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Williams v. State, 316 So. 2d 267 (Fla. 1975)

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a granting by the judge of a motion for directed verdict.[32] Until such final determination by a judge, the plaintiff's right to a voluntary dismissal should remain intact. To allow Rule 1.420(a)(1) to remain unchanged gives the plaintiff a second chance at the expense of the hapless defendant.

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Criminal Law—GUILTY PLEAS—FACTUAL BASIS DETERMINATION NOT MANDATORY WHEN A COURT ACCEPTS A PLEA OF GUILTY OR NOLO CONTENDERE.—*Williams v. State*, 316 So. 2d 267 (Fla. 1975).

John Henry Williams was arrested for various narcotics violations and charged by information with 10 drug related offenses. At first appearance he entered pleas of not guilty and requested a trial by jury. Williams was also charged by information with possession of a firearm by a convicted felon. A jury trial on one of the drug charges resulted in a verdict of guilty. Pursuant to plea negotiations, Williams pleaded guilty to the remaining drug charges and was to receive a 5-year prison sentence for the jury conviction, and another 5-year sentence on one of the other charges, which two sentences were to be served consecutively, followed by a 5-year probation period for the remaining charges. The state agreed not to prosecute the charge of possession of a firearm by a convicted felon.[1] The trial court, however, imposed an additional 5-year term of imprisonment on a drug charge, and inadvertently adjudged Williams guilty on the firearm charge, with

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32. The following is a suggested amendment to Rule 1.420(a)(1):

(1) By Parties. Except in actions wherein property has been seized or is in the custody of the court, an action may be dismissed by plaintiff without order of the court (i) by serving or during trial, by stating on the record, a notice of dismissal at any time before a hearing on motion for summary judgment, or if none is served or if such motion is denied, *before granting of a motion for directed verdict*, or before retirement of the jury in a case tried before a jury or before submission of a nonjury case to the court for decision, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when served by a plaintiff who has once dismissed in any court an action based on or including the same claim. If a lis pendens has been filed in the action, a notice or stipulation of dismissal under this paragraph shall be recorded and cancels the lis pendens without the necessity of an order of court.

1. Williams v. State, 316 So. 2d 303 (Fla. 2d Dist. Ct. App. 1974). [Note: A discrepancy as to the details of charges and pleadings exists between the brief of John Henry Williams filed in the Supreme Court of Florida, and the opinion of the Second District

a further imposition of 5-years probation. The Second District Court of Appeal vacated the judgment of guilt and order of probation entered inadvertently on the charge which was to have been nol-prossed;[2] the court also enforced the plea bargain[3] by vacating the additional 5-year sentence with directions to enter an order of probation.[4] Williams unsuccessfully argued that his guilty pleas were erroneously accepted since no factual basis determination was made, as required by Florida Rule of Criminal Procedure 3.170(j);[5] the district court held that in the absence of allegations that prejudice resulted from failure to follow the rule, the plea was valid.[6] However, the court certified the case to the Florida Supreme Court because the decision involved a question of great public interest. The Supreme Court granted certiorari[7] on the basis of the certified question[8] and because the decision conflicted with decisions of other district courts of appeal.[9] The court engaged in an exhaustive discussion of guilty pleas and concluded that

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Court of Appeal. Williams' brief states that he was tried on *two* charges, and pleaded guilty to *all* remaining charges. (Petitioner's Brief, at 2, 316 So. 2d 267 (Fla. 1975).) Neither the opinion of the district court nor the supreme court specifically mentioned the charge of possession of a firearm by a convicted felon; Williams' brief states (at 4) that such a charge was dismissed by the state.]

2. *Id.* at 304.

3. This procedure is specifically contemplated in the plea negotiation process in Florida. FLA. R. CRIM. P. 3.171. *See* Troupe v. Rowe, 283 So. 2d 857 (Fla. 1973); State *ex rel.* Gutierrez v. Baker, 276 So. 2d 470 (Fla. 1973). *Cf.* Santobello v. New York, 404 U.S. 257 (1971) (Douglas, J., concurring).

