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Accepting the Indigent Defendant's Waiver of Counsel and Plea of Guilty

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1244 election under Subchapter S is questionable. Presumably, any decrease in the value of stock in an S corporation would be caused by losses in the operation of the business. Under Subchapter S these losses would serve to reduce the basis of each shareholder's stock[253] thereby reducing and possibly nullifying any losses that could be recognized on a subsequent sale of the stock. This, of course, would not be true in a Subchapter C corporation since net operating losses will not be reflected in the shareholder's basis of his stock. Conceivably, however, the fair market value of S corporation stock could drop appreciably in expectation of future losses and a sale of the stock at that time could produce a loss. Although the benefit of section 1244 to an S corporation would probably be limited to this very narrow situation, in view of the minimal likelihood of loss the corporation should perhaps be advised to elect under section 1244.

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ACCEPTING THE INDIGENT DEFENDANT'S WAIVER OF COUNSEL AND PLEA OF GUILTY

THE PROBLEM

An indigent defendant may neither plead guilty nor waive his right to counsel unless the trial court first determines that he does so *voluntarily* and with sufficient *understanding* of the situation to enable him to make a rational decision. This note discusses the knowledge that constitutes understanding on the part of the defendant, the extent to which the requirements vary with circumstances, and the accuracy of the plea.

253. CODE §1376 (b) (1).

Practical as well as social and moral reasons[1] demand that criminal convictions without trial or counsel be fair and reliable.[2] Plea bargaining may have a pervasive effect on the fairness and reliability of convictions that involve unsophisticated, unrepresented defendants. Such defendants may be unaware of bargaining opportunities[3] or unable to evaluate accurately the relative merit of choices available to them.[4] The danger is always present that an innocent defendant may plead guilty because of threats, fear of damaging publicity, or fear that insisting upon a trial may result in a harsher sentence.[5] Moreover, plea bargaining may cause disparate results when un-

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1. "[T]he fact that opportunities and techniques for bargaining exist . . . can have an adverse effect upon attempts to rehabilitate and generally to decrease crime rates. What happens . . . when one man . . . does not know of bargaining techniques . . . [and] is sentenced to prison while another more sophisticated offender . . . who commits the same offense, arranges . . . probation? Certainly the rationalizations of the man sentenced to prison . . . that he is a 'fall guy' . . . make rehabilitation far more complex if not impossible." Newman, *Pleading Guilty for Consideration: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780, 790 (1956). *See* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 224 (1966).

2. In eight states, the federal district courts, and the District of Columbia an average of 87% of the convictions were found to have been based on pleas of guilty. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 9 (1967). A study of the criminal docket of the Eighth Judicial Circuit of Florida revealed that in 1964 9% of the criminal defendants who appeared at arraignment waived counsel and pleaded guilty as compared with 5% in 1967. In 40% of the 1967 cases the court withheld adjudication and placed the defendant on probation. In part, the low percentage of defendants who waived counsel and pleaded guilty in 1967 can be explained by the practice in the Eighth Circuit of discouraging such waiver. Often the court, without asking the indigent defendant if he desires the services of the public defender, will appoint that officer to consult with the defendant before accepting his plea. *See* AMERICAN BAR FOUNDATION, DEFENSE OF THE POOR (National Report) 9, 89-102 (1954); Brown, *Collateral Post Conviction Remedies in Florida*, 20 U. FLA. L. REV. 306 n.5 (1968).

3. AMERICAN BAR FOUNDATION, *supra* note 2, at 91-93; D. NEWMAN, *supra* note 1, at 212-15; Newman, note 1 *supra*, *passim*.

4. Newman, *supra* note 1, at 785.

5. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 11-12 (1967). The defendant may believe that, by demanding counsel, he will antagonize the prosecutor or the judge. He may not trust lawyers or he may have bargained for a concurrent sentence, a lesser sentence, or a charge dropped. Newman, *supra* note 1, at 783 (table III). One author has suggested that: "[T]he defendant who is first offered counsel at arraignment more often has reached a decision to plead guilty, acting either on his own conscience or on the advice of his cellmates and therefore sees an appointment as both futile and a potential cause of additional delay . . . ." Mazor, *The Right To Be Provided Counsel: Variations on a Familiar Theme*, 9 UTAH L. REV. 50, 77 (1964). A defendant may plead guilty because he wants the clock to start running. Other factors inducing such action include the attitude of the judge, the intelligence and attitude of the defendant, the stage at which counsel is offered, the setting in which counsel is offered, and the size and nature of the city in which the court sits. AMERICA BAR FOUNDATION, *supra* note 2, at 100. In a random sample of 724 male defendants convicted in a metropolitan court upon a plea of guilty, 373 professed their innocence. Of these, 86 claimed to have been manipulated, 147 were pragmatic (they wanted to get the trial over with or had prior records), 92 claimed that their lawyers induced them to plead guilty, 33 claimed to have been framed or betrayed, and 15 blamed probation officers or psychiatrists for a "bad report." An additional 248 defendants, who

represented, unknowledgeable defendants are overcharged by prosecutors attempting to gain initially advantageous bargaining positions.[6]

In a long line of "right-to-counsel" cases culminating in *Gideon v. Wainwright*,[7] the United States Supreme Court faced issues not unlike those discussed in this note. The right-to-counsel cases concern the defendant's understanding as it affects his ability to defend himself. The flexible early approach determined understanding on the basis of age, experience, and education. *Gideon* abandoned this method in favor of the single test of indigency. The decisions indicate a similar trend toward fixed requirements for determining understanding as it relates to pleas of guilty and waivers of counsel by indigents. The trend may culminate in the disallowance of an indigent defendant's right to waive counsel or plead guilty until he has conferred with an attorney. Several jurisdictions already follow such a rule.[8] In other jurisdictions similar counseling functions are performed by trial judges.[9]

INQUIRY INTO THE VOLUNTARINESS OF THE PLEA

Rule 1.170 (a) of the Florida Rules of Criminal Procedure requires a judicial determination of voluntariness before a plea is accepted. Any adjudication of guilt in a state or federal court based upon an involuntary plea of guilty, whether unfairly obtained or given through ignorance, fear, or inadvertence, is not consistent with due process of law.[10] The determining factor is whether the defendant, at the time he pleaded guilty, had that free will essential to a reasoned choice whether to continue to trial or enter a plea of guilty.[11] Guilty pleas are not rendered involuntary merely because counsel advised the defendant concerning the probabilities of various alternatives available to the court[12] or because an understanding existed as to the punishment to be recommended.[13] The plea is voluntary if genuinely entered by a

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would not admit guilt but did not press their innocence, stated that it was the only way out. A. BLUMBERG, THE PRACTICE OF LAW AS CONFIDENCE GAME: ORGANIZATIONAL COOPERATION OF A PROFESSION 235-36 (1968).

