TO PLEA OR NOT TO PLEA: THE QUESTION POSED BY FEDERAL RULE 11

Effective July 1, 1966,[1] Rule 11 of the Federal Rules of Criminal Procedure placed a burden on federal judges to personally address the defendant to ascertain whether or not he knowingly, willingly and intelligently waived the constitutional rights and privileges attendant to a trial by jury when such defendant entered a plea of guilty. Adoption of the rule stemmed from a desire to insure fairness and adequacy in accepting a guilty plea when it was realized that a majority of defendants in the federal court pleaded guilty and did not proceed to trial.[2]

There are several underlying reasons for the Rule 11[3] requirement that a defendant be personally addressed by the court when entering a plea of guilty: (1) in order that the plea reflect the defendant's own choice he must be aware of the charges and consequences of his conviction; (2) it is important that the defendant realize that the court is concerned with preserving his rights and in so doing, impress upon the defendant the court's fairness; and, (3) a record will be provided which will minimize later claims of error.[4]

In the recent case of *McCarthy v. United States*,[5] the United States Supreme Court found that Rule 11 must be strictly adhered to since:

> [A] defendant who enters such a plea (of guilty) simultaneously waives several constitutional rights, including his privilege against compulsory self incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an

1. FED. R. CRIM. P. 11.
2. U.S.C.A. RULE 11, n.2 (1969).
3. FED. RULE CRIM. P. 11 provides in part:
   The court may refuse to accept a plea of guilty, and *shall not* accept such a plea or plea of *Nolo Contendre* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and consequences of the plea. . . . 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. (emphasis added)
4. McCarthy v. United States, 89 S. Ct. 1166, 1170-71 (1969). *See also* Hoffman, *Rule 11 and the Plea of Guilty*, 45 F.R.D. 149 (1967).
5. McCarthy v. United States, 89 S. Ct. 1166 (1969).

> intentional relinquishment or abandonment of a known right or privilege'.[6]

Therefore, unless voluntarily made, the guilty plea is void as being in violation of the fifth amendment of the United States Constitution.[7]

McCarthy was charged with three counts of willfully and knowingly attempting to evade tax payments.[8] Upon a plea of guilty to the second count the government dismissed the first and third counts. McCarthy's counsel represented to the court that he had explained the charge to his client. Based on this representation the judge assumed the defendant was aware of the nature of the charge and the consequences of the plea. During the course of the trial McCarthy consistently claimed that failure to file was based on neglect. He appealed on two grounds; the court had not determined that the plea was entered voluntarily or that there was a factual basis for the plea.[9]

On certiorari, the United States Supreme Court reversed; there had been a failure of compliance with Rule 11: The defendant had not been personally addressed by the court to determine if his plea had been made voluntarily with an understanding of the nature of the charges and the consequences of the plea.

Having decided *McCarthy* the United States Supreme Court granted certiorari in the case of *Boykin v. Alabama*.[10] The

6. 89 S. Ct. at 1171. *Compare* Stanley, *Requirements of Rule 11 and 44 of the Federal Rules of Criminal Procedure*, 45 F.R.D. 149, 158 (1967) (wherein he points out that compliance with Rule 11 is not accomplished by any ritual), *with* United States v. Rizzo, 362 F.2d 97, 99 (7th Cir. 1966); United States v. Jackson, 390 F.2d 130, 135 (7th Cir. 1968) (a questioning format is laid out in this case that is sufficient to satisfy Rule 11); Quibell v. United States, 265 F. Supp. 474, 480 (S.D. Cal. 1965) (pointing out that unless Rule 11 is complied with at the time of a plea of guilty, or prior thereto, and compliance is shown in the record, the resulting sentence is not valid); United States *ex rel* Crosby v. Brierley, 404 F.2d 790, 793 (3rd Cir. 1968) (a plea of "guilty generally" disclosed that defendant was asked no questions concerning his understanding of the plea, the mens rea requirement, or its consequences).