4. 316 So. 2d at 303–04.

5. FLA. R. CRIM. P. 3.170(j) provides:

> (j) Responsibility of Court on Pleas. No plea of guilty or nolo contendere shall be accepted by a court without first determining, in open court, with means of recording the proceedings stenographically or by mechanical means, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness, and that there is a factual basis for the plea of guilty.
>
> A complete record of the proceedings at which a defendant pleads shall be kept by the court.

Florida rule 3.170 concerns generally pleas of guilty or nolo contendere. *See also* AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY, (Approved Draft, 1968) [hereinafter cited at A.B.A. STANDARDS]; FED. R. CRIM. P. 11.

6. 316 So. 2d at 304.

7. Williams v. State, 316 So. 2d 267 (Fla. 1975).

8. *Id.* Certified question jurisdiction is provided by constitution in Florida. FLA. CONST. art. V, § 3(b)(3). The question presented in *Williams v. State* was whether it was reversible error for the trial court to have accepted a plea of guilty without first ascertaining that there was a factual basis for the plea where the defendant did not contend that there was no factual basis for the guilty plea or that he was mistaken in the belief that his conduct amounted to an admission of the crime charged and to which he pleaded guilty.

9. The conflict was noted in Hall v. State, 303 So. 2d 417 (Fla. 2d Dist. Ct. App. 1974). Conflict existed primarily with Lyles v. State, 299 So. 2d 146 (Fla. 1st. Dist. Ct.

it is not reversible error for the trial court to accept a plea of guilty without first ascertaining that there is a factual basis for such plea, unless the defendant shows that clear prejudice or manifest injustice would result from failure to vacate the plea.[10]

The court interpreted Florida Rule of Criminal Procedure 3.170(j),[11] which provides, in part as follows: "*Responsibility of Court on Pleas.* No plea of guilty or nolo contendere shall be accepted by a court without first determining, in open court, . . . that there is a factual basis for the plea of guilty." This rule is patterned in part after Federal Rule of Criminal Procedure 11(f),[12] and Standard 1.6 of the American Bar Association Standards of Criminal Justice for Pleas of Guilty.[13] The rule, which sets out the guidelines necessary to meet the requirements promulgated in the 1969 United States Supreme Court cases of *Boykin v. Alabama*[14] and *McCarthy v. United States*,[15]

App. 1974). Jurisdiction of the Supreme Court is predicated upon FLA. CONST. art. V, § 3(b)(3).

10. 316 So. 2d at 275.

11. For the full text of subsection (j), consult note 5 *supra*.

12. FED. R. CRIM. P. 11(f) reads in pertinent part: "(f) *Determining accuracy of plea.* Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

It should be noted that the amended rule 11(e) specifically provides for a plea agreement procedure. Prior to the latest amendments (*see* Amendments to the Federal Rules of Criminal Procedure, 416 U.S. 1001 (1974)) the rules did not deal with the subject of plea negotiations. *But see* Santobello v. New York, 404 U.S. 257 (1971) *and* Brady v. United States, 397 U.S. 742 (1970), in which the practice of plea negotiation and agreement was approved and the value of the process discussed.

13. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY (Approved Draft 1968), Standard 1.6, states: "Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as may satisfy it that there is a factual basis for the plea." The Commentary to A.B.A. STANDARD 1.6 states that this determination is not required when the plea of nolo contendere is entered. Neither rule 3.170(j) nor Florida courts make this distinction; furthermore, nothing in *Williams* or other decisions differentiates between the procedure relating to pleas of guilty and pleas of nolo contendere. *See* Cheseborough v. State, 255 So. 2d 675 (Fla. 1971), *cert. denied*, 406 U.S. 976 (1972); Stovall v. State, 252 So. 2d 376 (Fla. 4th Dist. Ct. App. 1970); Russell v. State, 233 So. 2d 148 (Fla. 4th Dist. Ct. App. 1970). These decisions have construed a plea of nolo contendere as a plea of guilty. Thus, the procedures recommended in *Williams* appear applicable to pleas of nolo contendere. *But see, e.g.*, Lott v. United States, 367 U.S. 421 (1961); FED. R. CRIM. P. 11, Advisory Committee Notes, which state:

