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Post Conviction Guilty Plea Withdrawals

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NOTES

POST CONVICTION GUILTY PLEA WITHDRAWALS

Thirteen years after being convicted for armed robbery and murder, the defendant filed a motion to vacate the convictions and withdraw his guilty pleas. Prior to a hearing on the motion, the defendant wrote to the judge who had received the original pleas, admitting he had killed one of the victims. On rehearing,[1] the Missouri supreme court reversed the conviction and remanded the case to permit withdrawal of the plea. The court *held* that defendant's post-conviction admission of guilt to the trial judge was *immaterial* to the grant of his motion to withdraw an *involuntary* plea of guilty. *State v. Reese*, 481 S.W.2d 497 (Mo. 1972).

A plea of guilty is generally construed as a *waiver* of all nonjurisdictional defects;[2] it constitutes a relinquishment of the right to a jury trial,[3] the right of confrontation,[4] and the privilege against self-incrimination.[5] Because this *waiver* involves federal constitutional rights, due process requires that the plea be both voluntary and intelligent.[6]

1. On original hearing, the Missouri supreme court concluded that the trial court erroneously failed to determine whether the pleas were voluntarily and understandingly made in accordance with MO. REV STAT. 42.103 (1959), which provides in part: "The court . . . shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge . . . ." The other pleas were allowed to be withdrawn, but the court withheld judgment on the plea involving the post-conviction admission, pending a lower court hearing. The supreme court there took the position that if the confession or admission were voluntary, no injustice would result by denying the defendant's motion irrespective of the defective plea. State v. Reese, 457 S.W.2d 713 (Mo. 1970).

2. Eaton v. United States, 458 F.2d 704 (7th Cir. 1972); Smith v. Beto, 453 F.2d 403 (5th Cir. 1972); McDonald v. United States, 437 F.2d 1251 (5th Cir. 1971); People v. Jury, 252 Mich. 488, 233 N.W. 389 (1930). *But see* Winters v. Cook, 466 F.2d 1393 (5th Cir. 1972).

3. U.S. CONST. amend. VI; Duncan v. Louisiana, 391 U.S. 145 (1968).

4. U.S. CONST. amend. VI; Pointer v. Texas, 380 U.S. 400 (1965).

5. U.S. CONST. amend. V; Malloy v. Hogan, 378 U.S. 1 (1964).

6. Johnson v. Zerbst, 304 U.S. 458 (1938). The following cases have expressly observed that the "voluntariness" of the plea is the critical factor in determining its validity and that due process mandates that the plea be knowingly and understandingly made: Alford v. North Carolina, 400 U.S. 25 (1970); Parker v. North Carolina, 397 U.S. 790 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (1970); Boykin v. Alabama, 395 U.S. 238 (1969); McCarthy v. United States, 394 U.S. 45 (1969); United States v. Jackson, 390 U.S. 580 (1968); Machibroda v. United States, 368 U.S. 487 (1962); Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956); Schnautz v. Beto, 416 F.2d 214 (5th Cir. 1969); Leonard v. United States, 231 F.2d 588 (5th Cir. 1956); United States *ex rel.* Bresnock v. Rundle, 300 F. Supp. 264 (E.D. Pa. 1969). D. NEWMAN, THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 8 (1966): "While the accurate separa-

There is conflicting judicial authority with respect to the propriety of considering guilt or innocence at a post-conviction hearing on a motion to withdraw a guilty plea. The United States Supreme Court has not ruled directly on this issue. It appears that a majority of jurisdictions[7] follow the reasoning of *Kerscheval v. United States*,[8] where the Supreme Court stated in dictum: "[T]he court will vacate a plea of guilty shown to have been *unfairly* obtained or given through ignorance, fear or inadvertence. *Such an application does not involve any question of guilt or innocence.*"[9] (Emphasis added.) The cases supporting this view take the position that the issue is not the movant's guilt or innocence, but whether the guilty plea was "voluntarily, advisedly, intentionally and understandingly entered . . . or attributable to force, fraud, fear, ignorance, inadvertence or mistake."[10]

