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THE FINALITY OF A PLEA OF GUILTY

*William H. Erickson**

I. Introduction

Pleas of guilty are estimated to account for at least ninety per cent of the criminal convictions every year.[1] Such dispositions are clearly necessary from a pragmatic point of view. If a trial were required for every defendant, there would not be enough judges, defense counsel, prosecutors, or courtrooms. Guilty pleas, however, must reflect more than the defendant's desire for lenient treatment and the prosecutor's concern for case load management. Justice, especially criminal justice, must be founded on truth. The quest in a criminal trial is a search for truth; therefore, guilt must be the truth. Fair and accurate guilty pleas also hasten the beginning of rehabilitation and increase respect for our criminal justice system. If trials serve to decide primarily those cases in which the defendant has grounds for contesting guilt, the presumption of innocence and the requirement for proof of guilt beyond a reasonable doubt will regain their deserved vigor. Since rehabilitation cannot truly begin if the accused is still struggling to avoid responsibility for his conduct, the finality of a guilty plea is also an important feature of an effective system of criminal justice. Standards developed in recent years by the American Bar Association assist judges, prosecutors, and defense counsel alike in arriving at fairness and accuracy in entering guilty pleas with a view to minimizing post-conviction contests as to finality. Indeed, these standards relating to guilty pleas constitute a major step toward increasing the overall effectiveness of the criminal process.[2]

II. History

The critical and peculiar nature of a plea of guilty has long been recognized. "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. More is not required, the court has nothing to do but give judgment and sentence."[3] Since the plea operates as a conviction, its validity must be as firmly grounded as any conviction. In *Machibroda v. United States*,[4] the petitioner, under the so-called federal habeas corpus provision,[5] moved to set aside and vacate the sentence he was serving

* Justice, Colorado Supreme Court.

1 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967). In Santobello v. New York, 404 U.S. 257 (1971), Justice Douglas, in a footnote [1a] to his concurring opinion, recognized that the percentage of convictions based on guilty pleas was 90.2 in 1964. In fiscal 1970, 28,178 convictions occurred in 89 United States District Courts, of which 24,111 were by plea of guilty or nolo contendere. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966).

2 *See generally,* AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY (1968) [hereinafter cited as PLEAS OF GUILTY].

3 Kercheval v. United States, 274 U.S. 220 (1927).

4 368 U.S. 487 (1962).

5 28 U.S.C. § 2255 (1971). District courts are required to grant a prompt hearing to determine issues, make findings of fact and conclusions of law. This procedure is followed unless the motions, files, and records of the case show that the prisoner is entitled to no relief.

because his plea of guilt was not voluntarily entered. In spite of the government's contentions that the petitioner's allegations were improbable and unbelievable, the Court ordered a hearing, largely because of the gravity of the petitioner's claim.

Procedures to follow in accepting guilty pleas were lacking until the Supreme Court of the United States, acting under its rule-making power, promulgated Rule 11 of the Federal Rules of Criminal Procedure.[6] Subsequently, the Court established the all but constitutional significance of Rule 11 in *McCarthy v. United States.*[7] In *McCarthy,* the Court held that if the District Court failed to comply with Rule 11, the defendant's plea of guilty must be set aside and the case remanded for another hearing. Rule 11 is designed to eliminate any need to resort to a subsequent fact-finding proceeding after a plea of guilty is accepted.[8] In a decision that clarified the prerequisites for acceptance of a plea of guilty, the Court, in *Boykin v. Alabama,*[9] found reversible error where the record failed to show that the defendant voluntarily and understandingly entered his plea of guilty. In that case, the Court explained that a guilty plea waived three important constitutional rights: the right to trial by jury, the right to confront one's accusers, and the privilege against compulsory self-incrimination. The essence of *Boykin*[10] was to make the requirements of Rule 11 applicable to the states.

Accuracy is paramount; force, threats, or lack of knowledge and understanding by the accused deprive a guilty plea of validity. Improper promises or misrepresentations by the prosecution or gross error by defense counsel will destroy the seeming insulation of a guilty plea which is entered in literal accordance with Rule 11 of the Federal Rules of Criminal Procedure. A recent series of Supreme Court cases deal with post-conviction attacks on the voluntariness of guilty pleas.[11] These cases hold that a defendant assumes the risk of error in either his or his attorney's assessment of the law or the facts when he enters a plea of guilty. The guilty plea of a defendant represented by competent counsel in *Brady v. United States*[12] was not made involuntary solely because the plea was prompted by the defendant's fear of the death penalty possibility if the case were to be tried by a jury.

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6 FED. R. CRIM. P. 11 provides:

> A defendant may plead not guilty, guilty or, with the consent of 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 corporation 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.

7 394 U.S. 459 (1969). It was a violation of FED. R. CRIM. P. 11, that required the dissolution of the plea of guilty in this case. Numerous post-conviction attacks on the constitutional validity of guilty pleas can be avoided by close adherence to the rule.

8 Heiden v. United States, 353 F.2d 53 (9th Cir. 1965).

9 395 U.S. 238 (1969).

10 *Id.*

11 Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970).

12 397 U.S. 742 (1970).

In *McMann v. Richardson*,[13] the defendants were denied hearings on their habeas corpus petitions. The fact that their pleas of guilty were entered with the advice of competent counsel superseded the defendants' allegations of improperly procured confessions. In *Parker v. North Carolina*,[14] purported police misconduct during interrogation did not vitiate a plea of guilty which was entered freely and voluntarily more than a month after the interrogation. Indeed, where there is a factual basis for the plea, *North Carolina v. Alford*[15] teaches that a plea of guilty may be voluntary in spite of being combined with protestations of innocence. In *Dukes v. Warden*[16] the Court held that where a plea of guilty was fair and accurate, an attorney's representation of others in a related but separate proceeding was not sufficient reason to vacate the plea. The foregoing cases make it clear that the Supreme Court has recognized the finality of a plea of guilty when proper safeguards have been afforded the defendant.

