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## **Guilty plea as a relinquishment of constitutional rights**

### **1. Introduction**

In the United States a guilty plea is a formal admission of guilt made by a defendant in open court. Ordinarily, it has the same procedural effect as a conviction in a public jury trial. Such a pleading is not only an admission of actual guilt understood as self-incriminating evidence, but also an official statement indicating the defendant's consent to entering a judgement and sentence against him.<sup>1</sup> For this reason, the U.S. Supreme Court held in 1927 that a plea of guilty is itself a conviction, conclusive like a verdict of jury.<sup>2</sup> Guilty plea – if accepted by the court – implicates a relinquishment of certain constitutional substantive and procedural rights.<sup>3</sup> This aspect differentiates such statement from other manifestations of admission of guilt, extrajudicial confessions and acts of self-incrimination that – in general – do not lead to waiving constitutional guarantees. Because of procedural consequences of a guilty plea the courts do not evaluate the value of these pleadings similarly to any other evidence but are obliged to verify their validity and admissibility, with particular reference to the conditions of waiving constitutional rights. In other words, a plea of guilty should not be accepted by the court (and therefore, it would not be binding upon a defendant) unless several conditions have been met. Inevitably, these conditions are bound with the Due Process Clause, in particular with specific rights and privileges that any defendant sacrifices by pleading guilty.

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<sup>1</sup> See H.M. Emory, *The guilty plea as a waiver of rights and as an admission of guilt*, "Temple Law Quarterly" 1970, vol. 44, p. 540.

<sup>2</sup> *Kercheval v. United States*, 274 U.S. 220 (1927).

<sup>3</sup> See W.J. Stuntz, *Waiving rights in criminal procedure*, "Virginia Law Review" 1989, vol. 75, no. 4, p. 762–786.

## 2. Constitutional guarantees in criminal proceeding

The Fifth Amendment provides *inter alia* that no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. In the context of criminal proceeding, these rights are enriched under the Sixth Amendment by the following procedural guarantees of the accused: the right to a speedy and public trial by an impartial jury; the right to be informed of the nature and cause of the accusation; the right to be confronted with the witnesses against him; the right to have compulsory process for obtaining witnesses in his favour; and the right to have the assistance of counsel for his defence. Even among constitutional rights there are several of a major significance, especially in relation to guilty pleas.

In *Boykin v. Alabama* the U.S. Supreme Court distinguished a triad of rights, namely: the privilege against compulsory self-incrimination, the right to a jury trial and the right to confront one's accusers.<sup>4</sup> This triad mirrors three integral aspects of a guilty plea as incriminating evidence of utmost importance, non-trial mode of criminal proceeding and abandonment of defending oneself during proceeding on the merits. A guilty plea means that a defendant does not exercise privilege against self-incrimination. Moreover, by pleading guilty a defendant expresses his resignation from a full adjudicative process. Instead, he chooses a much quicker disposition of a criminal case without standing trial and – simultaneously – without questioning accuser's allegations. Consequently, if the court finds a guilty plea valid and admissible,<sup>5</sup> the rights indicated in *Boykin v. Alabama* are automatically waived.<sup>6</sup>

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<sup>4</sup> *Boykin v. Alabama*, 395 U.S. 238 (1969).

<sup>5</sup> There is a difference between a valid and admissible guilty plea or *nolo contendere* plea. Under Federal Rules of Criminal Procedure for instance, before the court accepts the plea, the defendant may withdraw it in any time, even without any reason. After the court accepts the plea and before the sentence is imposed, the plea may be withdrawn if the court rejects a plea agreement or if the defendant can show a fair and just reason for requesting such withdrawal. Generally, the evidence of withdrawn pleas, plea discussions or related statements are inadmissible in a civil or criminal case against the defendant who made such plea or participated in the plea discussions (*vide* Rule 410 of Federal Rules of Evidence). Such plea may have fulfilled the conditions of validity at the moment it was made, but nonetheless turned out to be inadmissible, because the defendant withdrew it in accordance with the law.

<sup>6</sup> As stated in *Brady v. U.S.*, 397 U.S. 742 (1970): "Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the act charged in the indictment. He thus stands as a witness against himself, and he is shielded by the Fifth Amendment from being compelled to

In *Johnson v. Zerbst* the Court stated that:

[...] a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right [...] must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.<sup>7</sup>

As a consequence, a plea which was not both voluntary and knowing would be obtained in violation of the Due Process Clause and void accordingly.<sup>8</sup> Apart from being voluntary and intelligent a plea needs also to have sufficient factual basis. Simultaneously, a valid and admissible guilty plea – which means the plea made voluntarily, intelligently and with sufficient factual basis – is binding upon a defendant. As stated in *Tollett v. Henderson*:

[...] a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is, in fact, guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea.<sup>9</sup>

However, on the grounds of the claim regarding ineffective counsel representation, the defendant may also question the decision-making process preceding guilty plea.<sup>10</sup>

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do so — hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial — a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”

<sup>7</sup> *Johnson v. Zerbst*, 304 U.S. 458 (1938).

<sup>8</sup> *McCarthy v. United States*, 394 U.S. 459 (1969).