> For a variety of reasons it is desirable in some cases to permit entry of judgment upon a plea of nolo contendere without inquiry into the factual basis for the plea. The [factual basis determination requirement] is not, therefore, made applicable to pleas of nolo contendere. It is not intended by this omission to reflect any view upon the effect of a plea of nolo contendere in relation to a plea of guilty.

14. 395 U.S. 238 (1969).

15. 394 U.S. 459 (1969).

had not previously been construed by the Supreme Court of Florida. Therefore the court utilized the federal cases which the rule implements as a basis for interpreting the provision.

In *McCarthy,* the United States Supreme Court determined for the first time the effect of a failure by a trial judge in a United States district court to comply fully with the requirements of Federal Rule of Criminal Procedure 11. The Court strictly construed the rule, holding that "prejudice inheres in a failure to comply with Rule 11."[16] The *McCarthy* Court expressly stated that it did not reach any of the constitutional arguments presented by the petitioner; instead, it based its decision solely on its supervisory authority.[17] The Court was primarily interested in implementing the intent that motivated the formulation of federal rule 11,[18] and in erecting the fortress of procedural safeguards it deemed necessary to protect the pleading defendant.

Mr. Justice Warren, writing for the Court, expressed concern for the defendant who pleads " 'voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.' "[19] For the protection of such defendants, the trial judge must be satisfied that there is a factual basis for the plea.[20] The failure to effect such a determination constitutes prejudicial error. By its failure to address the government's argument that the record demonstrated a factual basis for the plea, the Court strongly implied that a subsequent appellate examination of the record for factual basis would not suffice as a substitute for that determination by the trial judge.[21] The Supreme Court has not explicitly moderated

16. *Id.* at 471.

17. *Id.* at 464.

18. The expressed intent behind federal rule 11 has been succintly stated as a concern for "[t]he fairness and adequacy of the procedures on acceptance of pleas of guilty [which] are of vital importance in according equal justice to all in the federal courts." FED. R. CRIM. P. 11, Advisory Committee Notes.

19. 394 U.S. at 467, *quoting* FED. R. CRIM. P. 11, Advisory Committee Notes. The petitioner in *McCarthy* pleaded guilty to wilfully and knowingly attempting to evade tax payments, obviously a criminal act requiring specific intent. But at the sentencing hearing he protested that the failure to pay taxes had not been deliberate, thus denying that the required mens rea existed.

20. "The judge must determine 'that the conduct which the defendant admits constitutes the offense charged . . . or an offense included therein to which the defendant pleaded guilty.' " *Id.* at 467, *quoting* FED. R. CRIM. P. 11, Advisory Committee Notes. (Footnote omitted).

21. The court was presented with two constructions of federal rule 11 by the circuits. The Court adopted the view expressed in Heiden v. United States, 353 F.2d 53 (9th Cir. 1965) which required that a conviction be vacated if the trial court failed to comply with rule 11. This was contra the approach urged by the government in *McCarthy,* that "if voluntariness cannot be determined from the record, the case is remanded for an evidentiary hearing on that issue." 394 U.S. at 469. This approach had been accepted by the fifth circuit. *See, e.g.,* Lane v. United States, 373 F.2d 570 (5th Cir. 1967).

the rigid *McCarthy*[22] requirements; however, the federal courts of appeals have reviewed trial court records to substantiate the validity of guilty pleas,[23] thus effectively ignoring this aspect of the *McCarthy* mandate. The Supreme Court has not chosen to review these decisions.

