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GUilty PleA Colloquies: Let the Record Show...  

Mary Kay Wheeler

I. Introduction

In 1982, ninety-two percent of the criminal convictions in Montana were obtained via guilty pleas. Many guilty plea convictions, however, are later challenged through the direct appeal process or post-conviction procedures. Many of those appeals present "colorable" claims, i.e., new issues with arguable merit that the Montana Supreme Court has not directly addressed.

A 1977-78 survey conducted by the Montana Attorney General's Office showed that the information the accused received from the court when entering a guilty plea varied with each judge. Many appellate claims could be avoided, and criminal defendants could be assured of receiving an equal and adequate amount of information, if some form of "standard" guilty plea colloquy were adopted. A standard colloquy would assist the court in making an on-the-record assessment that meets the constitutional requirements for a valid guilty plea. It would also eliminate the need for expensive post-conviction review of possibly frivolous claims.

The purpose of this comment is to propose a standard colloquy checklist. This comment will discuss: (1) the minimum requirements under the federal Constitution; (2) the statutory framework and case law used in Montana to determine whether a guilty plea is constitutionally valid; (3) the importance of certain information that, although not required, ought to be received by each criminal defendant; and (4) topics that should uniformly be covered by each court before acceptance of a guilty plea.


2. 21 AM. Jur. 2d Criminal Law § 478 (1981) provides:

   Questions as to whether an accused was sufficiently informed of the consequences of a guilty plea before making such a plea may be raised by a motion to withdraw that plea, by a direct attack on a judgment or order by appeal or writ of error, or by various forms of collateral attack such as in habeas corpus, coram nobis, or motion under statutes.

II. Requisites for a Guilty Plea under the United States Constitution

A. Voluntariness and Understanding Must be Demonstrated in the Record

In Kercheval v. United States, a 1927 case, the United States Supreme Court enunciated the constitutional standard for a valid guilty plea. The Court held that "a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." The Court noted that a guilty plea is a conviction and that nothing else need be done by a court after entry of a valid guilty plea except to give judgment and impose a sentence. The landmark case setting forth the constitutional necessity for some kind of on the record colloquy when an accused enters a guilty plea was Boykin v. Alabama. The Court held that there is reversible error when the record does not disclose that the defendant voluntarily and understandingly entered his guilty plea.

Boykin requires that the accused be addressed personally and in open court. Because waiver of a constitutional right usually involves "an intentional relinquishment or abandonment of a known right or privilege," waiver cannot be presumed from a silent record. The Court noted that several federal rights are waived through entry of a guilty plea: the privilege against compulsory self-incrimination; the right to trial by jury; and the right to confront one's accusers.

Because of the express reference to these rights, some courts have held that a defendant must be informed of these rights as a constitutional requirement. Other courts have ruled that enumeration of these rights is not required by the due process clause of the fourteenth amendment. Those courts have held that the ap-

5. Id. at 223. The concept of "understanding" has also been expressed through use of the terms "intelligent" and "knowing." Many courts use these terms interchangeably.
6. Id.
8. Id. at 244.
11. Id.
plicable standard is set forth in *North Carolina v. Alford*,\(^4\) i.e., whether the guilty plea represents an intelligent and voluntary choice. The *Boykin* Court concluded:

What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences. When the judge discharges that function, he leaves a record adequate for any review that may be later sought . . . and forestalls the spin-off of collateral proceedings that seek to probe murky memories.\(^15\)

The Court's direction that lower courts exercise the "utmost solicitude" sets a high standard. Waiver standards in the guilty plea context are justifiably set high, however, for a guilty plea is a waiver of the whole "bundle of rights" the accused has. Brief and cursory colloquies, therefore, do not meet the standard set forth in *Boykin*.

Lower courts, both state and federal, have struggled to define the voluntariness and understanding requirements in various factual situations. Rule 11 of the federal rules of criminal procedure\(^16\) provides a procedure to guarantee that a minimum amount of information is given each criminal defendant in federal court. In *McCarthy v. United States*,\(^17\) the Supreme Court held that these procedures must be followed in federal court in order to ensure that a plea is voluntary. Failure properly to follow those procedures gives the defendant the right to plead anew.\(^18\) State courts, however, are not bound by the federal rules of criminal procedure.\(^19\) They have, therefore, looked to the United States Supreme Court for further

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\(^{15}\) *Boykin*, 395 U.S. at 243-44 (citations omitted).

\(^{16}\) Fed. R. CRIM. P. 11(c) requires that "[b]efore accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands," the nature of the charge and its minimum and maximum penalties, the right to representation, the right to plead not guilty, the right to a jury trial, the right to confront witnesses, the privilege against self-incrimination, and the possibility that statements made during the plea interrogation may later be used against him in a prosecution for perjury or false statement.


\(^{18}\) *Id.* at 472.

B. Voluntariness

A guilty plea induced by some form of coercion, threat, intimidation, deception, or trick is not voluntary. In *Brady v. United States*, the Supreme Court adopted the standard of the Fifth Circuit in *Shelton v. United States* as to voluntariness of guilty pleas:

[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).

Promises made by state or federal officials to encourage the defendant to plead guilty to criminal charges, while not in and of themselves sufficient to invalidate the plea, are taken into account in the voluntariness determination. Until relatively recently, plea bargaining and plea agreements were often not acknowledged in open court. In *Brady* the Supreme Court discussed the plea bargaining process and sustained the constitutionality of the practice. The Court found that Brady's guilty plea was not compelled...
or invalid because it was motivated by his desire to accept the certainty or probability of a lesser penalty.\textsuperscript{27}

Other Supreme Court decisions have discussed the contours of the voluntariness requirement. Several decisions have discussed the "factual basis" inquiry\textsuperscript{28}—i.e., questioning the defendant for admission of sufficient facts to form a judgment that the defendant is, in fact, guilty of the offense charged. While endorsing this inquiry, the Supreme Court has not squarely held that a factual basis is required to satisfy due process requirements. In \textit{North Carolina v. Alford},\textsuperscript{29} the Court held that the defendant's guilty plea was voluntary, notwithstanding the fact that he testified he was innocent. The Court has also held that a prior coerced confession must be shown to have an "enduring effect" on the guilty plea in order for the plea to be involuntary.\textsuperscript{30}

In assessing the voluntariness of a guilty plea, the Supreme Court has noted the importance of effective assistance of counsel.\textsuperscript{31} A guilty plea entered without counsel or without valid waiver of counsel is constitutionally invalid.\textsuperscript{32}

\begin{flushright}
C. Understanding
\end{flushright}

The understanding requirement has been a fertile source of litigation since \textit{Boykin}. The Supreme Court has focused on three factors in determining whether the guilty plea is constitutionally "intelligent": (1) the competency of the accused at the entry of the plea; (2) the accused's understanding of the "nature of the charges"; and (3) the accused's understanding of the "consequences of the plea."