<sup>9</sup> *Tollett v. Henderson*, 411 U.S. 258 (1973).

<sup>10</sup> In *Hill v. Lockhart*, 474 U.S. 52 (1985) the ineffective advice led to the acceptance of plea bargaining offer. Similarly, in *Padilla v. Kentucky*, 559 U.S. 356 (2010) a defendant claimed that “he would have insisted on going to trial if he had not received incorrect advice from his attorney.” On the other hand in *Lafler v. Cooper*, 566 U.S. (2012), the ineffective advice led not to an offer's acceptance but to its rejection. Additionally, in *Missouri v. Frye*, 566 U.S. 133 (2012) Galin Frye alleged his counsel's failure to inform him of the prosecution's plea offer denied him the effective assistance of counsel. At an evidentiary hearing, Frye testified he would have entered a guilty plea to the misdemeanor had he known about the offer.” This indicates that apart from questioning

### 3. *Nolo contendere* plea as an equivalent of a guilty plea

Before the conditions of evaluating guilty pleas (and, at the same time, of waiving the abovementioned constitutional rights) will be analysed, it should be recalled that under Federal Rules of Criminal Procedure, there is also another type of plea which has similar procedural consequences to a guilty plea.<sup>11</sup> Rule 11 (a)(1) provides that a defendant may plead not guilty, guilty or (with the court's consent) *nolo contendere*.

*Nolo contendere* plea (no-contest plea) is recognized in jurisprudence and practice, just to mention the Probation Act of 1925.<sup>12</sup> This type of plea originated from the common law and the earliest example of its use has been found in Salkeld (England) in the case *Queen v. Templeman*.<sup>13</sup> It has been defined as "a formal declaration by the accused that he will not contest the charge against him."<sup>14</sup> By pleading no-contest, the defendant does not expressly admit his guilt, but nonetheless enables the court to sentence him as if he pleaded guilty.<sup>15</sup> In fact, no-contest plea has the effect parallel to guilty plea, although the defendant is not estopped from denying the facts to which he pleaded *nolo contendere* in a subsequent civil proceeding.<sup>16</sup>

Rule 11 (a)(1) and (3) provide that a *nolo contendere* plea shall be subject to the consent of the court that before accepting such plea must consider

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voluntariness and intelligence of a plea, a defendant may also base his claim on the ineffectiveness of advice and therefore, refer to the circumstances temporarily preceding the plea and substantially distinct from the issues of voluntariness and intelligence.

<sup>11</sup> Federal Rules of Criminal Procedure (2016). In general, these rules govern the procedure in all criminal proceedings in the United States in district courts, the United States courts of appeals, and the Supreme Court of the United States. These rules were adopted on 6 January 1941 (311 U.S. 733). Since then, they have been amended on several occasions. The complete list of amendments: Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; Pub. L. 94-64, § 3(5)-(10), July 31, 1975, 89 Stat. 371, 372, eff. Aug. 1 and Dec. 1, 1975; Apr. 30, 1979, eff. Aug. 1, 1979, and Dec. 1, 1980; Apr. 28, 1982, eff. Aug. 1, 1982; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Mar. 9, 1987, eff. Aug. 1, 1987; Pub. L. 100-690, title VII, § 7076, Nov. 18, 1988, 102 Stat. 4406; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 26, 1999, eff. Dec. 1, 1999; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 16, 2013, eff. Dec. 1, 2013.

<sup>12</sup> The Probation Act, 18 U.S.C. 724 [currently 3651].

<sup>13</sup> *Queen v. Templeman*, 1 Salk. 55 (1702), as cited in *Hudson v. United States*, 272 U.S. 451 (1926).

<sup>14</sup> G. Hawkins, as cited in N.B. Lenvin, E.S. Meyers, *Nolo contendere: Its nature and implications*, "The Yale Law Journal" 1942, vol. 51, no. 8, p. 1256.

<sup>15</sup> *Hudson v. United States*, 272 U.S. 451 (1926); *United States v. Norris*, 281 U.S. 619 (1930).

<sup>16</sup> See N.B. Lenvin, E.S. Meyers, *Nolo...*, p. 1263.

the parties' views and the public interest in the effective administration of justice. These conditions shall be viewed as an attempt to find a balanced solution towards the problem that arose in judicial practice, namely under what circumstances shall the court permit the plea of no contest.<sup>17</sup> The requirement that the court shall consider the parties' views and the public interest in the effective administration of justice interpreted from Rule 11 (e)(3) does not limit the court in deciding whether *nolo contendere* plea shall be accepted. Entering no-contest plea remains a judicial discretion and thus, it is "a matter of grace" rather than the right of the defendant,<sup>18</sup> who has no remedy by arguing abuse of discretion.<sup>19</sup> Notwithstanding the foregoing, Rule 11 (e)(3) identifies criteria that shall be taken into account while making a decision over acceptance of a no-contest plea. In that sense, the court decision is discretionary, but a decision-making process is guided by these criteria.

