Pleas in Federal Criminal Procedure

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PLEAS IN FEDERAL CRIMINAL PROCEDURE

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Rule 11 of the Federal Rules of Criminal Procedure, entitled “Pleas,” provides as follows:

A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with an understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

I. HISTORY OF DRAFTING OF RULE 11.

The first draft of the Federal Rules of Criminal Procedure, dated September 8, 1941, provided in Rule 7(a): “The plea shall be not guilty, nolo contendere or guilty.” Rule 8(b)(2) provided that if the defendant does not plead nolo contendere or guilty, he shall plead not guilty or move to dismiss the accusation. If the defendant wishes to deny directly and without affirmative defense that he did the act charged, he, or his counsel in his presence, shall enter orally in open court his plea of not guilty. If the defendant wishes in addition to assert an affirmative defense, he or his counsel shall file a motion to dismiss the accusation. The Committee for the Southern District of Florida proposed that all other pleas be abolished; that a defendant be permitted to plead guilty by so announcing in court, and that the court be empowered forthwith to accept such and to enter judgment. Judge Taylor of the Sixth Circuit complained that many defendants plead not guilty at arraignment and then change their plea on the date of the trial. He discouraged this by announcing at the time of arraignment that such a change might bring additional punishment. But he admitted that often the lawyer rather than the defendant was at fault. The Committee for the Western District of Oklahoma suggested that if a defendant refuses to plead the

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court must then enter a plea of not guilty for him; and that special pleas should be filed within ten days after a plea of not guilty but without withdrawal of the not guilty plea. Mr. A. W. Trice of the Committee for the Eastern District of Oklahoma suggested that a plea of not guilty be made in writing prior to or at the time of arraignment, or orally in open court at the time of arraignment, or within 24 hours thereafter. The Committee for the Eastern District of New York suggested a rule to permit defendants charged with felonies or misdemeanors to plead guilty to a petty offense if the United States Attorney and the court approve. The Committee for the Western District of Oklahoma would permit a plea of *nolo contendere* up to the time the jury is sworn; when it is entered the United States Attorney must present to the court a statement of facts which he is prepared to prove and the court will then determine the defendant's guilt or innocence. Frederick F. Faville of Iowa would abolish the plea. The Judicial Conference of the Second Circuit discussed the plea and concluded that it had more friends than had been supposed.

Rule 30(a) of the second draft, dated January 12, 1942, provided: "The plea upon arraignment shall be not guilty, nolo contendere, or guilty." Furthermore no other pleas "shall be recognized." Rule 51(c), entitled "Pleas," provided: (1) that defendant on arraignment may ask the court for more time to secure counsel or otherwise prepare his defense, or may plead; (2) that the court may refuse to accept a plea of guilty or of *nolo contendere*; (3) that if the defendant stands mute or pleads evasively, or if the defendant is a corporation and fails to appear, a plea of not guilty shall be entered; (4) that if the defendant pleads not guilty he shall at the same time file any motions asking the court for orders either disposing of the written accusation or bringing the case on to trial; and, (5) that the arraignment or plea shall be entered of record, but the failure of the record to show the entry shall not constitute a defect or error if the defendant is not shown by the record to have objected to proceeding to trial without arraignment or plea.

Rule 51(b) of the third draft, dated March 4, 1942, made a number of changes in the former Rule 51(c). Under subsection (1) no provision was made for the defendant's asking for more time at his arraignment to secure counsel or otherwise prepare his defense. Under subsection (4) if the defendant pleads not guilty he shall within a reasonable time fixed by the court file any motions for orders with respect to the written accusation. The former subsection (5) on entry of record of arraignment and plea was omitted.

The fourth draft, dated May 18, 1942, was much more concise and much closer to its final form. Rule 15(a) provided:

The defendant may plead guilty, not guilty, or nolo contendere. The court may refuse to accept a plea of guilty or of nolo contendere. If the defendant refuses to plead or if the defendant is a corporation and fails to appear, the court shall enter a plea of not guilty.

Rule 15(a) of the fifth draft, dated June, 1942, made no changes. A draft, known as Preliminary Draft, dated May, 1942, was submitted to the Supreme Court for comment, but no comment was made.

Rule 11 of the sixth draft, dated Winter 1942-1943, made no changes in
substance. The rule now spoke of a defendant instead of the defendant; and it stated "if a defendant corporation fails to appear" instead of "if the defendant is a corporation and fails to appear." For the first time a whole rule was devoted to pleas only.

The First Preliminary Draft (seventh committee draft), dated May, 1943, changed the number of this rule to Rule 12. The first sentence attained its final form. The second sentence provided that the court shall not accept a plea of guilty "without first determining that the indictment or information charges an offense and that the plea is made voluntarily with understanding of the nature of the charge." The third sentence remained unchanged from the sixth draft.

The following comments were made to the Advisory Committee on the First Preliminary Draft. Judge George H. Moore of the Eastern District of Missouri pointed out that the rule was silent as to what shall be deemed sufficient compliance with the constitutional right of the defendant to assistance of counsel. The rule should specifically state what shall constitute sufficient advice to the defendant of this right and evidence of its waiver. John B. Sanborn of the Court of Appeals of the Eighth Circuit thought that the second sentence of the rule contained the inference that it is the duty of the judge to examine the indictment with the utmost care. This would put too great a burden on the judge, as, for example, in a long involved mail fraud case involving numerous counts. The judge should not be required before accepting a plea of guilty to determine that the indictment or information charges an offense. Judge J. W. Waring of the Eastern District of South Carolina would require that a plea of guilty be signed by the defendant so that he may not later claim that he misunderstood his plea. Judge A. Lee Wyman of the District of South Dakota would abolish the plea of nolo contendere, as would the Committee for the District of South Dakota. Joseph T. Votava, United States Attorney for the District of Nebraska, would require the consent of the United States Attorney to a plea of nolo contendere, as would Robert M. Hitchcock of Dunkirk, New York. Judge Walter C. Lindley of the Eastern District of Illinois thought it wise to continue the use of nolo contendere. Its availability will often avoid the need for a new trial. For all practical purposes such a plea is the same as a guilty plea. It is not important that the rule require consent of the United States Attorney, as the court will not ignore his recommendation except for good cause. George J. Morrissey, United States Attorney for the District of Colorado, would permit a plea of not guilty by reason of insanity. Stuart H. Steinbrink of New York would have the rule made clear that a defendant may plead orally in open court. There was some doubt about this in the existing practice. There might be still more question under the proposed rules as a plea is denominated a "pleading" in the rule following the rule on pleas. If a corporation fails to appear steps should be taken by distraint or otherwise to compel its submission to the

1 Comments, Recommendations and Suggestions Received Concerning the Proposed Federal Rules of Criminal Procedure 89 (1943).
2 Id. at 90.
3 Id. at 91.
4 Id. vol. 2 at 387.
jurisdiction of the court; a plea should be entered only after its appearance or after it has in some way indicated its submission to the jurisdiction. Judge A. F. St. Sure of the Northern District of California would omit the second sentence.\(^5\) The judge should not have to determine that the indictment or information charges a crime. This is unnecessary as the rules provide that defenses or objections to the accusation may be raised by motion before trial. The rule would be burdensome on the court and would delay the trial. Furthermore the judge should not have to determine that the plea is made voluntarily with understanding of the nature of the charge. How can a court determine that the defendant understood the nature of the charge? Sheldon E. Bernstein of the Criminal Division of the Department of Justice opposed requiring the court to pass on whether the accusation charged a crime.\(^6\) The court should do this even though the rule is silent. Putting the requirement in the rule might raise the question whether it is reversible error if the court fails to make a specific and express finding on this point. In effect the court would have to raise a demurrer for the defendant and then rule on it. The proposed rule would be sound if the defendant does not have counsel. But if the defendant has counsel the proposed rule is unnecessary as the defendant's counsel could raise the point on demurrer or motion.

The Second Preliminary Draft (eighth committee draft) is dated February, 1944, and in it Rule 11 attained its final form.

The following comments were made on the Second Preliminary Draft. The Special Committee of the Oregon State Bar would delete the language "and shall not accept the plea" from the second sentence.\(^7\) Not accepting the plea of guilty should be discretionary with the court rather than mandatory. There should be added to the rule the following provision:

The court, upon a request being made by a defendant, shall make a determination as to whether or not the defendant is mentally able to enter a plea, to advise his counsel as to the facts, or assist in his defense.

Whether a defendant has the mental capacity to know whether or not he did commit a crime should be determined by the court prior to the entry of the defendant's plea. Judge J. Foster Syme of the District of Colorado would have the rule require that a plea of guilty be in writing.\(^8\) In order to avoid numerous habeas corpus proceedings being brought by defendants alleging that when they pleaded guilty they were not properly advised of their constitutional rights, Judge Syme adopted the practice of having them sign a written statement that they had been advised of their constitutional rights to trial by jury, appointment of counsel, and summoning of witnesses. Assistant Attorney General Berge of the Antitrust Division of the Department of Justice favored retention of the plea of nolo contendere. It was useful in anti-trust cases where the crime is merely *malum prohibitum* rather than *malum in se*. Moreover a conviction after a nolo contendere plea has the same effect as a conviction after a guilty plea,

\(^5\) *Id.* at 388.

\(^6\) *Id.* at 389.

\(^7\) *Id.* vol. 3 at 41 (1944). Judge A. F. St. Sure took the same view. *Id.* at 43.

\(^8\) *Id.* at 42.
except that the nolo plea is not admissible as prima facie evidence of the pleader's guilt in a treble damage suit. In anti-trust proceedings often the first step is indictment and the next civil complaint. Thus, closing out the criminal case is simply a preliminary to eradicating the improper practices. Use of nolo contendere speeds the process. The policy of the Antitrust Division has been not to object to the interposition of the plea of nolo contendere. The Committee of the State Bar of California favored the provision permitting a plea of nolo contendere.

It was felt that there is a definite place in criminal procedure for a plea which will permit the disposition of an indictment for a felony by entering a plea which would permit a court to impose some penalty, but which would not carry with it the results which flow from the conviction of a felony.9

The Report of the Advisory Committee (ninth committee draft) dated June, 1944, made no changes. The Supreme Court adopted the rule without change.

II. Federal Procedure Before Rule 11

A. What Law Applied

Federal law rather than state law was held to apply to the effect of standing mute.10 The prosecution in its argument referred to both federal and state law. However the state law was identical with the federal, hence no clear distinction was called for. Federal law also applied as to asking the defendant, following a plea of not guilty, how he would be tried.11 Even though state law may call for asking this question, it was not asked in the federal courts. Federal law applied to whether the record must show arraignment and plea.12 It also applied to the question of whether there may be a sentence of imprisonment after a plea of nolo contendere.13 Federal law governed the scope of defenses which may be raised under the plea of not guilty,14 and pleading insanity at the time of the offense.15

B. Presence of the Court

The plea should be made in the presence of the court.16 Possibly there is an analogous requirement that his retained counsel be present unless his presence is intelligently waived.

C. Presence of Defendant

Circuit Justice Curtis stated that a federal court may in its discretion allow one indicted for a misdemeanor to plead and defend by counsel, even though he

9 Id. vol. 4 at 28.
13 Hudson v. United States, 9 F.2d 825, 826 (3rd Cir. 1925).
15 United States v. Fore, 38 F. Supp. 140, 141 (S.D. Cal. 1941). The procedure in determining present insanity is governed by the common law as there are no federal statutes. Youtsey v. United States, 97 Fed. 937 (6th Cir. 1899).
The offense must not be one for which imprisonment must be inflicted, and the court must be satisfied of this. The United States Attorney must consent, or it must appear to the court that he unreasonably withholds his consent. Sufficient cause must be shown for the absence of the defendant, and he must execute a special power of attorney to counsel to appear and defend in his absence. In cases where imprisonment is required by law or where it ought to be imposed, no general rule can be laid down, but the decision will depend on the circumstances of each case.

D. **Plea by Insane Defendant**

A court of appeals has stated that it “is fundamental that an insane person” cannot “plead to an arraignment.” Counsel for the defendant should object before arraignment, but “the defense may be interposed after arraignment in bar of a trial.” At the arraignment counsel may object orally to the court. The objection may be raised by a motion for a continuance. Since the federal statutes are silent the common law rules are applied in determining the issue of present insanity. The court may use a jury, but is not bound to do so, and there may also be a petition for inquiry into the present condition of the defendant.

E. **Must the Defendant Plead Personally?**

In an early case arising in the Territory of Washington the court stated that the plea in capital or otherwise infamous cases should be made by the defendant personally and not merely by his counsel. This was true whether the defendant pleaded guilty or not guilty. Counsel could not alone enter a plea of not guilty. The defendant might consider it to his interest to plead guilty and throw himself upon the mercy of the jury or the court. The court cited the fifth and sixth amendments to the federal constitution.

To some extent there is case law permitting the attorney for the defendant to plead guilty for him in his presence even when the sentence is imprisonment. Where the attorney asked the defendant, who had already pleaded *nolo contendere*, if he wished to plead guilty on condition that the court delay imposition of sentence, and the defendant replied, “What can I say?” and the attorney in his own words and in the presence of defendant, who made no protest, entered a plea of guilty, the plea of guilty was valid. The crime was willful and fraudu-

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20 Youtsey v. United States, supra note 19, at 942.
24 Elick v. Washington Territory, 1 Wash. Territ. 138 (1861). This case was cited and quoted favorably in State v. Walton, 50 Ore. 142, 91 Pac. 490, 493 (1907). See also ANNOT. 13 L.R.A. 811 (1908).
lent evasion of income taxes, and the sentence was imprisonment. The court did not distinguish between felonies and misdemeanors.

In a narcotics trial, while summing up to the jury, the defendant’s attorney said that the defendant was guilty of the second count. The trial judge then asked whether the defendant pleaded guilty to which the attorney replied in the affirmative. In charging the jury the judge declared that the defendant had pleaded guilty to the second count and withdrew it from their consideration. The verdict was guilty on the first count. The defendant was sentenced to ten years upon the first count and five years on the second count, the sentences to run concurrently. Upon appeal the defendant claimed that he did not plead guilty on the second count. The plea was held sufficient but this is open to serious question. Even when the defendant personally pleads, the court should ascertain that the defendant understands the consequences of his action. The defendant may not understand the effect of his attorney’s action. His mere silent acquiescence does not necessarily show understanding. It should not be assumed that he understood, particularly when serious offenses involving long prison terms are charged to the defendant. The requirement that the defendant plead personally seems a corollary to the general rule that the defendant be present during the trial.

