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Improvident Guilty Pleas and Related Statements: Inadmissible Evidence at Later Trial

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Notes

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I. INTRODUCTION

Roughly 90 per cent of all criminal convictions in state and federal courts result from guilty pleas,[1] the use of which saves the time, expense, and uncertainty of lengthy trials.[2] Many pleas result from "plea bargaining" where the accused enters a plea of guilty in exchange for a reduced charge or a favorable sentence recommendation by the prosecutor.[3] Even if there are no actual negotiations, the plea may be the result of a "tacit bargain" where the accused is aware that the court is generally more lenient to those who plead guilty.[4]

There are, however, inherent dangers in the judicial practice of accepting pleas of guilty. The secrecy and informality present in the current system of nontrial disposition encourages prosecutorial coercion and overreaching.[5] It is unlikely that such abuse

1. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 1 (1966) [hereinafter cited as CONVICTION]; THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967) [hereinafter cited as THE COURTS].

2. CONVICTION at 29; L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 297-300 (1947). If all cases went to trial, it would be far too great a number for the present judicial system to handle. H. LUMMUS, THE TRIAL JUDGE 46 (1937); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 881 (1964).

3. THE COURTS at 9. Another situation in which defendant may prefer to have the charge against him changed is where the original charge has a prescribed sentence and, therefore, the judge has no discretion to be lenient with him. *Id.* at 11-12. *See, e.g.*, State v. Osgood, 266 Minn. 315, 123 N.W. 2d 593 (1963).

4. Enker, *Perspectives on Plea Bargaining*, in THE COURTS 108, 111 [hereinafter cited as Enker]. There is every indication that many judges do look favorably upon a defendant who not only saves the state the time and expense of a full trial, but by his action indicates he is repentant of his criminal behavior. *See* CONVICTION at 29; Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 209-10 (1956). Leniency is awarded not only because such pleas minimize the number of trials, but also because it is thought that a lesser sentence is sufficient as to one who acknowledges his guilt and agrees to forego possible defenses in order to receive the punishment which may be imposed. *See Pilot Institute on Sentencing*, 26 F.R.D. 231, 288-89 (1959).

5. THE COURTS at 9. For recent discussions of the dangers involved in negotiated pleas see Enker *passim*. *See also* Comment, 19 STAN. L. REV. 1082 (1967).

can be corrected by the judge, since the defendant will not want to jeopardize his position by revealing the fact or character of the bargain.[6] Furthermore, the state's position may be inadequately represented, either because of a lack of prosecutorial diligence veiled by the secrecy surrounding the plea or because of an absence of all relevant facts at the time of the bargain.[7] In addition, the defendant may plead guilty to a crime of which he is innocent because of an erroneous belief that his conduct constitutes the crime charged.[8]

Whenever a plea of guilty is tendered, a danger exists that the accused is unaware of his constitutional rights. Since the plea is a waiver of defendant's right to trial, he should be fully advised of this right before the plea.[9] Likewise, the accused should be made aware of his right to counsel when he tenders his plea.[10] Additionally, the danger exists that the confession of guilt by a plea was induced by some form of state misconduct[11] or was the result of a previous involuntary confession[12] or illegal seizure of evidence.[13] In spite of the above dangers, many juris-

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6. THE COURTS at 9.

7. For a discussion of the problems facing the prosecutor in balancing the interests of the state and of the defendant see Mills, *The Prosecutor: Charging and "Bargaining,"* 1966 U. ILL. L.F. 511, 514-16.

8. *See* State *ex rel.* Dehning v. Rigg, 251 Minn. 120, 86 N.W.2d 723 (1957); CONVICTION at 23-24; *Committee on Rules of Practice and Procedure of the Judicial Conference of the United States,* 34 F.R.D. 411, 418 (1964).

9. People v. Ballheimer, 37 Ill. 2d 24, 224 N.E.2d 811 (1967); State v. Clifford, 267 Minn. 554, 126 N.W.2d 258 (1964). For a discussion of what constitutes a valid waiver of trial see Comment, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace,* 32 U. CHI. L. REV. 167 (1964).

10. White v. Maryland, 373 U.S. 59 (1963); Rollins v. State, 194 So. 2d 247 (Fla. 1967). Where defendant is represented by counsel it is sometimes presumed he has been advised of his rights and the consequences that follow his plea. State *ex rel.* Rankin v. Tahash, 276 Minn. 97, 149 N.W.2d 12 (1967). *But see* United States v. Davis, 212 F.2d 264, 267 (7th Cir. 1954).

11. A "guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void." Machibroda v. United States, 368 U.S. 487, 493 (1962). In *Machibroda* the prosecutor had promised defendant no more than 20 years if he pleaded guilty. Defendant, represented by counsel, so pleaded and was sentenced to 40 years.

12. *See, e.g.,* United States *ex rel.* Cuevas v. Rundle, 258 F. Supp. 647 (E.D. Pa. 1966). An extorted confession is often the white flag of surrender which precedes the guilty plea. Kamisar, *What is an "Involuntary" Confession?,* 17 RUTGERS L. REV. 728, 735 (1963).

13. Many courts follow the theory that the plea of guilty waives all defects not jurisdictional or that since the illegal evidence was not used against him the defendant has no ccmplaint and they deny defend-

dictions have traditionally encouraged informality by requiring only that the guilty plea be entered voluntarily by a competent defendant.[14] More recently, however, some courts have begun to grant official sanction to plea bargaining[15] and many have recognized the need for a more formal and complete inquiry of the defendant.[16]

In light of the dangers which presently exist in the administration of plea bargains, it is not surprising that many such pleas are attempted to be withdrawn. Absent a statute giving the defendant the absolute right of withdrawal, such right is subject to the discretion of the court.[17] Generally, the ground upon which a court will find an improvident plea and allow withdrawal is one where the dangers inherent in accepting such a plea are present. If the plea were entered in ignorance or mistake as to its effect,[18] or if the defendant was not made aware of his right to counsel or other constitutional rights,[19] withdrawal will

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dant's request to withdraw the plea. *E.g.*, Mahler v. United States, 333 F.2d 472 (10th Cir. 1964); People v. Deweese, 27 Ill. 2d 332, 189 N.E. 2d 247 (1963); Churchill v. Haskins, 176 Ohio St. 183, 198 N.E.2d 656 (1964). However, such rationales must be premised on the belief that the plea was in fact a voluntary waiver, that is, the defendant was aware that he could move to suppress any illegal evidence before he entered his plea. *See* State v. Poelakker, 276 Minn. 41, 148 N.W.2d 372 (1967).

14. CONVICTION at 8.

15. *See, e.g.*, State v. Johnson, ___ Minn. ___, 156 N.W.2d 218 (1968); State v. Carreau, 182 Neb. 295, 154 N.W.2d 215 (1967). In *Johnson* the court held that plea bargaining is not in conflict with public policy if (1) defendant is represented by counsel; (2) the plea is entered by defendant himself in open court; (3) any reduction in a criminal charge is not unreasonably related to defendant's conduct; and (4) the court is satisfied that there is a factual basis for the plea of guilty. Therefore, although the court is not to participate in the bargaining agreement itself, it should make a discrete inquiry into the propriety of the settlement it is asked to accept.

