Entry of the Plea of Guilty in Texas: Requirements and Post-Conviction Review

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by

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IN the Spring of 1975 attempts were made, both by judicial opinion and legislative amendment, to insulate the plea of guilty from post-conviction attack. The Texas Court of Criminal Appeals declared a new rule for post-conviction review of the plea, and the legislature adopted new rules for both entry and post-conviction review of the plea. This Article discusses, in part I, the rules which were applied to entry and review of the plea prior to the Spring. In parts II and III it discusses the changes which were made to the rules in the Spring. Finally, in part IV, some due process issues which arise with respect to the changes are discussed.

I. THE STATUTE PRE-SPRING: REQUIREMENTS AND THE RULE OF FUNDAMENTAL ERROR

From the original Code of Criminal Procedure, enacted in 1856,[1] until the Code of Criminal Procedure of 1965,[2] as amended, to the Spring of 1975, the rule applied to the entry of a plea of guilty was singular:[3] No defendant

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1. *See* CODE OF CRIM. PROC. art. 474, officially reproduced in W. OLDHAM & G. WHITE, DIGEST OF THE LAWS OF TEXAS 623 (1859). The original Code of Criminal Procedure was prepared by a commission appointed by the legislature and was adopted at the adjourned session of the Sixth Legislature in 1856. *See* S. WILLSON, REVISED PENAL CODE AND CODE OF CRIMINAL PROCEDURE iii (2d ed. 1889) (introductory note).

2. TEX. CODE CRIM. PROC. ANN. art. 26.13 (1966).

3. Two distinctions must be made at this point. First, this discussion of the "entry of the plea of guilty" does not include references to the written waiver, in felony cases, of trial by jury and appearance, confrontation, and cross-examination of witnesses. *See* TEX. CODE CRIM. PROC. ANN. art. 1.15 (Supp. 1974). If a waiver is entered into in a given case and if the trial judge ascertains at that point that the waiver is voluntary and intelligent, then the problems with which the text concerns itself may to some extent be avoided. However, there is nothing in article 1.15 itself which indicates that the trial judge will do any more than is required by article 26.13 with regard to voluntariness and intelligence, except perhaps to explain that the rights described above are being waived. And if the trial judge does no more than that, the problems remain. Second, in certain places, and in Dallas County in particular, the defendant is required, in all cases in which a guilty plea is entered, to sign a statement that acknowledges the defendant's awareness of the rights of trial by jury, confrontation and cross-examination of accusers, and the privilege against self-incrimination, and that such rights are being waived voluntarily. In addition, the defendant's lawyer is required to make a statement on the record that the lawyer has explained the waiver of the rights to the defendant. Such a practice may also avoid some of the problems with which the text is concerned. It would seem, however, at the very least, that substantial problems still remain as to the defendant's understanding not of his or her procedural rights but, for example, of the penal consequences of the plea. *See* text accompanying notes 22-24, 80-84 *infra*.

could plead guilty unless he or she was "admonished by the court of the consequences" of the plea and unless it "plainly appear[ed]" that the defendant was "sane, and . . . uninfluenced by any consideration of fear, or by any persuasion, or delusive hope of pardon, prompting him to confess."[4] And from at least 1881 until the Spring of 1975, the rule applied to post-conviction review of a plea of guilty was singular, too: Unless each requirement of the statute had been satisfied and unless the record so reflected, the judgment entered upon the plea would be reversed,[5] regardless of whether the violation was raised on appeal or habeas corpus and regardless of whether it was assigned as error.[6] The rule applicable to post-conviction review will be referred to in this discussion as the rule of fundamental error.

The reason for the rule of fundamental error was explained in *Saunders v. State*,[7] the earliest official opinion construing the plea of guilty statute. The court of appeals there said that the statute's requirements were "conditions precedent"[8] to or "concomitants"[9] of a proper plea and that "[w]ithout their existence . . . the plea is no plea in law."[10] Any judgment based on such a plea would have to be reversed. Finally, the court said: "What the statute requires should be done in so important a matter as the plea in a felony case should not and cannot be left to inference, intendment or presumption; the facts which constitute the very gist of such a plea when prescribed must be made manifest of record."[11]

As one might suspect, litigation under the plea of guilty statute concerned itself for many years not with the rule of fundamental error but with what the trial judge was required to do at the time the plea was entered in order to comply with the statute. A brief summary of the opinions about such requirements follows.

