NOTES

CONSTITUTIONAL LAW—GUILTY PLEAS COUPLED WITH CLAIM OF INNOCENCE—SHOULD THEY BE ACCEPTED?

In *North Carolina v. Alford*[1] the United States Supreme Court held that a guilty plea could be accepted even though the defendant denied committing the criminal act at the same time he pleaded guilty.[2] Alford was indicted for first degree murder, and the court appointed counsel to represent him. The court appointed attorney interviewed all but one witness (whom Alford said would substantiate his claim of innocence) and found that instead of supporting Alford's claim they gave statements strongly indicating his guilt. Alford's attorney recommended that he plead guilty and the prosecution agreed to accept a plea of guilty to second degree murder.[3] The trial court heard a summary of the state's case[4] after which Alford took the stand and testified that he had not committed the murder but was pleading guilty because he feared the threat of the death penalty if he did not do so.[5] The Fourth Circuit held that Alford's plea was made involuntarily,[6] and the Supreme Court noted probable jurisdiction.[7]

Approximately 90 percent of all criminal convictions are by pleas of guilty.[8] The entire system of criminal justice comes to depend upon a high rate of guilty pleas, and the requirements for court personnel and correctional facilities are based in large part on the high note of guilty pleas.[9]

It has not been until recently that the courts have become concerned with the accuracy of the guilty plea. An innocent person may plead guilty because he falsely believes that his conduct constitutes the crime

1. ___ U.S. ___, 91 S. Ct. 160 (1970).

2. *Id.* at 167. "[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty." *But see* Brady v. United States, 397 U.S. 742 (1970).

3. *Id.* at 162.

4. *Id.* The state's case indicated that Alford took his gun from his house, stated his intention to kill the victim and returned home with the declaration that he had carried out the killing.

5. *Id.* at 163. This note will be confined to a discussion of guilty pleas coupled with a claim of innocence and not the coercive effect of the death penalty.

6. 405 F.2d 340 (4th Cir. 1968).

7. 394 U.S. 956 (1969). In its opinion at ___U.S.___, 91 S. Ct. 160 (1970) the Supreme Court quickly held that the guilty plea was not coerced because of a possible death penalty if convicted for first degree murder. 91 S. Ct. at 164. The remainder of its opinion was devoted to the effect of Alford's claim of innocence. *Id.* at 164-168.

8. O. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966).

9. *Id.* at 4.

charged or believes that he committed the acts charged when he did not. Defendants have plead guilty even though they were innocent because they were suffering from a mental disability, and innocent defendants have plead guilty in order to get a lighter sentence because the evidence was so strong against them they believed that they would be convicted despite their innocence.[10]

A guilty plea waives all non-jurisdictional defects[11] and is the defendant's admission in open court that he committed the act charged in the indictment,[12] and his consent that judgment of conviction be entered against him without a trial.[13] Since a guilty plea is a waiver of the defendant's fifth amendment right not to plead guilty and sixth amendment right to trial by jury and to confront his accusers, it must be a voluntary, knowing, intelligent act done with sufficient awareness of the relevant circumstance and likely consequence.[14]

In *McCarthy v. United States*[15] the Supreme Court held that a defendant is entitled to withdraw his original plea and plead again if the district court accepts his guilty plea without fully adhering to the procedure in Rule 11.[16] The Court expressly refused to base its decision on constitutional grounds instead basing its decision on its supervisory powers over the lower federal courts.[17] While the Supreme Court refused to make the procedure of Rule 11 a constitutional requirement, the Court has held that it is error for a state court to accept a guilty plea without an affirmative showing in the record that the plea is intelligent and voluntary.[18]

In *McCoy v. United States*[19] the court said even though Rule 11 gives

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10. 1966 WASH. U. L. Q. 306.
11. Quillien v. Leeke, 303 F. Supp. 698 (C.D.S.C. 1969).
12. Brady v. United States, 397 U.S. 742 (1970).
13. *Id.* at 748.
14. *Id.*
15. 394 U.S. 459 (1969).
16. *Id.* at 463-4. Fed. Rules Crim. Proc. Rule 11, 18 U.S.C. 4489 (1971).