McCarthy was directed solely to the federal court system as a directive for application of the Federal Rules of Criminal Procedure. In *Boykin v. Alabama*,[24] the Supreme Court ruled that some of the *McCarthy* requirements apply to state proceedings. Speaking for the majority, Mr. Justice Douglas found that the Constitution requires a determination that a guilty plea is given voluntarily and with an understanding of the charge.[25] Mr. Justice Harlan remarked, in dissent, that "[t]he 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."[26] A close reading of *Boykin* suggests, however, that the trial court is constitutionally required only to determine that a guilty plea is voluntary and intelligent. Thus some portions of rule 11—in particular the requirement that a factual basis be determined at trial level by the trial judge—do not fall within the *Boykin* constitutional mandate.

The Supreme Court decisions,[27] together with several decisions of

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22. In Brady v. United States, 397 U.S. 742 (1970), the Supreme Court held, *inter alia*, that so long as the defendant pleaded voluntarily, the plea was valid, irrespective of alleged coercion exerted by the possibility that a sentence of death could result if a jury trial were requested. *Id.* at 746. *Cf.* United States v. Jackson, 390 U.S. 570 (1968). In *Jackson* the Supreme Court held unconstitutional a statute limiting imposition of the death penalty to trials by jury. "The inevitable effect of any such provision, is . . . to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." *Id.* at 581 (footnote omitted). The Court found that the validity of a guilty plea is not diminished by the fear of the pleading defendant of the death sentence.

Although the Court did not establish the existence of a factual basis in either of the cases, it did conduct an appellate review of the record. This implicitly rejects the strict *McCarthy* requirement.

23. *See* United States v. Johnson, 507 F.2d 826 (7th Cir. 1974), *cert. denied*, 421 U.S. 949 (1975). Upon appellate review of Johnson's plea of guilty, the seventh circuit found that "the transcript reveal[ed] that the court by personal interrogation of the defendant-appellant did elicit from him a factual basis to support the guilty plea." 507 F.2d at 828. *See also* Mejia v. United States, 430 F.2d 1273 (5th Cir. 1970).

24. 395 U.S. 238 (1969).

25.

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. . . . Second, is the right to trial by jury. . . . Third, is the right to confront one's accusers.

Id. at 243 (citations omitted).

26. *Id.* at 245 (Harlan, J., dissenting).

27. The Florida Supreme Court in *Williams* mentioned other United States Supreme

the United States Court of Appeals for the Fifth Circuit,[28] represent the basis in federal law upon which the Florida Supreme Court rested its decision in *Williams*. Initially the *Williams* court recognized, by implication, the value of guilty pleas obtained through plea negotiations and plea bargaining.[29] Thus the court must be presumed to be unwilling to destroy this efficient procedure for dispensing with the necessity of a full trial before an adjudication of guilt may be entered. It is apparent that the court has contemplated the value of plea negotiations, since Florida Rule of Criminal Procedure 3.171 deals specifically with plea discussions and agreements.[30] The majority of

Court decisions. North Carolina v. Alford, 400 U.S. 25 (1970), was among these. There the Supreme Court was again presented with the protestations of innocence of a pleading defendant. The factual dispute was resolved by the Court by examining the record and making a post conviction determination of factual basis. *Id.* at 37–38. This may be construed as approval of subsequent appellate review of the trial court record for a post-conviction determination of a factual basis for the plea of guilty.

This decision possesses value primarily with respect to considerations the Court did not address. The Supreme Court was presented with an opportunity to make the factual basis test mandatory upon the states in the manner already required of the federal district courts. It is of note that the Court by-passed this opportunity.

28. *E.g.*, United States v. Gearin, 496 F.2d 691 (5th Cir. 1974); United States v. Bethany, 489 F.2d 91 (5th Cir. 1974); Jimenez v. United States, 487 F.2d 212 (5th Cir. 1973), *cert. denied*, 416 U.S. 916; United States v. Martinez, 486 F.2d 15 (5th Cir. 1973); United States v. Rushing, 456 F.2d 1294 (5th Cir. 1972); Wells v. United States, 452 F.2d 1001 (5th Cir. 1971). The cases do not specify a single rule; conflicting mandates for compliance with FED. R. CRIM. P. 11 are prescribed.

