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Where Strong Evidence of Actual Guilt Substantially Negated Defendant's Claim of Innocence and Provided Strong Factual Basis for the Guilty Plea, Defendant Being Represented by Competent Counsel, Court Committed No Constitutional Error in Accepting Guilty Plea despite Defendant's Claim of Innocence and Fear of Death Penalty, and Such Was Voluntarily and Intelligently Pleaded.

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it has been held that a court will take judicial notice of the regulation and of the statute it was issued pursuant to.[68] Even so, it is still necessary to prove proximate cause.[69] With the possible applications of such rulings in cases like this, attorneys most assuredly will want to determine whether or not the toy the child was injured by was subject to any regulation made pursuant to this act.

To conclude, it appears that the Child Protection and Toy Safety Act of 1969 has definite applications to the area of commerce as evidenced by the instant case, and, it would appear to have some practical impact in a certain class of tort action.[70] In either event, this case provides evidence that courts will not hesitate to consider the intent and policy behind the act in enforcing action consistent with the preservation of safety for children.

Robert Morrison

CRIMINAL LAW—GUILTY PLEAS—WHERE STRONG EVIDENCE OF ACTUAL GUILT SUBSTANTIALLY NEGATED DEFENDANT'S CLAIM OF INNOCENCE AND PROVIDED STRONG FACTUAL BASIS FOR THE GUILTY PLEA, DEFENDANT BEING REPRESENTED BY COMPETENT COUNSEL, COURT COMMITTED NO CONSTITUTIONAL ERROR IN ACCEPTING GUILTY PLEA DESPITE DEFENDANT'S CLAIM OF INNOCENCE AND FEAR OF DEATH PENALTY, AND SUCH WAS VOLUNTARILY AND INTELLIGENTLY PLEADED. *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970).

Defendant was indicted for the capital crime of first degree murder. North Carolina law, at time of pleading, provided a maximum penalty of life imprisonment if a guilty plea was entered. This was lower than the maximum penalty authorized if a verdict of guilty by a jury.[1] There were no eye witnesses to the crime but evidence showed circumstantial guilt. Testimony elicited before the plea of guilty was accepted indicated that shortly before the killing defendant left his house with

[68] United States v. Spence, 425 F.2d 1079 (5th Cir. 1970). The court took judicial notice of a regulation issued by the Secretary of HEW under 21 U.S.C.A. § 360 (Supp. 1970) which made LSD come under the act prohibiting the sale, delivering, and disposing of it.

[69] *See, e.g.*, Shafer v. Mountain States Telephone and Telegraph Co., 335 F.2d 932, 935 (9th Cir. 1964).

[70] The manufacturer would also be very interested in both aspects of the application of the regulations.

[1] The North Carolina statute permitting guilty pleas in capital cases was repealed in 1969. N.C. GEN. STAT. 15-162.1 repealed (Supp. 1969). Such laws having differentiation in punishment were held unconstitutional in United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed.2d 138 (1968). *See also* Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 25 L. Ed.2d 785 (1970).

a gun and stated his intention to kill the victim. Witnesses also stated that the defendant returned home later with the declaration that he had carried out the killing. Faced with strong evidence of guilt and no substantial evidentiary support for a claim of innocence, defendant's attorney recommended that he plead guilty. Defendant took the stand and testified that he had not committed the murder but that he was pleading guilty because he faced the threat of a death penalty if a jury decided his guilt. The prosecutor agreed to accept a plea of guilty to a charge of second-degree murder and the trial court accepted defendant's guilty plea, sentencing him to the maximum punishment of thirty years. Defendant sought post-conviction relief claiming his plea of guilty was invalid because it was the product of fear and coercion and that he was denied effective assistance of counsel. On appeal, a divided panel of the Fourth Circuit Court of Appeals reversed on the ground the plea was made involuntarily.[2] Held—*Vacated and remanded.* Where strong evidence of actual guilt substantially negated defendant's claim of innocence and provided strong factual basis for the guilty plea, defendant being represented by competent counsel, court committed no constitutional error in accepting guilty plea despite defendant's claim of innocence and fear of death penalty, and such was voluntarily and intelligently pleaded.

