby v. Brierley, 404 F.2d 790, 795 n.6 (3d Cir. 1968), *cert denied*, 395 U.S. 924 (1969); United States *ex rel.* McDonald v. Commonwealth of Pa., 343 F.2d 447, 451 (3d Cir. 1965); Semon v. Turner, 289 F. Supp. 803 (D. Utah 1968); Ware v. State, ___ Ala. App. ___, 219 So. 2d 910, 912 (1969); State v. Nestor, ___ Ariz. App. ___, 449 P.2d 315 (1969); Brown v. State, 250 A.2d 503, 505 (Del. 1969); People v. Brown, 41 Ill. 2d 230, 233, 242 N.E.2d 242, 243 (1968); State v. Sisco, 169 N.W.2d 542, 547 (Iowa 1969); Duvall v. State, 5 Md. App 484, 248 A.2d 401 (1968); People v. Taylor, 9 Mich. App. 333, 338, 155 N.W.2d 723, 725 (1968), *rev'd on other grounds*, 383 Mich. 338, 175 N.W.2d 715 (1970); State *ex rel.* Burnett v. Burke, 22 Wis. 2d 486, 494, 126 N.W.2d 91, 95-96 (1951) [mandatory by Ernst v. State, 43 Wis.2d 661, 674, 170 N.W.2d 713, 719 (1969)]; ALAS. R. CRIM. P. 11; COLO. R. CRIM. P. 11; FLA. R. CRIM. P. 1.170; KY. R. CRIM. P. 8.08; 2 LA. CODE CRIM. P. art. 556 (1967); ME. R. CRIM. P. 11; MONT. REV. CODE ANN. § 95-1606 (e) (cum. supp. 1969); NEV. REV. STAT. § 174.035 (1969); W. VA. CODE ANN. § 62-3-1a (1966). This understanding is viewed as an essential due process requirement. Smith v. O'Grady, 312 U.S. 329, 334 (1941).

113. Shelton v. United States, 242 F.2d 101, *rev'd on rehearing*, 246 F.2d 571 (5th Cir. 1957) (*en banc*), *rev'd on confession of error*, 356 U.S. 26 (1958) (*per curiam*).

114. Belgrade v. Turner, 421 F.2d 1395 (10th Cir. 1970) [defendant offered to plead guilty to nighttime burglary but stated the burglary took place at dawn. Failure of the trial court to explain the difference between nighttime burglary (with a 6 month-3 year range of sentence) and daytime burglary (1 to 20 year range of sentence possible) rendered the plea invalid as not understandingly entered].

to the defendant by his attorney. *Boykin*, under the most liberal of interpretations, requires only that this communication be revealed on the record. In the usual case, that of an unrepresented defendant, the judge's inquiry should presumably be more extensive.

Survey responses (question 20) did not generally favor informing defendants of lesser included offenses [*see* Table 1 *supra*]. This inquiry was not heard in any St. Louis arraignment [*see* Table 2 *infra*].

k. Circumstances under which a Plea may be Withdrawn

"Circumstances under which the plea may be withdrawn" was unfortunate phrasing in the questionnaire. A more appropriate question is whether the defendant understands that the plea of guilty cannot automatically be withdrawn. The utility of such a question is to impress the defendant with the finality and portent of his act; since the situation should speak for itself, this is a rather limited "utility". Furthermore, if *McCarthy's* characterization of large numbers of specious habeas corpus suits is accurate, no one is, in any event, taking the finality of the guilty plea conviction very seriously. In view of efforts facilitating easier withdrawal of reconsidered guilty pleas,[115] it may no longer be an accurate assertion by the trial judge anyway.

Thirty percent of state court arraignments featured admonition or inquiry about the limited right to withdraw the plea. No federal arraignment included either [*see* Table 2 *infra*]. Responses to the survey indicate a low quantum of "necessity" for the inquiry [*see* Table 1 *supra*].

Although no reason for the high percentage of admonitions in the state courts was apparent, it may be that this warning is serving as a substitute for the numerous other arraignment inquiries which are not made.

l. Satisfaction with Counsel

The assistance of an attorney is frequently considered to support a presumption of voluntariness for a guilty plea.[116] Perhaps in response to

115. *But see* ABA 53-59.

116. *See, e.g.*, McMann v. Richardson, ____ U.S. ___, 90 S.Ct. 1441 (1970). *Boykin* has been viewed as generally undermining the inference that there is a high correlation between presence of counsel and voluntariness. *See, e.g.*, State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969); Ernst v. State, 43 Wis. 2d 661, 673-74, 170 N.W.2d 713, 719 (1969). *McMann*, however, seems to support the inference—shifting some arraignment burdens off of the trial court judge. *Cf.* People v. Thomas, 41 Ill. 2d 122, 126, 242 N.E.2d 177, 179 (1968).

the large number of post-conviction actions alleging incompetent representation by counsel,[117] several courts have begun asking defendants whether consultation with their attorney has been adequate or, at least, whether the defendant is satisfied with the job his attorney has done.[118] The heavy weight given to assistance of counsel by the Supreme Court in *McMann v. Richardson* suggests that the defendant's satisfaction with his counsel is closely related to the voluntariness of his plea.[119] Moreover, the Supreme Court made it clear in *Von Moltke v. Gillies* that any guilty plea entered after unavoidably hasty consultation with counsel, should be accepted with great caution.[120] With the exception of state trial judges and public defenders, "extent of consultation" (survey question 22), was regarded as "absolutely necessary and appropriate" by persons responding [*see* Table 1 *supra*]. In St. Louis arraignments the inquiry was made in 47% of state cases and 69% of federal cases [*see* Table 2 *infra*].

m. Cautionary Instruction

Because a guilty plea may be invalid if a promise of leniency is not honored, judges, with increasing frequency, expressly indicate to a defendant that they are not bound by any promises made by anyone to the defendant.[121] Absence of such a warning when coupled with an unfulfilled promise, will automatically allow withdrawal of the plea.[122] On the other hand, cautions to the defendant by the judge that he is not bound by any promises, when appearing in the arraignment record substantially increases defendant's burden of showing that the promises

117. For a statement of the problem, *see* Brown v. State, 250 A.2d 503, 505 (Del. 1969).

118. *See, e.g.*, Ware v. State, ___ Ala. App. ___, 219 So. 2d 910 (1969); State v. Carpenter, ___ Ariz. ___, 467 P.2d 749, 751 (1970); Brown v. State, 250A.2d 503, 505 (Del. 1969). *See* notes 129-135 *supra*. *Cf.* McMann v. Richardson, ___ U.S. ___, 90 S.Ct. 1441 (1970).

