The Changing Role of the Trial Judge in Criminal Cases — Ensuring that the Sixth Amendment Right to Assistance of Counsel is Effective

*Frank J. Remington**

It is important to the criminal justice system that defendants be effectively represented. Increasingly, the law asks trial judges to take steps to ensure that defendants are able to make appropriately informed decisions. This Article suggests that too much is being asked of trial judges and not enough is being asked of defense counsel who must bear primary responsibility.

INTRODUCTION

Donald Newman's book, *Conviction*,[1] was published twenty years ago. *Conviction* was a product of the American Bar Foundation's *Survey of the Administration of Criminal Justice in the United States*. The survey examined criminal justice administration in Michigan, Kansas, and Wisconsin emphasizing the guilty plea process, which researchers previously had given little attention.[2] In the Foreword I wrote: "Cer-

---

*Jackson Professor of Law, University of Wisconsin. B.S. 1947, LL.B. 1949, University of Wisconsin. Michael Bauer, Lucille Hamre, and Diane Roessler assisted in the preparation of this Article.

I have known Ed Barrett for many years. We first worked together when the Advisory Committee on the Federal Rules of Criminal Procedure was reactivated in 1960. At that time I was a member of the committee; Ed Barrett was the reporter. Ed was an excellent reporter. After a few years, we switched places. He joined the committee; I became the reporter. We continued to work together during the years that followed. There are people who know a lot; there are those who it is fun to be with. With Ed Barrett, it was both.

[1] D. NEWMAN, CONVICTION (1966).

[2] *See id.* at 7 (transcript of the taking of a guilty plea several decades ago in a Michigan court; entire proceeding reported in a single page).

HeinOnline -- 20 U.C. Davis L. Rev. 339 1986-1987

tainly what is said in this volume demonstrates that the conviction process [and] the role of the trial judge . . . are much more complex than has generally been assumed, and that they deserve more attention than they have been given in the past."[3]

About the time of *Conviction*'s publication, Ed Barrett was Reporter to the Advisory Committee on the Rules of Criminal Procedure of the Judicial Conference of the United States. In that capacity, he recommended greater attention to the trial judge's responsibility in accepting guilty pleas. In 1966,[4] an amendment to rule 11 made explicit the judge's responsibility to determine that the plea was made voluntarily with an understanding of the charge. The amendment required the judge to address the defendant personally (rather than relying upon defense counsel's representations), and to ensure that the defendant understood the plea's consequences. The amendment also required a factual basis for the plea.

These changes, inspired by Ed Barrett, began a trend imposing increasing responsibility on judges to ensure that criminal defendants' decisions to plead guilty were knowledgeable. Judges today must explain the charge and the consequences of conviction, and must review and approve or reject any plea agreement.[5] The increased responsibility of trial judges is not limited to the process of pleading guilty. They also are asked to ensure that defendants receive adequate assistance of counsel in other ways, and this trend toward increased trial judge responsibility continues today.

Despite the changes, the trial judge's role has received little analysis, especially as to the judge's responsibility to ensure that defendants are effectively represented.[6] For example, the *ABA Standards for Crimi-*

---

[3] *Id.* at xv. In H. LUMMUS, THE TRIAL JUDGE (1937), the discussion of the trial judge's role focuses entirely on the trial process, guilty pleas, and sentencing, but no effort is made to analyze the trial judge's role in criminal cases.

[4] FED. R. CRIM. P. 11 (1966 amendment).

[5] The increased requirements are reflected in rule 11 of the Federal Rules of Criminal Procedure, which has had a substantial impact on the requirements adopted in the state courts. Rule 11's history and increased complexity are discussed in United States v. Dayton, 604 F.2d 931 (5th Cir. 1979).

[6] A review of the literature does not indicate any attempt to analyze the role of the trial judge in the criminal justice system with the same care that has been given to the roles of police and prosecutors. The American Bar Association has a group of standards on the judge's special functions, but they do not deal with the threshold question of what functions the trial judge should be expected to perform. AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE § 6-1.1 (2d ed. 1980) [hereafter ABA STANDARDS] assumes that the judge is dealing with the adversary proceeding at trial. It is true that other standards deal with issues such as bail, pleas of quality, and sentenc-

HeinOnline -- 20 U.C. Davis L. Rev. 340 1986-1987

nal Justice, Special Functions of the Trial Judge, asserts a general responsibility to safeguard "both the rights of the accused and the interests of the public."[7] But no indication exists of any special judicial responsibility to ensure that defendants are effectively represented, and no effort has been made to define that responsibility's scope. The lack of critical analysis of the trial judge's role contrasts with important efforts to analyze the police's role, especially Herman Goldstein's pioneering work,[8] and the prosecutor's function.[9]

---

ing, but no effort is made to analyze overall the judge's role in current criminal justice administration. Most law review discussion of nontraditional trial responsibilities focuses on sentencing and the judge's role in plea bargaining. *See, e.g.*, Gillers, *The Judicial Function in Criminal Justice: A Report*, 55 N.Y. ST. B.J. 37 (1983); Schleisinger & Malloy, *Plea Bargaining and the Judiciary: An Argument for Reform*, 30 DRAKE L. REV. 581 (1980-81). The general literature concerning the trial judge's role includes Gautier, *Judicial Discretion to Intervene in the Course of the Trial*, 23 CRIM. L.Q. 88 (1980); Levine, *Preventing Defense Counsel Error — An Analysis of Some Ineffective Assistance of Counsel Claims and Their Implications for Professional Regulation*, 15 U. TOL. L. REV. 1275, 1426-35 (1984); Neeley, *Handicapped Advocacy: Inherent Barriers and Partial Solutions in the Representation of Disabled Children*, 33 HASTINGS L.J. 1359 (1982); Schwarzer, *Dealing With Incompetent Counsel — The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980).