III. The Providency Hearing

A. *Is the Plea of Guilty Fair and Accurate?*

Most states have statutes or court rules relating to the acceptance of guilty pleas that parallel Rule 11 of the Federal Rules of Criminal Procedure.[17] These laws are by no means uniform and indicate no universal concern either for protecting the defendants from injustice or safeguarding the pleas from attack. The *American Bar Association Standards for Criminal Justice* [hereinafter referred to as *Standards*] include Pleas of Guilty among seventeen criminal procedural *Standards*. The seventeen *Standards* work together to provide guidance at each stage of criminal proceedings. The *Standards* attempt to clarify existing procedures and to delineate new ones that will improve the truth-finding process in

13 397 U.S. 759 (1970).
14 397 U.S. 790 (1970).
15 400 U.S. 25 (1970).
16 Dukes v. Warden, Connecticut State Prison, 406 U.S. 250 (1972).
17 ALA. CODE tit. 15, § 277 (Cum. Supp. 1972); ALASKA R. CRIM. P. 11; ARIZ. R. CRIM. P. 160, 189; 4A ARK. STAT. ANN. § 43-1221 (1964); CAL. PENAL CODE § 1017 (West 1970); COLO. R. CRIM. P. 11(a); 28 CONN. GEN. STAT. ANN. § 54-60 (1960); DELA. SUPER. CT. (CRIM.) R. 11; FLA. R. CRIM. P. 3.170; 10B GA. CODE ANN. § 27-1404 (1972); HAWAII R. CRIM. P. 11; 4 IDAHO CODE ANN. § 19-1714 (1948); ILL. REV. STAT. ch. 38, § 113-4 (1970); IND. R. CRIM. P. 10; 56 IOWA CODE § 777.12 (1971); KAN. STAT. ANN. § 22-3210 (Cum. Supp. 1970); KY. R. CRIM. P. 8.08; 2 LA. STAT. ANN. art. 556 Code of Crim. P. (1967); ME. R. CRIM. P. 11, 11(A); 9B MD. ANN. CODE, MD. R. P. 720-722 (1971); MASS. R. CRIM. P. 4, 5; 40 MICH. COMP. LAWS ANN. § 767.37 (Cum. Supp. 1972); 41 MINN. STAT. ANN. §§ 630.29-.30 (1947); 2A MISS. CODE ANN. § 2564.5 (Cum. Supp. 2A, 1971); MO. R. CRIM. P. 25.04; 8 MONT. REV. CODES ANN. § 95-1606 (1969); NEB. REV. STAT. § 29-1820 (1965); 5 NEV. REV. STAT. §§ 174.045,-.055,-.065 (1971); 5 N.H. REV. STAT. ANN. § 605:3 (1955); N. J. R. R. CRIM. PRAC. 3: 5-2; 6 N.M. STAT. ANN. § 41-23-21 (c) (Cum. Supp. 1972); 11A N.Y. CRIM. P. L. §§ 220.10-.30 (McKinney 1971); 5 N.D. CENT. CODE §§ 29-14-16, -17 (1960); OHIO REV. CODE ANN. §§ 2943.03-.04 (1954); OKLA. STAT. ANN. tit. 22, § 516 (1969); 1 ORE. REV. STAT. § 135.840 (1971); PA. R. CRIM. P. 319; 3 R. I. GEN. LAWS ANN. § 12-12-19 (1970); 4 S. C. CODE ANN. §§ 17-511, 17-512 (1962); 8 S.D. CODE §§ 23-35-18, -19, -20, -21 (1969); 7 TENN. CODE ANN. § 40-2310 (Cum. Supp. 1972); TEX. CODE CRIM. PROC. arts. 26.13, -.14, 27.13 (1966); art. 27.14 (Cum. Supp. 1971); 8 UTAH CODE ANN. §§ 77-24-3, -6, -7, -8, -9, -10 (1953); 4 VA. CODE ANN. §§ 19.1-19.2 (1960); 10 WASH. REV. CODE ANN. § 10.40.170 (1961); 17 W. VA. CODE ANN. § 62-3-1(a) (1966); 42A WIS. STAT. § 971.08 (1971); WYO. R. CRIM. P. 15.

criminal cases. Particular attention is paid to the proceeding at which the defendant tenders his plea of guilty—the so-called providency hearing. The constitutional requirements for the providency hearing set forth in all the recent Supreme Court decisions are rather similar to the framework established in the *Standards Relating to Pleas of Guilty.*

A Presidential Commission has outlined the judge's obligation and difficult function which he must carry out at the providency hearing.[18] The judge must be certain that the defendant understands the charge and the consequences of the plea and that the record indicates a factual basis for the plea. Overcharge or excessive leniency by the prosecutor must be prevented, and the judge must also insure that the correctional disposition reached by the immediate parties is within the range of sentencing appropriateness.[19]

The *Standards* require that the defendant have the opportunity to retain counsel prior to his entry of a plea.[20] If he is without counsel, he should at least be given reasonable time to deliberate on his course of action.[21] According to both Rule 11 of the Federal Rules of Criminal Procedure and the *Standards,* the court must address the defendant personally to determine that he understands the nature of the charge and the consequences of the plea.[22] According to the *Standards,* but not the Federal Rule and some state procedures, the court must give the defendant adequate warning of the consequences of the plea in every case.[23] The court's warning should include an explanation of the defendant's waiver of constitutional rights and a realistic picture of all sentencing possibilities. Such a warning in each case will help to avoid subsequent objections by a defendant that his counsel gave him erroneous information.

Prior to the adoption of Rule 11 of the Federal Rules of Criminal Procedure, there was a general dearth of authority supporting a requirement that the judge make a determination of the accuracy of a tendered plea of guilty.[24] Rule 11 and the *Standards*[25] require the court to make a suitable inquiry to satisfy itself that there is a factual basis for the plea before entering judgment on the plea. The *Standards* also propose that there be a verbatim record of the

18 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 136 (1967).