Ordinarily, an accepted plea of *nolo contendere* has the same consequences as a plea of guilty.<sup>20</sup> In jurisprudence it has even been described as "an admission of guilt for the purposes of the case"<sup>21</sup> which means *inter alia* that a court may exercise more lenient sentencing, because of such plea.<sup>22</sup> Also on the grounds of the Federal Rules of Criminal Procedure no-contest pleas are in several dimensions treated as an equivalent of guilty plea, for instance the requirements regarding considering and accepting pleas are almost the same.

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<sup>17</sup> In accordance with a liberal approach endorsed in *United States v. Jones*, in the absence of some reason why a defendant should not have been allowed to enter *nolo contendere* plea; see *United States v. Jones*, 119 F. Supp. 288 (S.D. Cal. 1954). However, in *United States v. Bagliore* the Court criticised this line of reasoning for a lack of basis and expressed its scepticism towards no-contest plea. The Court stated: "although the general policy of this Court is hostile to the acceptance of such a plea, circumstances surrounding the event and the condition of the defendant [it was possible that the defendant had been unable to fully and clearly recognize the consequences of his behaviour – author's note] frequently make a strong appeal to the exercise of the Court's discretion"; see *United States v. Bagliore*, 182 F. Supp. 714 (E.D.N.Y. 1960).

<sup>18</sup> See N.B. Lenvin, E.S. Meyers, *Nolo...*, p. 1256.

<sup>19</sup> See N.S. Oberstein, *Nolo contendere. Its use and effect*, "California Law Review" 1964, vol. 52, no. 2, p. 411.

<sup>20</sup> See N.B. Lenvin, E.S. Meyers, *Nolo...*, p. 1257.

<sup>21</sup> *Hudson v. United States*, 272 U.S. 451 (1926); *United States v. Bagliore*, 182 F. Supp. 714 (E.D.N.Y. 1960).

<sup>22</sup> *Hudson v. United States*, 272 U.S. 451 (1926).

#### 4. Intelligence of plea

In *Kercheval v. United States* the Court expressed the view that a guilty plea and a no-contest plea “shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.”<sup>23</sup> Citing T.R. McCoy and M.J. Mirra:

[...] the defendant must have sufficient information to assess the chances of acquittal or conviction at trial and to weigh those chances against the other consequences, positive and negative, of the contemplated plea.<sup>24</sup>

The real problem lies in answering the question which issues are covered by the wording “consequences of plea.”

I have already sketched that a guilty plea and a *nolo contendere* plea have several inevitable consequences bound with their functions as incriminating evidence, relinquishment of trial and abandonment of defending oneself.<sup>25</sup> Even in the narrowest sense, the intelligence of plea requires that a defendant should be informed about and understand: the government’s right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath; the right to plead not guilty or persist in such plea; the right to a jury trial and the specific rights in a trial, e.g. to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence and to compel the attendance of witnesses.<sup>26</sup> Then, the defendant should understand that the

<sup>23</sup> *Kercheval v. United States*, 274 U.S. 220 (1927).

<sup>24</sup> T.R. McCoy, M.J. Mirra, *Plea bargaining as due process in determining guilt*, “Stanford Law Review” 1982, vol. 32, no. 5, p. 901; see also P. Westen, D. Westin, *A constitutional law of remedies for broken plea bargains*, “California Law Review” 1978, vol. 66, no. 3, p. 503.

<sup>25</sup> It is important to stress that abandonment of defending oneself is not the same as self-incrimination. In fact, the defendant may remain silent during the whole proceeding, not confront and cross-examine adverse witnesses and not present any evidence, and therefore not question the prosecutor’s allegations. This would be an example of a situation when the defendant does not defend himself and does not exercise his procedural rights in practice. In case of self-incrimination the defendant does not have to be passive, but needs to give the official authorities evidence which are unfavourable for him. Guilty plea combines these elements together, because the defendant incriminates himself, but due to conclusiveness of plea cannot be an active participant of the proceeding on the merits, because there is no such proceeding after valid and effective guilty plea. The only possible activities of the defendant may take place during sentencing hearing when the court evaluates mitigating and incriminating circumstances concerning the defendant and his conduct.

<sup>26</sup> Rule 11 (b)(1)(a–e) Federal Rules of Criminal Procedure.

acceptance of a plea of guilty or a *nolo contendere* plea implicates the waiver of these trial rights.<sup>27</sup> Because the practice of plea bargaining has dominated the American criminal justice system,<sup>28</sup> it is also apparent that a defendant shall be familiar with the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.<sup>29</sup>

The Due Process Clause also implicates that a defendant must acknowledge his right to be represented by counsel – and if necessary have the court appoint counsel – at trial and every other stage of the proceeding. This matter is of the utmost importance, because ineffective representation by a counsel constitutes an independent basis for a claim. Under *Strickland v. Washington* standards a claim that counsel’s assistance was defective may lead to the reversal of a conviction provided that defendant shows, first, that counsel’s performance was deficient and, second, that the deficient performance prejudiced the defence so as to deprive the defendant of a fair trial.<sup>30</sup> Although claims based on ineffective assistance are often correlated with the lack of information or misleading information given to the defendant by his counsel, *Strickland* standards focus much more on whether objectively deficient counsel’s behaviour changed the course and result of criminal proceeding to the detriment of the defendant. In respect of the infringement of the Sixth Amendment due to ineffective assistance of a counsel, the uninformed pleas seem to be a possible outcome of deficient counsel’s performance. In other words, deficient representation necessarily entails a risk that a plea

<sup>27</sup> Rule 11 (b)(1)(f) Federal Rules of Criminal Procedure.

