Revised Federal Rule 11: Tighter Guidelines for Pleas in Criminal Cases

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REVISED FEDERAL RULE 11: TIGHTER
GUIDELINES FOR PLEAS IN CRIMINAL CASES

I. INTRODUCTION

“Plea bargains have accompanied the whole history of this nation's criminal jurisprudence.”1 Considering the overwhelming significance of the entire criminal plea process, both to the fate of individual defendants and to the efficient functioning of the criminal justice system,2 it is surprising that nontrial adjudication has met with “relative neglect”3 from the legislative and judicial branches. Such oversight, however, may be in the process of correction. Symptomatic of the change is the expansion in recent years of rule 11 of the Federal Rules of Criminal Procedure, particularly its vast overhaul effective December 1, 1975.4

Rule 11, dealing with pleas of guilty, not guilty, and nolo contendere,5 was formerly (“old rule”)6 a fairly brief set of general guidelines that remained to be fleshed out by the courts. Largely as a result of case law development,7 the rule was amended in 1966 (“1966 rule”) to specify more fully the conduct required by the trial judge in accepting a plea. In substance, the 1966 rule added the conditions that the judge personally address the defendant, include the defendant's understanding of the consequences of the plea as an element in determining voluntariness, and be satisfied that a factual basis for the plea existed.8

2. In 1972, out of 37,220 federal district court criminal convictions, 31,714 (approximately 85%) were the result of guilty pleas. Statistical Abstract of the United States 161 (1973). In 1964, 95.5% of all criminal convictions in trial courts of general jurisdiction in New York resulted in guilty pleas. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967).
5. The current rule 11 provides in part: “(a) ALTERNATIVES. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.” Id.
6. Prior to 1966, rule 11 provided: “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 the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.”
7. See notes 44 & 96 infra and accompanying text.
8. Fed. R. Crim. P. 11 as amended in 1966 provided: “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 or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall
PLEA BARGAINING

In April, 1974, the Supreme Court adopted and submitted to Congress proposed amendments to the Federal Rules of Criminal Procedure, including rule 11 ("new rule"). Congress delayed the effective date for one year, until August 1, 1975. Following further revisions by House and Senate Committees, the amendments were approved and signed by the President to take effect December 1, 1975. An exception was made for rule 11 ("amended new rule") section (e)(6), which became effective August 1, 1975.

The most significant addition to rule 11 in the 1974-75 amendments was a completely new section which at last brings plea bargaining negotiations into open court and regulates their use. Substantial changes, likely to have enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." See the Advisory Committee Notes to the 1966 Amendment to Fed. R. Crim. P. 11, 18 U.S.C. App. 4489-90 (1970) [hereinafter cited as Advisory Committee Notes].

9. See Justice Douglas' dissent in H.R. Doc. No. 292, 93d Cong., 2d Sess. 22 (1974). Calling the Court "a mere conduit of the Rules to Congress," Justice Douglas opposed adoption "since the Court has had no hand in drafting them and has no competence to design them in keeping with the titles and spirit of the Constitution." Id.

10. The amendments were promulgated pursuant to 18 U.S.C. §§ 3771-72 (1970), the rules' enabling acts, providing an effective date of ninety days after submission to Congress, unless blocked by both Houses.

11. H.R. Rep. No. 247, 94th Cong., 1st Sess. 2 (1975) [hereinafter cited as House Report]. One reason for the delay was that some of the changes (not involving rule 11) were "highly objectionable" to the Justice Department. Id. at 39.

12. The effect of the amendments will probably be keenly felt on both federal and state levels. By analogy, the amended new rule should be treated similarly to its predecessor so that any noncompliance with it would be reversible error, requiring the resultant plea to be set aside. See McCarthy v. United States, 394 U.S. 459, 464 n.9 (1969). On the other hand, since a later case limited the McCarthy construction to prospective application, strict compliance with the new rule may not be necessary until a new ruling akin to McCarthy. See Halliday v. United States, 394 U.S. 831, 833 (1969); Davis v. United States, 470 F.2d 1128, 1130 (3d Cir. 1972); Counts v. United States, 441 F.2d 1377, 1379 (5th Cir. 1971), cert. denied, 404 U.S. 1046 (1972).

Further, the amended new rule will have important repercussions in state cases, inasmuch as the dictates of the 1966 rule were in effect held applicable to state criminal prosecutions on constitutional grounds in Boykin v. Alabama, 395 U.S. 238 (1969), which was also prospectively applied, Crowe v. South Dakota, 484 F.2d 1359, 1362 (8th Cir. 1973), cert. denied, 415 U.S. 927 (1974). However, since Boykin was decided on a broad constitutional basis, it left open whether strict compliance with rule 11 would be necessary in state cases. Thus far, state courts do not require total adherence to the procedural aspects of the rule. Wade v. Coiner, 468 F.2d 1059, 1060 (4th Cir. 1972) (no need for state court to engage in rule 11 colloquy); Freeman v. Page, 443 F.2d 493, 497 (10th Cir.), cert. denied, 404 U.S. 1001 (1971) (no need for state court to determine factual basis); State v. Williker, 107 Ariz. 611, 491 P.2d 465 (1971) (en banc) (only the spirit and not the letter of the "personal address" provision need be followed); cf. Boykin v. Alabama, 395 U.S. 238, 245 (Harlan & Black, J.J., dissenting) (the majority was burdening the states with "the rigid prophylactic requirements of Rule 11. . .").