19 *Id.*

20 PLEAS OF GUILTY, *supra* note 2, at § 1.3, cited in Grades v. Boles, 398 F.2d 409 (4th Cir. 1968).

21 *Id.*

22 PLEAS OF GUILTY, *supra* note 2, at § 1.4. For cases citing this section, *see* United States v. Howard, 407 F.2d 1102 (4th Cir. 1969); People v. Flannigan, 267 N.E.2d 739 (Ill. App. 1971); People v. McCullough, 45 Ill.2d 305, 259 N.E.2d 19 (1970); State v. Coe, 290 Minn. 537, 188 N.W.2d 421 (1971); State v. Judd, 277 Minn. 415, 152 N.W.2d 724 (1967); Troletti v. State, 483 S.W.2d 755 (Tenn. 1972); Wilson v. State, 456 S.W.2d 941 (Tex. Crim. App. 1970); Ex parte Battenfield, 466 S.W.2d 569 (Tex. Crim. App. 1971); McBain v. Maxwell, 2 Wash. App. 27, 466 P.2d 177 (1970).

23 PLEAS OF GUILTY, *supra* note 2, at § 1.4(b) & (c).

24 Hoffman, *What Next in Federal Criminal Rules?* 221 WASH. & LEE L. REV. 1, 10-11 (1964).

25 PLEAS OF GUILTY, *supra* note 2, at § 1.6. X. v. United States, 454 F.2d 255 (2d Cir. 1971); Manley v. United States, 432 F.2d 1241 (2d Cir. 1970); Moneyhun v. People, 486 P.2d 434 (Colo. 1971); Glens Falls Group Ins. Corp. v. Hoium, 200 N.W.2d 189 (Minn. 1972); State v. Coe, 290 Minn. 537, 188 N.W.2d 421 (1971); State ex rel. Kons v. Tahash, 281 Minn. 467, 161 N.W.2d 826 (1968); Edwards v. State, 51 Wis.2d 231, 186 N.W.2d 193 (1971); State v. Reppin, 35 Wis.2d 377, 151 N.W.2d 9 (1967).

providency hearing.[26] In some jurisdictions, no reporter is present at this supremely critical stage, or the practice is merely to file the reporter's shorthand notes or the clerk's minutes.[27] A verbatim record should provide a reviewing court with sufficient information to determine whether the defendant's rights have been protected.[28]

B. *Plea Negotiation and Voluntariness of Plea*

A frequent post-conviction attack on guilty pleas is that they have not been voluntarily entered. The *Standards* require that the court determine the voluntariness of the plea before accepting it.[29] The court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court, if the court's inquiry reveals that the tendered plea is the result of prior plea discussions or agreements.[30]

It has been said that "justice and liberty are not the subjects of bargaining and barter."[31] In fact, however, charge and sentence concessions to secure pleas of guilty are, and always have been, part and parcel of our criminal justice system.[32] Plea negotiation involves an exchange of concessions and advantages between the state and the accused. In *Santobello v. New York*,[33] Chief Justice Burger, writing for the majority, called disposition of criminal charges by plea negotiation an essential component of the administration of justice. *Santobello* held further that plea negotiation is not inherently coercive and, with proper safeguards, is to be encouraged.

Traditionally, plea negotiations have remained hidden behind arraignment procedures. Critics charge that this common invisibility provides no record, no review, and no judicial scrutiny.[34] Other frequent objections to plea bargaining dwell on its chilling effect on the constitutional privilege against self-incrimination, the right to confront witnesses, as well as the right to have compulsory

26 PLEAS OF GUILTY, *supra* note 2, at § 1.7; *see* People v. West, 3 Cal. 3d 595; 477 P.2d 409, 91 Cal. Rptr. 385 (1970).

27 PLEAS OF GUILTY, *supra* note 2, at 35.

28 The record should include the requirements of PLEAS OF GUILTY, *supra* note 2, at §§ 1.4-1.6.

29 PLEAS OF GUILTY, *supra* note 2, at § 1.5. *See* United States v. Williams, 407 F.2d 940 (4th Cir. 1969); United States ex rel. Amuso v. LaVallee, 291 F. Supp. 383 (E.D.N.Y. 1968); United States v. Miss Smart Frocks, Inc., 279 F. Supp. 295 (S.D.N.Y. 1968); People v. West, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970); Moneyhun v. People, 486 P.2d 434 (Colo. 1971); State v. Coe, 290 Minn. 537, 188 N.W.2d 421 (1971); State v. Judd, 277 Minn. 415, 152 N.W.2d 724 (1967); State v. Turner, 186 Neb. 424, 183 N.W.2d 763 (1971); State v. Tunender, 182 Neb. 701, 157 N.W.2d 165 (1968); Belcher v. State, 42 Wis.2d 299, 166 N.W.2d 211 (1969). *See also* Note, *The Trial Judge's Satisfaction as to Voluntariness & Understanding of Guilty Pleas*, 1970 WASH. U.L.Q. 289.

30 *Id.*

31 Shelton v. United States, 242 F.2d 101 (5th Cir. 1957).

32 *See* D. NEWMAN *supra* note 1, at 76-130.

33 404 U.S. 257 (1971), in which the United States Supreme Court vacated a judgment and sentence imposed as the result of a guilty plea that was induced by the promise of a prosecutor which was later disavowed.

34 For criticism of the practices of plea bargaining, *see generally*, White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970); Note, *Plea Bargaining—Justice Off the Record*, 9 WASHBURN L. J. 430 (1970); Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

process for obtaining favorable witnesses, and the right to stand trial by jury.[35] Moreover, the lack of uniformity in the plea bargaining process creates a certain amount of unpredictability which many feel is unsatisfactory. In essence, the argument against plea bargaining is that too often, when criminal cases are compromised, the rule of law is sacrificed to the rule of convenience.