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tion of the guilty from the innocent is obviously a major objective of adjudication by trial or by plea, there is also increasing concern, particularly by appellate judges, over aspects of the guilty plea process not directly related to the guilt or innocence of the defendant. For example, it is generally required that the person pleading guilty do so only with full understanding of the consequences." "Fairness of the process is no less an objective in guilty plea cases than in cases which are tried, but dimensions and the significance of fair procedures in the guilty plea process has received less attention than the matter of fair trial." *Id.* at 206. The Supreme Court in *Alford v. North Carolina*, 400 U.S. 25, 31 (1970), held that a guilty plea found to have been knowingly, understandingly, and voluntarily made is valid, despite the defendant's contention of innocence at the time it is received. The Court reiterated that the standard for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." For an excellent article concerning the standards pertaining to the acceptance of a guilty plea see Note, 1970 WASH. U.L.Q. 289. *See also* Note, 55 COLUM. L. REV. 366 (1955); Note, 112 U. PA. L. REV. 865 (1964); Note, 64 YALE L.J. 590 (1955).

7. United States v. Young, 424 F.2d 1276 (3d Cir. 1970); Heideman v. United States, 281 F.2d 805 (8th Cir. 1960); United States v. Morin, 265 F.2d 241 (3d Cir. 1959); Woodring v. United States, 248 F.2d 166 (8th Cir. 1957); Leonard v. United States, 231 F.2d 588 (5th Cir. 1956); Richardson v. United States, 217 F.2d 696 (8th Cir. 1954); Friedman v. United States, 200 F.2d 690 (8th Cir. 1952), *cert. denied*, 345 U.S. 926 (1953); United States v. Lias, 173 F.2d 685 (4th Cir. 1949); Kramer v. United States, 166 F.2d 515 (9th Cir. 1948); Bergen v. United States, 145 F.2d 181 (8th Cir. 1944). *See also* Facion v. State, 258 So.2d 28 (Fla. 1972); State v. Dunham, 149 La. 1013, 90 So. 387 (1922); Commonwealth v. Crapo, 212 Mass. 209, 98 N.E. 702 (1912).

8. 274 U.S. 220 (1927).

9. *Id.* at 224.

10. Friedman v. United States, 200 F.2d 690, 694 (8th Cir. 1952), *cert. denied*, 345 U.S. 926 (1953). The rationale of many of the cases displays a concern for fairness and the recognition that a guilty plea serves to waive numerous valuable rights. As stated by the Fifth Circuit: "The right to trial by jury being one of the most valuable and most highly cherished rights guaranteed by the Constitution, the courts have been understandably slow in holding an accused to an election to waive the right and enter a plea of guilty . . . . The fact that the defendant did not show that he had

On the other hand, there is authority for the position that a defendant, upon filing his motion to withdraw, must at least allege that he is innocent of the charge.[11] A leading opinion supporting this view is that of Judge Learned Hand in *United States v. Paglia: "A defendant is not entitled to gamble on the outcome of a trial . . .* [a] motion to withdraw a plea of guilty cannot be granted where it is accompanied by the defendant's admission of all the facts on which his guilt depends."[12] (Emphasis added.) A few early cases espoused an even more stringent requirement, asserting, *inter alia*, that before a defendant could be granted relief, it had to appear that a retrial would result in a judgment different from the one sought to be vacated.[13]