6. D. NEWMAN, *supra* note 1, at 43-44; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 12 (1967). Such considerations have led one author to observe that any valid system of plea negotiations would presumably require that defendant have counsel. *Id.* at 116.

7. 372 U.S. 335 (1963).

8. *See* notes 104-06 *infra*.

9. *See* cases cited notes 33, 34 *infra*.

10. Busby v. Holman, 356 F.2d 75 (5th Cir. 1966); *see* Machibroda v. United States, 368 U.S. 487, 493 (1962); Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956); Kerchevel v. United States, 274 U.S. 220, 223 (1927); United States *ex rel.* McGrath v. La Valler, 319 F.2d 308 (2d Cir. 1963).

11. Busby v. Holman, 356 F.2d 75, 77 (5th Cir. 1966). "Of necessity we deal in probabilities in deciding whether the defendant, at the time he pleads guilty, had that free will essential to a reasoned choice either to continue with the trial or to enter a plea of guilty. Its determination involves an evaluation of psychological factors and elements that may be reasonably calculated to influence the human mind." United States v. Tateo, 214 F. Supp. 560, 565 (S.D.N.Y. 1963).

12. Baker v. State, 188 So. 2d 346 (3d D.C.A. Fla. 1966).

13. *See* Paul v. State, 165 So. 2d 779 (3d D.C.A. Fla. 1964).

defendant who is guilty, who understands his situation, his rights, and the consequences of his plea, and who was neither deceived nor coerced.[14] The judge must additionally determine whether a guilty plea based on a bargain or agreement was made voluntarily.[15]

When a defendant claims his plea of guilty was coerced by a prior involuntary confession, his understanding is critical. A judgment on a guilty plea that was entered voluntarily on *advice of counsel* is not invalid because the defendant had previously made an inadmissible confession. Legality of the confession is relevant only to the extent that it may affect the voluntary character of the plea. Although illegally obtained, a confession may not be the basis for a collateral attack upon a judgment of conviction entered upon a *voluntary* and *understanding* plea of guilty.[16] The assumption is that prior confessions that the defendant knew were inadmissible would not induce a guilty plea. Often the presence of counsel is the determining factor since courts implicitly assume that counsel informed the defendant about the inadmissibility of the confession.[17] Another factor often examined by the courts is the presence or absence of evidence of guilt other than a confession.[18]

In *Smith v. Wainwright,* the United States Court of Appeals for the Fifth Circuit stated:[19]

> [T]here is a fine line between refusing on the one hand to set aside a plea of guilty where there was a possible coerced confession which did not effect the voluntariness of the plea and, on the other, possibly setting aside the plea if the confession caused the plea and thus rendered it involuntary. The line must be drawn, however, on the facts and after a hearing. And there must be a hearing when the allegations of the petition make out a possible fatal infection of the plea from the confession.

The court remanded this case for an evidentiary hearing even though the defendant had been represented by counsel at his arraignment.[20] A Florida court will not presume that the confession caused the guilty plea;[21] how-

14. Cooper v. Holman, 356 F.2d 82 (5th Cir. 1966); *see* Martin v. United States, 256 F.2d 345, 349 (5th Cir. 1958).

15. Cooper v. Holman, 356 F.2d 82 (5th Cir. 1966).

16. *E.g.,* Busby v. Holman, 356 F.2d 75, 77 (5th Cir. 1966); Hull v. State, 201 So. 2d 235 (4th D.C.A. Fla. 1967).

17. *E.g.,* Brown v. Beto, 377 F.2d 950 (5th Cir. 1967) (defendant had counsel); Busby v. Holman, 356 F.2d 75, 77 (5th Cir. 1966) (defendant failed to prove his counsel's incompetence); Childress v. State, 181 So. 2d 655 (1st D.C.A. Fla. 1966).

18. *E.g.,* Knowles v. Gladden, 378 F.2d 761 (9th Cir. 1967); Camacho v. State, 203 So. 2d 23 (2d D.C.A. Fla. 1967) (presence of counsel and sufficient other facts established plea as voluntary); Taylor v. State, 169 So. 2d 861 (3d D.C.A. Fla. 1964) (defendant had counsel and it did not appear that there was absence of other evidence).

19. 373 F.2d 506, 507 (5th Cir. 1967). *See also* Streets v. Wainwright, 402 F.2d 87 (5th Cir. 1968).

20. Smith v. Wainwright, 373 F.2d 506 (5th Cir. 1967); *see* Townsend v. Sain, 372 U.S. 293 (1963); *cf.* Waley v. Johnston, 316 U.S. 101 (1942); Jones v. State, 165 So. 2d 191 (Fla. 1964).

21. William v. State, 174 So. 2d 97, 99-100 (2d D.C.A. Fla. 1965), *appeal dismissed,* 179

ever, in *Thompson v. State*[22] the possibility that a forced confession had induced the defendant's guilty plea caused a relitigation of the issue. Arguably, the burden should rest upon the prosecution to prove that the coerced confession did not induce the defendant's later action. This rule prevails when a defendant alleges that his testimony at trial[23] or a second confession[24] was induced by a prior inadmissible confession. The defendant's knowledge concerning the existence of other evidence of guilt will often control the outcome because the critical issue is the effect of the prior confession on the defendant's will. This is so even when the defendant did not know that the prior confession was inadmissible.[25]

FINDING AN UNDERSTANDING WAIVER AND PLEA

Arraignment may be a critical stage in the proceedings entitling the indigent defendant to court appointed counsel.[26] In Florida, arraignment is a critical step if the defendant pleads guilty. If the right to counsel is not intelligently and understandingly waived at arraignment or by subsequent action of the accused, a conviction grounded upon a guilty plea entered without counsel is constitutionally defective.[27] Without the requisite understanding an indigent defendant cannot validly plead guilty because both the waiver and the plea itself are invalid.[28]

Rule 1.160 (e) of the Florida Rules of Criminal Procedure requires that the trial court advise an unrepresented defendant of his right to counsel and to court appointed counsel, if indigent. If the defendant understandingly waives counsel, such waiver must be in writing.