> A plea of guilty is more than a confession which admits the accused did the various acts; it is itself a conviction; nothing remains but to give judgment and determine the proper punishment.[3]

A valid guilty plea is a waiver of several fundamental constitutional rights: all nonjurisdictional defects,[4] trial by jury,[5] right of confrontation,[6] right to contest the admissibility of evidence[7] and privilege against self-incrimination.[8] As stated by Judge Duniway of the Ninth

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2 Alford v. North Carolina, 405 F.2d 340 (4th Cir. 1968), *relying on* United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed.2d 138 (1968). In *Jackson*, the Court held that a statute which made the risk of death the price of a jury trial was unconstitutional because it imposed an impermissible burden upon the exercise of a constitutional right and the plea could not be voluntary since result of fear of death.

3 Kercheval v. United States, 274 U.S. 220, 223, 47 S. Ct. 582, 583, 71 L. Ed. 1009, 1012 (1927).

4 Rice v. United States, 420 F.2d 863 (5th Cir. 1969), *cert. denied*, 398 U.S. 910, 90 S. Ct. 1705, 26 L. Ed.2d 70 (1969). Glenn v. McMann, 349 F.2d 1018 (2d Cir. 1965), *cert. denied*, 383 U.S. 915, 86 S. Ct. 906, 15 L. Ed.2d 669 (1966).

5 Donnelly v. United States, 185 F.2d 559 (10th Cir. 1950), *cert. denied*, 340 U.S. 949, 71 S. Ct. 528, 95 L. Ed. 684 (1951). *See generally* on right of trial by jury Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed.2d 491 (1968), *rehearing denied*, 392 U.S. 947, 88 S. Ct. 2270, 20 L. Ed.2d 1412 (1968).

6 Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed.2d 274 (1969). *See generally* on right of confrontation Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed.2d 923 (1965).

7 McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed.2d 763 (1970). *Caveat*: State law may permit a defendant to challenge the admissibility of a confession even if plea of guilty is entered. N.Y. CODE CRIM. PROC. 813-g (McKinney Supp. 1970).

8 McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed.2d 418 (1969).

Circuit, "A guilty plea . . . is the most conclusive form of self-incrimination."[9] It admits the existence of all incriminating facts necessary to establish guilt[10] and the introduction of evidence is only to enable the judge or jury to intelligently assess punishment. A plea of guilty shall not be accepted by the courts unless made voluntarily after proper advice and with full understanding of the consequences.[11] Due to the serious implications and results of a guilty plea, the courts have continually strived to establish a standard to determine the voluntariness of a guilty plea. One such standard was defined by Judge Tuttle of the Fifth Circuit:

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (*e.g.* bribes).[12]

It is reversible error for a court to accept a guilty plea without an affirmative showing that it was intelligent and voluntary.[13]

These requirements of a valid guilty plea were incorporated into Rule 11 of the Federal Rules of Criminal Procedure which states:

> A defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea . . . without first addressing the defendant personally and determining that the plea is made voluntarily, with the understanding of the nature of the charge and the consequence of the plea . . . the court shall

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9 United States v. Wells, 430 F.2d 225, 227 (9th Cir. 1970).