29. 316 So. 2d at 270.

30. FLA. R. CRIM. P. 3.171 states:

Plea Discussions and Agreements,

(a) The Procecuting Attorney is encouraged to discuss and agree on pleas which may be entered by a defendant. Such discussion and agreement must be conducted with the defendant's counsel or, if the defendant is unrepresented, may be conducted with defendant.

(b) Defense counsel shall not conclude any plea bargaining on behalf of a defendant-client without his client's full and complete consent thereto, being certain that any decision to plead guilty or nolo contendere is made by the defendant.

Defense counsel shall advise defendant of all pertinent matters bearing on the choice of which plea to enter and the particulars attendant upon each plea, the likely results thereof as well as any possible alternatives which may be open to him.

(c) Responsibilities of the Trial Judge. After an agreement has been reached, the trial judge may with the consent of the parties, have made known to him the agreement and reasons therefor prior to the acceptance of the plea. The terms of the agreement shall be placed in the record. He shall thereafter advise the parties of whether other factors (unknown at the time) may make his concurrence impossible. Should such other factors make ultimate judicial concurrence impossible, any plea of guilty or nolo contendere entered based upon such agreement may thereafter be withdrawn.

(d) Discussion and Agreement Not Admissible. If the defendant pleads not guilty, no mention of any prior proceedings hereunder shall be admissible against him.

guilty pleas are the result of some negotiation between the prosecuting and defense attorneys—if not the product of extensive plea bargaining.[31] Indeed, *Williams* and the majority of the decisions released the same day[32] involved plea agreements of which the trial court had notice.

The court's initial venture into the theoretical aspects of guilty pleas involved a recitation of the tripartite requirements for the acceptance of a plea of guilty. First, the plea must be voluntary.[33] Second, the defendant must understand the nature of the charge and the consequence of the plea.[34] Third, the trial court must determine whether there is a factual basis for the plea.[35] These requirements are enumerated in Florida Rule of Criminal Procedure 3.170 and the series of United States Supreme Court decisions discussed above.

Although the Florida district courts of appeal had disagreed concerning the necessity of the factual basis determination, the Florida Supreme Court had not addressed the problem prior to *Williams*. The first and second districts exemplified the disagreement. While the first district assumed the position prescribed in *McCarthy*,[36] the second district preferred a more permissive stance, vacating the guilty plea only if the trial court's failure to comply with the rule prejudiced the

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Although this section is new in Florida, having been incorporated into the rules with the 1972 revision, the Florida Supreme Court had previously endorsed at least the practical aspects of the process. *See* Brown v. State, 245 So. 2d 41 (Fla. 1971); A.B.A. STANDARDS 3.1–34 (after which 3.171 is patterned).

The propriety of plea bargaining in Florida was further enhanced when the United States Supreme Court promulgated the new FED. R. CRIM. P. 11(3), in which plea agreement procedures were expressly validated and requisites were enumerated. The new rule became effective August 1, 1975. *See* Amendments to the Federal Rules of Criminal Procedure, 416 U.S. 1001, 1007 (1974).

31. *See* Santobello v. New York, 404 U.S. 257, 264 (1971) (Douglas, J., concurring) (in 1964, guilty pleas accounted for 90.2% of convictions in federal district courts); Brady v. United States, 397 U.S. 742, 752 (1970) ("well over three-fourths of the criminal convictions in this country rest on pleas of guilty . . . ."); A.B.A. STANDARDS, Commentary at 66.

32. State v. Lyles, 316 So. 2d 277 (Fla. 1975); Grant v. State, 316 So. 2d 282 (Fla. 1975); Estes v. State, 316 So. 2d 276, 277 (Fla. 1975).