A defendant must have a minimum mental capacity or competency to enter a guilty plea.\textsuperscript{33} In \textit{Brady}, the Court found that the

\textsuperscript{27} While the Court upheld the validity of Brady's guilty plea, it carefully distinguished the facts of the case before it from "improper" bargaining: "We here make no reference to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty." \textit{Brady}, 397 U.S. at 751.

\textsuperscript{28} \textit{Boykin}, 395 U.S. at 249; \textit{McCarthy}, 394 U.S. at 462-63; \textit{Alford}, 400 U.S. at 37-38.

\textsuperscript{29} A majority of state courts now require that some form of factual basis be established. \textbf{See J. Bond, Plea Bargaining and Guilty Pleas} § 3.54(a) (1982).


\textsuperscript{32} \textit{Rice v. Olson}, 324 U.S. 786, 788 (1945).

\textsuperscript{33} \textit{Brady}, 397 U.S. at 756 (noting that nothing in the record indicated that the accused was not competent). \textbf{See also} \textit{Frame v. Hudspeth}, 309 U.S. 632 (1940) (remand or-
defendant possessed sufficient understanding because he "was advised by competent counsel, he was made aware of the nature of the charge against him, and there was nothing to indicate that he was incompetent or otherwise not in control of his mental faculties . . . ." A conviction of an accused person while he is legally incompetent violates due process.

An accused must also be informed of the "nature of the charges" in order to enter an intelligent guilty plea. In *Paterno v. Lyons*, the Supreme Court discussed whether the defendant was given sufficient notice of the charges. The defendant was charged with larceny, but pleaded guilty to the lesser offense of receiving stolen goods. The Court concluded that there was sufficient "basis for an intelligent decision to plead guilty."

A guilty plea is an admission of all elements of a formal criminal charge. Therefore it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. Although the Supreme Court has not required that a defendant be informed of all elements of a crime in order for his plea to be voluntary and understanding, in *Henderson v. Morgan* the Court held that intent was such an essential element of the crime charged that the defendant had to be informed of this element in order to have adequate notice of the charges.

A defendant must also understand the "consequences of his plea." Many lower courts, relying on *Brady*, have attempted to distinguish between "direct" consequences, of which the accused must be informed in order to enter a valid guilty plea, and "collateral" consequences. Courts have determined that, at a minimum,
the defendant must be informed of the maximum possible sentence for the crime charged.43

Without a definitive statement from the Supreme Court as to which consequences the defendant must be informed of in order to enter a valid guilty plea, and not bound by the strictures of the federal rules of criminal procedure, state decisions on this issue have varied widely. Some states have looked to the federal rules or other recognized standards to define their guilty plea colloquies.44 Others have adopted uniform court rules in order to standardize practice among judicial districts.45 Montana has responded by enacting statutes incorporating the constitutional standards.46 Those statutes, as well as the judicial interpretation of them, comprise the basic legal framework for asserting or challenging the validity of a guilty plea at the present time.

III. MONTANA REQUIREMENTS FOR A VALID GUILTY PLEA

A. Statutory Framework

Several Montana statutes set forth the information a defendant must be given in order to enter a valid guilty plea. The court is required to advise the defendant of the nature of the charges against him,47 the punishment for the crime charged,48 the right to counsel,49 the right to "reasonable" time to enter a plea,50 and the right to secure bail.51 The court or clerk must deliver a copy of the information to the defendant, along with a list of the witnesses against the defendant.52 The information must be read to the de-

43. See, e.g., In re Tahl, 1 Cal. 3d 122, 460 P.2d 449 (1969); State v. Sisco, 169 N.W.2d 542 (Iowa 1969); State v. Ernst, 43 Wis. 2d 661, 170 N.W.2d 713 (1969); Smith v. Oklahoma City, 513 P.2d 1327 (Okla. 1973).
46. See infra notes 47-59 and accompanying text.
47. MONT. CODE ANN. § 46-12-202(1)(a) (1983).
48. Id. § 46-12-202(1)(b) (1983). See also State v. Lewis, 177 Mont. 474, 582 P.2d 346 (1978); In re Davis, 179 Mont. 196, 587 P.2d 30 (1978); State v. Maldonado, 176 Mont. 322, 578 P.2d 296 (1978) (failure to inform the defendant of the mandatory minimum sentence held not to affect the voluntariness of the guilty plea); MONT. CODE ANN. § 46-16-105(1)(b) (1983).
51. Id. § 46-12-202(1)(e).
52. Id. § 46-12-202(2)(a).
fendant unless he waives its reading. The court cannot accept a guilty plea without first determining that the plea is voluntary, with an understanding of the charge. A guilty plea may be accepted when a defendant enters a guilty plea in open court and the court has informed the defendant of the "consequences" of his plea and of the maximum penalty that may be imposed. The court must determine if the defendant is under any disability and if the defendant's true name is other than the one used in the charge.

B. Montana Case Law

An examination of recent case law reveals that many criminal defendants have challenged the adequacy of the interrogation at the entry of the plea. In State v. Lewis the Montana Supreme Court examined the adequacy of the arraignment interrogation of the defendant. The court concluded:

when in the sentencing procedure, the District Court carefully, as here, examines the defendant, finds him to be competent, and determines from him that his plea of guilty is voluntary, he understands the charge and his possible punishment, he is not acting under the influence of drugs or alcohol, he admits his counsel is competent and he has been well advised, and he declares in open court the facts upon which his guilt is based, then a plea of guilty accepted by the District Court on the basis of that examination will be upheld . . .