In the *Standards,* the American Bar Association took the position that it is better to recognize plea bargaining, to examine the agreement and its concomitant facts in the open, than to allow the same bargaining in secrecy, with no judicial review. Obviously, it is better to provide standards for proper negotiations of a guilty plea than to foreclose all guidance or judicial inquiry.[36] Support for the use of plea negotiation is widespread,[37] and the *Standards* attempt to serve the effective administration of justice by setting out adequate safeguards.[38] Several matters may be the subjects of negotiation. Where the judge's power is severely limited by high minimum or fixed maximum sentences or by the absence of probation as an alternative, significant sentencing range is possible only through charge reduction. Where judges have broad sentencing discretion, agreements to seek sentence leniency are more common. The *Standards* approve the use of plea agreements and the granting of charge or sentence concessions in situations where the effective administration of justice will be furthered.[39] Ranked in their most popular use, the three most common plea agreements are to accept a plea to a lesser offense, to dismiss other counts or charges, and to

35 U.S. CONST., amends. V, VI.

36 PLEAS OF GUILTY, *supra* note 2, at § 1.5.

37 For a thorough analysis of plea negotiations with reference to the *ABA Standards, see* Davis, *The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy,* 6 VAL. U. L. REV. 111 (1972); Hoffman, *Plea Bargaining and the Role of the Judge,* 53 F.R.D. 499 (1972); Note, *Plea Bargaining: The Case for Reform,* 6 U. RICH. L. REV. 325 (1972); Note, *Plea Bargaining—Proposed Amendments to Federal Criminal Rule 11,* 56 MINN. L. REV. 718 (1972); Davis, A., *Sentences for Sale: A New Look at Plea Bargaining in England and America,* 1971 CRIM. L. REV. 150; Klonoski, Mitchell, Gallagher, *Plea Bargaining in Oregon: An Exploratory Study,* 50 ORE. L. REV. 114 (1971); McMenamin, *Plea Bargaining in the Military,* 10 AM. CRIM. L. REV. 93 (1971); Comment, *The Guilty Plea as a Waiver of Rights and as an Admission of Guilt,* 44 TEMP. L. Q. 540 (1971); Comment, *Judicial Supervision Over California Plea Bargaining: Regulating the Trade,* 59 CALIF. L. REV. 962 (1971); Note, *The ABA's Standards on Criminal Justice and Wis. Stat. § 971.08,* 1971 WIS. L. REV. 583; Note, *Plea Bargaining: A Model Court Rule,* 4 U. MICH. J. LAW REFORM 487 (1971); Note, *The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas,* 1970 WASH. U.L.Q. 289.

38 PLEAS OF GUILTY, *supra* note 2, at §§ 3.1-3.4. These Standards have been cited in Woodson v. Brewer, 437 F.2d 1036 (8th Cir. 1971); Baily v. MacDougall, 392 F.2d 155 (4th Cir. 1968); Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967); Raleigh v. Coiner, 302 F.Supp. 1151 (N.D.W.Va. 1969); Semon v. Turner, 289 F. Supp. 803 (D. Utah 1968); United States ex rel. Thurmond v. Mancusi, 275 F. Supp. 508 (E.D.N.Y. 1967); People v. West, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970); DeLuzio v. People, 494 P.2d 589 (Colo. 1972); Barker v. State, 259 So.2d 200 (Fla. 1972); State v. Coe, 290 Minn. 537, 188 N.W.2d 421 (1971); Beltowski v. State, 289 Minn. 215, 183 N.W.2d 563 (1971); State v. Wolske, 280 Minn. 465, 160 N.W.2d 146 (1968); State v. Johnson, 279 Minn. 209, 156 N.W.2d 218 (1968); State v. Judd, 277 Minn. 415, 152 N.W.2d 724 (1967); State v. Starr, 186 Neb. 327, 182 N.W.2d 910 (1971); State v. Poli, 112 N.J. Super. 374, 271 A.2d 447 (1970); Commonwealth v. Fuller, 440 Pa. 161, 269 A.2d 652 (1970); Austin v. State, 49 Wis.2d 727, 183 N.W.2d 56 (1971); State v. Draper, 41 Wis.2d 747, 165 N.W.2d 165 (1969); Galvin v. State, 40 Wis.2d 679, 162 N.W.2d 622 (1968); Cresci v. State, 36 Wis.2d 287, 152 N.W.2d 893 (1967); State v. Reppin, 35 Wis.2d 377, 151 N.W.2d 9 (1967).

39 PLEAS OF GUILTY, *supra* note 2, at §§ 1.8, 3.1(a). For cases citing § 3.1(a), *see* United States ex rel. Scott v. Mancusi, 429 F.2d 104 (2d Cir. 1970); United States ex rel. Brown v. LaVallee, 424 F.2d 457 (2d Cir. 1970); Meyer v. United States, 424 F.2d 1181 (8th Cir. 1970).

recommend agreed sentences. The *Standards* approve each of these three forms of plea agreement when it is appropriate to the circumstances of the case.[40]

The prosecutor has a duty to acknowledge considerations relevant to granting concessions whenever they are present. With this in mind, the *Standards* require equal plea agreement opportunities for defendants occupying similar positions.[41] The facts of a particular case, of course, may lead the prosecutor to refuse to negotiate. If the plea is not an expression of repentance, but is only an attempt to gain leniency, the prosecutor may justifiably force a plea on the original charge. If the guilty plea indicates remorse for criminal acts, sentence concessions are consistent with the rehabilitation theory of criminal punishment.[42] The *Standards* state that although the judge should not participate in plea negotiations themselves,[43] nevertheless, he should be made aware of any agreements that have taken place. Notwithstanding the existence of a plea agreement, the judge must independently decide whether to approve the agreement and whether granting the concessions serves the public interest in the administration of justice.[44]

IV. The Role of Counsel

A. *Defense*

The providency hearing, at which the court accepts a tendered guilty plea, should not be held until the accused has been fully advised both by his lawyer and by the court. Knowledge and understanding on the part of the accused are as constitutionally indispensable as a true factual basis for his plea of guilty.[45] Defense counsel cannot, of course, predict with certainty the outcome of a trial, but the defendant is, nonetheless, entitled to a thorough professional evaluation of his case. Defense counsel, as well as the prosecution, should conduct discovery willingly and expeditiously and should engage in effective and timely plea discussions.[46] The *Standards* prohibit plea negotiation by defense counsel, except with the consent of the defendant.[47] When a guilty plea is predicated upon a plea agreement of any kind, it becomes the duty of both prosecution and defense counsel to see that the court is fully informed. Moreover, unless the court is fully advised, defense counsel should not participate in any proceeding which might