119. *See* notes 64-65 *supra* and accompanying text; Cross v. State, 452 S.W.2d 854 (Ark. 1970); *cf.* State v. Roach, 447 S.W.2d 553 (Mo. 1969).

120. 332 U.S. 708 (1947).

121. *See, e.g.*, Cross v. State, 452 S.W.2d 854 (Ark. 1970); Brown v. State, 234 So. 2d 161 (Fla. App. 1970); Moore v. State, 216 So. 2d 766 (Fla. App. 1968); State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969); People v. Taylor, 9 Mich. App. 333, 338, 155 N.W.2d 723, 726 (1968), *rev'd on other grounds*, 383 Mich. 338, 175 N.W.2d 715 (1970); Commonwealth v. Culbreath, 439 Pa. 21, ___, 264 A.2d 643, 646 (1970); *In re* Lamphere, ___ Vt. ___, 256 A.2d 29 (1969); *cf.* United States *ex rel* McGrath v. LaVallee, 319 F.2d 308 (2d Cir. 1963); United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966); State v. Roach, 447 S.W.2d 553 (Mo. 1969); People v. Stevenson, 300 N.Y.S.2d 674 (N.Y. App. 1969); Adcock v. State, 461 P.2d 960 (Okla. 1969); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865-68 (1964).

122. *E.g.*, Cross v. State, 452 S.W.2d 854 (Ark. 1970).

induced an involuntary plea.[123] This inquiry, therefore, has utility in post-conviction proceedings by supporting the initial trial court determination that the plea was voluntary. The inquiry is mandatory in some jurisdictions.[124]

Most questionnaire responses indicated that a judge's inquiry as to "defendant's understanding that the Judge is not bound to the prosecutor's recommendation" is necessary. Appellate judges, Legal Aid Lawyers, public defenders and law school faculty indicated their opinion that such an inquiry is "absolutely necessary" [*see* Table 1 *supra*]. There was, however, such inquiry in only 20% of the state court arraignments viewed in St. Louis [*see* Table 2 *infra*]. The federal judge's responses indicated that federal courts do not commonly request U.S. Attorneys' recommendations, therefore, the inquiry was not relevant to federal practice.

3. Waiver of Counsel

The sixth amendment guarantee of assistance of counsel extends to arraignments in both federal[125] and state courts.[126] Counsel's advice prior to a defendant's plea of guilty undoubtedly is, in many cases, a primary source of a defendant's "understanding of the consequences". When and if a defendant waives counsel and appears at arraignment offering to plead guilty,[127] it is the trial judge's responsibility prior to acceptance of the plea to assure that the defendant is intelligently and voluntarily waiving the advice and assistance of counsel, appointed or otherwise.[128] This duty includes more than mechanically reciting the accused's "Miranda" rights or requesting the defendant to perform the formality of signing a waiver form.[129]

To discharge this duty properly in light of the strong presumption against

123. *E.g.*, Moore v. State, 216 So. 2d 766 (Fla. App. 1968).

124. *E.g.*, State v. Sisco, 169 N.W.2d 542, 548 (Iowa 1969); People v. Taylor, 9 Mich. App. 333, 155 N.W.2d 723 (1968).

125. Von Moltke v. Gillies, 332 U.S. 708 (1947); Johnson v. Zerbst, 304 U.S. 458 (1935).

126. *See* Coleman v. Alabama, 399 U.S. 1 (1970); Hamilton v. Alabama, 368 U.S. 52 (1961); *cf.* Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainright, 373 U.S. 335 (1963).

127. In some jurisdictions it may now be the practice of the trial judges to never accept a guilty plea from an unrepresented defendant. *See* letter from a public defender to *Washington University Law Quarterly*, which indicates that the trial judge who handled both trials in Gideon v. Wainwright, 373 U.S. 335 (1963), now refuses all tendered pleas from unrepresented defendants.

128. *See* VonMoltke v. Gillies, 332 U.S. 708 (1947); *cf.* People v. Brown, 242 N.E.2d 242, 243 (Ill. 1968); MONT. REV. CODE ANN. § 95-1606 (e) (Supp. 1969).

129. This case graphically illustrates that a mere routine inquiry—the asking of several

> waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.[130]

To accomplish this task as required by *Von Moltke v. Gillies*, it is clear that the questions set out in the survey under "Waiver of Counsel" are insufficient. However, if those latter inquiries are accompanied with forthright inquiries like those set out in the remainder of the questionnaire, a "formal" compliance is reasonably certain.[131] Anything more than a routine inquiry may, of course, be initiated on the discretion of the trial judge according to the circumstances of the case.

Specifically, it is absolutely necessary for the judge to inform the defendant that he has a constitutional right to the assistance of counsel, and that if he is without funds, an attorney will be provided.[132] With the exception of state trial judges and public defenders, every response to the questionnaire indicated that this information should always be conveyed to the defendant at arraignment [*see* Table 1 *infra*]. In fact, a large proportion of federal judges responding indicated that they do not accept a guilty plea *under any circumstances* unless the defendant is represented by counsel at arraignment.[133] As a result of this practice, the stringent standards of *Von Moltke* would apparently come into play in the federal system infrequently.

Several state decisions have suggested that a trial judge should inform an unrepresented defendant prior to final waiver of counsel and plea that

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standard questions followed by the signing of a standard written waiver of counsel—may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel.

Von Moltke v. Gillies, 332 U.S. 708, 724 (1947).

130 *Id.* at 723-24.

131 *See* the model set out in Drake v. State, 172 N.W.2d 664 (Wis. 1969).

132 *See, e.g.*, United States *ex rel.* Miner v. Erickson, 303 F. Supp. 960 (D.S.D. 1969); Reiff v. State, 164 N.W.2d 249 (Wis. 1969); Copenhaver v. State, 431 P.2d 669, 674 (Okla. Crim. Ct. App. 1967); MONT. REV. CODE ANN. § 95-1606 (e) (Supp. 1969).

133. Letters on file with *Washington University Law Quarterly*.

an attorney's competence in difficult legal matters, such as the admissability of evidence or development of defenses, will far exceed the defendant's.[134] Obviously the purpose behind such colloquy is to assure that the defendant clearly understands the value of counsel's assistance. In most cases this will probably be apparent to the defendant, particularly if he has a record of prior convictions. Moreover, to the extent a recidivist has decided that an attorney has been of no value to him in the past, the inquiry will be of little meaning. These pragmatic limitations on the utility of the inquiry are reflected in the questionnaire responses, which generally rated this type of an inquiry by the trial judge to be only moderately necessary [*see* Table 1 *infra*].

