Denver Law Review

Volume 47 | Issue 3 Article 10

January 1970

Criminal Procedure - Guilty Pleas - Voluntariness Where Motivated by Desire to Escape Death Penalty under Unconstitutional Statutory Scheme - Brady v. United States, 397 U.S. 742 (1970); Parker v. North Carolina, 397 U.S. 790 (1970)

Denver Law Journal

Criminal Procedure - Guilty Pleas - Voluntariness Where Motivated by Desire to Escape Death Penalty under Unconstitutional Statutory Scheme - Brady v. United States, 397 U.S. 742 (1970); Parker v. North Carolina, 397 U.S. 790 (1970)

COMMENT

CRIMINAL PROCEDURE — GUILTY PLEAS — Voluntariness Where Motivated by Desire to Escape Death Penalty Under Unconstitutional Statutory Scheme. — *Brady v. United States,* 397 U.S. 742 (1970); *Parker v. North Carolina,* 397 U.S. 790 (1970).

EARLY in 1959 Robert Brady was indicted in federal court for kidnapping and for failing to release the victim unharmed in violation of the Federal Kidnapping Act.[1] He faced a maximum penalty of death if the verdict of the jury should so recommend.[2] After his codefendant had confessed and on advice of counsel, Brady entered a plea of guilty. The plea was accepted, but only after the trial judge had twice questioned Brady concerning its voluntariness.[3] Brady was sentenced to 50 years (later reduced to 30 years) imprisonment.

Five years after Brady's conviction, 15 year old Charles Lee Parker was arrested in Roanoke Rapids, North Carolina, for suspicion of burglary. After being questioned, he was placed in a jail cell where he spent the night. The following morning after a short period of questioning, Parker confessed to burglary and rape. He was subsequently indicted for first degree burglary, an offense which carries a mandatory death sentence[4] unless the defendant pleads guilty or the jury recommends mercy.[5] On advice of counsel Parker pled guilty; and, following a series of questions by the trial judge as to its voluntariness,[6] the plea was accepted. Parker was thereupon sentenced to life imprisonment.[7]

---

[1] 18 U.S.C. § 1201 (a)(1) (1964).

[2] *Id.* § 1201 (a)(1) to (2) (1964), provides that:

> (a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

[3] For a verbatim account of the exchange between Brady and the trial judge, see 397 U.S. at 743-44 n.2.

[4] N.C. GEN. STAT. § 14-52 (1969).

[5] N.C. GEN. STAT. § 15-162.1 (1965):

> In the event [a guilty] plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgement that the defendant be imprisoned for life in the State's prison.

[6] For a verbatim account of the exchange see Parker v. North Carolina, 397 U.S. at 793 n.3 (1970).

[7] *Id.* at 793.

In 1968, doubt was cast on the validity of the guilty pleas of Brady and Parker by the decision in the case of *United States v. Jackson*,[8] in which the Supreme Court invalidated the death penalty provision of the Federal Kidnapping Act on the ground that it imposed an impermissible burden upon the exercise of the Sixth Amendment right to trial by jury and the Fifth Amendment right not to plead guilty. The precise infirmity of the statutory provision considered in *Jackson* was that it immunized from the death sentence those willing to enter a guilty plea and, therefore, "needlessly" encouraged guilty pleas and jury waivers.[9] Relying on only the implications of *Jackson*,[10] Brady and Parker filed petitions in their respective forums seeking post-conviction relief on the ground that their guilty pleas were motivated by a desire to escape the death penalty, a motivation supplied by an impermissible, unconstitutional statutory scheme.[11] Both petitions were denied, Brady's by the lower federal courts[12] and Parker's by the North Carolina state courts.[13] On review, the Supreme Court *held* that neither the record in *Brady* nor in *Parker* revealed any basis for disturbing the judgments of the respective courts below, *i.e.*, that the petitioners' guilty pleas were tendered voluntarily and knowingly and were therefore valid.[14]

I. Guilty Pleas and the Constitution: The State of the Law Prior to Brady and Parker.

It has long been established that a plea of guilty constitutes a waiver of several fundamental constitutional rights[15] and is therefore subject to stringent safeguards.[16] A constitutionally valid guilty plea

[8] 390 U.S. 570 (1968).