7. U.S. CONST. amend. V.

8. INT. REV. CODE of 1954, § 12. McCarthy, a 65 year old man, had contended at the trial that his failure to pay the taxes was the result of poor bookkeeping during a period when he had been suffering with a serious drinking problem. In this situation the mens rea requirement, "willfully and knowingly" would appear to be absent. Apparently one of the purposes of Rule 11 would be to make it incumbent upon judges to explain the mens rea requirement to avoid guilty pleas by innocent persons.

9. *See* text accompanying note 8, *supra*.

10. Boykin v. Alabama, 89 S. Ct. 1709 (1969).

defendant, a Negro male, pleaded guilty to five counts of common-law robbery while represented by court-appointed counsel. At the sentence hearing Boykin was sentenced to death, the maximum penalty for robbery in Alabama.[11] The conviction was upheld on automatic appeal to the Alabama Supreme Court.[12] The United States Supreme Court reversed, holding that it was error for the State Court trial judge to accept a plea of guilty without an affirmative showing in the record that the plea was made voluntarily. This must be accompanied by an understanding of the nature of the charge and the consequences of the plea. In so ruling the reasoning of Rule 11 was superimposed on the state courts. As Mr. Justice Harlan stated in his dissent:

> The court thus in effect fastens upon the states, as a matter of federal constitutional law, the rigid prophylactic requirements of Rule 11 of the Federal Rules of Criminal Procedure.[13]

The *McCarthy* and *Boykin* decisions establish the following as the federal standard for accepting a guilty plea. The court must: 1) personally address the accused to insure that he is aware of the nature of the charge against him and the consequences of his plea; 2) insure that the plea was entered voluntarily; 3) determine that there is a factual basis for the plea; and, 4) make an affirmative showing in the record that the plea was made voluntarily and with an understanding of the charge and the penalty.

This Comment will attempt to analyze the procedure used in California to insure the rights of a defendant who pleads guilty and the potential impact of the Rule 11 standard on California State Courts. This discussion will include the inferential effect the *Boykin* decision may have on plea bargaining in the state courts and any possible trends emanating from *McCarthy* and *Boykin*.

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11. Alabama provides, "Any person who is convicted of robbery shall be punished, at the discretion of the jury, by death, or imprisonment in the penitentiary for not less than ten years." CODE OF ALA., Tit. 14 § 415 (Michie 1958).

12. Automatic appeal is provided for anyone who receives the death penalty for the commission of a felony. CODE OF ALA., Tit. 15 § 382 (2) (Michie 1958); *see* People v. Boykin, 281 Ala. 659, 207 S.2d 412 (1968), where conviction was upheld on appeal.

13. 89 S. Ct. at 1713.

CALIFORNIA PROCEDURE

California has enacted two statutory safeguards to protect the interests of the defendant who pleads guilty. California Penal Code Section 1018 requires that the plea of guilty be made in the open court,[14] and California Penal Code Section 1192 directs the court to determine the degree of the crime before passing sentence.[15] California procedure developed through these statutes and case authority will be compared with the federal standard to see their similarities or divergences.

In reviewing the cases it appears the standard set in California for accepting the guilty plea is providing the accused with counsel, having the plea made in an open court and deciding on the degree of the crime, if the crime is one that involves degrees, prior to sentencing. California leaves the accused, on appeal, with the burden of going forward with the evidence to show that he was not aware of the consequences of the guilty plea. He must allege and have the burden of proving (by clear and convincing evidence)[16] that he was the victim of fraud, duress, coercion or an unkept promise. California state courts are not required to explain to the accused the effects of his guilty plea or the extent of possible punishment. This duty is left to the attorney.

In *People v. Cabral,*[17] defendant was charged with offering to sell heroin, conspiring to obtain money by falsely promising to sell heroin, and, conspiring to cheat and defraud by criminal means. He was granted permissioin to withdraw his plea of not guilty to the charge of conspiring to cheat and defraud by criminal means. Upon entering this plea the other two charges were dropped. On appeal defendant contended that his plea was the result of fear, intimidation and false promises and, that he pleaded guilty on the

14. In pertinent part, this section reads as follows: "Unless otherwise provided by law every plea must be put in by the defendant himself in open court. No plea of guilty for a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel. . . ." CAL. PENAL CODE § 1018 (West 1956).