16. *See* CONVICTION at 20-24. A federal court is now required by FED. R. CRIM. P. 11 to satisfy itself that the facts support the plea rather than just determine whether it was entered voluntarily and intelligently. *See generally* Note, *The Trial Judge's Satisfaction as to the Factual Basis of Guilty Pleas*, 1966 WASH. U.L.Q. 306.

17. Kercheval v. United States, 274 U.S. 220 (1927); State v. Jones, 234 Minn. 438, 48 N.W.2d 662 (1951). *See generally* Annot., 66 A.L.R. 628 (1930).

18. *See* Commonwealth v. Phelan, 427 Pa. 265, 234 A.2d 540 (1967). The court in State v. Jones, 267 Minn. 421, 127 N.W.2d 153 (1964), stated that since a plea of guilty is a confession in open court, it must be received with caution. It should not be accepted unless defendant has been advised of the nature and elements of the crime charged and doubt extinguished as to whether the plea was made with intelligence and understanding.

19. *See* ABA, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL

be permitted. Upon the granting of a motion to withdraw, the case proceeds to trial for a determination on the merits. The issue then raised is whether the state can introduce as evidence the former plea, or admissions by the defendant made during post-plea interrogations.

This Note will analyze the judicial attitude toward the use of a withdrawn plea as evidence at the subsequent trial and will then discuss whether a distinction should be drawn between the plea itself and the admissions made by the defendant during official inquiries prior to and after sentencing. With some exceptions, the Note will advocate the inadmissibility of both the plea and the related admissions and advance constitutional rationales for such treatment.

II. INADMISSIBILITY OF THE WITHDRAWN PLEA OF GUILTY

The accused's guilty plea operates both as a waiver of trial and as an admission of guilt.[20] It is well recognized that evidence of an admission is receivable against the admitter for the truth of the matter asserted.[21] An exception exists for confessions or incriminating admissions[22] which result from coercion or misconduct on the part of the state.[23] Even if deemed voluntary, such a confession is not conclusive as to the guilt of the defendant; it must be corroborated by other evidence.[24] However, the following discussion will show that most courts treat the withdrawn plea unlike extra-judicial confessions.

JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 2.1 (Tentative Draft, 1967) [hereinafter cited as ABA STANDARDS]. *See generally* Annot., 66 A.L.R. 628 (1930) *and* notes 5-13 *supra*, and accompanying text.

20. *E.g.*, Hoover v. United States, 268 F.2d 787, 790 (10th Cir. 1959); State *ex rel.* Schuler v. Tahash, 278 Minn. 302, 154 N.W.2d 200 (1967).

21. *E.g.*, Litman v. Peper, 214 Minn. 127, 7 N.W.2d 334 (1943). In such a case the hearsay rule is not applicable. 4 J. WIGMORE, EVIDENCE § 1048 (3d ed. 1940).

22. In regard to admissibility as evidence, there is to be no distinction made between a confession and an incriminating admission. Miranda v. Arizona, 384 U.S. 436, 476 (1966); State v. Jones, 65 Wash. 2d 449, 455, 397 P.2d 815, 819 (1964).

23. *See* United States v. Drummond, 354 F.2d 132 (2d Cir. 1965), *cert. denied*, 384 U.S. 1013 (1966); State v. Hoyt, 21 Wis. 2d 310, 124 N.W.2d 47 (1963); Kamisar, *supra* note 12. If a court deems a confession voluntary it will be admitted as evidence. *See, e.g.*, State v. Schabert, 218 Minn. 1, 15 N.W.2d 585 (1944).

24. State v. Carta, 90 Conn. 79, 96 A. 411 (1916); State v. Voss, 192 Minn. 127, 255 N.W. 843 (1934).

A. RATIONALE LACKING CONSTITUTIONAL JUSTIFICATION

The majority of states hold that a withdrawn plea of guilty is inadmissible as evidence at the subsequent trial.[25] Although different reasons for the rule have been stated,[26] it can be said that the primary reason for exclusion is based on the considerations set out in the federal case of *Kercheval v. United States*.[27] Here it was stated that the trial judge should withdraw a plea only if it were shown that the plea was "unfairly obtained or given through ignorance, fear, or inadvertence."[28] The court then held that the admission of a withdrawn guilty plea was reversible error, on the grounds that an order of withdrawal annulled the plea for all purposes.[29] The court reasoned that the plea's admission would deprive the defendant of any advantage gained by the withdrawal and would have the effect of restoring him to a position of inevitable conviction at the hands of the jury.[30]

The type of error in *Kercheval* is usually considered too prejudicial to be cured by instructions to the jury.[31] It would therefore seem that a new trial should also be ordered if the prosecutor comments on the improvident plea[32] or informs the jury of the plea by innuendo.[33]

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25. *See, e.g.*, State v. Anderson, 173 Minn. 293, 217 N.W. 351 (1927). *See generally* Annot., 86 A.L.R.2d 326 (1962). The recent cases squarely confronted with the issue have followed the majority view and overruled former cases if necessary. *See* People v. Quinn, 61 Cal. 2d 551, 393 P.2d 705, 39 Cal. Rptr. 393 (1964); People v. Spitaleri, 9 N.Y.2d 168, 173 N.E.2d 35, 212 N.Y.S.2d 53 (1961); State v. Thompson, 203 Ore. 1, 278 P.2d 142 (1954); *cf.* State v. Wright, 5 Ariz. App. 357, 427 P.2d 338 (1967).

26. *See* People v. Quinn, 61 Cal. 2d 551, 555 n.2, 393 P.2d 705, 708 n.2, 39 Cal. Rptr. 393, 396 n.2 (1964).

27. 274 U.S. 220 (1927).

28. *Id.* at 224.

29. *Id.* "If this means that it ceases to be admissible, the statement may be sound, but otherwise it is hard to see how the evidential value of a statement once made is nullified by the happening of subsequent events." Comment, 3 ARK. L. REV. 471, 472 (1949).

30. *See* Heim v. United States, 47 App. D.C. 485, 1918E L.R.A. 87, *cert. denied*, 247 U.S. 522 (1918); White v. State, 51 Ga. 285 (1874).

31. *See, e.g.*, Oliver v. United States, 202 F.2d 521 (6th Cir. 1953); People v. Haycraft, 76 Ill. App. 2d 149, 221 N.E.2d 317 (1966); People v. Street, 288 Mich. 406, 284 N.W. 926 (1939); Blankenship v. State, 410 S.W.2d 159 (Tenn. 1966). *Contra*, State v. Weekly, 41 Wash. 2d 727, 252 P.2d 246 (1952). But in *Weekly* it would not have been error to overrule the objection to the use of the evidence.

32. People v. Street, 288 Mich. 406, 284 N.W. 926 (1939).

33. State v. Reardon, 245 Minn. 509, 73 N.W.2d 192 (1955).

B. THE NEED FOR CONSTITUTIONAL SANCTITY

Although the majority of states[34] protect the accused from use of the withdrawn plea as evidence, in a minority of states the accused is not so safeguarded. These states have treated the withdrawn plea as an extra-judicial confession and allowed its admission[35] on the presumption that the plea was voluntarily entered.[36] Of course, the plea is not conclusive on the question of guilt, other corroborative evidence being required.[37] However, its inherently damaging aspects are overwhelming and obvious. Indeed, the minority position may violate today's constitutional standards.[38] The voluntariness of a confession must first be determined by the judge sitting without a jury.[39] The burden of proving that a confession was voluntarily entered is on the government.[40] Therefore, a presumption to that effect places this burden on the accused,[41] depriving him of this fundamental right. If the minority view is to have validity at all it should require an explicit finding that the plea was entered voluntarily. To the extent the minority position remains law, constitutional sanctity is necessary to insure the defendant's protection in the state courts.