Standard To Be Used in Determining Understanding

Waiver is the intentional relinquishment or abandonment of a known right or privilege. In earlier cases, trial courts were instructed to look to the

So. 2d 211 (1965), *cert. denied,* 382 U.S. 963 (1965). *See also* Freeland v. State, 191 So. 2d 245, 250 (Ala. App. 1966). There must be averment and clear proof of cause and effect between the confession and plea; it would also seem necessary to establish counsel's inadequateness.

22. 176 So. 2d 564, 566 (3d D.C.A. Fla. 1965). *But see* Brown, *supra* note 2, at 324.

23. Harrison v. United States, 392 U.S. 219 (1968).

24. Darwin v. Connecticut, 391 U.S. 346 (1968).

25. Taylor v. State, 169 So. 2d 861 (3d D.C.A. Fla. 1964) (neither defendant nor his attorney could have known the confession was inadmissible since Escobedo v. Illinois, 378 U.S. 478 (1964), had not been decided).

26. White v. Maryland, 373 U.S. 59 (1963). In Hamilton v. Alabama, 368 U.S. 52 (1961), the Supreme Court held that arraignment is a critical stage, and denial of counsel at that stage requires reversal, even though no prejudice is shown.

27. *E.g.,* Carnley v. Cochran, 369 U.S. 506, 515 (1962); Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116, 118 (1956); *cf.* Sardinia v. State, 168 So. 2d 674 (Fla. 1964) (the court found that defendant's failure to request withdrawal of his plea of guilty or tender any defense or proceed to full trial reaffirmed his plea and waived lack of counsel at arraignment).

28. *E.g.,* Boykin v. Alabama, 395 U.S. 238 (1969). The element of understanding is expressed in terms of voluntariness since a plea of guilty or waiver of counsel given through ignorance or inadvertence is deemed involuntary and inconsistent with due process of law.

background, experience, and conduct of the accused in determining whether a waiver of counsel was intelligent.[29] A weighty responsibility is placed upon the trial judge; he must indulge every reasonable presumption against waiver of so fundamental a right.[30]

The most comprehensive statement of the requirements placed upon the trial court is found in *Von Moltke v. Gillies*:[31]

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

Although *Von Moltke* stated specifically the minimum amount of knowledge the court must impart to the defendant, it did not dispel the confusion in this area both because it involved a federal prisoner and because it was a plurality, rather than a majority, opinion.[32]

Like *Gideon v. Wainwright* the *Von Moltke* opinion indicated a dissatisfaction with the prior flexible approach and the wide discretion allowed the trial court. Nonetheless, *Von Moltke* permits the extent and nature of the judge's inquiry and the amount of information that he must impart to the defendant to remain situational once certain minimum standards have been met. Several federal[33] and state courts[34] have interpreted this decision

29. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *See, e.g.*, McNeal v. Culver, 365 U.S. 109 (1961) (lack of education, mental illness, complex legal questions); Rice v. Olson, 324 U.S. 786 (1945) (possible defenses too complicated for layman). A defendant may be entitled to counsel because of the gravity of the crime, his age and education, the conduct of court or prosecutor, the complicated nature of the offense and possible defenses. Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948).

30. Johnson v. Zerbst, 304 U.S. 458 (1938).

31. 332 U.S. 708, 723-24 (1948).

32. *Id.* at 708, 709, 727, 731.

33. Sessions v. Wilson, 372 F.2d 366, 370 (9th Cir. 1967) (*Von Moltke* applied to state courts); Shawan v. Cox, 350 F.2d 909 (10th Cir. 1965) (*Von Moltke* applied to state courts sub silentio); United States v. Pennsylvania, 343 F.2d 447 (3d Cir. 1965) (*Von Moltke* applied to state courts sub silentio); United States v. Lister, 247 F.2d 496 (2d Cir. 1957) (in discharging duty imposed by rule 11 federal courts must apply *Von Moltke*); Snell v. United States, 174 F.2d 580, 582 (10th Cir. 1949) (federal courts must adhere to *Von Moltke*).

34. Bement v. State, 91 Idaho 388, 422 P.2d 55 (1966); *accord*, Ebersole v. State, 91 Idaho 630, 428 P.2d 947 (1967); Bundrant v. Fogliano, 82 Nev. 388, 419 P.2d 293 (1966); Glynn v. State, 442 P.2d 526 (Crim. App. Okla. 1968). *Compare* Commonwealth v. Murphy, 210 Pa. Super. 524, 233 A.2d 594 (1967), *with* Commonwealth *ex rel.* McCray v. Rundle, 415 Pa. 65, 202 A.2d 303 (1964). *Compare* People v. Chesser, 29 Cal. 2d 815, 178 P.2d 761 (1947), *with In re* Jones, 265 Cal. App. 2d 376, 71 Cal. Rptr. 172 (Dist. Ct. 1968).

as requiring a fixed minimum standard and have adopted it in its entirety. However, most courts still follow the more flexible approach, even though their opinions often refer to some of the specfic requirements found in *Von Moltke*.[35]