15. CAL. PENAL CODE § 1192 (West 1956), provides:

> Upon a plea of guilty, or upon a conviction by the court without a jury, of a crime distinguished or divided into degrees, the court, must, before passing sentence, determine the degree. Upon the failure of the court to so determine, the degree of the crime of which the defendant is guilty, shall be deemed the lesser degree.

16. People v. Dufford, 163 Cal. App. 2d 673, 329 P.2d 707 (1958).

17. People v. Cabral, 128 Cal. App. 2d 693, 694-95, 275 P.2d 927, 928 (1954).

advice of his counsel who represented that he would be pleading guilty to petty theft. There was no showing in the record that defendant was personally addressed by the court to discern defendant's awareness of the nature of the charge and the consequences of his plea.

Again, indicative of California procedure, is the case of *People v. Loeber.*[18] Defendant was charged with three separate counts of issuing checks without sufficient funds. Represented by counsel, he entered a plea of guilty to the offense charged. On appeal, it was claimed that the deputy district attorney faltered on a deal.

> It is further claimed by the appellant that the court erroneously failed to admonish him of the consequences of a plea of guilty and failed to ask him whether any promise, reward or immunity had been offered or granted. The trial court was not required to so 'admonish' the appellant or to ask him the question stated. Furthermore, the record also shows that when appellant entered his plea he was represented by counsel, who presumably informed him of the consequences of the plea entered.[19]

Appellant had the burden of proving the plea was involuntary.

In contrast to federal standards the *Loeber* court places the burden on counsel to explain the nature and consequences of a guilty plea to the defendant. The court is not required to admonish a person of the nature of the charges or the consequences of his plea. A record is not required to show that appellant was aware of the nature of the charges and the consequences or that the plea was entered voluntarily.

In *People v. Martinez,*[20] appellant was charged with assault by means of force likely to do great bodily harm. Appellant requested and received appointed counsel. He subsequently

18. People v. Loeber, 158 Cal. App. 2d 730, 735-36, 323 P.2d 136, 140 (1958). *See also.* People v. Jolke, 242 Cal. App. 2d 132, 133, 51 Cal. Rptr. 171, 180 (1965) (defendant has burden ofproving plea was involuntary); People v. Mendez, 21 Cal. 2d 20, 21, 161 P.2d 929, 930 (1945) (no special admonition need be given concerning guilty plea).

19. People v. Loeber, 158 Cal. App. 2d 730, 735-36, 323 P.2d 136, 140 (1958).

20. People v. Martinez, 154 Cal. App. 2d 233, 234-35, 316 P.2d 14, 15-16 (1957) *See also.* People v. Murrary, 247 Cal. App. 2d 730, 731, 56 Cal. Rptr. 21, 24 (1967) (no need for affirmative showing in the record). The court has also stated that no responsibility rests on them to see that the accused receives sound advice. People v. Morton, 100 Cal. App. 2d 269, 270-71, 223 P.2d 259, 260 (1950).

pleaded guilty to the offense charged. Appellant's arguments on appeal are especially significant in light of Rule 11.

> The only issue raised by this appeal is whether the appellant's rights to due process of law under section 13, article I of the state constitution, and Amendment XIV of the Constitution of the United States were denied to him by the failure of the trial court to explain to him the effect and meaning of his plea of guilty and the degree of his crime and the punishment therefore.[21]

The court, by way of answer stated that due process had been observed as the record showed that appellant had been represented by counsel who had requested and had been granted a one week continuance to discuss a plea.

The court deems due process to be analogous with the appointment of counsel. This is shown by the court's placement of the burden of explaining the nature of the plea and its consequences as well as assuring its voluntariness, upon the counsel. Federal Rule 11, as interpreted by the United States Supreme Court, has clearly placed this burden on the court.

These cases indicate that once an accused pleads guilty and this plea is accepted, he must prove on appeal that his plea was the result of fraud, coercion, or an unkept promise[22] in order to justify a new trial.[23] Indeed the courts appear to forget the legal phenomena of plea bargaining and its possible consequences.

THE INFERENTIAL EFFECT RULE 11 MAY HAVE ON PLEA BARGAINING IN CALIFORNIA STATE COURTS.