In holding a defendant's admitted guilt *immaterial* to the grant of his post-conviction motion to withdraw an *involuntary* guilty plea, the instant case extended the *Kerscheval* rationale to its logical conclusion.[14] The *Reese* majority opinion is based

a defense to the charge or the fact that he might, or probably would, be found guilty by a jury is not significant here . . . ." Leonard v. United States, 231 F.2d 588, 590-91 (5th Cir. 1956). Of significance is a recent article by Judge Friendly of the Second Circuit who takes the minority postion that post-conviction relief should be unavailable unless, "the prisoner supplements his constitutional plea with a colorable claim of innocence." One of the few exceptions Judge Friendly makes to his proposition, however, is a conviction resulting from an involuntary plea of guilty. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 152 (1971). In addition, the standard for guilty plea withdrawals put forward by the American Bar Association includes the proviso: "The defendant may move for withdrawal of his plea without alleging that he is innocent of the charge to which the plea has been entered." *ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty* F. 2.1 (a) (iii) (App. Draft 1968).

11. United States v. Hughes, 325 F.2d 789 (2d Cir.), *cert. denied*, 377 U.S. 907 (1964); Smith v. United States, 324 F.2d 436 (D.C. Cir.), *cert. denied*, 376 U.S. 957 (1963); United States v. Paglia, 190 F.2d 445 (2d Cir. 1951); Cantwell v. United States, 163 F.2d 782 (4th Cir. 1947); Welton v. United States, 313 F. Supp, 729 (E.D.N.Y. 1970); United States v. Cooper, 222 F. Supp. 661 (D.D.C. 1963); State v. Nichols, 167 Kan. 565, 207 P.2d 469 (1949); People v. Fargo, 178 N.W.2d 137 (Mich. App. 1970); Langston v. State, 245 So.2d 579 (Miss. 1971). *But see* Bishop v. United States, 349 F.2d 220 (D.C. Cir. 1965).

12. 190 F.2d 445, 446-47 (2d Cir. 1951).

13. *See, e.g.*, United States v. Moore, 166 F.2d 102, 104 (7th Cir. 1948), and cases cited therein.

14. The *Reese* majority emphasized that all defendants are entitled to certain fundamental protections—the right to a jury trial and the presumption of innocence. An involuntary plea is a deprivation of these protections. By drawing an analogy to the "fairness" approach used to determine the voluntary character of a confession in *Rogers v. Richmond*, 365 U.S. 534 (1961), the majority concluded that when a defendant, whether guilty or innocent, is deprived of these rights, the plea must be set aside. The court cited *Alford v. North Carolina*, 400 U.S. 25 (1970), to support its conclusion "that the key issue is whether the plea is voluntarily and understandingly made." 481 S.W.2d at 500.

on the principle that the appropriate place to determine guilt or innocence is a trial on the merits. The dissent took the position advocated by Judge Hand that a defendant's admission of guilt, subsequent to his conviction, precludes a withdrawal of the plea. The dissent opined that the admission rendered it unnecessary to go to the time and expense of a trial to ascertain what had already been conceded in writing by the defendant.

Although *Reese* was decided under Missouri law,[15] the issue is broader, involving as well a matter of federal constitutional dimension. Admitting that an *involuntary* guilty plea violates due process in that it deprives a defendant of his constitutional rights, can the fact that the defendant admits his guilt serve to cure the violation? A plea of guilty is more than a confession or admission, since the guilty plea is sufficient in itself for a conviction.[16] One pleading guilty is surrounded by numerous safe-

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15. The majority pointed out that the test under Missouri law for granting a post-conviction motion to withdraw a plea of guilty is whether "manifest injustice" has occurred. The majority explicitly held that "'manifest injustice' or its absence, should not be equated with ultimate guilt or innocence . . . ." 481 S.W.2d at 499. The court concluded that a guilty plea which is involuntary or is given without proper understanding is a "manifest injustice" that must be corrected. *See* FED. R. CRIM. P. 32(b). The *Reese* dissent argued that "manifest injustice" could not result where a defendant confesses his guilt on the one hand and seeks to withdraw his plea on the other. *See particularly* the dissenting opinion of Judge Henley, 481 S.W.2d at 503.