33. FED. R. CRIM. P. 11; A.B.A. STANDARDS, *supra* note 13, at Standard 1.5; Santobello v. New York, 404 U.S. 257 (1971); North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970); United States v. Martinez, 486 F.2d 15 (5th Cir. 1973); Brown v. State, 109 So. 627 (Fla. 1926); FLA. R. CRIM. P. 3.170(j).

34. FED. R. CRIM. P. 11; A.B.A. STANDARDS, *supra* note 13, at Standard 1.4; McCarthy v. United States, 394 U.S. 459 (1969); FLA. R. CRIM. P. 3.170(j).

35. FED. R. CRIM. P. 11; A.B.A. STANDARDS, *supra* note 13, at Standard 1.6; McCarthy v. United States, 394 U.S. 459 (1969).

36. The first district view is typified by Lyles v. State, 299 So. 2d 146 (Fla. 1st Dist. Ct. App. 1974). *Accord*, Blankenship v. State, 307 So. 2d 453 (Fla. 1st Dist. Ct. App. 1974). *Contra*, Estes v. State, 294 So. 2d 122 (Fla. 1st Dist. Ct. App. 1974).

In *Estes*, the first district required a showing of prejudice resulting from the failure to follow FLA. R. CRIM. P. 3.170(j). The *Lyles* court rejected that view without mentioning *Estes*.

defendants.[37] The first district did not relish the position of strict constructionist; rather, it expressed displeasure, but felt compelled to apply Florida Rule of Criminal Procedure 3.170(j) as promulgated by the supreme court.[38]

The remaining districts experienced little difficulty with post-sentencing inquiries into guilty pleas. The third district has not rendered a decision pertaining to the factual basis determination.[39] The fourth district assumed a stance similar to that of the first district,[40] adopting the essentials of *McCarthy*, but only, it appears, because of the express language of the 1972 revision of Florida Rule of Criminal Procedure 3.170(j).[41]

A person who pleads guilty waives the protection of several constitutional guarantees.[42] For this reason, it is necessary to determine that these guarantees are not waived by mistake or ignorance. Nonetheless, although the purpose of the factual basis determination is to determine the accuracy of the guilty plea and to avoid mistakes, it is well settled that the United States Constitution does not require the factual basis determination.[43]

The Supreme Court of Florida has previously held that a violation of a procedural rule mandates a reversal only upon demonstration of harm or prejudice to the defendant.[44] The court's decision concerned a rule of criminal discovery; that rule, like rule 3.170, is not constitutionally required. Thus the *Williams* decision is consistent with prior treatment of procedural safeguards which are not required by the

37. The second district first decided the issue in Hall v. State, 303 So. 2d 417 (Fla. 2d Dist. Ct. App. 1974). *Accord*, Kendrick v. State, 308 So. 2d 152 (Fla. 2d Dist. Ct. App. 1974); Edmonson v. State, 304 So. 2d 458 (Fla. 2d Dist. Ct. App. 1974).

38. *See* Lyles v. State, 299 So. 2d 146, 148 (Fla. 1st Dist. Ct. App. 1974).

39. *But see* Thomas v. State, 299 So. 2d 130 (Fla. 3d Dist. Ct. App. 1974). *Cf.* Chase v. State, 284 So. 2d 459 (Fla. 3rd Dist. Ct. App. 1974). These cases do not directly pertain to FLA. R. CRIM. P. 3.070(j) and do not specify a requirement for challenges to the sufficiency of factual basis determinations.

40. Church v. State, 299 So. 2d 649 (Fla. 4th Dist. Ct. App. 1974); Rentfrow v. State, 293 So. 2d 376 (Fla. 4th Dist. Ct. App. 1974).

