Loyola University Chicago Law Journal

Volume 2
Issue 2 *Winter 1971*

Article 7

1971

Constitutional Law - Criminal Law - Guilty Plea Is Not Invalid Because It Is the Product of a Plea Bargain

Roseann Oliver

CONSTITUTIONAL LAW—CRIMINAL LAW—Guilty Plea Is Not Invalid Because It Is the Product of a Plea Bargain.

On December 2, 1963, Henry C. Alford was indicted for first degree murder under North Carolina law. The North Carolina homicide statute provided that first degree murder was punishable by death, unless the jury recommended life imprisonment.[1] Alford's court-appointed attorney recommended, in light of strong evidence of guilt, that he plead guilty. The prosecutor agreed to accept a plea of guilty to second degree murder, and at trial, on December 10, 1963, Alford pleaded guilty to that charge.

Before accepting the guilty plea, the trial judge heard a summary of the State's case and informed Alford of the consequences of his plea. Alford acknowledged that his counsel had informed him of the difference between first and second degree murder and of his rights in case he chose to go to trial. Although Alford affirmed his decision to plead guilty, he stated he was pleading guilty only to avoid the possibility of the death penalty for first degree murder. He also testified that he did not commit the murder, but was pleading guilty on the basis of what his attorney had told him. The trial court accepted his plea and sentenced him to thirty years in prison.

Alford sought post conviction relief in 1965. The state court found that the plea was willingly, knowingly, and understandingly made on the advice of competent counsel, and in light of a strong prosecutorial case. In 1965, Alford's petition for a writ of habeas corpus was denied by the United States District Court for the Middle District of North Carolina and by the Court of Appeals for the Fourth Circuit on the basis of the state court's findings.

In 1967, Alford again petitioned for a writ of habeas corpus which was denied on the same ground as in 1965 without an evidentiary hearing. However, in 1968, the Court of Appeals for the Fourth Circuit

1. At the time Alford pleaded guilty, the statute provided that if a guilty plea to first degree murder was accepted, the penalty would be life imprisonment, rather than death. (N.C. Gen. Stat. § 14-17 (1969)). This provision permitting guilty pleas in capital cases was repealed in 1969. *See* Parker v. North Carolina, 397 U.S. 790, 792-95 (1970). However, under North Carolina law it remains possible for a person charged with a capital offense to plead guilty to a lesser charge.

reversed, holding that Alford's guilty plea was involuntarily made as it was motivated by a fear of the death penalty.[2] The court reasoned that the North Carolina statute encouraged pleas of guilty to murder, thereby inducing Alford to waive his right to trial by jury, by promising a maximum of thirty years in prison rather than the threat of the death penalty. The court said that under the rationale of *United States v. Jackson*,[3] this encouragement to plead guilty was an impermissible burden on Alford's constitutional rights.

The United States Supreme Court noted probable jurisdiction,[4] and, in November, 1970, held that the guilty plea to second degree murder was valid. The Court explained that where the plea was made from alternatives available to the defendant and where a strong factual basis for the plea existed, the guilty plea was voluntarily and intelligently made. The Court further stated that the plea was not invalid even though the defendant also asserted his innocence.[5]

This decision in *Alford* clarifies the Court's position on the constitutionality of the practice of plea bargaining. By reversing the finding that Alford's plea to the reduced charge was not voluntarily and intelligently made, the Court held that plea bargaining is an acceptable practice in the administration of criminal justice. Thus the Court accepted the fact that the plea bargaining system is based on inducements to the defendant to plead guilty, but these inducements, even in capital cases, are not unconstitutional per se.

The Court also summarized the procedures which courts have employed in determining the voluntariness and validity of a guilty plea. The decision in *Alford* decided that the only standard to be used in 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."[6] The rationale in *Alford* is a culmination of the Court's current interpretation of the guilty plea process.[7] However, questions are thus raised concerning this standard of voluntariness and the real effect of these "safeguards" on a criminal defendant.