With respect to the statutory requirement that the defendant plainly appear sane or mentally competent (hereinafter referred to as "the requirement about competency"), opinions contruing the plea of guilty statute have never required the trial judge to ask the defendant any particular questions, or indeed any questions at all, or to take evidence from anyone else, unless an issue as to the insanity or mental incompetency of the defendant was raised at the entry of the plea.[12] At the same time, however, the trial judge has been required to make a finding as to the defendant's sanity or mental

4. TEX. CODE CRIM. PROC. ANN. art. 26.13 (1966) [hereinafter the quoted portion will be referred to as "the plea of guilty statute"]. "Sane" was changed to "mentally competent" by ch. 399, § 2(A), [1973] Tex. Laws 969.

5. Saunders v. State, 10 Tex. Crim. 336, 338-39 (1881).

6. *See, e.g.*, Williams v. State, 415 S.W.2d 917 (Tex. Crim. App. 1967), *overruled, Ex parte* Taylor, 522 S.W.2d 479, 480 n.1 (Tex. Crim. App. 1975); Alexander v. State, 163 Tex. Crim. 53, 288 S.W.2d 779 (1956), *overruled, Ex parte* Taylor, 522 S.W.2d 479, 480 n.1 (Tex. Crim. App. 1975); May v. State, 151 Tex. Crim. 534, 209 S.W.2d 606 (1948), *overruled, Ex parte* Taylor, 522 S.W.2d 479, 480 n.1 (Tex. Crim. App. 1975).

7. 10 Tex. Crim. 336 (1881).

8. *Id.* at 338.

9. *Id.* at 339.

10. *Id.* at 338.

11. *Id.* at 339.

12. *See* Ring v. State, 450 S.W.2d 85, 87 (Tex. Crim. App. 1970); Zepeda v. State, 110 Tex. Crim. 57, 58-59, 7 S.W.2d 527, 528 (1928).

competency[13] and such finding has had to have been supported, at a minimum, by an adequate opportunity to observe the defendant during entry of the plea.[14] Further, in accordance with the rule of fundamental error, it has been required that the finding appear in the record.[15]

With respect to the requirement that the defendant plainly appear uninfluenced by fear, persuasion, or hope of pardon (hereinafter referred to as "the requirement about influences"), opinions construing the plea of guilty statute have been more demanding of the trial judge than those decisions dealing with the requirement about competency. Again, the opinions have not required the trial judge to ask the defendant any particular questions,[16] but some questioning by the trial judge[17] or some written statement by the defendant[18] has been required. Thus, mere observation of the defendant during entry of the plea has not sufficed.[19] Recent opinions in the court of criminal appeals have suggested that the trial judge question the defendant in the words of the statute.[20] When the trial judge has failed to use the words of the statute, the opinions on appeal have divided sharply over whether the questions asked touched upon each of the factors of fear, persuasion, and hope of pardon.[21] In any event, if the record did not sufficiently reflect the trial judge's questions or the defendant's statements, the rule of fundamental error has required reversal.[22]

With respect to the requirement that the trial judge admonish the defendant as to the consequences of the plea of guilty (hereinafter referred to as

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13. Taylor v. State, 88 Tex. Crim. 470, 479-82, 227 S.W. 679, 684-85 (1921) (on motion for rehearing); Coleman v. State, 35 Tex. Crim. 404, 33 S.W. 1083 (1896).

14. *Cf.* Lucero v. State, 502 S.W.2d 750, 753 (Tex. Crim. App. 1973); Williams v. State, 497 S.W.2d 306, 308 (Tex. Crim. App. 1973); White v. State, 495 S.W.2d 903, 905 (Tex. Crim. App. 1973).

15. *See* cases cited note 13 *supra.*

16. Wade v. State, 511 S.W.2d 7, 9 (Tex. Crim. App. 1974), *overruled on other grounds,* Guster v. State, 522 S.W.2d 494, 495 n.2 (Tex. Crim. App. 1975).

17. Rogers v. State, 479 S.W.2d 42, 43 (Tex. Crim. App. 1972), *overruled on other grounds, Ex parte* Taylor, 522 S.W.2d 479, 480 n.1 (Tex. Crim. App. 1975), and Guster v. State, 522 S.W.2d 494, 495 n.2 (Tex. Crim. App. 1975).