Importance of the Record

Whether the trial court performs some or all of the *Von Moltke* requirements, clearly the record is not conclusive on the issue of voluntariness or understanding. Although the proceedings may appear satisfactory from the transcript, facts outside the record may show a defendant's waiver not to have been intelligent and understanding.[36] Nor is the trial judge's belief that the defendant acted with intelligence and understanding conclusively dispositive of the issue.[37] When a denial of constitutional protections is asserted by allegations of fact not patently frivolous or false considering *the whole record,* the proceedings may not be summarily dismissed merely because a state prosecuting officer files an answer denying the allegations.[38] Federal courts must also grant an evidentiary hearing to habeas corpus applicants when state factfinding procedures were inadequate to afford a full and fair hearing.[39] When substantial issues of fact exist concerning events in which the defendant participated, the court should require his presence.[40] If testimony is to be taken, either the defendant or his counsel must be present.[41]

Citing *Von Moltke,* the Supreme Court of Florida has adopted the rule that the trial judge must inform an indigent defendant of the nature of the charges and his right to court appointed counsel.[42] Florida decisions conflict as to what other facts must appear of record before a court may deny without hearing a petition to vacate judgment and sentence.[43]

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35. *E.g.,* Coates v. United States, 273 F.2d 514, 515 (D.C. Cir. 1959) (inquiry into defendant's understanding fell short of penetrating examination required by *Von Moltke*); Arnold v. United States, 271 F.2d 440, 442 (5th Cir. 1959) (inquiry fell short of depth required by *Zerbst* and *Von Moltke*); Davis v. United States, 226 F.2d 834 (8th Cir. 1955) (court must inform defendant of the nature of charges and range of allowable punishments).

36. Sanders v. United States, 373 U.S. 1 (1963); United States v. Washington, 341 F.2d 580 (10th Cir. 1949); *see* Alford v. Wainwright, 156 So. 2d 1 (Fla. 1963) (defendant who was of low mentality had been refused counsel at preliminary hearing and believed that making a request of trial court would be futile).

37. Sanders v. United States, 373 U.S. 1, 19 (1963).

38. *E.g.,* Pennsylvania v. Claudy, 350 U.S. 116 (1956); Hawk v. Olson, 326 U.S. 271 (1945); Smith v. O'Grady, 312 U.S. 329 (1941).

39. Townsend v. Sain, 372 U.S. 293 (1963); *accord,* United States v. Russell, 388 F.2d 21 (3d Cir. 1968).

40. United States v. Hayman, 342 U.S. 205 (1952); King v. State, 157 So. 2d 440, 444 (2d D.C.A. Fla. 1963).

41. *See* Lambert v. State, 169 So. 2d 374 (1st D.C.A. Fla. 1964); Dickens v. State, 165 So. 2d 811 (2d D.C.A. Fla. 1964).

42. Mason v. State, 176 So. 2d 76 (Fla. 1965).

43. *Compare* McKenzie v. State, 187 So. 2d 69 (2d D.C.A. Fla. 1966), *with* Donald v. State, 166 So. 2d 453 (2d D.C.A. Fla. 1964). For an example of a record that justifies such a denial, *see* Stanley v. State, 203 So. 2d 31 (2d D.C.A. Fla. 1967).

Federal trial judges are required by rule 11 of the Federal Rules of Criminal Procedure to address the defendant personally when determining whether his plea is voluntary and made with understanding both of the nature of the charge and the consequences of the plea. When a guilty plea is proffered, the court must also satisfy itself that a factual basis for the plea exists.

McCarthy v. United States provides the basic guidelines for federal courts:[44]

> [A]lthough the procedure embodied in Rule 11 has not been held to be constitutionally mandated . . . it is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary. . . . [T]he Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post conviction attacks. . . . [B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

In *Boykin v. Alabama*[45] the Supreme Court held, in effect, that state courts must substantially comply with rule 11. Regardless of whether the defendant had counsel, the record must not only show that the guilty plea was voluntary and understanding, but also specifically that the court informed the defendant of his right to jury trial, his right to confront his accusers, and his privilege against compulsory self-incrimination. The failure to comply is reversible error and the defendant must be allowed to plead anew.[46] If rule 11 represents the minimum constitutional requirement, then it is applicable to the states in its entirety, including the provisions requiring the court to inform the defendant of the consequences of his plea and to conduct an inquiry into the factual basis of the plea.

Informing the Defendant of His Right to Counsel

An indigent defendant without counsel cannot plead guilty in either a state or federal court unless he has been advised in clear terms of his right to court appointed counsel.[47] Informing the defendant that he has this right depending upon "whether [he is] guilty or not" is insufficient.[48] The advice

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44. 394 U.S. 459, 465 (1969); *see* A.B.A. STANDARDS RELATING TO PLEAS OF GUILTY (tent. draft 1967); D. NEWMAN, *supra* note 1, at 22-24. McCarthy v. United States, 394 U.S. 459 (1969), was held to be nonretroactive in Halliday v. United States, 394 U.S. 831 (1969).

45. 395 U.S. 238 (1969).

46. McCarthy v. United States, 394 U.S. 459 (1969), held this was the effect of a failure to comply with rule 11.

47. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966); Mason v. State, 176 So. 2d 76 (Fla. 1965).

48. Machwart v. State, 222 So. 2d 38, 42 (2d D.C.A. Fla. 1969).

may not be given in such a manner that the defendant thinks his choice is between trial with counsel or pleading guilty without it.[49] Since waiver of counsel will not be presumed from a silent record, the absence of a request for counsel cannot be treated as a waiver.[50] If a waiver of counsel appears in the record, the burden shifts to the defendant to prove by a preponderance of the evidence that it was not voluntary and understanding.[51] However, the defendant need not literally say, "I waive counsel."[52] In Florida, arraignment, trial, and sentencing are distinct critical stages and each requires the court to offer counsel.[53] Denial of counsel at a critical stage may fatally taint any later waiver.[54]

Informing the Defendant of the Nature of the Charge

Due process of law requires that the defendant be informed of the nature of the charge against him.[55] Rule 1.160 (a) of the Florida Rules of Criminal Procedure states that arraignment consists of reading the accusatorial writ or an oral statement of its substance and then calling upon the defendant to plead to the charge.[56] If the defendant waives the reading or statement, or if he pleads or proceeds to trial without objection, he waives any objection to a failure to arraign or to an irregularity in the arraignment procedure.[57] Rule 1.170 (a) makes it clear, however, that the judge must make a determination that the defendant understands the charge.