10 Machibroda v. United States, 368 U.S. 487, 493, 82 S. Ct. 510, 513, 7 L. Ed.2d 473, 477 (1962). *Caveat*: There must, however, be sufficient evidence to show a factual basis for the plea before it is acceptable. In Texas, there are different requirements as to the necessity of introducing evidence by the State depending on whether the plea in a felony case is before the judge or jury. If the plea is in a case where a jury is waived, TEX. CODE CRIM. PROC. ANN. art. 1.15 (1965) requires that the state introduce evidence showing guilt. Watson v. State, 363 S.W.2d 933 (Tex. Crim. App. 1963). If the guilty plea is before a jury, evidence is not necessary except to enable jury to establish punishment. Reyna v. State, 434 S.W.2d 362 (Tex. Crim. App. 1968). However, right to have evidence submitted to corroborate plea of guilty is solely a creature of Texas statute and is not a violation of federal constitutional guarantees if state does not adhere to the statute and introduce evidence. Hendrick v. Beto, 253 F. Supp. 994 (S.D. Tex. 1965), *aff'd* 360 F.2d 618 (5th Cir. 1966).

11 Machibroda v. United States, 368 U.S. 487, 493, 82 S. Ct. 510, 513, 7 L. Ed.2d 473, 478 (1962). Kercheval v. United States, 274 U.S. 220, 223, 47 S. Ct. 582, 583, 71 L. Ed. 1009 (1927).

12 Shelton v. United States, 246 F.2d 571, 572, n.2 (5th Cir. 1957) (*en banc*), *rev'd on other grounds*, 356 U.S. 26, 78 S. Ct. 563, 2 L. Ed.2d 579 (1958).

13 Boykin v. Alabama, 395 U.S. 238, 247, 89 S. Ct. 1709, 1714, 23 L. Ed.2d 274, 279 (1969).

> not enter judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.[14]

The purpose of Rule 11 is to insure that an accused is appraised of the significant effects of his plea so that his decision to plead guilty and waive his right to a trial is an informed one.[15] The Supreme Court has held that a failure to comply with Rule 11 requires that a defendant having pled guilty be allowed to plead anew.[16] An element was added by the Supreme Court when they required that the record must affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily.[17] In 1966 the "factual basis" test was also added to Rule 11 requiring that the judge be satisfied that there are circumstances that show guilt.[18] The courts have always had the discretion within the mandate of Rule 11 to refuse to accept a guilty plea. The Supreme Court has commented on the discretion and stated that the defendant has no absolute right to have his guilty plea accepted.[19] The Court inferred that even if a judge accepted a guilty plea when there was evidence before the court which showed a valid defense, there would probably be no constitutional error.[20]

The waivers under a guilty plea must be valid under the Due Process Clause,[21] therefore the "voluntary and intelligent" test applies to both federal and state proceedings.[22] This determination under "voluntary and intelligent" has caused the courts much confusion because of the inexactability of the terms; each case being decided on its own facts. As stated in *Brady v. United States*, "the voluntariness of a

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14 FED. R. CRIM. P. 11. It was amended in 1966 to include the requirement that the court address the defendant personally to determine whether he understands the consequences of his plea. *But see* Halliday v. United States, 394 U.S. 831, 89 S. Ct. 1498, 23 L. Ed.2d 16 (1969) holding the requirement was nonretroactive.

15 Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed.2d 747 (1970).

16 McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed.2d 418 (1969). *But see* Halliday v. United States, 394 U.S. 831, 89 S. Ct. 1490, 23 L. Ed.2d 16 (1969) holding the *McCarthy* rule was not retroactive.

17 Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 1712, 23 L. Ed.2d 274, 279 (1969). The Supreme Court has not yet passed on the question of the retroactivity of this new requirement.

18 FED. R. CRIM. P. 11. *See* United States v. Steele, 413 F.2d 967, 969 (2d Cir. 1969); United States v. Tucker, 425 F.2d 624, 629 (4th Cir. 1970).

19 Lynch v. Overholser, 369 U.S. 705, 719, 82 S. Ct. 1063, 1072, 8 L. Ed.2d 211, 220 (1962).

20 *Id.*

21 Machibroda v. United States, 368 U.S. 487, 82 S. Ct. 510, 7 L. Ed.2d 473 (1962); McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed.2d 763 (1970).