40 PLEAS OF GUILTY, *supra* note 2, at § 3.1(c).
41 *Id.* § 3.1(b).
42 *Id.* at 44.
43 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE, § 4.1(a) (1972) [hereinafter cited as TRIAL JUDGE].
44 TRIAL JUDGE, *supra* note 43, at § 4.1(c)(ii); PLEAS OF GUILTY, *supra* note 2, at § 1.8 lists several considerations which are appropriate in determining this question.
45 PLEAS OF GUILTY, *supra* note 2, at §§ 1.3, 1.4, 1.5, 1.6; McCarthy v. United States, 394 U.S. 459 (1969); Boykin v. Alabama, 395 U.S. 238 (1969).
46 AMERICAN BAR ASSOCIATION, SPECIAL COMMITTEE ON STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE—BEFORE TRIAL § 1.4 (1970) [hereinafter cited as DISCOVERY].
47 PLEAS OF GUILTY, *supra* note 2, at § 3.2, cited with approval in Bresnahan v. People, 487 P.2d 551 (Colo. 1971).

permit a judicial determination of guilt of an accused who elects to enter a guilty plea while persisting in claims of innocence.[48]

As soon as the defense lawyer has an understanding of the factual and legal issues which support the charge against his client, he should determine whether his client's interests would be best served by the entry of a plea of guilty.[49] The defense lawyer has a duty to be aware of the practices and attitudes of the prosecutor and the court relating to plea discussions.[50] It bears repeating that defense counsel must obtain the consent of his client before engaging in plea discussions and must keep his client fully informed of developments in the negotiations.[51] The *Standards* make it abundantly clear that defense counsel, in his negotiations with the prosecution, must maintain the highest integrity. Making false statements or trading the interest of one client for that of another is unprofessional conduct.[52]

B. *Prosecution*

Although it is authorized, the use of plea bargaining is not mandatory, and the prosecutor may elect not to negotiate. Generally, however, to mitigate the evil of prosecutorial over-charging, the prosecutor should consult with defense counsel about disposition of charges by negotiated pleas of guilty.[53] He also has a professional duty not to engage in plea discussions directly with an accused who is represented by counsel.[54] The prosecutor has a number of avenues available for negotiation. He may offer to accept a guilty plea to a lesser or related offense or to drop some charges in exchange for a guilty plea to another. He may also offer to recommend a particular sentence to the court or promise not to request some particular one.[55] It is important that the prosecutor make it clear to defense counsel that he cannot determine the sentence which the judge will impose after a guilty plea is entered.[56] In federal practice, the court discourages the prosecutor from even making sentence recommendations, because the sentencing function belongs to the court.

When inequality in bargaining position resulted in a defendant's inability to enforce a plea agreement, the Ninth Circuit held that the fundamental principle of fairness implicit in due process was violated and set aside the plea.[57] When a prosecutor cannot adhere to a plea agreement, he must take steps to see

48 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, THE DEFENSE FUNCTION § 5.3 [hereinafter cited as DEFENSE FUNCTION].
49 *Id.* § 6.1.
50 DEFENSE FUNCTION, *supra* note 48, at 247.
51 *Id.* §§ 6.1(b), 6.2(a).
52 *Id.* §§ 6.2(b) and (c).
53 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, THE PROSECUTION FUNCTION § 4.1(a) [hereinafter cited as PROSECUTION FUNCTION].
54 PROSECUTION FUNCTION, *supra* note 53, at § 4.1(b) and commentary. The prosecutor must exercise considerable caution in dealing with an uncounseled defendant.
55 *See* Santobello v. New York, 404 U.S. 257 (1971).
56 PROSECUTION FUNCTION, *supra* note 53, at § 4.3.
57 Dillon v. United States, 307 F.2d 445 (9th Cir. 1962).

that his action does not prejudice the defendant.[58] Noncompliance with a plea agreement by the prosecutor undermines the voluntariness of the defendant's plea.[59]

V. Evaluation of a Case Through Full Discovery

Discovery prior to trial should be as full and free as possible to provide the accused with sufficient information to enable him, with the advice of his counsel, to enter an informed plea to the charge as well as to lesser included offenses.[60] The *Standards* offer an omnibus hearing as an appropriate pretrial procedure to ferret out the facts.[61] The court supervises discovery and acts as a catalyst to the process at the omnibus hearing which is only held after counsel for the prosecution and defense have interchanged discoverable facts. A check-list, which assumes that all conceivable issues are exposed and dealt with at an early stage of the proceedings, is an integral part of the omnibus hearing.[62] One of the jurisdictions which has adopted the omnibus hearing has found that one of its greatest resultant advantages is the increase in the number of guilty pleas which are occasioned by the omnibus hearing.[63] Experience has also shown that the omnibus hearing saves trial time and makes a speedy trial possible.[64] When full discovery of the government file is permitted, the defendant and his lawyer can realistically base their plea discussions on the contents of the file. In fact, full discovery is a prerequisite to intelligent and early plea negotiations.

VI. Post-Conviction Review

Even though procedural safeguards inherent in the *Standards* help insulate guilty pleas from subsequent attack, there are occasions when post-conviction relief is dictated. Provisions have been made for the withdrawal of pleas of

58 PROSECUTION FUNCTION, *supra* note 53, at § 4.3(c). For specific guidelines for proper conduct in such proceedings, *see also*, LaBelle, *Negotiated Pleas*, in THE PROSECUTOR'S DESK-BOOK 239 (Healy and Manak eds. 1971).

59 Santobello v. New York, 404 U.S. 257 (1971).

60 DISCOVERY, *supra* note 46, at §§ 1.1, 1.2; AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, art. 320 (Tent. Draft 1972) [hereinafter cited as A.L.I. CODE].

61 DISCOVERY, *supra* note 46, at § 5.1.

62 *Id.* § 5.3. The discovery and pretrial procedures proposed by these *Standards* were first implemented on an experimental basis in the United States District Court for the Southern District of California in 1967 and in the Western District of Texas. *See* Revelle & Ashbaugh, *Criminal Pre-Trial Discovery—A Proposal*, 3 GONZAGA L. REV. 48 (1968). For a critical view of the omnibus hearing concept utilized in San Diego Federal District Court, *see* R. NIMMER, THE OMNIBUS HEARING: AN EXPERIMENT IN RELIEVING INEFFICIENCY, UNFAIRNESS AND JUDICIAL DELAY (1971), and Nimmer, *A Slightly Movable Object—A Case Study in Judicial Reform in the Criminal Justice Process—The Omnibus Hearing*, 48 DENVER L.J. 179 (1972).