It is important to note that the court in Lewis did not expressly hold that all of this information, or indeed, any particular kind of information was necessary for the colloquy to be constitutionally sufficient. The Lewis opinion does, however, constitute at least an endorsement of this type of information.

The Montana Supreme Court set forth a three-part test to be applied to appeals challenging the validity of a guilty plea in State

53. Id. § 46-12-202(2)(b).
54. Id. § 46-12-204(2).
55. Id. § 46-12-201(1).
56. The use of the term "consequences" in § 46-16-105(1)(b), without specific delineation of what that term means, has led many criminal defendants to challenge the validity of their guilty pleas. A standard guilty plea inquiry will help to define this vague term.
57. See supra note 48.
59. Id. § 46-12-201(2).
60. 177 Mont. 474, 582 P.2d 346 (1978).
61. Id. at 485, 582 P.2d at 352.
v. Huttinger.\textsuperscript{62} The three factors are: (1) the adequacy of the interrogation at the entry of the guilty plea; (2) the promptness with which the defendant attempts to withdraw the prior plea; and (3) whether the defendant's plea was the result of a plea bargain.\textsuperscript{63} In a later case the court referred to the test set forth in Huttinger, and held it was not just the record at the entry of the plea which is examined to determine the validity of the plea.\textsuperscript{64} The record as a whole is examined in assessing the plea's validity.

The court enunciated the standard for determining whether a plea is constitutionally valid in Yother v. State.\textsuperscript{65} The standard is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant as affirmatively disclosed by the record."\textsuperscript{66} The Yother court suggested that courts and counsel look to Huttinger and Lewis for guidance in determining what the defendant should be informed of in entering a guilty plea.

The principles of Huttinger, Lewis, and Yother provide the basic framework for determining the validity of guilty pleas in Montana. The court has elsewhere further defined the scope of the court's duty as well as that of defense counsel. In State v. Nelson,\textsuperscript{67} the court held the trial court's interrogation was inadequate where the court did not make the defendant aware of the distinct elements of the crime charged. In order for an accused to have an adequate understanding of the nature of the charges, he must be informed of any lesser included offenses.\textsuperscript{68} The duty to inform the defendant about possible defenses and mitigating factors is defense counsel's, however, and not the court's.\textsuperscript{69}

The trial court is not required to articulate a defendant's specific rights, but an "in depth examination" is desirable, and \textit{may in some circumstances be mandatory}.\textsuperscript{70} In State v. Haynie,\textsuperscript{71} the court stated that whether the defendant was informed that constitutional rights were waived by a guilty plea was a factor to be considered in determining the validity of the defendant's waiver of those rights. Thus the better practice in Montana is to inform the

\begin{footnotesize}
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\item 62. 182 Mont. 50, 595 P.2d 363 (1979).
\item 63. \textit{Id.} at 54, 595 P.2d at 366.
\item 64. State v. Myers, \textit{Mont.} \textit{-}, 627 P.2d 860, 961 (1981).
\item 65. 182 Mont. 351, 597 P.2d 79 (1979).
\item 66. \textit{Id.} at 358, 597 P.2d at 83.
\item 67. \textit{Mont.} \textit{-}, 603 P.2d 1050 (1979).
\item 70. Yother, 182 Mont. at 358-359, 597 P.2d at 83.
\item 71. \textit{Mont.} \textit{-}, 607 P.2d 1128, 1130 (1980).
\end{itemize}
\end{footnotesize}
defendant of the constitutional rights waived, although it is not always constitutionally necessary.

Other case law and statutes further define the Montana requirements for a valid guilty plea. The state must give written notice to the defendant prior to the entry of the guilty plea of its intent to treat him as a persistent felony offender. Failure to inform the defendant of the minimum sentence does not affect the voluntariness of the plea. The court has not faced the issue of whether the defendant must be told that a guilty plea waives the right to evidentiary objections. In Petition of Ebeling and State v. Turcotte, the court held that a plea of guilty conditioned upon reservation of right to appeal an adverse decision on suppression of evidence was an attempt to create a procedure for which there was no statutory authority. The defendant has to plead not guilty and stand trial to preserve the objection.

In the recent case of State v. Cavanaugh, the Montana Supreme Court held that the defendant’s guilty plea was not valid because he was not told that his sentence might include a restriction on eligibility for parole or participation in the prison furlough program. The court held that this was a consequence of which the defendant must be informed. Influenced by Santobello v. New York, the court also enunciated a “fairness” element to be included with the voluntary and knowing requirements. In State v. Hendricks, the court cited Cavanaugh for a holding that “it would be fundamentally unfair not to allow the defendant to withdraw his guilty plea under circumstances where the District Court refuses to accept the concessions granted by the State in a plea bargain agreement.” Most recently, in State v. Wilkenson, the court held that the Cavanaugh holding applies only to sentencing after the date of that decision.

The above cases make it clear that the “rule” in Montana for what is necessary for a guilty plea to be constitutionally valid is the standard found in Yother. The Yother standard essentially reiterates the Boykin v. Alabama requirements, with three modifica-

73. See supra note 48.
77. Id. at ___, ___ P.2d at ___.
78. 404 U.S. 257 (1971).
tions in its application. First, the Montana court looks to the record as a whole, whereas in Boykin constitutional validity is assessed from the record at the entry of the plea. Second, the court considers whether the guilty plea was the result of a plea bargain in assessing voluntariness and understanding. Third, the court has applied a timeliness requirement for challenges to the validity of a guilty plea. Additionally, Cavanaugh and subsequent decisions indicate that the court is applying a concept of "fundamental fairness" to the proceedings.