Plea bargaining, the process whereby defense counsel negotiates with the prosecution over crime, plea and punishment, is an integral part of the criminal judicial process. "[T]he best estimate is that over 85 percent of all non-federal prosecutors' offices negotiate to some degree, 'when appropriate',[24] in order to obtain pleas of guilty."[25] Acceptance of guilty pleas and the

21. People v. Martinez, 154 Cal. App. 2d 233, 235, 316 P.2d 14, 16 (1957).

22. For grounds of reversal, *see* 15 CAL. D. 274 b (West 1959).

23. A Federal District Court Judge, in a personal interview, brought out his belief that plea bargaining works to the advantage of the guilty client. It provides an opportunity for a lesser penalty and, because prolonged litigation is dispensed with, it is rehabilitative.

24. There appears to be no criteria set out as to when plea bargaining is appropriate.

25. Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty*

process of plea bargaining has attendant problems—those to which Federal Rule 11 is addressed. Dean Wigmore stated that: "under certain stresses a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt."[26]

Though many authors have put forward public policy arguments in favor of plea bargaining,[27] in a recent article[28] it was pointed out that there is, in actuality, no check on the fairness of the plea bargaining process as the interests of prosecution and defense tend to merge.

> The prosecutor desires to have the case disposed of by the plea and the defendant is trying to have his plea accepted. . . . There is no adversary check. The court then has difficulty in discovering and examining the elements underlying the bargain that may be relevant to fairness.[29]

What is needed is a means whereby justice can be enhanced for the accused.[30] Checks must be placed on the prosecutor and defense attorney when negotiating the fate of the accused.

Since the plea bargaining process is underway prior to trial,

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Pleas, PENN. L. REV. 856, 901 (1964) [hereinafter cited as *Guilty Plea Bargaining: Compromises*].

26. 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940) states:

> There has been no careful collection of statistics of untrue confessions, nor has any great number of instances been even loosely reported, but enough have been verified to fortify the conclusion, based on ordinary observation of human conduct, that under certain stresses a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is at the time more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk there may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence.

See also Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385, 393 (1951) (it is stated that people have pleaded guilty to a lesser charge out of fear of being railroaded to the penitentiary for a long period of years); Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204, 220 (1957) ("The greatest danger inherent in the policy of utilizing the [guilty] plea as a factor in sentencing is that innocent men will be influenced to plead guilty. . . . A defendant may be especially reluctant to plead not guilty when he has a criminal record, for then his chances of successfully establishing innocence are greatly diminished.").

27. *See e.g.*, Fay, *Bargained for Guilty Plea*, 4 CRIM. LAW BULL. 265 (1968).

28. Folberg, *"Bargained For" Guilty Plea—An Evaluation*, 4 CRIM. LAW BULL. 201, 204 (1968); *see also Guilty Plea Bargaining: Compromises* at 866.

29. Folberg, *"Bargained For" Guilty Plea—An Evaluation*, 4 CRIM. LAW BULL. 201, 204 (1968).

30. For an interesting brief discussion of this fact *see Guilty Plea Bargaining: Compromises* at 885-86.

the District Attorney is left unhampered in bringing as many charges as he feels are appropriate. With subtle pressure the merging of interests is then underway to have the accused plead to a lesser, albeit, non-existent charge to relieve himself from the possible conviction of a greater charge. For an ex-felon whose past can be brought into court for impeachment purposes—this becomes a dubious right.[31] The only limiting factor, aside from the exceptions stipulated in the code, is that when the evidence is introduced it must be done in good faith.[32] In balancing the probability of the jury believing him, notwithstanding his conviction record, the ex-felon, faced with circumstances that he believes might require him to take the stand, might well throw up his hands and go for the bargain.