Such need is also present in the federal courts. In *United States ex rel. McKeithan v. Fay*,[42] where the jury was told of defendant's prior improvident plea, it was held that the exclusionary rule of *Kercheval* was based on a rule of evidence rather than on a constitutional right. The state appellate court had ruled that the use of the plea was error, but held that no new trial was necessary in view of the overwhelming independent

34. *See* note 25 *supra.*

35. *See, e.g.*, State v. Carta, 90 Conn. 79, 96 A. 411 (1916); State v. Bringgold, 40 Wash. 12, 82 P. 132 (1905). For additional cases see Annot., 86 A.L.R.2d, 326, 329 (1962).

36. State v. Carta, 90 Conn. 79, 96 A. 411 (1916).

37. *Id.*

38. *But see* Canizio v. New York, 327 U.S. 82, 86 n.2 (1946), where the Court implies that there is no constitutional objection to the use of a withdrawn plea as evidence if the defendant was represented by counsel when the plea was entered.

39. Jackson v. Denno, 378 U.S. 368 (1964); State *ex rel.* Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3 (1965).

40. *See* Domenica v. United States, 292 F.2d 483 (1st Cir. 1961); People v. Ziegler, 358 Mich. 355, 110 N.W.2d 456 (1960). This is generally the rule as to extra-judicial confessions. *See* cases cited in 23 C.J.S. *Criminal Law* § 835 (1961).

41. *See* United States *ex rel.* Spears v. Rundle, 268 F. Supp. 691, 698 (1967) where the opposite presumption was drawn.

42. 219 F. Supp. 779 (S.D.N.Y. 1963).

evidence against the defendant.[43] Thus, where independent evidence of guilt is sufficiently strong,[44] use of the improvident plea will merely be harmless error and the accused will go unprotected. The fact that there is "no more solemn confession of criminality than that involved in . . . a judicial answer to charges"[45] and that it is highly unlikely the jury will, even if instructed, ignore the evidence,[46] clearly indicates the need for constitutional protection. In addition, *McKeithan's* failure to find a constitutional ground deprives the defendant of any federal question to allow collateral attack in a federal habeas corpus action.[47]

C. CONSTITUTIONAL CONCEPTS FOR EXCLUSION: FIFTH AMENDMENT

Two different grounds have been judicially advanced to give the majority rule constitutional sanctity. One is that any use of the plea is a violation of the privilege against self-incrimination. The other is that any use of the plea is violative of due process. The following discussion will analyze the judicial opinions which advance these views and submit other constitutional rationales.

Two courts have found the plea's entry to be a violation of the fifth amendment privilege against self-incrimination. The first was *Wood v. United States*[48] which involved a preliminary hearing[49] at which the presiding magistrate had no authority to request or accept a plea of guilty. Here, it was held that the use

43. People v. McKeithan, 14 App. Div. 2d 916, 223 N.Y.S.2d 707 (1961), *aff'd mem.*, 12 N.Y.2d 718, 186 N.E.2d 127, 233 N.Y.S.2d 770 (1962), *cert. denied*, 372 U.S. 971 (1963).

44. *See, e.g.*, Commonwealth *ex rel.* Ashmon v. Banmiller, 391 Pa. 141, 137 A.2d 236, *cert. denied*, 356 U.S. 945 (1958); Commonwealth v. Chavis, 357 Pa.158, 53 A.2d 96, *cert. denied*, 332 U.S. 811 (1947).

45. United States v. Stivers, 12 U.S.C.M.A. 315, 318, 30 C.M.R. 315, 318 (1961).

46. *See* People v. Haycraft, 76 Ill. App. 2d 149, 221 N.E.2d 317 (1966); *cf.* Bruten v. United States, 391 U.S. 123 (1968).

47. The criminal defendant's remedy on any federal question after state remedies have been fully pursued is not limited to a review by the United States Supreme Court. He can collaterally attack the state's ruling by a habeas corpus action in a federal district court. This review is not limited to the state record or necessarily bound by state procedural rules governing the assertion of federal questions. Meador, *The Impact of Federal Habeas Corpus on State Trial Procedures*, 52 VA. L. REV. 286 (1966).

48. 128 F.2d 265 (D.C. Cir. 1942).

49. The purpose of a preliminary hearing is to determine whether an offense has been committed and whether there is probable cause to believe that the accused is the offending party. State *ex rel.* Welper v. Rigg, 254 Minn. 10, 93 N.W.2d 198 (1958).

of the plea violates the privilege[50] against self-incrimination because the defendant was "compelled" to speak without being informed of his right to remain silent,[51] or his right to counsel.[52] The court reasoned that the function of the plea was to decide whether there is a contest—whether the Government must put forward its proof; it was neither given by the defendant, nor accepted by the court, for any *evidential* reason. The court argued that the plea's admission constituted a judicial gathering of evidence against the defendant, contrary to the policy of the privilege which demands that the court play a neutral role.[53] Since the plea was not evidential and since the courts cannot force a defendant to swear to his innocence, the allowance of the plea into evidence forces the defendant to testify against himself. The court concluded that a plea of guilty is merely a waiver of trial and does not constitute a waiver of the privilege against self-incrimination.[54]

The rationale of *Wood* is less than satisfying and has evidently not been followed.[55] The entering of a guilty plea by a defendant, at least in a practical sense, is a statement by him that is contrary to his later position of "not guilty."[56] It is doubtful that defendants who plead guilty realize they are merely waiving trial,[57] and not admitting that they actually did the acts

50. 128 F.2d at 278; *see* People v. Jackson, 23 Ill. 2d 263, 178 N.E.2d 310 (1961).

51. This is undoubtedly correct today under the rule of Miranda v. Arizona, 384 U.S. 436 (1966).

52. Pointer v. Texas, 380 U.S. 400 (1965) found a sixth amendment violation if the accused had not waived his right to counsel when the plea was asked for or accepted.

53. One policy of the privilege is "that the courts shall not play . . . favorites with the prosecution or . . . aid in performing its functions." 128 F.2d at 275.

54. *Id. Accord,* Knox v. State, 234 Md. 203, 208, 198 A.2d 285, 287 (1964) (dissenting opinion). *But see* note 108 *infra.*

55. It is interesting to note that Justice Rutledge, who wrote the *Wood* opinion, was unable to influence the Supreme Court toward his view of the issue. *See* Canizio v. New York, 327 U.S. 82, 91 (1946) (Rutledge, J., dissenting). *But see* State v. Wright, Ariz. App. 357, 362, 427 P.2d 338, 343 (1967) (dissenting opinion), which agrees with *Wood.*

56. *See* Johnson v. United States, 254 F.2d 239, 241 (8th Cir. 1958) where the court states that the plea is an admission of the facts charged in the indictment and an accused cannot later be heard to say that *no evidence* was offered against him.