---

2. Alford v. State, 405 F.2d 340 (4th Cir. 1968).
3. 390 U.S. 570 (1968). The Court held that the capital punishment amendment of the Lindberg Kidnapping Act was unconstitutional. The statute had provided for capital punishment to be imposed only by a jury after a trial. The risk of death was encountered only by pleading not guilty and therefore was an impermissible burden upon the exercise of Fifth and Sixth Amendment rights.
4. 394 U.S. 956 (1969).
5. North Carolina v. Alford, 400 U.S. 25 (1970).
6. 400 U.S. at 31.
7. In Brady v. United States, 397 U.S. 742 (1970) and Parker v. North Carolina, 397 U.S. 790 (1970), the Court held that a defendant is influenced by many factors

Although the guilty plea process has been criticized and is undergoing change, it is an administrative fact of life for the criminal justice system.[8] The practice of plea bargaining is largely responsible for the high incidence of these guilty pleas, and thus, the efficient functioning of criminal justice also depends on plea bargaining.[9] The majority of convictions have been and will continue to be by pleas of guilty.

The pervasiveness of the bargaining process in the state and federal systems indicates that a great deal of time is spent by prosecutors attempting to induce defendants to plead guilty and forego a formal trial.[10] Any decision by a defendant to plead guilty naturally results in a waiver of his right to defend and of his right to trial by jury. In *United States v. Jackson*,[11] the Supreme Court held that a statutory scheme, similar to the one in North Carolina, which encouraged waivers of trials by jury was unconstitutional, and therefore, a guilty plea entered to escape such a statutory penalty was invalid. Even though *Jackson* did not mention plea bargaining, the indirect result of the decision was to cast doubt on all guilty pleas.[12]

In *Alford* the Court removed all doubt of the validity of plea bargaining per se by refusing to extend the rationale of *Jackson* to a plea bargaining situation. The Court flatly stated: "*Jackson* established no new test for determining the validity of guilty pleas."[13] The Court rejected the application of *Jackson* on the ground that the plea of guilty to second degree murder was not the direct result of the unconstitutional statutory scheme. By the Court's reasoning the unconstitutionality of the statute had no bearing on Alford's choice to accept the bargain. Alford's choice would have been the same regardless of the sentencing differential.[14] Thus even though a defendant proves he pleaded guilty to avoid the death penalty, this alone is not enough to invalidate his guilty plea. To be entitled to relief under *Jackson* a defendant must show that his guilty plea was motivated by a statutory

---

when deciding to plead guilty, and the pressures he faces when he pleads are not violative of the Fifth and Sixth Amendments per se.

8. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966) (hereinafter cited as NEWMAN).

9. *Id.* at 76.

10. The most common forms of plea bargaining are a promise of a sentence reduction in exchange for a plea of guilty, or a reduction of the charge in exchange for a plea of guilty.

11. 390 U.S. 570. *See* note 3, *supra.*

12. U.S. ex rel Mullin v. Henderson, 312 F. Supp. 1363, 1367 (E.D. La. 1970).

13. 400 U.S. at 31.

14. Judge Haynsworth's Dissent in Alford v. State, 405 F.2d 340, stated that the defendant's choice was to accept a plea arrangement, and the constitutional infirmity in the statute was not causally related to his acceptance of the bargain. *See also* U.S. ex rel Brown v. La Vallee, 424 F.2d 457 (2nd Cir. 1970) in which the court arrives at the same conclusion as the Court in *Alford* with facts very similar to the facts in *Alford.*

scheme which authorized a lesser penalty if he pleaded guilty to the crime charged.

A more important aspect of the *Alford* decision concerns the treatment of waiver of rights. In *Jackson* the Court was primarily concerned with a statute that would encourage waivers of rights to contest guilt in the absence of any compelling state interest. However, the result in *Alford*, indicates that even though plea bargaining inherently encourages waivers, these inducements are tolerable. Inducements necessary to maintain a plea bargaining system burden a defendant's right to defend and contest his guilt. The Court may have justified the existence of these burdens on a defendant's rights by applying the rationale set forth in *Sherbert v. Verner.*[15] In *Sherbert* the Supreme Court suggested that some constitutional rights are not inviolate. The Court phrased the relevant test as "whether some compelling state interest . . . justifies the substantial infringement of appellant's . . . right." The result in *Alford* thus indicates that the right to trial and defend must tolerate the chilling effect which is inherent in plea bargaining because of some compelling state interest.