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendre*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendre* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . .The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

17. *Id.* at 464. The court went on to say, "[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 plea is truly voluntary." *Id.* at 465 (Emphasis added).
18. Boykin v. Alabama, 395 U.S. 238, 242 (1969). The record did not show where the judge had asked petitioner any questions concerning his plea or where the petitioner had addressed the court.
19. 363 F.2d 306 (D.C. Cir. 1966). *See* Quillien v. Leeke, 303 F. Supp. 698 (C.D.S.C. 1969). The court held it was not necessary for a defendant to admit his guilt in order for his plea to be accepted.

the trial judge discretion in accepting a guilty plea the plea should not be refused without good reason.[20] The court went on to say that the defendant need not concede his guilt because an accused while believing he is innocent might believe that a jury would find him guilty and elect to take a chance for a lighter sentence.[21] This view was again expressed in *Bruce v. United States*[22] when the court said the evidence implicating the defendant may be so overwhelming that even though the defendant believes he is innocent he may consider it to be in his own self interest to plead guilty and throw himself on the mercy of the court rather than face the possibility of a greater sentence after trial.[23] The view expressed in *McCoy* and *Bruce* was not new. In the ancient case of *State v. Kaufman*[24] the court said:

> It matters not whether the defendant is in fact guilty, the plea of guilty is just as effectual as if such was the case. Reasons other than the fact that he is guilty may induce a defendant to so plead . . . yet the state never actively interferes in such case, and the right of the defendant to so plead has never been doubted.[25]

The validity of the guilty plea has also been challenged in cases where the defendant did not know whether he committed the crime or not. In *State v. Tahash*[26] a defendant who was convinced of his own guilt was allowed to plead guilty even though he had no definite memory of the details of the crime because he had been drinking, and in *State v. Martinez*[27] a defendant who at the time he plead guilty said he did not recall the incident was not allowed to withdraw his plea. In *Martinez* the court said that the defendant had not given an acceptable reason why he could not recall the incident, and that he was later given an opportunity to change his plea but declined showing his intent to let it stand as an unqualified plea.[28] The same result was reached in *United States v. Russell*[29] when the court refused to rule that a guilty plea was invalid because he could not remember committing the murder or any events on the night in question.[30]

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20. 363 F.2d at 307.
21. *Id.* at 308.
22. 379 F.2d 113 (D.C. Cir. 1967).
23. *Id.* at 119, n. 17.
24. 51 Iowa 578, 2 N.W. 275 (1879).
25. *Id.* at ____, 2 N.W. at 276. *See* City of Burbank v. General Electric Co., 329 F.2d 825 (9th Cir. 1964).
26. 263 Minn. 299, 116 N.W.2d 666 (1962).
27. 89 Ida. 129, 403 P.2d 597 (1965).
28. *Id.* at ____, 403 P.2d at 603.
29. 281 F. Supp. 104 (E.D. Pa. 1968).
30. *Id.* at 106. *See* Maxwell v. United States, 368 F.2d 735, 739, n. 3 (9th Cir. 1966).

The Court of Appeals for the District of Columbia adopted the same reasoning employed by the Supreme Court in *Alford* when it held that a plea of guilty is acceptable even if it is accompanied with a claim of innocence if there is a high probability of conviction,[31] and the Florida Court of Appeals in *Hooper v. State*[32] said a guilty plea put at rest any issue as to guilt or innocence. What this attitude does not take into consideration is that the purpose of a trial is to punish the guilty and not just to punish someone—anyone—for an offense. Theoretically at least the courts are after the protection of the innocent from those who have committed crimes and the rehabilitation of the criminal and not just a conviction for the sake of conviction.