57. Morgan, *The Law of Evidence, 1941-45,* 59 HARV. L. REV. 481, 525 (1946); Morgan, *The Privilege Against Self-Incrimination,* 34 MINN. L. REV. 1, 26 (1949). In the latter article Professor Morgan outlines the history of the privilege and states that no English court ever dreamed it was a violation of the privilege to use physical force to make a de-

charged.[58] However, the only issue before the *Wood* court was a plea entered at a preliminary hearing where the accused had not been advised of his constitutional rights, including his right to remain silent.

In a habeas corpus action the court in *United States ex rel. Spears v. Rundle*[59] also held that the use of defendant's withdrawn plea violated the fifth amendment privilege against self-incrimination.[60] A defendant can not be ordered to take the stand during trial to be questioned as to his guilt, and, according to the *Spears* court, the use of the improvident plea as evidence, in effect, forces him to do just that. Defendant must either take the stand and explain why he made the plea in the first instance, or suffer from the adverse inference likely to be drawn by not so explaining.[61] In dealing with the issue of whether or not the plea waived the privilege, the court suggested that if the plea waives the privilege, the later withdrawal of the plea withdraws the waiver.[62] The court, however, bypassed the issue by looking at the facts and circumstances surrounding the entry of the plea, and presumed the withdrawal was granted because the plea was not voluntarily made. Since the privilege cannot be involuntarily or unknowingly waived, no waiver existed to be considered.[63]

Although the relief granted the defendant in *Spears* is commendable, the rationale given is subject to criticism for ignoring a major objection to the use of the plea as evidence—it is too prejudicial to be corrected by jury instructions.[64] The same is certainly true of any explanation defendant may give if he takes the stand. Unfortunately the *Spears* court, believing the use of the plea to be unfair, had no authority to grant relief and therefore chose a rather tenuous fifth amendment objection as its ground for granting relief. Perhaps this is best illustrated by its concluding statement on the issue: "The internal inconsistency within a court which on the one hand permits a guilty plea to

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fendant say "guilty" or "not guilty." Today he can stand mute and a plea of not guilty is entered for him. 34 MINN. L. REV. at 26.

58. Whether they actually did the acts or not is irrelevant to what they suppose they are saying. That is, in a negotiated plea they may be "saying" they did acts less serious than they actually did, or in a minor offense they may be "admitting" acts they never did rather than bother with the time and expense of trial.

59. 268 F. Supp. 691 (1967).

60. *Id.* at 699.

61. *Id.* at 698-99.

62. *Id.* at 699.

63. *Id.*

64. *See* People v. Haycraft, 76 Ill. App. 2d 149, 153, 221 N.E.2d 317, 319 (1966); *cf.* Bruten v. United States, 391 U.S. 123 (1968).

be withdrawn, and on the other permits it to be used as evidence, *entraps an unwary defendant* and cannot be tolerated."[65] This language shows that the court was basically concerned with prejudice against the defendant when the plea is used as evidence; however, it properly tried to find error in the means used to obtain the evidence.

There is an inherent problem created if the privilege against self-incrimination is relied upon to exclude the plea from evidence. Even if it is true that the improvident plea fails to waive the privilege because not given voluntarily or intelligently by the defendant, this may be an insufficient ground on which to base the exclusion. At present the exclusion of good evidence occurs only when the evidence is obtained by state conduct violative of the constitution and this conduct is sought to be deterred by excluding such evidence.[66] Although deterrable conduct exists when the plea is coerced, if the waiver is ineffective merely because the accused is not sufficiently aware of his predicament to make an intelligent choice, misconduct is wanting and thus there seems no reason to invoke the exclusionary rule.

D. Due Process Grounds

Other courts have found the use of the plea to be a violation of due process. In *State v. Reardon*[67] the prosecutor mentioned a withdrawn plea in closing argument and the defendant was convicted. Although Minnesota had already adhered to the majority rule,[68] the *Reardon* court expressly decided that comment on the withdrawn plea violated the due process of law guaranteed by both the Minnesota Constitution and the fourteenth amendment.[69] The court noted that a plea of guilty is hardly synonymous with an extra-judicial admission, the plea being a conclusive admission of guilt leaving the court only to pass sentence.[70] The prejudice to the defendant resulting from jury knowledge of his improvident plea was too great for cure by jury instructions,[71] and the existence of independent evidence sufficient to convict was irrelevant since the constitutional right

65. 268 F. Supp. 691, 700 (1967) (emphasis added).
66. *See* Mapp v. Ohio, 367 U.S. 643, 656 (1961); Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).
67. 245 Minn. 509, 73 N.W.2d 192 (1955).
68. *See* State v. Anderson, 173 Minn. 293, 217 N.W. 351 (1927) and notes 51 & 52 *supra*, and accompanying text.
69. 245 Minn. at 513, 73 N.W.2d at 195.
70. *Id.* at 511, 73 N.W.2d at 193.
71. *Id.* at 513, 73 N.W.2d at 195.

to a fair trial is too basic a right "to allow factually strong cases to erode it. . . ."[72]

In *State v. Joyner*[73] constitutional sanctity was again given the rule which excludes from evidence a withdrawn plea of guilty, as the court stated the majority view is "sound and more consonant with our concept of the *constitutional* rights of the accused."[74] The gist of the *Joyner* rationale is that an accused is presumed innocent until proven guilty beyond a reasonable doubt. If the state is allowed to show the highly prejudicial improvident plea, the presumption of innocence is destroyed.[75] Although the court does not state the constitutional concept upon which its decision is based, it seems likely that if the presumption of innocence is to be given constitutional sanctity, such sanctity falls under due process.[76]

Reardon and *Joyner* provide a constitutional rationale for the rule excluding the plea from evidence, both decisions seem to center on the prejudice to the defendant when the plea is used against him at trial. Since it should not be error to use the evidence unless there was error in obtaining the evidence, it seems appropriate for the court to find and set out such error. This is apparent when one considers that a guilty plea should not be withdrawn unless the defendant establishes, to the court's satisfaction, that withdrawal is necessary to correct a "manifest injustice."[77] Although there are a number of reasons[78] why a court may allow a withdrawal after finding that a manifest injustice was committed,[79] after the plea is with-

72. *Id.* at 514, 73 N.W.2d at 195.

73. 228 La. 927, 84 So. 2d 462 (1955).

74. *Id.* at 930, 84 So. 2d at 463 (emphasis added). For an almost identical holding, *see* People v. Haycraft, 76 Ill. App. 2d 149, 221 N.E.2d 317 (1966).

75. *Accord*, State v. Wright, 5 Ariz. App. 357, 427 P. 338 (1967).

76. *Cf.* McFarland v. American Sugar Refining Co., 241 U.S. 79, 86 (1916); McNeilly v. State, 119 N.J.L. 237, 195 A. 725 (1937).

77. ABA STANDARDS, § 2.1. *See also* note 17 *supra*, and accompanying text.

78. *See* Chapman v. Minnesota, ___ N.W.2d ___ (Minn. Nov. 1, 1968).