The decision in *Alford* was foreshadowed by *Brady v. United States*[16] and *Parker v. North Carolina.*[17] In both cases the Supreme Court affirmed the validity of the guilty pleas which were entered to avoid the possibility of the death penalty. The Court in *Brady* conceded that the State's encouragement of guilty pleas is not rendered invalid merely "because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law."[18] This is the basis of a plea bargain, and the *Brady* Court accepted the practice not only because there is no present alternative, but also because the Court saw benefits to the defendant and to the State. The Fifth Amendment does not forbid prosecutors and judges from accepting guilty pleas to selected counts, to lesser included offenses, or to reduced charges.[19]

In light of the Court's approval of plea bargaining practices in the previously mentioned cases, the question arises: What is the valuable service plea bargaining performs which permits the "tolerable" effect of encouraging waivers of constitutional rights? To be able to accept these burdens on a defendant's constitutional rights the Court must see

15. 374 U.S. 398, 406 (1963). *Cf.* Scott v. U.S., 419 F.2d 264, 270 (D.C. Cir. 1969) which has facts similar to the facts in *Alford.*
16. 397 U.S. 742.
17. 397 U.S. 790.
18. 397 U.S. at 752.
19. *Id.* at 753.

plea bargaining as more than efficient;[20] the Court must envision it as desirable in the administration of justice. The arguments for plea bargaining emphasize the potential benefits to both defendants and states. Defendants who are likely to be convicted can limit their probable penalties, and the burdens of a trial are eliminated. The State realizes the tremendous gain of avoiding trial. Scarce judicial and prosecutorial time and energy are conserved for those cases in which the State will not bargain or the defendant will not waive his right to trial.

In this ideally-operated plea bargaining system, society is benefitted. One of the objectives of criminal justice administration is to individualize justice.[21] Plea bargaining offers an opportunity to achieve this objective by permitting leniency to defendants who may not deserve the legislatively prescribed sentence. In this way the criminal justice system will retain flexibility and discretion which is necessary for the system to appear humane.

The plea bargaining system maintains the guilty plea process. With no inducements to plead guilty, defendants would not be as willing to waive their rights, and our trial courts would be flooded with cases. This problem of overcrowded dockets is a legitimate consideration, for such a problem would severely curtail, if not eliminate, trial procedures as we know them today. Thus to keep the criminal justice system functioning at all, plea bargaining practices are vitally needed.

Finally, it is argued that plea bargaining offers humane treatment to any individual charged with a crime who faces the risk of grave punishment. The Fifth Amendment does not require that leniency for many must be denied to assure that no man is needlessly encouraged to waive his right to defend.[22] To require every defendant to risk the death penalty would be cruel.[23] To extend the Fifth Amendment to such a situation would force all defendants to undergo a trial at the risk of their lives. Thus the Fifth Amendment "protection" would work to the detriment of defendants as a group. In contrast, the overall impact of the plea bargain is to benefit defendants as a group. This is the atmosphere of fundamental fairness in which the criminal justice system should operate.

Perhaps because of these objectives and potential advantages, the Court in *Alford* did not decide that plea bargaining is a constitutionally

20. In the area of confessions (Miranda v. Arizona, 384 U.S. 436, 479-81 (1966)) and habeas corpus (Fay v. Noia, 372 U.S. 391, 424 (1963)), the Court has sacrificed efficiency when constitutional rights were being abridged.
21. NEWMAN at 77.
22. *See* State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968).
23. U.S. v. Jackson, 390 U.S. at 584.

unacceptable practice. A plea entered by a defendant to a reduced charge, or because of a bargain, is not invalid merely because the defendant wished to avoid the greater penalty, even if the penalty is death. The Court's major concern in *Alford* is that the guilty plea, whether the product of a bargain or not, conforms to the standard of voluntariness.[24]

In *Alford*, the Court reiterated that the standard of voluntariness was and still is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."[25] Courts have accepted this general standard which together with Rule 11 of the Federal Rules of Criminal Procedure[26] provides guidelines to determine the voluntariness of the guilty plea.[27] Rule 11 states:

> A defendant may plead not guilty, guilty, or with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea 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 not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

The Court in *Alford* applied the basic requirements of a valid guilty plea and demonstrated how the standard of voluntariness must be interpreted by the trial courts. The Court attempted to explain what "safeguards" must be invoked to assure the validity of the plea. A defendant who enters a guilty plea waives constitutional rights, and for this waiver to be valid, it must be an "intentional relinquishment or abandonment of a known right."[28] Thus any guilty plea must be voluntary, knowingly made and accurate.