Just as in the case of a guilty plea, a waiver of counsel induced by threats or promises is involuntary.[135] Probably because waivers of counsel only rarely are induced by official threat or promise, the arraignment questionnaires indicated a fairly unanimous opinion that any question inquiring about such threats is not quite absolutely necessary [*see* Table 1 *infra*]. In a similar vein, at least one state decision has suggested that many defendants waive representation in the belief that the trial judge will "reward" the waiver with a lowered sentence.[136] Although these defendants are entertaining this belief without actually having been promised any concessions, it may be that in courts where this subjective conclusion is being drawn by defendants, some statement should be made to the defendant negating the existence of any such standard practice.[137] Clearly, any effort of this nature is not mandatory under *Boykin* or *Von Moltke*, but it could be beneficial to unwise defendants in jurisdictions where waiver occurs frequently.

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134. *See, e.g.*, Drake v. State, 172 N.W.2d 664, 666 (Wis. 1969); State v. Linehan, 164 N.W.2d 616 (Minn. 1969); Ernst v. State, 170 N.W.2d 713, 719 (Wis. 1969) [making mandatory the recommendation of State *ex rel.* Burnett v. Burke, 22 Wis. 2d 486, 494, 126 N.W.2d 91, 95-6 (1964) that the trial court should "alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to a layman such as the accused."].

135. *See* State *ex rel.* Burnett v. Burke, 22 Wis. 2d 486, 494, 126 N.W.2d 91, 95-6 (1964); Ernst v. State, 170 N.W.2d 713, 719 (Wis. 1969).

136. Some accused persons waive counsel in a desperate effort to curry favor. If one can obtain a charge concession in exchange for a guilty plea, it is understandable that some may believe additional concessions may be obtained by full 'co-operation', the waiving of counsel. Newman, *Pleading Guilty for Consideration: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780, 783-785 (1956).

People v. Byrd, 162 N.W.2d 777, 781 (Mich. App. 1968) (Levin, J., concurring).

137. *See* Ernst v. State, 170 N.W.2d 713, 719 (Wis. 1969).

III. St. Louis Arraignment Data

The data on St. Louis arraignments was collected, principally by two second year law students, during two months in the Spring and one in the Summer of 1970 in St. Louis criminal courts and the federal district court. These students transcribed arraignment interrogations by hand, making an effort to get at least the sense of every question asked.

The St. Louis setting of this empirical effort is atypical in one respect: the acceptance of guilty pleas in Missouri is governed by a statutory rule incorporating several of federal Rule 11's substantive requirements. Missouri Rule 25.04 provides:

> Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. A defendant may plead not guilty or guilty. The court may refuse to accept a plea of guilty, and *shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge . . . .* (Emphasis added)

Although a growing number of states have similar statutory requirements,[138] the majority of states still lack them. The existence of an express legislative mandate facilitates comparison of Missouri state courts with the federal court practice under Rule 11 (note, however, that the Missouri Rule does not require a demonstration on the record of an accuracy determination). In each category of inquiry, therefore, data was combined into an "All" arraignments summary. This combination, in view of the similar rule requirements, is probably a legitimate device in all but the accuracy categories [questions 19(b) and 19(e)] and the judge's admonition as to his independence of the prosecutor's recommendation (question 23), which is irrelevant to federal courts. In general, the "All" category is useful in portraying the arraignment process in St. Louis as a whole. The questions and their frequency are indicated in Table 2. Areas of deficiency in the aggregate interrogation sample were noted in Part II of this paper as to each specific area of inquiry.

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138 *See* statutes cited note 31 *supra*.

TABLE 2: ST. LOUIS ARRAIGNMENTS	State [30 pleas observed]	Federal [16 pleas observed]	Total [46 pleas observed]
(1) Personal Data			
(a) age of defendant	77% [23/30]	88% [14/16]	81% [37/46]
(b) education of defendant	66% [20/30]	88% [14/16]	74% [34/46]
(c) employment record of defendant	30% [9/30]	12% [2/16]	24% [11/46]
(d) homelife of defendant (marital status, etc.)	60% [18/30]	0% [0/16]	39% [18/46]
(2) Mental Health (Mental Disease, Prior Commitment, Etc.)	17% [5/30]	6% [1/16]	13% [6/46]
(3) Addictions			
(a) narcotic	40% [12/30]	0% [0/16]	26% [12/46]
(b) alcoholic	20% [6/30]	0% [0/16]	13% [6/46]
(4) Prior Convictions	50% [15/30]	25% [4/16]	41% [19/46]
(5) Are You Voluntarily and Understandably Entering This Plea?	17% [5/30]	17% [3/16]	17% [8/46]
(6) Threats, Coercion, Duress	30% [9/30]	100% [16/16]	54% [25/46]
(7) Threats of Prosecution of Others	—	—	—
(8) Promises of Sentence Concessions	57% [17/30]	100% [16/16]	72% [33/46]
(9) Plea Bargains With Prosecutor	—	—	—
(10) Specific Maximum and Minimum Sentence Range	53% [16/30]	75% [12/16]	61% [28/46]
(11) Concurrent and/or Consecutive Sentencing Possibilities	—	—	—
(12) Parole Eligibility	—	—	—
(13) Qualification Under Special Sentencing Statutes	—	—	—
(14) Collateral Consequences of Plea	—	—	—
(15) Constitutional Right to Impartial Jury	63% [19/30]	44% [7/16]	56% [26/46]
(16) Constitutional Right to Confront and Cross-Examine his Accusers	33% [10/30]	19% [3/16]	28% [13/46]

	State [30 pleas observed]	Federal [16 pleas observed]	Total [46 pleas observed]
(17) Constitutional Right Against Self-Incrimination	17% [5/30]	0% [0/16]	11% [5/46]
(18) Constitutional Right to Compulsory Process for Witnesses	—	—	—
(19) Specific Nature of Charges in the Indictment			
(a) prosecutor explains elements of crime to defendant	17% [5/30]	0% [0/16]	11% [5/46]
(b) defendant asked questions to establish elements of crime	23% [7/30]	81% [13/16]	43% [20/46]
(c) prosecutor asked to read facts of indictment	43% [13/30]	12% [2/16]	33% [15/46]
(d) judge reads facts of indictment	30% [9/30]	62% [10/19]	41% [19/46]
(e) defendant asked to explain what occurred	17% [5/30]	88% [14/16]	41% [19/46]
(20) Lesser Included Offenses	—	—	—
(21) Circumstances Under Which a Plea May Be Withdrawn (That Once Accepted Can Not Be Automatically Withdrawn)	30% [9/30]	0% [0/16]	20% [9/46]
(22) Extent of Consultation with Counsel *re* all the Above	47% [14/30]	69% [11/16]	54% [25/46]
(23) Extent of Defendant's Understanding that Judge not Bound to Honor Recommendations of Prosecutor	20% [6/30]	0% [0/16]	13% [6/46]

(24)-(27) Because not applicable, none of the pleas observed included questions relative to waiver of counsel. All observed to plead guilty in the course of this study had assistance of counsel.