F. Waiver of Plea

In 1887 the Circuit Court of the Eastern District of Missouri took the view that the record need not show arraignment and plea. The court relied on the federal statute providing that no proceeding shall be affected by “any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.” The result might be different if in fact the defendant went to trial supposing the charge was one thing, and after the testimony was introduced he discovered for the first time that he was being tried for a different thing. But such facts did not appear in this case. However, in 1896 the Supreme Court held that the record must show that the defendant was formally arraigned or that he pleaded to the indictment. Whether the defendant pleads or does not plead to an infamous crime is not a matter of form. It is the prevailing rule in this country and in England, at least in cases of felony, that a plea to the indictment is necessary before trial and this fact must appear affirmatively from the record. In the absence of a plea there is nothing for the jury to try. As to infamous crimes the courts are not at liberty to guess that a plea was made by or for the accused or what the nature of the plea was. Due process of law requires that the accused plead, or be ordered to plead, or, in a proper case, that

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26 United States v. Moe Liss, 105 F.2d 144, 145 (2d Cir. 1939). This case was cited favorably in United States v. Colonna, 142 F.2d 210, 213 (3rd Cir. 1944). But in the latter case the defendant was specifically asked by the court whether he understood the plea and answered in the affirmative.
30 Id. at 637.
31 Id. at 642.
32 Id. at 644.
a plea of not guilty be filed for him, before his trial can rightfully proceed." Three justices, Peckham, Brewer, and White dissented. They were satisfied that in fact the defendant had been arraigned and pleaded not guilty. The fact that a jury was summoned shows that there was a plea of not guilty. Even if the defendant had not in fact been formally arraigned or had not in terms pleaded, he waived these protections by proceeding to trial without objection. There was no real injury to the defendant, hence the statute doing away with formal defects should apply.

Following this decision a court of appeals held that, while arraignment may be waived, "the plea is absolutely essential." The rule as to plea is true as to misdemeanors as well as felonies. Another court while upholding waiver of arraignment in misdemeanor cases nevertheless did not do so as to plea. Where a defendant was tried without having interposed a plea to any of the counts of the indictment except one, to which he pleaded not guilty, the issue made by such a plea is the only one on which he can be tried. Where the defendant was arraigned and pleaded not guilty, but then obtained leave to withdraw his plea and file a motion to quash and a demurrer to the indictment, which were later overruled, and the defendant went to trial, another plea of not guilty is not necessary, as the withdrawal of the plea of not guilty was merely provisional.

The Supreme Court in a second case adhered to its earlier decision, again in a federal criminal case, that in capital and otherwise infamous crimes "both the arraignment and plea are matters of substance, and must be affirmatively shown by the record." But finally in 1914 in a state court case the Supreme Court held that when, on a second trial after grant of a motion for new trial, there was no arraignment or plea but defendant went to trial without objection he had waived arraignment and plea.

Following this decision a number of lower federal court decisions found a binding waiver. One case held that the Supreme Court decision applied to federal criminal cases as well as state, and that it applied even though the issue

33 Id. at 645. The court did not refer to or expressly overrule United States v. Molloy, 31 Fed. 19 (E.D. Mo. 1887). But that case was said to have been overruled by the Crain case, in United States v. Aurnadt, 153 N.M. 292, 107 Pac. 1064, 1066 (1910). The Crain case was thought at the time to represent the weight of authority of the state courts. 21 Harv. L. Rev. 217 (1908). Arraignment and plea must precede the impaneling and swearing of the jury. United States v. Aurnadt, 153 N.M. 292, 107 Pac. 1064, 1065 (1914).

34 Shelp v. United States, 81 Fed. 694, 701 (9th Cir. 1897). In this case there was an affirmance as to a defendant who waived arraignment and pleaded not guilty; but a reversal as to another defendant when the record showed neither arraignment nor plea.


37 O'Hara v. United States, 129 Fed. 551, 556 (6th Cir. 1904).


39 Garland v. Washington, 232 U.S. 642, 645 (1914). A comment on this case in 27 Harv. L. Rev. 760 (1914) pointed out that most state courts took the opposite view because without arraignment and plea there is no issue to try, or because no statute provides for waiver. But the holding was thought to be correct in principle. In recent years most of the state courts have adopted the doctrine of waiver. 27 Mich. L. Rev. 703 (1929); 3 De Paul L. Rev. 105, 109 (1953).
was raised in the trial court. There was no reversible error where the defendant, after the government had introduced its evidence and rested, moved for a directed verdict on the ground that he had not been formally arraigned, and was then told to plead, and did plead not guilty. In another case an indictment was presented and four days later it was ordered that the defendant appear for arraignment at a time five days after the order. The defendant filed a demurrer which was argued and overruled. Counsel for the defendant and the United States Attorney then agreed on a date for trial and that the defendant should plead on that date so as to save a trip. At the opening of the trial the indictment was read to the jury, and the clerk stated that the defendant had entered a plea of not guilty. The defendant proceeded to trial without any objection from him that there had been no arraignment or plea. At the end of the trial his motion in arrest of judgment was overruled. On appeal no error was found.

The court of appeals referred to the Supreme Court decision upholding waiver and the statute on standing mute or refusing to plead. It is too late on motion for new trial to raise the issue of waiver of arraignment or plea, and after judgment it is too late to object that there was no arraignment or plea following the overruling of a demurrer to the indictment. Where there was a recital in the order of the trial court of a plea of not guilty and where there is no express admission of a failure to arraign by the trial court or by the United States Attorney, it is doubtful that the lack of arraignment may be established by affidavit. But even if it could be raised by such an affidavit, it is too late to raise it after conviction. Where the defendant demurs and his demurrer is overruled and he is then tried and arraigned only at the close of the government's case, the motion of the defendant to dismiss need not be granted.

It may be broadly concluded that where the defendant proceeds to trial without objection that there was no arraignment or plea, there is a waiver, or at least there is no reversible error.

In one case involving nine defendants, six had been tried for what they claimed to be the same offense. In the present proceeding all nine were arraigned and pleaded not guilty. Later they were given leave to withdraw their pleas of not guilty and to demur to the indictment. The demurrers were overruled and the trial commenced. Early in the trial, counsel for the six previously tried called the court's attention to the fact that there were no pleas because of the withdrawal of the pleas of not guilty, and asked permission to plead. Counsel for the other three defendants concurred in asking permission to plead. The trial court did not distinguish the two sets of defendants, and held as to all nine that their failure to plead after demurrer was a waiver of their right to plead. On appeal it was held as to the set of six defendants that their convictions be

40 Cornett v. United States, 7 F.2d 531, 532 (8th Cir. 1925).
42 Williams v. United States, 3 F.2d 933, 935 (6th Cir. 1925).
43 Rossi v. United States, 278 Fed. 349, 353 (9th Cir. 1922).
44 United States v. Austin-Bagley Corp., 31 F.2d 229, 234 (2d Cir. 1929).
45 King v. United States, 25 F.2d 242, 243 (6th Cir. 1928).
reversed. They had not by inaction waived their right to plead, but had offered to plead both not guilty and double jeopardy, and they had repeatedly objected during trial. They were deprived of their opportunity to defend under a proposed plea of double jeopardy. The other three defendants objected too late. They were not prejudiced as they had not previously been tried and could not therefore plead double jeopardy.

A state court in effect has pointed out that without an arraignment there is not likely to be a plea.

Even on the day set for that purpose it is not customary, nor is it expected, that the defendant shall arise and make such plea known until directed by either the court or district attorney. He would have no means of knowing when the particular time of the day or hour fixed had arrived until his attention should be called to it in the usual manner. The prisoner, as a rule, would be the last to risk incurring the court's displeasure by rising unsolicited at an improper moment to announce he was ready to plead. It is not, therefore, to be expected that the defendant should make his desire manifest until called upon to do so.

When there was an arraignment and plea at the first trial, these need not be repeated at the subsequent trial or trials of the case where there is a mistrial or new trial. When after mistrial and before new trial amendments are made to purely formal parts of certain counts of an indictment, and the defendants are not rearraigned and do not plead again, even if the irregularity is material, which is not conceded by the court, it can affect only the counts so amended, and the error, if error it be, is cured by arrest of judgment on such counts. Thus it is clear that as to some amendments to an indictment another plea will be necessary.

G. Plea of Not Guilty

Justice Harlan thus described the nature of the plea of not guilty:

The plea of not guilty is unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive grounds of defense by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged. Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty.

The function of the plea of not guilty is to put the government to its proof.

47 State v. Walton, 50 Ore. 142, 91 Pac. 490, 492 (1907). The Supreme Court has said, referring to the statute on standing mute or refusing to plead: “It will be observed that the word ‘arraignment’ is used as comprehensively descriptive of what shall precede the plea.” Johnson v. United States, 225 U.S. 405, 411 (1912). In an early case the defendant wished to plead to a felony without being arraigned, but the court ordered that he be arraigned. United States v. Pettis, 27 Fed. Cas. 521 (No. 16038) (C.C.D.C. 1831). When he is arraigned for a felony he must be placed in the criminal box or dock and cannot avoid this by asking to plead only. United States v. Pittman, 27 Fed. Cas. 543 (No. 16053) (C.C.D.C. 1828).
49 Gardes v. United States, 87 Fed. 172, 182-83 (5th Cir. 1898). See also 13 L.R.A. 811 (1908).
and to preserve the right to defend.\textsuperscript{51} It does not go to prove that the defendant is innocent. It is not evidence, it is not testimonial, it is not under oath, and it is not subject to cross examination.

A plea of not guilty "operates in law as a denial of all charges in the indictment, and puts the government on proof to make out its case on fact and law."\textsuperscript{52} Even though there be a confession by the defendant, the government must introduce other evidence to establish the corpus delicti. A plea of not guilty puts in issue every allegation of the count to which it is addressed and places "upon the government in the amplest way the burden of proving every essential element of the offense charged."\textsuperscript{53} The plea of not guilty is to the charge in the indictment and not to inconsistent matter that may appear on the back of a good indictment, or in other records of the court.\textsuperscript{54}

When on arraignment the defendant pleads not guilty, it is not necessary to ask the defendant how he will be tried as the Constitution provides for trial by jury.\textsuperscript{55} Moreover trial by battle never existed in the United States.

The defense of entrapment may be raised by a plea of not guilty.\textsuperscript{56} Under the majority view of the United States Supreme Court, evidence of entrapment must be introduced under the plea of not guilty, and the fact of entrapment becomes a matter which the jury must determine and finally dispose of, as an element of its finding of guilty or not guilty.\textsuperscript{57} Under the minority view of Justices Roberts, Brandeis, and Stone the issue of entrapment is for the determination of the court, at any time and in any manner the issue may be raised; and on a finding of entrapment the indictment must be quashed and the case dismissed.

Under a plea of not guilty the defendant may raise the issue of the statute of limitations.\textsuperscript{58} The rule has been applied to denial of a continuing offense.\textsuperscript{59} It has also been applied to denial of being a fugitive from justice\textsuperscript{60} and to other extensions of the time limitation.\textsuperscript{61}

\textsuperscript{51} Wood v. United States, 128 F.2d 265, 273 (D.C. Cir. 1942).
\textsuperscript{52} United States v. Mayfield, 59 Fed. 118, 119 (E.D. La. 1893). See also United States v. Sands, 14 F.2d 670 (W.D. Wash. 1926); Lateran v. United States, 93 F.2d 395, 400 (8th Cir. 1939).
\textsuperscript{53} Prettyman v. United States, 180 Fed. 30, 42 (6th Cir. 1910).
\textsuperscript{54} Smith v. United States, 208 Fed. 131, 132 (8th Cir. 1913).
\textsuperscript{57} 42 YALE L.J. 803 (1933).
\textsuperscript{59} United States v. Kissel, supra note 58; United States v. Barber, 219 U.S. 72, 78 (1911).
Insanity at the time of the offense may be raised under a plea of not guilty. The defense of alibi may be raised on a plea of not guilty. The privilege against self-incrimination under the fifth amendment is a matter of defense under the general issue of not guilty, and it is improper to use a special plea to single this question out for determination in advance of trial. In general, when matters set forth in special pleas are mere matters of defense determinable under the general issue, the plea of not guilty will raise the issue.

A plea of not guilty does not raise the issue of double jeopardy, which must be pleaded specially. A plea of double jeopardy should not be tendered simultaneously with a plea of not guilty, but should precede it. Waiver of double jeopardy will be implied when the defendant pleads not guilty, and proceeds to trial, verdict, and judgment without raising such defense.

H. Standing Mute

As early as 1818 it was held that on arraignment for a robbery of a mail-carrier, if the person charged stands mute, the trial will proceed as though he had pleaded not guilty. In this case the defendant at first had entered a plea of not guilty and a plea to the jurisdiction; had then withdrawn his pleas on leave obtained from the court; and had then stood mute. The court in granting leave had assumed that counsel meant to plead other pleas. The court granted the motion of the United States Attorney to proceed as if the defendant had pleaded not guilty. The court pointed out that the question was a novel one. The federal constitution provides that trial of crimes shall be by jury. A defendant may not, by maneuvering, defeat trial by jury. Penance or peine forte et dure to compel an answer is unknown in the United States. The court did not hold that the case was determined by state law. But if state law, here that of Maryland, was applied, the result would be the same. While standing mute would be equivalent to conviction prior to 1809 in Maryland, a statute of 1809 made standing mute equivalent to a plea of not guilty. In a subsequent case Circuit Justice Story pointed to acts of 1790 and 1825 as providing that stand-

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63 Colbeck v. United States, 10 F.2d 401 (7th Cir.), cert. denied, 271 U.S. 662 (1925).
67 Brady v. United States, 24 F.2d 399, 405 (8th Cir. 1929).
69 But see In re Smith, 13 Fed. 25, 26 (D. Mass. 1882). This case also asserts that English law providing that standing mute results in conviction applied in the United States.
ing mute is equivalent to pleading not guilty."\textsuperscript{70} The refusal of the defendant to plead to an information does not destroy the jurisdiction of the court.\textsuperscript{71} It is a mere matter of form to enter a plea of not guilty in such a case. Even if the statutes were silent on standing mute, the trial would proceed as if the defendant had pleaded not guilty. No distinction should be taken from muteness arising \textit{ex visitatione Dei} or \textit{ex malitia}. There is a not guilty plea for the latter as well as the former.

The court may enter a plea of not guilty when a corporation appears in court and stands mute.\textsuperscript{72} The record showed that when the case came on for trial there were appearances for the corporate defendants. The corporation had appeared at the first trial by attorneys. The court did not rely on the appearance of two officers of the corporation. It is immaterial that no process had been served on the corporation. If the attorneys desired to correct the record or to withdraw their appearances they should have done so.