16. Boykin v. Alabama, 395 U.S. 238 (1969). It is a constitutional mandate, governed by federal standards that a guilty plea be voluntary and intelligent. *See* note 6 *supra*. A plea which fails to meet this test is void on due process grounds. Since a guilty plea is itself a sufficient basis for a conviction, an invalid plea is, in effect, an invalid conviction open to collateral attack. Waley v. Johnston, 316 U.S. 101 (1942). To correct this situation, there must be a valid judgment rendered or the imprisoned individual set at liberty. The recognized cure for an invalid conviction is a conviction based on a valid plea of guilty or a trial on the merits. Since a confession is neither a guilty plea nor, a fortiori, a trial on the merits, it cannot serve to cure the conviction. Thus, in the author's opinion, a *meritorious* claim by a defendant that his conviction was the product of an involuntary or unintelligent plea of guilty necessitates vacating the conviction and permitting a withdrawal, notwithstanding the likelihood of the defendant's guilt. *See* Dukes v. Warden, 406 U.S. 250 (1972). *See also* the concurring opinion of Justice Marshall in Santobello v. New York, 404 U.S. 257, 267 (1971). As the Court reaffirmed in *Brady v. United States*, 397 U.S. 742, 748 (1970), "the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or judge." Moreover, a recent decision by the Fifth Circuit furthers the proposition that the guilt of the defendant is of no significance in determining the validity of a guilty plea. The Court held that irrespective of a subsequent acquittal of the only other co-conspirator, defendant's voluntary plea of guilty to the conspiracy charge was not thereby vitiated. United States v. Strother, 458 F.2d 424 (5th Cir. 1972).

guards which the Supreme Court held in *Boykin v. Alabama*[17] were constitutionally required to assure the exercise of a voluntary and intelligent choice. Moreover, the plea of guilty is entered in an atmosphere of calm, decorum, and dignity, and must be free of influences that may *taint* the constitutional waiver. Because the extra-judicial confession or admission is made in the absence of such protections, the "indicia of reliability" is significantly reduced. Even if it be assumed that the confession is reliable, it is not certain that the accused will be convicted at trial. A confession or admission is merely evidence; it is not tantamount to conviction. *The critical issue is that an individual who pleads guilty involuntarily has been deprived of his option to trial by jury where he may have been adjudged innocent.* Viewing the guilty plea in this light, it is difficult, to avoid the *Reese* conclusion that a subsequent confession cannot breathe new life into an otherwise void plea of guilty, and that an individual aggrieved by an involuntary plea should be permitted to regain his position *status quo ante*.[18]

Finally, it does not appear that an involuntary guilty plea should be considered "harmless error" unless the state could prove "beyond a reasonable doubt" that, irrespective of the constitutional violation, a plea of guilty would still have been tendered and the same penalty imposed[19]—a seemingly impossible task.

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DUTY-RISK—AN ALTERNATIVE TO PROXIMATE CAUSE?

After completing roofing repairs, defendant's employees left a ladder leaning against a house. Subsequently, an unknown third party moved the ladder and laid it flat on the ground. Plaintiff,

17. 395 U.S. 238, 243 (1969). In *Boykin*, the Supreme Court held that a guilty plea must be fully supported on the court record by an affirmative showing that it was voluntarily and intelligently made. In a recent decision the Louisiana supreme court followed the mandate of *Boykin* and established guidelines to be used in accepting a plea. State *ex rel.* Jackson v. Henderson, 260 La. 90, 255 So.2d 85 (1971). *But see* State *ex rel.* LeBlanc v. Henderson, 262 La. 185, 262 So.2d 786 (1972).

18. *Cf.* Boykin v. Alabama, 395 U.S. 238 (1969); Kerscheval v. United States, 274 U.S. 220 (1927). As has been stated: "The judgment and sentence which followed a plea of guilty are based *solely* upon the plea." Busby v. Holman, 356 F.2d 75, 77-78 (5th Cir. 1966). (Emphasis added.)

19. *Cf.* Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18, 24 (1967).