The Court stated the plea is voluntary if it is the "product of a free and rational choice."[29] The possibility of the death penalty and the opportunity to bargain to reduce the penalty does not render the plea involuntary. The broad definition of voluntariness as set out in the dissent of *Shelton v. United States* has become the accepted standard:

---

24. Machibroda v. U.S., 368 U.S. 487, 493 (1962).
25. 400 U.S. at 31.
26. 18 U.S.C. Rule 11 (1966).
27. McCarthy v. U.S., 394 U.S. 459 (1969) binds federal courts to requirements of Federal Rule 11 and Boykin v. Alabama, 395 U.S. 238 (1969) compels state courts to follow the same basic procedures. Although a factual basis test is not required in the states, the trend is toward this type of determination. *See*, n.10 of the *Alford* opinion.
28. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
29. 400 U.S. at 31.

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentations (including unfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to prosecutorial business.[30]

Working within this definition, the Court in *Alford* could not find a guilty plea invalid merely because it was the result of a plea bargain.

The standard of voluntariness for a guilty plea is much more limited than are the standards of voluntariness for the waiver of other constitutional rights. In waiving Fourth Amendment rights, the burden is on the government to sustain the legal sufficiency of the consent.[31] Also in waiving Fifth Amendment rights by confessing, the State under *Miranda v. Arizona*[32] has the burden of proving the confession is not coerced. And under *Bram v. United States*,[33] the confession "must not be extracted by any sorts of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . . ."[34] Under this standard the guilty plea which is induced by a plea bargain to avoid the death penalty would be an improper influence which would invalidate the plea. However, the Court in *Brady* and *Alford* has impliedly rejected this concept of voluntariness and apparently accepted the definition in *Shelton*. In addition, defendants who plead guilty are allowed to waive more rights[35] than are permissible at any other point in the criminal justice system, and these waivers are apparently validated by a broader voluntariness standard.

To understand the difference in standards, one must understand the Court's view of the guilty plea process. The Court in *Brady* held that the voluntariness standard for a guilty plea is not inconsistent with the *Bram* standard for a confession.[36] The Court concluded that a defendant in custody, alone and unrepresented by counsel is subjected to coercion by even a promise of minor benefits because he is too sensi-

30. 242 F.2d 101, 115 (5th Cir. 1957) (Tuttle, J. dissenting), *rev'd* 246 F.2d 571 (5th Cir. 1957). When the decision was reversed Judge Tuttle's dissent became the majority opinion.
31. Judd v. U.S., 190 F.2d 649, 651 (D.C. Cir. 1951). U.S. v. Page, 302 F.2d 81, 83-84 (9th Cir. 1962).
32. 384 U.S 436 (1966).
33. 168 U.S. 532, 542 (1897).
34. *Id.* at 543.
35. By pleading guilty a defendant not only waives the right to a jury and the privilege against self-incrimination, but he also forfeits procedural rights which might lead to dismissal or acquittal at trial, e.g. right to challenge an unlawful search or an illegal confession, right to attack an insufficient indictment, or the composition of a grand jury, right to insist that the government produce documents.
36. 397 U.S. at 754.

tive to inducements in such a situation. The Court distinguished this from a guilty plea situation by asserting that the plea bargaining procedure and the whole guilty plea process do not operate in a coercive atmosphere. The Court in *Brady* reasoned that where the defendant has "competent counsel and full opportunity to assess the advantages and disadvantages of a trial . . . ,"[37] there is no danger of an impulsive response to a plea inducement as there is in a confession situation. The Court in *Alford* reiterated this confidence by holding that a bargained-for plea may not be involuntary where the defendant is represented by competent counsel whose advice was that the plea would be advantageous.[38] Thus the only way the Court can reconcile the disparity in standards is by relying on the guilty plea process operating with fundamental fairness and propriety.

In addition to being voluntary, a valid guilty plea must be intelligently entered.[39] *Alford* held that an "intelligent plea" is one which is entered by a defendant who understands the nature of the charge and the consequences of his plea, and then makes a reasonable choice based on a rational assessment of his situation. The Court found that Alford exercised a reasonable choice in light of his counsel's advice, and in light of the State's evidence.[40] It is apparent that the Court's determination of this requirement is based on the presence or absence of counsel to advise a defendant.[41] If a defendant is advised by counsel, the Court assumes that he has reached a reasoned assessment of all the factors for and against pleading guilty, and his decision is rational. In *United States ex rel. Brown v. LaVallee*,[42] the defendant, indicted for murder, pleaded guilty after the charge was reduced to second degree murder. The Second Circuit Court of Appeals upheld the validity of his plea on the basis of "well considered advice of his lawyers" and "the realities of the defendant's situation."[43] The *LaVallee* court merely supported this presumption of an intelligent plea based on the presence of counsel. The *Alford* Court also defended the validity of the plea on the basis that Alford was advised by "competent" counsel. Even though this rationale has been accepted by most state and federal courts,[44] in practice, the requirement of competency of counsel is as-