I. Plea of Guilty

Justice Butler, speaking for the Supreme Court has said: "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. . . . More is not required; the court has nothing to do but give judgment and sentence."\textsuperscript{73} A plea of guilty is a judicial confession.\textsuperscript{74} A plea of guilty made at arraignment is a judicial confession of ahigher plane than a plea of guilty before a committing magistrate. The facts set forth in the indictment are admitted by the plea.\textsuperscript{75}

When the defendant pleads guilty he thereby in effect waives his right to trial by jury. Citing Blackstone, Circuit Justice Clifford stated: "Conviction may accrue in two ways, either by the party confessing his offense and pleading guilty, or by his being found guilty by the jury."\textsuperscript{76} The Supreme Court in a state court case stated broadly that both at common law and today no jury trial is necessary when the plea is guilty, even in capital cases.\textsuperscript{77} The sixth amendment does not require jury trial in federal cases when the defendant pleads guilty. "The accused, by the plea of guilty, eliminated all issues of fact, and left nothing to be submitted to a jury."\textsuperscript{78} When the Supreme Court upheld the validity of


\textsuperscript{71} United States v. Borger, 7 Fed. 193 (S.D.N.Y. 1881). Thus prosecutions under informations are treated like prosecutions under indictments even though the statute on standing mute used the word "indicted." \textit{Accord}, In re Smith, 13 Fed. 25, 26 (D. Mass. 1882), involving prosecution by complaint.

\textsuperscript{72} United States v. Beadon, 49 F.2d 164, (2d Cir.), cert. denied, 284 U.S. 625 (1931).


\textsuperscript{74} Heim v. United States, 47 App. D.C. 485, 486 (D.C. Cir. 1918).

\textsuperscript{75} Rachel v. United States, 61 F.2d 360, 362 (8th Cir. 1932); Langston v. United States, 153 F.2d 840 (8th Cir. 1946).


\textsuperscript{77} Hallinger v. Davis, 146 U.S. 314, 314 (1892).

\textsuperscript{78} West v. Gannon, 98 Fed. 426, 428 (6th Cir. 1899). See also Heim v. United States, 47 App. D.C. 485, 486 (D.C. Cir. 1918); United States v. Harrison, 23 F. Supp. 249, 252 (S.D.N.Y. 1938); Hood v. United States, 152 F.2d 431, 433 (8th Cir. 1946); Cooke v. Swope,
waiver of trial by jury in federal felony cases it pointed out that "the accused may plead guilty and thus dispense with a trial altogether." Similarly, on a plea of nolo contendere there is no trial by jury.

May the plea of guilty ever be made prior to arraignment as at the preliminary examination? In 1918 a plea of guilty before the commissioner was thought not objectionable in a dictum of the Court of Appeals of the District of Columbia. In 1925 the Court of Appeals of the Sixth Circuit held that evidence as to admissions and seemingly pleas of guilty made at the preliminary examination could be admitted at the trial. The Second Circuit held that a plea of guilty could be made at the preliminary examination and that such a plea would be received at the trial as freely as any extra-judicial admission of guilt where not obtained by unfair practice. The defendant could plead not guilty at the trial without withdrawing his guilty plea before the commissioner.

In 1942 it was held that a plea of guilty should not be received at the preliminary examination. The privilege against self-incrimination is violated where defendants charged with robbery are asked at the preliminary examination whether they plead guilty or not guilty, the defendants being without counsel and not cautioned as to the consequences of the plea of guilty. Hence such a guilty plea will not be admitted in evidence at the trial. A guilty plea made at arraignment and later withdrawn is not admissible in evidence. The same rule should be applied to a plea made at the preliminary examination. Many writers have thought the holding to be a proper application of the privilege rule. It is the purpose of the privilege to stimulate search for independent evidence and to preserve the impartiality of the court so that guilt is a matter of objective proof. Other writers have thought it an improper extension of the privilege and contrary to the traditional approach. Justice Rutledge, when later on the Supreme Court, adhered to his view in the Wood case in a dissenting opinion.

It would seem that a defendant has a right to plead guilty in all criminal cases including capital cases. But a statute may take away such rights in

28 F. Supp. 492, 493 (W.D. Wash. 1939); United States v. Colonna, 142 F.2d 210, 213 (3d Cir. 1944).
79 Patton v. United States, 281 U.S. 276, 305 (1930). The Supreme Court had taken the same position in upholding waiver of jury trials as to petty offenses. Shick v. United States, 195 U.S. 65, 71 (1904). Justice Harlan in his dissent admitted that a guilty plea even to murder made a jury unnecessary. 195 U.S. 65 at 81-82.
82 Cooper v. United States, 3 F.2d 497, 500 (6th Cir. 1935). But see Hodge v. United States, 13 F.2d 596, 598 (6th Cir. 1926) refusing to recognize a practical difference between a plea at preliminary examination and a plea at arraignment.
83 United States v. Adelmann, 107 F.2d 497, 499 (2d Cir. 1939).
84 Wood v. United States, 128 F.2d 265, 275 (D.C. Cir. 1942). The present Federal Criminal Rule 5(c) follows this case.
88 United States v. Dixon, 25 Fed. Cas. 872, (No. 14968) (C.C.D.C. 1807). But the defendant was later permitted to withdraw such plea and to plead not guilty. See also Seidell v. United States, 97 F.2d 742, 748 (7th Cir. 1937) where the sentence was death.
capital cases, such as rape. The Supreme Court has stated:

The Constitution does not compel an accused who admits his guilt to stand trial. . . . Legislation apart, no social policy calls for the adoption by the courts of an inexorable rule that guilt must be determined only by trial and not by admission.

Where there are co-defendants it is possible for some to plead guilty and some not guilty. If all co-defendants plead not guilty, it is possible for a co-defendant during trial to plead guilty. But this should be done out of the presence of the jury. If the court finds it necessary to explain the absence of such co-defendant during the remainder of the trial, the court may do so and may instruct the jury that the fact of such guilty plea should not be considered as any evidence of guilt of the other defendants.

What is the proper method of pleading where there are several counts charging separate offenses in a single indictment? It was held that there was a binding plea of guilty as to all counts when the record showed that on arraignment the accused "being informed of the charges [plural] in the indictment, says for his plea that he is guilty thereof in the manner and form as charged in the indictment."

When the defendant gives the judge a written statement when he enters his plea of guilty, in explanation and in qualification of his plea, such written statement must be considered as much a part of his plea as was the word "guilty."

If the trial judge receives testimony of witnesses relating to the killing after the defendant has pleaded guilty, this is not an abuse of discretion where the testimony was received merely for the court's information in acting upon the plea and imposing sentence.

The defendant may not attack his guilty plea when he admits that "he was possessed of his senses and understanding, knew the nature of the case and the accusation against him, had the advice of counsel, and voluntarily came into court and entered a plea of guilty." The Fourth Circuit quoted as a correct statement the view of the Supreme Court of West Virginia:

Before receiving a plea of guilty in a criminal case, the court should see that it is made by a person of competent intelligence, freely and voluntarily, and with full understanding of its nature and effect, and of the facts on which it is founded.

89 Green v. United States, 40 App. D.C. 426, 427 (D.C. Cir. 1913). The statute authorized the jury to inflict the death penalty.
91 United States v. Hartenfeld, 113 F.2d 359, 362 (7th Cir. 1940).
93 Bergen v. United States, 145 F.2d 181, 188 (8th Cir. 1944). Defendant was allowed to withdraw his plea.
95 West v. Gammon, 98 Fed. 426, 429 (6th Cir. 1899).
96 Fokus v. United States, 34 F.2d 97, 98 (4th Cir. 1929) quoting Nicely v. Butcher, 81 W. Va. 247, 94 S.E. 147, 148 (1917). In Waley v. Johnston, 159 F.2d 117 (9th Cir.), cert. denied, 321, U.S. 779 (1944), the court found that there had been no coercion by an F.B.I. agent. In Hood v. United States, 152 F.2d 431, 433 (8th Cir. 1946), the record showed that the plea was intelligently and voluntarily entered.
The court of appeals affirmed the decision of the district court finding untrue allegations of the defendants that they had been induced to plead guilty by misrepresentations made by deputy United States marshals as to the punishment that would be given them. Justice Butler, speaking for the Supreme Court, has said:

"Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. [And] on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence."

A defendant should be permitted to plead guilty only "after being admonished by the court as to its consequences."

A plea of guilty is intelligently made even though the defendant pleaded guilty on advice of counsel and received a longer sentence than both had hoped would be imposed. The same is true where the defendant received a sentence of imprisonment instead of probation so that he could go into the armed forces.

A plea of guilty entered in complete ignorance of the right to counsel is not intelligent. Such a plea is not a waiver of the right to counsel. But on habeas corpus the accused must show that he did not know and was not advised of his constitutional right to counsel, and entered the plea either because he failed to understand the charge or because he believed that the only alternative was to go to trial without counsel, and so believing chose to plead guilty, and would not otherwise have done so.

In a state court case the Supreme Court held that a plea of guilty will not be regarded as voluntary if procured by trick or artifice, as where defendant, an uneducated man who was not aided by counsel, received a twenty-year sentence after he had been tricked into believing that he was pleading guilty to a crime carrying a much smaller penalty.

A prisoner who was represented by court-appointed counsel was granted a hearing on his petition for habeas corpus on the basis of his allegation, which was not denied by the respondent, that he had been coerced into pleading guilty. The alleged coercion was by an F.B.I. agent. A plea of guilty coerced by a federal enforcement officer is no more consistent with due process than a conviction supported by a coerced confession. Such a plea is not a waiver of the defense of coercion even though the accused had court-appointed counsel. But

100 Dorsey v. Gill, 148 F.2d 829, 830 (N.D. Calif. 1942) (facts of case held not to show such ignorance).
101 Parker v. Johnston, 29 F. Supp. 829, 830 (N.D. Calif. 1939) (facts of case held not to show such ignorance).
102 Smith v. O'Grady, 312 U.S. 329 (1941); 20 Neb. L. Rev. 173 (1941); 15 Temple L. Q. 441 (1941).
103 Waley v. Johnston, 316 U.S. 101, 104 (1942). The court reversed 124 F.2d 587 (9th Cir. 1942) which had affirmed 38 F. Supp. 408 (N.D. Cal. 1941). The coercion consisted of a threat to publish false statements and manufacture false evidence that the kidnapped person had been injured, so that the accused might be hanged.
CRIMINAL PROCEDURE

where the defendant makes a confession during illegal detention before being brought before a commissioner, this does not deprive the court of jurisdiction to accept a voluntary plea of guilty.\(^{104}\)

A plea of guilty is not invalid because of coercion where the defendant has already pleaded \textit{nolo contendere} and then pleads guilty on condition that his request for delay in imposition of sentence be granted in order to attend commencement exercises of his son.\(^{105}\) The court will refuse to accept a plea of guilty from a defendant who has been entrapped, and will instead dismiss the case.\(^{106}\)

After a plea of guilty the defendant is not in a position to raise many objections to the indictment.\(^{107}\) He waives defects in the form of the indictment.\(^{108}\) He waives his constitutional right to claim double jeopardy, if any such claim is available.\(^{109}\) Upon an indictment simply for murder he may make a binding plea of guilty of second degree murder.\(^{110}\) The defendant waives all defects that are not jurisdictional,\(^{111}\) and "all defenses other than that the indictment charged no offense under the laws of the United States."\(^{112}\) He also waives the issue that he did not commit the crime in the district.\(^{113}\) If issues of foreign law are involved he admits them against himself as they are treated as matters of fact, and he admits all matters of fact.\(^{114}\) The only objection that can be made is "that the indictment fails to describe the various acts intended to be proved with that reasonable certainty which the law requires to constitute a valid indictment."\(^{115}\) As to other defects a motion in arrest of judgment will not lie.\(^{116}\) If the defendant fears a second prosecution for the same crime he should ask for a bill of particulars before pleading guilty.\(^{117}\) The defendant by pleading guilty indicates that the acts charged have been sufficiently identified. The rule that those defects which would be bad on demurrer are cured by a jury verdict of

\(^{104}\) Blood v. Hunter, 150 F.2d 640, 641 (10th Cir. 1945).

\(^{105}\) United States v. Demnston, 89 F.2d 696, 697 (2d Cir.), cert. denied, 301 U.S. 709 (1937).


\(^{108}\) Nicholson v. United States, 79 F.2d 387, 389 (8th Cir. 1935); Weir v. United States, 92 F.2d 634, 635 (11th Cir. 1937); United States v. Harrison, 23 F. Supp. 249, 252 (S.D.N.Y. 1938); Caballero v. Hudspeth, 36 F. Supp. 905, 906 (D. Kans. 1941); Lindsay v. United States, 134 F.2d 960, 962 (10th Cir. 1943); Steffer v. United States, 143 F.2d 772, 774 (10th Cir. 1944).

\(^{109}\) United States v. Harrison, 23 F. Supp. 249, 252 (S.D.N.Y. 1938); Caballero v. Hudspeth, 114 F.2d 545, 547 (10th Cir. 1940).


\(^{111}\) Weir v. United States, 92 F.2d 634, 635 (7th Cir. 1937).

\(^{112}\) Rice v. United States, 30 F.2d 681 (5th Cir. 1929); Kachmic v. United States, 53 F.2d 312, 315 (9th Cir. 1931); Weatherby v. United States, 150 F.2d 465, 466 (10th Cir. 1945); Forthoffer v. Swope, 103 F.2d 707, 708 (9th Cir. 1939).

\(^{113}\) Spencer v. Hunter, 139 F.2d 828, 829 (10th Cir. 1944).

\(^{114}\) United States v. Lvuisch, 17 F.2d 200, 202 (E.D. Mich. 1927) (writ of error coram nobis was denied).