IV. CONCLUSION

McCarthy and *Boykin* have, in the short time since they were handed down by the Supreme Court in 1969, spawned an enormous volume of state and federal decisions. These appellate rulings have struggled to define *what* a trial judge must or might do at arraignment to accomplish an "on the record" demonstration of voluntariness for guilty pleas. Few, if any, of these *McCarthy-Boykin* progeny have considered more than one area of inquiry at a time. An aggregate of those decisions, however, amounts to a somewhat lengthy but comprehensive scheme of inquiry at arraignment. As is apparent from the case law surveyed, each area of inquiry listed on the model arraignment questionnaire has been required

or recommended in at least one jurisdiction. Responses to the questionnaire indicate that a cross-section of criminal administration personnel rates twenty-six out of the twenty-seven categories in the questionnaire as "absolutely necessary" or "necessary" for an acceptance of a tendered plea. Nonetheless, the *Quarterly's* study of arraignments in state and federal St. Louis courts reveals that some trial judges in those courts are not making any concerted effort to comply with the mandates of *McCarthy* and *Boykin*. The various guilty plea and waiver forms included in the Appendix suggest that there is in fact a wide variance of compliance throughout the country. Particularly striking in St. Louis was the failure of federal trial judges to inform defendants of their right to a jury trial in 44% of the arraignments viewed by the *Quarterly* staff. Because *McCarthy* expressly decided that absence of this warning in the record represents automatic reversible error, it is difficult to understand why this deficiency in procedure occurs. In part, it may illustrate that there will be a time-lag following the Supreme Court's decisions before compliance is fully achieved. On the other hand, the answer here may be that trial court judges haven't the time or resources available to develop any individual scheme for their acceptance of guilty pleas, and are hard put to achieve formal compliance absent some model to refer to during the hurried moments of an arraignment. This note, with its interrelated presentation of case law, opinion and empirical data, is quite obviously designed to fill some of that vacuum. Certainly the objectives asserted by the Supreme Court in *McCarthy* and *Boykin* can only be accomplished if trial judges attempt to, and do, synthesize and follow some form of "model" inquiry form such as that suggested by the results of this survey.

Appendix I: Survey Results

The figures in this appendix show tabulations of all responses received during the survey before the figures were compiled. The numbers to the left of the figures indicate the question number; the left hand column represents an answer with a scored value of plus two, moving from left to right are plus one, zero, minus one, and minus two. The figures are given by the category of respondent to the questionnaire and totalled.

Appellate Judge (State)

	(category)				
1	2	2	—	—	—
2	2	1	—	1	—
3	2	1	—	1	—
4	2	1	—	1	—
5	4	—	—	—	—
6	4	—	—	—	—
7	3	1	—	—	—
8	4	—	—	—	—
9	3	1	—	—	—
10	4	—	—	—	—
11	3	1	—	—	—
12	1	—	—	1	2
13	2	1	—	1	—
14	—	1	1	—	2
15	3	1	—	—	—
16	3	1	—	—	—
17	3	1	—	—	—
18	3	1	—	—	—
19	3	—	—	—	—
20	2	1	—	1	—
21	2	1	—	1	—
22	4	—	—	—	—
23	4	—	—	—	—
24	4	—	—	—	—
25	1	1	2	—	—
26	1	3	—	—	—
27	3	—	—	1	—

Appellate Judge (Federal)

	(category)				
1	4	1	—	—	—
2	5	1	—	—	—
3	3	3	—	—	—
4	2	1	—	3	—
5	6	—	—	—	—
6	6	—	—	—	—
7	4	1	—	—	—
8	6	—	—	—	—
9	4	1	—	—	—
10	4	1	—	—	1
11	3	—	1	1	—
12	2	1	1	2	—
13	6	—	—	—	—
14	—	1	1	1	3
15	4	1	—	—	1
16	4	1	—	—	1
17	4	1	—	—	1
18	4	1	—	—	1
19	4	1	—	—	1
20	—	2	3	—	1
21	1	—	3	—	2
22	5	1	—	—	—
23	4	—	—	1	—
24	6	—	—	—	—
25	3	1	1	—	1
26	2	3	—	—	1
27	4	1	—	—	—

Trial Judge (State)

		(category)			
1	8	3	5	2	1
2	9	1	5	2	2
3	7	5	4	1	2
4	5	6	3	3	1
5	16	1	—	—	2
6	17	—	—	1	1
7	8	2	5	1	3
8	16	1	2	—	—
9	14	1	1	1	—
10	13	3	2	—	1
11	9	3	2	1	1
12	9	1	4	3	2
13	7	4	3	3	2
14	1	2	8	4	4
15	16	1	1	—	1
16	13	1	3	—	2
17	13	1	2	—	3
18	11	2	2	1	4
19	18	—	—	—	2
20	7	4	5	1	3
21	2	5	6	3	3
22	15	—	—	—	4
23	15	—	1	2	1
24	14	—	1	—	2
25	10	—	4	—	1
26	9	2	4	1	—
27	14	—	1	1	—

Trial Judge (Federal)

		(category)			
1	11	3	3	3	1
2	13	7	1	—	—
3	9	8	3	—	1
4	2	1	8	3	7
5	21	—	—	—	—
6	21	—	—	—	—
7	9	3	7	2	—
8	19	1	—	—	—
9	13	4	2	1	—
10	21	—	—	—	—
11	11	4	1	3	2
12	6	2	4	4	4
13	16	4	2	—	—
14	1	1	6	8	5
15	20	—	1	—	—
16	17	1	2	1	—
17	18	—	2	1	—
18	14	2	3	1	1
19	21	—	—	—	—
20	3	7	6	3	2
21	3	3	3	4	7
22	16	2	2	1	—
23	11	5	1	—	1
24	21	—	—	—	—
25	9	6	2	3	—
26	8	6	2	4	—
27	14	2	1	2	—