18. *See* Williams v. State, 522 S.W.2d 483, 484-85 (Tex. Crim. App. 1975).

19. *See* Rogers v. State, 479 S.W.2d 42 (Tex. Crim. App. 1972), *overruled on other grounds,* Guster v. State, 522 S.W.2d 494, 495 n.2 (Tex. Crim. App. 1975).

20. Mitchell v. State, 493 S.W.2d 174, 175 (Tex. Crim. App. 1973); Kane v. State, 481 S.W.2d 808, 809 (Tex. Crim. App. 1972).

21. Two contrasting cases should suffice to illustrate the division. In Mitchell v. State, 493 S.W.2d 174, 175 (Tex. Crim. App. 1973), the court divided 3-2 in deciding that the following questions satisfied the requirement about influences: "Are you pleading guilty because you are guilty and for no other reason? . . . Has anyone threatened you to force you to plead guilty? . . . Anyone promised you anything to induce you to plead guilty?" But in Wade v. State, 511 S.W.2d 7, 8 (Tex. Crim. App. 1974), *overruled on other grounds,* Guster v. State, 522 S.W.2d 494, 495 n.2 (Tex. Crim. App. 1975), the court divided 4-1 in deciding that the following questions did *not* satisfy the requirement: "Are you pleading quilty [*sic*] because you are guilty and for no other reason? . . . Has anyone held out any hope of pardon or promise of reward in order to get you to plead guilty?" Presiding Judge Onion and Judge Roberts, who dissented in *Mitchell* and who concurred in *Wade,* believe that each of the factors of fear, persuasion, and hope of pardon must be clearly, if not expressly, touched upon in the trial judge's questions. Bosworth v. State, 510 S.W.2d 334, 336, 344 (Tex. Crim. App. 1974) (dissenting opinions). A commentator has described the court's opinions as adopting a " 'substantial compliance' interpretation" of the statutory requirements. Bubany, *Criminal Law and Procedure, Annual Survey of Texas Law,* 29 Sw. L.J. 284, 314 (1975).

22. *See, e.g.,* Wade v. State, 511 S.W.2d 7 (Tex. Crim. App. 1974), *overruled,* Guster v. State, 522 S.W.2d 494, 495 n.2 (Tex. Crim. App. 1975).

"the requirement about consequences"), opinions construing the statute have been demanding of the trial judge, too. The trial judge has been required to inform the defendant of "the range of punishment provided by law within which the Court would assess punishment upon his plea of guilty."[23] Recent opinions, again splitting the court of criminal appeals sharply, have recognized an exception to the rule of fundamental error, declaring that even if the trial judge has misinformed the defendant as to the range of punishment, the judgment entered upon the plea would not be reversed if the error were harmless, that is, if the error "could not have misled [the defendant] to his detriment."[24]

In sum, regardless of some differing views as to how much or how little the trial judge has been required to do at the entry of the plea of guilty, it was clear until the Spring that at least certain minima were required to make sure that the "conditions precedent" to or "concomitants" of the plea of guilty were met, and the rule of fundamental error required that those minima appear of record.

II. THE STATUTE IN THE SPRING: JUDICIAL ABANDONMENT OF THE RULE OF FUNDAMENTAL ERROR; ONE RULE OF PREJUDICIAL ERROR

In the Spring of 1975 the court of criminal appeals abandoned the rule of fundamental error with regard to the requirements about influences and consequences. The opinions decided, in effect, that even should the trial judge not "fully" satisfy those requirements, a judgment based upon the plea of guilty would not be reversed on appeal or habeas in cases in which the defendant had made no objection to the trial judge unless the defendant could show prejudice. Thus, the court adopted what we shall call "the rule of unasserted prejudicial error."