22 *See also*, TEX. CODE CRIM. PROC. ANN. art. 26.13 (1966):

> If the defendant pleads guilty, or enters a plea of nolo contendere he shall be admonished by the court of the consequences; and neither of such pleas shall be received unless it plainly appears that he is sane, and is uninfluenced by any consideration of fear, or by any persuasion, or delusive hope of pardon, prompting him to confess his guilt.

The duty imposed by the Texas statutes is mandatory, and performance is a condition precedent to the validity of such a plea and failure to perform may be raised after conviction. Braggs v. State, 334 S.W.2d 793 (Tex. Crim. App. 1960).

[guilty] plea can be determined only by considering all the relevant circumstances surrounding it."[23]

In analyzing the circumstances and factors motivating a guilty plea there is only one rigid rule; that if the defendant has entered a plea of guilty without counsel and without having validly waived the right to counsel, the plea is invalid, based on the assumption that it was not knowingly made.[24] If a defendant has been represented by counsel when he entered a plea, the inadequacy of such counsel can be a basis for attacking a guilty plea as invalid.[25] The counsel's conduct must be such that would "shock the conscience of the court and make the proceeding a farce and mockery of justice."[26] In *McMann v. Richardson*,[27] the Supreme Court held that if the attorney commits an "ordinary error" (misjudged the admissibility of a confession) it would not be grounds for collateral attack. The mere presence of counsel representing the defendant at time of pleading will mitigate against a later claim of an invalid guilty plea since the courts are reluctant to hold that counsel has been incompetent or ineffective.[28] There are other factors a court will consider when applying the "voluntary and intelligent" test to determine the validity of a guilty plea. If the defendant's mental faculties were so impaired by drugs when he pleaded this could be grounds for reversal.[29] Proof of insanity would of necessity render a guilty plea invalid since the defendant would not be capable of making an "intelligent" choice. Presently, if no evidence of insanity is offered the trial court does not have to hear evidence regarding sanity.[30] Threats may affect the "voluntary" nature of the plea but it must be shown that there existed mental coercion overbearing the will of the petitioner.[31] Knowledge of the maximum punishment a defendant may be assessed under the charge is held to be a requisite for an "intelligent" plea.[32]

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23 397 U.S. 742, 749, 90 S. Ct. 1463, 1469, 25 L. Ed.2d 747, 757, (1970), *citing* Haynes v. Washington, 373 U.S. 503, 513, 83 S. Ct. 1336, 1343, 10 L. Ed.2d 513 (1963).

24 *See* White v. Maryland, 373 U.S. 59, 83 S. Ct. 1050, 10 L. Ed.2d 193 (1963); Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed.2d 747 (1970).

25 *See* Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed.2d 747 (1970).

26 United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950, 70 S. Ct. 478, 94 L. Ed. 586 (1949).

27 397 U.S. 759, 774, 90 S. Ct. 1441, 1450, 25 L. Ed.2d 763, 775 (1970).

28 *See* McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed.2d 763 (1970).

29 Sander v. United States, 373 U.S. 1, 83 S. Ct. 1068, 10 L. Ed.2d 148 (1963). *See also* Schnautz v. Beto, 416 F.2d 214, 215 (1969); Manley v. United States, 396 F.2d 699 (5th Cir. 1968). But such are usually found voluntary. *See* Falu v. United States, 308 F. Supp. 1051 (D.C. N.Y. 1969), *aff'd* 421 F.2d 687 (2d Cir. 1970).

30 Parrish v. State, 339 S.W.2d 670 (Tex. Crim. App. 1960); Gallery v. State, 400 S.W.2d 751 (Tex. Crim. App. 1966).

31 Crow v. United States, 397 F.2d 284 (10th Cir. 1968). *But see* Roberts v. Virginia, 317 F. Supp. 1311 (W.D. Va. 1970) where counsel informed client that he could guarantee him nothing less than thirty years if he insisted on jury trial but eighteen years for a guilty plea and court held such plea was valid.