<sup>28</sup> *Black’s law dictionary* provides that plea bargain is “a negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor” – B.A. Garner, *Black’s law dictionary*, New York 2009, p. 1270. Generally, plea negotiations are oriented on the number of counts, the scope and types of charges, the sentence recommendation and the length of sentence imposed by the court. However, the defendant may also be offered with additional forms of leniency, such as the following: withdrawing incriminating information, not prosecuting co-defendants, promising influencing the date of trial or sentencing, arranging for a defendant to be sent to a particular institution, arranging for sentencing in a particular court or by a particular judge, not opposing probation, providing immunity for crimes not yet charged. See B.A. Garner, *Black’s...*, p. 1270; A. Alschuler, *Plea bargaining and its history*, “Columbia Law Review” 1979, vol. 79, no. 1, p. 3; A. Alschuler, *Guilty plea bargaining: Compromises by prosecutors to secure guilty pleas*, “University of Pennsylvania Law Review” 1964, vol. 112, p. 866; M.M. Feeley, *Plea bargaining and the structure of the criminal process*, “The Justice System Journal” 1982, vol. 7, no. 3, p. 338.

<sup>29</sup> Rule 11 (b)(1)(n) Federal Rules of Criminal Procedure.

<sup>30</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).



will be uninformed to the extent that suggests subsequent infringement of the Constitution.

The abovementioned elements of the informed plea refer exclusively to its procedural and constitutional consequences. However, there are also prerequisites concerning substantive criminal law. In general, a defendant shall understand the nature and consequences of charges, because otherwise, a plea will be deemed not informed.<sup>31</sup> In *Smith v. O'Grady* the Court stated that "a real notice of the true nature of charge against a defendant is the first and most universally recognized requirement of due process."<sup>32</sup> For instance, the court must ensure that a defendant acknowledges whether a criminal offense charged is a misdemeanour or felony, what are its *mens rea* and *actus reus* elements and whether intent is a mandatory element of his offense.<sup>33</sup> In practice, there is an assumption that a defendant was informed about the nature of charges if he was provided with a copy of the indictment.<sup>34</sup>

Notwithstanding the notice about charges and their nature, a defendant shall be informed of other consequences of his plea and conviction, including the possible punishment.<sup>35</sup> Due to that fact, under Federal Rules of Criminal Procedure the court should ensure that a defendant knows any maximum possible penalty, including imprisonment, fine, and term of supervised release; any mandatory minimum penalty; any applicable forfeiture; the court's authority to order restitution; the court's obligation to impose a special assessment; and in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors.<sup>36</sup>

It should be recalled that in jurisprudence there may be found compelling examples of violations of the due process standards in this respect, such as

<sup>31</sup> See P. Westen, D. Westin, *A constitutional...*, p. 501.

<sup>32</sup> *Smith v. O'Grady*, 312 U.S. 329 (1941); see also *Henderson v. Morgan*, 426 U.S. 637 (1976).

<sup>33</sup> *Henderson v. Morgan*, 426 U.S. 637 (1976), as cited in P. Westen, D. Westin, *A constitutional...*, p. 502. Intent is widely recognized as an element differentiating offenses with the same *actus reus* element. For example, in *People v. Rivera*, NY Slip Op 02379 (2014) the Court noted: "First- and second-degree manslaughter and second-degree murder share the *actus reus* of causing the death of another person. The crimes differ in *mens rea*: second-degree intentional murder and first-degree or intentional manslaughter require intent to cause death and intent to cause serious physical injury, respectively, while second-degree or reckless manslaughter requires only a reckless state of mind."

<sup>34</sup> *Bousley v. United States*, 523 U.S. 614 (1998).

<sup>35</sup> See P. Westen, D. Westin, *A constitutional...*, p. 503–504.

<sup>36</sup> Rule 11 (b)(1)(g–m) Federal Rules of Criminal Procedure.



in the case *Von Moltke v. Gillies* in which a defendant said that she understood the indictment and was voluntarily entering a plea of guilty, whereas the record neither confirmed that the indictment and the procedural consequences of a plea had been explained to her, nor that she acknowledged that a sentence of death could have been imposed on her.<sup>37</sup> Therefore, contemporarily, there is also a notable and understandable tendency to widen the scope of the condition that a defendant shall act with the full understanding of consequences, especially if a defendant does not only plead guilty, but also wishes to waive a right to counsel.

Nevertheless, it seems to be surprising that in the recent years the U.S. Supreme Court extended the category of the consequences of a plea by holding that “deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”<sup>38</sup> This statement is mirrored under the most recent amendment of 2013 to the Federal Rules of Criminal Procedure according to which a defendant should be informed about and understand that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.<sup>39</sup> This provision shall be viewed as an outcome of the case *Padilla v. Kentucky* in which the counsel failed to inform a defendant – Jose Padilla that a conviction for the offense with which he was charged results in a mandatory deportation. Supreme Court expressed the view that counsels must inform their clients whether his plea carries a risk of deportation if such risk is explicitly expressed by the law.<sup>40</sup> Although the judgment did not address the courts obligation to provide a defendant with such advice concerning his situation, the measures required from the professional counsels were adopted symmetrically in relation to the court on the grounds of the Federal Rules of Criminal Procedure which is desirable for the purposes of coherence of the system.

