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bound and gagged defendant. Removal, tempered by the use of modern technology suggested in Justice Brennan's concurring opinion,[30] may be the best method for preserving the essence of the defendant's right to confrontation while allowing the trial to proceed. A glass booth would be one way of insulating the defendant yet allowing him to take part in the trial process.[31] However, the difference between seeing a defendant shackled or seeing him apparently caged within a booth is conjectural.[32] A closed circuit television from which the defendant may observe proceedings coupled with a telephone to give him access to his counsel may be sufficient to ameliorate the difficulties.[33]

This method would be equally applicable in the case of the political trial discussed in Justice Douglas's concurring opinion.[34] A political defendant who contests the constitutionality of the law under which he is prosecuted or disputes the propriety of the state's prosecutorial power in his case[35] would seem to have no more right to exceptions in judicial procedure than Allen. However, if the previously bound and gagged defendant is found innocent, or if the law under which he is charged is found unconstitutional, the court would have helped create martyrs by restraining or incarcerating innocent men for protesting their innocence too loudly.[36]

In any event, because of the lofty stature in which judicial dignity and decorum are held, it appears that a disruptive defendant will not be entitled to the benefit of unlimited constitutional protection for "[t]he Constitution would protect none of us if it prevented the courts from acting to preserve the very process which the Constitution itself prescribes." [37]

[30] *Id.* at 351 (1970).

[31] G. HAUSNER, JUSTICE IN JERUSALEM (1966). During the trial of Adolph Eichmann a glass booth was installed to protect the defendant from possible assassination.

[32] Flaum and Thompson, *supra* note 1 at 337 n. 82.

[33] *But see Id.* at 337, where the authors maintain that the expense involved in this method is too high, especially in light of inadequate funds in smaller counties to support minimally required facilities.

[34] Mr. Justice Douglas concurred with the basic hypothesis of the Court, but advised that guidelines for dealing with a disruptive defendant may be different in a classical case such as *Allen* as distinguished from a case involving political or subversive overtones. *See* 397 U.S. at 351.

[35] *See* O. KIRCHHEIMER, POLITICAL JUSTICE (1961).

[36] 397 U.S. at 353–355.

[37] *Id.* at 350 (Brennan, J., concurring).

GUILTY PLEAS

McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (1970); Parker v. North Carolina, 397 U.S. 790 (1970)

The Supreme Court has repeatedly held that a valid guilty plea must represent the voluntary and intelligent act of a defendant. *Herman v. Claudy*[1], for instance, stands for the proposition that a conviction based on a coerced guilty plea violates a defendant's right to due process. In that case, Herman, after an allegedly coerced confession, pleaded guilty without having been advised of his right to counsel. Mr. Justice Black, writing for a unanimous Court, recognized that a guilty plea may be coerced by an involuntary confession or by an unintelligent waiver of the right to counsel. In circumstances in which the defendant's rights could not have been protected in the absence of counsel, "it is entirely possible that petitioner's prior confession caused him, in the absence of counsel, . . . " [2] to plead guilty.

The Court continued to expand judicial scrutiny of guilty pleas in *United States v. Jackson*[3] which held the death penalty provision of the Federal Kidnapping Act unconstitutional. Under this statute, if one pleaded guilty, the threat of the death penalty was *ipso facto* removed.[4] The Court

[1] 350 U.S. 116 (1956).

[2] *Id.* at 122.

[3] 390 U.S. 570 (1968).

[4] 18 U.S.C. §1201(a) (1964), The Federal Kidnapping Act, stated:

> Whoever knowingly transports in interstate commerce, any person who has been unlawfully seized, confined, . . . and held for ransom or reward or otherwise . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term

thus reasoned that by making the risk of the death penalty the price of exercising the fifth amendment right not to plead guilty and the sixth amendment right to demand a jury trial, the statute needlessly discouraged assertion of those rights. Mr. Justice Stewart, writing for the majority, stated:

> If the provision had no other purpose or effect than to chill the assertion of constitutional rights . . . it would be patently unconstitutional.[5]

Since not every plea entered under the Act was necessarily involuntary[6], the power of federal judges to reject coerced guilty pleas could not totally eliminate the unconstitutionality of the capital punishment provision of the statute. Unfortunately, Mr. Justice Stewart did not face the problem of what to do with guilty pleas entered before *Jackson* and allegedly coerced by the provision condemned in that case.[7] However, it is arguable that on the basis of another fifth amendment case, *Griffin v. California*,[8] one would expect that the petitioner who established that his plea was coerced would be entitled to relief.