13. See note 130 infra and accompanying text.

14. See notes 20-38 infra and accompanying text. Relevant portions of the amended new rule will be quoted as they are discussed in this Note. For a discussion of the purposes of the amendments, see the Advisory Committee Notes to the 1974 Amendment to Fed. R. Crim. P. 11, 18 U.S.C.A. 20-27 (1975) [hereinafter cited as Advisory Committee Notes].
varying degrees of impact, have also been made in the areas of determining the voluntary and knowing character of a plea, its accuracy or factual basis, and its use in later proceedings. Further, a court may accept a nolo contendere plea "only after due consideration of the views of the parties and the interest of the public in the effective administration of justice." This Note will survey the changes written into the new amendments, analyzing the extent of their derivation from case law development before and since the 1966 rule, and probing their likely effect on judicial decisions to come.

II. PLEA BARGAINING

The constitutional requirement of voluntariness to validate pleas, and the pragmatic need for plea bargaining to unburden crowded calendars, have often been assumed to be necessarily in conflict, with the unfortunate result that the trial court record is in effect falsified by denial of the existence of a perfectly reasonable negotiated plea agreement. Further, a record so substantially incomplete invites collateral attack by a defendant who alleges an unkept bargain.

The new rule 11 reflects the view that the time has come to legitimize plea bargaining. It recognizes that a properly negotiated plea represents a voluntary step by the defendant and is distinct from a coerced plea based on threats or unfulfilled promises. Perhaps the stimulus to bring plea bargaining into open court stemmed from the 1971 Supreme Court decision, Santobello v. New York, which clearly advocated the practice, "properly administered," as "an essential

15. See notes 39-93 infra and accompanying text.
16. See notes 94-128 infra and accompanying text.
17. See notes 129-38 infra and accompanying text.
18. The plea of nolo contendere was held constitutionally valid in Hudson v. United States, 272 U.S. 451 (1926), but its use is still controversial. It is acceptable under the laws of only about half the states. ABA Standards, supra note 3, at 14. It operates in effect like a plea of guilty, but it cannot be used as an admission against the defendant in a later trial—civil or criminal. Advisory Committee Notes, supra note 14, at 21. No factual basis is required for the plea under rule 11.
21. See notes 33-35 infra and accompanying text.
22. Fed. R. Crim. P. 11(d) provides: "INSURING THAT THE PLEA IS VOLUNTARY. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney." See Machibroda v. United States, 368 U.S. 487 (1962) (hearing required to determine whether guilty plea was not voluntary as induced by promises and threats).
component of the administration of justice." The Court listed the desirable results of plea bargaining:

It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Section (e) of the amended new rule contains the plea bargain provisions. The congressional amendments represent mostly insubstantial changes in the Supreme Court's version.

It should first be pointed out that section (e) does not require that plea negotiations be conducted, but only that if conducted, they be revealed either in open court or, with good cause, in camera. The negotiations may be

24. Id. Federal cases had already held that when pleabargaining exists it should be "spread on the record." E.g., Raines v. United States, 423 F.2d 526, 530 (4th Cir. 1970).

25. 404 U.S. at 261. For additional discussion of the benefits of plea bargaining, see Brady v. United States, 397 U.S. 742, 752 (1970); Advisory Committee Notes, supra note 14, at 23-24. Of course, it is often pointed out that the practice is open to abuse, e.g., over-lenience in sentencing. Challenge of Crime, supra note 20, at 135.

26. Fed. R. Crim. P. 11(e) provides:

   "(1) IN GENERAL. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following—(A) move for dismissal of other charges; or (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or (C) agree that a specific sentence is the appropriate disposition of the case. The court shall not participate in any such discussions.

   "(2) NOTICE OF SUCH AGREEMENT. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

   "(3) ACCEPTANCE OF A PLEA AGREEMENT. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

   "(4) REJECTION OF A PLEA AGREEMENT. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

   "(5) TIME OF PLEA AGREEMENT PROCEDURE. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court."


28. The "in camera" provision was added by Congress (House Report, supra note 11, at 6) to
conducted between the defense attorney (or the defendant acting pro se) and the prosecutor. The judge, however, is excluded from participation, in order to maintain the court's objectivity in later assessing the voluntariness of the plea. Furthermore, the exclusion of the judge is intended to prevent undue pressure on the defendant to waive his right to trial. Because the judge's participation may appear to pose a threat of a longer sentence if the defendant refuses to plead guilty, "participation by even fair-minded judges . . . is likely to devastate a defendant's volition" and thus produce a coerced plea.

The section provides for several possible negotiated concessions in return for a plea of guilty or nolo contendere. The plea can be made to a reduced or related charge, or it can result in dismissal of other charges. The prosecutor may agree to recommend or not to oppose a specified sentence, or the prosecution and defense may agree that a particular sentence is appropriate. One problem untouched by the rule is that a defendant's opportunity to plea bargain continues to hinge upon the prosecutor's selective agreement to negotiate. In order to provide equal protection for all defendants, it has been suggested that defendants seeking plea concessions have access to an impartial arbiter who would recommend appropriate pleas in given cases.