[9] *Id.* at 583.

[10] It should be noted that the Court in *Jackson* was faced only with the question of the constitutionality of the death penalty provision of the Federal Kidnapping Act. The Court did not have before it a guilty plea tendered under that act because the defendant's motion to dismiss the indictment on the ground that the statute was unconstitutional had been granted by the district court; no plea was ever entered. Thus, the assumption by Brady and Parker that their guilty pleas were invalid for having been entered under constitutionally infirm statutory schemes was pure speculation and was not directly supported in *Jackson*.

[11] While the North Carolina statute under which Parker had been convicted was not directly affected by the decision in *Jackson*, the effect of the North Carolina statute was the same; and Parker was safe in assuming that it would be invalidated under the principle announced in *Jackson*. Indeed, the statute *was* invalidated on the basis of *Jackson* in *Alford v. North Carolina*, 405 F.2d 340, 345 (4th Cir. 1968), *rev'd on other grounds*, 39 U.S.L.W. 4001 (1970).

[12] Brady v. United States, 404 F.2d 601 (10th Cir. 1968).

[13] Parker v. State, 2 N.C. App. 27, 162 S.E.2d 526 (1968).

[14] Brady v. United States, 397 U.S. 742, 749 (1970); Parker v. North Carolina, 397 U.S. 790, 796 (1970).

[15] *See, e.g.*, Boykin v. Alabama, 395 U.S. 238 (1969): Expressly the right against self-incrimination, trial by jury, and confrontation of witnesses.

[16] *See* Boykin v. Alabama, 395 U.S. 238 (1969); Machibroda v. United States, 368 U.S. 487 (1962); Von Moltke v. Gillies, 332 U.S. 708 (1948); Kercheval v. United States, 274 U.S. 220 (1927).

must be knowingly and voluntarily tendered.[17] Although often discussed under the single generic heading of "voluntariness,"[18] these two requirements are separate and distinct elements, and an infirmity in either serves to vitiate a particular guilty plea.[19]

In order to constitute a "knowing" guilty plea, the defendant must be fully apprised "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 . . . ."[20] Implicit in such a test is the requirement that the information upon which the defendant relies must not be false or misleading.[21]

The requirement that a guilty plea be entered voluntarily is a more illusive concept. From a philosophical point of view, the concept of voluntariness connotes the free exercise of a person's will; but what constitutes "free will" is open to alternative interpretations. On the one hand, it is possible to proceed from the premise that the mere existence of an extraneous inducement will be sufficient to deprive an act of its voluntariness. Under this view, a guilty plea would be involuntary unless motivated solely by the defendant's sense of guilt and remorse.[22] On the other hand, "free will" can be defined in terms of a rational choice between genuine alternatives.[23] With this interpretation, a guilty plea would be involuntary only when the impact of extraneous inducements is sufficient to cause the defendant to make an

[17] Boykin v. Alabama, 395 U.S. 238, 244 (1969); Machibroda v. United States, 368 U.S. 488, 493 (1962); Johnson v. Zerbst, 304 U.S. 458, 465 (1938); Kercheval v. United States, 274 U.S. 220, 223 (1927).

[18] Lassiter v. Turner, 423 F.2d 897, 900 (4th Cir. 1970).

[19] McCarthy v. United States, 394 U.S. 459, 467 (1962).

[20] Von Moltke v. Gillies, 332 U.S. 708, 724 (1948).

[21] *Id.* at 720. *See generally* Johnson v. Zerbst, 304 U.S. 458 (1938). Pursuant to such reasoning it has been held that a prosecutor's threat to bring charges not permitted by law or warranted by the evidence is tantamount to presenting a defendant with false and misleading information and a guilty plea tendered in reliance thereon is invalid. *Lassiter v. Turner,* 423 F.2d 897, 900 (4th Cir. 1970). Likewise where a prosecutor fails to keep a promise of leniency upon which the defendant relied in tendering his plea, the plea will not be allowed to stand. *Dillon v. United States,* 307 F.2d 445, 449 (9th Cir. 1962). This latter proposition probably has more to do with ethical due process than with the "knowing" requirement, but it is possible to argue that the element of deceit implicit in the broken promise is but another form of false and misleading information.