41. Church v. State, 299 So. 2d 649, 650 (Fla. 4th Dist. Ct. App. 1974).

42. The plea waives the sixth amendment guarantee of a trial. A voluntary plea of guilty also waives any nonjurisdictional defect. Micale v. State, 296 So. 2d 648 (Fla. 2d Dist. Ct. App. 1974); Williams v. State, 259 So. 2d 753 (Fla. 1st Dist. Ct. App. 1972); Thomas v. State, 201 So. 2d 834 (Fla. 2d Dist. Ct. App. 1967). *Accord*, Brady v. United States, 397 U.S. 742 (1970); Broxson v. Wainright, 477 F.2d 397 (5th Cir. 1973); Eaton v. United States, 458 F.2d 704 (7th Cir. 1972); United States v. Soltow, 444 F.2d 59 (10th Cir. 1971) (waiver of objection of validity of search warrant); Chandler v. United States, 413 F.2d 1018 (5th Cir. 1969) (waiver of objection that arrest was without probable cause).

43. *See* notes 21–23 and accompanying text *supra*; Halliday v. United States, 394 U.S. 831 (1969); McCarthy v. United States, 394 U.S. 459 (1969).

44. Richardson v. State, 246 So. 2d 771 (Fla. 1971).

Constitution. Practical considerations suggest, however, that a strict construction of the factual basis determination requirement would have been a more sound decision.

Although requiring a factual basis determination may reduce the efficiency of the guilty plea procedure,[45] the benefits derived from that determination far outweigh the detriment incurred. The inquiry assures the court that the defendant actually committed a crime at least as serious as the one to which he is willing to plead. Investigation into the factual basis of guilty pleas increases the visibility of charge reduction practices, a common form of plea agreement. These inquiries provide a more adequate record of the conviction process. This record minimizes a defendant's chances of successfully challenging the plea subsequent to its entry. Finally, increased knowledge of the circumstances of the defendant's offense provides the trial court with a better assessment of the defendant's competency, his willingness to plead guilty, and his understanding of the charges against him.[46]

By construing the rule as it has, the court has created a fundamental problem. If the requirement of Florida Rule of Criminal Procedure 3.170(j) is merely a recommendation, the courts must devise a standard for the validity of guilty pleas for which the trial court did not determine a factual basis. What degree of harm or prejudice must a defendant suffer—how manifest must the injustice be—for such a conviction to be reversed? The answers must be determined in the state's appellate courts. Thus by choosing to construe the rule broadly, thereby easing the burden on the trial courts, the *Williams* court has invited increased litigation in the courts of appeal.

This concern, expressed in Mr. Justice England's concurring opinion, is not assuaged by the court's reference to the model provisions for withdrawal of guilty pleas.[47] Under those provisions, before

45. To make a record of the plea proceeding would be time consuming. A more complete record would make the procedure more visible. The visibility might prevent attorneys from freely engaging in plea negotiations for fear of later withdrawals or vacations.

46. The practical considerations represented here have been the prime motivation for the United States Supreme Court's strict adherence to the strictures of rule 11. "When the judge discharges that function, he leaves a record adequate for any review that may be later sought . . . , and forestalls the spin-off of collateral proceedings that seek to probe murky memories." Boykin v. Alabama, 395 U.S. 238, 244 (1969). *See also* McCarthy v. United States, 394 U.S. 459, 472 (1969); A.B.A. STANDARDS, *supra* note 13, commentary at 32–33.

47. 316 So. 2d at 273–74. *See* A.B.A. STANDARDS, *supra* note 13, Standards 2.1, 2.2, and accompanying commentary. The *A.B.A. Standards* contemplate plea withdrawal to correct "manifest injustice." The federal rules have provisions for withdrawal of pleas of guilty. *See* FED. R. CRIM. P. 32(d), which states in pertinent part: *"Withdrawal of Pleas of Guilty.* A motion to withdraw a plea of guilty . . . may be made only before

a plea may be withdrawn the defendant must show that the violation results in manifest injustice. The provisions do not define instances which would represent "manifest injustices," except those which correspond to violations of constitutional guarantees.[48]

In *McCarthy*,[49] the United States Supreme Court intended that the mandatory nature of the factual basis determination of federal rule 11 would eliminate the necessity of later fact finding proceedings to determine the accuracy of a guilty plea.[50] By concluding that prejudice inheres in a failure to comply with rule 11, the Court attempted to compel trial judges to adhere to the procedural strictures.