At the arraignment or other pre-trial hearing at which the plea is offered in court, the judge may accept or reject it, or defer decision until he has considered the presentence report. Upon deciding to accept the plea, the judge must inform the defendant that the sentence will be as provided in the agreement. Because failure by the judge or prosecutor to keep a plea bargain promise generates "an outraged sense of fairness," many appellate courts have traditionally reversed convictions for this failure. The difficulty, however, has been in demonstrating that there was a bargained-for plea, since the record often proved to be barren of any such indication. At least one court has denied a hearing where the defendant attacked an alleged unkept plea bargain which he had failed to reveal in response to the trial judge's rule 11 inquiries under the 1966 rule. On the other hand, a defendant might, out of fear of jeopardizing the bargain, answer in the negative to a general rule 11 inquiry as to whether promises had been made, and thus a defendant who

31. Id. at 49 & n.111.
33. A recent New York case ruled that even a defendant who had absconded was entitled to receive the promised sentence or else be allowed to withdraw his plea. People v. Johnson, 48 App. Div. 2d 643, 368 N.Y.S.2d 26 (1st Dep't 1975) (per curiam).
later claimed an unkept bargain should be granted a hearing.\textsuperscript{35} Such problems should be minimized by the openness compelled by the new disclosure requirements.

The unamended version of section (e) had provided that if the judge accepted the plea, the defendant would receive the promised disposition or one more favorable to him. The “more favorable” clause was deleted by the amendments. This change should serve to cement the bargain from the prosecutor’s point of view as well as the defendant’s.

If the judge decides to reject the plea, he must so inform the parties and the defendant personally, allowing the defendant to withdraw the plea. Otherwise the defendant may receive a less favorable disposition than that provided by the agreement. Case law development has indicated that the court must inform the defendant, when any plea agreement is disclosed, that the court is not obligated to accept the plea.\textsuperscript{36} However, if the judge then decides to reject the bargained-for disposition, the courts have not agreed on whether the defendant should be permitted to withdraw his plea.\textsuperscript{37} By providing for such withdrawal, section (e) answers this question.

Section (e) is untested, but it seems to present a just and workable procedure for assuring that plea negotiations produce the fairest results considering the interests of both the government and the defendant. Since it does not compel the use of plea bargaining, each federal court can decide the extent to which it will allow negotiations to be conducted within its jurisdiction.\textsuperscript{38} Only after trial courts have worked with the new section for a time, and appellate review has begun, will an evaluation of its success or failure be possible.

III. VOLUNTARINESS

The concept of voluntariness, applying to pleas of guilty and nolo contendere, encompasses several aspects. Pleas have generally been considered voluntary if made with knowledge of the nature of the charge to which the plea is entered and of the consequences of the plea. The facet of voluntariness relating to freedom from threats or promises has already been discussed.

The pre-1966 provision of rule 11\textsuperscript{39} reflected a long-standing concern that a plea be voluntary, in view of its serious consequences. The Supreme Court made this point in *Kercheval v. United States*:\textsuperscript{40}

A plea of guilty . . . is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of

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  \item \textsuperscript{35} Walters v. Harris, 460 F.2d 988, 993 (4th Cir. 1972), cert. denied, 409 U.S. 1129 (1973).
  \item \textsuperscript{36} E.g., Paradiso v. United States, 482 F.2d 409, 413 (3d Cir. 1973).
  \item \textsuperscript{37} For a view that plea withdrawal in such case should be allowed in the absence of prejudice to the prosecution, see United States ex rel. Culbreath v. Rundle, 466 F.2d 730, 735 (3d Cir. 1972). But see Vanater v. Boles, 377 F.2d 898, 900 (4th Cir. 1967) (plea withdrawal not justified by disappointed expectation of leniency, unless wrongfully induced by prosecution).
  \item \textsuperscript{38} House Report, supra note 11, at 6.
  \item \textsuperscript{39} See note 6 supra.
  \item \textsuperscript{40} 274 U.S. 220 (1927).
\end{itemize}
guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.\textsuperscript{41}

In 1966 the rule was enlarged to require that the court not accept the plea "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."\textsuperscript{42} The "personal address" provision was added to put the stamp of approval on a practice that was causing much controversy among the circuits. Some courts, faced with the situation of a defendant represented by counsel, felt that the voluntariness determination could be satisfied by assertions of counsel at the time of the plea.\textsuperscript{43} This opinion was based on the theory that the attorney's statements in the presence of the defendant would presumably indicate the defendant's understanding and knowledge. The growing view, however, even prior to 1966, was that personal interrogation of a defendant by the court was the preferable practice even when counsel was present\textsuperscript{44} in order to assure voluntariness. The presence of counsel, nonetheless, was an additional factor in a subsequent determination of voluntariness.\textsuperscript{45}

Adoption of the "personal address" provision in the 1966 rule did not bring an end to the controversy. On the contrary, many questions remained open, such as whether full rather than substantial adherence would be required.\textsuperscript{46} Failure to comply strictly with this provision led to the case of \textit{McCarthy v. United States},\textsuperscript{47} in which the Supreme Court mandated the setting aside of guilty pleas in the absence of full compliance with rule 11.\textsuperscript{48} Deciding under the Supreme Court's supervisory power over the lower federal courts rather than on constitutional grounds,\textsuperscript{49} the Court in \textit{McCarthy} reasoned that strict compliance with the "personal address" provision was necessary in order both to assure a voluntary plea and to develop a strong trial record that could withstand later attack on this basis.\textsuperscript{50}

Under the 1966 rule the issue of statements and admissions by defendant's counsel to the court continued to arise. These were generally held not to satisfy the "personal address" clause,\textsuperscript{51} since to accept them would defeat the

\begin{enumerate}
\item Id. at 223.
\item See note 8 supra.
\item See United States v. Diggs, 304 F.2d 929, 930 (6th Cir. 1962); Domenica v. United States, 292 F.2d 483, 485 (1st Cir. 1961).
\item Gundlach v. United States, 262 F.2d 72, 76 (4th Cir. 1958), cert. denied, 360 U.S. 904 (1959).
\item 394 U.S. 459 (1969); see note 12 supra.
\item 394 U.S. at 471-72.
\item Id. at 464.
\end{enumerate}

Another reason suggested for the "personal address" provision is for correctional purposes, to impress the defendant with the dignity of the court process and its fairness and concern for his rights. Hoffman, Rule 11 and the Plea of Guilty, 45 F.R.D. 151 (1967).