37. *Id.*
38. 400 U.S. at 31.
39. Machibroda v. U.S., 368 U.S. at 483 and 18 U.S.C. Rule 11, Fed. Rules Cr. Proc.
40. State testimony before the court revealed that there were no eyewitnesses, but there was testimony that Alford stated his intention to kill, and returned home declaring he had carried out the killing.
41. Brady v. U.S., 397 U.S. at 756.
42. 424 F.2d at 460.
43. *Id.* at 461.
44. U.S. v. Tateo, 214 F. Supp. 560, 567 (S.D.N.Y. 1963) where the court held

sumed.[45]

Thus as to the elements of voluntariness and intelligence, the Court merely summarized the requirements of previous case law. Previously, the Court has held that the trial judge must make sure the defendant is aware of the consequences of his plea. As mentioned above, under the *Shelton* standard, a plea bargain is not an improper inducement which deprives the plea of its voluntariness. According to case law, the plea is assumed to be intelligently entered if the defendant is advised by "competent counsel."[46] However, the Court in *Alford* was also concerned with procedures to determine the accuracy of the plea. A properly functioning guilty plea process will induce only guilty defendants to admit their guilt. Thus a flexible test was sought by the Court to recognize situations in which bargains had induced innocent defendants to plead guilty.

In this area the Court faced two problems. First, Federal Rule 11 provides that the trial court may inquire into the factual basis of the plea. This aspect of the Rule had never been clarified by the Supreme Court and trial courts were uncertain as to how extensive this examination of the facts should be.[47] *Alford* held that, in a situation where Rule 11 was not directly applicable, the judge may hear a summary of the State's case and the testimony of the defendant. If the evidence is substantially against the defendant and if his plea is voluntary and intelligent, the court may accept the plea. This provides a broad base for accepting pleas, since most defendants are not charged with crimes until the State has seemingly substantial cases against them. In addition, the evidence which the court hears at this stage may be inadmissible at trial.[48]

The second problem facing the Court was related to this factual basis

---

that the defendant makes a deliberate and measured choice when he and his attorney appraise the evidence. State v. Stacy, 43 Wash. 358, 361, 261 P.2d 400, 402 (1953) where the court concluded: "Where counsel is experienced and able to weigh the desirbility of pleading guilty to a lesser offense . . . there would seem to be little doubt that a knowing, intelligent choice is exercised."

45. Morris v. U.S., 315 F. Supp. 1016, 1019 (N.D. Ga. 1970) held that mistaken evaluation by counsel is not ineffective assistance unless the attorney was so "inept and incompetent as to render the proceedings a farce." Also, the Supreme Court in McMann v. Richardson, 397 U.S. 759, 772 (1970) held that a defendant was not incompetently advised by his attorney and entitled to relief unless the defendant demonstrated "gross error on the part of counsel."

46. *See* notes 42, 43, 44, 45 *supra.*

47. McCoy v. U.S., 363 F.2d 306, 308 (D.C. Cir. 1966) held that the court could properly accept the guilty plea if "significant evidence" was present. Also, in Bruce v. U.S., 379 F.2d 113 (D.C. Cir. 1967) the court concluded that the trial judge can accept a guilty plea if he determines that the "evidence establishes a high probability of conviction."

48. From the Court's opinion in *Alford,* it is apparent that a portion of the State's evidence against Alford was hearsay evidence. In McMann v. Richardson, 397 U.S. 759, the Court upheld the guilty plea which was made by the defendant because of a coerced confession which would have been inadmissible at trial.

requirement. The Court was faced with a situation where Alford affirmed his decision to plead guilty, but refused to admit his guilt, and, in fact, affirmatively stated that he was innocent. The Court's decision whether to accept the plea or not was based primarily on its interpretation of the guilty plea process. *Alford* clearly stated that an admission of guilt is not a necessary element of a voluntary and intelligent plea. In *Hudson v. United States*,[49] a plea of nolo contendere[50] was held to be an admission of guilt for purposes of conviction. Thus, if a nolo contendere plea was acceptable as a guilty plea, a voluntary guilty plea may be acceptable even though the defendant refuses to admit his guilt publicly. *Alford* has gone further with its interpretation of the guilty plea process by holding that such a plea is acceptable without an admission of guilt, even if the plea is coupled with protestations of innocence.