IV. POLICY REASONS FOR USING A STANDARD COLLOQUIY

A. Enhancing the Integrity of Courts

An informal survey conducted by the Montana Attorney General’s Office in 1977-78 queried district court judges about what information they give defendants prior to the entry of a guilty plea. The responses indicated that practices varied from judge to judge. Due to this lack of consistency and the application of a "totality of circumstances" test on review, not all criminal defendants are equally apprised of their rights and of the consequences of their pleas.

Language in Boykin directing lower courts to use the "utmost solicitude" in canvassing the matter with the accused at the time of entry of the guilty plea indicates the depth of inquiry envisioned by the Supreme Court. Indeed, commentators have long argued that superficial colloquies are insufficient. William Thompson, a judge in Kanawha County, West Virginia, suggested as far back as 1960 that the best way to protect convictions and the reputation of the courts was to safeguard the rights of the defendant. Judge Thompson wrote:

Of course, we are cognizant of the fact that men under long penitentiary sentences want out. With abundant opportunity for reflection on how to get out, they will imagine and invent all sorts of spurious charges concerning the denial of constitutional rights. Conceivably these people can create serious problems in the administration of criminal law. We, as state trial judges, can, by following precautions, have an effective means of protecting ourselves from such false or unfounded charges, and at the same time safeguard the constitutional rights and interests of a

82. See supra note 3.

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defendant. 83

The "effective means" is to build a solid and comprehensive record at the entry of the plea that will withstand any review. Judge Thompson noted that "no judge can take pride in holding his procedure to the very minimum of fairness as required by the law. After all, we are dealing primarily here with constitutional guarantees and the life and liberty of an individual is involved." 84

B. A Standard Colloquy Makes Sense From Both Defense and Prosecution Perspectives

A more comprehensive guilty plea inquiry, uniformly given to all criminal defendants, makes good practice from both the defense and prosecution perspectives. A standard inquiry would provide an opportunity for equal understanding by every defendant of the rights being waived and the consequences of his plea. The accused's understanding should not be dependent upon the experience or personal philosophy of the individual judge, or the exigencies of the court calendar on the particular date of the plea.

A more comprehensive inquiry also makes sense from the prosecution's perspective. Convictions obtained on the basis of such inquiries are more likely to withstand appellate review. The defendant will be unable to assert more than a patently frivolous claim that the plea was involuntary or without understanding where the court has meticulously assessed the defendant's understanding, and the voluntary and understanding nature of the plea is affirmatively set forth in the record. As noted earlier, 85 over ninety percent of recent criminal convictions in Montana were obtained via guilty pleas. Waiver of evidentiary objections and the absence of trial proceedings on which to allege error leave little basis for the allegation of error once the validity of the plea is upheld. A defendant challenging the validity of his plea bears the initial burden of demonstrating that his plea was constitutionally invalid. 86 Where a thorough inquiry is found in the record, strong

84. Id. at 222.
85. See supra note 1.
86. See J. BOND, supra note 28, § 7.11:
The defendant bears the burden of proof on a withdrawal motion. He must show some plausible reason that justifies withdrawal of his plea. . . . [T]he defendant who wishes to withdraw his plea of guilty must demonstrate good cause to do so, or else he fails to sustain his burden of proof.
See also MONT. CODE ANN. § 46-16-105(2) (1983): "At any time before or after judgment the court may, for good cause shown, permit the plea of guilty to be withdrawn and a plea of
evidence in the nature of a presumption is established as to the validity of the plea.\textsuperscript{87}

The American Bar Association Standards for Criminal Justice (ABA Standards) set forth an example of a comprehensive inquiry at the entry of the plea, as well as a supporting rationale.\textsuperscript{88} This rationale is a rich source of policy arguments for challenging guilty pleas that are mere perfunctory assessments. The objective of the standards is "to formulate procedures that will maximize the benefits of conviction without trial and minimize the risks of unfair or inaccurate results."\textsuperscript{89} This objective serves the best interests of both the defense and prosecution.

V. Recurrent Special Issues

Certain issues are frequently litigated in challenges to the validity of guilty pleas. The discussion that follows will: (1) identify those issues; (2) discuss the policies supporting inclusion of information relating to these issues in the guilty plea colloquy; (3) discuss recommendations by commentators and other noted authorities; and (4) suggest a recommended inquiry regarding each issue.

A. Competency Inquiries

The due process clause of the fourteenth amendment requires that a person pleading guilty must be competent.\textsuperscript{90} In order to determine the competency of the defendant, the court must make some initial inquiries as to the defendant's identity—name, age, address, marital status. Where the defendant is young, unfamiliar with the English language, lacking in education, or of low intelligence, those factors should be considered by the court in assessing the depth of inquiry necessary to assure that the guilty plea is voluntary and understanding.

Competency is established on the record by questioning the defendant regarding any prior mental illness or drug or alcohol de-
pendency, and health and mental status at the entry of the plea. This prevents collateral attack on this basis at a later time. Virtually all authorities recommend that some degree of inquiry into competency take place at the entry of the plea, with variation only as to the particular inquiries. 91 The recommended practice for establishing competency on the record is to inquire regarding the defendant's age, amount of formal education, work experiences, present health, and any history of mental illness or drug or alcohol addiction.

B. Informing the Defendant of the Nature of the Charges

A guilty plea cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. 92 As the United States Supreme Court has long recognized, "[R]eal notice of the true nature of the charge . . . [is] the first and most universally recognized requirement of due process." 93 While a court is not able to assess the subjective understanding of the defendant, it is possible to set forth an affirmative inquiry informing the defendant (on the record) of the charges against him, the elements of the charge, and his responses to inquiries as to his understanding of the charges. This inquiry should encompass lesser included offenses, and the elements of those charges. 94 The ABA Standards recommend that the defendant be informed of both the nature of the charges and the elements of the offense to which the defendant pleads guilty:

An explanation of the elements of the charge helps to assure that the defendant fully appreciates the nature of the offense to which the plea is tendered. Since a guilty plea is a formal admission of all elements of the charge, a defendant, in fairness, should be formally advised of the elements before the plea is accepted. 95

Courts, therefore, are encouraged to inquire whether the defendant has a copy of the charges. The defendant should be instructed to hold a copy of the charges during the inquiry so that he may refer to them if he so desires. The court should read the information to the defendant, unless the defendant or his attorney waives reading of the same. The court should then explain the

91. See J. Bond, supra note 28, § 3.30(a)-(c). A judge should be particularly alert for incoherence at the plea-taking, prior history of mental illness, prior determination of incompetence, and evidence that defendant is being treated for chronic mental illness. Id.
92. McCarthy, 394 U.S. at 466.
93. Brady, 397 U.S. at 756.
94. See supra text accompanying notes 37-40.
95. ABA Standards § 14-1.4(a)(i) commentary.
charges and elements of the offense(s) to the defendant, including elements of lesser offenses.