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\item E.g., United States v. Cody, 438 F.2d 287, 288 (8th Cir. 1971).
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purposes of assuring voluntariness and building a proper record. Another question was whether the prosecutor, rather than the judge, could conduct the personal interrogation or any part of it. This presented a situation where the correct party under the rule was questioned, but the questioner failed to fit within a strict construction of its language. The prevailing view seemed to be that having the prosecutor ask some of the critical questions was substantial compliance, because the "evil" intended to be cured by the provision was that of having counsel state defendant’s supposed understanding.52 Since McCarthy, however, the practice apparently has been disallowed, under the strict construction theory.53

The new rule as recently amended expands the personal discussion, which must occur in open court, between judge and defendant. In section (c), entitled “ADVICE TO DEFENDANT,” the “nature of the charge” provision is retained,54 and the “consequences of the plea” requirement is delineated to include “the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law . . . .”55

The 1966 rule had added the “consequences of the plea” requirement in order “to state what clearly [was] the law.”56 The maximum/minimum sentence provision of the new rule probably has somewhat the same purpose, since the “consequences” have generally been read to mean at least the maximum sentence that can be imposed.57 The Advisory Committee describes the objective as “to insure that a defendant knows what minimum sentence the judge must impose and what maximum sentence the judge may impose.”58

It is not clear what effect the new provision will have on the need to explain to the defendant any other consequences of the plea,59 a divisive issue under

53. E.g., Davis v. United States, 470 F.2d 1128, 1130 (3d Cir. 1972) (since plea pre-dated McCarthy, questioning by prosecutor held acceptable) (dictum); Hopkins v. United States, 431 F.2d 429 (5th Cir. 1970) (per curiam) (same). Contra, e.g., Kress v. United States, 411 F.2d 16, 18 (8th Cir. 1969) (per curiam) (prosecutor advised defendant of the plea consequences).
54. The extent of the explanation of the charge depends on the complexity of the charge, the defendant’s age, record, intelligence, ability to understand what is said to him (i.e., language barrier), and whether he is represented by counsel. Irizarry v. United States, 508 F.2d 960, 964 & n.3 (2d Cir. 1974).
57. United States v. Maggio, 514 F.2d 80, 87-88 (5th Cir.), cert. denied, 96 S. Ct. 563 (1975) (defendant must be aware “of the range of sentences to which the plea exposes him”); see Marvel v. United States, 380 U.S. 262 (1965) (per curiam) (hearing required on whether defendant, not informed of possibly longer sentence under Federal Youth Corrections Act, was misled as to maximum sentence); Pilkington v. United States, 315 F.2d 204, 210 (4th Cir. 1963) (defendant must have “a complete understanding of the possible sentence”).
58. Advisory Committee Notes, supra note 14, at 21 (emphasis in original).
59. The ABA Standards, supra note 3, at 25, contain the workable suggestion that a defendant be informed when the offense charged is one that may impose a different or additional punishment on persons with previous convictions.
the 1966 version. An often-quoted guideline is that a defendant must be informed of those consequences that will have "a definite, immediate and largely automatic effect on the range of [his] punishment."60 Under this reasoning, for example, a defendant would not have to be informed that his conviction by plea makes him subject to separate deportation proceedings.61 Key among the questioned consequences are ineligibility for parole62 and the special parole term.63 Under the 1966 rule, ineligibility for parole has been held by some courts to be a "consequence" that must be explained;64 the opposite view has been taken by others on the ground that a defendant can make an intelligent plea without knowing every "but for" consequence that follows from it.65 An explanation of such consequences would seem appropriate since "the right to parole has become so engrafted on the criminal sentence that such right is 'assumed by the average defendant' and is directly related in the defendant's mind with the length of his sentence."66 Under the new rule, however, such explanation apparently would not be necessary, since parole ineligibility affects neither the mandatory minimum nor the possible maximum term.67 The question of whether the special parole term is a plea consequence that must be explained has likewise resulted in some confusion among the courts.68 The new rule should be held to require that a defendant who may be subject to such a term be informed of it, since it will increase his potential maximum imprisonment.69

Not only must the court determine that the defendant understands the nature of the charge and the consequences, but it is specified that the court must "inform him of" them. Although this last change has been ignored by the