Florida's new constitution provides that the accused shall, upon demand, be informed of the nature of the charges.[58] The phrase "upon demand" is

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49. McKenzie v. State, 187 So. 2d 69 (2d D.C.A. Fla. 1966).

50. Carnley v. Cochran, 369 U.S. 506 (1962); Rice v. Olson, 324 U.S. 786 (1945). In Mason v. State, 176 So. 2d 76 (Fla. 1965), the failure to request counsel was held not to constitute a waiver. The court had the duty to inform the defendant of his right to his own counsel or to state supplied counsel; *accord*, Summerlin v. State, 186 So. 2d 77 (1st D.C.A. Fla. 1966).

51. Mason v. State, 176 So. 2d 76 (Fla. 1965); Leeds v. State, 187 So. 2d 77 (2d D.C.A. Fla. 1966); King v. State, 157 So. 2d 440 (2d D.C.A. Fla. 1963).

52. In Brisbon v. State, 201 So. 2d 832 (3d D.C.A. Fla. 1967), the police had read defendant's rights to him, as required by *Miranda*. They asked him if he wanted to make a statement without counsel, the defendant replied, "Yes." *But cf.* Arnold v. United States, 271 F.2d 440, 441 (4th Cir. 1959) (defendant, when asked if he wanted counsel, pointed to probation officer).

53. Machwart v. State, 222 So. 2d 38 (2d D.C.A. Fla. 1969).

54. Williams v. Alabama, 341 F.2d 777 (5th Cir. 1965) (defendant had lost the defense of insanity at the arraignment, when he was without counsel); *see* Alford v. Wainwright, 156 So. 2d 1 (Fla. 1963).

55. Smith v. O'Grady, 312 U.S. 329, 334 (1941); Munich v. United States, 337 F.2d 356 (9th Cir. 1964). *See also* Thompson, *The Judges Responsibility on a Plea of Guilty*, 62 W. VA. L. REV. 213, 220 (1960).

56. In Roberts v. State, 199 So. 2d 341 (2d D.C.A. Fla. 1967), the court stated that a plea of nolo contendere cannot be accepted by the trial court when a capital offense is charged, even if the court plans to grant mercy.

57. FLA. R. CRIM. P. 1.160 (b) (1967).

58. FLA. CONST. Decl. of Rights §16.

new; its inclusion is presumed intentional.[59] In light of the statement by the United States Supreme Court that "[R]eal notice of the true nature of the charge . . . [is] the first and most universally recognized requirement of due process,"[60] the inclusion of this phrase can have no effect on the defendant's substantive rights. However, it may be a declaration of a public policy disfavoring the expansion of the rights of criminal defendants. The real issue is what constitutes sufficient compliance, and particularly, whether the court must inform the defendant of lesser included offenses.

Because the plea is an admission of all the elements of the charge, it requires a sophisticated knowledge of the law in relation to the facts.[61] No set procedure is required to inform the defendant of the nature of the charge. Concerning the requirements of federal rule 11, the Court in *McCarthy* said:[62]

> The nature of inquiry will vary from case to case and we therefore do not establish any guidelines other than those expressed in the rule itself . . . however when the charge encompasses included offenses, personally addressing the defendant as to his understanding of the essential elements of the charge . . . would seem a necessary prerequisite to a determination that he understands the meaning of the charge. In all such inquiries matters of reality, and not mere ritual, should be controlling.

One purpose of the above inquiry is to protect the defendant who pleads voluntarily and with understanding of the charge, but who fails to realize that the charge does not encompass his conduct.[63] It is doubtful that the defendant, even after an extended explanation of the charge, has the legal acumen necessary to know if his conduct technically falls within the charge.[64] By requiring this dialogue between court and defendant, the legal knowledge of the judge may be utilized to evaluate the defendant's conduct in light of the offense charged.

As in the pre-*Gideon* right-to-counsel cases, the number, complexity, and the seriousness of the charges are often controlling factors. Florida courts have relied upon age and the seriousness of the charges as tests of understanding.[65] In the absence of difficulty involving these factors[66] or where the record has refuted the defendant's allegations,[67] Florida courts have found the requisite understanding.

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59. *See* Reitman v. Mulkey, 387 U.S. 369 (1967); Advisory Opinion to the Governor, 112 So. 2d 843 (Fla. 1959).

60. Smith v. O'Grady, 312 U.S. 329, 334 (1941).

61. McCarthy v. United States, 394 U.S. 459, 466 (1969); A.B.A. STANDARDS RELATING TO PLEAS OF GUILTY, note 44 *supra* §1,4 (a) comments.

62. McCarthy v. United States, 394 U.S. 459, 467 n.20 (1969).

63. *Id.* at 467.

64. *See generally* McNeal v. Culver, 365 U.S. 109 (1961).

65. Mullins v. State, 157 So. 2d 701 (1st D.C.A. Fla. 1963).

66. Spriggs v. State, 158 So. 2d 786 (1st D.C.A. Fla. 1963); *see* United States v. Washington, 341 F.2d 277 (3d Cir. 1965) (defendant was able to understand the simple conspiracy charge).

67. Gilroy v. State, 212 So. 2d 823 (2d D.C.A. Fla. 1968).

Having adopted the *Von Moltke* formula, the United States Court of Appeals for the Ninth Circuit has indicated that due process and rule 11 require that the defendant understand the charge, the acts necessary to establish guilt, and the consequences of pleading guilty.[68] Judicial determination of understanding must have a substantial basis in fact, and the single question: "Do you understand the charge?" does not sufficiently establish such a basis.[69] When the charge describes the defendant's conduct completely, adequately and accurately, and when the evidence and circumstances clearly demonstrate that he consciously participated in such conduct, the court need not set forth finely-spun explanations and definitions of other possible charges.[70]