	Public Defenders (category)				
1	6	—	4	2	—
2	4	3	1	4	—
3	2	2	4	4	—
4	2	2	2	4	2
5	10	—	1	—	1
6	10	1	—	—	1
7	6	1	1	2	2
8	9	—	2	—	1
9	9	—	1	1	1
10	8	2	2	—	—
11	10	—	2	—	—
12	7	1	3	1	—
13	7	1	2	1	1
14	2	—	3	5	2
15	8	2	—	1	1
16	8	1	—	3	—
17	7	1	—	3	—
18	5	2	1	4	—
19	10	—	1	1	—
20	2	1	3	3	3
21	4	1	2	3	2
22	9	1	—	1	1
23	10	1	1	—	—
24	9	—	1	—	1
25	7	1	1	1	1
26	7	1	2	—	1
27	9	1	—	—	1

	Legal Aid Attorney (category)				
1	7	1	2	—	—
2	7	2	—	—	—
3	7	1	1	—	—
4	2	3	1	1	2
5	9	—	—	—	—
6	9	—	—	—	—
7	6	1	1	—	1
8	7	—	1	1	—
9	7	—	1	1	—
10	7	1	1	—	—
11	7	—	2	—	—
12	5	1	2	—	1
13	6	2	1	—	—
14	3	3	—	1	2
15	6	—	1	—	2
16	5	2	—	1	1
17	7	1	—	—	1
18	5	—	2	1	1
19	9	—	—	—	—
20	5	1	1	—	2
21	5	1	—	—	3
22	9	—	—	—	—
23	7	2	—	—	—
24	9	—	—	—	—
25	7	2	—	—	—
26	7	1	1	—	—
27	7	1	—	—	1

U.S. Attornies

	(category)				
1	3	—	2	—	—
2	2	1	2	—	—
3	2	1	2	—	—
4	1	3	1	—	—
5	5	—	—	—	—
6	5	—	—	—	—
7	5	—	—	—	—
8	5	—	—	—	—
9	3	1	—	1	—
10	4	1	—	—	—
11	3	2	—	—	—
12	4	—	1	—	—
13	4	1	—	—	—
14	1	—	2	2	—
15	4	—	1	—	—
16	3	1	—	1	—
17	3	1	—	1	—
18	3	—	1	1	—
19	5	—	—	—	—
20	2	1	1	1	—
21	1	—	1	2	1
22	4	—	1	—	—
23	3	1	1	—	—
24	4	—	—	—	—
25	3	1	—	—	—
26	3	1	—	—	—
27	3	1	—	—	—

General Practitioner

	(category)				
1	11	—	4	1	—
2	11	1	2	—	—
3	8	2	1	3	—
4	2	6	2	3	1
5	14	—	—	—	—
6	11	1	—	—	1
7	6	4	2	—	1
8	7	6	—	—	—
9	6	3	2	2	1
10	10	2	1	—	1
11	4	7	3	—	—
12	4	4	3	2	1
13	7	5	2	—	—
14	2	2	6	2	2
15	12	—	2	—	—
16	10	1	3	—	—
17	10	—	4	—	—
18	8	3	2	2	—
19	14	—	—	1	—
20	5	5	3	2	—
21	8	—	2	3	1
22	11	2	1	—	—
23	7	2	4	1	—
24	14	—	—	—	—
25	8	2	3	2	—
26	7	4	3	—	—
27	10	2	—	—	1

Faculty

	(category)				
1	4	—	—	1	—
2	4	—	1	—	—
3	3	1	1	—	—
4	2	1	—	—	1
5	5	—	—	—	—
6	5	—	—	—	—
7	2	1	2	—	—
8	5	—	—	—	—
9	5	—	—	—	—
10	5	—	—	—	—
11	4	—	—	—	1
12	3	1	—	—	1
13	4	1	—	—	—
14	4	—	—	—	1
15	3	1	1	—	—
16	3	1	1	—	—
17	2	2	1	—	—
18	2	1	2	—	—
19	5	—	—	—	—
20	4	1	—	—	—
21	4	—	—	—	1
22	5	—	—	—	—
23	5	—	—	—	—
24	5	—	—	—	—
25	3	—	1	1	—
26	3	—	1	1	—
27	4	—	—	1	—

All Responses

	(category)				
1	56	10	20	9	2
2	57	17	12	7	2
3	43	24	16	9	3
4	20	24	17	18	14
5	90	1	1	—	3
6	88	2	—	1	3
7	49	14	18	5	7
8	78	8	5	1	1
9	64	11	7	7	2
10	76	10	6	—	3
11	54	17	11	5	4
12	41	11	18	13	11
13	59	19	10	5	3
14	14	10	27	23	21
15	76	6	7	1	5
16	66	10	9	6	4
17	67	8	9	5	5
18	55	12	13	10	7
19	89	1	1	2	3
20	30	23	22	11	11
21	30	11	17	16	20
22	78	6	4	2	5
23	66	11	8	4	2
24	86	—	2	—	3
25	51	14	14	7	3
26	47	21	13	6	2
27	68	8	2	5	3

Appendix II: Sample Arraignment Questionnaires and Forms

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA	)	
	)	NO. CR _____
vs.	)	
	)	PETITION TO ENTER PLEA OF GUILTY
_____,	)	
	)	[Fed. R. Crim. Proc., Rules 10 and 11]
Defendant.	)	

The defendant represents to the Court:

(1) My full true name is: _____ and I request that all proceedings against me be had in that name.

(2) I am represented by a lawyer; his name is _____.

(3) I received a copy of the indictment* before being called upon to plead. I read the indictment and have discussed it with my lawyer. I fully understand every charge made against me. The following is the substance of the charge: (If there is more than one count, set forth the charge in each count separately. If more space is needed, add a separate sheet.)

(4) I told my lawyer all the facts and circumstances known to me about the charges asserted in the indictment. I believe that my lawyer is fully informed on all such matters. My lawyer has counselled and advised with me on the nature of each charge and on all possible defenses that I might have in this case.

(5) I understand that I may plead "Not Guilty" to any offense charged against me. If I choose to plead "Not Guilty" the Constitution guarantees me (a) the right to a speedy and public trial by jury, (b) the right to see and hear all witnesses called to testify against me, (c) the right to use the power and process of the Court to compel the production of any evidence, including the attendance of any witnesses in my favor, and (d) the right to have the assistance of a lawyer at all stages of the proceedings.