C. Inquiry Into the Factual Basis of the Charge

Although several Supreme Court decisions have discussed the "factual basis" requirement, none have squarely held that this is required to satisfy due process requirements. A factual basis, however, serves many important purposes. It assures that a defendant is in fact guilty. Establishment of a factual basis decreases the risk of an innocent person being convicted. It also eliminates the necessity for post-conviction fact-finding proceedings to determine the accuracy of the guilty plea. The factual basis is also often useful to the court at sentencing.

As one commentator has observed, the voluntariness and factual basis requirements are inextricably linked. Virtually all model provisions recommend that a factual basis be established. In light of Montana Supreme Court decisions endorsing this practice, as well as the important purposes the factual basis serves, this should be included in the standard inquiry.

The recommended practice is to have the defendant establish the factual basis by telling the story in his own words. The court should first inform the defendant of the right against self-incrimination; inform the defendant that by pleading guilty he waives that right; have the defendant waive the right; and then have the defendant testify regarding the factual basis. The court must determine, after listening to the factual basis, whether the facts testified to by the defendant constitute the offense charged.

Some judicial districts in Montana use a written acknowledgement of waiver of rights that also contains the factual basis of the offense. The practice of using a written waiver is recommended because it presents another opportunity for the accused to set forth his version of the offense. It also gives him another occasion to consider the seriousness of the action he is taking in entering a guilty plea. While such written waiver forms are useful as a checklist and serve to emphasize for a defendant his constitutional rights, their use should not be regarded as a substitute for a verba-

96. See supra notes 28-30 and accompanying text.
97. ABA STANDARDS § 14-1.6(a) commentary.
100. See supra note 3.
D. Informing the Defendant of the Maximum Possible Sentence and Other Related Matters

The defendant must be informed of the maximum penalty that may be imposed for the offense charged. The defendant's primary concern is the possible length of the sentence. Virtually all model provisions agree that the defendant should be advised of the maximum possible sentence, as well as any mandatory minimum sentence.\textsuperscript{102}

Many issues have been raised on appeal, however, as to what constitutes the maximum possible sentence. The ABA Standards set forth a specific guideline as to information that should be included: "As used in this standard, the 'maximum possible sentence' includes punishment possible by virtue either of the sentence provisions of the state under which the charge is brought or of other statutes that authorize added penalties because of special circumstances in the case."\textsuperscript{103} The ABA Standards also provide: "A defendant should be told of any possible added punishment under multiple offender statutes."\textsuperscript{104}

In view of these standards defining maximum possible punishment, the defendant should be informed about other Montana statutes that may affect the punishment imposed. Admittedly, a defendant cannot be informed of every remote possibility regarding the punishment imposed. The ABA Standards, however, present a comprehensive and well-reasoned approach as to where the line should be drawn in regard to informing the defendant as to the possible penalty. In addition to the maximum punishment provided by statute for the offense charged, the defendant should be informed that an additional mandatory penalty is provided for offenses committed with a weapon,\textsuperscript{105} and that the mandatory penalty increases for persons twice convicted of an armed offense.\textsuperscript{106} The defendant should be informed that these additional punish-

\textsuperscript{101} ABA STANDARDS, § 14-1.7 commentary. See also Blackledge v. Allison, 431 U.S. 63, 71 (1977), where the Supreme Court ruled that the defendant's execution of a standard printed guilty plea form did not foreclose collateral attack in a postconviction proceeding, where there was no record of the entry of the guilty plea.

\textsuperscript{102} ABA STANDARDS § 18-6.5(b)(iii); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.4(1) (1975); Fed. R. Crim. P. 11(c); CRIMINAL JUSTICE STANDARDS AND GOALS, Courts 3.7 (1973); UNIFORM RULES OF CRIMINAL PROCEDURE 444(b) (1974).

\textsuperscript{103} ABA STANDARDS § 14-1.4(a)(ii) commentary.

\textsuperscript{104} Id. § 14.1-4(a)(iii) commentary.


\textsuperscript{106} See id. § 46-18-221(2).
ments are to run consecutively to the sentence provided for the offense.\textsuperscript{107}

The Montana Supreme Court has held that failure to inform an accused of the mandatory minimum sentence did not affect the voluntariness of his plea.\textsuperscript{108} Although not constitutionally required, informing the defendant of any mandatory minimum sentence constitutes good policy and therefore good practice. As the comments to the ABA Standards correctly point out:

Not all the recommended advisements contained in this standard are constitutional requirements for the acceptance of a valid guilty plea. But all of the advisements are considered highly desirable from a policy standpoint, as compliance with this standard will help to assure that the defendant appreciates the significance of the plea and that once entered the plea will withstand attack in postconviction proceedings.\textsuperscript{109}

Other Montana statutory provisions are arguably within the "special circumstances" of which defendants should be informed. In light of the Cavanaugh decision, the defendant should be informed of the possible restrictions on eligibility for parole and participation in supervised release programs.\textsuperscript{110} The accused should also be informed of the consequences of noneligibility for designation as a nondangerous offender.\textsuperscript{111} These statutory provisions are not sentencing enhancement statutes—i.e., they do not allow the imposition of time beyond the statutory maximum.\textsuperscript{112} They may, however, greatly increase the amount of time actually served, or significantly affect the defendant’s subjective expectations as to the amount of time he will actually serve.