Informing the Defendant of the Consequences

Knowledge of the consequences of the plea relates to the fairness of the proceedings and to the consensual nature of the plea. Even in the absence of legislation or specific court rule,[71] appellate courts have generally required trial judges to inform defendants of the consequences of their pleas.[72] While the Florida Rules of Criminal Procedure do not require a warning of the consequences, the author's comments to *Florida Statutes Annotated* suggest that such a warning be given.[73] Usually this is interpreted to mean that the court must inform the defendant of the maximum penalty,[74] but not the minimum penalty or collateral consequences of conviction.[75] *Boykin v. Alabama* requires the court to inform the defendant that by pleading guilty he waives his right to jury trial, right to confront his accusers, and privilege against self-incrimination. Whether this requirement also includes a warning of the maximum permissible sentence is still uncertain.[76]

If the unrepresented defendant is young or inexperienced, failure to advise him of the consequences of his plea may deny him a fair hearing,[77] particularly if the charge is a serious one involving a heavy penalty.[78] Guilty

68. Munich v. United States, 337 F.2d 356 (9th Cir. 1964).

69. *Id.* at 359; *see* Dorrough v. United States, 385 F.2d 887, 890 (5th Cir. 1967). *See also* Williams v. United States, 385 F.2d 46, 47 (5th Cir. 1967) (not clear from record that defendant had any real understanding of the nature of the indictment or the allowable punishment); Vellky v. United States, 279 F.2d 697, 699 (6th Cir. 1960) (even though defendant waived counsel he was entitled to more of an explanation than was given).

70. Dorrough v. United States, 385 F.2d 887, 893 (5th Cir. 1967) (the offense described in the information coincided exactly with defendant's conscious conduct).

71. *E.g.*, COLO. REV. STAT. ANN. §39-7-8 (1964); MICH. STAT. ANN. §28.1058 (1954) (similar to rule 11); ARIZ. R. CRIM P. 182 (1966).

72. A.B.A. STANDARDS RELATING TO PLEAS OF GUILTY, note 44 *supra* §1.4(c)(i), (ii), (iii) comments; D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 32 (1966); *see* Annot., 97 A.L.R.2d 549 (1964).

73. 33 FLA. STAT. ANN. §1.170 (1968).

74. D. NEWMAN, *supra* note 72, at 8.

75. United States v. Cariola, 323 F. 2d 180, 186 (3d Cir. 1963).

76. 395 U.S. 238 (1969).

77. *See* Uveges v. Pennsylvania, 335 U.S. 437 (1948); Von Moltke v. Gillies, 332 U.S. 708 (1948); Kercheval v. United States, 274 U.S. 220 (1927).

78. *See* Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956).

pleas entered without knowledge of the maximum and minimum penalties might be found to have been obtained unfairly because of the defendant's ignorance.[79]

Although withdrawal of a guilty plea in Florida is normally discretionary, the court must allow its withdrawal if it appears that the defendant was ignorant of his rights or the consequences of his acts, if he was unduly influenced by hope or fear, or if the plea was entered under some mistake or misapprehension.[80] Prior to the present rule 11 requirement that judges inform defendants of the consequences of their pleas, the federal appellate courts held that lack of awareness of the possible range of sentence was not a factor that alone demanded vacation of a sentence.[81] Under the present rule 11, a defendant *must* be informed of the maximum sentence.[82] Arguably, this is one of the "consequences" mentioned in *Boykin v. Alabama,* which the defendant must be aware of before his guilty plea can constitutionally be accepted.

Informing the Defendant of Possible Defenses

In the pre-*Gideon* right-to-counsel cases the possible existence of a legal defense beyond the understanding of a layman was often considered as a circumstance that required a defendant to have counsel.[83] In one such case, the Supreme Court stated in dictum: "[T]he entry of a guilty plea might have raised a fact issue as to whether the accused did not intelligently and understandingly waive his constitutional right."[84] If a trial judge's conversation with a defendant suggests, or should suggest, the existence of a possible defense, the court should not accept a proffered guilty plea.[85] Even when the existence of a possible defense has not been suggested, there is support for the argument that a trial court has a duty to explain to an accused the possible defenses that may be involved.[86]

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79. *See* Boykin v. Alabama, 395 U.S. 238 (1969); Busky v. Holman, 356 F.2d 75 (5th Cir. 1966).

80. Rubenstein v. State, 50 So. 2d 708 (Fla. 1951). *But see* Stratton v. State, 77 So. 2d 864 (Fla. 1955) (if defendant is a mature, college educated man, the rule that a person without counsel may withdraw a plea of guilty because of extreme youth, inexperience or illiteracy is not applicable).

81. *E.g.,* Verdon v. United States, 296 F.2d 549, 553 (8th Cir. 1961); *accord,* United States v. Kniess, 264 F.2d 353, 356 (7th Cir. 1959); Twining v. United States, 321 F.2d 432, 436 (5th Cir. 1963).

82. James v. United States, 388 F.2d 453 (5th Cir. 1968); Beufve v. United States, 344 F.2d 958 (5th Cir. 1965); McCullough v. United States, 231 F. Supp. 740 (N.D. Fla. 1964).

83. *See, e.g.,* Chewning v. Cunningham, 368 U.S. 443 (1962) (difficult problem of local law); Reynolds v. Cochran, 365 U.S. 525 (1961) (difficult problem of rules of evidence and constitutionality).

84. Carnley v. Cochran, 369 U.S. 506, 515 (1962).

85. McKenzie v. State, 187 So. 2d 69 (2d D.C.A. Fla. 1966). *See also* Donald v. State, 166 So. 2d 453 (2d D.C.A. Fla. 1964).

86. United States v. McGee, 242 F.2d 520 (7th Cir. 1957), held that it was not the duty of the trial judge to explain or enumerate for the accused the possible defenses. The Supreme Court *reversed per curiam,* 355 U.S. 17 (1957).

Neither the Florida Rules of Criminal Procedure, the Federal Rules of Criminal Procedure, nor the *A.B.A. Standards Relating to Pleas of Guilty* expressly require trial courts to inform defendants of possible defenses. Federal rule 11 and section 1.6 of the *A.B.A. Standards Relating to Pleas of Guilty* do, however, require courts to inquire into the factual basis of guilty pleas. Hopefully, such inquiries would alert the courts to the existence of possible defenses. The courts should then either refuse to accept the pleas of guilty or at least inform defendants of the defenses.