(6) I also understand that if I plead "GUILTY" the Court may impose the same punishment as if I had pleaded "Not Guilty," stood trial and been convicted by a jury.

(7) My lawyer informed me that the maximum punishment which the law provides for the offense charged in the indictment is: A maximum of _____ years imprisonment and a fine of $_____ for the offense charged in

of the indictment.

I am _____ years old. I understand that the Court may sentence me under the provisions of the Youth Corrections Act or as a Young Adult Offender for an indeterminate sentence [18 U.S.C. § 5010(b)], which may require me to spend as long as six (6) years in a penal institution. [This paragraph is applicable only if the defendant is at the date hereof at least 18 years of age and not more than 26 years of age.]

(8) I declare that no officer or agent of any branch of government (Federal, State or local) nor my lawyer, nor any other person, has made any promise or suggestion of any kind to me, or within my knowledge to anyone else, that I will receive a lighter sentence, or probation, or any other form of leniency if I plead "GUILTY."

(9) I believe that my lawyer has done all that anyone could do to counsel and assist me, AND I AM SATISFIED WITH THE ADVICE AND HELP HE HAS GIVEN ME.

(10) I know that the Court will not permit anyone to plead "GUILTY" who claims to be innocent and, with that in mind and because I am "GUILTY" and make no claim of innocence, I wish to plead "GUILTY" and respectfully request the Court to accept my plea of "GUILTY" and to have the Clerk enter my plea of "GUILTY" as follows: (*)

(11) I OFFER MY PLEA OF "GUILTY" FREELY AND VOLUNTARILY AND OF MY OWN ACCORD AND WITH FULL UNDERSTANDING OF ALL THE MATTERS SET FORTH IN THE INDICTMENT AND IN THIS PETITION AND IN THE CERTIFICATE OF MY LAWYER WHICH IS ATTACHED TO THIS PETITION.

(12) I further state that I wish to waive the reading of the indictment in open court, and I request the Court to enter my plea of "GUILTY" as set forth above in Paragraph (10) of this petition.

Signed by me in open court in the presence of my attorney this _____ day of _____, 19____.

_____
Defendant

CERTIFICATE OF COUNSEL

The undersigned, as lawyer and counsellor for the defendant _____ _____ hereby certifies:

(1) I have read and fully explained to the defendant the allegations contained in the indictment in this case.

(2) To the best of my knowledge and belief the statements, representations and declarations made by the defendant in the foregoing petition are in all respects accurate and true.

(3) I explained the maximum penalty for each count to the defendant, and since the defendant is _____ years of age, I informed him that he may be sentenced under the provisions of the Youth Corrections Act or as a Young Adult Offender and that if he is given an indeterminate sentence under the provisions of 18 U.S.C. § 5010(b) he may be required to spend as much as six (6) years in a penal institution.

(4) The plea of "GUILTY" offered by the defendant in paragraph (10) accords with my understanding of the facts he related to me and is consistent with my advice to the defendant.

(5) In my opinion the defendant's waiver of reading of the indictment in open court as provided in Rule 10 is voluntarily and understandingly made, and I recommend to the Court that the waiver be accepted by the Court.

(6) In my opinion the plea of "GUILTY" as offered by the defendant in paragraph (10) of the petition is voluntarily and understandingly made. I recommend that the Court accept the plea of "GUILTY."

Signed by me in open court in the presence of the defendant above named and after full discussion of the contents of this certificate with the defendant, this _____ day of _____, 19____.

_____
Attorney for the Defendant

ORDER

IT IS ORDERED that the defendant's plea of "GUILTY" be accepted and entered as prayed for in the petition and as recommended in the certificate of his lawyer.

Done in open court this _____ day of _____, 19____.

_____

United States District Judge

MINNESOTA DISTRICT COURT—NINTH JUDICIAL DISTRICT

(OFFER TO PLEAD GUILTY)

1. What is your name and age?
2. How far did you go in school?
3. Have you ever been a patient in a mental hospital or institution?
4. Do you now believe or have you ever believed yourself to be mentally ill or mentally incompetent in any respect?
5. Have you received a copy of the (Indictment) (Information) before entering this plea of guilty?
6. Have you read it?
7. Have you discussed it with your attorney?
8. Do you understand the accusation(s) made against you in this case?
9. Do you understand you are charged with committing the crime of _____ _____, in the _____ of _____, County of _____, State of Minnesota, on the _____ day of _____, 19____?
10. Have you told your attorney all the facts and surrounding circumstances concerning the crime with which you are charged?
11. Are you satisfied that your attorney is fully informed as to all such matters?
12. Have you had sufficient time to discuss this case with your attorney?
13. Have you been fully advised by your attorney as to all aspects of the case including your legal rights?
14. Has your attorney counselled and advised you as to the nature and cause of the accusation(s) against you, and as to any possible defenses you might have in this case?
15. Are you satisfied that your attorney has adequately and competently represented your interests and fully advised you of your legal rights?
16. Do you understand that if you (entered a plea of Not Guilty) (continued in your plea of Not Guilty) you would be entitled to a trial by a jury of twelve persons, or by a judge without a jury if you prefer to waive a jury trial?
17. Do you understand that you would be entitled to have the services of an attorney throughout the trial?
18. Do you understand that at a trial the jury would be instructed that you are presumed to be innocent?
19. Do you understand that upon a trial, the State would be required to prove you guilty of the charge made against you beyond a reasonable doubt and the jury would be so instructed?
20. Do you understand that had this case proceeded to trial you could testify or not testify, as you choose, and that no comment could be made by the prosecutor or the court about your failure to testify if you decided not to testify?
21. Do you understand that if you had a trial by jury there could be no conviction unless all 12 jurors voted unanimously for the conviction?

22. Do you understand that if you had a trial, the State would be required to produce in open court the witnesses against you, and that you would have a right through your attorney to cross-examine the witnesses?

23. Do you understand that at such trial you would be entitled to offer evidence in your defense, if you so choose?

24. Do you understand that you are pleading guilty to a (felony) (gross misdemeanor) and that as a result of your plea of guilty the court may sentence you to imprisonment or confinement in a penal institution for a period not to exceed _____ years or a fine up to $_____, or both?

25. Do you claim to be innocent of this crime for any reason?

26. Do you claim to have any defense against this charge?

27. Are you pleading guilty with a full awareness that in fact you are guilty of the crime charged?

28. Do you understand that the court will not accept a plea of guilty from anyone who claims to be innocent?

29. Tell me in your own language what you did in this case?

30. Do you claim to have been under the influence of alcohol or drugs at the time of this offense?

31. Do you claim you did not know what you were doing at the time of this offense?

32. Do you understand that the State seeks to offer in evidence:

a. _____Evidence obtained as a result of a search and seizure?

b. _____Evidence discovered because of a confession or statements in the nature of a confession obtained from you?

c _____Confessions or statements in the nature of confessions made by you?