With respect to the requirement about influences, two opinions declared the rule of unasserted prejudicial error. In *Williams v. State*[25] the trial judge had questioned the defendant about any promise of leniency or pardon but not about any influence of fear.[26] In the court of criminal appeals two judges believed that the trial judge's questions had not satisfied the statute and that the rule of fundamental error required reversal;[27] one judge believed that the trial judge's questions had satisfied the statute.[28] The latter, however, joined the opinion of two other judges,[29] which opinion decided that since the claim had not been asserted as error on appeal, it could not be reviewed "unless prejudice or injury is shown."[30] In *Guster v. State*[31] the

23. Reed v. State, 500 S.W.2d 137, 138 (Tex. Crim. App. 1973).
24. Cameron v. State, 508 S.W.2d 618, 619 (Tex. Crim. App. 1974) (Onion, P.J., and Roberts, J., dissenting); Jorden v. State, 500 S.W.2d 117, 118 (Tex. Crim. App. 1973) (Onion, P.J., and Roberts, J., dissenting); Valdez v. State, 479 S.W.2d 927, 928 (Tex. Crim. App. 1973) (Onion, P.J., concurring).
25. 522 S.W.2d 488 (Tex. Crim. App. 1975).
26. *Id.* at 488 n.1, 489-90 (concurring opinion).
27. *Id.* at 492-94 (Roberts, J., dissenting, joined by Onion, P.J.).
28. *Id.* at 489-92 (Douglas, J., concurring).
29. *Id.* at 488-89 (Odom, J., for the court, joined by Morrison and Douglas, JJ.).
30. *Id.* at 489.
31. 522 S.W.2d 494 (Tex. Crim. App. 1975).

defendant was questioned about any influence of "threat" or promise of leniency or pardon, but not about fear or persuasion.[32] In the court of criminal appeals the judges divided as they had in *Williams* with respect to whether the trial judge's questions had satisfied the statute.[33] Again, three judges joined[34] in an opinion which decided that since the claim had not been asserted as error in the trial court, it could not be reviewed without a showing of prejudice or injury.[35]

With respect to the requirement about consequences, one opinion expressly and two opinions impliedly declared the rule of unasserted prejudicial error. In *Ex parte Taylor*[36] the trial judge mistakenly informed the defendant that the maximum penalty for the offense to which he was pleading was life when, in fact, the maximum penalty was death.[37] The opinion of the court of criminal appeals did not discuss whether the violation of the statute was harmless. Instead, the opinion decided that since the claim was raised on habeas, it could not be reviewed unless there was "a showing that [the] defendant was prejudiced or injured."[38] Two judges dissented, stating that the statute had not been satisfied and that, therefore, the rule of fundamental error required reversal.[39] In *Tellez v. State*[40] the trial judge omitted to inform the defendant that he was subject to fine in addition to imprisonment.[41] The court of criminal appeals affirmed the judgment, but the basis of the opinion is not clear. It may be that the violation of the statute was believed harmless.[42] It may also be, however, that the violation, even if possibly harmful, could not be reviewed on appeal where no objection had been made to the trial judge, unless the harm was affirmatively shown.[43] Subsequently, the court of criminal appeals in *Walker v. State*[44] described *Tellez* as a case in which the statutory violation was harmless.[45] Thus, *Tellez* cannot be viewed as abandoning the rule of fundamental error. However, in the same opinion, the court of criminal appeals described *Guster,* which is discussed above with regard to the requirement about influences,[46] as

32. *Id.* at 495 n.1 and 495-97 (concurring opinion).
33. Two judges believed that the statute had not been satisfied. *Id.* at 498-500 (Onion, P.J., dissenting, joined by Roberts, J.). One believed that the statute had been satisfied. *Id.* at 495-97 (Douglas, J., concurring).
34. *Id.* at 494-95 (Odom, J., for the court, joined by Morrison and Douglas, JJ.).
35. *Id.* at 495.
36. 522 S.W.2d 479 (Tex. Crim. App. 1975).
37. *Id.* at 480.
38. *Id.*
39. *Id.* at 481-82 (Onion, P.J., dissenting) and at 482-83 (Onion, P.J., and Roberts, J., dissenting).
40. 522 S.W.2d 500 (Tex. Crim. App. 1975).
41. *Id.* at 500-01.
42. The court noted: "Defense counsel wrote in his brief that the trial court, 'although not complying with the exact wording of Article 26.13 [the plea of guilty statute] . . . did substantially comply with said article.'" *Id.* at 501; *see* note 24 *supra* and accompanying text.
43. The court responded to the dissenting opinion, in part, as follows: "It [the dissenting opinion] does not attempt to show why this statute, where no harm has been claimed, should be given some sort of special interpretation or status when harm has to be shown if other mandatory statutes and constitutional provisions are not followed to the letter." 522 S.W.2d at 502.
44. 524 S.W.2d 712 (Tex. Crim. App. 1975).
45. *Id.* at 713.
46. *See* note 31 *supra* and accompanying text.

applicable to the requirement about consequences.[47] Accordingly, it can be said that the court was of the opinion that a trial judge's possibly harmful violation of the statute with regard to the requirement about consequences could not be reviewed on appeal where no objection was made to the trial judge, unless some harm was affirmatively shown.