63 Panel Discussion (Gillespie, Harrison, Jr., Spears), *Why the Omnibus Hearing Project?* 55 JUDICATURE 377 (1972).

64 Address by Judge John W. Oliver (U.S.D.C., W.D.Mo.), Judicial Conference of the State of Michigan Annual Meeting, September 23, 1972. Judge Oliver cited a recent study which revealed that the time period from the filing of a case to its disposition by guilty plea averaged one month in the Western District of Missouri in contrast to a national median time of 3.4 months. The time period for those cases disposed of by court trial, jury trial, or dismissal was also substantially less than the national average in this district of Missouri; at the same time, a greater percentage of criminal convictions was obtained here than nationally.

guilty when it is necessary to correct a manifest injustice.[65] Unlike Rule 32 of the Federal Rules of Criminal Procedure, the *Standards* provide that a motion to withdraw a guilty plea should not be barred because it is made subsequent to judgment or sentence;[66] the defendant must prove that one of four conditions existed to make withdrawal necessary.[67]

The facts of the *Santobello*[68] case exhibit a prosecution failure to honor a plea agreement, which is one of the four conditions for withdrawing a plea of guilty. Again, note that the *Standards* mandate that post-conviction relief not be dependent on the applicant's attacking a sentence of imprisonment then being served.[69]

When a conviction rests upon a guilty plea, the scope of questions that survive for appellate review is restricted. A few states provide by statute[70] that after

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65 PLEAS OF GUILTY, *supra* note 2, at § 2.1. For cases discussing this section in conjunction with withdrawal of pleas, *see* United States v. Harvey, 463 F.2d 1022 (4th Cir. 1972); United States v. Tabory, 462 F.2d 352 (4th Cir. 1972); United States v. Sambro, 454 F.2d 918 (D.C. Cir. 1971); United States ex rel. Scott v. Mancusi, 429 F.2d 104 (2d Cir. 1970); Tafoya v. State, 500 P.2d 247 (Alaska 1972); People v. Riebe, 40 Ill.2d 565, 241 N.E.2d 313 (1968); People v. Walston, 38 Ill.2d 39, 230 N.E.2d 233 (1967); People v. Baron, 130 Ill. App.2d 588, 264 N.E.2d 423 (1970); People v. Palma, 25 Mich. App. 682, 181 N.W.2d 808 (1970); State v. Robb, 195 N.W.2d 587 (Minn. 1972); State v. Loyd, 291 Minn. 528, 190 N.W.2d 123 (1971); Chapman v. State, 282 Minn. 13, 162 N.W.2d 698 (1968); State v. Wolske, 280 Minn. 465, 160 N.W.2d 146 (1968); State v. Warren, 278 Minn. 190, 153 N.W.2d 273 (1967); Skaggs v. State, 476 S.W.2d 524 (Mo. 1972); Flood v. State, 476 S..2d 529 (Mo. 1972); Peters v. State, 50 Wis.2d 682, 184 N.W.2d 826 (1971); State v. Froelich, 49 Wis.2d 551, 182 N.W.2d 267 (1971); Belcher v. State, 42 Wis.2d 299, 166 N.W.2d 211 (1969); State v. Draper, 41 Wis.2d 747, 165 N.W.2d 165 (1969); Reiff v. State, 41 Wis.2d 369, 164 N.W.2d 249 (1969); State v. Galvin, 40 Wis.2d 679, 162 N.W.2d 622 (1968); LeFebre v. State, 40 Wis.2d 666, 162 N.W.2d 544 (1968); State v. Harrell, 40 Wis.2d 187, 161 N.W.2d 223 (1968); Cresci v. State, 36 Wis.2d 287, 152 N.W.2d 893 (1967).

66 *Id.*

67 PLEAS OF GUILTY, *supra* note 2, at § 2.1, Plea Withdrawal:

> (a) The court should allow the defendant to withdraw his plea of guilty or nolo contendere whenever the defendant, upon a timely motion for withdrawal, proves that withdrawal is necessary to correct a manifest injustice.
>
> (i) A motion for withdrawal is timely if made with due diligence, considering the nature of the allegations therein, and is not necessarily barred because made subsequent to judgment or sentence.
>
> (ii) Withdrawal is necessary to correct a manifest injustice whenever the defendant proves that:
>
> (1) he was denied the effective assistance of counsel guaranteed to him by constitution, statute, or rule;
>
> (2) the plea was not entered or ratified by the defendant or a person authorized to so act in his behalf;
>
> (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; or
>
> (4) he did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement.
>
> (iii) The defendant may move for withdrawal of his plea without alleging that he is innocent of the charge to which the plea has been entered.
>
> (b) In the absence of a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw his plea of guilty or nolo contendere as a matter of right once the plea has been accepted by the court. Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.

68 Santobello v. New York, 404 U.S. 257 (1971).

69 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO POST-CONVICTION REMEDIES § 2.3.

70 5 CODE OF ALABAMA tit. 15, § 266 (1959); 2 MISS. CODE ANN. tit. 10, § 1150 (1956); 1 ORE. REV. STAT. § 138.050 (1967).

a conviction based upon a plea of guilty, either no appeal can be taken or only one raising certain limited issues. The procedural safeguards which are now required for a valid conviction on a plea of guilty reduce the need for appellate review. The *Standards Relating to Criminal Appeals* provide for review of convictions which are based upon a plea of guilty.[71]

VII. Improving the Effective Administration of Justice in Guilty Plea Proceedings

One of the main factors which contribute to public complaint about the courts is the delay which precedes finality in a criminal case. This delay tends to deprive criminal law and its sanctions of their effectiveness. Accordingly, every effort should be made by the trial judge to insure that the providency hearing does not become an avenue for post-conviction relief. The *Standards* seek to insure finality without sacrificing the defendants' rights. Judge Oliver, in reviewing the *Standards,* said:

> If the trial judge, after appropriate omnibus hearing, accepts a plea of guilty consistent with the *ABA Standards on Pleas of Guilty* he should not be bothered about ruling against any post-conviction motion which may later be filed. Indeed, experience establishes that the filing of a post-conviction motion is apparently reduced to a bare minimum if the procedures provided generally by the *ABA Standards* for each step of the criminal process are fairly followed. The quality of the administration of justice is improved to the extent that the occasion for post-conviction review is reduced to a minimum.[72]

In addition to the *Standards,* other efforts are being made to improve the pretrial processing of a case in which a guilty plea is entered.[73] The Ninth Circuit has ruled that Rule 11 of the Federal Rules of Criminal Procedure is mandatory and must be strictly followed.[74] There must be a clear showing on the record that the accepted plea of guilty is intelligently entered with a clear understanding of the consequences.[75] The section in *A Model Code of Pre-Arraignment Procedure* relating to the court's accepting a guilty plea is based in part on the *Standards,* but the requirements of the *Model Code*[76] differ from the *Standards* in some respects. The proposed amendments to Rule 11 attempt to eliminate unfairness to the defendant and the practice of accepting a guilty

71 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO CRIMINAL APPEALS § 1.3(a)(iii).

72 Address by Judge John W. Oliver, *supra* note 64.

73 Some jurisdictions are experimenting with new procedures. *See also* A.L.I. CODE, *supra* note 60, at § 350 *et. seq.;* JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS (1971) [hereinafter cited as PROPOSED RULES]; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURT REPORT (Tent. Draft 1972) [hereinafter cited as COURT REPORT].

74 Heiden v. United States, 353 F.2d 53 (8th Cir. 1965); Freeman v. United States, 350 F.2d 940 (9th Cir. 1965).

75 *Id.*

76 A.L.I. CODE, *supra* note 60, at § 350.4. An "informed choice" rather than a voluntariness test is used, and the *Code* suggests the finding of a reasonable cause, rather than a factual basis for the plea.

plea predicated on a plea bargain without disclosing the agreement.[77] The National Advisory Commission on Criminal Justice Standards and Goals, although adopting some of the *ABA Standards,* has an independent view on sentencing that is related to a plea of guilty and plea negotiations.[78] Its proposals seek to minimize the likelihood that plea negotiations will result in unjust conviction or unwarranted leniency.

As previously mentioned, the judge is free to use any appropriate procedure for determining the accuracy of the guilty plea.[79] The United States District Court for Oregon employs a "Petition to Enter Plea of Guilty,"[80] which,

77 PROPOSED RULES, *supra* note 73, at 11(e)(2), (3), (4). The court requires the disclosure of plea agreements in open court at the time the plea is offered, and the judge is given latitude in sentencing discretion.

78 COURT REPORT, *supra* note 73, at ch. 3, *The Negotiated Plea.* The sentence or the prosecutor's sentence recommendation is not to be the subject of plea negotiation, and a plea of guilty may not be considered as a factor in sentencing. Bargaining concerning the charge is permitted by the Commission; thus, in effect, a basic limit on sentencing is inherently imposed. The Commission feels that this is the only way plea negotiations and informed and rational sentencing can be accommodated within the same system.

79 *See* text at note 20, *supra, et seq.*

80 Petition to Enter Plea of Guilty and Order Entering Plea:

The defendant represents to the Court:

"(1) My full true name is: ..... I am ..... years of age. I have gone to school up to and including ..... I request that all proceedings against me be in my true 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.

"(4) I told my lawyer all the facts and circumstances known to me about the charges made against me in the indictment. I believe that my lawyer is fully informed on all such matters.

"(5) I know that the Court must be satisfied that there is a factual basis for a plea of 'GUILTY' before my plea can be accepted. I represent to the Court that I did the following acts in connection with the charges made against me in Counts .....

(In the above space defendant must set out in detail what he did. If more space is needed, add a separate page.)

"(6) My lawyer has counselled and advised with me on the nature of each charge, on all lesser included charges, and on all possible defenses that I might have in this case.

"(7) I know that I may plead 'NOT GUILTY' to any offense charged against me. If I 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, (d) the right to have the assistance of a lawyer at all stages of the proceedings, and (e) the right to take the witness stand at my sole option; and, if I do not take the witness stand, no inference of guilt may be drawn from such failure.

"(8) I know that if I plead 'GUILTY,' there will be no trial either before a court or jury, and the Court may impose the same punishment as if I had pleaded 'NOT GUILTY,' stood trial and been convicted by a jury.

"(9) My lawyer informed me that the maximum punishment which the law provides is ..... years imprisonment and a fine of $..... for the offense charged in the indictment.

"If at this time I am at least 18 and not more than 26 years of age, I know 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.

"(10) If I am on probation or parole in this or any other Court, I know that by pleading guilty here my probation or parole may be revoked and I may be required to serve time in that case, which will be consecutive, that is, in addition, to any

sentence imposed upon me in this case.

"(11) I declare that no officer or agent of any branch of government (Federal, State, or local) has promised or suggested that I will receive a lighter sentence, or probation, or any other form of leniency if I plead 'GUILTY,' except as follows:

'(Here insert any promises or concessions made to the defendant or to his attorney.)

If anyone else made such a promise or suggestion, except as noted in the previous sentence, I know that he had no authority to do it.

"I know that the sentence I will receive is solely a matter within the control of the Judge. I hope to receive leniency, but I am prepared to accept any punishment permitted by law which the Court sees fit to impose. However, I respectfully request the Court to consider, in mitigation of punishment, that I have voluntarily entered a plea of guilty.

"(12) 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.

"(13) I know that the Court will not permit anyone to plead 'GUILTY' who maintains he is innocent and, with that in mind and because I am 'GUILTY' and do not believe that I am innocent, 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:**

"(14) My mind is clear. I am not under the influence of alcohol or drugs and I am not under a doctor's care. The only drugs, medicines or pills that I took within the past seven days are: ————————.
(If none, so state)

"(15) 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.

"(16) I waive the reading of the indictment in open court, and I request the Court to enter my plea of 'GUILTY' as set forth in Paragraph (13) 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 counselor 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 (13) 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' offered by the defendant in paragraph (13) 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:

"I find that the plea of guilty was made by the defendant freely and voluntarily

when combined with proper inquiries, has greatly reduced the number of motions for post-conviction relief.[81] The petition used in the Oregon court not only insures disclosure of a plea agreement, but also preserves a written record to support the guilty plea. The judge also learns through the petition of problems which he should inquire about before accepting the plea. Experience shows that it takes less than ten minutes for a judge to conduct a providency hearing to

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and not out of ignorance, fear, inadvertence or coercion. I further find that the defendant has admitted the essential elements of the crime charged.