33. Is your guilty plea based in any way on the State's intention to offer the evidence just mentioned?

(If) the answer is "yes", inquire into the admissibility of such evidence and advise defendant of his right to possibly suppress.)

34. Have you been advised that you have a right to a hearing before trial to have the court decide upon the admissibility of the State's evidence?

35 Has your attorney advised you about your possible right to have the State's evidence be not admitted against you?

36. Do you claim there is any reason why any evidence of the State should not be admitted against you?

37. Is it your desire to demand or to waive your right to contest the constitutional admissibility of this evidence?

38 Has any officer or agent of any branch of government (Federal, State or local), or any other person, made any promises, threats, or inducements to lead you to plead guilty?

39. Do you further understand that your plea of guilty to this offense could constitute a basis for revocation of any probation or parole that you are presently subject to, and that such probation or parole could be revoked?

40. Do you know that your attorney and the County Attorney have discussed this matter with the court?

41 Do you understand that your attorney and the County Attorney have recommended to the court that you receive (a limited sentence of _____ years) (probation) (etc.)?

42. Do you believe that recommended sentence is fair?

43 Do you have any objection to the court imposing the recommended sentence?

Summary No. 1 November, 1969

IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY, STATE OF OKLAHOMA)
THE STATE OF OKLAHOMA,)
Plaintiff,)
vs.) No. _____
_____)
Defendant,)

Plea of Guilty: Summary of Facts
(One Case)

1. Is the name just read to you your true name? A. _____.
2. How old are you now? A. _____ years of age.
3. Is Mr. _____ your lawyer? A. _____.
4. You know you are charged with _____
_____
_____? A. _____.
5. Have you and your lawyer had a copy of this charge? A. _____.
6. Do you know that the maximum punishment provided for this crime is _____
_____ and that the minimum is _____? A. _____.
7. You know that you are entitled to a jury trial on this charge? Do you waive this? A. _____
_____.
8. Have you talked over this case with your lawyer, understand your rights, and had his counsel and advice in this matter? A. _____.
9. Do you wish to enter a plea and be sentenced now? A. _____.
10. What is your plea? A. _____.
11. Do you plead guilty of your own free will, only for the reason that you are guilty, and you admit you did the acts charged? A. _____.
12. Have you been abused, mistreated, or threatened by anyone to have you enter this plea? A. _____.
13. (Memorandum of Sentence:) _____
_____
_____.
14. Do you now understand that you have the right to appeal this judgment and sentence to the Court of Criminal Appeals; to have an attorney represent you on such appeal, and if you are unable to hire an attorney the Court will provide an attorney for you; and that you are entitled to a transcript, that is a full record of these proceedings, at public expense, if you are unable to pay for it yourself? A. _____.
15. You are now told that to appeal to the Court of Criminal Appeals from this judgment and sentence you must give notice of your intention to appeal and your request for a transcript, both in writing and file such notice and request with the Clerk of this Court within ten (10) days from this date.
16. Do you wish to appeal from this judgment and sentence? A. _____.
17. Do you wish an attorney to be appointed to appeal this case for you to the Court of Criminal Appeals? A. _____.
18. Do you wish to be provided with a transcript at public expense? A. _____.
19. If these are not waived, you must be held in the county jail for ten (10 days. Do you understand that? A. _____.
20. Do you wish to be transported to the penitentiary immediately and not be held in the county jail for the ten (10) days waiting period? A. _____.

21. Have you fully understood the questions that have been asked you, and the answers you have given to each question, and are they your free and voluntary answers to these questions as made? A. _____

22. Above done in open Court this _____ day of _____, 19____.

23. (This is to be filed in the case as a part of the trial minutes).

APPROVED:

_____	_____
Assistant District Attorney	DISTRICT JUDGE
_____	_____
Attorney for Defendant	Court Reporter present
_____	_____
The Defendant	Deputy Court Clerk present

_____

_____

Summary No. 4 June, 1970 (2d)

IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY, STATE OF OKLAHOMA

HOMA,	)	No. _____
THE STATE OF OKLAHOMA,,	)	No. _____
Plaintiff,	)	No. _____
vs.	)	No. _____
_____	)	
Defendant.		

SUSPENDED SENTENCE
PLEA OF GUILTY: SUMMARY OF FACTS
(One or more cases)

1 Is the name just read to you your true name? A. _____

2. How old are you now? A. _____ years of age.

3. Is Mr. _____ your lawyer? A. _____.

4. You know you are charged with _____

_____

_____? A. _____

5. Have you and your lawyer had a copy of the charge(s)? A. _____.

6. Do you know that the maximum punishment provided for the crime(s) is imprisonment for _____ years and that the minimum is imprisonment for _____ years? A. _____

_____

7 Do you understand that on plea(s) of guilty you may be sentenced to a term of imprisonment within those limits? A. _____

8. You know that you are entitled to a jury trial on the charge(s), (and to each one of the charges)? Do you waive a jury trial? A. _____

9. Have you talked over the charge(s) with your lawyer, understand your rights, and had his advice in the matter(s)? A. _____

10. Do you wish to enter your plea(s) now and be sentenced now? A. _____

11. What _____ your plea(s) to the charge(s), (and to each one of them)? A. _____

12. Do you plead guilty of your own free will, only for the reason that you are guilty, and you admit that you did all the acts charged? A. _____.

13. Have you been abused, mistreated, or threatened by anyone to have you enter your plea(s) (or to enter any one of them)? A. _____.

14. (Memorandum of Sentence): _____

15. You are now told that the suspension of the sentence(s) may be revoked and the judgment(s) and sentence(s) enforced, without suspension:

1. If you violate any City, State or Federal laws;
2. If you should be in possession of narcotic durgs;
3. If you habitually associate with convicted felons, or with lewd or vicious persons;
4. If you indulge in vicious habits;
5. If you leave the State of Oklahoma without first having received written permission of the Corrections Officer to do so;
6. If you fail to report in writing to the Corrections Department as directed by them;
7. If you fail to pay the Court costs incurred herein, if and when ordered by the Corrections Department; or
8. If you fail to make restitution when ordered by the Corrections Department: _____

16. Do you fully understand the terms of your suspended sentence, as just read to you, and as set forth herein, and do you agree to abide by and obey these rules, and cooperate with the officers of the Corrections Department, and obey their rules, in the supervision of your suspended sentence, so long as the same is in force? A. _____.