Finally, in two recent decisions, the Court established a mandatory procedure for determining the validity of guilty pleas before they are accepted by the trial court. *McCarthy v. United States*[9] held that compliance with rule 11 of the Federal Rules of Criminal Procedure must precede acceptance of the plea by federal judges. Such compliance would insure that the plea is voluntary and factually based.[10] *Boykin v. Alabama*[11] extended the *McCarthy* mandate to the states.

The Supreme Court, however, has seemingly reversed the trend of expanding judicial scrutiny of guilty pleas during the past Term. *McMann v. Richardson*[12], *Brady v. United States*[13], and *Parker v. North Carolina*[14] held that a defendant who pleads guilty with the advice of reasonably competent counsel, notwithstanding the fact that the plea may have been motivated by a coerced confession or by the fear of a harsh sentence, not only waives his fifth amendment right not to plead guilty and his sixth amendment right to demand a jury trial, but also in effect may relinquish his right to habeas corpus review.

Mr. Justice White, writing for the majority in each case, held that none of the respective petitioners were entitled to habeas corpus relief. He attached paramount significance to the presence of counsel during the pleading process and to the administrative efficiency of the criminal justice system. Mr. Justices Brennan, Douglas, and Marshall, dissenting in *McMann* and *Parker* (while concurring in *Brady*) concluded that the concept of voluntariness was not so narrowly defined as to stand only for the opportunity, upon the advice of counsel, to make a rational choice between going to trial and pleading guilty. Instead, involuntariness "refers to a surrender of constitutional rights influenced by considerations which the government cannot properly introduce into the pleading process." [15]

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of years or for life, if the death penalty is not imposed.

Hence, the defendant who pleaded guilty or who obtained a bench trial escaped the risk of the death penalty.

[5] 390 U.S. at 581.

[6] "[T]he evil in the federal [kidnapping] statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them." *Id.* at 583 (emphasis in original).

[7] The Court was not faced with this issue in *Jackson*. That case was a review of the District Court's decision to quash Jackson's indictment for kidnapping on the ground that the Federal Kidnapping Act was unconstitutional. *See* 262 F.Supp. 716 (1967). The Supreme Court agreed that the death penalty provision of the Act was unconstitutional, but held that it was severable from the rest of the Act. The purpose of Congress to make kidnapping a federal crime is not frustrated by removing the threat of the death penalty from the statute. The case was remanded to the District Court with instructions to reinstate the kidnapping count.

[8] 380 U.S. 609 (1965). *Griffin* held that the California procedure of permitting the prosecutor or the judge to comment on the defendant's silence violated the fifth amendment right against self incrimination. Mr. Justice Douglas, for the majority, concluded that the procedure compelled the accused to testify against himself, stating:

> It [the commenting procedure] is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. *Id.* at 614.

Griffin can thus be viewed as holding that the defendant who established that his waiver of a constitutional right was in fact compelled by the government's unconstitutional action is entitled to relief.

[9] 394 U.S. 459 (1969).

[10] FED. R. CRIM. P. 11 states:

> A defendant may plead not guilty, guilty, or, with the consent of the court, *nolo contendere*. The Court may refuse to accept a plea of guilty, and shall not accept such a plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature and the consequences of the plea. . . . The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

[11] 395 U.S. 238 (1969).

[12] 397 U.S. 759 (1970).

[13] 397 U.S. 742 (1970).

[14] 397 U.S. 790 (1970).

[15] McMann v. Richardson, 397 U.S. 759, 778 (1970) (dissenting opinion).

In *McMann v. Richardson*[16] there were three separate petitions for habeas corpus under consideration, each of which the Court of Appeals for the Second Circuit found sufficient to compel a hearing.[17] Defendants Dash, Richardson, and Williams, all charged with various criminal offenses, pleaded guilty and were sentenced. After unsuccessful application for relief in the state courts, they sought habeas corpus relief alleging, *inter alia*, that their pleas were coerced, that their confessions were coerced, or that their attorneys were incompetent.