[22] Fortunately for the administration of justice in the United States, the courts have not embraced this argument; for roughly 90 percent of all convictions in the United States result from guilty pleas (D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 8 (1966)), and most of these pleas are induced by permissible plea bargaining. Thus if the premise that "free will" is negated by the existence of of any extraneous inducement were adopted by the courts, plea bargaining would be inherently coercive, and the administration of justice in the United States would be greatly impaired; *but see* Chalker, *Judicial Myopia, Differential Sentencing and the Guilty Plea — A Constitutional Examination,* 6 AM. CRIM. L. Q. 187 (1968).

[23] *See* Gilmore v. California, 364 F.2d 916 (9th Cir. 1966); Godlock v. Ross, 259 F. Supp. 659 (E.D.N.C. 1966); United States v. Tateo, 214 F. Supp. 560 (S.D.N.Y. 1963); Note, *The Unconstitutionality of Plea Bargaining,* 83 HARV. L. REV. 1387 (1970).

irrational choice.[24] This second view would require coercion-in-fact to render a guilty plea involuntary.

Judicial practice has drawn upon elements of both theories of voluntariness. For example, courts are often heard to say that it is necessary to look to all the relevant circumstances, *i.e.,* the "totality of factors," to determine whether or not the defendant was in fact coerced.[25] However, the inherent impropriety of a given inducement may compel the conclusion that, irrespective of its actual impact on the defendant's will, the mere presence of the inducement within his decision making milieu is sufficient to render a guilty plea invalid.[26] In other words, such an inducement is deemed to be coercive *per se.*

This dual approach to the problem of voluntariness is illustrated by the response of the lower courts to the decision in *United States v. Jackson.*[27] Prior to *Jackson,* the mere fact that a defendant's decision to plead guilty was motivated by his fear of the death penalty was generally held to be insufficient to render his plea invalid.[28] In the aftermath of *Jackson,* however, the courts were faced with the problem of deciding what effect an *unconstitutional* death penalty provision should have on the validity of a guilty plea made in fear thereof. Given the attitude of the courts toward improper inducements,[29] it might have been expected that the courts would conclude that statutory schemes such as that condemned in *Jackson* are inherently coercive and that all guilty pleas tendered thereunder should be declared invalid. However, inasmuch as express language in *Jackson* forbade such an interpretation,[30] the courts were forced to adopt alternative positions. From the quandary there emerged two distinct patterns.

The Fourth Circuit in the case of *Alford v. North Carolina*[31] opted for a "principal factor" test and held that a prisoner is entitled to relief if he can demonstrate that his plea was primarily the product of the

---

[24] Note, *The Unconstitutionality of Plea Bargaining,* 83 HARV. L. REV. 1387, 1398 (1970).

[25] Haynes v. Washington, 373 U.S. 503, 513 (1963); Leyra v. Denno, 347 U.S. 556, 558 (1954); United States *ex rel.* Brock v. La Vallee, 306 F. Supp. 159, 165 (S.D.N.Y. 1969); McFarland v. United States, 284 F. Supp. 969, 977 (D. Md. 1968); United States v. Colson, 230 F. Supp. 953, 955 (S.D.N.Y. 1964); United States v. Tateo, 214 F. Supp. 560, 565 (S.D.N.Y. 1963).

[26] Euziere v. United States, 249 F.2d 293, 194-95 (10th Cir. 1957); United States v. Tateo, 214 F. Supp. 560, 567 (S.D.N.Y. 1963) [Promises of leniency or threats of harsher punishment by trial judge held to be coercive per se.]

[27] 390 U.S. 570 (1968).

[28] Gilmore v. California, 364 F.2d 916, 918 (9th Cir. 1966); Laboy v. New Jersey, 266 F. Supp. 581, 584 (D.N.J. 1967).

[29] *See* cases cited notes 21 & 26 *supra.*

[30] According to the Court "the fact that the Federal Kidnapping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily." 390 U.S. at 583.