DETERMINING THE ACCURACY OF THE PLEA

By inquiring into the factual basis of the plea, a court may acquire information that facilitates evaluation of the defendant's competency to plead guilty and the appropriateness of the particular charge. In addition, the inquiry assures the court that the defendant committed a crime at least as serious as the one charged, which acts as a check on the plea bargaining process.[87]

Although current emphasis is placed almost exclusively upon the issues of voluntariness and the requisite understanding of both the nature of the charge and the consequences of the plea, many courts have also become concerned with the accuracy of guilty pleas.[88] With few exceptions, the inquiry into the factual basis of a plea either is not required by statute or court rule or is required only in certain circumstances.[89] Despite this, there is evidence that the use of such an inquiry is becoming widespread.[90]

When a defendant enters a general plea of guilty to an offense divided into degrees, a Florida court must examine the witness to determine the degree.[91] Rule 1.780 of the Florida Rules of Criminal Procedure provides that, when the court has discretion as to the penalty, it shall, upon the suggestion of either party that there exist circumstances that may properly be taken into consideration, hear evidence relating to them. The court may also inquire into such circumstances on its own initiative. Rule 1.122 (b) (2) provides that, on demand of the prosecutor, a magistrate shall examine the state's witnesses and record their testimony. If there appears no probable cause as to any offense, the magistrate is to order the defendant discharged. The utility of these rules as an aid in determining accuracy is lessened by their limited applicability and their general dependence upon prosecutorial initiative. Additionally, rule 1.22 (h) provides that any witnesses produced by the defendant shall be sworn and examined. If the defendant elects to

87. A.B.A. STANDARDS RELATING TO PLEAS OF GUILTY, note 44 *supra* §1.6 comments; D. NEWMAN, *supra* note 72, at 8.

88. D. NEWMAN, *supra* note 72, at 8-14; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 12 (1967); Thompson, *The Judge's Responsibility in a Plea of Guilty*, 62 W. VA. L. REV. 213 (1960).

89. A.B.A. STANDARDS RELATING TO PLEAS OF GUILTY, note 44 *supra* §1.4 (b) comments.

90. *Id.* §1.6 comments; D. NEWMAN, *supra* note 72, at 8.

91. FLA. R. CRIM. P. 1.170 (h) (1968).

testify, he must be warned that his testimony may be used against him in a subsequent trial.

In an unusual case, but perhaps a harbinger of the future, a federal district court in New York has held that state courts are required to find a substantial factual basis for a determination of guilt before accepting a guilty plea.[92] The Second District Court of Appeal of Florida, alluding to the practice of hearing evidence of guilt, stated: "[T]he trial judge properly exercised his right, *if not duty*, to hear sworn testimony as to the merits of the charge . . . ."[93]

If the factual inquiry convinces a court that it should not accept a defendant's guilty plea, an attempt to introduce the defendant's testimony at a later trial may pose problems of admissibility. Pleas of guilty are judicial admissions. Early Florida cases held that a withdrawn plea of guilty is admissible in a later trial unless the defendant was not warned that it could be used against him.[94] If the defendant is not advised of his constitutional rights, however, any judicial admissions made at or before arraignment cannot be used as evidence in a later trial.[95] When a defendant is advised of his rights and waives them, the status of his judicial admissions is yet uncertain.

In *Harris v. State*,[96] the Supreme Court of Florida held that *Hamilton v. Alabama*[97] and *White v. Maryland*[98] dictated holding that admitting into evidence a prior judicial confession given without advice of counsel was reversible error. The opinions in the above three cases do not clearly state whether the defendant was advised of his right to counsel and waived it, or was never so advised. However, *White v. Maryland* was cited in *Harris* as standing for the proposition that only the presence of counsel could have enabled the defendant to plead intelligently. This apparently implies that even if a defendant had validly waived counsel, his judicial admissions would be inadmissible in a later trial. This implication is further strengthened by another Florida case holding that, even though the defendant has been advised of his constitutional rights prior to his confession, due process prohibits the evidentiary use of a judicial confession made without advice of counsel.[99]

If a court's refusal to accept a guilty plea is based upon doubt concerning the defendant's guilt of the crime charged, it would be anomalous to allow the defendant's conversations with the court to be used against him in a later

92. United States *ex rel.* Thurmond v. Mancusi, 275 F. Supp. 508 (E.D.N.Y. 1967). If all of rule 11 is now constitutionally mandated, then an inquiry into the factual bases of the plea is required. However, the opinion in *Boykin v. Alabama* is unclear as to whether that part of rule 11, which requires a fact inquiry, is constitutionally mandated.

93. Roberts v. State, 199 So. 2d 340, 341 (2d D.C.A. 1967) (emphasis added); *see* Miller v. State, 217 So. 2d 903 (2d D.C.A. Fla. 1969).

94. Williams v. State, 134 Fla. 588, 184 So. 111 (1938); McNish v. State, 45 Fla. 83, 34 So. 219 (1903); Green v. State, 40 Fla. 474, 24 So. 537 (1898).

95. White v. Maryland, 373 U.S. 59 (1963).

96. 162 So. 2d 262 (Fla. 1964).

97. 368 U.S. 52 (1961).

98. 373 U.S. 59 (1963).

99. Williams v. State, 184 So. 2d 525 (4th D.C.A. Fla. 1966), *aff'd per curiam*, 195 So. 2d 202 (Fla. 1967).

trial. Not only would the preferable view prohibit its use, but a contrary position might contravene the rule that a criminal defendant cannot be forced to give up his right against self-incrimination in order to assert another constitutional right.[100] To allow a defendant's testimony at a fact inquiry to be used against him in a later trial would force the defendant to choose between foregoing his right against self-incrimination and foregoing the safeguards designed to ensure that his plea is understandingly and accurately given.