Mr. Justice White recognized that a valid guilty plea must be voluntary and intelligent, but found nothing to indicate that the plea, as distinguished from the confession, was involuntary.

> . . . [A] petition for collateral relief asserting that a *coerced* confession induced his plea is at most a claim that the admissibility of his confession was mistakenly assessed [by counsel].[18]

The inquiry was reduced to whether the defendant had made an intelligent choice, for White seemingly equated the opportunity to make a rational choice with voluntariness. However, in deciding whether the defendant had in fact made an intelligent plea, White refused to require that the advice of defense counsel withstand retrospective examination in a post conviction hearing. He explained the majority's position.

> In our view, a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the grounds that counsel misjudged the admissibility of the confession.[19]

White placed such significance on the presence of counsel during the pleading process that all future pleas must be assumed to be voluntary, except in the rare case in which the defendant is actually coerced at the time of pleading. In the majority's view, any misjudgment by counsel would be understandable and not prejudicial in light of the difficulties inherent in the decision to plead guilty before all the evidence is in. Thus,

> the defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing.[20]

Nor does fear of the death penalty entitle petitioner to relief. In *Brady v. United States*[21] the Court considered the contention that a guilty plea was coerced if induced by the fear of a harsher penalty. In 1959, Brady was indicted for kidnapping in violation of the Federal Kidnapping Act. Since the victim had not been liberated unharmed, Brady faced the risk of a death penalty if he went to trial and was found guilty. Brady first pleaded not guilty. He changed his plea to guilty with the knowledge that his co-defendant had earlier pleaded guilty and turned state's evidence. In 1967, Brady applied for habeas corpus relief alleging that his plea was invalid under *United States v. Jackson*[22]. The District Court, after a hearing, found that the plea had not been induced by a fear of the death penalty, but by the knowledge that his co-defendant was available to testify against him. The Court of Appeals accepted this finding and affirmed the denial of relief.[23]

Mr. Justice White agreed with the findings of the lower courts and reached the issue whether the fear of the death penalty could render a guilty plea invalid.[24] *Jackson*, White noted, recognized that not every plea rendered under the Federal Kidnapping Act was involuntary. As there was no evidence that Brady was so "gripped with fear" of the death penalty that he could not make a rational choice between going to trial and pleading guilty, White concluded:

> We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from aquittal to conviction and a higher penalty authorized by law.[25]

To hold otherwise would require forbidding guilty

[16] 397 U.S. 759 (1970).
[17] Dash v. Follette, 409 F.2d 1016 (2d Cir. 1969); Richardson v. McMann, 408 F.2d 48 (2d Cir. 1969); Williams v. Follette, 408 F.2d 658 (2d Cir. 1969).
[18] 397 U.S. at 769.
[19] *Id.* at 770.
[20] *Id.* at 771.
[21] 397 U.S. 742 (1970).
[22] *See* notes 3–6 and accompanying text.
[23] Brady v. United States, 404 F.2d 601 (10th Cir. 1968).
[24] Since Mr. Justice White agreed with the finding of the District Court for the District of New Mexico that Brady's plea was not motivated by fear of the death penalty, the case could have been decided without reaching the issue of whether fear of the death penalty could compel a guilty plea. That is, the issue of whether a guilty plea is compelled by fear of the death penalty was not properly before the Court in *Brady*.
[25] 397 U.S. at 751.

pleas altogether, providing uniform penalties for statutory crimes, or placing "the sentencing function in a separate authority having no knowledge of the manner in which the conviction . . . was obtained." [26] White's concerns were clear. The administrative resources of the criminal justice system would be severely overburdened by forbidding guilty pleas based on the expectation of a lesser penalty than that for going to trial. Plea bargaining would be seriously limited if not completely destroyed. In addition, the increase in the habeas corpus petitions of prisoners attacking their convictions based on such pleas would probably innundate the federal courts.[27] Furthermore, the states would not only be faced with the burden of trying more defendants to obtain convictions, but would also have to allocate already strained resources to retry those defendants who had formerly pleaded guilty. The majority's desire to avoid these burdens was evident. Indeed, *Brady* could have been decided without reaching the constitutional issue of whether fear of the death penalty could compel a guilty plea.[28]