The catalogue set out in Rule 11 (b)(1) of the Federal Rules of Criminal Procedure shows a general approach towards the condition that a guilty

<sup>37</sup> *Von Moltke v. Gillies*, 332 U.S. 708 (1948).

<sup>38</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010).

<sup>39</sup> Rule 11 (b)(1)(o) Federal Rules of Criminal Procedure.

<sup>40</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010); S. Bibas, *Regulating the plea-bargaining market: From caveat emptor to consumer protection*, “California Law Review” 2011, vol. 99, no. 4, p. 1117–1161; S. Zeidmann, *Padilla v. Kentucky: Sound and fury, or transformative impact*, “Fordham Urban Law Journal” 2012, vol. 39, no. 1, p. 203–227; M.C. Love, *Evolving standards of reasonableness: The ABA standards and the right to counsel in plea negotiations*, “Fordham Urban Law Journal” 2012, vol. 39, no. 1, p. 147–168.

plea and a *nolo contendere* plea should be informed. This provision may be analysed on three levels. First, on the level of waiving constitutional rights. Generally, a criminal defendant may waive the majority of the protective measures guaranteed by the Constitution.<sup>41</sup> This assumption, as stated in *Carnley v. Cochran*, “imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.”<sup>42</sup> Consequently, the court must inform the defendant about his rights resulting directly from the Fifth and Sixth Amendments set out in Rule 11 (b)(1)(a–e), *ad exemplum* the right to be represented by counsel, and simultaneously inform the defendant that a plea of guilty or *nolo contendere* if accepted by the court, implicates the waiver of these rights (*vide* Rule 11 (b)(1)(f)).

Second, there is a requirement that a defendant shall understand the nature and consequences of charges and counts. Otherwise, a plea will be deemed not informed.<sup>43</sup> Third, notwithstanding the notice about charges and waiver of constitutional rights, a defendant shall be also informed about other – not necessarily penal – consequences of a guilty plea (no-contest plea) conviction, including the possible punishment<sup>44</sup> and the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence. In addition to that, the recent amendment of 2013 provides in subdivision (b)(1)(o) that the court must inform a defendant who is not a citizen of the United States that if convicted, he may be removed from the United States, denied citizenship, and denied admission to the United States in the future and determine that the defendant understands it.

To summarise, the requirement of the informed plea under Federal Rules of Criminal Procedure is fulfilled when the court determines that a defendant understands the consequences of a guilty plea or *nolo contendere* plea on three levels: constitutional, which means that the defendant must be conscious of the range of protective measures provided by the Amendments he will relinquish if the court accepts the plea; substantive, which means that the defendant shall understand the nature and consequences of charges and, finally, the level of foreseeable consequences of plea and conviction including *inter alia* the notice of possible punishment and the risk of deportation.<sup>45</sup>

<sup>41</sup> *Ricketts v. Adamson*, 483 U.S. 1 (1987); *United States v. Mezzanatto*, 513 U.S. 196 (1995); S. Bibas, *Regulating...*, p. 1122.

<sup>42</sup> *Carnley v. Cochran*, 369 U.S. 506 (1962).

<sup>43</sup> See P. Westen, D. Westin, *A constitutional...*, p. 501.

<sup>44</sup> See P. Westen, D. Westin, *A constitutional...*, p. 503–504.

<sup>45</sup> See P. Westen, D. Westin, *A constitutional...*, p. 508.

## 5. Voluntariness of plea

In general, voluntariness as a condition of waiving constitutional rights predates the U.S. Constitution by ages<sup>46</sup> and though evolving over the last century, remains ambiguous.<sup>47</sup> In *Hallinger v. Davis*, the first case in which the United States Supreme Court upheld a guilty-plea conviction,<sup>48</sup> the Court stated:

[...] the appellant, in voluntarily [emphasis added] availing himself of the provisions of the statute and electing to plead guilty, was deprived of no right or privilege within the protection of the Fourteenth Amendment [...].<sup>49</sup>

Thereby, the U.S. Supreme Court stressed the importance of voluntariness as a condition which legitimizes the relinquishment of constitutional right, however the Court did not evaluate on the scope of this requirement.

Voluntariness has many components. First of all, a defendant should have mental capacity required to make a competent decision concerning the plea. In other words, a defendant must have sufficient psychological and intellectual power to express his will. Moreover, he must plead knowingly and understand the nature and consequences of charges. This component overlaps with the requirement of plea's acceptance that a guilty plea must be informed. Furthermore, a defendant must be free of force, threats, inducements and promises. Here comes, however, a major problem, namely whether any kind of inducement and promises is forbidden and subsequently excludes voluntariness of a plea in criminal proceeding.