32 Freeman v. United States, 350 F.2d 940 (9th Cir. 1965). But an accused need not be

The courts have held a guilty plea is not rendered invalid on claims of coercion merely because it is the result of a plea bargaining situation.[33] The appellate courts have generally used the defendant's trial court statement that the plea was voluntary, and not because of promises, to sustain the guilty plea. A more realistic approach was taken by the Court in *United States v. Tweedy*[34] when it noted that a defendant would probably not say anything about the bargaining because he might think "that this was all part of the game, and that honest answers would destroy the deal."[35]

Prior guilty pleas have also been attacked on grounds that they should have been withdrawn when the pleas were induced by illegal evidence or unconstitutional statutes contending that the plea could not have been voluntarily and knowingly made under the circumstances. However, three recent Supreme Court decisions[36] stand for the proposition that such pleas may nevertheless be "voluntary and intelligent." This places the burden on petitioner to show the plea was "substantially motivated" by the illegal evidence or statute. Thus,

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informed about every conceivable collateral effect the conviction entered on the plea might have. *See, e.g.*, Meaton v. United States, 328 F.2d 379 (5th Cir. 1964), *cert. denied*, 380 U.S. 916, 85 S. Ct. 902, 13 L. Ed.2d 801 (1965). There are contra views whether ineligibility of parole is a consequence of the plea about which the defendant must be informed. Holding *affirmatively*: Jenkins v. United States, 420 F.2d 433 (10th Cir. 1970); Durant v. United States, 410 F.2d 689 (1st Cir. 1969). Holding *contra*: Smith v. United States, 324 F.2d 436 (D.C. Cir. 1963), *cert. denied*, 376 U.S. 957, 84 S. Ct. 978, 11 L. Ed.2d 975 (1964). But even if the record is silent, it may be shown that the defendant knew the maximum punishment from other sources such as his bondsman or relative. The Fifth Circuit, sitting en banc, considered this problem and the interesting question arose as to whether the defendant's attorney can testify that he informed his client and whether this would violate the attorney-client privilege. With strong dissent, the court held the attorney could testify. United States v. Woodall, No. 28352 (5th Cir., Feb. 24, 1971). The court, citing *Alford*, also held that where defendant was told the maximum penalty, which later was found to be less than advised, the plea was still voluntary since the probability defendant would not change his plea outweighed the possibility the heavier sentence would cause him to change. The court expressly overruled its two recent decisions on the subject: Grant v. United States, 424 F.2d 273 (5th Cir. 1970); Stephen v. United States, 426 F.2d 257 (5th Cir. 1970) which held contra.

33 Putman v. United States, 337 F.2d 313, 315 (10th Cir. 1964); Schnautz v. Beto, 416 F.2d 214, 216 (5th Cir. 1969). *Contra*, United States v. Lester, 247 F.2d 496 (2d Cir. 1957), where court allowed a plea to be withdrawn when evidence showed prosecutor promised leniency. But, as stated in United States v. Weese, 145 F.2d 135, 136 (2d Cir. 1945) the courts fear that if they allow guilty pleas to be withdrawn every time a defendant claims he was promised leniency, defendants will "indulge in a plea of guilt as a mere trial balloon to test the attitude of the trial judge" and withdraw plea if not satisfied. The Supreme Court has not decided the constitutionality of plea bargaining at this time. *See generally*, Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); 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).

34 419 F.2d 192 (9th Cir. 1969).

35 *Id.* at 193.

36 Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed.2d 747 (1970). Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 25 L. Ed.2d 785 (1970) and McMann v. Richardson, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed.2d 763 (1970) both holding that even if defendant's counsel was wrong in assessment of the admissibility of a confession, it does not follow that his error and the illegal confession were sufficient to render the plea unintelligent.