79. Withdrawal is ordered by a court because it believes the plea was the result of circumstances which were unfair to the defendant. The plea may have been the result of the prosecutor making false promises. *See, e.g.*, Dillon v. United States, 307 F.2d 445 (9th Cir. 1962); *cf.* United States *ex rel.* Cuevas v. Rundle, 258 F. Supp. 647 (E.D. Pa. 1966). Also, the defendant may have entered his plea before he made an effective waiver of his right to counsel. *See* note 10 *supra*, and accompanying text. However, where there is no undue influence and where the defendant is aware of and understands his constitutional rights when the plea is entered, the unfairness resulting in withdrawal

drawn it should make no difference what the reason was. *If the injustice to the defendant was sufficient to grant withdrawal, it should be sufficient to deny admission of the withdrawn plea at the subsequent trial.* Obviously, the withdrawal fails to remedy the injustice completely if the plea is subsequently allowed to be used as evidence.

E. Suggested Rationale

Clear constitutional concepts can now be expressed. On the one hand, if the plea is used at trial the defendant has incriminated himself, which must not happen unless the defendant has made a valid waiver of his fifth amendment privilege against self-incrimination. On the other hand, it can be said that a guilty plea is a waiver of a defendant's constitutional right to a trial,[80] such a waiver being ineffective if the plea is withdrawn. A constitutional right cannot be waived unless it is done freely and intelligently.[81] A guilty plea is allowed to be withdrawn either because the court believes the state unfairly induced the plea or because the defendant was not sufficiently cognizant of his legal position to make an intelligent decision. Either way there has been an invalid waiver of constitutional rights.

However, it should again be noted that the basic reason for suppressing an incriminating admission or confession, where there is no reason to doubt the truthfulness thereof, is to deter the state from engaging in the type of conduct which brought about the admission.[82] Some pleas may have been tendered

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is difficult to explain. In such a case the withdrawal is likely allowed because the court believes the defendant was not sufficiently aware of either the effect of the plea or his legal position. *See, e.g.*, Kotz v. United States, 353 F.2d 312, 314 (8th Cir. 1965). The defendant's lack of understanding is important because, but for the guilty plea, he would have gone to trial where the burden of proving his guilt is on the state and his own comprehension of his legal position is relatively unimportant in determining whether or not he will be convicted.

80. It could hardly be contended that the due process clause does not grant all citizens accused of committing a crime the right to demand a fair trial. In fact, the Supreme Court has recently held that, in accordance with the sixth amendment, a state must grant a jury trial to a person accused of more than a petty offense, unless such a trial is waived. Duncan v. Louisiana, 391 U.S. 145 (1968).

81. *Cf.* Miranda v. Arizona, 384 U.S. 436, 465, 469 (1966).

82. Harrison v. United States, 392 U.S. 219, 228 (1968) (dissenting opinion); *see* Linkletter v. Walker, 381 U.S. 618, 634-39 (1965).

However, the Supreme Court has indicated there is more than just deterrence behind suppression of certain evidence. It is "imperative of judicial integrity" that no court allow evidence to be used which was obtained in violation of the laws or Constitution of the United States.

because of undue duress or false promises on the part of the state and such conduct should be deterred. In addition, many pleas are withdrawn because the defendant was not sufficiently advised to make an intelligent decision to so plead. Arguably it should be the affirmative duty of the court to make sufficient inquiry before accepting the plea in order to determine whether the defendant is cognizant of all the circumstances confronting him.[83] If a breach of this duty can be said to be deterrable conduct, then protection would always be found, as all improvident pleas would result either from undue influence or from an insufficient inquiry. However, it is likely that proper judicial conduct can be encouraged by means other than exclusion of good evidence. Furthermore, an insufficient inquiry is obviously no reason to exclude an *offer* to plead guilty which was rejected by the court.[84] Yet, the introduction into evidence of an offer to plead guilty would likely be as damaging to a defendant as a withdrawn plea, and, if a court does not allow a withdrawn plea to be used, neither should it allow the use of a rejected plea.[85]

Lee v. Florida, 392 U.S. 378, 385-86 (1968). In two recent cases suppression was ordered where deterrence could not reasonably have been a strong factor. Simmons v. United States, 390 U.S. 377 (1968); Harrison v. United States, *supra*.

83. In United States *ex rel.* Thurmond v. Mancusi, 275 F. Supp. 508, 514-19 (E.D.N.Y. 1967), it was held that due process requires a fair procedure in the state courts surrounding the acceptance of a guilty plea. A fair procedure requires a reasonable assurance that (1) there is a factual basis for a finding of guilt and (2) that the plea is voluntary. That is, the defendant must understand the significance of what he is doing and his ability to choose the course best serving his needs must not be unduly distorted by his predicament. A searching inquiry by the court is the most efficient means of meeting the due process requirement; even if the defendant is represented by counsel, a cursory examination will not suffice.

84. The Supreme Court recently denied certiorari to a case where the state court held that the admission of an out-of-court offer to a prosecutor to plead guilty was harmless error. Three Justices dissented to the denial of certiorari. After stating that the defendant could not be expected to overcome the prejudice resulting from the admission of such evidence, the dissent concluded:

> We should consider whether we should not, in any event, prohibit the use of a statement made for bargaining purposes. We should not attach such a penalty to discussion of the possibility of a guilty plea. The general rule is that such evidence would not be admissible in a civil suit even where the stake is as little as a few dollars. We should at least consider the bearing of the practice *upon the constitutional guarantee of a fair trial* where the issue is murder and the possible penalty is death.

Hamilton v. California, 389 U.S. 921, 922 (1968) (emphasis added).

85. *See* State v. McGunn, 208 Minn. 349, 294 N.W. 208 (1940); Dykes v. State, 213 Tenn. 40, 372 S.W.2d 184 (1963).

It is submitted that the most appropriate constitutional rationale for excluding from evidence the withdrawn plea or the rejected plea of guilty is that the plea's admission at trial deprives the defendant of his constitutional right to a fair and impartial trial by reducing the state's burden of gathering evidence and proving any guilt beyond a resonable doubt.[86] This rationale finds support in the very policy behind the majority rule which excludes the improvident plea from evidence—that to use the plea as evidence deprives the defendant of any advantage gained by the withdrawal.[87] However, it goes further in explaining the unfairness of obtaining the plea in the first instance—the plea was obtained as a result of an ineffective waiver of trial. This ineffective waiver was the result of an attempt by the defendant to obtain a means of adjudication made available by the state as an alternative to his constitutional right to a fair and impartial trial with the full burden of proof on the state. When this alternative adjudication is not used,[88] the state must give to the defendant all rights and incidents to the trial he would have possessed if the ineffective waiver of trial had not occurred.

An analogy to the above theory can be found in a recent Minnesota case which held that a bargained plea must be withdrawn if the prosecutor does not fulfill his promise. Failure to do so, according to the court, deprives the defendant the presumption of innocence and his right to a jury trial.[89]

> Underlying this reasoning is a recognition of the adversary nature of our system of criminal justice. This system rests on the basic assumptions that every person accused of a crime is presumed innocent and that his legal guilt must be established in an adversary proceeding in which the state has the burden of proof. Thus, an accused, despite his own feeling concerning his guilt or his apparent guilt in the eyes of law enforcement officials, the victim, or others, has the unqualified right to elect to stand trial and to receive the aid of counsel . . . .[90]

The court could well have expressed its view in terms of a waiver. An effective waiver of a constitutional right can only occur where the accused speaks after becoming aware of the

86. Due process puts the full burden of proof on the state. *Cf.* McFarland v. American Sugar Refining Co., 241 U.S. 79, 86 (1916); McNeilly v. State, 119 N.J.L. 137, 195 A. 725 (1937).