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61. Id.
62. For example, under multiple offender statutes, defendants with previous convictions may be subject to parole ineligibility.
63. The Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 841(b)(1)(A) & (C) (1970), provides for special terms of parole which may, if violated, result in imprisonment beyond the statutory maximum term.
64. E.g., United States v. Rex, 465 F.2d 875, 878 (6th Cir. 1972); Paige v. United States, 443 F.2d 781, 783 (4th Cir. 1971).
65. E.g., Trujillo v. United States, 377 F.2d 266, 268-69 (5th Cir.), cert. denied, 389 U.S. 899 (1967). However, a later Fifth Circuit decision called the opposite the "better view," United States v. Farias, 459 F.2d 738, 740 (5th Cir. 1972) (dictum), aff'd per curiam, 488 F.2d 852 (5th Cir. 1974) (en banc).
67. "Under the rule the judge is not required to inform a defendant about these matters . . . ." Advisory Committee Notes, supra note 14, at 22.
68. Roberts v. United States, 491 F.2d 1236, 1237 (3d Cir. 1974) (per curiam) (special parole term must be explained as "consequence"); United States v. Richardson, 483 F.2d 516, 518 (8th Cir. 1973) (same). But see Bell v. United States, 521 F.2d 713, 715 (4th Cir. 1975) (failure to inform defendant of special parole term held not reversible error so long as sentence imposed, including special parole term, was within stated maximum).
69. See note 63 supra.
Advisory Committee in its accompanying notes, it would seem that the new wording may have the effect of clarifying the required procedure for the trial judge. For example, a recent Sixth Circuit case, affirming denial of a motion to withdraw a plea of nolo contendere to a federal charge of conspiracy to manufacture counterfeit notes, held that there was “substantial compliance with Rule 11”—sufficient to satisfy the McCarthy requirement—based in part on the fact that the defendant “represented . . . that he understood the charge and there were no questions in his mind about it . . . .” It may be significant that nowhere in the trial court colloquy between the defendant, his counsel, and the judge, is there any statement simply informing the defendant of the nature of the charge. This case was decided under the 1966 rule, but under the “inform him of” proviso of the new rule, it would appear that the dissent's view—already the holding of several circuits—would have to prevail. The dissent stated that the court must “inquire into a defendant's understanding of the nature of the charge against him, and this requires an explanation of the basic acts that must be proved in order to establish guilt.”

In addition to the nature of the charge and maximum/minimum term provisions of the “personal address” by the court, section (c) as amended further requires that the court inform the defendant of, and determine that he understands, his rights to counsel, to plead not guilty, to trial by jury (and the waiver by the plea of trial of any kind), to confront the witnesses against him, and the right against self-incrimination. This represents a substantial expansion of the proposed section which had omitted all the above except the right to plead not guilty and the waiver of trial. The latter provision was

70. “Subdivision (c)(1) retains the current requirement that the court determine that the defendant understands the nature of the charge. This is a common requirement.” Advisory Committee Notes, supra note 14, at 21.

71. United States v. Brogan, 519 F.2d 28 (6th Cir. 1975) (per curiam).

72. Id. at 30. The majority concluded that McCarthy does not “require the parroting of any rule . . . .” Id.

73. Id. at 30-30.

74. E.g., Irizarry v. United States, 508 F.2d 960, 964 (2d Cir. 1974); Woodward v. United States, 426 F.2d 959, 962 (3d Cir. 1970).

75. 519 F.2d at 30 (McCree, J., dissenting).

76. It has long been the law that a defendant who pleads guilty without counsel must do so with understanding of the waiver of counsel. Von Moltke v. Gillies, 332 U.S. 708 (1948). Pleas made without counsel have generally been scrupulously examined for constitutional infirmities. See, e.g., Fontaine v. United States, 411 U.S. 213 (1973).

77. Section (c) as amended states in pertinent part that the defendant must be informed of and understand: “(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

"(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

"(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial . . . ."
intended to clarify matters for defendants who, while understanding the trial by jury waiver, mistakenly believe that a trial of some kind will follow. The other rights listed were included for the purpose of making obligatory, and conforming to, the dictates of *Boykin v. Alabama*, which in effect applied rule 11, at least in broad outline, to state prosecutions. *Boykin* held that the waiver of the federal constitutional rights against self-incrimination, to trial by jury, and to confront one's accusers, implied by a plea of guilty or nolo contendere, could not be presumed "from a silent record." Without such waiver, a plea would fail for lack of an affirmative showing that it was voluntary and intelligent. Since *Boykin*, however, several circuits have ruled that pleas do not become constitutionally invalid when defendants are not advised of the three rights enumerated in *Boykin*, on the ground that a record affirmatively disclosing voluntariness is all that is required. Thus, the congressional committee which amended the new rule stated that its objective in section (c) was in part to add the warnings which *Boykin* held to be constitutionally required. The Advisory Committee Notes to the unamended new rule also referred to *Boykin*, concluding that the rights against self-incrimination and to confront one's accusers were best explained, respectively, in terms of the right to plead not guilty and the waiver of a trial. In any event, it seems clear that, in conjunction with *McCarthy*'s strict compliance rule, the three *Boykin* warnings will be mandated for all guilty pleas under the new rule.

However, other rights, of a non-jurisdictional nature, accruing before a plea, have been held to be voluntarily and finally waived implicitly by the plea of guilty. Examples include the rights to indictment by a grand jury selected by non-discriminatory procedures, to a speedy trial, and to

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78. Advisory Committee Notes, supra note 14, at 22.
79. 395 U.S. 238 (1969) (held invalid a guilty plea to a state charge of robbery, since judge failed to personally address defendant).
80. Id. at 245 (Harlan & Black, J.J., dissenting); Crowe v. South Dakota, 484 F.2d 1359, 1362 (8th Cir.), cert. denied, 415 U.S. 927 (1973) (dictum).
81. 395 U.S. at 243.
82. A waiver has long been held to require "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
83. 395 U.S. at 242-43.
84. Wilkins v. Erickson, 505 F.2d 761, 763 (9th Cir. 1974); Lockett v. Henderson, 484 F.2d 62 (5th Cir. 1973), cert. denied, 415 U.S. 933 (1974); Stinson v. Turner, 473 F.2d 913, 916 (10th Cir. 1973); Wade v. Cointer, 468 F.2d 1059, 1061 (4th Cir. 1972); see Davis v. United States, 470 F.2d 1128, 1129 (3d Cir. 1972) (where the court inquires as to voluntariness of the plea, and informs the defendant of the right to trial by jury, and is thereby satisfied the plea was made knowingly and voluntarily, no independent warning against self-incrimination is necessary).
86. Advisory Committee Notes, supra note 14, at 22.
87. McDonald v. United States, 437 F.2d 1251 (5th Cir. 1971) (a guilty plea waives all non-jurisdictional defects).
challenges of entrapment, illegal search and seizure, and coercion in making any prior confession. Since a guilty plea is a "break in the chain of events," it cuts off challenges to certain prior stages of the criminal process, limiting later attack to whether the plea was entered intelligently with the advice of competent counsel.