With the approach of the Summer, the court drew a bottom line under the opinions decided in the Spring. In *Walker v. State*[48] the trial judge had wholly failed to admonish the defendant of the range of his possible punishment. Notwithstanding the fact that apparently no objection had been made to the trial judge, the court decided that the violation of the statute was available for review, and the judgment entered upon the plea was reversed. The only rationale offered by the court was that *Walker* differed from the opinions based upon the rule of unasserted prejudicial error, because a total failure to admonish the defendant was not involved in any of those opinions.[49]

None of the opinions described above appeared to have abandoned the applicability of the rule of fundamental error to the requirement about competency.[50] Thus, were the Spring opinions of the court of criminal appeals the end of the story, there would have been two rules applicable to post-conviction review of violations of the plea of guilty statute: The rule of fundamental error would have been applicable to the requirement about competency, and the rule of unasserted prejudicial error would have been applicable to the requirements about influences and about consequences.

III. THE STATUTE IN THE SPRING: LEGISLATIVE REVISION OF REQUIREMENTS AND A SECOND RULE OF PREJUDICIAL ERROR

Also during the Spring of 1975 the legislature substantially amended the plea of guilty statute, both with regard to what the trial judge was required to do at the entry of the plea and what rule was to be applied on post-conviction review.[51]

With respect to what the trial judge must do at the colloquy, the new plea of guilty statute provides in section (a) that the trial judge shall admonish the defendant not only as to the range of punishment (hereinafter referred to as "the requirement about punishment"), but also as to the non-binding effect of the prosecutor's recommendation about punishment[52] (hereinafter referred to as "the requirement about the prosecutor's recommendation"). In section (b) the new statute provides, as had the old statute, that it must

47. 524 S.W.2d at 713.
48. *Id.* at 712.
49. *Id.* at 713-14.
50. *See* text accompanying notes 12-15 *supra.*
51. Ch. 341, § 3, [1975] Tex. Laws 909, *amending* TEX. CODE CRIM. PROC. ANN. art. 26.13 (Supp. 1974).
52. TEX. CODE CRIM. PROC. ANN. art. 26.13(a), which provides:

> (a) Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of:
>
> (1) the range of punishment attached to the offense; and
>
> (2) the fact that any recommendation of the prosecuting attorney as to punishment is not binding on the court.

plainly appear to the trial judge that the defendant is mentally competent.[53] However, no longer must it plainly appear that the defendant is uninfluenced by fear, persuasion, or hope of pardon; instead, it must plainly appear that the plea is "free and voluntary"[54] (hereinafter referred to as "the requirement about voluntariness"). The new statute thus ends the controversy as to whether each of the factors of fear, persuasion, and hope of pardon must be touched upon by the trial judge's questions and, by substituting words which are terms of art in criminal procedure, seemingly gives the trial judge more freedom to frame whatever questions will best determine freedom and voluntariness. Clearly, however, given the prior construction of the requirement about influences,[55] a proper construction of the new statute would require that the trial judge ask some questions to determine the freedom and voluntariness of the plea.

With respect to the rule or rules to be applied on post-conviction review, the new statute leaves us somewhat confused. In section (c)[56] the new statute provides a rule of post-conviction review which curiously seems applicable only to the requirement about punishment[57] and more curiously does not seem to negate the applicability of other rules of post-conviction review. Section (c) provides that if the trial judge's admonishment about the range of punishment is in "substantial compliance" with the sentencing statute, then the judgment entered upon the plea will not be reversed unless "the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court"[58] (hereinafter referred to as "the rule of substantial compliance/prejudicial error").