an alleged violation of constitutional rights is simply another factor to be taken into consideration in determining the voluntariness of the plea;[37] and does not render the judgment invalid per se since the conviction is based on the plea itself and not on the evidence.[38] In *Brady v. United States*,[39] a case similar to the instant case, the Supreme Court considered a situation where the defendant's counsel advised him that if he was convicted it would be possible for the jury to impose the death penalty, but if he pleaded guilty, the maximum penalty would be life imprisonment. The Supreme Court unanimously held that the plea was "intelligently" made and the statute did not necessarily prove that the plea was coerced and invalid as an involuntary act.[40] In considering guilty pleas, the Supreme Court stated:

> Central to the plea and the foundation for entering judgment against the defendant is the defendant's *admission in open court* that he committed the acts charged in the indictment.[41]

Subsequently it was shown in *United States v. Jackson*[42] that this advice was legally incorrect since such statutes with differentiation of punishment were held unconstitutional.

One issue confronting state and lower federal courts is whether a guilty plea can be valid when it is accompanied by a simultaneous claim of innocence; since on its face a claim of innocence is also a pleading of not guilty. Some jurisdictions authorize the acceptance of a guilty plea only where guilt is professed.[43] Other jurisdictions take the position that it is entirely within the discretion of the trial judge and decline to rule definitely that such pleas must be either accepted or rejected.[44] However, some courts take the position that such inconsistent pleas are acceptable and valid on the basis that a court should not force any defense on a defendant. Since the results of a defense and jury trial may be more severe than punishment under a guilty plea, the courts

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37 *Id. See also*, United States *ex. rel.* Ross v. McMann, 409 F.2d 1016, 1021 (2d Cir. 1969).

38 "A conviction after a plea of guilty normally rests on the defendant's own admission in open court that he committed the acts with which he is charged." McMann v. Richardson, 397 U.S. 759, 766, 90 S. Ct. 1441, 1446, 25 L. Ed.2d 763, 770 (1970), *citing* Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 1468, 25 L. Ed.2d 747, 756 (1970); McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 1171, 22 L. Ed.2d 418, 425 (1969).

39 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed.2d 747 (1970).

40 Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed.2d 747 (1970).

41 *Id.* at 748, 90 S. Ct. at 1468, 25 L. Ed.2d at 756 (emphasis added).

42 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed.2d 138 (1968). The basis for the Court's holding was that the operative effect of the capital punishment provision was "to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." *Id.* at 581, 88 S. Ct. at 1216, 20 L. Ed.2d at 147.

43 Hulsey v. United States, 369 F.2d 284, 287 (5th Cir. 1966). Texas requires that the defendant state he is guilty or the court will not accept a guilty plea. Luna v. State, 436 S.W.2d 910 (Tex. Crim. App. 1969).

44 Maxwell v. United States, 368 F.2d 735, 738 (9th Cir. 1966).

feel that the defendant should be left with the choice.[45] It has been stated that the mere assertion of innocence is insufficient to compel withdrawal of a guilty plea once entered. The absence of an assertion of innocence can be a factor against granting withdrawal.[46]

In the instant case, *North Carolina v. Alford*,[47] the defendant claimed his prior plea of guilty was invalid. He contended that the plea was the product of fear and coercion because if he pled innocent the jury might assess the death penalty. Defendant also claimed he was denied effective assistance of counsel prior to pleading guilty and, that his simultaneous claim of innocence should negate his plea.[48] The Supreme Court, in accord with past decisions, restated the basic test of a valid guilty plea:

> The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.[49]

Regarding the alleged coercion caused by the death penalty provision, the Court restated and extended its prior holding in *Brady*.[50]

> [A] plea of guilty which would not have been entered except for the defendant's desire to avoid a possible death penalty and to limit the maximum penalty to life imprisonment or a term of years was not for that reason compelled within the meaning of the Fifth Amendment. . . . That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice. . . .[51]

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45 Quillien v. Leeke, 303 F. Supp. 698 (D.C. Conn. 1969); Griffin v. United States, 405 F.2d 1378 (D.C. Cir. 1968).