Some courts have refused to accept pleas of guilty if they are inconsistent with defendants' statements concerning their guilt.[51] However, the *Alford* Court did not accept this interpretation and ruled that an admission of guilt is not essential in a valid guilty plea. The Court saw the guilty plea process as Justice Goldberg defined it in his dissenting opinion in *Dorrough v. United States*: "In the guilty plea process the defendant finds what facts he can, and then with the facts and the law, he makes a decision as to a plea."[52] The court in *McCoy v. United States* stated that requiring the defendant to admit his guilt, or the trial judge to eliminate the existence of any doubt as to innocence, would be to usurp the fact-finding function of a trial.[53] The court went on to say that there may be many reasons why a defendant may be unwilling or unable to admit his guilt, but if he knowingly, voluntarily, and understandingly consents to plead guilty, his plea will be accepted. The *Alford* Court has assumed that the defendant can find the facts and can give a knowing consent to a guilty plea regardless of expressions of innocence.

The Court has tried to balance two theories concerning the guilty plea process. First, under the factual basis requirement, the Court proceeded under the assumption that guilty pleas should be entered

49. 272 U.S. 451, 455 (1926).
50. The plea of nolo contendere is considered to be a consent by the defendant to be punished, even though he does not admit his guilt. The Court in *Alford* implied that there is no constitutional difference between a plea of guilty in which the defendant refused to admit his guilt and a plea of nolo contendere.
51. Griffin v. U.S., 405 F.2d 1378, 1380 (D.C. Cir. 1968), State v. Leyba, 80 N.M. 190, 453 P.2d 211 (1969); People v. Hetherington, 379 Ill. 71, 39 N.E.2d 361 (1942).
52. 385 F.2d 887, 895 (5th Cir. 1967), *aff'd on reh.* 397 F.2d 811 (5th Cir. 1968).
53. 363 F.2d at 308.

only by guilty defendants. This is in accord with the proper objectives of the system. Secondly, the Court accepted the theory that the plea should be decided upon by the defendant if he pleads knowingly, intelligently and voluntarily. Persons asserting their innocence are allowed to plead guilty. This theory is based on the realities of the criminal justice system. The Court in *Alford* tried to compromise these theories by arriving at a conclusion whereby the defendant can plead guilty while still asserting his innocence, if there is a factual basis for the plea. The result of this approach may allow innocent defendants to plead guilty on the basis of a judicial determination. This determination closely approximates the jury's duty, but is carried on without the safeguards of a formal trial. The assessment of facts at the final stage is taken away from the defendant and is given to the court.

The Court in *Alford* tried to develop a flexible factual basis test for this factual determination. What the Court did, however, was to give trial courts another method of determining that a defendant understands the true situation—if there is a factual basis, the plea is obviously a rational choice. Such a determination does not, in fact, guarantee the accuracy of the plea, because a defendant whose only concern is his sentence may not willingly contest the State's evidence. The Court, before *Alford*, stated in *Brady*:

> We would have serious doubts about this case if encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and there is nothing to question the accuracy and reliability of defendants' admissions that they committed crimes with which they are charged.[54]

The Court appears to have departed from this standard in *Alford* by allowing a defendant to plead guilty while protesting his innocence. The Court may have increased the likelihood of defendants falsely condemning themselves. The only safeguard is the factual determination. The alternative, however, would be to require a defendant, who although he maintains his innocence, recognizes that a close to unbeatable circumstantial case opposes him, to lose an opportunity to plead guilty to a lesser charge. Here also the factual determination serves to insure that the accused has not overestimated the persuasiveness of the State's case against him.

54. 397 U.S. at 758.

The Court held that a system of criminal justice which allows a defendant to eliminate the risk of severe penalty, and allows the State to conserve its scarce resources is constitutional. The Court, by outlining procedures to safeguard the defendant's rights, attempts to insure that this will eliminate the problems of the guilty plea process. It is questionable if they have fully succeeded in accomplishing this purpose. These procedures might perform their function as safeguards, if, in fact, the criminal justice system is an adversary system. However, the plea bargaining process is not a "give-and-take negotiation . . . between the prosecution and defense which possess relatively equal bargaining power."[55] The defendant who is a party to a bargain is not in a position to determine its fairness and cannot make a comprehensive assessment of all the circumstances. The guilty plea system as set out in *Aflord* is desirable only when the process is reliable and procedurally fair.