87. *See* note 30 *supra*, and accompanying text.

88. The state has already decided it is unjust to use the alternative procedure. *See* note 77 *supra*, and accompanying text.

89. State v. Wolske, 160 N.W.2d 146 (Minn. 1968). Where an unfulfilled promise is the reason for the withdrawal, it may be a more appropriate remedy for the court to compel performance of the promise rather than withdraw the plea.

90. *Id.* at 151.

right and cognizant of the consequences of foregoing it.[91] The plea of guilty, when obtained without an effective waiver of trial, must be withdrawn and the defendant given his right to a trial. However, the reasoning of the Minnesota court, as far as it went, would seem to support a requirement that any evidence obtained during an ineffective attempt on the part of the defendant to waive his right to trial be inadmissible. Use of such evidence would deprive the accused of his right to have the burden of gathering all the evidence on the state.

III. STATEMENTS RESULTING FROM THE IMPROVIDENT PLEA

The accused will undoubtedly say more than "guilty" after entering an improvident plea.[92] In answering questions put to him by the court, or by a correction official assigned to his case, he may make statements which the prosecution might desire to use against him should the plea subsequently be withdrawn. Although the trend toward a more complete inquiry will cut down the number of improvident pleas,[93] such inquiries give rise to substantially more damaging statements by the defendant. Even if it is held that the state cannot use the statements in its case in chief, there remains the issue as to whether they can utilize them for impeachment purposes. Also, a distinction might be made between admissions to the court and admissions to correction officials. The following will discuss current judicial treatment of the matter and alternative suggestions.

A. Statements Made Before the Court

In *State v. Hook*[94] the prosecution read almost verbatim most of the questions the judge had asked defendant when the plea was entered. Although no direct mention of the plea was made, the court, holding the statements inadmissible, emphasized that the manner in which the questions were asked revealed that a guilty plea had been entered.[95] Citing *Kercheval*, the court said that the plea, sentence, and judgment were nullified by the vacating order when the plea was withdrawn and that use of the

91. *Cf.* Miranda v. Arizona, 384 U.S. 436, 469 (1966).
92. *See* notes 15-16 *supra*, and accompanying text.
93. *See* text accompanying note 16 *supra*.
94. 174 Minn. 590, 219 N.W.2d 926 (1928).
95. ". . . [I]t can be said that no one familiar with court rooms could believe that the jury did not understand that a plea of guilty has been entered." *Id.* at 592, 219 N.W.2d at 927.

plea, including implicit reference thereto, conflicted with that order. In indicating that the instant statements implied that a guilty plea had been entered,[96] the court leaves unanswered whether statements which give no indication that a guilty plea was entered are admissible.

In accord with *Hook* is *United States v. Long*[97] where the prosecution introduced into evidence the entire transcript of the proceeding at which a subsequently withdrawn plea of guilty had been entered. The court held that since the plea was vacated by the withdrawing order, it could not be used, even by innuendo, as evidence.[98]

In both *Hook* and *Long* the jury could understand that a plea of guilty had been entered and the unfairness in such a case is as great as where the plea is specifically mentioned. However, the more difficult issue of whether a related statement can be used if there is no implication of the prior plea was not answered. If a statement is used which in no way reveals the entrance of a guilty plea, the objection that admitting such evidence leaves the defendant in no better position than he was before the plea was withdrawn[99] is less persuasive. One jurisdiction has introduced a policy rationale for excluding all related statements from evidence. The Court of Military Appeals has held that neither a stipulation of facts entered with the improvident guilty plea,[100] nor statements made by defendant in mitigation prior to sentencing,[101] can be used against him at a later trial on the ground that freely given statements are to be encouraged to aid in the imposition and review of sentences and such encouragement would be frustrated if these statements could be used against the defendant in the event of trial.[102]

To determine whether an incriminating statement should be used against a defendant, it is essential that the circumstances which prompted the defendant to make the statement be reviewed. The statements made in court before and after the plea's entry would not have been made but for the plea.[103] It

96. *Id.*
97. 323 F.2d 468 (6th Cir. 1963).
98. *Id.* at 472. This was despite the fact that defendant's own counsel first mentioned the withdrawn plea.
99. *See* text accompanying note 30 *supra.*
100. United States v. Daniels, 11 U.S.C.M.A. 52, 28 C.M.R. 276 (1959).
101. United States v. Stivers, 12 U.S.C.M.A. 315, 30 C.M.R. 315 (1961).
102. *Id.* at 318, 30 C.M.R. at 318.
103. Therefore, if the plea was coerced by state misconduct, perhaps all resulting statements should be excluded. However, a rationale

has already been suggested that to use an improvident plea as evidence would violate defendant's right to a fair trial.[104] He has the right to go to trial unhampered by evidence obtained by the state as a result of a prior ineffective waiver. Seemingly this would include statements resulting from official inquiries[105] in connection with the improvident plea.

The only distinction between the use of the improvident plea and the statements is that the statements are often not as prejudicial. Therefore, it can be argued that the admission of the statements should constitute only harmless error where sufficient independent evidence of guilt exists. However, the statements frequently reveal that the defendant formerly entered a plea of guilty. The line between what statements give rise to an inference of the improvident plea, and what statements do not, would be difficult to draw. In addition, even the non-revealing statements prejudice the defendant, as he will not likely be able to explain them without revealing his guilty plea. Therefore, the defendant may have to allow a statement to stand uncontested which radiates a stronger inference of guilt than warranted under the circumstances. To discourage any "accidental" use of the statements by the prosecution, their use should not be considered harmless error.

The rationale that statements should be excluded from evidence when obtained while the defendant is being encouraged by the state to accept an alternative procedure to his constitutional right of trial receives indirect support in two recent Supreme Court decisions. In *Harrison v. United States*[106] the Court held that when a new trial is granted because illegally obtained confessions were introduced against the defendant, the state cannot subsequently use defendant's testimonial admissions of the first trial, unless the state can prove defendant would have made

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which excludes the statements whether or not the plea was coerced is desirable.

104. *See* text following note 85 *supra.*

105. When this Note speaks of official inquiries in connection with the plea it is referring to statements made in court necessary for the entry of the plea and the imposition of sentence, and to statements to correction officials which are an immediate result of the plea—usually the pre-sentence investigation or an application for probation or parole within a matter of days after sentencing. An application for probation or parole after defendant has begun serving his sentence, which is too far removed in time to be considered part of the "overall procedure" connected with the entry of the plea, is not the "result" of the plea. This Note *does not* advocate that such far removed statements should be excluded from evidence if the plea is subsequently withdrawn.

106. 392 U.S. 219 (1968).

such admissions even absent the evidential use of the confession.

In *Simmons v. United States*[107] the Court held that statements made by a defendant during a hearing on an unsuccessful motion to suppress evidence, allegedly seized in violation of the fourth amendment, cannot be used against him at trial. The Court reasoned that a defendant should in no way be deterred from seeking his constitutional rights, and it would be grossly unjust if he had to waive his privilege against self-incrimination to obtain them.