Williams intended much the same result; but where the probability of review of guilty pleas is low, motivation to strictly comply with the rule is correspondingly meager. Thus, because the trial judge knows that the defendant bears a weighty burden of proof on appeal, the process may relax to the extent that the procedural safeguards intended by Florida rule 3.170(j) are subverted. The individual attacking a guilty plea will suffer a considerable disadvantage so far as proving prejudice or harm. But as Justice England noted:

> Individuals residing in our jails and correction centers as a result of negotiated convictions and sentences have little reason not to bring to our courts their offer to prove "manifest injustice", or whatever other term the Court may from time to time prescribe, in the acceptance of the plea.[51]

The majority of pleading defendants do not subsequently attack their pleas. The *Williams* court, however, has opened the door to such attacks. A strict construction of Florida rule 3.170(j) would prevent this potential burden upon the state's criminal justice system. Such an interpretation of the rule should "insure that every accused

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sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." These provisions have not been enacted in Florida.

48. *See* A.B.A. STANDARDS, *supra* note 13, Standards 2.1(a)(ii)(1)–(4). In the cases decided with *Williams*, the court found examples of nonprejudicial error. No instances of prejudice were described, however. *See, e.g.*, State v. Lyles, 316 So. 2d 277 (Fla. 1975); Grant v. State, 316 So. 2d 282 (Fla. 1975).

49. *See* notes 15–21 and accompanying text *supra*.

50. 394 U.S. at 469–70.

51. 316 So. 2d at 275 (England, J., concurring). Justice England further observed:

> Undoubtedly the possibility of rescinding the bargain and conducting the obviated trial will deter those convicted individuals whose negotiated sentences are significantly shorter or less harsh than the maximum sentence to which they were exposed for the crimes they admit. Even this concern, however, diminishes in time as the prospect of proving the state's case becomes more remote.

Id.

is afforded procedural safeguards . . . [and should] help reduce the great waste of judicial resources required to process frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate."[52] The decision in *Williams* fails to allay the fear that these goals are not being fulfilled. It does not require the trial court to build a record. Yet to do so would require only a few moments of the judicial schedule and would alleviate factual problems which could develop on appeal. To compel the inquiry would cause minimal expense and delay, and could prevent potential burdens on the system. Mr. Justice England's comment that, despite his reservations, the *Williams* decision is "presently practical and constitutionally permitted,"[53] may prove to be only half true.

RICHARD W. EPSTEIN

Torts—WRONGFUL DEATH—FLORIDA'S WRONGFUL DEATH ACT IS CONSTITUTIONAL AND PERMITS PUNITIVE DAMAGES.—*Martin v. Security Services, Inc.*, 314 So. 2d 765 (Fla. 1975).

United Securities, Inc., [hereinafter United Securities] a security guard business, hired David D. Turner, provided him with pistol and uniform, and assigned him to guard the University Club apartment complex in Jacksonville, Florida. On October 21, 1972, Turner entered Joyce Atchley's home, adjacent to the complex, telling her that he needed to use her telephone. While inside, Turner allegedly assaulted Mrs. Atchley, attempted to rape her, and shot and killed her with the pistol provided him by United Securities.

Subsequently it was discovered that Turner was a heavy drinker with a history of psychiatric problems. On June 27, 1973, Beverly Martin, administratrix of Atchley's estate, sued United Securities in separate survival and wrongful death actions. She alleged that United Securities had been grossly negligent in hiring Turner and entrusting him with a pistol, and prayed for punitive damages.[1] Martin later amended her complaint to comply with Florida's new Wrongful Death Act [hereinafter the Act], which had become effective July 1,

52. McCarthy v. United States, 394 U.S. 459, 472 (1969).

53. 316 So. 2d at 275 (England, J., concurring).

1. Brief for Appellant at 2–3, Martin v. Security Services, Inc., 314 So. 2d 765 (Fla. 1975).