The guilty plea process is an administrative operation. An initial guilt determination is made by police and prosecutors at their discretion and because of administrative pressures. Defendants are then "bargained" into pleading guilty. A defendant charged with a crime is concerned only with the direct consequences. The pressure from his attorney and the prosecutor during the bargaining process may be inherently coercive. Many defendants cannot evaluate a bargain adequately since they are uninformed and powerless. The State structures two alternatives,[56] and encourages defendants to plead guilty to the lesser of two evils. Many "competent" defense attorneys do not equalize the bargaining positions since they automatically tell their clients to accept a bargain.[57] An attorney can advise his client, but cannot eliminate the coercion inherent in the choice, regardless of his competence.

A defendant pleading guilty waives his Fifth and Sixth Amendment rights. *Johnson v. Zerbst* held that a waiver must be an "intentional relinquishment of a known right" to be effective.[58] In *Garrity v. New Jersey*,[59] the Court held that an individual's choice to waive his Fifth and Sixth Amendment rights rather than be dismissed from his job was involuntary since it was coerced. In the usual plea bargaining situation, the defendant certainly faces more severe pressure than was

55. Parker v. North Carolina, 397 U.S. 790 (Brennan, J., dissenting).
56. The State "offers" the defendant his choice of going to trial and risking a greater penalty, or pleading guilty.
57. Tigar, *Waiver of Constitutional Rights: Disquiet in The Citadel*, 84 HARV. L. REV. 1, 22 (1970).
58. *Supra* note 28.
59. 385 U.S. 493 (1967).

exercised in *Garrity*. The guilty plea is accepted as voluntary in these situations, even when the defendant is facing capital punishment.[60] In addition, the defendant waives procedural errors. In *McMann v. Richardson*,[61] the defendant in a habeas corpus proceeding alleged he had pleaded guilty because of the existence of what he now deemed to be a coerced confession. The Court refused to invalidate the guilty plea in the absence of any evidence that he was incompetently advised by counsel concerning the admissibility of the confession. Thus possibly coerced confessions or arguably unlawful searches may add to the pressures on a defendant to plead guilty. In such situations, the intentional, free choice standard of *Zerbst* is replaced by the requirements of *Alford*.

The basis of the safeguards which the *Alford* Court offered to defendants is afforded through the accepted role of the trial judge and the role of the defense counsel. The *Alford* Court attempted to approximate the protections of a trial by allowing the trial judge to scrutinize the plea bargaining procedures. However, the guilty plea process itself makes it impossible for the trial judge to completely perform this function. One of the major concerns of the trial judge is assuring a factual basis for the plea. This provides very limited protection against inaccurate pleas. By the time the defendant enters his guilty plea, he has become convinced that the bargain is the best route for him. Thus he is not compelled to contest the State's evidence.[62] Because the prosecutor can almost always present a prima facie case, a courtroom hearing by the judge will not usually result in a finding different from the defense counsel's acceptance of the bargain.

In effect, the only way left for the judge to safeguard the defendant's rights is to consider the pressures and procedural errors which may have caused the plea, in light of the defendant's assertion of his innocence. If the *Alford* Court insists that the trial judge take a more active role, the focal point of concern should be with why the defendant pleaded guilty. The Court stated that its motive is to equalize the conditions under which the bargaining takes place. The role given to the trial judge who is presumed to be the symbol of justice to the defendant may accentuate the inequality of the process. The trial judge cannot realistically ascertain the motives of the prosecutor who has offered the bargain, nor can he determine the assistance given by defense counsel.[63] The only effect, then, of the judge's increased activity under *Alford* will

60. Brady v. U.S., 397 U.S. 742 (1970).
61. *Supra* note 45.
62. *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1393 (1970).
63. Scott v. U.S., 419 F.2d 264 (D.C. Cir. 1969) (Wright, J. concurring).

be to protect the defendant from flagrant abuses. Innocent defendants may still plead guilty, and some defendants will still waive their rights. Thus the steps the Court has taken in *Alford* have not completely corrected the basic problems of the plea bargain.