\(^{116}\) For example, misjoinder of parties and misjoinders of counts and duplicity cannot be so raised. Spirou v. United States, 24 F.2d 796, 797 (2d Cir. 1926).

guilty is applicable to a plea of guilty.\textsuperscript{118} The statute against setting aside proceedings for defects of form limits the availability of motion in arrest of judgment.\textsuperscript{119} Justice Harlan stated in a dissenting opinion that when the defendant pleads guilty before a lawful tribunal he admits every material fact well averred in the indictment or information, and there is no issue to be tried; no facts are to be found; no trial occurs. After such a plea nothing remains to be done except that the court shall pronounce judgment upon the facts voluntarily confessed by the accused.\textsuperscript{120}

The making of a guilty plea does not authorize the court to impose a legally excessive sentence.\textsuperscript{121} By pleading guilty the defendant does not waive his right to object to an excessive sentence. Where the defendant pleads guilty and is sentenced under two indictments each of which contained two counts and all sentences ran concurrently, and one count in each indictment was sufficient to charge an offense, the defendant is not entitled to release on habeas corpus on the ground that one count in each indictment did not charge an offense.\textsuperscript{122}

The defendant may in certain cases appeal from a conviction following a plea of guilty.\textsuperscript{123} On appeal he may raise the questions whether the statute under which he is prosecuted is constitutional and whether the accusation charges a crime.\textsuperscript{124}

A plea of guilty, when offered in evidence against the defendant in another criminal case, in which the fact admitted by the plea is material, is regarded as extra-judicial in that case, and the defendant may show that he did not intend to enter the plea recorded, or did not know at the time of the nature of the charge.\textsuperscript{125} The same would be true in a civil case. Under the general law of evidence a guilty plea may be admitted in other trials as an admission against the defendant entering the plea.\textsuperscript{126} And in any civil action by the government against the defendant, the doctrine of res judicata may apply and the judgment entered upon the guilty plea becomes conclusive as to the facts alleged in the indictment or information.\textsuperscript{127}

J. Plea of Nolo Contendere

A plea of nolo contendere "is allowable only under leave and acceptance

\textsuperscript{118} United States v. Bayaud, \textit{supra} note 117, at 383-84.
\textsuperscript{120} Schick v. United States, 195 U.S. 65, 72, 82 (1904); \textit{accord}. Bugg v. Hudspeth, 113 F.2d 260, 261 (10th Cir. 1940). The court must impose the statutory penalty following conviction on a plea of guilty. \textit{Ex parte} United States, 242 U.S. 27 (1916) (mandamus lies to compel sentence).
\textsuperscript{121} Caballero v. Hudspeth, 36 F. Supp. 905, 906 (D. Kans. 1941). The accused was released on habeas corpus proceedings. \textit{Accord}, Bertsch v. Snook, 36 F.2d 155, 156 (5th Cir. 1929); Sprague v. Aderholt, 45 F.2d 790, 791 (N.D. Ga. 1930).
\textsuperscript{122} Barnett v. Hunter, 138 F.2d 448, 449 (10th Cir. 1943).
\textsuperscript{123} Hocking Valley Ry. Co. v. United States, 210 Fed. 735, 738 (6th Cir. 1914) (failure to charge a crime); Oesting v. United States, 234 Fed. 304, 306 (9th Cir. 1916).
\textsuperscript{124} United States v. Ury, 106 F.2d 28 (2d Cir. 1939). See also, Roberts v. United States, 60 F.2d 774, 775 (7th Cir. 1932).
\textsuperscript{125} Accardi v. United States, 15 F.2d 619, 621 (8th Cir. 1926).
\textsuperscript{126} Blumer v. Haft, 78 F.2d 833, 836 (9th Cir. 1935); \textit{but see}, Greenfield v. Tuccillo, 129 F.2d 854, 856 (2d Cir. 1942); \textit{cf.}, United States v. Standard Oil Co., 60 F. Supp. 807, 812 (S.D. Calif. 1945).
\textsuperscript{127} See Local 167, Teamsters Union v. United States, 291 U.S. 293, 298 (1934).
by the court." One court has said that "from a purely technical point of view a plea of nolo contendere does not admit the allegation of the charge, but merely says that the defendant does not choose to defend the same." Conviction and punishment on such a plea has been characterized as being "in the nature of a compromise between the prosecutor and the defendant." The nature of the plea was not changed by the Clayton Act.

Negotiations between the defendant and the government resulting in a plea of nolo contendere are not binding on the court. But the court will approve where the government could have proceeded initially by a civil action in equity, and the wrong complained of was merely malum prohibitum and of an economic nature, and the proceeding was one in which the attainment of a proper understanding between the parties was of itself a desirable end.

For the purposes of the criminal law a plea of nolo contendere and a plea of guilty have the same effect. Circuit Justice Clifford stated that "it is well settled that the legal effect of the former is the same as that of the latter, so far as regards all the proceedings on the indictment." A plea of nolo contendere is an admission that the crime was committed within the district where the plea was made, as the plea "is in effect a plea of guilty to every essential element of the offense well pleaded in the charge against him, and warrants his conviction without more . . . though the conviction cannot be used in any other case." A plea of nolo contendere, like a plea of guilty, may be set aside if the indictment charges no offense. Likewise an appeal may be taken both where there is a plea of guilty and a plea of nolo contendere. As in the case of a plea of guilty, a jury trial is waived by making the plea, and it may be withdrawn only if the court allows it.

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132 Gemignani v. United States, 9 F.2d 384 (6th Cir. 1925). See also 152 A.L.R. 253, 270 (1944).


134 United States v. Lair, 195 Fed. 47, 52 (8th Cir.), cert. denied, 229 U.S. 609 (1913). Defendant was sentenced to two years imprisonment, fined $2,500 and costs. The crime was importing alien women for the purpose of prostitution, and was a felony.

135 Hacking Valley Ry. Co. v. United States, 210 Fed. 735, 738 (6th Cir. 1914). The penalty fixed by the court was a fine of $42,000 for violation of the Interstate Commerce Act and the Elkins Act. See also Tucker v. United States, 196 Fed. 260, 262 (7th Cir. 1912). Withdrawal of the plea was permitted when the indictment showed on its face that the statute of limitations had run. United States v. Anthracite Brewing Co., 11 F. Supp. 1018 (M.D. Pa. 1934).

136 Farnsworth v. Zerbst, 97 F.2d 255, 256 (5th Cir. 1938), rehearing denied, 98 F.2d 541 (5th Cir. 1938).

the defendant to plead double jeopardy if he is later prosecuted for the same offense.\textsuperscript{139}

The record of the conviction of the principal on a plea of\textit{nolo contendere} is admissible on a trial of confederates, who are jointly indicted with him, and tried on the theory that they are accessories, for the purpose of establishing the conviction and prima facie the guilt of the principal.\textsuperscript{140}

The plea of\textit{nolo contendere} differs from a plea of guilty in that it "cannot be used against the defendant as an admission in any civil suit for the same act."\textsuperscript{141} However under the federal statutes an alien may be deported who has been sentenced to imprisonment for a year or more because of conviction in this country of a crime involving moral turpitude. An alien so sentenced in a state court following a plea of\textit{nolo contendere} may be deported.\textsuperscript{142} One may be classified a second offender under the Fair Labor Standards Act if he has used this plea in a prior action.\textsuperscript{143} This plea may not be used in a gasoline jobber's civil action against an oil company which made the plea in an anti-trust case.\textsuperscript{144}

After a plea of\textit{nolo contendere} nothing remains for the court but to render judgment, as no issue of fact exists and none can be made while the plea remains of record.\textsuperscript{145} After entry of the plea, a stipulation of facts filed by the defendant is ineffective to raise an issue as to the sufficiency of the indictment, or an issue of fact upon the question of guilt or innocence. It could be used by the trial court merely as evidence in determining what sentence was imposed. The stipulation could not add particulars to the indictment as this calls for concurrence by the grand jury. It could not raise an issue as to guilt or innocence as the plea, like a plea of guilty, is conclusive on that. The defendant can obtain relief as to such issues only by withdrawing his plea with leave of the court. In some cases, where it was decided to submit a case to the court without a jury, the defendant has pleaded\textit{nolo contendere} and the court has then heard evidence offered for the government and the defendant and then announced a finding of guilty.\textsuperscript{146} Such evidence cannot be used to attack the indictment or information or to raise an issue of guilt or innocence. Evidence is heard only to aid the judge in fixing sentence.\textsuperscript{147}


\textsuperscript{141} Tucker v. United States, 196 Fed. 260, 262 (7th Cir. 1912). This view was adopted by the Supreme Court in\textit{dicta} in Hudson v. United States, 272 U.S. 451, 455 (1926); United States v. Norris, 281 U.S. 619, 622 (1930). See also Berlin v. United States, 14 F.2d 497, 498 (3rd Cir. 1926); Barnsdall Refining Corp. v. Birmamwood Oil Co., 32 F. Supp. 308, 312 (E. D. Wis. 1940); Caminetti v. Imperial Mut. Life Ins. Co., 59 Cal. App. 2d 476, 139 F.2d 681, 689 (1944); 50\textit{Yale L. J.} 489, 505 (1941).

\textsuperscript{142} United States ex rel Bruno v. Reimer, 98 F.2d 92 (2d Cir. 1938).


\textsuperscript{145} United States v. Norris, 281 U.S. 619, 623 (1930),\textit{reversing} 34 F.2d 839 (3d Cir. 1929) which had reversed 29 F.2d 744, 745 (E.D. Pa. 1928). \textit{ Accord,} Dillon v. United States, 113 F.2d 334, 339 (8th Cir. 1940),\textit{cert.}\textit{denied}, 311 U.S. 689 (1940); Fisher v. Schilder, 131 F.2d 522, 524 (10th Cir. 1942).

\textsuperscript{146} Roitman v. United States, 41 F.2d 519 (7th Cir. 1930).

\textsuperscript{147} Dillon v. United States, 113 F.2d 334, 338 (8th Cir. 1940),\textit{cert.}\textit{denied}, 311 U.S. 689 (1940).
The Court of Appeals for the Seventh Circuit has stated that the plea of *nolo contendere* does not authorize a sentence of imprisonment. It cannot be accepted in cases of felony requiring infamous punishment or in cases of misdemeanor for which the punishment must be imprisonment for any time with or without fine.\(^{148}\) The court admitted that there were no English or American cases expressly so limiting the plea. The Court of Appeals for the Third Circuit held that a plea of *nolo contendere* is not applicable where the punishment must be imprisonment with or without a fine, thus it would not be acceptable in a capital case; but is applicable and may be accepted where punishment may be by fine also, although an alternative imprisonment punishment is provided.\(^{149}\) The case appealed involved the latter situation, hence the plea was held to lie although imprisonment had been imposed. The Supreme Court in affirming the decision adopted wholly different reasoning.\(^{150}\) A federal court could impose a sentence of imprisonment in any case where an offense is punishable by imprisonment or fine or both.\(^{151}\)

The plea was known to the common law, but there are no English decisions involving its use after 1702. The common law did not clearly prevent a penalty of imprisonment. A court in its discretion may mitigate the punishment, but it is not mandatory that it do so.

Where the defendant pleads *nolo contendere* but the judgment recites that the conviction was on a plea of guilty, there is no such fundamental error as goes to the jurisdiction of the court.\(^{152}\) Relief must be through appeal rather than habeas corpus. After expiration of the term, the trial court probably could not correct such an error by a *nunc pro tunc* order.

K. The Right to Counsel

In an 1818 criminal proceeding the defendant had counsel who advised him to withdraw his plea of not guilty and stand mute. In argument counsel asserted that in the United States a defendant has the "right to be heard and advised by counsel in every stage of the proceedings against him."\(^{153}\) In an 1834 capital case involving robbery on the high seas the court appointed counsel two days before the arraignment and plea of not guilty.\(^{154}\) But it was not until 1938 that the Supreme Court took the view that a failure to comply with the provision in the sixth amendment guaranteeing the right to counsel meant that the district court lost jurisdiction over the case.\(^{155}\) Habeas corpus therefore lies.

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\(^{148}\) Tucker v. United States, 196 Fed. 260, 265-67 (7th Cir. 1912).

\(^{149}\) Hudson v. United States, 9 F.2d 825 (3rd Cir. 1925). The penalty in the sentence was imprisonment for a year and a day. The crimes were conspiracy to use and using the mails to defraud.

\(^{150}\) Hudson v. United States, 272 U.S. 451 (1926); 36 Yale L.J. 421 (1921). The case was followed in Dillon v. United States, 113 F.2d 334, 338 (8th Cir.), cert. denied, 311 U.S. 689 (1940); Farnsworth v. Sanford, 33 F. Supp. 400 (N.D. Ga. 1940).

\(^{151}\) As to offenses for which they have been accepted see Annot. 152 A.L.R. 265-66 (1944).

\(^{152}\) Fisher v. Shilder, 131 F.2d 522, 524 (10th Cir. 1942).


A single case has said that the right to counsel accrues when the grand jury returns an indictment into court. A single case has said that there is a right to assign counsel even at the preliminary examination. But the great weight of authority is contrary.

A court of appeals has pointed out that the period from arraignment to trial is the “most critical of the proceedings” as “investigation and preparation” are vitally important, and the defendant should have counsel during that period. But the Supreme Court has stated in a state court case that, “like other judgments, a judgment based on a plea of guilty is not of course to be lightly impeached in collateral proceedings.”

At his arraignment the district court should advise the defendant of his right to counsel, and of his right, if indigent, to have counsel appointed for him. This is true even if the defendant pleads guilty. “The constitutional guarantees make no distinction between the arraignment and other stages of criminal proceedings in respect of the application of the guarantee.”

Although a defendant is without counsel at arraignment and pleads not guilty, habeas corpus does not lie when he was represented by an attorney at the trial. Likewise habeas corpus does not lie where the defendant without counsel pleaded not guilty and the jury was selected and impaneled, and the court upon being advised that the defendant had engaged counsel, delayed proceedings until counsel arrived and accepted the jury.

Even when the defendant pleads guilty but the court appoints counsel

159 Price v. Johnston, 144 F.2d 260, 262 (9th Cir. 1944).
165 Note, 42 Colum. L. Rev. 271, 276 (1942).
166 De Maurez v. Swope, 104 F.2d 758, 759 (9th Cir. 1939). In Alexander v. United States, 136 F.2d 783, 784 (D.C. Cir. 1943) it was held that there would be no reversal on an appeal. See also Dorsey v. Gill, 148 F.2d 857, 875 (D.C. Cir. 1945), cert. denié, 325 U.S. 890 (1945); Wilfong v. Johnston, 156 F.2d 507, 508 (9th Cir. 1946).
167 Thompson v. King, 107 F.2d 307, 308 (8th Cir. 1939).
immediately after arraignment, and the defendant elects on advice of counsel
to stand on his plea of guilty which was subject to change, the constitutional
rights of the defendant are not violated. Habeas corpus would not lie,
although better practice required appointment at arraignment. The Supreme
Court laid down a similar rule in a state court case. Professor Fellman has
concluded: "It has been held that an accused is entitled to the assistance of a
lawyer upon arraignment whether he pleads guilty or not, but the weight of
opinion seems to be otherwise."  

While a plea of guilty may be made without advice of counsel the court
before accepting it should determine whether it was made with intelligence and
comprehension.  

The defendant may waive the right to counsel and such waiver may be
informal. Waiver will ordinarily be implied when the accused appears with-
out counsel and fails to request that counsel be assigned to him. According
to three cases the constitutional right to counsel did not apply to a voluntary and
intelligent guilty plea. No waiver of counsel was found where the defendant
pleading guilty was eighteen years old and ignorant of the charge, and the
record failed to indicate advice as to the right to counsel. Nor was there a
waiver, where the court failed to advise as to the consequences of a plea of
guilty, and where the court conducted a private meeting in chambers with the
government attorney and a probation officer.  