Montana law also provides that if a defendant is twice convicted of deliberate homicide he will, if sufficient mitigating circumstances are not found, be sentenced to death.\textsuperscript{113} Therefore, if the offense charged is deliberate homicide, the court should inform the defendant of this provision.

Under Montana law, persons designated persistent felony offenders must be imprisoned for at least five years.\textsuperscript{114} However, the state is also required to give written notice to the defendant prior to the entry of the guilty plea that it intends to seek treatment of

\textsuperscript{107} See id. § 46-18-221(4).
\textsuperscript{108} See supra note 48.
\textsuperscript{109} ABA STANDARDS § 14-1.4 commentary.
\textsuperscript{111} See id. § 46-23-201(1)(a).
\textsuperscript{112} Cavanaugh v. Crist, Mont. 615 P.2d 890, 893 (1980).
\textsuperscript{114} Id. § 46-18-502.
the accused as a persistent felony offender. An on the record inquiry whether the state intends to seek treatment as a persistent felony offender and whether written notice has been given establishes the record as to these issues and, again, eliminates the basis for later allegation of error.

E. Informing the Defendant of Specific Constitutional Rights Waived

The defendant should be informed of the specific constitutional rights he is waiving. As noted earlier, waiver of constitutional rights cannot be presumed from a silent record. In order to show that the rights were known and intentionally forfeited, there must be positive objective evidence. A colloquy specifically informing the defendant of these rights and an affirmative act on the part of the defendant to waive them satisfies the requirement for an intentional waiver of these rights. A written waiver, along with discussion of these rights on the record, provides additional evidence of intentional relinquishment.

The ABA Standards suggest, in addition to the rights specified in Boykin, that the defendant be advised of additional constitutional rights made applicable to the states, e.g. the right to a speedy trial, the right to insist that proof of guilt be established beyond a reasonable doubt, and the right to compulsory process. The defendant should be told of the right to testify at trial to assure that the defendant understands his right to take the witness stand if he rejects the right to remain silent. If the defendant has signed a written acknowledgment of waiver of rights, the court should question the defendant as to his reading, understanding, and signing of the written waiver.

F. Informing the Defendant of Waiver of Evidentiary Objections

A guilty plea waives the right to object to illegally seized evidence and to the sufficiency of the charging papers. If the defendant is not apprised by counsel of the strength of the state’s case and the probable admissibility of the evidence against him, he is not able to make an intelligent choice as to whether to put the

115. Id. § 46-18-503(1).
116. See supra text accompanying note 11.
117. ABA STANDARDS § 14-1.4(a)(iv) commentary.
118. Id.
119. See supra text accompanying notes 74 & 75.
state to its proof or to enter a guilty plea.

In Montana, a defendant may not plead guilty reserving the right to appeal evidentiary issues. The ABA Standards note that "whether or not the right of appeal is available, it is important that the defendant, prior to pleading guilty, in fairness to the defendant, understand that there is a pretrial right to object to illegally seized evidence." The comment also notes that such advice serves to insulate guilty pleas from attack on grounds of involuntariness based on the defendant's fear that illegally seized evidence could be used against him. The recommended practice is to inform the defendant that a guilty plea waives evidentiary objections.

G. Voluntariness and Plea Bargain Inquiries

The voluntary nature of the plea must affirmatively appear in the record. In order to determine that the guilty plea is voluntary the court should ask whether the defendant was in any way threatened, coerced, or pressured into pleading guilty. It is also important that the court inquire whether the guilty plea is a result of plea bargaining between defense counsel and the prosecuting attorney. Where the entire plea agreement is brought forth on the record at the entry of the guilty plea, the judge is better able to assess both the defendant's understanding and whether the plea is truly voluntary. If the plea bargain is not disclosed, the defendant may keep quiet—i.e., not mention threats, coercion, or circumstances rendering his plea involuntary—for fear of "spoiling" the bargain. The terms of the plea bargain may be the most persuasive factors in inducing the defendant to plead guilty. Without a thorough understanding of the terms of the bargain, the court does not have an adequate understanding of the nature of the plea.

The ABA Standards state that "[t]he court should inquire of the defendant as well as defense counsel concerning possible plea discussions and plea agreements. This should help to assure that the defendant is personally familiar with all discussions and agreements conducted between defense counsel and prosecutor." Both the federal rules of criminal procedure and the uniform rules of

120. Id.
121. ABA STANDARDS § 14-1.4(a)(v) commentary.
122. Id.
123. Boykin, 395 U.S. at 244.
125. ABA STANDARDS § 14-1.5 history of standard.
126. FED. R. CRIM. P. 11(d), (e)(2).
criminal procedure require that the court assess voluntariness by determining the content of prior plea discussions, and whether any force of threats were used to obtain the plea.

The recommended practice, therefore, is for the court to inquire whether the plea is the result of a plea bargain. If it is, the court should examine any documents setting forth the terms of the plea agreement and have defense counsel, prosecution, and defendant testify as to the discussions held, the terms and conditions of the plea agreement, and the reasons for it. The court should ask the defendant if this represents all the terms of the agreement. The court should then inform the defendant whether or not it concurs in the plea agreement. The court should inform the defendant that it is not bound by the agreement. It should further advise the defendant that if it later decides that the final disposition should not include the charge or sentence concessions, the defendant may affirm or withdraw his plea of guilty.

The court should, at this point, give the defendant an opportunity to ask any questions regarding the proceedings. This will allow the defendant to reconsider his plea. The court should ask whether any person has promised anything other than the terms of plea agreement and whether any person has threatened, forced, or intimidated the defendant into entering the guilty plea.

H. Other Recommendations

After the court initially determines that the defendant wishes to plead, the defendant should be sworn in. Having the defendant sworn adds a measure of solemnity to the colloquy, and may also discourage later repudiations.