Finally, in *Parker v. North Carolina*,[29] Mr. Justice White's logic is fully developed. Neither a coerced confession nor the fear of a harsher sentence entitles the petitioner to habeas corpus relief. Parker, a black minor, was indicated for first-degree burglary—an offense punishable by death under North Carolina law unless the jury recommends life imprisonment.[30] His guilty plea, after interrogation by the court, was accepted. Parker received the mandatory sentence of life imprisonment. After unsuccessful application for relief in the state courts, certiorari was granted. Parker alleged that his guilty plea was the invalid product of a coerced confession and the fear of an unconstitutional death penalty.[31]

The Court, citing *Brady*, dismissed Parker's claim that his plea was compelled by fear of the death penalty. The death sentence discourse in *Brady*, moreover, was only dicta (or should have been).[32] It was nevertheless made law in *Parker* in rather conclusory fashion. According to the majority, guilty pleas induced by the certainty of a lesser penalty are not compelled. Parker's coerced confession claim was dismissed on the basis of *McMann*. In evaluating the validity of a guilty plea allegedly based on a coerced confession, White again limited the inquiry to whether the plea was intelligent and based on the advice of reasonably competent counsel. He argued that such advice would enable the defendant to rationally weigh the advantages between going to trial and pleading guilty. Under *McMann*, any plea entered after such a rational choice is assumed to be voluntary. Under *McMann* and *Parker*, any such plea is probably intelligent as well. With *McMann* alone, Mr. Justice White may not have expressly validated all guilty pleas entered on the advice of counsel. Under that case, a petitioner is entitled to a hearing if he was incompetently advised by his attorney.[33] The standard for incompetence that will award the petitioner a hearing is referred to by White as "gross error" [34] or as "serious derelictions on the part of counsel sufficient to show that his plea [petitioner's] was not, after all, a knowing and intelligent act." [35] However, this standard is seriously weakened by *Parker*, for in that case Justice White stated:

> . . . even if Parker's counsel was *wrong* in his assessment of Parker's confession, it does not follow that his error was sufficient to render the plea unintelligent.[36] (emphasis added)

The standards of *McMann* are hence meaningless under *Parker*. Guilty pleas entered upon the advice of counsel are not only assumed to be voluntary, but also are most likely to be deemed intelligent. The majority's position on counsel's responsibility for determining the admissibility of

[26] *Id.* at 753.

[27] *See* Ross v. McMann, 409 F.2d 1029 (2d Cir. 1969) (Lumbard, Moore, and Friendly, JJ., dissenting).

[28] *See* note 24 *supra*.

[29] 397 U.S. 790 (1970).

[30] N. C. GEN. STAT. §14–52(1969) provides:

> Any person convicted, according to due course of law, of the crime of burglary in the first-degree shall suffer death: Provided, if the jury when rendering its verdict in open court shall so recommend, the punishment shall be imprisonment for life. . . .

At the time Parker's plea was accepted, N.C. GEN. STAT. §15–162.1 (1953) provided that the maximum sentence for a plea of guilty to first-degree burglary was life imprisonment. This provision was repealed in 1969.

[31] Although the North Carolina courts refused to consider whether the death penalty provision of N.C. GEN. STAT. 14–52 (1949) was unconstitutional under Jackson v. United States, the Court nevertheless assumed that the North Carolina statute might have been unconstitutional in reaching the result in *Parker*. That is, even if the provision had been unconstitutional. Parker's plea was still not compelled. *See* State v. Peele, 274 N.C. 106, 161 S.E.2d 568 (1968).

[32] *See* note 24 *supra*.

[33] 397 U.S. at 772.

[34] *Id.* at 772.

[35] *Id.* at 774.

[36] Parker v. North Carolina, 397 U.S. 790, 797(1970).

confessions must be viewed as another step toward insulating guilty pleas from collateral attack. The administrative efficiency of the criminal justice system will be increased, for it is difficult to imagine a petitioner prevailing upon an allegation of incompetence of counsel in his advisory capacity.