The greatest significance of *Harrison* and *Simmons* lies in the fact that the basic reason for excluding apparently truthful evidence has been that exclusion is the only practical means of deterring state agents from obtaining evidence in an unconstitutional manner. Yet it is obvious that the exclusion of the type of statements involved in the two decisions will provide no meaningful deterrence against the underlying police misconduct. It would seem that the Court in *Harrison* was basically concerned with providing the defendant with a right to a trial unprejudiced by evidence which would not have been obtained by the state if all constitutional safeguards had been extended to the defendant immediately. In turn, the Court in *Simmons* indicates that defendant's right to a fair trial cannot be diminished by using as evidence statements he finds necessary to give in an attempt to gain the protection of a constitutional right. It would seem to follow that it is also unjust to allow the state substantially to diminish defendant's constitutional right to a fair trial by using statements made by defendant when he tried to take advantage of a state-offered alternative to trial. When the alternative fails —no effective waiver of trial being made—and it is necessary to allow defendant his constitutional right to trial belatedly, all evidence obtained by official state inquiries connected with the alternative should be excluded.

It can be argued that in-court statements are obtained in violation of the privilege against self-incrimination. This is based on a rationale that the state "compelled" the defendant to answer because it did not appear he was incriminating himself, when, in fact, he was. It is generally recognized that a party who has pleaded guilty waives his right to claim the privilege as to the facts of the crime in question.[108] This is because the prosecution

107. 390 U.S. 377 (1968).

108. *See, e.g.*, United States v. Gernie, 252 F.2d 664, 670 (2d Cir.), *cert. denied*, 356 U.S. 968 (1958); Knox v. State, 234 Md. 203, 198 A.2d 285 (1964); State *ex rel.* Jones v. Tahash, 276 Minn. 188, 149 N.W.2d 270 (1967). *Contra*, cases cited note 54 *supra*.

is over—he cannot incriminate himself further. Therefore, unless his answer may reveal a new offense or subject the defendant to prosecution by some other jurisdiction, the defendant must reply or be held in contempt.[109] Since the existence of the plea allows such compulsion, the plea's withdrawal arguably results in the defendant having been compelled to incriminate himself and, therefore, the statements should be excluded.[110]

Although there is merit to the above argument, the better rationale seems to be that the improvident plea of guilty is an ineffective waiver of trial and therefore it and the resulting statements should be excluded.[111] Not only does that rationale relieve an "overworked" privilege which perhaps is best limited to use where official misconduct can be shown, but it more clearly points out the original unfairness and the desired end—a fair trial. Also it can be easily extended to official inquiries made out of court. The following discussion, however, presents a possible alternative for such inquiries if the rationale is not so extended.

B. Statements Made to Correction Officials

Rather than the court making extensive inquiries of the defendant, subsequent to his guilty plea, to determine an appropriate sentence, such inquiries may be made by a state correction agency.[112] In the event the guilty plea is later withdrawn, the state might desire to have a correction official testify as to any admissions made to him by the defendant.[113] The admissibility of this testimony is then in issue.

Apparently the only jurisdiction with reported cases on this issue is California. There the presence of actual threats or promises appears to be the controlling factor.[114] In *People v. Quinn*,[115]

109. *See* the statement of facts and holding in Malloy v. Hogan, 378 U.S. 1 (1964).

110. *See* United States *ex rel.* Spears v. Rundle, 268 F. Supp. 691, 698 (E.D. Pa. 1967) where the court suggests that if the plea does waive the privilege, the later withdrawal should remove the effect of the waiver and reinstate the privilege.

111. However, this does not take away from whatever weight the rationale may have as to statements after conviction at trial and before a retrial. See Part IV *infra*.

112. *See* Minn. Stat. § 243.49 (Supp. 1967); Conviction 14.

113. The issue here is using admissions against defendant for the substantive crime, as distinct from a hearing to determine if parole or probation privileges should be granted or revoked.

114. The California Supreme Court has recently added a new requirement—unless it appears affirmatively that a defendant made statements to a probation officer under advice of counsel, or has waived his

defendant was charged with robbery and unlawful possession of narcotics. A plea of guilty was entered to the charge of robbery and a motion for probation was continued for hearing and determination. The defendant was then interviewed by a probation officer who told the defendant that he would not recommend probation if he later found that the defendant was not telling him the truth. Thereafter, the trial court permitted the defendant to withdraw his plea. At the subsequent trial the probation officer was called as a state witness and revealed, over objection, what the defendant had told him in the interview.[116] On appeal the court reversed, finding the statements involuntary since they resulted from the officer's threat and implied promise of leniency.

On the other hand, in *People v. Brooks*,[117] the court held differently where defendant had counsel, had been repeatedly told of his right to remain silent, and had not been coerced by threats or promises.[118] At trial following a withdrawal of defendant's plea, the officer was allowed to testify as to defendant's admissions.

It is suggested that if a threat to deny parole or probation privileges is sufficient to render a defendant's statements involuntary, all statements to correction officials should be deemed involuntary. All defendants are likely to believe that failure to answer questions will result in a denial of any privileges.

In addition, the very nature of the inquiries by correction officials—presumably made with the intention of helping the defendant rather than gathering evidence against him—make it unfair to use defendant's statements against him. Although the statements were admitted, this unfairness was judicially expressed by another California decision:

> Although we find no reason for holding the testimony . . . inadmissible we deplore the use of any admissions of a defendant to a probation officer as evidence against him in a trial. While the officer had no reason to warn defendant that his statement might be used against him in any criminal prosecution, we think the use of such information to convict the defendant of a crime is inherently deceptive, to say the least. And it appears to us that in order to get full cooperation from a defendant he

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right to counsel and has been advised of his right to remain silent, the state cannot use the statements for any purpose. People v. Alesi, 67 Cal. 2d 856, 860-61, 434 P.2d 360, 363, 64 Cal. Rptr. 104, 107 (1967).

115. 61 Cal. 2d 551, 393 P.2d 705, 39 Cal. Rptr. 393 (1964).

116. He also revealed that defendant had pleaded guilty; this was held to be reversible error.

117. 234 Cal. App. 2d 662, 44 Cal. Rptr. 661 (1965).

118. The court also noted that the admission in no way indicated that a plea of guilty had been entered. *Id.* at 683-84, 44 Cal. Rptr. at 674.

> should be advised that any statement he makes will be used only for the information of the court in a probationary hearing. *We do not doubt that defendants have that belief* and that if they knew their damaging admissions could be used against them in another trial they would not talk freely and the purpose of the interview would be frustrated.[119]

Perhaps statements to correctional officials should, in light of the above, be inadmissible on the ground that they are privileged communications.[120] This rationale is premised on the purpose of correction agencies being rehabilitative and this objective being best served by full cooperation from the defendant. To obtain such cooperation the defendant should feel secure in believing that the correction agency is there only to help him in the future, presenting no retributive threat as to past behavior. It should be remembered that since 90 per cent of all "convictions" are by guilty pleas with few ever withdrawn, the "convicted" defendant interviewed by a correction official who "may be incriminating himself" is the exception rather than the rule. The interest, therefore, in free discussion and rehabilitation of *all* criminals should outweigh any interest in using the admissions against the *few* criminals who withdraw their plea.