The new rule generally tightens the guidelines for determining whether a plea is entered knowingly and voluntarily by expanding the number of items about which the trial court must personally advise the defendant, including specifically the three Boykin rights. The delineation of these requirements should lead to more consistent results among the circuits. On the other hand, the new minimum/maximum sentence provision may have a narrowing effect on the required advice by making it unnecessary to discuss other consequences of the plea.

IV. ACCURACY OF THE PLEA: "FACTUAL BASIS" REQUIREMENT

Section (f) of the new rule requires a determination of the accuracy of the guilty plea, i.e., whether the defendant is in fact guilty of the crime to which he is pleading. The section is substantially similar to the corresponding provision in the 1966 rule. The new section (f) states that notwithstanding "the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Under the 1966 rule, the court was not required to make "inquiry" in order to be satisfied on the accuracy issue; it is debatable whether this change will have a significant impact.

Prior to 1966, the rule contained no factual basis requirement. However, incorporation of such a requirement reflected the approach taken in recent years by many trial judges concerned with the problem of inaccuracy in guilty pleas. A fundamental concern was that a defendant might enter a guilty plea that met the standards for voluntariness and yet was inaccurate, due to the accused person's ignorance that his conduct failed to constitute the necessary elements of the crime charged.

91. United States v. Bell, 457 F.2d 1231, 1234 n.1 (5th Cir. 1972).
94. See note 8 supra.
95. See notes 103 & 104 infra and accompanying text.
96. "Although the practices vary greatly from place to place, they reflect a dissatisfaction with the brief and cursory question and answer sequence that has traditionally characterized the arraignment. Many judges make a detailed inquiry of the defendant concerning the precise nature of his conduct. Others use a post-plea-of-guilty hearing, at which physical evidence or statements may be produced or witnesses may be examined. Elsewhere judges have required that the presentence investigation focus more directly upon the facts surrounding the alleged crime to which the defendant has entered a plea." ABA Standards, supra note 3, at 32; see Newman, supra note 3, at 10-21.
97. 1966 Advisory Committee Notes, supra note 8, at 4489. For example, in a 1948 case.
The factual basis provision left to the trial judge's discretion the method by which he was to be "satisfied" on the accuracy issue. At first, it was uncertain whether this satisfaction had to be specified on the record. One belief was that it was to be presumed from acceptance of the plea.98 In 1970, the Second Circuit held that in cases of pleas entered before the effective date of McCarthy v. United States,99 it would be sufficient if the record indicated that the trial judge knew that an ample factual basis existed, even if he failed to specify what it was.100 However, the court continued, in post-McCarthy cases the trial judge "must demonstrate on the record that he has satisfied himself that there is a factual basis for the plea."101 The Supreme Court espoused this latter view in 1971 stating: "the sentencing judge must develop, on the record, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge."102

The new rule requires the trial judge to make "such inquiry" as is necessary to satisfy himself of the factual basis. Although the Advisory Committee Notes to the new rule imply that the new provision is indistinguishable from the old,103 this precise language had apparently been suggested once in the past and rejected, indicating that it had previously been the subject of controversy.104 It would seem likely that the new language is meant to clarify the point that the judge's satisfaction as to factual basis cannot be based on facts privately known or subjectively believed by him, but must be founded on an objective factual inquiry developed on the record.

The new rule, like its 1966 counterpart, leaves open the question of how the factual basis is to be determined. Unlike the voluntariness provision, there is where the principal issue was voluntariness, the Supreme Court questioned the factual basis of the plea, since the defendant might have been misled into believing that innocent association with criminals was sufficient to constitute guilt on a charge of conspiracy to violate the 1917 Espionage Act. Von Moltke v. Gillies, 332 U.S. 708, 722 (1948).

98. "It is believed . . . that a specific finding in the record is unnecessary, and that the pronouncement of judgment is sufficient indication that the required determination has been made. While the published note of the Advisory Committee sheds no light on the subject, the writer is informed by a member of the Committee that the belief herein expressed is in accord with the unanimous view of the Committee." Stanley, Requirements of Rules 11 and 44 of the Federal Rules of Criminal Procedure, 45 F.R.D. 155, 158 (1967).
100. Manley v. United States, 432 F.2d 1241, 1244 (2d Cir. 1970).
101. Id. (emphasis added); accord, Irizarry v. United States, 508 F.2d 960, 967 (2d Cir. 1974) ("Any additional facts on which the court relies in determining that there is a factual basis for the plea must be put into the record at the time of the plea.").
103. "Subdivision (f) retains the requirement of old rule 11 that the court should not enter judgment upon a plea of guilty without making such an inquiry as will satisfy it that there is a factual basis for the plea." Advisory Committee Notes, supra note 14, at 26.
104. The phrase was included in an early version of the 1966 Rule, prior to its final adoption. Proposed Amendments to Rules of Criminal Procedure 5 (Second Preliminary Draft 1964). One commentator stated that there was a "significant difference" in phraseology, since the adopted version made it clearer "that the test is a subjective one, is the court satisfied, rather than an objective test, is there a factual basis." 1 C. Wright, Federal Practice & Procedure 375-76 (1969).
no requirement that the judge personally address the defendant on the factual basis issue. The Advisory Committee suggested three possible sources of information: the defendant, the attorney for the government, and the presentence report.105 The major point of controversy which has developed in this area is the handling of a situation where the record strongly evidences the defendant’s guilt and the defendant wishes to enter a guilty plea, while refusing to admit his guilt. The Supreme Court paved the way for acceptance of a plea under such circumstances in its landmark decision, *North Carolina v. Alford*,106 which affirmed a state murder conviction despite the defendant’s allegation that his prior guilty plea was the result of fear and coercion. While proclaiming his innocence throughout, the defendant had pleaded guilty to second degree murder for the express purpose of avoiding the mandatory sentence of death (or life imprisonment, at the jury’s discretion) if he were convicted of first degree murder following a jury trial. Although the Court had previously upheld the validity of a guilty plea made to escape the death penalty,107 it had never considered this issue in conjunction with that of a defendant who steadfastly maintained his innocence. The Court upheld the constitutionality of the plea,108 since it reflected an intelligent choice made under advice of counsel, in the light of a record which strongly indicated guilt109 (the trial court had heard damaging evidence from several witnesses prior to final acceptance of the plea).110 The Court did not mandate, however, that such pleas must necessarily be accepted. In all cases the result is within the judge’s discretion, and in state cases, the state can legislate against permitting pleas to reduced charges.111