The majority's elimination of coerced confessions and the fear of a harsher penalty in determining the validity of guilty pleas was attacked by Mr. Justices Brennan, Douglas, and Marshall. Although each concurred in the denial of relief to Brady, their concurrence was based on the District Court's finding that the plea was not motivated by fear of the death penalty. The threat of the death penalty had been identified, according to Brennan, as a factor to be considered in determining whether a particular defendant knowingly waived his constitutional rights.[37] Brennan challenged White's logic and showed that the converse of the latter's interpretation of *United States v. Jackson*[38] is equally true—not every defendant who pleaded guilty under the Federal Kidnapping Act did so voluntarily. Brennan concluded:

> If a particular defendant can demonstrate that the death penalty scheme exercised a significant influence upon his decision to plead guilty, then, under *Jackson*, he is entitled to reversal of the conviction based on his illicitly produced plea.[39]

The dissenters also attacked the attachment of "talismanic significance" to the advice of counsel in these cases. That is, in none of the cases could the advice of counsel offset the constitutional defects introduced into the pleading process. In *McMann*, each petitioner faced an "unconstitutional" New York procedure for determining the validity of confessions.[40] In *Brady* and *Parker*, "there was no action which counsel could take to remove the threat posed by the unconstitutional death penalty scheme."[41] The dissenters would, therefore, continue to follow *Herman v. Claudy*[42] and determine

> whether, under all the circumstances of the case the pressures brought to bear on the defendant were sufficient to render [a] plea involuntary.[43]

McMann, *Brady*, and *Parker* represent a departure from the traditional concept of voluntariness employed by the Court. As defined by Mr. Justice Brennan:

> "involuntary" has traditionally been applied to situations in which an individual, *while perfectly capable of rational choice*, has been confronted with factors which the government may not constitutionally inject into the decision making-process.[44] (emphasis added)

This concept of voluntariness has been replaced by Mr. Justice White's requirement of an opportunity to make a rational choice between trial and a guilty plea. Under *McMann*, *Brady*, and *Parker*, this new standard is apparently met by evidence of the advice of counsel, notwithstanding the fact that counsel may not be able to effectively counteract the unconstitutional factors introduced into the pleading process. It seems Mr. Justice Brennan was correct when he concluded:

> ... the Court moves yet another step toward the goal of insulating all guilty pleas from subsequent attack no matter what unconstitutional action of government may have induced a particular plea.[45]

That the effect of the three cases will be to limit federal habeas corpus proceedings can hardly be doubted. *McMann*, *Brady*, and *Parker* illustrate the desire of the majority to finalize trial court

[37] *Id.* at 810. Mr. Justice Brennan cites Green v. United States, 355 U.S. 184 (1957) and Fay v. Noia, 372 U.S. 391 (1963) in support of his contention. In *Green*, it was contended that defendant, convicted of second-degree murder on an indictment charging first-degree murder, waived his objections to a second trial for first-degree murder by successfully appealing his conviction of second-degree murder. The Court rejected this contention, holding that the law does not place defendants in such an incredible dilemma. In *Fay*, it was contended that the petitioner was barred from habeas corpus relief for deliberately by-passing the state appellate process. The Court, "[n]oting that the petitioner had been faced with the grisly choice of foregoing his appellate rights or facing a possible death sentence if his appeal were successful," held that "the failure to seek state appellate review, motivated by fear of the death penalty, could not be interposed to bar the federal habeas corpus remedy." Parker v. North Carolina, 397 U.S. 790, 810 (1970) (Brennan, Douglas, and Marshall, JJ.)

[38] *See* notes 3–6 and accompanying text.

[39] 397 U.S. at 808.

[40] The New York procedure for determining the voluntariness of confessions, approved in Stein v. New York, 346 U.S. 156 (1953), consisted of submitting the confession to the jury with all the other evidence with instructions to disregard the confession if it was found to be inadmissible. The procedure was declared unconstitutional in Jackson v. Denno, 378 U.S. 368 (1964).

[41] McMann v. Richardson, 397 U.S. 759, 781 (1970) (dissenting opinion).

[42] 350 U.S. 116 (1956).

[43] 397 U.S. at 778.

[44] Parker v. North Carolina, 397 U.S. 790, 802 (1970) (dissenting opinion).

[45] McMann v. Richardson, 397 U.S. 759, 775 (dissenting opinion).