Fortunately not all courts have been unanimous in the view taken in *Alford*. In *Harsham v. State*[33] the defendant plead guilty to a charge of vehicle taking. He told the judge that he had been drinking and did not remember taking the vehicle but there was so much evidence that he must be guilty. The court said:

> It [guilty plea] should not be accepted from one who does not know, or who, at the time of arraignment, asserts that he does not know, whether or not he has committed the crime charged, for such would be entirely incompatible with the idea of an admission of guilt, and wholly inconsistent with the administration of justice.[34]

In discussing a plea of guilty coupled with a claim of innocence the court said, "[A] plea of guilty tendered by one who in the same breath protests his innocence, or declares he actually does not know whether or not he is guilty, is no plea at all."[35] The Fifth Circuit Court of Appeals in *Hulsey v. United States*[36] pointed out that requiring the guilty plea to manifest an unqualified admission of the offense charged merely implements a fundamental requirement of due process and is not to exalt

31. Griffin v. United States, 405 F.2d 1378, 1380 (D.C. Cir. 1968).

32. 232 So.2d 257, 263 (Fla. Ct. App. 1970).

33. 232 Ind. 618, 115 N.E.2d 501 (1953).

34. *Id.* at ____, 115 N.E.2d at 502. *See* Harris v. State, 76 Tex. Crim. 126, 172 S.W. 975, 977 (1915). "Our law only authorizes a conviction where guilt is shown. If there be no legal guilt, a conviction could not be sustained, although a defendant entered a plea of guilty."

35. *Id.* at ____, 115 N.E.2d at 502. *See* State v. Reali, 26 N.J. 222, 139 A.2d 300 (1958). "When, at the time of pleading, the court is expressly informed by the attorney for the accused that he claims to be innocent, a plea of guilty should be refused." Commonwealth v. Cottrell, 433 Pa. 177, 249 A.2d 294 (1969), where the court distinguished between the situation where the defendant could not remember committing the offense and where a defendant pleads guilty and protests his innocence. The court said the latter was clearly unacceptable but the former could be accepted if caution was exercised.

36. 369 F.2d 284 (5th Cir. 1966).

form over substance.[37] In *People v. Linscott*[38] the Michigan Court of Appeals took the view that when the defendant could not remember committing the offense there was no way to determine that the defendant was pleading guilty freely, voluntarily, and understandingly.[39]

In the *Alford* case the United States Supreme Court recognized that if Alford's statements were sincere assertions of innocence, there was a factual and legal dispute between him and the state and without more would negate any admission of guilt.[40] But the Court went on to say that the trial court heard an account of the charges against him.[41] This investigation by the trial court evidently is the difference between the unacceptibility and acceptibility of the plea. What this means in effect is by virtue of a defendant pleading guilty and claiming innocence at the same time the trial judge can conduct a "trial" with none of the safeguards of a regular trial. If the trial judge decides to accept the plea, the defendant is convicted; but if the judge refuses the plea, the defendant is not acquitted. The state is then put in the position of having to put its case to the test of a trial with the defendant having the benefit of all his constitutional safeguards.

The Supreme Court recognized the danger of allowing a defendant to plead guilty; and after the prosecution case has grown stale, allowing the defendant to withdraw his plea. But the Court failed to recognize the danger of accepting improper guilty pleas. It is true that the courts have overcrowded dockets and must try as many cases as they can as fast as they can, but the answer is not in accepting pleas such as the one in *Alford*.

As soon as the defendant claims he is innocent at the same time he is pleading guilty, there is a factual dispute which should be resolved only in a trial with all its procedural and constitutional safeguards. It is true that a defendant while believing he is innocent can keep his mouth shut and therefore thwart the judge in his inquiry. This problem can only be solved by conscientious trial judges in their examination of the defendant under Rule 11 or its equivalent. But in a case such as Alford where the dispute is squarely before the judge, and before the prosecution's case is stale, to accept such a guilty plea is intolerable.

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37. *Id.* at 287.
38. 14 Mich. App. 334, 165 N.W.2d 514 (1968).
39. *Id.* at ____, 165 N.W.2d at 517.
40. ____U.S. at ____, 91 S. Ct. at 165.
41. *Id.*