The standards set out by Professor Wigmore for determining privileged communications seem to embrace these statements to correction officials:

(1) The communications must originate in a confidence that they will not be disclosed.
(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties.
(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[121]

C. Use of Statements for Impeachment

Admissions which do not reveal the entry of the guilty plea are not, on their face, as prejudicial as the plea itself.[122] But

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119. People v. Garcia, 240 Cal. App. 2d 9, 13, 49 Cal. Rptr. 146, 148 (1966) (emphasis added). The case involved an inquiry after a conviction at a trial. However, in this respect, the inquiry after a plea of guilty is closely analogous.

120. For a discussion of this privilege see Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communication Doctrine*, 71 Yale L.J. 1226 (1962).

121. 8 J. Wigmore, Evidence, § 2285 (McNaughton Rev. 1961).

122. Note that the Court in Harrison v. United States, 392 U.S. 219,

if they are considered the result of an ineffective waiver of trial, they should be excluded from evidence regardless.[123] However, it can be said that evidence illegally obtained, which cannot be used by the prosecution in its case in chief, is not necessarily forbidden in impeachment.[124] This is especially true if the impeachment evidence merely attacks defendant's credibility, rather than tending to show that defendant did the acts charged.[125]

However, it would seem that any use of post-plea (or even post-conviction) statements does create dangers in that they often hint at the circumstances under which they were given. They are more harmful to defendant than ordinary pre-indictment admissions as they cannot be explained by the defendant without the risk of revealing the improvident plea to the jury. If the defendant makes no explanation, the attack on his credibility is almost assured of full success. Arguably, therefore, placing the defendant in this position, which, after all, is due to an attempt to cooperate with the state, should not be permitted. The detriment to him is always great, while the value to the state in attacking his credibility, assuming no other inference, may often be slight.

IV. ANALOGY TO AFTER-TRIAL STATEMENTS

Since the plea of guilty operates as a conviction, one might argue that statements made in response to official inquiry after acceptance of an improvident plea should not be distinguished from statements made after conviction at trial, but before a retrial. In both there will likely be pre-sentence investigations and interviews by correction officials. In both it is likely that the defendant does not realize he may be jeopardizing his interests at the time he makes incriminating statements.[126] In both there is about the same degree of "compulsion" to answer. But for the improvident plea, or the conviction, the statements would not have been made.

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223 n.9 (1968), limited its holding to forbidding the state to use the first-trial testimony during its case in chief.

123. *See* text following note 85 *supra.*

124. *See* Kent, *Miranda v. Arizona—The Use of Inadmissible Evidence for Impeachment Purposes,* 18 W. RES. L. REV. 1177 (1967).

125. Walder v. United States, 347 U.S. 62 (1954).

126. For the purpose of discussion this paper will assume that the defendant is not planning to make a motion for retrial at the time of the inquiry, and the fact that he is not will not be held against him. That is, if the motion for retrial is granted by the state, it has been a timely motion.

However, if one believes that the important element in determining whether or not the statement should be admissible is how the state "induced" the defendant to make them, the foregoing analogy between post-plea and post-conviction statements means little. The post-plea statements are a result of the plea—an ineffective waiver of trial—and it appears just to place defendant in the position he would have been in if the plea and the resulting official inquiries had not occurred. But the defendant who pleads *not* guilty has not attempted to waive his right to trial. There is no danger here that the defendant has, through hope of leniency, "submitted" himself to the state. He was an adversary at all times. The state has already devoted to him a full trial, not just an inquiry.[127] In the context of "right to a fair trial," the defendant should be allowed to go to trial unprejudiced by his statements if the plea is not accepted or is withdrawn. It is more difficult to see why good evidence should be excluded when a defendant has taken advantage of his constitutional right to trial, but his conviction is reversed due to unintentional error at trial. However, where the error was a constitutional one, it still can be said that the defendant did not receive the trial he was entitled to and perhaps he should in all fairness now be given a trial unhampered by the "fruits" of the state's error.

127. Of course, it may well be that even a conviction at trial was not fairly obtained by the state and the resulting statements should be excluded, especially if a retrial is ordered due to a constitutional error. Even then, however, there may be no logic to using the exclusionary rule if its purpose is to deter some undesired conduct—as it is highly unlikely that the judicial error was intentional and, therefore, deterrable. Exclusion would have to be based on some sort of "unfairness" or due process rationale. It comes down to a policy question of how fair a society must be to an accused.

In absence of constitutional error, however, the problem is more difficult. A trial is an attempt to ascertain the truth. The defendant should be punished according to law if he is guilty. Unless there has been some undesirable conduct on the part of the state which the policy of the exclusionary rule should deter, all good evidence should be used against him. So, for example, if a retrial is granted because of "new evidence" discovered by the defendant, there is not likely to be any reason for the state not to use post-trial statements.

A close case is where the defendant was convicted because of some violation by the state of a rule of evidence or a state statute. Here there can be said to be unfairness on the part of the state resulting in a conviction. But, at the same time, if the state is willing to grant a retrial for violation of state law, it should be within the state's prerogative to decide on how the retrial is to be governed. It can only be suggested that if a state believes the unfairness great enough to grant a retrial, it should allow the defendant to start afresh. It is hesitantly submitted that, if such statements were used against the defendant, he may claim he was denied the equal protection guaranteed him by the fourteenth amendment.

V. CONCLUSION

The plea of guilty operates as a waiver of trial. At trial the defendant is presumed innocent and the state must carry the burden of proving otherwise. All the evidence and the merits of any defenses should be presented to the jury. The jury would be made aware of what action constitutes the crime charged as well as what element of intent is needed to find defendant guilty. When a defendant tenders a plea of guilty, however, he may be unaware that he does not have the requisite culpability to be found guilty of the crime charged, he may be unaware of all his constitutional rights, or he may have been pressured into pleading guilty by threats or promises. Since there is to be no trial, it should be the affirmative duty of the court to ascertain that the plea of guilty will not result in a miscarriage of justice.

A thorough inquiry by the court, when the plea is entered, will tend to reduce the number of improvident pleas. When an improvident plea is accepted, it can be said to be the result of an inadequate inquiry. The consequences to the defendant of an improvident plea are slight, however, if he is allowed to withdraw his plea and proceed to trial unprejudiced by any evidence obtained against him as a result of the plea.

The majority of courts presently forbid the use of the improvident guilty plea as evidence. However, since the prejudice to the defendant is likely too great to be overcome if the plea is used against him, the Constitution should protect all defendants from such prejudice. An improvident plea is actually an ineffective waiver of a defendant's constitutional right to a fair trial. Since state and public policy encourage guilty pleas and, therefore, the waiver of a constitutional right, the state should not, absent an effective waiver, be allowed to use the plea to make a sham out of the "trial" awarded to the defendant who has withdrawn his plea.

Statements made in response to official inquiries following an improvident plea should not be used as evidence. They are the result of an ineffective waiver of trial. Although their use is not as prejudicial as use of the plea itself, the statements are much more prejudicial to the defendant than admissions made prior to indictment. Even if the admissions do not reveal the guilty plea, it is nearly impossible for a defendant to explain them away without disclosing the circumstances which prompted them.