In reaching its decision, the Court pointed to its previous holding in *Hudson v. United States*112 that it is not constitutionally impermissible to convict and imprison a defendant who has refused to admit guilt, where conviction is based on a plea of nolo contendere. Several courts had since argued however, that a guilty plea must be grounded in an “unequivocal” admission of guilt.113

The *Alford* holding has been attacked for at least three reasons. First, it may facilitate conviction of the innocent defendant who pleads guilty for his own purposes.114 Second, the convicted defendant who denies guilt may

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105. 1966 Advisory Committee Notes, supra note 8, at 4489; Advisory Committee Notes, supra note 14, at 26-27; see Woodward v. United States, 426 F.2d 959, 963 (3d Cir. 1970) (court can satisfy itself of factual basis from any source).


108. Only five Justices joined in the majority opinion; a separate opinion by Justice Black concurred in the result. 400 U.S. at 39.

109. Id. at 37-39.

110. Id. at 28.

111. Id. at 38-39.


114. “A guilty plea may be entered by a psychiatrically disturbed person . . . . A clearly
present special problems for prison officials or others in the correctional process. Finally, acceptance of such pleas at the trial level may only ease the way for time-consuming post-conviction litigation by disgruntled defendants.

Indicative of the general hesitancy to extend *Alford* was the Eighth Circuit's refusal to accept mere reading from the indictment by the prosecutor as providing sufficient factual basis for a plea. Confining *Alford* to "its narrow factual context," the court concluded that "the ominous consequences of self-conviction resulting from a guilty plea must still be guarded by thorough judicial inquiry as required by Rule 11." On the other hand, the Seventh Circuit recently seems to have fully adopted the *Alford* rationale, stating that ordinarily when there is strong evidence of guilt and the defendant, with an understanding of the charge and the consequences of his plea and with the advice of competent counsel, wants to plead guilty although he will not admit the facts that show his guilt, he is entitled to plead guilty. When the trial judge accepts the plea under these circumstances, Rule 11 is satisfied ....

When a defendant wishes to plead guilty but the conduct he admits does not constitute the offense charged, appellate courts are reluctant to allow the plea to stand. In a recent Second Circuit case involving a plea of guilty to a federal charge of obstructing commerce, the court quoted extensively from the trial court record wherein the judge had exacted a detailed oral statement from the defendant concerning his actions. In vacating the sentence entered on defendant's plea, the court noted that this statement, although on the surface a confession of guilt, was in effect a "protestation of innocence,"

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115. Such defendant "is often difficult to deal with in a correctional setting, and it may therefore be preferable to resolve the issue of guilt or innocence at the trial stage rather than leaving that issue unresolved, thus complicating subsequent correctional decisions." Advisory Committee Notes, supra note 14, at 27.

116. "To accept a plea in the face of a complete denial of involvement, regardless of the strength of the incriminating evidence, is to invite a collateral attack." 8 J. Moore, Federal Practice ¶11.03[3], at 11-77 (1975).


118. Id. (footnotes omitted); cf., Langdeau v. South Dakota, 446 F.2d 507 (8th Cir. 1971).

119. United States v. Davis, 516 F.2d 574, 578 (7th Cir. 1975).

120. Rizzo v. United States, 516 F.2d 789 (2d Cir. 1975).

121. More specifically, the charge pleaded to was "obstructing, delaying and affecting commerce and the movement of articles in commerce by obtaining money ... through the inducement of actual and threatened use of force, violence and fear in violation of 18 U.S.C. § 1951 [(1970)]." 516 F.2d at 791.

122. Id. at 794, citing Hulsey v. United States, 369 F.2d 284, 287 (5th Cir. 1966).
since it denied the essential elements of use or threatened use of force, violence or fear. The trial record apparently contained no outside evidence for finding a factual basis, other than a paraphrasing of the indictment by the judge. Thus, the court's decision left open the outcome if a case were to present an identical statement combined with a strong factual basis from another source. The situation therein was further complicated by the fact that several defendants were charged in the same indictment; courts have been particularly cautious in such cases to ascertain a factual basis for each one.