[31] 405 F.2d 340 (4th Cir. 1968), *rev'd,* 39 U.S.L.W. 4001 (1970).

burdens placed upon him by the unconstitutional statutory scheme.[32] According to the court in *Alford,* when fear of an unconstitutional death penalty provision was the principal motivating factor in the defendant's decision to plead guilty, there is no need for a subjective inquiry into the voluntariness of the plea — the plea is invalid irrespective of whether or not the defendant was capable of making a rational choice.[33]

Other federal courts have refused to assign any special status to the constitutionally infirm death penalty and have continued to apply the subjective "totality of factors" test[34] in an effort to determine whether the defendant's will was actually overborne.[35] This position appears to be more in keeping with the underlying purpose of the *Jackson* rationale which was not to identify inherently coercive inducements and render guilty pleas entered in response thereto invalid, but rather to remove from the defendant's decisionmaking process inducements which needlessly penalize the assertion of constitutional rights.[36] It is this position which is endorsed by the Supreme Court in the instant cases.

II. BRADY AND PARKER: A CLARIFICATION

The Supreme Court's decision in the instant cases[37] essentially reaffirms the traditional "totality of factors" test and, at the same time, redefines in more precise terms what constitutes an involuntary guilty plea.[38] In arriving at its decision, the Court begins by reiterating what it said in *Jackson* concerning the effect of statutory schemes, such as those condemned, on a guilty plea made thereunder. According to the Court in *Brady*: "*Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not."[39] Thus the Court rejects out of hand the assertion that unconstitutional

[32] *Id.* at 347. For a discussion of the Supreme Court's reaction to the test devised by the Court of Appeals for the Fourth Circuit, see text accompanying notes 47 & 48, *infra.*

[33] Two district court cases which have applied the *Alford* test are *Quillien v. Leeke,* 303 F. Supp. 698 (D.S.C. 1969); *Shaw v. United States,* 299 F. Supp. 824 (S.D. Ga. 1969).

[34] *See* text accompanying note 25 *supra.*

[35] United States *ex rel.* Brock v. La Vallee, 306 F. Supp. 159, 165 (S.D.N.Y. 1969); Pindell v. United States, 296 F. Supp. 751, 753 (D. Conn. 1969); Wilson v. United States, 303 F. Supp. 1139, 1143 (W.D. Va. 1969); McFarland v. United States, 284 F. Supp. 969, 977 (D. Md. 1968).

[36] 390 U.S. 570, 583 (1968).

[37] Since the Court's views on the issue under consideration are more complete in *Brady* than in *Parker,* for purposes of analysis the *Brady* opinion will be used more extensively.

[38] A third case, *McMann v. Richardson,* 397 U.S. 759 (1970), decided on the same day as *Brady* and *Parker* also sheds light on the question of when a guilty plea is valid and when it is not; but inasmuch as it deals with the effect of an allegedly coerced confession on the validity of a guilty plea, it is beyond the scope of this comment.

[39] 397 U.S. 742, 747 (1970).

death penalty provisions are inherently coercive.[40] In so doing, the Court appears to be endorsing a concept of voluntariness which is based entirely on the impact of the inducement in question on the defendant's ability to make a rational choice.[41] In other words, the nature of the inducement has no bearing on the question of voluntariness.[42]

In many respects the Court's holding in these two cases was inevitable. In *Jackson* the Court had invalidated a statutory scheme which was said to encourage, as opposed to coerce, guilty pleas. Because the infirmity was said to be a tendency to encourage, the *Jackson* decision cast grave constitutional doubts on any and all inducements which are calculated to encourage guilty pleas, including the time-honored practice of plea bargaining.[43] If an unconstitutional death penalty provision and the practice of plea bargaining can be said to suffer from the same infirmity, it is clear that if the Court had held that all guilty pleas made in response to the encouragement offered by the unconstitutional statutory scheme are invalid, logic would compel the conclusion that guilty pleas made in response to like encouragement offered by plea bargaining would be equally invalid.

Of course at first glance the Court could have avoided this undesirable result by holding that the statute condemned in *Jackson* was infirm not only because it needlessly encouraged guilty pleas but also because the encouragement involved was the threat of death — a threat which, by its nature, is coercive. By emphasizing the gravity of the threat, the Court could have resolved most of the doubts concerning the constitutionality of plea bargaining without doing violence to its holding in *Jackson*. It would then have been free to invalidate the guilty pleas of Brady and Parker without the fear that its holding would be cited as justification for invalidating guilty pleas made in response to less offensive methods of encouragement. However, the Court would

---

[40] As support for this proposition, the Court in *Brady* cites the case of *Laboy v. New Jersey*, 266 F. Supp. 581 (D.N.J. 1967), where a plea of *non vult* under a similar statute was held voluntary even though the defendant was obsessed by the fear of death to the extent of suffering a temporary breakdown. *Id.* at 747.