17. You have the right to file a petition in the Court of Criminal Appeals for a Writ of Certiorari, that is a request for the Court to review this judgment and sentence. It may be granted or denied. Do you understand that? A. _____.

18. Petition for a Writ of Certiorari must be filed in the Court of Criminal Appeals within ninety (90) days from this date. Notice of such filing must be given within five (5) days thereafter by serving a copy of the petition for Writ of Certiorari on the prosecuting attorney, who prosecuted petitioner, and on the Attorney-General. Do you understand that? A. _____.

19. Have you fully understood the questions that have just been asked you, and the answers you have given to each question, and are they your free and voluntary answers to these questions as made? A. _____.

20. Above done in open Court this _____ day of _____, 19____.

21. (This is to be filed in the case as a part of the trial minutes).

APPROVED: _____.

_____	_____
Assistant District Attorney	DISTRICT JUDGE
_____	_____
Attorney for Defendant	OFFICIAL COURT REPORTER PRESENT
_____	_____
The Defendant	DEPUTY COURT CLERK PRESENT
_____	_____
_____	_____

Summary No. 3 February, 1970

IN THE DISTRICT COURT IN AND FOR
OKLAHOMA COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,)
Plaintiff,) No. _____.
)
vs.) No. _____
)
_____)
Defendant.)

Plea of Guilty: Deferred Sentence: Summary
(one or more cases)

1 Is the name just read to you your true name? A. _____.
2 How old are you now? A. _____ years of age.
3. Is Mr. _____ your lawyer? A. _____.
4 You know you are charged with _____
_____? A. _____.
5. Have you and your lawyer had a copy of the charge(s)? A. _____.
6. Do you know that the maximum punishment provided for the crime(s) is imprisonment for _____ years and that the minimum is imprisonment for _____ years? A. _____.
7. Do you understand that on plea(s) of guilty you may be sentenced to a term of imprisonment within these limits? A. _____.
8. You know that you are entitled to a jury trial on the charge(s)? Do you waive a jury trial? A. _____.
9. Have you talked over the case with your lawyer, understand your rights and had his advice in the matter(s)? A. _____.
10 Do you wish to enter your plea(s) now and to be sentenced at a later date? A. _____.
11 What is your plea(s)? A. _____.
12. Do you plead guilty of your own free will, only for the reason that you are guilty, and you admit you did the acts charged? A. _____.
13. Have you been abused, mistreated, or threatened by anyone to have you enter this plea? A. _____.
14 You are directed to appear personally before me, or in my absence, before a Judge of this Court on the _____ day of _____, 19____, at _____ o'clock ____m. Defendant released on _____ to appear as set out herein.
15 You are now told that the deferring of the sentence(s) may be revoked and a judgment and sentence given you prior to the above date on your plea(s) of guilty entered this date:

1. If you violate any City, State or Federal laws;
2. If you should be in possession of narcotic drugs;
3. If you habitually associate with convicted felons, or with lewd or vicious persons;
4. If you indulge in vicious habits;
5. If you leave the State of Oklahoma without first having received written permission of the Corrections Officer to do so;
6 If you fail to report in writing to the Corrections Department as directed by them;
7. If you fail to pay the Court costs incurred herein, if and when ordered by the Corrections Department; or
8. If you fail to make restitution if and when ordered by the Corrections Department ____
_____

16. Do you understand the terms of your deferred sentence, as just read to you, and as set out

herein, and do you agree to abide by and obey these rules, and cooperate with the officers of the Corrections Department, and obey their rules, in the supervision of your deferred sentence so long as the same is pending? A. _____.

17. Have you understood the questions that have just been asked you and the answers you have given to each question, and are they your free and voluntary answers to the questions as made? A. _____.

18. Done in open Court this _____ day of _____, 19____.

19. (This to be filed in the case as a part of the trial minutes).

APPROVED:

_____	_____
Assistant District Attorney	DISTRICT JUDGE
_____	_____
Attorney for Defendant	OFFICIAL COURT REPORTER PRESENT
_____	_____
The Defendant	DEPUTY COURT CLERK PRESENT

_____

_____

IN THE CIRCUIT COURT OF THE
FOURTEENTH JUDICIAL CIRCUIT
IN AND FOR CALHOUN COUNTY
FLORIDA

STATE OF FLORIDA
-vs-

_____
Defendant

WAIVER AND CONSENT

I, the undersigned Defendant, accused of violation of Sec. _____, Florida Statutes, hereby acknowledge that I have been orally informed in open Court this day of certain legal rights and other information and this arraignment, namely;

1. I have been advised of the nature of the charges against me and acknowledge a receipt of a copy of these charges and have had sufficient time to discuss these charges with my attorney who is present with me here in Court and who has explained to me every accusation therein. He has also advised me that the maximum penalty for the offense for which I am charged is as follows: _____ years or $_____ fine or both.

2. I understand that I have a right to have a trial of my case before a petit or trial jury, wherein the jury will determine whether or not I am guilty of these offenses. I knowingly give up and waive my right to have a jury trial.

3. I further acknowledge that I have been advised that probation may or may not be granted and no person, officer, agent, or any official or any branch of the Government, Federal State or otherwise, nor my Attorney, has made any promises or suggestions of any kind to me, or to anyone else within my knowledge, that if I would plead guilty to the charges. I would receive a light sentence, probation, or any other form of leniency by the Court.

4. My plea entered here today is given freely and voluntarily of my own free will and accord,

solely to confess my guilt, and no one has forced, threatened, persuaded, promised, induced or otherwise influenced me to enter my plea to these charges.

5. I acknowledge before the Court that I have not been mistreated in any manner by any person; that I am satisfied with the services and advice of my attorney and I have no questions to ask the Court and no statement to make to the Court except to enter my plea of Guilty to these charges.

_____ _____

Attorney for Defendant Defendant

APPROVED:

_____

Circuit Judge

* "Indictment" also includes "Information".

* The defendant's plea of "GUILTY" or "NOT GUILTY" to each offense should be entered in the blank space provided in paragraph (10). If the indictment charges a single offense, a defendant who wishes to plead "GUILTY" should write in paragraph (10) "GUILTY" as charged in the indictment." If more than one offense is charged, the defendant may write in paragraph (10) "Guilty as charged in Count _____," etc. "Not Guilty as charged in Count _____," etc.