In determining whether there was an implied waiver the appellate courts
examine the whole factual picture. If the defendant had been in court pre-
viously, this tends to show a waiver by his failure to request appointment. The
same is true where the defendant discussed his case with a lawyer whom he
failed to retain. Waiver was found where the defendant had shown a shrewd
knowledge by bargaining with the United States Attorney. If factual data
were not available an appellate court would emphasize the usual presumption

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168 McJordan v. Huff, 133 F.2d 408, 409 (D.C. Cir. 1943). See also Saylor v. Sanford, 99 F.2d 605, 606 (5th Cir.), cert. denied, 306 U.S. 630 (1939); Bugg v. Hudspeth, 113 F.2d 260 (10th Cir. 1940); Beckett v. Hudspeth, 131 F.2d 195 (10th Cir. 1942).  

169 Canizio v. New York, 327 U.S. 82, 85 (1946). This case was followed as to a federal criminal defendant in Hiatt v. Gann, 170 F.2d 473 (5th Cir. 1948).  


172 Bergen v. United States, 145 F.2d 181, 187 (8th Cir. 1944) (defendant allowed to withdraw his plea.).  


174 See cases cited in Evans v. Rives, 126 F.2d 833, 839 n. 6 (D.C. Cir. 1942).  

175 Cook v. Swope, 109 F.2d 955 (9th Cir. 1940); Adkins v. Sanford, 120 F.2d 471 (5th Cir. 1941); Parker v. Johnston, 29 F. Supp. 829 (N.D. Cal. 1939).  


in habeas corpus proceedings that the judgment below was regular and the waiver was presumptively competent. This might overcome the defendant's contention that he had been insane, or that he was ignorant and lacked friends. Evidence of a court custom of advising all defendants of their right to counsel was held sufficient to overcome the silent record.

In 1941 the Supreme Court tightened the rules as to waiver of counsel. Where a defendant, regardless of whether or not he intended to plead guilty, had not been advised of his right to have counsel or had not waived the right in knowing fashion, the judgment was held invalid. A silent record, a lack of request for counsel, and a plea of guilty would no longer show a waiver. Following this holding the flood of applications for habeas corpus increased. An unadvised negro defendant with a fourth grade education was presumably ignorant of his right to counsel, so that his failure to request counsel and his plea of guilty did not constitute a waiver. But there was no need to advise a defendant who had several previous convictions and who had corresponded with an attorney. Where there had been previous convictions, and where there was some evidence of an offer of counsel though nothing appeared on the record, a waiver was found. There is no waiver where a lawyer representing a co-defendant asked the defendant if he wanted counsel; the court relied in part on the inexperience of the defendant. Where a young defendant had only the advice of an intoxicated father and a hysterical mother and there was a record of insanity in the defendant's history no waiver was found. Where the United States Attorney undertakes the duty to inform the accused he must inform correctly, as a defendant can waive only with correct knowledge. It is not correct to inform the defendant that he has the right to counsel "in the event he is not guilty and wants to stand trial." If the defendant's knowledge of his right to have counsel can be shown from other facts in the case, the failure of the record to show advice and an offer of counsel by the judge is not fatal error and does not warrant relief on a writ of error coram nobis. It is better practice to have the waiver in writing. Waiver by a defendant seventeen years old was found when everyone concerned with the case testified that he had been

182 Blood v. Hudspeth, 113 F.2d 470, 471 (10th Cir. 1940).
188 Widmer v. Johnston, 136 F.2d 416, 418 (9th Cir. 1943); Pinfold v. Hunter, 140 F.2d 564, 565 (10th Cir. 1944).
191 Michener v. Johnston, 141 F.2d 171, 174, 175 (9th Cir. 1944).
192 United States v. Steese, 144 F.2d 439, 441 (3rd. Cir. 1944). Circuit Judge Biggs dissented in part. He thought the writ of error coram nobis particularly appropriate to raise the issue of the right to counsel, 144 F.2d 447. See also De Jordan v. Hunter, 145 F.2d 287 (10th Cir. 1944).
told by several officials of the right to counsel. On the other hand even though the waiver appears in the record it may be held incompetent; the fact that the defendant was only seventeen upset the presumption of an intelligent waiver. Insanity makes a waiver invalid.

Bad advice of a court-appointed counsel as to a plea of guilty is not necessarily ground for habeas corpus. To justify habeas corpus an extreme case must be disclosed, and it must be shown that the proceedings were a farce and a mockery of justice. Serious mistakes on the part of an attorney are not alone enough. Incompetency was not shown by the fact that counsel advised the defendant to plead guilty to the lesser charge of grand larceny, rather than go to trial for robbery, because otherwise he would likely be found guilty on his previous record and be given a heavier penalty.

III. RULE 11 AS INTERPRETED IN THE DECISIONS

A. Time of Pleas

Normally the defendant’s plea will be made after a motion to dismiss. Federal Criminal Rule 12(b)(3) provides: "The motion shall be made before the plea is entered but the court may permit it to be made within a reasonable time thereafter." One case erroneously referred to a statute requiring objection to be made before or within ten days of arraignment. This statute is now superseded by Rule 12(b)(3). In one case the court permitted the motion to dismiss to be made after a plea of not guilty. A plea of guilty may be entered after impaneling of the jury, upon withdrawal of a plea of not guilty.

B. Presence of Court Reporter

Under an act of Congress of 1944 a court reporter is to attend at each session and to record among other matters “all proceedings in criminal cases had in open court, whether connected with pleas, trial or sentence.” A motion to vacate sentence for absence of a reporter would not lie as to criminal proceedings before this statute. It is not a basis for reversal on appeal that arraignment and a plea of not guilty do not appear in the stenographer’s notes of the trial. It is enough that the district judge has found that the defendant pleaded not

195 Kuczynski v. United States, 149 F.2d 478 (7th Cir. 1945).
196 Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945). In Beckett v. Hudspeth, 131 F.2d 195, 196 (10th Cir. 1942) court appointed counsel was found competent. The attorney was 38 years old, a law school graduate, had practiced 13 years and was a member of a large Indianapolis firm. He had had three conferences with the defendant before the plea was filed, and had fully advised the defendant of his rights and the consequences of the plea.
197 Wright v. United States, 165 F.2d 405, 407 (8th Cir. 1948).
202 Beaty v. United States, 203 F.2d 652, 653 (4th Cir. 1953).
guilty, and that such plea was entered by the clerk on his original record, and was referred to by the judge in his charge to the jury. The court reporter must, as a minimum, without charge and as a routine matter transcribe and certify in every criminal case the proceedings on the defendant's pleas.\textsuperscript{203}

C. \textit{Waiver of Plea}

It is well settled that arraignment and a plea of not guilty are waived by going to trial.\textsuperscript{204} Waiver of formal arraignment will not make a plea of guilty invalid.\textsuperscript{203} There are no cases of a waiver of a guilty plea. In one case in which the defendant asserted that there had been no entry of a guilty plea, the court accepted the written record of entry of such a plea as against the unsupported allegations of the accused.\textsuperscript{200} In the opinion of the author where there is a conviction and sentence without trial there must have been either a plea of guilty or of \textit{nolo contendere}.

D. \textit{Plea of Not Guilty}

Arraignment and a plea of not guilty may be before one judge and trial before another.\textsuperscript{207} Such procedure is neither unlawful nor unusual and is authorized by statute.\textsuperscript{208} There is no denial of due process because arraignment, plea of not guilty, and impaneling of the jury take place on the same day.\textsuperscript{209} The defendant could protect himself by moving for a continuance when the case was called for trial.

On a plea of not guilty the defendant may raise the issue of insanity at the time of the crime.\textsuperscript{210} Likewise he may raise the issue of entrapment.\textsuperscript{211} A defendant may, with leave of the court, withdraw his plea of not guilty and plead \textit{nolo contendere}.\textsuperscript{212} Such withdrawal may be shown by the defendant's conduct. A defendant may also withdraw his plea of not guilty and plead guilty to a lesser degree of the crime.\textsuperscript{213}

E. \textit{Plea of Guilty}

In 1959 Judge Alexander Holtzoff stated: "In all courts, both Federal and State, a great majority of criminal cases are disposed of on pleas of guilty.\textsuperscript{3}\textsuperscript{2} In 1953, eighty-three percent of federal criminal convictions resulted from guilty pleas.\textsuperscript{215}

\begin{thebibliography}{215}
\bibitem{203} Poole \textit{v.} United States, 250 F.2d 396, 399 (D.C. Cir. 1957).
\bibitem{204} Beatty \textit{v.} United States, 203 F.2d 652, 654 (4th Cir. 1953) (facts showed arraignment and plea).
\bibitem{205} Merritt \textit{v.} Hunter, 170 F.2d 739, 741 (10th Cir. 1948).
\bibitem{207} Palmer \textit{v.} United States, 249 F.2d 8, 9 (10th Cir. 1957).
\bibitem{208} 28 U.S.C. §137 (1952).
\bibitem{209} Picciurro \textit{v.} United States, 250 F.2d 585, 590 (8th Cir. 1958).
\bibitem{210} Bradley \textit{v.} United States, 249 F.2d 922 (D.C. Cir. 1957).
\bibitem{211} Henderson \textit{v.} United States, 237 F.2d 169, 172 (5th Cir. 1956); 70 Harv. L. Rev. 1302 (1957). See also 44 Iowa L. Rev. 578, 579-580 (1959).
\bibitem{212} Chapman \textit{v.} United States, 247 F.2d 879, 881 (6th Cir. 1957).
\bibitem{213} Irby \textit{v.} United States, 246 F.2d 706, 707 (D.C. Cir. 1957). But before the court will accept the substituted guilty plea it should determine that it is voluntary and intelligent. United States \textit{v.} Mack, 249 F.2d 421, 423 (7th Cir. 1957).
\bibitem{215} Note, 64 Yale L. J. 590 (1955).
\end{thebibliography}
A plea of guilty may be accepted in a division of the district other than that in which the crime was committed without the express consent of the defendant even though this may be irregular under Rules 18 and 19. The defect is not one of jurisdiction and may be waived. In general venue is waivable and objection to improper venue should be made to the trial court when pleading.

A defendant may make a valid plea of guilty even though he is an epileptic and even though he had an epileptic seizure on the day he pleaded. In one case in which a defendant alleged that he was of unsound mind because of drug addiction when he waived counsel and pleaded guilty, both the district court and the court of appeals agreed that the evidence did not show unsound mind. Where a federal district judge has concluded that a defendant may be competent to stand trial, it does not follow that the court should accept a plea of guilty as a greater degree of awareness is required for such a plea. If an issue as to a defendant's sanity or mental competence is raised before trial, the court should have the defendant examined by a psychiatrist, and upon a report indicating present insanity, the court must hold a hearing and make a finding with respect thereto. The Supreme Court has held that the statute is constitutional and that it is not confined to cases of temporary mental disorder. The writ of error coram nobis has been granted to test the mental competency of the defendant in making his plea. A motion to vacate under 28 U.S.C. section 2255 also lies.

Traditionally the defendant is called upon to plead by having the interrogatory propounded to him, after reading of the indictment, "How do you plead: guilty or not guilty?" The defendant then answers "guilty" or "not guilty", or stands mute. But due process is not violated by a less formal mode of pleading. In one situation a court called an F.B.I. agent for his report concerning investigations of the defendant, and the agent stated specifically what the defendant was charged with. When the agent finished, counsel for defendant stated that he had talked with the defendant, and that he wished to plead guilty. A motion to vacate was held not to lie because the defendant's attorney, appointed by the court on the day of arraignment, stated, while standing beside the defendant before the judge, that defendant wished to plead guilty, and the defendant answered affirmatively the court's question as to whether the charges heard by the defendant were correct. The defendant had then effectively pleaded guilty in person, as well as by attorney.

217 Walker v. United States, 218 F.2d 80, 81 (7th Cir. 1955).
219 Lipscomb v. United States, 209 F.2d 831 (8th Cir. 1954).
223 Roberts v. United States, 158 F.2d 150 (4th Cir. 1946); Allen v. United States, 162 F.2d 193 (6th Cir. 1947).
225 Mayes v. United States, 117 F.2d 505, 506 (8th Cir. 1949). Historically the defendant
When the defendant is in court with his counsel, the plea of guilty may be made by his counsel even in a felony case. The defendant need not plead out of his own mouth. There is no loss of jurisdiction because the plea is made by the attorney, and there may be a waiver of arraignment and plea. One court has pointed out that while at common law a defendant in a felony case must plead in person, today an exception exists when the defendant is present and indicates his approval or acquiescence in the plea. It will be noted that these cases do not say that the plea may be made in the defendant's absence. Federal Criminal Rule 43 provides that the defendant "shall be present at the arraignment." But it also provides: "In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence." Since the rule uses the word "may" the court has discretion to permit or to deny absence.

Stipulations by defendant's counsel may in effect amount to a plea of guilty. It was so held where counsel made stipulations and statements admitting crucial facts and that the defendant had no defense to offer, that the defendant's counsel and the government counsel agreed that the government had established a prima facie case, and that defendant's counsel did not wish to put the defendant on the stand.

A defendant may plead guilty even to first degree murder. The power of the court to accept pleas of guilty for offenses cognizable within its jurisdiction is inherent in its very existence. It is necessary to serve the practical ends of justice. A plea in a capital case should be with the advice of counsel. In such a case the court may impose any sentence the jury should impose. It is not confined to imposing a death sentence, and a jury is not necessary to the imposition of life imprisonment. A court has pointed out: "Rule 11 provides that the arraigning judge may in his discretion refuse to accept a plea of guilty. We do not decide whether a judge should refuse a plea of guilty when made by one who asserts his innocence but enters the plea with full understanding of the nature of the charge and the consequences of his action." A court may, over the defendant's objection, refuse to accept a plea of guilty on the ground of mental incompetency even though he was sufficiently competent for trial. A court may refuse to accept a plea of guilty from a defendant without counsel until he confers with counsel subsequently appointed by the court.

226 Merritt v. Hunter, 170 F.2d 739 (10th Cir. 1948). The assistant United States Attorney had explained the charge on inquiry by the court. The defendant admitted that he understood the charge. See Annot., 110 A.L.R. 1300 (1937). See also Brown v. United States, 182 F. 2d 933, 934 (6th Cir. 1950) (motion to vacate denied); United States v. Port Washington Brewing Co., 277 Fed. 306, 308 (E. D. Wis. 1921) (writ of error coram nobis denied).

227 Julian v. United States, 236 F.2d 155, 158 (6th Cir. 1956); 47 J. CRIM. L., CRIM. & P. S. (1957). Here the plea was not accepted.

228 Julian v. United States, 236 F.2d 155, 157 (6th Cir. 1956).

229 Donnelly v. United States, 185 F.2d 559, 560 (10th Cir. 1950).

230 United States v. Lester, 247 F.2d 496, 499 n.4 (2d Cir. 1957). See also Puttkammer, ADMINISTRATION OF CRIMINAL LAW 170 n. 17 (1953).