Other problem areas involving factual basis occur when a defendant facing a strong prosecution case wishes to plead guilty but either cannot remember committing the crime, due, for example, to intoxication, or may have a valid defense, such as insanity or self-defense. Failure of the defendant to recall whether he committed murder has been held proper grounds for disallowing a plea, although acceptance of such plea would have been within the trial judge's discretion. A 1962 Supreme Court case held, by implication, that there would be no constitutional bar to accepting a plea even though the trial judge had evidence indicating an insanity defense. Finally, a plea of guilty to murder, made to escape the death penalty, was ruled valid although the defendant believed he had a self-defense claim. Since solutions to problems such as these have been forthcoming on a case-by-case basis, highly dependent on the specific facts involved, it is difficult to extract general principles when factual basis is at issue.

It appears that the new rule, through its factual basis provision, will guarantee that grounds for accepting the accuracy of the plea will be determined through on-the-record inquiry by the judge. The questions left open by the 1966 rule, however, as to the sources of inquiry and when sources other than the defendant will suffice, remain unanswered by the new rule, and will await additional case law development.

V. USE OF RELATED STATEMENTS IN LATER PROCEEDINGS

Two related sections of the amended new rule, (c)(5) and (e)(6), are likely to engender controversy. The debatable element added by the congres-
sional amendments is the provision that if, at the time of a plea of guilty which is later withdrawn, or nolo contendere, or an offer to plead either, the defendant makes statements related to or in connection with the plea—on the record, under oath, and in the presence of counsel—evidence of such statements may be used in a subsequent perjury prosecution, though not in any other civil or criminal proceeding. The courts have held inadmissible, as an admission of guilt in a later proceeding, an offer to plead guilty or nolo contendere or a withdrawn plea, whereas an accepted plea of guilty can be used for this purpose. Rule 11 has never included reference to this issue before. The new provision apparently does not reflect case law development or judicial conflict, but rather was invented by Congress. This provision is the only part of rule 11 which is not clearly in line with the ABA Standards Relating to Pleas of Guilty.

The stated purpose of section (e)(6) is to "protect the integrity of the judicial process from willful deceit and untruthfulness." Although it was recognized that the section may have the result of discouraging plea agreements or, at least, discouraging candidness during plea negotiations, in balance this disadvantage was considered less important than the stated goal. The purpose of section (c)(5) is to warn the defendant about the potential effects of section (e)(6); such warning was considered "only fair."

The House Committee's version of section (e)(6) was somewhat broader than the provision as eventually passed by the Conference Committee; it would have allowed limited use of the withdrawn plea or offer itself, rather than just related statements. A strong objection to the House version was that "[i]t can lead to the anomaly of having an innocent defendant convicted for claiming he was guilty [since if a] guilty plea were overturned by an appellate court on the grounds that it was coerced, the government could then prosecute the defendant for perjury on the ground that he said he was guilty." The enacted version may reduce the possibility of this peculiar result by limiting later use to related statements in connection with the plea.

The more formidable ground for attack of the two sections is likely to be a plea of guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere . . . is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel."

133. ABA Standards, supra note 3 at 59, proscribe use of a withdrawn plea in later criminal proceedings but do not address the "related statements" issue.
135. Id.
136. Id.
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one rejected by Congress, i.e., that they may have a deleterious effect upon the plea negotiation system. Since a key part of the new rule is intended to encourage on-the-record plea bargains, a strong argument can be made against a provision that may have precisely the opposite effect.

VI. CONCLUSION

Taken together, the changes wrought by the various sections of rule 11 add up to a renewed concern for consistent results in the courts and for tightened guidelines to more fully advise the trial judge of his responsibilities in the criminal plea process.

The final part of the new rule, section (g), supplies a quick summary of the major areas of expansion under the amended new rule. Section (g) is intended to produce a complete record for use in the event of post-conviction attack of the plea. It requires that a verbatim record be made of all proceedings at which a plea is entered. When a plea of guilty or nolo contendere is made, the record must include "without limitation" the court's advice to the defendant and inquiry into voluntariness, plea agreements, and accuracy.

Section (c) (advice to defendant), together with section (d), encompass the long-required standards for determination of voluntariness of the plea and understanding by the defendant of the nature of the charge. Also, it reflects the 1966 rule's added requirements that the judge personally address the defendant and also that he determine that the defendant understands the consequences of the plea. It further incorporates a substitution for "consequences" of minimum and maximum penalties, and the new requirement that the defendant be informed of and understand the specific constitutional rights that are waived by a plea of guilty or nolo contendere. The new elaboration on the previous rule should achieve greater consistency among the courts as to the role of the trial judge.

Section (e) establishes a series of guidelines for use by courts which are willing to accept plea agreements entered into by prosecutor and defendant. This seal of approval on plea bargaining should help to insure fair and open negotiations, although candidness may be hindered by the section (e)(6) provision allowing limited use of certain statements in perjury prosecutions.

Section (f), necessitating the court to "make inquiry" to reach its previously-required satisfaction as to the factual basis or accuracy of a guilty plea, should make it clearer that the factual basis itself is to be indicated in the record, and not just the fact that there is a known factual basis.

Finally, section (b) requires the court to weigh the public interest against the parties' interests in deciding whether to accept a plea of nolo contendere.

139. Fed. R. Crim. P. 11(g) provides:

"RECORD OF PROCEEDINGS. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea."

140. Advisory Committee Notes, supra note 14, at 27.
Thus, the amended new rule outlines more exact procedures than those required in the past for accepting or rejecting pleas in criminal cases. Still, its precise application to given facts, its gaps and weaknesses when put to practical use, and the degree of compliance it will be accorded, must ultimately await analysis and resolution on a case-by-case basis.

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