The superimposition of Rule 11 on the California courts would ovrrule California case precedent relating to the burden of proving whether or not defendant understood the nature of the charges against him. It would clearly place this burden on the judge. Practically speaking, the result would be to assure the defendant of a trial by the judge in that he must satisfy himself that there is a factual basis for the plea before sentencing. This procedural safeguard attempts to eliminate the possiblity of an innocent person being convicted.[33] Additionally, the accused must understand the consequences of the plea which would directly affect California's statutory law. The requirement in Penal Code Section 1192 that a person be made aware of the degree of the crime, where the crime is one involving degrees, before sentencing would be obsolete. Not only would the accused have to know the degree of the crime, if degrees be involved, but he must be aware of the consequences of his plea in every instance. This is, in essence, saying that the particular *mens rea* requirement must be explained by the judge to the accused and understood by him or his counsel before the plea is entered. The judge would be in a

31. Prior felony convictions, for the purpose of attacking the credibility of a witness, may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony. CAL. EVID. CODE § 788 (West 1966).

32. People v. Perez, 58 Cal. 2d 229, 237-38, 373 P.2d 617, 621 (1962).

33. As a matter of pressing current concern, it is conceivable that with increased urban unrest, coupled with incidents between citizens with police, what would normally be considered curiosity might end up being charged as obstructing a police officer while making an arrest, inciting to riot, failure to disperse or resisting arrest.

position to discern and convey to the defendant whether or not the plea bargaining has been realistic. If, after examining the major elements of the crime, the accused perceives that he is receiving no bargain he may proceed to trial.

Rule 11 is not a panacea. For example, if prior to trial, bargaining has taken place and the initial charge has been dropped or modified, the judge will not be in a position to evaluate the elements of the initial crime, and the potential impact of Rule 11 is questionable. It seems that the United States Supreme Court is merely attempting to counteract the potential negative impact of plea bargaining and hastily arranged guilty pleas. The most favorable prognosis for the rule is that the accused will be aware of what he is faced with in terms of charges and possible sentences. It is only in that manner that it will have impact on the actual bargaining process though statutory and case authority would be overruled. The subtle pressures that lend one to give into the plea bargaining process (multiplicity of charges,[34] a chance for leniency if one pleads guilty, or, a rougher penalty if you force the court into a regular trial)[35] remain unchecked.

CONCLUSION

In substance, the accused must intelligently and knowingly plead guilty. Nevertheless the application of Rule 11 is not a solution for the obvious hazards of the plea bargaining process: innocent men convicted, ex-felons afraid to play the odds and subtle coercion by judges to have the accused participate in the bargaining process as a means of efficient and economical administration.

As long as an ex-felon's record can be introduced into evidence for the purpose of impeaching his testimony an anomaly exists. The truth of a person's testimony should be evaluated in light of the surrounding circumstances. If the purpose for which we imprison people is to rehabilitate them it seems strange that this very fact can be used to lend credence to making them a recidivist. The admission of a prior conviction record is tantamount to double jeopardy and should be excluded.

34. *See* note 29, *supra*, at 205.

35. *See e.g.*, Comment, *The Influence of The Defendants Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 209 (1957).

It is suggested that there is an efficient method of overseeing the plea bargaining process. To provide the accused with bargaining leverage, after his preliminary hearing a lay procedure could be enacted whereby potential charges against the accused would be evaluated in light of the reasonableness of the facts surrounding the arrest. Obviously those charges which have no potential bearing would be precluded from being brought. If this procedure occurred prior to negotiations with the District Attorney or even prior to trial, an excellent means would be provided for alleviating undue pressure on the accused. This subtle pressure is probably the greatest factor inducing a person to plead guilty. Moreover, it is commonly recognized[36] that a sentence is more lenient if a person pleads guilty, more harsh if he forces the court to trial. This practice should be recognized, evaluated and condemned within the constitutional framework of a person's right to trial by jury—a right which he should not be punished for exercising.

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36. Comment, *Influence of the Defendant's Guilty Plea on Judicial Determination of Sentence.* 66 YALE L.J. 204, 207-09 (1956-57). This article states:

> The concessions accorded by prosecutors to a defendant who pleads guilty are not the only sentencing advantages he may expect to receive. . . . 66 per cent of the 140 judges replying consider the defendant's plea a relevant factor in the local sentencing procedure. 87 per cent of the judges who acknowledged that the plea was germane indicated that a defendant pleading guilty to a crime was given a more lenient punishment than a defendant who pleaded not guilty.