A plea of guilty should not be accepted unless made voluntarily, after proper advice, and with full understanding of the consequences. The Supreme Court has quoted a text writer as saying:

Since a plea of guilty is a confession in open court and a waiver of trial, it has always been received with great caution. It is the duty of the court to see that the defendant thoroughly understands the situation and acts voluntarily before receiving it.

One court has concluded that the standard for acceptance of a plea of guilty under Rule 11 and the standard for determination whether a guilty plea may be withdrawn are the same; or, more precisely, that the standard under Rule 32(d) is not less favorable to the defendant than the standard under Rule 11.

In the last decade there has been a series of cases spelling out the duty of the trial court to determine whether or not the guilty plea is voluntary and intelligent. The Eighth Circuit has held that the explanation could be made to the defendant by the Assistant United States Attorney instead of by the trial judge.

A defendant without counsel at arraignment and plea is constitutionally entitled to considerable explanation and discussion of the charge against him and the facts affecting a decision to plead guilty. This is also true where at the trial a lawyer employed by a co-defendant volunteered to defend him and advised him to plead guilty, since the defendant is entitled to counsel without conflicting interest. The trial court need not explain and set out for the accused the possible defenses he might adduce to the charges against him, even if counsel is waived, and the court finds a competent, intelligent, and intentional waiver.

According to another court of appeals a defendant is not in a position to assert that his plea of guilty was accepted without the court first determining that the plea was made voluntarily and intelligently where he is represented by an attorney of his own choosing and the attorney makes a statement to the court in the defendant's presence indicating that the defendant had acted deliberately after a week's consideration in deciding to plead guilty. The defendant is bound by the statements of his attorney made in his presence and with his apparent acquiescence and understanding. Another court has also stated broadly that the court need make no inquiry as to whether the plea was

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234 ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 300 (1947), cited in 332 U.S. 708, 719 n.5.


236 Michener v. United States, 181 F.2d 911, 918 (8th Cir. 1950). As to state law on the duty of the court to admonish the defendant of the consequences of his plea see Annot., 110 A.L.R. 228 (1937).

237 Howard v. United States, 186 F.2d 778, 780 (6th Cir. 1951). On a motion to vacate the defendant is entitled to a hearing. See also Van Moltke v. Gillies, 332 U.S. 708, 721-23 (1947); Ruebush v. United States, 206 F.2d 810 (10th Cir. 1953); Collins v. United States, 176 F.2d 773 (9th Cir.), cert. denied, 338 U.S. 943 (1950); Snell v. United States, 174 F.2d 580 (10th Cir. 1949).

238 Michener v. United States, 181 F.2d 911, 918 (8th Cir. 1950).

voluntary and intelligent when the defendant is represented by counsel. 240 But the Seventh Circuit took a different view. The duty under Rule 11 to determine that the plea is made voluntarily with understanding of the nature of the charge is mandatory. The trial court "is not relieved of the duty which it imposes solely because the accused . . . is represented by counsel of his choice." 241 A failure to make the determination is reversible error only in the absence of a showing that in fact the defendant understood the nature of the charge. Such knowledge will not be presumed from the fact of representation by counsel where the defendant alleges that he was misled by false statements of his counsel. No particular ritual need be followed in the determination, but a brief discussion with the defendant regarding the nature of the charges may normally be the simplest and most direct way of ascertaining the state of his knowledge. In a subsequent decision the court of appeals of the same circuit made it clear that there may be cases where the defendant has requisite understanding so that the court need not instruct the defendant as to the charges. 242 The explanation need not be made by the trial judge personally. It is sufficient that the defendant has the requisite understanding from another. The explanation of the charges and possible penalties made by the defendant's attorney may be enough. Subsequently the same court of appeals held that where a husband and wife had been charged with a narcotics violation, and counsel simply announced to the trial court on the wife's behalf that he was withdrawing her plea of not guilty to three counts of a twelve count indictment and asked that a guilty plea be substituted and that he had acquainted her with the consequences of the plea, the trial court did not comply with Rule 11. 243 The minimum requirements of Rule 11 are that the trial court determine if the guilty plea was her desire, if the plea was voluntary, and if she understood the nature of the charges to which she was pleading guilty.

The Tenth Circuit has concluded that the trial court should advise the defendant concerning the nature of the charge, the range of possible punishment, possible defenses, possible circumstances in mitigation, and other similar factors entering into the equation, as well as of the right to the assistance of counsel. 244 While it may be better practice for the court to inquire, even when the defendant appears with counsel of his own selection, if the defendant has been apprised of his constitutional rights including the right to trial by jury, a failure to so inquire is not reversible error and a motion to vacate judgment and sentence does not lie. 245 Doubtless the trend is for the courts to be more careful about

241 United States v. Davis, 212 F.2d 264, 267 (7th Cir. 1954). The decision was two to one. The majority of the court held that the defendant was entitled to a hearing on his motion to vacate. This case was cited in Bridges v. United States, 259 F.2d 611, 625 (9th Cir. 1958) (dissenting opinion).
243 United States v. Mack, 249 F.2d 421, 423 (7th Cir. 1957). The court of appeals ordered a hearing on the motion to withdraw the plea of guilty.
244 Snell v. United States, 174 F.2d 580, 582 (10th Cir. 1949).
245 Barber v. United States, 227 F.2d 431, 433 (10th Cir. 1955). See also Bradley v. United States, 262 F.2d 679, 680 (10th Cir. 1959).
The Sixth Circuit has insisted on interrogation and discussion where defendant's counsel, by stipulation as to crucial facts, in effect entered a plea of guilty. The Fifth Circuit has held that a failure to make the determination of voluntary and intelligent pleading cast the burden on the government in a coram nobis proceeding to show that the plea was voluntarily and intelligently made. Furthermore if the plea was made on any understanding or agreement as to punishment to be recommended the trial court must, before accepting the plea, make certain that it was voluntarily made. But on rehearing before the court of appeals sitting en banc, the court, with two judges dissenting, affirmed the decision of the trial court against the defendant. Rule 11 does not require that a certain form of finding must be entered in the record. The court of appeals agreed that the evidence sustained a finding that the plea was voluntarily made notwithstanding evidence that as a result of the plea the defendant expected to receive favorable treatment. The Supreme Court granted certiorari, and on consideration of the record and confession of error by the Solicitor General that the plea might have been improperly obtained, judgment of the court of appeals was reversed, and the case remanded to the district court for further proceedings.

The Second Circuit held that there must be something more than a perfunctory examination conducted by the prosecutor. The judge should thoroughly investigate the circumstances under which the plea is made; and when the defendant is without counsel, an even more exacting inquiry is demanded. Before accepting the plea the court should determine whether the plea has been improperly induced by the prosecutor and whether the defendant is aware of the nature of the charges, statutory offenses included therein, range of possible punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. And such a determination may be made only by a penetrating and comprehensive examination of all circumstances under which the plea is made. But the inadequacy of the determination is not reversible error in the absence of a showing that the defendant had been misled by the government.

The Fourth Circuit does not approve "anything less than full compliance with Rules 10 and 11." The rules serve to protect not only important rights
of defendants, but also protect proper administration of the criminal law. Full compliance with the rules and having the record show this discourages motions to vacate. Even the presence of counsel does not relieve the judge of his obligation under the rules, although this is a circumstance to be taken into account in determining the nature and extent of the inquiry to be made. While no particular ritual is required, an alert and adequate inquiry should be made.

A district judge of the District of Columbia has said that a violation of the rule for determination that the plea is intelligent and voluntary is a violation of a mere rule of practice and does not necessarily result in a deprivation of constitutional rights, and therefore no motion to vacate should lie. But on the facts he found that such a determination had been made in the case. The rule does not require the court personally to question the defendant. The court may rely on representations of counsel. Subsequently the District of Columbia Court of Appeals pointed out that there would be fewer motions to vacate if the court made an inquiry “sufficient to bring to light any facts which might affect the validity of the plea.” It has also been pointed out that the most obvious way to assure that the defendant has knowledge of what he is doing is to require the judge to inform the defendant at least of the direct consequences of his plea and of the court’s absolute discretion over the sentence within the stated statutory limits. In general the trial judge should clearly and simply advise the defendant of the nature of the accusation, of the consequences of the plea, and of his right to counsel. He should refrain from making an assurance or promise and should warn the defendant that any assurance or promise made by another including the prosecutor cannot bind the court. He should not accept the plea without a determination that it is voluntarily made.

The court of appeals of the District of Columbia has held that the words “with understanding” refer merely to the meaning of the charge, and what acts amount to being guilty of the charge, and the consequences of pleading guilty thereto, rather than to dilatory or evidentiary charges.

Before accepting a plea of guilty the trial judge should not consult privately with the prosecuting agent regarding information as to the social and economic background of the defendant, including his prior criminal record. This is especially true where the defendant has waived grand jury indictment and the right to counsel.

A court of appeals has held that a sentence must be vacated on the ground that the statements made by the trial court were reasonably calculated to in-

255 Note, 55 Colum. L. Rev. 366, 379 (1955). Such a warning will usually preclude a showing of reliance on assurances made to the defendant. Kramer v. United States, 166 F.2d 515, 517 (9th Cir. 1948); Friedman v. United States, 200 F.2d 690, 697 (8th Cir. 1952); United States v. Booth, 112 F. Supp. 60, 65 (S.D. Calif.), aff’d, 209 F.2d 183 (9th Cir.), cert. denied, 347 U.S. 923 (1954).
fluence the defendant to the point of coercion. The court stated that if the defendant stood trial and was found guilty, the court would expect to give him the maximum sentence as he had put the government to the expense of a trial when he was guilty. The Seventh Circuit recently held that a federal district court has no authority under the Federal Probation Act to predicate denial of a first offender's probation request upon a standing policy of refusing to consider probation for defendants who plead not guilty.

An accused who has been convicted on a guilty plea induced by threats, promises, and intimidations by law enforcement agents has been deprived of constitutional rights to the same extent as a person who has been convicted upon a confession obtained through coercion, and habeas corpus will lie. But the obtaining of a confession during illegal detention in violation of Rule 5 does not render a subsequent guilty plea involuntary and nugatory.

When on appeal a defendant claims that he pleaded guilty to a lesser charge because he was told by the Assistant United States Attorney that if he so pleaded he would receive a sentence of from one year and one day to not more than two years, but was sentenced to five years, there is no ground for reversal when the Assistant United States Attorney offered three affidavits showing conclusively that no such agreement was made and the record showed that the trial judge explained every right to him. A motion to vacate will not lie where the record does not show alleged coercion by the judge. Nor does the motion to vacate lie where the defendant was not prejudiced or misled by alleged misrepresentations made to him by an Assistant United States Attorney, or where no misrepresentations were made. Motion to vacate does not lie where the record disproves alleged coercion by F.B.I. agents. A motion to vacate was denied when the record failed to show that a narcotics agent persuaded the defendant to retain a certain attorney and this resulted in inadequate legal representation. It would not lie merely because the F.B.I. agent, United States Marshal, and the United States Commissioner had advised him to plead guilty.

259 Euziere v. United States, 249 F.2d 293, 294 (10th Cir. 1957). Withdrawal of a guilty plea was permitted when the trial judge imposed a severe sentence after making a remark which might have been interpreted as a promise of leniency. United States v. Lias, 173 F.2d 685, 688 (4th Cir. 1949). See Note, 55 COLUM. L. REV. 366, 371 (1955).
261 Behrens v. Hironimus, 165 F.2d 245, 247 (4th Cir. 1948). The district court was directed to hear the evidence on such allegations. See also Teller v. United States, 263 F.2d 871, 872 (6th Cir. 1959) granting a hearing on a motion to vacate the sentence; United States v. Morin, 265 F.2d 241, 245 (3rd Cir. 1959).
262 United States v. Morin, 265 F.2d 241, 246 (3rd Cir. 1959).
264 Williams v. United States, 177 F.2d 97 (8th Cir. 1949).
265 Michener v. United States, 181 F.2d 911 (8th Cir. 1950).
266 Stidham v. United States, 170 F.2d 294, 297 (8th Cir. 1948); Young v. United States, 228 F.2d 693, 694 (8th Cir.), cert. denied, 351 U.S. 913 (1956); United States v. Hoyland, 264 F.2d 346, 349 (7th Cir. 1959).
268 Johnston v. United States, 254 F.2d 239 (8th Cir. 1958).
269 Adam v. United States, 266 F.2d 819, 820 (10th Cir. 1959).
A defendant who wishes to object that his plea of guilty was obtained by the defendant's attorney misleading him as to a light sentence should do so by appeal from the conviction and not by motion to vacate. The same is true as to promises of the United States Attorney or F.B.I. agents. But in a case involving trickery by the defendant's attorney the rule might be different if he was not represented by other counsel not involved in the trickery.

A plea of guilty is a waiver of trial by jury. This is true even though the charge is first degree murder and the sentence might be capital punishment. A plea of guilty admits all the facts charged in the indictment or information. It is a formal criminal pleading which waives trial and defense and leaves the court nothing to do but give judgment and sentence. It is not a mere admission of guilt or an extra-judicial confession of guilt, but is as conclusive as the verdict of a jury. And the plea of guilty must be to the crime charged in the indictment or information. A plea to some other crime would not be valid.

A plea of guilty waives all defenses other than that the indictment or information charges no offense. All defects not jurisdictional are waived. Double jeopardy is waived. The statute of limitations is waived. The sufficiency of the indictment or information is not subject to collateral attack after a plea of guilty, either in a habeas corpus proceeding or by a motion to vacate.
vacate. But jurisdictional facts are not waived, and there is no jurisdiction if the information sets out an act which is not a federal offense.

Where a party charged with having purchased heroin was subjected to an unlawful search in violation of the fourth and fifth amendments, waived counsel, and pleaded guilty in ignorance of his constitutional rights, and the court was without knowledge of the unconstitutional search, the judgment was vacated. But when a defendant pleads guilty while represented by competent counsel of his own choice, he may not secure a vacation of sentence and judgment where evidence obtained by unreasonable search and seizure and a coerced confession was never used against him. The same is true where there is an improper arrest without a warrant, since the manner of arrest and preliminary examination do not affect the plea. If there is any basis for a reasonable apprehension that the plea resulted from a confession illegally obtained, the plea and sentence may be vacated.