46 *See generally*, Annot., "Withdrawal of Plea of Guilty or Nolo Contendere, Before Sentence, Under Rule 32(d) of Federal Rules of Criminal Procedure," 6 A.L.R. Fed. 665 (1971). Nolo contendere pleas have always been acceptable to the court although such pleas are not by definition considered an actual admittance of guilt in most courts. *See*, Hudson v. United States, 272 U.S. 451, 47 S. Ct. 127, 71 L. Ed. 347 (1926). *See, e.g.*, Lott v. United States, 367 U.S. 421, 81 S. Ct. 1563, 6 L. Ed.2d 940 (1961).

47 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970). *Alford* was noted approvingly in Dawson v. Wainwright, No. 30027 (5th Cir., Feb. 24, 1971), where defendant stated "Well I'm not guilty but I'm going to plead guilty . . . but I mean, I'd plead guilty . . . rather than see my wife and family killed, I will." Defendant's family had been threatened if he testified who actually did the killing in the robbery in which he took part—which would be necessary if he pleaded innocent. *Held*—voluntary plea.

48 North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970).

49 *Id.* at —, 91 S. Ct. at 163, 27 L. Ed.2d at 166. Counsel, in court, asked the defendant if he still wanted to plead guilty and defendant answered "Well, I'm still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence; that the jury will prosecute me on—on the second. You told me to plead guilty, right. I don't—I'm not guilty but I plead guilty."

50 Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed.2d 747 (1970).

51 North Carolina v. Alford, 400 U.S. 25, —, 91 S. Ct. 160, 164, 27 L. Ed.2d 162, 167 (1970), *citing* Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed.2d 274 (1969); Machibroda v. United States, 368 U.S. 487, 82 S. Ct. 510, 7 L. Ed.2d 473 (1962); Kercheval v. United States, 274 U.S. 220, 47 S. Ct. 582, 71 L. Ed. 1009 (1927).

Thus, a plea of guilty may be valid even though encouraged by an unconsitutional statute.

The Supreme Court used the definition and case history of the nolo contendere plea as their basis for holding that a guilty plea with a contemporaneous claim of innocence may still be valid. Justice White, delivering the opinion, stated:

> The fact that his plea was denominated a plea of guilty rather than a plea of nolo contendere is of no constitutional significance with respect to the issue now before us, for the Constitution is concerned with the practical consequences, not the formal categorizations of state law. . . . Nor can we perceive any material difference between a plea which refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interest require entry of a guilty plea. . . .[52]

The Court stressed all the circumstances that have been considered in the past when applying the "voluntary and intelligent" test. The Court made it clear that there was no one factor that made the defendant's guilty plea valid but noted: that the defendant was represented by effective counsel; that there was a strong factual basis for the plea; that the trial court had questioned and admonished the defendant; and that coercion did not exist. It was only because of the combination of all these affirmative elements that the Court found the plea to be voluntary.

It has been estimated that eighty-five to ninety per cent of all convictions occurring annually in federal courts are based upon pleas of guilty or nolo contendere,[53] and that an attack by a prisoner upon the validity of his guilty plea is a problem that is coming before the courts more and more frequently. The judiciary have had a problem attempting to minimize the risk of wasted effort involved in separating bona fide petitions from those presenting a "construct of the fertile brains of defense lawyers without counterpart in reality."[54] The *Alford*

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52 400 U.S. 25, —, 91 S. Ct. 160, 164, 27 L. Ed.2d 162, 171 (1970), (citations omitted).

53 ABA Project on Minimum Standards for Criminal Justice, Pleas of Guilty, Tent. Dr. 1967. pp. 1-2. Brady v. United States stated some of the advantages of a guilty plea:

> For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt . . . .

397 U.S. 742, 751, 90 S. Ct. 1463, 1471, 25 L. Ed.2d 747, 758 (1970).

54 United States *ex. rel.* Ross v. McMann, 409 F.2d 1016, 1041 (2d Cir. 1969), (Chief Justice Friendly's dissenting opinion). *See generally*, Diamond v. United States, 432 F.2d