In his dissent in *Dorrough v. United States*, Justice Goldberg attacked the majority's reliance on a factual basis requirement.[64] The propriety of the plea bargaining process must depend, not on the trial judge, but on the behavior of the participants—the prosecutor and the defense attorney.[65] The prosecutor works in a complex bureaucracy. His major preoccupation is to dispose of a high proportion of criminal offenders. He is motivated by the need for speed and finality, and he determines guilt by a series of informal decisions.[66] This determination is only part of the discretionary decision-making process which comprise the criminal justice system. However, if the prosecutor overcharges to increase his bargaining position, or if he offers to bargain because of a lack of time and resources, he has improperly exercised this discretion.[67] The Court has tried to impose an obligation on the trial judge to supervise the fairness of the bargain and to prevent these occurrences. Even under the *Alford* interpretation these improprieties remain invisible to the judge. The only party in a position to recognize the unfairness of the bargain and to really aid the defendant is the defense counsel, who is a participant in the bargain himself.

Defense counsel is relied upon by the court to be the equalizer in the bargaining process. He is seen as relieving the defendant of the pressures of plea bargaining and negotiating on his behalf.[68] However, defense attorneys may also be concerned with the same objectives as the prosecutors—saving time, labor, expense and avoiding trial. The theory has been expressed that criminal attorneys are part of the criminal justice bureaucracy, and they plead their clients guilty because this is the quickest way to dispose of the case and collect a fee.[69] The attorney's major concern may not always be the client, but to maintain his appearance as advocate in an adversary setting. The defense attorney must realize that he plays the most important role in the plea bargaining process. Most defendants plead guilty because their attorneys tell them to plead. The attorney crystallizes their alternatives for them, and conse-

64. *Supra* note 52.
65. Gentile, *Fair Bargains and Accurate Pleas*, 49 B.U. LAW REV. 514, 524 (1969).
66. 83 HARV. L. REV. at 1388.
67. Scott v. U.S., 419 F.2d at 276-277.
68. *Supra* notes 38 and 39.
69. Blumberg, "Lawyers With Convictions", in *The Scales of Justice* 51-67 (A. Blumberg ed. 1970) (hereinafter cited as Blumberg).

quently, is the critical element in most decisions to plead guilty.[70] Therefore, the concept of his duties is most important in providing safeguards for the defendant.

> If all "law is compromise", the compromise in the conviction process is neither surprising nor less desirable than compromise exercised at other stages in the criminal justice process.[71]

Plea bargaining is a reality. The issue which the Court was concerned with in *Alford* was how to provide safeguards for defendants in such situations. The defense attorney, as the defendant's agent in this compromise can assure the defendant that his rights will, in fact, be safeguarded. Too many attorneys are not skilled in the job of carefully assessing the strength of the prosecutor's case before advising their clients to plead guilty.[72] They do not have skill in analyzing confessions, searches, and seizures which may be critical aspects in the process of assessment.

If the attorney becomes skilled in these ways and recognizes and accepts his role as an agent of the defendant in this process of compromise, the plea bargaining procedure, and the whole guilty plea process, will be a substantially more equitable proceeding. To be able to effectively aid his client, the attorney must realize that he is the link between the system and the accused who are both striving to terminate the process with a "minimum of damage."[73] The Court in *Alford* and in *Brady* saw the guilty plea process operating as beneficial to each side. If the attorney realizes his job as a compromiser, and performs skillfully, the benefits to both sides can be real, and not merely apparent. This is the key to attaining the propriety of the plea bargaining process.

The *Alford* Court expressed confidence in the functioning of the guilty plea process through plea bargaining, even though the necessity of the system compels such an ex post facto acceptance. The Court also set out procedures to assure a voluntary and intelligent plea. However, what the Court did was merely to summarize the existing procedure.

The guilty plea process needs reform, and the Court in *Alford* has placed supervision in the hands of the trial judges. This increased reliance on the trial courts is a beginning. But the defendant will not be completely protected from the pressures inherent in plea bargaining. To obtain benefits for the defendant, the system of criminal justice ad-

---

70. *Id.* at 63.
71. NEWMAN at 76.
72. Tigar, 84 HARV. L. REV. at 22. Also *cf.* Comment, *Incompetency of Retained Counsel* 1 LOYOLA U.L.J. 166 (1970).
73. Blumberg at 59.

ministration must depend on the skill, integrity, and professionalism of the attorney. "There is no one else in the court structure more ideally suited to handle this than the defense attorney."[74]

ROSEANN OLIVER

74. *Id.*