Section (c) thus gives us a rule applicable when the trial judge is in "substantial compliance" with the sentencing statute. But what if the trial judge is not in substantial compliance? Does the rule of fundamental error apply? It would seem that the answer should be affirmative. Yet, what if the trial judge is not in substantial compliance, and the defendant does not object? It is not clear whether the rule of unasserted prejudicial error would apply. If the rule of unasserted prejudicial error applies only when the trial

53. *Id.* art. 26.13(b), which provides in relevant part: "(b) No plea of guilty or plea of nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent . . . ."

54. *Id.*, which provides in relevant part: "(b) No plea of guilty or plea of nolo contendere shall be accepted by the court unless it appears that . . . the plea is free and voluntary."

55. *See* text accompanying notes 16-19 *supra.*

56. TEX. CODE CRIM. PROC. ANN. art. 26.13(c) (Supp. 1974).

57. *Id.* provides: "(c) In admonishing the defendant as herein provided, substantial compliance by the court is sufficient, unless the defendant affirmatively shows that he was not aware of the consequences of his plea and that he was misled or harmed by the admonishment of the court." Section (c)'s initial reference to the trial judge's "admonishing" of the defendant seems to be a reference to the defendant's awareness of the "consequences of his plea" and, thus, seems to limit section (c)'s effect to the trial judge's admonishment about the range of punishment alone. There probably is enough ambiguity in section (c), however, for the court of criminal appeals to extend its effect to the admonishment about the non-binding effect of the prosecutor's recommendation about punishment. Since a legislative proscription of post-conviction review should be more explicit, it would seem sounder, however, not to so extend section (c).

58. *Id.*

judge does not "fully"[59] yet does "substantially" comply with the sentencing statute, then clearly the rule of unasserted prejudicial error and the rule of substantial compliance/prejudicial error overlap, and only the rule of fundamental error applies to the trial judge's failure to substantially comply with the sentencing statute. But if the rule of unasserted prejudicial error applies when the trial judge does not "substantially" comply with the sentencing statute, then two rules are operative—the rule of substantial compliance/prejudicial error when the trial judge substantially complies and the rule of unasserted prejudicial error when the trial judge does not substantially comply.[60]

As if this confusion were not enough, the new statute leaves us uninformed about what rule or rules of post-conviction review are applicable to the other requirements of the new statute. If the trial judge does not satisfy the requirement about the prosecutor's recommendation,[61] does the rule of fundamental error apply? Or does the rule of unasserted prejudicial error apply? If the Spring opinions of the court of criminal appeals with respect to the requirement about consequences are any indication, then a total failure to admonish the defendant that the prosecutor's recommendation is not binding will be available on review.[62] A less than total failure will be subject to the rule of unasserted prejudicial error.[63] If the trial judge does not satisfy the requirement about voluntariness,[64] does the rule of unasserted prejudicial error apply? Again, if the Spring opinions of the court of criminal appeals with respect to the requirement about influences are any indication, then absent a total failure to satisfy the statute, the rule of unasserted prejudicial error would apply.[65] Finally, if the trial judge does not satisfy the requirement about competency, does the rule of fundamental error apply? The answer would seem to be affirmative until the rule of unasserted prejudicial error or some other rule is held applicable to the requirement.[66]

In short, it seems that the rule of substantial compliance/prejudicial error and either the rule of fundamental error or the rule of unasserted prejudicial error may be applicable to the requirement about punishment; the rule of unasserted prejudicial error may be applicable to the requirements about the prosecutor's recommendation and voluntariness; and the rule of fundamental error is still applicable to the requirement about competency.

IV. Some Due Process Issues

Whether the above rules validly restrict post-conviction review is subject to some doubt. The doubt's source is the due process clause of the United States

59. *See* text preceding note 25 *supra*.
60. If the trial judge fails *totally* to comply with the sentencing statute, then reversal would be required by the opinion in Walker v. State, 524 S.W.2d 712 (Tex. Crim. App. 1975). If the trial judge does not substantially comply with the sentencing statute and the defendant objects, the error, assuming that it was not corrected at trial, would be available for review in the normal course.
61. *See* note 52 *supra* and accompanying text.
62. *Cf.* text accompanying notes 48-49 *supra*.
63. *Cf.* text accompanying notes 36-47 *supra*.
64. *See* note 54 *supra*.
65. *See* text accompanying notes 25-35 *supra*.
66. *See* text accompanying notes 12-15 *supra*.