ASSIGNING COUNSEL TO ADVISE THE DEFENDANT

Since the presence of defense counsel assures the court that the plea is voluntary, accurate and understanding, many trial judges are reluctant to accept an indigent defendant's waiver of counsel.[101] The *A.B.A. Standards Relating to Providing Defense Services* provide that a waiver of counsel should not be accepted unless the defendant has consulted at least once with an attorney.[102] Even if the defendant is adamant in his desire to waive counsel, the consultation required by this standard would necessarily include much of the advice an attorney would give the defendant with regard to his plea. The *A.B.A. Standards Relating to Pleas of Guilty*, however, adopt the prevailing view that actual appointment of counsel despite defendant's wishes to the contrary is not a prerequisite to accepting his plea of guilty.[103]

Some states provide by statute that, before accepting a plea of guilty to a felony, the court must appoint counsel to advise the defendant.[104] Other states require this only in special circumstances.[105] Empirical studies indicate that a considerable number of courts refuse to accept a waiver of counsel from indigent defendants.[106] In some jurisdictions, including the Eighth Judicial Circuit of Florida, counsel is often appointed to confer with an indigent defendant without first inquiring if he desires counsel.[107]

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100. Simmons v. United States, 390 U.S. 377, 390 (1968) (defendant had testified at hearing in order to contest the admissibility of evidence and the admissions made at the hearing were used against him at trial).

101. AMERICAN BAR FOUNDATION, DEFENSE OF THE POOR (National Report 77 (table 24) (1965)).

102. A.B.A. STANDARDS RELATING TO PROVIDING DEFENSE SERVICES (Project on Minimum Standards for Criminal Justice) §7.3 (tent. draft 1967).

103. A.B.A. STANDARDS RELATING TO PLEAS OF GUILTY (Project on Minimum Standards for Criminal Justice) §1.3 comments (tent. draft 1967).

104. *See, e.g.*, ALA. CODE tit. 15, §262 (1958); IOWA CODE §777.12 (1962); VA. CODE ANN. §19.1-192 (1960).

105. *E.g., Ex parte* Coleman, 344 P.2d 1114, 1116 (Okla. 1959); CAL. PENAL CODE §1018 (West 1965); ILL. REV. STAT. ch. 38, §§113-15 (1965); TEX. CODE CRIM. P. art. 1.13 (1961).

106. D. NEWMAN, *supra* note 72, at 51, 200; Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 26-27, 34-35 (1963); Elison, *Assigned Counsel in Montana: The Law and the Practice*, 26 MONT. L. REV. 1, 3 (1964).

107. *See* notes 2, 106 *supra*.

In Florida an accused may be heard both in person and by counsel.[108] The United States Constitution guarantees the right to counsel;[109] and it has been held that there is a correlative right to dispense with counsel.[110] However, in both federal and state courts this right to proceed *pro se* is limited to competent defendants.[111] The implicit reason for this qualification is the need to protect the integrity of the judicial proceedings and to ensure that trials proceed in an orderly fashion.[112] Thus, forcing counsel upon a defendant to advise him *prior to pleading* has not violated constitutional provisions similar to Florida's guarantee of the right to proceed *pro se*.[113] Although the United States Supreme Court has often stated that counsel cannot be forced upon a defendant who desires to proceed *pro se,* the Court has never held that *appointing* counsel contrary to the wishes of the defendant would violate due process; and no state court has reversed a conviction for that reason alone.[114]

CONCLUSION

Under the Florida Rules of Criminal Procedure it is possible for an unrepresented, indigent defendant to waive counsel and plead guilty without any meaningful knowledge of the nature of the charges, the advantages of having counsel, the right to a jury trial, or the consequences of his act. Additionally, a court, even though complying with the Rules, may have little information upon which to base a determination of the defendant's competency and the voluntariness and accuracy of his waiver and plea.

As a minimum, before accepting an indigent, unrepresented defendant's guilty plea, the trial judge should perform the following:

(1) inform the defendant of his right to jury trial;
(2) inform the defendant of his right to remain silent;
(3) inform the defendant of the consequences of his plea, including the maximum and minimum penalties;
(4) inform the defendant of his right to confront his accusers;

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108. FLA. CONST. Decl. of Rights §16; *see* 77 A.L.R.2d 1233 (1966).

109. U.S. CONST. amend. V.

110. United States *ex rel.* McCann, 317 U.S. 269 (1942).

111. *See* Johnson v. Zerbst, 304 U.S. 458 (1938); State v. Capetta, 216 So. 2d 749 (Fla. 1968).

112. Thompson v. State, 194 So. 2d 649 (2d D.C.A. Fla. 1967).

113. *See* People v. York, 207 Cal. App. 2d 880, 24 Cal. Rptr. 815 (Dist. Ct. 1964) (court reasoned that defendant could have renewed his motion to proceed *pro se*); State v. Thomlinson, 100 N.W.2d 121 (S.D. 1960) (appointment of counsel to confer and consult with defendant before honoring waiver of counsel or accepting plea did not violate the South Dakota Constitution). "[I]t may be that the defendant should always be furnished counsel in the first instance, so that the benefits of legal assistance might be described by someone other than the judge and so that even a waiver can be shown to have been made upon the advice of counsel." Mazor, *The Right To Be Provided Counsel: Variations on a Familiar Theme*, 9 UTAH L. REV. 50, 76 (1964).

114. Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 36 n.155 (1963).

(5) inform the defendant of his right to counsel;
(6) inform the defendant of the nature of the charge, including an explanation of the elements of the crime;
(7) inquire into the voluntariness of the plea;
(8) inquire into the accuracy of the plea;
(9) explain any possible defenses that may be applicable.

If mandatory, the above procedures would ensure that waivers or pleas by defendants are voluntary, intelligent, and understanding. Such procedures would also facilitate the disposition of false or frivolous attacks upon convictions based on pleas of guilty. The court should also make it clear that, for the defendant's protection, his conversation with the court could not be used as evidence in a later trial.

In addition, adoption of a rule disallowing a waiver of counsel until the defendant has conferred with an attorney would alleviate the criticism that it is unrealistic to expect the trial court to act, in effect, as defense counsel. This rule alone would cure many of the defects of the present system. In Florida, public defenders are required to be present in court during arraignments. After determining defendant's indigency, lack of counsel and desire to plead guilty, the court could appoint the public defender to confer with the defendant, allowing a reasonable time for such conference. Alternatively, the public defender, upon notification by custodial authorities, could confer with the defendant prior to his appearance in court on plea day.

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