[41] That this indeed represents the Court's view is illustrated by a revealing passage in the text of the opinion. In rejecting Brady's contention that his plea was involuntary, the Court notes that there was no evidence "that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantage of pleading guilty." 397 U.S. 742, 750 (1970).

[42] Mr. Justice Brennan, in a separate opinion, attacks the Court's position in *Brady* and *Parker* on the ground that it is "totally without precedent." 397 U.S. 790, 800 n.2 (1970). However, as has been previously noted, courts have often considered the impact on the defendant's ability to make rational choices to be the controlling factor in the issue of voluntariness. *See* cases cited in note 23 *supra*. Where the Court's position does differ from that of other courts is in its reluctance to hold that an improper or illicit inducement is inherently coercive.

[43] *See* Note, *supra* note 23 at 1387.

still have been faced with the difficult task of showing how a statutory threat of the death penalty differs in its coercive effect from the plea bargaining situation in which the charges are reduced from first to second degree murder in return for a plea of guilty. Both inducements threaten the death penalty if the defendant goes to trial, and both offer a promise of leniency if he does not. Again logic would compel that if the death penalty provision is inherently coercive, so must be the plea bargaining situation when the threat of the death penalty is involved.

Thus no matter which way the court turned, a holding that a guilty plea is invalid if made within the context of the statutory scheme condemned in *Jackson* would have provided serious grounds for attacking other guilty pleas entered in response to a threat of greater punishment or an offer of leniency. The response of the Court to this dilemma was to revert to the "totality of factors" test[44] and to determine the question of voluntariness on the record.

III. THE IMPLICATIONS OF BRADY AND PARKER

The Court's clear emphasis on the impact (as opposed to the nature) of inducements on the rationality of choice in determining voluntariness is not likely to produce any appreciable change in the prevailing judicial approach to the question of validity of guilty pleas. If the holding is given broad interpretation, it may be that the inherent coerciveness of threats or promises by judges[45] will no longer be recognized, making it necessary to look to the impact of such inducements on the defendant's will to determine whether his ability to make a rational choice was actually overborne. On the other hand, because of the unequal bargaining power of the judge and defendant and because of the need to ensure impartiality, it may be that this apparent exception to the holding in the instant cases will be preserved.

As to unkept promises or threats by prosecutors, the requirement that the defendant be aware of all relevant circumstances, including the range of possible penalties, will serve to ensure that a guilty plea induced by deceit, whether intentional or unintentional, will not be sustained.[46]

---

[44] "The voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it." 397 U.S. 742, 749 (1970).

[45] *See* cases cited note 26 *supra.*

[46] Courts often hold that such promises or threats are coercive *per se,* but in fact the deception problem speaks to the knowledge requirement and not to the voluntariness requirement. Thus while deception will still have the effect of vitiating a guilty plea made in response thereto, courts will have to frame the infirmity in more precise terms.

CONCLUSION

In striking down the death penalty provision of the Federal Kidnapping Act in *United States v. Jackson,* the Supreme Court clearly manifested its disapproval of statutory schemes — and, by implication, of all official acts — which needlessly encourage the waiver of constitutional rights. What was not directly before the Court in *Jackson,* however, was the question of the validity of guilty pleas induced by such schemes. While it may have been logical to assume prior to *Brady* and *Parker* that had the *Jackson* Court been confronted with this question it would have opted for invalidity, the decisions in those cases expressly reject such a conclusion. Indeed, the decisions in *Brady* and *Parker* do not in any way affect the continued viability of *Jackson.* In *Brady* and *Parker* the Court merely answers the question left open in *Jackson* regarding the validity of guilty pleas tendered within the context of a constitutionally infirm statutory scheme.