Under the general law of evidence a guilty plea may be admitted in subsequent trials as an admission against the defendant who has entered the plea. Furthermore, in any civil action by the government, the doctrine of res judicata may apply and the judgment entered on the guilty plea may become conclusive as to the facts alleged in the indictment or information.
plea of guilty is given greater scope than is a judgment of conviction after trial, as where the parties are not the same in the two proceedings. But there are weighty arguments against giving a guilty plea res judicata effect. In the case of a conviction after a plea of not guilty, the government has sustained its case beyond a reasonable doubt. Conviction on a plea of guilty may have resulted from the defendant’s unwillingness to litigate, or a compromise between the government and the defendant in return for a lesser punishment. As a practical matter it is difficult to explain the basis of the guilty plea. Making the guilty plea conclusive may stifle compromise.

A guilty plea may be used as evidence in a subsequent civil action on the same facts. But one court has pointed out that “pleas of guilty must be construed strictly and must be limited to the narrowest confines consistent with an intelligent interpretation of the effect thereof.”

What about the time interval between plea of guilty and sentence? Such interval is discretionary with the court, hence prompt sentencing is not objectionable.

A failure to require that criminal proceedings be reported in accordance with statute does not invalidate a judgment based on a plea of guilty. Habeeb corpus does not lie, nor a motion to vacate.

F. Plea of Nolo Contendere

The plea of nolo contendere was retained in Rule 11 “to preserve a sometimes useful device by which a defendant may admit his liability to punishment without being embarrassed in other proceedings.” The main, if not the only, modern purpose of the plea is to avoid exacting an admission which could be used as an admission in other potential litigation. The plea meets a particular need in antitrust prosecutions.

One case referred to a plea of nolo contendere as a “compromise” and as such a “final settlement.” It is intended to insure the defendant a sentence less than the maximum. It is irrevocable. But this type of reasoning seems erroneous. The trial judge may not fetter his discretion in imposing sentence.

293 See e.g., 64 Harv. L. Rev. 1376 (1951); 50 Yale L.J. 499, 505 (1941).
295 United States v. American Packing Corporation, 113 F. Supp. 223, 225 (D.N.J. 1953). This was an action by the United States for statutory forfeitures and double damages followed by a plea of guilty to conspiracy.
302 61 Harv. L. Rev. 888 (1948).
The court should not have articulated the "sporting chance" theory of jurisprudence.

A plea of nolo contendere requires the consent of the court.\textsuperscript{303} Federal Rule 20 on transfer for guilty plea or plea of nolo contendere does not change the provision in Rule 11 that nolo contendere can be pleaded only with the consent of the court.\textsuperscript{304} Rule 20 is subject to Rule 11 on this issue.

There may be a valid plea of nolo contendere after an express and even an implied withdrawal of a plea of not guilty.\textsuperscript{305}

Attorney General Brownell issued a memorandum which was very critical of the plea of nolo contendere.\textsuperscript{306} It should not be used frequently, particularly where it is used to avoid certain indirect consequences of pleading guilty, such as loss of license or sentencing as a multiple offender. Uncontrolled use means low sentences and insignificant fines which fail to deter crime. The public is led to believe that the government has only a technical case. United States Attorneys should not consent to the plea except in the most unusual circumstances and then only after approval by the Assistant Attorney General responsible or by the Attorney General. But the memorandum is not binding on the federal courts who must exercise their discretion.\textsuperscript{307} Where the Attorney General opposed the plea one court accepted it on the assumption that the Attorney General would advise the sentencing judge of the exceptionally obnoxious conduct of the defendants and on the assumption that the Attorney General would proceed with the trial of the antitrust civil action.\textsuperscript{308} In another case the court stated that "relative but by no means controlling weight" should be given to the view of the Attorney General.\textsuperscript{309} In another case the court accepted the plea even though the government objected that there had been four prior convictions on a plea of nolo contendere; the court could look at such convictions in fixing the penalty.\textsuperscript{310} The fact that private litigants would lose the benefits of a guilty plea as prima facie evidence in a civil action was not a reason to refuse the plea. This is particularly true where a civil action is pending. Congress has enacted no statutes changing Rule 11. Neither the Clayton Act nor the Sherman Act should be so construed. A crowded docket is not a ground for accepting the plea. But the benefits to be derived from a long trial were not sufficient to justify rejection of the plea. Pos-

\begin{itemize}
\item \textsuperscript{304} Singleton v. Clemmer, 166 F.2d 963, 965 (D.C. Cir. 1948).
\item \textsuperscript{305} Chapman v. United States, 247 F.2d 879, 881 (6th Cir. 1957).
\item \textsuperscript{308} United States v. Cigarette Merchandisers Ass'n., supra note 307.
\item \textsuperscript{310} United States v. Safeway Stores, 20 F.R.D. 451, 455 (N.D. Tex. 1957).
\end{itemize}
sibly one can conclude that the plea in antitrust cases is more likely to be accepted where a companion civil suit is filed.\textsuperscript{311}

The penalty on the plea is fixed by the court. It is therefore inappropriate for the government and the defendant to bargain as to the amount of the fines.\textsuperscript{312}

Occasionally a plea of \textit{nolo contendere} is rejected. In rejecting such a plea in an antitrust case, one court pointed out that the factors to be considered are the nature of the claimed violations, length of persistence therein, defendant's size and power in the industry, impact of the condemned conduct on the economy, whether greater deterrent effect will result from an acceptance of the plea, and the view of the Attorney General.\textsuperscript{313} There is no violation of due process of law when the court refuses to accept a plea.\textsuperscript{314} The court found it unnecessary to decide whether a refusal might not in some cases be an abuse of discretion, and pointed out that the discretion is broad. Bernard Goldfine, over the protest of the government, was recently permitted to change his plea of not guilty to one of \textit{nolo contendere} on a charge of contempt of Congress.\textsuperscript{315} Possibly the readiness of the court to accept the plea was affected by the use of eavesdropping by the government, the heavy financial burden on the defendant in fighting various proceedings against him estimated at $324,000, and the admission through the plea that the House Subcommittee could ask questions and require answers. The government had objected that Goldfine's "willful defiance" of the Committee should preclude the plea, and that the plea was not a "full vindication" of the rights of the subcommittee to require answers to their questions. Goldfine was sentenced to a year's imprisonment and a $1,000 fine, both being suspended.

When the defendant pleads \textit{nolo contendere} in a prosecution for using preference ratings to secure quantities of goods greater than the ratings called for, the defendant cannot make a claim of authority to obtain the goods under other preference ratings, as this is an attempt at denial, contrary to the admissions of the plea.\textsuperscript{316} Evidence on the question of guilt cannot be considered so long as the plea remains of record.\textsuperscript{317}

Ordinarily a plea of \textit{nolo contendere} leaves open for review only the sufficiency of an indictment.\textsuperscript{318} The contention that no offense is charged survives.\textsuperscript{319} Like a plea of guilty it may be reviewed to determine whether a crime is stated by the indictment. But in a case of great uncertainty as to the law the defendant may have an opportunity to make a defense to the indictment.\textsuperscript{320} Judgment on

\textsuperscript{311} See \textit{De Paul L. Rev.} 68, 73-76 (1958).
\textsuperscript{314} \textit{Mason v. United States}, 250 F.2d 704, 706 (10th Cir. 1957).
\textsuperscript{318} \textit{United Brotherhood of Carpenters v. United States}, 330 U.S. 395, 412 (1947); \textit{United States v. Cosentino}, 191 F.2d 574, 575 (7th Cir. 1951); \textit{Crolich v. United States}, 196 F.2d 879, 881 (5th Cir. 1952).
the plea was reserved until after trial. A plea of *nolo contendere* to a non-existent crime is not binding, and a motion to vacate judgment and sentence will lie.\[321\] A plea of *nolo contendere* waives the defendant’s demand for a bill of particulars,\[322\] and it is a waiver of trial by jury.\[323\]

A plea of *nolo contendere* admits all facts charged in the indictment or information.\[324\] It is an admission of guilt for the purposes of the case,\[325\] but it is not an admission which binds the defendant in a civil action for the same wrong. For example, in a proceeding to forfeit an automobile and liquor for failure to pay a special federal tax, the defendant’s plea of *nolo contendere* entered in a prosecution for failure to pay the special tax could not be considered.\[326\] A plea entered by another party in a criminal prosecution involving the same car cannot be used in a subsequent civil proceeding of forfeiture.\[327\] It cannot be used to establish a charge of civil conspiracy.\[328\] Evidence of the plea is not admissible either as an admission of guilt in a subsequent suit, where the subsequent suit is based on the same set of facts as the case wherein the plea was used,\[329\] or if the subsequent case is based on different facts.\[330\]

A plea of *nolo contendere* is a “conviction” with respect to deportation proceedings.\[331\] An alien applying for a visa must reply affirmatively that he has been convicted.

The record of conviction of a witness on a plea of *nolo contendere* is admissible to impeach the witness in a federal civil action for damages for conspiring to violate the antitrust laws.\[332\] It would not be treated as an admission of the operative facts in another action. This case represents the law of the state courts except Alabama, Massachusetts, and New Hampshire.\[333\]

**The Right to Counsel**

Rule 44 of the Federal Rules of Criminal Procedure in effect lays down a

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has been pointed out that such cases are very rare. McHugh v. United States, 230 F.2d 252, 254 (1st Cir.); *cert. denied*, 351 U.S. 963 (1956). See 8 *De Paul L. Rev.* 68, 70 (1958).


322 Kramer v. United States, 166 F.2d 515, 519 (9th Cir. 1948).

323 United States v. Consentino, 191 F.2d 574, 575 (7th Cir. 1951). See also Lloyd v. Patterson, 242 F.2d 742, 744 (5th Cir. 1957).

324 United States v. Vidaver, 75 F. Supp. 382, 383 (E.D. Va. 1947); United States v. Consentino, 191 F.2d 574, 575 (7th Cir. 1951); Harris v. United States, 190 F.2d 503, 505 (10th Cir. 1951).


329 Mickler v. Fabs, 243 F.2d 515, 517 (5th Cir. 1957). The second proceeding was an action by taxpayers to recover income tax deficiencies.

330 Piassick v. United States, 253 F.2d 658, 661, (5th Cir. 1958). Here the second proceeding was a criminal prosecution.


332 Pfotzer v. Aqua Systems, 162 F.2d 779, 784 (2d Cir. 1947).

rule that the court at arraignment advise the defendant of his right to counsel.\footnote{334} In one federal case the court pointed out that the state courts of Michigan had adopted a rule of court expressly requiring the trial judge to advise the defendant of his right to counsel at arraignment.\footnote{335}

What is the lawyer's function in connection with pleas? The Supreme Court has said: "Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered."\footnote{336}

The defendant has a right under the statutes\footnote{337} to conduct his own case and this includes the right to plead. But this right is not violated when a defendant answers in the negative the trial judge's question as to whether he wanted to make a statement before answering the charges against him, and when he told his attorney appointed by the court that he wanted to plead guilty.\footnote{338} It made no difference that he had previously stated, in answer to the judge's questions, that he had no representative and was his own lawyer.

Like the cases before 1946 the cases after that date continue to hold that absence of counsel at arraignment when the defendant pleads not guilty is not a basis for release on habeas corpus.\footnote{339} The Constitution does not require that the defendant be represented by counsel on arraignment when he pleads not guilty.\footnote{340} The District of Columbia Court of Appeals has stated: "It has not been the custom in this jurisdiction to assign counsel upon arraignment if the plea is not guilty, and we are not advised that it has been the custom in other jurisdictions."\footnote{341}

Where the trial court appoints counsel whom the defendant dismisses before his plea of not guilty, the record of offer, acceptance, and later waiver of counsel will be sufficient to overcome a defendant's allegations of denial of counsel.\footnote{342}

One case has summarized the prior cases as holding that a plea of guilty by a defendant not represented by counsel will not be regarded as voluntary if procured by trick or artifice; or if the defendant, without waiving the assistance of counsel has been coerced into so pleading; if the plea was entered in complete

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335 Von Moltke v. United States, 189 F.2d 56, 56 (6th Cir. 1951).
338 Mayes v. United States, 177 F.2d 505, 507 (8th Cir. 1949). It has been concluded that this case justifies a court in appointing counsel when appropriate even though the defendant has waived his right to counsel. 55 Colum. L. Rev. 366, 380 (1955). See also Scott v. Johnston, 71 F. Supp. 117, 120 (N.D. Cal. 1947).
339 Ruben v. Welch, 159 F.2d 493 (4th Cir.), cert. denied, 331 U.S. 814 (1947); Setser v. Welch, 159 F.2d 703, 704 (4th Cir. 1947); Holloway v. Welch, 160 F.2d 575 (4th Cir. 1947).
342 Owens v. Hunter, 169 F.2d 971, 972 (10th Cir. 1948).}
ignorance of the right to counsel; or if the plea was entered in ignorance of the rights guaranteed by the fourth and fifth amendments.\textsuperscript{343}

Even where the defendant pleads guilty, the failure to appoint counsel is not prejudicial where counsel is appointed immediately thereafter and full opportunity is given to withdraw the pleas, or to take whatever steps are necessary or desirable without regard to what had previously transpired.\textsuperscript{344} The federal criminal cases followed a similar ruling of the Supreme Court for state court cases.\textsuperscript{345} A recent case has held that the failure of the court to inform the defendant of his right to counsel at the time he entered a plea of guilty is cured when the defendant is represented by counsel at the time of sentence and has opportunity to move to withdraw his plea but fails to do so.\textsuperscript{346}

What about the right to counsel in making a plea of nolo contendere? One court has stated: "A plea of nolo contendere is an admission of guilt as to all facts set forth in the indictment and a waiver of all nonjurisdictional defects and defenses, except where the plea was entered without advice and aid of counsel."\textsuperscript{347} But as pointed out by Professor Fellman:

> the better view is that one needs the advice of counsel on the crucial question of how to plead. Some judges have taken the position that how one pleads doesn't matter much because counsels are always free to change a plea later. However, once a plea of guilty has been entered, a very damaging admission has been made, and counsel may be understandably reluctant to try to undo the harm later by changing the plea. State courts are practically unanimous in agreeing that the right to counsel accrues at arraignment.\textsuperscript{348}

In at least one case the Supreme Court spoke very broadly as to the right to counsel at arraignment and plea. The trial judge had assigned a young lawyer for arraignment purposes only. The lawyer spent a few moments with the defendant and recommended that she stand mute, which she did. A plea of not guilty was entered and she was remanded to custody. Counsel had never seen the indictment. Later, still without counsel of her own choice or without counsel having been assigned to her as promised by the judge, she changed her plea to guilty after receiving incorrect advice from an F.B.I. agent who was a lawyer. Justice Black stated "Arraignment is too important a step in a criminal proceeding to give such wholly inadequate representation to one charged with a crime."\textsuperscript{349} There should be no "hollow compliance with the mandate of the Constitution at a stage so important as arraignment." Perhaps the case can be reconciled with earlier lower court decisions on the basis that the defendant was not promptly supplied with counsel following arraignment so that she made her

\textsuperscript{343} United States v. Sturm, 180 F.2d 413, 416 (7th Cir.), cert. denied, 339 U.S. 896 (1950).