Yes/no responses should be avoided. The term "colloquy" aptly expresses the nature of the interchange. It should represent a two-party exchange of information and understandings. As the comment to the ABA Standards states, "where the defendant does nothing more than state that he or she understands the advisements, there may occasionally be doubts by the court as to

130. ABA Standards § 14-1.6(b) commentary provides: [T]he court must make certain that the defendant's statements are sufficiently detailed so as to establish factual guilt; the questions asked of the defendant, therefore, should call for responses in the defendant's own words. If the defendant simply answers yes or no to the court's inquiries, there may later be dispute as to the presence of factual guilt.
whether the defendant truly comprehends the rights men-
tioned."131 Wherever doubt exists, the court should have the defen-
dant repeat information or understanding as to rights in his or her
own words.

The suggested "standard" colloquy attached to this comment
as an appendix is intended only as a "skeletal" inquiry. It is in-
tended to be used as a starting point upon which the court should
expand depending on the particular defendant and the factual sit-
tuation presented to the court. It is not intended to be a substitute
for the discretionary power of the court to question more fully
where the court determines that such an inquiry is necessary.132

There should be express questioning by the court whether the
accused has had sufficient time for deliberation with counsel.133
The court should also inquire whether the accused is satisfied with
counsel's services.

Under Montana law it is the duty of defense counsel to inform
the defendant about possible defenses and mitigating factors.134
After listening to the factual basis for the plea, the court is in an
excellent position to note any possible defenses that might be as-
serted. An affirmative inquiry should be made into whether possi-
ble defenses were discussed with the defendant. Such a record pre-
ccludes a later contention that such matters were not discussed.
Where defenses and mitigating circumstances are discussed on the
record, allegations of ineffective assistance of counsel as to these
matters are easily disposed of should they later be raised on
appeal.

VI. Conclusion

Strong policy arguments support a guilty plea inquiry that
goes beyond what the courts have held to be constitutionally re-
quired. Montana courts should adopt a standard inquiry that more
fully complies with the spirit of the Boykin directive.135 The adop-
tion of a standard inquiry will allow equal information for all crim-
inal defendants, prevent a substantial number of appeals, and en-
hance the integrity of the entire criminal justice system.

131. Id. § 14-1.4(b) commentary.
132. As Judge Rosenblatt states in the introduction to his suggested inquiry, the sug-
gested colloquy is not a "catechism." It is not intended as a substitute for the judicial exer-
cise of discretion on a case-by-case basis. Rosenblatt, The Guilty Plea Colloquy, Annotated
133. ABA Standards § 14-1.3.
135. See supra text accompanying notes 7-15.
The ABA Standards present a comprehensive, well-researched source as to what the defendant ought to be informed of at the entry of a guilty plea. The Montana Supreme Court, pursuant to its supervisory powers, should direct a judicial commission, composed of members of all the judicial districts, to propose a standard colloquy to be adopted by supreme court rule. The ABA Standards and other model provisions provide the necessary framework for such an inquiry. The commission’s task would consist of adapting provisions such as these to the requirements of Montana law. The standard colloquy adopted by supreme court rule should be incorporated into the judge’s desk book, for ease of reference and accessibility.

Only by adoption of such a comprehensive standard colloquy will every criminal defendant be assured of the “utmost solicitude” mandated by the Supreme Court in Boykin. A number of inequities inherent in the criminal justice system cannot be corrected because of the nature of the system itself—e.g. the unequal experience and ability of opposing counsel. Equal information at entry of a guilty plea, however, is easily accomplished. Where equality is so easily obtained, the criminal justice system should take action to obtain it.

“Equal justice for all” should mean equal information for all persons criminally accused.

APPENDIX

SUGGESTED QUESTIONS FOR THE COURT TO ASK IN TAKING A GUILTY PLEA

Acknowledgments: The author drew heavily from the following sources in formulating the suggested colloquy and wishes to acknowledge and thank the authors of those sources:


QUESTIONS BY THE COURT

[Note: Any defendant appearing without counsel should be informed of the right to counsel, and that if he is without means to employ counsel, counsel will be provided. The court should not accept a guilty plea without valid waiver of the right. The record should be especially thorough and comprehensive where the defendant waives the right to counsel.]

Court: (To Defense Counsel) What is the position of the defendant?
Court: (To Defendant) Before the court can accept your plea of guilty, it must determine that it is freely and voluntarily made by you. The court must also be satisfied that you know what you are doing. For this reason, I will be asking you certain questions. If you do not understand the questions or words that I use, or desire a further explanation, do not hesitate to stop me and tell me so.
Court: Do you have a copy of the indictment, information or complaint?
Court: I suggest that you hold a copy of the charge(s) in your hand so that you may refer to them readily during this hearing. Your plea will not be accepted unless you realize that by your plea you admit every act or omission and every element with respect to the offense to which you plead guilty, and that you are pleading guilty because you really are guilty. If you are not convinced that you are in fact guilty, you should not allow any other consideration to influence you to plead guilty.
Court: Under Montana law, all persons are bailable before conviction, except when death is a possible punishment for the offense...
charged and the proof is evident or the presumption great that the
defendant is guilty of the offense charged. A guilty plea constitutes
a conviction, and therefore, bail is not available as a matter of
right, subsequent to the entry of the plea. (To Defense Counsel)
Has bail been discussed with the defendant?
Court: Is it correct, (Defendant), that as your attorney said, you
want to plead guilty to [offenses Defendant is pleading guilty to]?
(Have the Defendant sworn in. Remind the Defendant of the pen-
alties for perjury.)
Court: What is your full name and address? Is this your true
name?
Court: How old are you? (If Defendant is under 21, inquire about
Defendant's parents and their location. If parents are present,
make sure they state their names and addresses for the record. In
addition, ask if the Defendant has discussed the decision to enter a
plea of guilty with his or her parents.)
Court: How much education do you have?
Court: Can you read and write English? (If there is any suggestion
of a language barrier, the court should appoint an interpreter.)
Court: What kind of work or occupation have you engaged in dur-
ing your lifetime?
Court: Are you currently under the care of a physician for any
reason?
Court: Have you ever been or are you now under the care of a psy-
chiatrist or psychologist? Have you ever been treated for any
mental illness? (If so, find out what type of mental illness the De-
fendant has been or is being treated for and obtain statements
from the Defendant and Defense Counsel that there is no question
concerning competency at this time.)
Court: Have you ever been treated or confined for narcotic or drug
addiction?
Court: Do you feel in good physical and mental health as you stand
here today?
Court: Have you taken any drugs or alcoholic beverages within the
last 24 hours?
Court: Do you feel that you have had ample time to consult with
your attorney before deciding to plead guilty?
Court: Are you satisfied with the services of your attorney?
Court: I am going to read the [indictment, information or com-
plaint] to you so that you will understand the offense[s] charged.
(Court reads the charging instrument. Defendant or Defense Coun-
sel may waive reading of the same.)
Court: If you choose to go to trial rather than enter a plea of guilty
you could be found guilty of these lesser included offenses: (Ex-
plain any applicable lesser-included offenses.)
Court: Do you understand the nature of the charges brought
against you?
Court: You have the right to remain silent at a trial. But by plead-
ing guilty you waive that right. Before accepting your plea, I must
be satisfied that you in fact committed the offense[s] charged. Do
you wish to waive the right to remain silent?
Court: Is this what you did? (Again, briefly paraphrase the
charge[s].)
Court: Explain in your own words what you did.