By deciding the validity issue in *Brady* and *Parker* in terms of the "totality of factors" test, the Court has to a considerable extent clarified the concept of voluntariness: Only when an extraneous inducement, whether proper or *improper,* has the effect of rendering a defendant incapable of exercising rational choice will a guilty plea fail for involuntariness. This differs considerably from the "primary factor" test expounded by the Fourth Circuit in *Alford v. North Carolina*[47] and endorsed by the concurring and dissenting justices in the instant cases.[48] The primary difference between the two positions is one of emphasis. While both pay homage to some sort of "factors" test, the tack taken in *Alford* was to give conclusive weight to illicit inducements. Thus the emphasis there was on the nature of the inducement while the emphasis in the instant cases is on the impact of the inducement.

The Supreme Court recently had occasion to review the decision in *Alford,* and in so doing it expressly rejected the reasoning of the Court of Appeals for the Fourth Circuit.[49] Relying on its decision in *Brady,* the Court held that the standard for determining the validity of guilty pleas "remains, [sic] whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. . . . That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice

[47] 405 F.2d 340, 347 (4th Cir. 1968), *rev'd* 39 U.S.L.W. 4001 (1970).

[48] 397 U.S. 790, 808 (1970) wherein Mr. Justice Brennan stated: "If a particular defendant can demonstrate that the death penalty scheme exercised a significant influence upon his decision to plead guilty, then, under *Jackson,* he is entitled to reversal of the conviction based upon his illicitly produced plea."

[49] North Carolina v. Alford, 39 U.S.L.W. 4001, 4002 (1970).

. . . ."[50] Thus, the Supreme Court in *Alford* clearly reaffirmed the principles announced in *Brady* and *Parker* and left little doubt as to what constitutes the proper test for determining the validity of guilty pleas.

Despite its clarity of statement, the test endorsed by the Court in *Brady* and *Parker* is limited by the obvious difficulty of quantifying the impact of the various inducements so as to be able to ascertain whether or not a particular defendant was rendered incapable of rational choice. Perhaps as the lower courts begin to apply the test, the mechanics of application will come into more precise focus.[51]

[50] *Id.* at 4002. It should be noted that a factual variation in *Alford* raised an additional issue apart from the question of the voluntariness of Alford's plea. It seems that after his guilty plea had been tendered but before it had been accepted, Alford denied he had committed the murder for which he had been charged. Nevertheless he reaffirmed his desire to plead guilty in order to avoid a possible death sentence. In spite of Alford's protestations of innocence, the trial court, after considering the strength of the State's case, accepted his plea and sentenced him to 30 years imprisonment. Thus, on review the Supreme Court was faced with the issue of whether a guilty plea can be accepted when it is accompanied by protestations of innocence and hence contains only a waiver of trial but no admission of guilt. In deciding this issue, the Court referred to language in *Brady* which in that context unequivocally stated that admission of guilt by the defendant is "[c]entral to the plea and is the foundation for entering judgment . . . ." 397 U.S. 742, 748. In an obvious attempt to get around what would otherwise be troublesome language, the Court in *Alford* qualifies the statement in *Brady* by stating that admission of guilt is *normally* central to the plea. 39 U.S.L.W. 4001, 4003 (1970). Having surmounted this obstacle, the Court then proceeds to hold that "while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty." *Id.* at 4004. Furthermore, a trial judge who accepts a plea which is accompanied by protestations of innocence does not commit constitutional error so long as he has reason to believe that there is a factual basis for the plea. *Id.*

[51] It should be noted that two recent cases decided by the Supreme Court ameliorate to some extent the magnitude of this problem. In *McCarthy v. United States,* 394 U.S. 459 (1969), the Court held that the trial court, before acepting a guilty plea, must comply with the provisions of Rule 11 of the Federal Rules of Civil Procedure and satisfy itself as to the voluntariness, intelligence, and factual basis of the plea. *Id.* at 467. Where this requirement is met the appellate courts will not disturb the judgment of the trial court unless there is a clear abuse of discretion. *Id.* at 470. In *Boykin v. Alabama,* 395 U.S. 238 (1969), this requirement was extended to state courts. *Id.* at 243. Thus at least as to guilty pleas made after *McCarthy* and *Boykin* the appellate courts will seldom have to undertake the task of ascertaining from the record the impact of any particular inducement on the defendant's freedom of choice.