"IT IS THEREFORE 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"

* "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 (13). If the indictment charges a single offense, a defendant who wishes to plead 'GUILTY' should write in Paragraph (13) 'GUILTY as charged in the indictment.' If more than one offense is charged, the defendant may write in Paragraph (13) 'GUILTY as charged in Count(s) ————,' 'NOT GUILTY as charged in Count(s) ————.'

81 Letter from Judge Gus J. Solomon to The Honorable Alfred P. Murrah, Director, The Federal Judicial Center, September 6, 1972:

Several Judges have written to me about the Petition to Enter Plea of Guilty. They want to know when and how the defendants and their lawyers obtain copies of the Petition. They also want to know our procedure in accepting a Petition and plea, including the Judge's interrogation of the defendant.

Other Judges may be interested in my answers.

* * * *

We, in Oregon have had no difficulty in getting the Petitions completed before a defendant enters a plea of guilty.

Most defendants in criminal cases are represented by court-appointed lawyers. Our active Criminal Justice panel has about 60 lawyers, and they serve for at least one year. The lawyers on this panel have all handled some criminal cases, and most of them have practiced for at least five years. At the time they are appointed, or shortly thereafter, they know that a defendant must sign a Petition which must be completed before he enters his plea of guilty.

Most defendants, when arrested after indictment, are brought before a Magistrate. The Magistrate appoints a lawyer for the defendant, informs him of his rights, and may admit him to bail.

When the Magistrate appoints a lawyer, the United States Attorney sends the lawyer a copy of the indictment and notifies him of the time and place of arraignment. The United States Attorney also encloses a copy of the Petition to Enter Plea of Guilty and gives advice on how to complete it. He suggests that the Petition be filled out in the defendant's own handwriting before the hearing and that he make sure that the defendant sets forth in section 5 of the Petition the details of the crime committed. This statement shall contain all the essential elements of the crime.

The procedure is almost the same when the defendant is brought before the Magistrate without having been indicted. Here, another hearing is scheduled to determine probable cause or whether the defendant will waive such a hearing and whether he will also waive indictment. At that time defendant's lawyer is often given the Petition and instructed how to complete it.

In Oregon, we permit wide discovery, and in the ordinary case the defendant's lawyer is given the privilege of examining the government's file. At this meeting, if counsel has not yet been given the Petition and if it appears that the defendant may plead guilty, his lawyer will be given a Petition.

We are now changing our procedure. It will be the responsibility of the Magistrate, and not the United States Attorney, to fix the time and place of arraignment. The Magistrate, and not the United States Attorney, will give the defendant or his attorney the Petition.

In many cases the defendant will plead not guilty when he is first arraigned. At his arraignment, he is given a trial date. If, prior to that date, defendant's

satisfy himself that the plea has been freely and voluntarily made and to accept the tendered plea of guilty.[82]

All of these suggestions and proposals should serve as a basis for legislation which will promote the rational, fair, and efficient administration of criminal justice. Guilt or innocence of one accused of crime should be determined at the earliest possible time, and the adjudication should be final. The *American Bar Association Standards for Criminal Justice* are designed to work as a whole to search out the truth in the fact-finding process; providency hearings are no exception. This article has demonstrated how the *Standards* also endeavor to complement each other to delineate a procedure for disposing of a criminal case fairly and finally by the entry of a valid plea of guilty. Such constructive proposals as those of the American Law Institute, the Judicial Conference of the United States, the National Advisory Commission on Criminal Justice Standards and Goals, and the United States District Court of Oregon must also be considered as valuable supplements. Implementation of the *Standards for Criminal Justice* in every state will bring accuracy and finality to pleas of guilty and will increase the respect and efficiency of our criminal justice system.

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lawyer notifies the United States Attorney that the defendant wants to change his plea, the attorney will be told to have the Petition prepared prior to the hearing.

Wednesday is our regular plea and arraignment day, and one Judge usually takes all the pleas and arraignments that are calendared for that day. The great majority of the defendants who enter pleas of guilty have prepared their Petitions before their cases are called.

Our problem is not in getting the completed Petition; it is in getting the Petition properly completed. Usually the facts of the crime are not set out with sufficient specificity.

The Petition serves a useful purpose, but it is not a substitute for the requirements of Rule 11. It does have the advantage of letting the Judge know if there are any problems about which the Judge should inquire before accepting the plea.

In Oregon, when a defendant is arraigned, the United States Attorney will announce whether it is an indicated guilty plea. If is it, the crier will bring the completed Petition, except for the signatures, to the Judge.

The Courtroom Deputy reads the indictment, particularly if it is a short one. After the defendant enters his plea of guilty, the Judge will interrogate the defendant. If the defendant waives the reading of the indictment, the Judge will summarize the indictment and take the plea.

When I preside, I usually start out with general questions on whether the defendant is satisfied with his lawyer and whether he has entered the plea freely and voluntarily without any promises or threats. I also ask him to tell me how he committed the offense. I have before me his proposed answers to the Petition, and when it appears necessary, I ask him questions based upon his answers. For example, if he failed to set out in writing all the essential elements of the crime, I ask him the necessary questions.

Ordinarily, it takes less than 10 minutes to take the plea and to satisfy myself that the plea is freely and voluntarily made. I will then return the Petition to the defendant for his signature and the signature of his lawyer. I usually tell the defendant that he is to sign the Petition only if all of the statements in it are true and only if he does it freely and voluntarily.

With this type of interrogation we attempt to avoid some of the problems that arise in those cases in which a defendant may later want to be relieved of his plea.

If the plea is a negotiated one, the answers in the Petition are particularly useful because they will alert the Judge to the problems created by this plea and he can ask the questions necessary to eliminate them.

We have not eliminated all 2255's, but with this Petition and with our interrogation, we have greatly reduced them.

82 *Id.*