Constitution[67] and, in particular, the clause's construction in and following the Supreme Court's opinion in *Boykin v. Alabama*.[68]

In *Boykin* the record with respect to the entry of the plea of guilty was silent as to whether the defendant, before he pleaded guilty, was asked any questions by the trial judge.[69] The record was silent, too, as to whether the defendant objected to the trial judge's failure.[70] Since in Alabama the plea of guilty apparently consisted of a waiver of the privilege against self-incrimination and the rights to trial by jury and confrontation and cross-examination of accusers,[71] the Court held that due process required that the record show that the entry of the plea was voluntary and intelligent.[72] The Court held further that the voluntary and intelligent waiver of rights could not be presumed from a silent record,[73] and accordingly it reversed the judgment based upon the entry of the plea of guilty.[74]

Boykin superficially resembles *Walker v. State*.[75] In both *Boykin* and *Walker* the trial judge failed to ask the defendant questions—any questions at all in *Boykin* and any questions with respect to the requirement about consequences in *Walker*. In both cases, the defendants failed to object, and in both cases the courts reviewed the claim. But the resemblance is only superficial and the distinction between the two cases illustrates the due process problems of the rule of unasserted prejudicial error. In *Boykin* the failure to object was irrelevant. What was relevant was, in the words of a later opinion by the Supreme Court, "that the record [failed to] affirmatively disclose that [the] defendant who pleaded guilty entered his plea understandingly and voluntarily."[76] In *Walker*, notwithstanding the fact that a plea of guilty in Texas is at least a waiver of the privilege against self-incrimination and the right to trial by jury on the issue of guilt, and often a waiver of the right of confrontation and cross-examination of accusers,[77] the court of criminal appeals did not attempt to construe the plea of guilty statute in such a way that records which did not affirmatively disclose a

67. U.S. CONST. amend. XIV.
68. 395 U.S. 238 (1969).
69. *Id.* at 239.
70. *Id.* at 239, 246 (Harlan, J., dissenting).
71. *Id.* at 243. The Court did not cite any Alabama cases. For a comment upon the Court's disregard of state law in deciding the effect of a plea of guilty, see Cogan, *Guilty Pleas: Weak Links in the "Broken Chain,"* 10 CRIM. L. BULL. 149 (1974).
72. 395 U.S. at 242.
73. *Id.* at 243.
74. The "record" has not been limited to the record of the plea of guilty colloquy but has included the record made at post-conviction review. *See, e.g.*, Wilkins v. Erickson, 505 F.2d 761, 765 (9th Cir. 1974); Todd v. Lockhart, 490 F.2d 626, 627-28 (8th Cir. 1974); McChesney v. Henderson, 482 F.2d 1101, 1107-09 (5th Cir. 1973).
75. 524 S.W.2d 712 (Tex. Crim. App. 1975); *see* text accompanying notes 48-49 *supra*.
76. Brady v. United States, 397 U.S. 742, 747-48 n.4 (1970).
77. In a felony case, a plea of guilty before a jury admits the existence of all facts necessary to establish guilt; the introduction of testimony by the state is for the jury's benefit in fixing punishment. Miller v. State, 412 S.W.2d 650, 651 (Tex. Crim. App. 1967). In a felony case, upon a plea of guilty before a court without jury, the state must introduce evidence into the record showing the guilt of the defendant. TEX. CODE CRIM. PROC. ANN. art. 1.15 (Supp. 1974); Miller v. State, 412 S.W.2d 650, 651 (Tex. Crim. App. 1967). In a misdemeanor case, the state need not introduce evidence into the record showing the guilt of the defendant. Brown v. State, 507 S.W.2d 235, 237-38 (Tex. Crim. App. 1974).

voluntary and intelligent plea necessarily would be reviewed, and that judgments entered upon such pleas necessarily would be reversed. Instead, the court reiterated the importance of a defendant's failure to object by noting the continued validity of the rule of unasserted prejudicial error and by distinguishing its applicability to a case where the trial judge asked no questions with respect to the requirement about consequences.