Initially, the judicial decisions were very restrictive, because the courts expected a plea to be sincere and not subject to any kind of interference (in particular, prosecutorial or judicial coercion<sup>50</sup>). At the dawn of XX century, in *Bram v. United States* the Supreme Court expressed the view that a plea

<sup>46</sup> Albert Alschuler claims that "the formal requirement that a guilty plea be voluntary is at least as old as the first English treatise devoted exclusively to criminal law, Staunford's Pleas of the Crown. This work, published in 1560, declared that a guilty plea arising from 'fear, menace, or duress' should not be recorded [...]" – A. Alschuler, *Plea...*, p. 12.

<sup>47</sup> See P. Westen, D. Westin, *A constitutional...*, p. 479.

<sup>48</sup> See A. Alschuler, *Plea...*, p. 10.

<sup>49</sup> *Hallinger v. Davis*, 146 U.S. 314 (1893).

<sup>50</sup> *Waley v. Johnson*, 316 U.S. 101 (1942); *United States v. Pearce*, 191 F.3d 488 (1999), as cited in F.A. Hessick III, R.M. Saujani, *Plea bargaining and convicting the innocent: The role of the prosecutor, the defence counsel, and the judge*, "Brigham Young University Journal of Public Law" 2001–2002, vol. 16, no. 2, p. 225.

shall not be produced by inducements engendering either hope or fear.<sup>51</sup> In other words, a defendant should not act under such pressure that would “preclude the exercise of his will,”<sup>52</sup> because “a guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void.”<sup>53</sup> In general, the courts searched not only for voluntariness understood as mental capacity and freedom from force, threats and coercion, but required also the will, intention to relinquish the constitutional guarantees<sup>54</sup> and, importantly, genuine admission of guilt (manifestation of remorse). For example, in *Griffin v. State*, the Court held that “the affirmative plea of guilty is received because prisoner is willing, voluntarily, without inducement of any sort, to confess his guilt and expiate his offense.”<sup>55</sup>

This line of thinking has changed through a two-pronged approach. First, the courts mitigated the requirement that a guilty plea should show genuine attitude towards the committed offense – regret, repentance, remorse. At least since *North Carolina v. Alford* – the case in which the Supreme Court accepted the plea made only for opportunistic reasons (to avoid capital punishment)<sup>56</sup> – the jurisprudence has presented guilty plea primarily as a waiver of constitutional rights and consent to entering judgement and conviction against the defendant and not as a true admission of guilt.<sup>57</sup> Second, the Supreme Court came to the conclusion that a defendant may be offered a leniency by competent authorities during plea bargaining negotiations.<sup>58</sup> Since then, such offers and promises have no longer been considered as impermissible inducement excluding voluntariness.<sup>59</sup>

<sup>51</sup> *Bram v. United States*, 168 U.S. 532 (1897). Similarly in *Watts v. Indiana*, the court held that “there is a torture of mind as well as body; the will is as much affected by fear as by force” – *Watts v. Indiana*, 338 U.S. 49 (1949).

<sup>52</sup> P. Westen, D. Westin, *A constitutional...*, p. 479.

<sup>53</sup> *Machibroda v. United States*, 368 U.S. 487 (1962).

<sup>54</sup> *Johnson v. Zerbst*, 304 U.S. 458 (1938): “a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.”

<sup>55</sup> *Griffin v. State*, 12 Ga. App. 615 (1913), as cited in A. Alschuler, *Plea...*, p. 22.

<sup>56</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970): A defendant – Alford denied that he had committed the murder but pleaded guilty to a second-degree murder in order to avoid a possible death sentence and to limit the penalty to the 30-year maximum provided for second-degree murder.

<sup>57</sup> See H.M. Emory, *The guilty...*, p. 540.

<sup>58</sup> *Brady v. United States*, 397 U.S. 742 (1970).

<sup>59</sup> Currently, for instance, Federal Rules of Criminal Procedure provide in Rule 11 (b)(2) that before accepting a plea of guilty or a *nolo contendere* plea, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

In general, the status of official and unofficial promises has long been discussed. Since the half of XX century, judicial caution and initial scepticism towards promises made by official authorities<sup>60</sup> started to weaken. In *Shelton v. United States*, for instance, the court stated that:

[...] a plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are, by their nature, improper as having no proper relationship to the prosecutor's business (e.g. bribes).<sup>61</sup>

Thereby, the Court highlighted that promises should not be *a limine* treated as an infringement of voluntariness. Only these promises and threats affect voluntariness which induce defendant's will in an unacceptable manner. For instance, the defendants and their families should not be threatened with physical or psychological abuse<sup>62</sup> or influenced by illegal tactics of public officers (the Police, Federal Bureau of Investigation, the prosecutor attorneys), such as withholding favourable evidence from the defendant<sup>63</sup> or producing false evidence.<sup>64</sup>

Later on, in *Bordenkircher v. Hayes* the Supreme Court confirmed it and held that:

[...] indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitu-

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This provision expresses a formal requirement that a guilty plea (*nolo contendere* plea) shall be voluntary and simultaneously stresses that promises as a part of the offers made during plea bargaining are not considered as an infringement of voluntariness.

<sup>60</sup> *Bram v. United States*, 168 U.S. 532 (1897): "But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight [emphasis added], nor by the exertion of any improper influence [...]."