\textsuperscript{345} Canizio v. New York, 327 U.S. 82, 85 (1946).

\textsuperscript{346} Young v. United States, 228 F.2d 693, 694 (6th Cir.), cert. denied, 351 U.S. 913 (1956).


\textsuperscript{348} FELLMAN, THE DEFENDANT'S RIGHTS, 123 (1958).


Counsel was only appointed at a time when it was too late to move to withdraw the guilty plea. At the present time possibly the result would be different as the defendant has more time to withdraw his plea of guilty. It should be noted that the right to counsel when the defendant pleads guilty does not extend to a motion to vacate under 28 U.S.C. section 2255. But this may be dubious as a motion to withdraw a guilty plea under Rule 32(d) seems to overlap with a motion to vacate. In a case in which the defendant tried to withdraw his plea of guilty after receiving a four-year sentence, but leave was denied and the defendant's request that the court appoint counsel to prepare a writ of habeas corpus was also denied, and the court then sentenced the defendant to five years, without appointing counsel, such procedure was held to violate due process and the right to counsel. Possibly this case may be construed as saying only that there is a right to counsel at the second sentencing, rather than as to withdrawal of the plea.

A defendant may plead guilty without counsel when he waives representation by counsel. Until 1938 there was no uniform practice to have the orders show the judge's conclusion that there had been a competent waiver of counsel. A defendant may enter a valid plea of guilty without the assistance of counsel. But a waiver of the constitutional right to assistance is just as important as waiver when the defendant pleads not guilty. When a defendant waives counsel, the court should not accept his plea of guilty without first advising him, fully and not merely perfunctorily, as to the nature of the charges and his rights with respect to them, and ascertaining that his plea is intelligently and understandingly made. There is an adequate waiver when the defendant is advised in open court that he could waive such right as he wished and proceed without an attorney. The court need not appoint counsel to advise the defendant whether to waive counsel. Merely telling the defendant in general terms of his right to counsel is not sufficient. The right to receive appointed counsel must be spelled out. Waiver was found in one case as to a defendant.

350 Three dissenting members of the court pointed out that the procedure at arraignment was not prejudicial as a plea of not guilty was entered when the defendant stood mute. Von Moltke v. Gillies, 332 U.S. 708, 731, 732 (1948).
351 Crowe v. United States, 175 F.2d 799, 801 (4th Cir. 1949), cert. denied, 338 U.S. 950 (1950); United States v. Caufield, 207 F.2d 278, 280 (7th Cir. 1953); Richardson v. United States, 199 F.2d 333, 335 (10th Cir. 1952); Vinson v. United States, 235 F.2d 120, 122 (6th Cir. 1956); Tubbs v. United States, 249 F.2d 37, 38 (10th Cir. 1957). See Orfield, New Trial in Federal Criminal Cases, 2 VILL. L. REV. 293, 361 (1957).
352 Notes, 55 COLUM. L. REV. 366, 367 (1955); 64 YALE L. J. 590 (1955). If the writ of error coram nobis is used, arguably there is a clearer right to counsel as the writ is regarded as a stop in a criminal proceeding. United States v. Morgan, 346 U.S. 502 (1954).
358 Smith v. United States, 238 F.2d 925, 931 (5th Cir. 1956).
361 United States v. Wauiland, 199 F.2d 237, 238 (7th Cir. 1952).
who had a record of previous convictions where there was some evidence of an offer of counsel though nothing appeared on the record.\textsuperscript{362} If no one can contradict the claims of the defendant a silent record may work in his favor to show no waiver.\textsuperscript{363} Where the evidence is conflicting concerning advice and offer of counsel, and the record is silent, it is to be assumed that there was no advice and no waiver.\textsuperscript{364} If the record shows insufficient advice before the waiver and plea of guilty were accepted, neither is valid.\textsuperscript{365} If there has been undue haste, even a written waiver may not be binding.\textsuperscript{366} And it is the duty of the judge to ascertain the fullness of the defendant's understanding by thorough questioning before accepting a waiver of counsel. The usual rule is that the written waiver and the recitals in the record will be held conclusive.\textsuperscript{367} In 1954 the Supreme Court stated: "Of course, the absence of a showing of waiver from the record does not of itself invalidate a judgment. " It is presumed the proceedings were correct and the burden rests on the defendant to show otherwise."\textsuperscript{368}

A defendant was held not to have waived his right to counsel even though he responded in the negative when he was asked by the court whether he desired counsel when the court failed to explain the second offender penalties involved.\textsuperscript{369} Where a United States Attorney states that the defendant was denied effective assertion of counsel at arraignment and on entry of a guilty plea, a motion to vacate the sentence should be granted.\textsuperscript{370}

In 1944 it was held for the first time in a federal court that the writ of error coram nobis could be used on the ground that the defendant pleaded guilty without being advised of his right to counsel and without waiving his right.\textsuperscript{371} In 1946 coram nobis was granted to determine the defendant's mental competency to waive counsel and plead guilty.\textsuperscript{372} But the Seventh Circuit denied relief on the grounds of delay, the absence of an averment of innocence or a showing of any defense or a showing that judgment would have been different if he had had counsel.\textsuperscript{373} The Fourth Circuit thought it a proper ground for relief.\textsuperscript{374}

\textsuperscript{363} Allen v. United States, 102 F. Supp. 866, 868 (N.D. Ill. 1952). This case is criticized as extreme in BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 70 (1955).
\textsuperscript{365} Cherrie v. United States, 179 F.2d 94, 95 (10th Cir. 1949). On remand the trial court found that other facts not appearing on the record indicated a competent waiver, and this finding was upheld on appeal. Cherrie v. United States, 184 F.2d 384, 385 (10th Cir. 1950).
\textsuperscript{366} Snell v. United States, 174 F.2d 580, 581 (10th Cir. 1949).
\textsuperscript{369} Gannon v. United States, 208 F.2d 772, 773-74 (6th Cir. 1953). See also 64 YALE L. J. 590, 596-97 (1955); 53 COLUM. L. REV. 366, 375 (1953).
\textsuperscript{370} Edick v. United States, 264 F.2d 229 (6th Cir. 1959).
\textsuperscript{371} United States v. Steese, 144 F.2d 439, 441 (3rd Cir. 1944). Judge Biggs in a concurring opinion relied on the "All Writs" section of the Judicial Code. See also United States v. Mahoney, 43 F. Supp. 943 (D. Mass. 1942); 1955 U. ILL. L. F. 617, 618.
\textsuperscript{372} Roberts v. United States, 158 F.2d 150 (4th Cir. 1946).
\textsuperscript{373} United States v. Moore, 166 F.2d 102, 104 (7th Cir. 1948). Accord, United States v. Rockower, 171 F.2d 423, 425 (2d Cir. 1948); United States v. Morris, 83 F. Supp. 970 (D.D.C 1949). Farnsworth v. United States, 198 F.2d 600 (D.C. Cir. 1952); United States v. Kershman, 201 F.2d 682 (7th Cir. 1953).
\textsuperscript{374} Crowe v. United States, 169 F.2d 1022, 1023 (4th Cir. 1948).
In 1954 the Supreme Court definitely upheld the use of the writ of error coram nobis in federal criminal cases. It could be used to vacate a federal conviction based on a guilty plea on the ground that the defendant was not given the right to counsel and had not waived the right. The defendant could have such relief even though he was not in federal custody. The writ is now frequently sought by defendants charged with multiple offenses in state courts who are burdened with more severe penalties because of a federal conviction alleged to be erroneous.

Following the decision of the Supreme Court there have been many decisions applying and construing it. The defendant must make a direct allegation of the absence of intelligent waiver of counsel. The doctrine of laches probably does not apply. But in 1957 a district court denied relief where there was an unexplained delay of twenty-two years. The court of appeals affirmed. The defendant was only eighteen at the time of his plea and the trial judge and all others who might show waiver were dead.

Neither the defendant's failure to prove his innocence nor long delay before asserting his rights bar a petition for the writ of error coram nobis to invalidate a federal conviction based on a plea of guilty entered without aid of counsel. Where the records show waiver of counsel and entry of a plea of guilty, coram nobis does not lie. If a defendant pleads guilty without requesting assistance of counsel, his waiver of counsel must be intelligent to be effective. Coram nobis was allowed to a boy of eighteen who had not intelligently waived assistance of counsel. Coram nobis was denied when the defendant failed to show alleged insanity as barring a waiver of counsel. Coram nobis does not lie merely because the clerk's records do not contain the name of counsel assigned to the defendant. It is better practice that the hearing on the writ of error coram nobis be before a district judge rather than the one who received the plea if the latter is a material witness. If the record shows representation, the writ does not lie. The same is true where the evidence at the hearing on the writ shows

376 Gordon v. United States, 216 F.2d 495, 497 (5th Cir. 1954).
378 United States v. Urrutia, 160 F.2d 675, 675 (2d Cir. 1955), noted 1955 U. Ill. L. F. 617; Farnsworth v. United States, 232 F.2d 59 (D.C. Cir. 1956). This case was criticized 45 Geo. L.J. 127 (1957) for possibly implying that when the record is silent on waiver, the onus is on the government to establish it.
representation. One case has suggested that the defendant must show that a retrial would have a different result. The weight to be attributed to the testimony of various witnesses can best be determined upon a hearing.

If the defendant is in federal custody a motion under 28 U.S.C. section 2255 will be granted on about the same principles as the writ of error coram nobis.

The requirement that a defendant have effective assistance of counsel does not require on a motion to vacate that the court ascertain whether the personally selected counsel was well qualified in the performance of his duty. Retained counsel for a defendant was found not to have acted incompetently when he advised the defendant after a mistrial to plead guilty because the case could be won on appeal, the case against the defendant being strong and the sentence light. A plea of guilty is not invalidated because the defendant relied on an incorrect representation of his attorney that conviction could not subject him to deportation. The advice was as to merely a "collateral consequence" of the plea. A motion to vacate does not lie unless the failure of counsel makes the proceeding a "mockery of justice."

With respect to the competency of counsel appointed by the trial court, the District of Columbia Court of Appeals has said on a motion to vacate that mere improvident strategy, bad tactics, carelessness or inexperience do not necessarily amount to ineffective assistance of counsel. The mere fact that counsel might have moved to suppress evidence obtained by alleged illegal search and seizure and illegal confessions does not show ineffective assistance of counsel which would justify vacating a plea of guilty. Ineffective assistance of counsel is immaterial except perhaps to the extent that it bears on the issues of voluntariness and understanding. The Second Circuit has held that the fact that the defendant conferred with court appointed counsel for about fifteen minutes between counsel's assignment and the time when the case was to be tried did not show inadequate representation where the belief of counsel that defendant's acts were within the

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389 Dunn v. United States, 238 F.2d 908, 91 (6th Cir. 1956). Here the defendant pleaded not guilty; and had adequate representation of counsel of his own choice.
390 United States v. Capsopa, 260 F.2d 566 (2d Cir. 1958). The trial court had denied a hearing. See also Kyle v. United States, 263 F.2d 657 (9th Cir. 1959).
392 Kennedy v. United States, 259 F.2d 883, 886 (5th Cir. 1958). See also United States v. Miller, 254 F.2d 523 (2d Cir. 1958).
393 Moore v. United States, 249 F.2d 504 (D.C. Cir. 1957). See also Moss v. Hunter, 167 F.2d 683, 684 (10th Cir. 1948); Merritt v. Hunter, 170 F.2d 739, 741 (10th Cir. 1948); Kinney v. United States, 177 F.2d 895, 897 (10th Cir. 1949); Loiseau v. United States, 177 F.2d 919, 922 (8th Cir. 1949). But assurance by counsel, whether baseless or unreasonably based in the remarks of some official that a plea of guilty will result in a reduced sentence may be evidence of incompetence. See United States v. Schnee, 105 F. Supp. 883 (E.D. Pa. 1951); Note, 55 Colum. L. Rev. 366, 378 (1955).
prohibition of the statute was correct. There is no inadequacy unless the representation turns the proceeding into a farce and mockery of justice. Advice to plead guilty without more does not prove incompetence. Whenever the court in good faith appoints or accepts the appearance of a member of the bar in good standing to represent the defendant, the presumption is that such counsel is competent. Recently the Ninth Circuit Court of Appeals ordered a hearing to determine adequacy of representation where it appeared that counsel advised the defendant to plead guilty in ignorance of material facts and after very brief preparation.

IV. Modern Reform Proposals

Rule 24 of the Uniform Rules of Criminal Procedure drafted by the National Conference of Commissioners on Uniform state laws and approved by the American Bar Association in 1952 is entitled "Pleas" and provides:

The defendant may plead not guilty, [not guilty by reason of insanity as provided by statute], guilty, [or with the consent of the court, nolo contendere]. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining of record that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a corporation fails to appear, the court shall enter a plea of not guilty. The court may strike out a plea of guilty and enter a plea of not guilty, if it deems such action necessary in the interest of justice.

The commentary pointed out that this rule was based in part on Rule 11 of the Federal Criminal Rules and Sections 208, 221, and 223-226 of the American Law Institute Code of Criminal Procedure. Statutes in several states authorize a special plea of guilty by reason of insanity. The plea of nolo contendere is not recognized in some states and is therefore bracketed. It serves a useful purpose. Rule 26 of the Uniform Rules provides for notice of alibi. The Supreme Court of the United States rejected an alibi rule prepared by its Advisory Committee. It is the policy of the Federal Criminal Rules to require very little affirmative pleading of the defendant. The plea of not guilty is very broad. Under it the defendant may plead insanity, alibi, entrapment, self-defense, and many other defenses. The prosecution is already so powerful that cutting

398 United States v. Wight, 176 F.2d 376, 378 (2d Cir. 1949). See also Vega-Murrillo v. United States, 247 F.2d 735, 737 (9th Cir. 1957); Thornburg v. United States, 164 F.2d 37, 39 (10th Cir. 1947).
400 Maye v. Pescor, 162 F.2d 641, 643 (8th Cir. 1947); Shepherd v. Hunter, 163 F.2d 872, 873 (10th Cir. 1947).
402 Kyle v. United States, 263 F.2d 657, 660 (9th Cir. 1959). Defendant proceeded by writ of error coram nobis.
down the scope of the not guilty plea seems unnecessary. While the prosecution may occasionally be inconvenienced by surprise, so may the defendant. The prosecution need not disclose in advance of trial the names and addresses of its witnesses nor the evidence upon which it proposes to rely. Some variances in proof are permitted. The defendant’s rights to a deposition under Rule 15 and to discovery under Rule 16 are narrow in scope.