The rule of unasserted prejudicial error may thus prevent review of a record which does not affirmatively disclose the entry of a voluntary and intelligent plea. This will happen in cases where the trial judge, although not totally failing in his or her duty, does fail to ask certain questions or make certain statements, and thereby creates a record insufficient to show the entry of a voluntary and intelligent plea; nonetheless, the defendant cannot show prejudicial error and thus cannot gain review.[78] In a similar way, the rule of substantial compliance/prejudicial error may prevent review of a record which does not affirmatively disclose a voluntary and intelligent plea. This will happen in cases where the trial judge substantially complies with the sentencing statute, but because of some error or omission the record is insufficient to show the entry of a voluntary and intelligent plea; nonetheless, the defendant cannot show prejudicial error and thus cannot gain review.[79] The following discussion illustrates the failure of the court and legislature to coordinate rules of post-conviction review with due process.

With respect to the intelligence of the plea of guilty, for example, due process has been held to require that the defendant be informed of "the outer limits of the penalty" for the charge to which he or she is pleading.[80] The new plea of guilty statute so requires, too.[81] But its preclusion of post-conviction review where the trial judge only substantially complies with the sentencing statute, unless the defendant shows prejudice, would violate due process if the judge's substantial compliance by itself is insufficient to affirmatively show an intelligent plea.[82] Similarly, under the assumption that the rule of unasserted prejudicial error is applicable to the requirement about punishment,[83] the preclusion of post-conviction review where the trial judge fails to "fully" comply with the statute and the defendant fails to object, unless the defendant shows prejudice, would also violate due process if the judge's failure results in a record insufficient to affirmatively show the entry of an intelligent plea.[84]

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78. Presumably, this does not include cases in which the trial judge makes a mistake or omission of such minor consequence that the entry of the plea cannot be said to be involuntary or unintelligent. *Cf.* United States v. Blair, 470 F.2d 331, 340 n.20 (5th Cir. 1972), *cert. denied*, 411 U.S. 908 (1973). *But cf.* Santobello v. New York, 404 U.S. 257, 262-63 (1971).

79. *See* note 78 *supra.*

80. United States *ex rel.* Hill v. Ternullo, 510 F.2d 844, 847 (2d Cir. 1975); United States *ex rel.* Leeson v. Damon, 496 F.2d 718, 721-22 (2d Cir.), *cert. denied*, 419 U.S. 954 (1974); United States v. Richardson, 483 F.2d 516, 519 (8th Cir. 1973); Wade v. Wainwright, 420 F.2d 898, 900 (5th Cir. 1969). *See also* United States v. Martinez, 486 F.2d 15, 21 n.10 (5th Cir. 1973).

81. *See* text accompanying note 52 *supra.*

82. *See, e.g.*, Wade v. Wainwright, 420 F.2d 898, 900 (5th Cir. 1969).

83. *See* text accompanying notes 59-60 *supra.*

84. *See, e.g.*, Wade v. Wainwright, 420 F.2d 898, 900 (5th Cir. 1969).

With respect to the voluntariness of the plea of guilty, due process does not require that the trial judge perform any particular ritual when the plea is entered.[85] But clearly due process does require that the trial judge make some inquiry or that the defendant make some statement so that the record affirmatively shows the entry of a voluntary plea.[86] The new plea of guilty statute requires such an inquiry by the trial judge.[87] However, should the court of criminal appeals decide that the rule of unasserted prejudicial error applies to post-conviction review of the requirement about voluntariness, then due process again would be violated if the record does not affirmatively show a voluntary plea of guilty.[88]

V. CONCLUSION

To some extent the court of criminal appeals and the legislature have succeeded in insulating the plea of guilty from post-conviction attack by clarifying what the trial judge must do at the time the plea of guilty is entered and by giving the trial judge more flexibility with respect to such tasks. To a large extent, however, they have failed. There is no clear indication of which rules of post-conviction review apply to most, if not all, the requirements of the new plea of guilty statute. Moreover, the rules which have been developed cannot be said to consistently stay within due process limitations. Hopefully, the opportunity of the court of criminal appeals to write upon the clean slate of the new statute will result in rules of post-conviction review which are both clear and consistent with due process.

85. *Cf.* Jenkins v. United States, 420 F.2d 433 (10th Cir. 1970) (FED. R. CRIM. P. 11).
86. Boykin v. Alabama, 395 U.S. 238, 242-43 (1969).
87. *See* text accompanying note 54 *supra.*
88. *See* Brady v. United States, 397 U.S. 742, 747-48 n.4 (1970); Boykin v. Alabama, 395 U.S. 238, 242-43 (1969).

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