[Note: If the Defendant wishes to enter an Alford plea, i.e., enter-
ing a guilty plea while maintaining his innocence, the following
questions should be asked:
Court: Do I understand correctly that you want to plead guilty
but you will give no factual account of guilty conduct?
Court: Please explain why you are pleading guilty, because the
court is not disposed to accept the plea unless it is satisfied that
you are doing this after great reflection and for sound reasons.]

Court: The court wants to advise you that under the law you could
be sentenced to a maximum of ______ years in prison; or, alterna-
tively the court in its discretion may sentence you to a lesser term;
or the court may place you on probation. (Also explain the
mandatory minimum sentence, if any, and the following special
circumstances that may affect defendant’s probation or release
from incarceration:

a). additional two to ten (2-10) years imposed for armed of-
fenses; four to twenty (4-20) years if second armed conviction;
b). additional sentences for armed offenses to run
consecutively;
c). that if the defendant is convicted of a second deliberate
homicide he will, if sufficient mitigating circumstances are not
found, be sentenced to death;
d). possibility of being ineligible for parole or participation in
prison furlough programs;
e). possible designation as dangerous or nondangerous of-
fender, with difference of serving either one-half or one-quarter of
the sentence term, less good time.)
Court: Does the State intend to seek treatment of the Defendant
as a persistent felony offender? (The Defendant should be in-
formed that if he is designated a persistent felony offender, he
must be imprisoned for at least five years.)
Court: (Defendant), by pleading guilty you are “waiving”—and by
“waiving” I mean “giving up”—several guarantees set forth in the Constitution. You have a right to a speedy and public trial, and this includes the right to a trial by jury. You also have the right to insist that the State establish your guilt of the offense at trial beyond a reasonable doubt. If a trial were to be held, you would have a right to testify. Also, if there were a trial, you would have a right to hear from the witnesses who claim that you committed (the offense charged). And, if there were a trial, you would be able to present witnesses of your own and to compel by the use of subpoenas the attendance at trial of these witnesses. Do you understand that by pleading guilty you are giving up all of these rights?

Court: (If written acknowledgment of waiver of rights has been filed, the court should say:) The court has before it a document entitled “Written Acknowledgment of Waiver of Rights.” Do you have a copy of this agreement?

Court: Did you sign it?

Court: Did you read it before you signed it?

Court: Do you understand the information set forth on that agreement?

Court: Do you have any questions about any of the terms contained in the agreement?

Court: Do you also understand that by pleading guilty you are giving up the right to object to the sufficiency of the papers charging you with [the offenses charged]? Do you also understand that by pleading guilty you are giving up the right to object to any evidence that may have been obtained in violation of your constitutional rights?

Court: Are you satisfied that you would prefer to plead guilty rather than raise any possible defenses?

Court: (To Defense Counsel) Have you discussed possible defenses with the Defendant?

Court: (To Defense Counsel) What defenses have you discussed with the Defendant?

Court: Are you (Defendant) convinced that you prefer to plead guilty rather than proceed to trial?

Court: Is the plea of guilty which you are offering to enter the result of a plea agreement that was arrived at between your attorney and the prosecutor? (Require Defense Counsel and Prosecutor to reply also.)

Court: (To Defense Counsel and Prosecutor) Are there any documents which set forth the terms of the agreement and which should be considered by the court?

Court: Since a plea agreement has been reached, I would like to
request that the attorneys for the prosecution and defense disclose to me at this time what discussions were held, the terms and conditions of the plea agreement, and the reasons for it.

Court: [Defendant], is this your understanding of the plea agreement?

Court: Does this comprise all the terms of the plea agreement, as you understand them?

Court: The terms of the plea agreement are not binding on this court. That is, the court can later refuse to grant sentence [and/or charge] reductions set forth in the plea agreement that have been agreed upon between your attorney and the Prosecutor. Do you understand that?

Court: Are there any questions you want to ask about the consequences or implications of your guilty plea? Or about any proceedings here?

Court: Has any person promised or suggested to you that you will be rewarded in any manner other than the terms of the plea agreement?

Court: Has any person used any threats, force, pressure, or intimidation to make you enter this plea of guilty?

Court: Are you entering this plea voluntarily and of your own free will?

Court: Has anyone—and I include the court, the County Attorney, your attorney, the police, or anyone else—threatened you or coerced you or in any way influenced you against your own free will in order to get you to plead guilty?

Court: Is there anything which you have said that is not true or which you now want to retract?

Court: Do you wish to reaffirm everything that you have said?

Court: The court finds that you, [Defendant], understand the nature of the offense and the consequences of your plea, and there is a factual basis for the plea, and that your decision to plead guilty has been made voluntarily of your own free will and accord.

Court: The plea of guilty is accepted.

Court: [Defendant], you are advised that you may request a withdrawal of the plea at any time before sentencing is announced, and if you have any sound reason for it, I will grant your request.