<sup>61</sup> *Shelton v. United States*, 46 F.2d 571, 572 n. 2 (C.A. 5<sup>th</sup> Cir. 1957) as cited in *Brady v. United States*, 397 U.S. 742 (1970).

<sup>62</sup> *Bram v. United States*, 168 U.S. 532 (1897); *Fontaine v. United States*, 411 U.S. 213 (1973); P. Westen, D. Westin, *A constitutional...*, p. 479.

<sup>63</sup> *Brady v. Maryland*, 373 U.S. 83 (1963); F.A. Hessick III, R.M. Saujani, *Plea...*, p. 204.

<sup>64</sup> *Waley v. Johnson*, 316 U.S. 101 (1942): "[...] petitioner's plea of guilty had been induced by the threats of a named Federal Bureau of Investigation agent to publish false statements and manufacture false evidence that the kidnapped person had been injured, and, by such publications and false evidence, to incite the public and to cause the State of Washington to hang the petitioner and the other defendants."

tional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.<sup>65</sup>

Thereby, although generally inducements and threats exclude voluntariness,<sup>66</sup> the Supreme Court legitimated the promises which are “integral to the plea process.”<sup>67</sup>

As a consequence, since 1970 when the U.S. Supreme Court accepted plea bargaining,<sup>68</sup> promises made by the officials have been considered as a matter of reality (a fact which is undeniable), rather than a possibility that should be prevented or a coercion. Currently, in the light of Rule 11 (b)(2) only promises other than ones included in a plea agreement are treated equally to force and threats. Consequently, promises that may occur in the course of plea bargaining practice generally do not affect voluntariness. Still, however, the most eminent critics of plea bargaining do not spare critical remarks, such as J.H. Langbein who claims that:

Like torture, the sentencing differential in plea bargaining elicits confessions of guilt that would not be freely tendered. It is, therefore, coercive in the same sense as torture, although not in the same degree.<sup>69</sup>

However, it must be stressed that the system of plea bargaining in the United States is generally a system of prosecutorial bargaining. In the classical model of the prosecutorial system, the judge is a neutral, impartial arbitrator who is not obliged to follow the sentence recommendation made by the prosecutor. It is in judicial discretion to impose more lenient or more severe sentence. Trial judges do not participate in negotiations and, simultaneously, the prosecutors are not significantly privileged in bargaining. Under Federal Rules of Criminal Procedure, for example, an attorney for the

<sup>65</sup> *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). See also W.J. Stuntz, *Bordenkircher v. Hayes: Plea bargaining and the decline of the rule of law*, in: *Steiker's criminal procedures stories*, ed. C.S. Steiker, New York 2005, p. 351–378.

<sup>66</sup> See i.a. *Boykin v. Alabama*, 395 U.S. 238 (1969): “Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality.”

<sup>67</sup> T.R. McCoy, M.J. Mirra, *Plea...*, p. 911.

<sup>68</sup> *Brady v. United States*, 397 U.S. 742 (1970).

<sup>69</sup> J.H. Langbein, *Torture and plea bargaining*, “The University of Chicago Law Review” 1978, vol. 46, no. 1, p. 13.

government and the defendant's attorney or the defendant (when proceeding *pro se*) may discuss and reach a plea agreement. The court is mandatorily excluded from these negotiations, because the judge and the defendant do not enjoy equal bargaining positions.

The system of judicial bargaining, however, is based primarily on the court's sentencing power, namely the power to impose sentence within the range provided by the law, to run sentences consecutively or concurrently, to suspend the sentence, to grant probation or parole. Judges may inform the defendant that they will impose more lenient sentence if the defendant pleads guilty instead of exercising his right to trial. This, however, raises important issues with the privilege against self-incrimination as the court's forthright interference with the process of bargaining is highly coercive. Therefore, the judges who participate actively in plea bargaining usually do not make their promises explicitly, but rather communicate by hints, suggestions and predictions. Not only does indirect judicial bargaining remain coercive, but also the defendant pleads under vague perspective of leniency and has no remedy for the court's broken promises. As a consequence, the system of judicial bargaining in each of its forms is highly controversial and casts doubt on impartiality and fairness of the whole proceeding.<sup>70</sup>

## 6. Factual basis for the plea

It is crucial to shortly recall the third rudimentary aspect which the court shall determine before accepting a plea of guilty or *nolo contendere*, namely whether there is a factual basis for the plea. In the beginning, it should be indicated that the existence of factual basis for the plea does not remedy invalid – involuntary or uninformed pleas. It is apparent that although the prosecution may have compelling evidence against a defendant, the standards of voluntariness and intelligence of plea should not be modified to the detriment of the defendant.

The requirement that the plea should have sufficient factual basis has two distinct functions. First, it is designed to ensure factual accuracy of a plea which means that there must be a correlation between the charges a defendant wishes to plead to and the evidence gathered against him by the prosecution. Second, the court is thereby enabled to prevent pleas which result from

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<sup>70</sup> See T.R. McCoy, M.J. Mirra, *Plea...*, p. 897, 911; F.A. Hessick III, R.M. Saujani, *Plea...*, p. 239; A. Alschuler, *The trial judge's role in plea bargaining. Part I*, "Columbia Law Review" 1976, no. 7, p. 1092.



a mistake of law,<sup>71</sup> in particular, “the situation where the defendant, although he realizes what he has done, is not sufficiently skilled in law to recognize that his acts do not constitute the offense with which he is charged.”<sup>72</sup>

This requirement should be tied with the fact that an accepted plea of guilty or *nolo contendere* implicates that a defendant withdraws his right to have his guilt proven beyond a reasonable doubt. Yet, a guilty-plea conviction – citing *Brady v. United States*:

[...] is no more foolproof than full trials to the court or to the jury [...] courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel, and that there is nothing to question the accuracy and reliability of the defendants’ admissions that they committed the crimes with which they are charged [emphasis added].<sup>73</sup>

In other words, the charges to which a defendant pleads must meet certain evidential threshold. This finding is all the more striking, given that even in case of so-called Alford plea when a defendant pleads, but simultaneously protests his own innocence, there must also be strong, overwhelming evidence of an actual guilt.<sup>74</sup>

Federal Rules of Criminal Procedure do not, however, specify the evidential threshold that shall be met. Albert Alschuler addresses at least three distinct standards that have been applied by the courts while considering a factual basis of plea, namely: a preponderance of the evidence, any “significant evidence that the accused was involved or implicated in the offense”<sup>75</sup> and sufficient evidence to avoid a directed verdict.<sup>76</sup> Still, it seems undisputable, because this standard is not the same as in case of finding guilt beyond a reasonable doubt in a jury trial, however the evidence shall be sufficient for a jury to conclude that a defendant is guilty.<sup>77</sup>

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<sup>71</sup> See A. Alschuler, *The defense attorney’s role in plea bargaining*, “Yale Law Journal” 1974, no. 84, p. 1293.

<sup>72</sup> *People v. Palmer*, Ct. App. 6 H036979 (2013).

<sup>73</sup> *Brady v. United States*, 397 U.S. 742 (1970).

<sup>74</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970); S. Bibas, *Regulating...*, p. 1125.

<sup>75</sup> *McCoy v. United States*, 363 F.2d 306 (D.C. Cir. 1966) as cited in A. Alschuler, *The defense...*, p. 1293.

<sup>76</sup> See A. Alschuler, *The defense...*, p. 1293.

<sup>77</sup> See F.A. Hessick III, R.M. Saujani, *Plea...*, p. 224; similarly *United States v. Webb*, 433 F.2d 400 (1<sup>st</sup> Cir. 1970), as cited in A. Alschuler, *The defense...*, p. 1293.

## 7. Conclusions

The conditions of plea understood as waiving constitutional rights imposes important obligations on both the court and the counsel. The court must inform the defendant about his rights and about the consequences of waiver of them in order to verify that as a matter of fact the defendant pleads voluntarily and knowingly. Moreover, it is the court role to evaluate the evidence against the defendant and determine that all conditions of plea's validity have been fulfilled. As far as information obligation is concerned, the duties parallel to those of the court incumbent upon the counsel. However, the temporal and material scope of these duties is much wider, because counsel must also inform the client about any formal offers made by any authority and assist the client at the pre-trial stages of proceeding. Counsels should also ensure (based on their former experience) that the defendant will be able to competently assess the probability of conviction, the value of evidence against him and finally – make a decision, the most beneficial in the given circumstances.

The present text does not seem to be an appropriate occasion to answer the question whether the structure of the criminal proceedings in the United States guarantee the fairness of proceedings and both the conditions evaluated above and the obligations imposed on the court and the counsels prevent the infringement of the accused's rights. William J. Stuntz, however, claimed that the reality of waiving the rights by guilty pleas and plea of *nolo contendere* does not give rise to optimism in this respect. The scholar wrote:

the following three propositions are all true: (1) a rational, factually guilty defendant who understands his rights and the consequences of relinquishing them would almost never waive them except as part of a bargain of some sort; (2) factually guilty defendants do in fact waive these protections regularly without receiving concessions in return; and (3) notwithstanding that waivers are often the product of mistake or overt deception, courts – and in particular the Supreme Court – regularly find them valid.<sup>78</sup>

Yet, it also seems that the abovementioned conditions of waiving constitutional rights express the timeless and universal premises which every criminal procedure should incorporate. However, these are only minimal requirements and – on their own – are unable to enact the standards of due process of law.

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<sup>78</sup> W.J. Stuntz, *Waiving...*, p. 763.

### Summary

The subject of this article is the institution of guilty plea understood as self-incriminating evidence, an official statement indicating the defendant's consent to render a judgment and sentence, and the relinquishment of certain constitutional substantive and procedural rights, including the right to a public jury trial. The author indicates the elements that must be determined by the court before accepting the plea (namely: voluntariness, intelligence and sufficient factual basis) which the U.S. Supreme Court derived from the fact that a valid and effective guilty plea implicates the waiver of certain constitutional guarantees. The remarks presented in the article are preceded by the analysis of academic literature and the U.S. Supreme Courts judgments regarding guilty pleas delivered since the end of the XIX century (case study method).

**Keywords:** guilt, guilty plea, criminal proceedings, law of United States of America, comparative criminal law

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