[7] ABA STANDARDS, *supra* note 6, § 6-1.1.

[8] The role of the police has been the subject of extensive exploration in the past 20 years, based largely on a strong belief that greater clarity and agreement are essential before one can, with any confidence, begin to work on improving police operations. For example, the ABA STANDARDS FOR CRIMINAL JUSTICE, URBAN POLICE FUNCTION, first published in 1973, were prefaced with this comment:

> These standards are offered in the belief that greater understanding of the function of police in a democratic society is necessary if there is to be needed improvement in the quality of police service . . . . The police in this country have suffered from the fact that their role has been misunderstood, the fact that demands made upon them have been so unrealistic, and the fact that the public has been so ambivalent about the function of police.

Id. § 1.5. In contrast with the meager writings on the role of the trial judge, an enormous body of literature now exists on the role of the police. For some of the leading works, see E. BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY (1970); H. GOLDSTEIN, POLICING A FREE SOCIETY (1977); W. MUIR, POLICE: STREETCORNER POLITICIANS (1977).

Dramatic changes are occurring in the police's function and in public expectations. For example, police are taking the initiative in addressing community problems, often acting proactively to deal with these problems outside the criminal justice system. *See, e.g.*, Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 CRIME & DELINQ. 236 (1979). In the context of these changes, the police administrator's role has also been redefined, as she assumes responsibilities extending to many matters not previously considered part of the police job. W. GELLER, POLICE LEADERSHIP IN AMERICA: CRISIS AND OPPORTUNITY (1985).

[9] ABA STANDARDS, *supra* note 6, § 3-1.1 deals with the prosecutor's function solely

HeinOnline -- 20 U.C. Davis L. Rev. 341 1986-1987

This Article explores the extent to which the trial judge's proper role includes ensuring that criminal defendants receive effective assistance of counsel. It emphasizes five developments: the increasing requirements (A) in taking a guilty plea, (B) in explaining appeal and postconviction rights to convicted defendants, (C) in ensuring that defendants make informed decisions whether to submit lesser included offenses to the jury, (D) in ensuring presentence reports' adequacy and accuracy, and (E) in ensuring that a single lawyer representing two or more defendants has no conflict of interest.

The trend toward greater trial judge responsibility in these areas is particularly surprising because it occurred during the same period as the great increase in defense counsel availability to practically all defendants. One might have expected that the judge's burden of ensuring effective representation would have lessened rather than increased. The increased burden reflects two factors: (1) appellate court insistence on a record demonstrating that the defendant was adequately informed of her rights,[10] and (2) a belief that despite increased availability of counsel, the effectiveness of representation often remains inadequate.[11]

A. *The Requirements for Taking a Valid Guilty Plea*

Rule 11 of the Federal Rules of Criminal Procedure contains the requirements imposed on the trial judge to ensure that the defendant made a voluntary and informed decision to plead guilty. But whether the increased requirements' purpose is merely to create a record that will hopefully withstand appellate attack, or is also to ensure that defendants in fact make a fully informed decision, is unclear.

Preventing a record's attack on appeal is difficult, and perhaps impossible. In some cases, despite an incomplete record, persuasive extrinsic evidence exists that the defendant made a voluntary and informed plea because defense counsel in fact effectively assisted the client in the guilty plea process. The appellate court is pressured to affirm the con-

---

in initiating prosecutions without identifying other functions. Other sections address the prosecutor's role in sentencing and relationships with the police.

[10] *See, e.g.*, State v. Cecchini, 124 Wis. 2d 200, 210, 368 N.W.2d 830, 836 (1985):

> We thus conclude that in reviewing the constitutional validity of a guilty plea, the reviewing court may only look to the plea hearing transcript itself to determine whether the defendant possessed a constitutionally sufficient understanding of the nature of the charge. The court may not search the entire record for evidence of a knowing and voluntary waiver.

[11] Schwarzer, *supra* note 6, at 633.

HeinOnline -- 20 U.C. Davis L. Rev. 342 1986-1987

viction even though the record is inadequate.[12]

Also in some cases, despite a complete record, the guilty plea is involuntary and uninformed, usually because counsel ineffectively represented the client in the guilty plea process.[13] Trial judges know that some lawyers fail to fully explain or adequately evaluate the defendant's available options. Unhappily, a significant number of lawyers believe they know the client's interests better than the client.[14] Often what the lawyer thought was a "good deal" turns sour, as when probation is revoked and a prison sentence is imposed.[15]

Two questions arise in these situations. First, to what extent may the prosecution show that, despite an incomplete record, counsel was effective and the plea was voluntary and informed? Second, to what extent may postconviction defense counsel show that, despite an adequate record, trial counsel ineffectively assisted the defendant and thus the plea was not voluntary and informed?

---

[12] *Compare Cecchini*, 124 Wis. 2d at 200, 368 N.W.2d at 830 *with* the later cases of State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986) *and* State v. Carter, 131 Wis. 2d 69, 389 N.W.2d 1 (1986).

> In accordance with our holding in *Bangert*, we hold that the due process requirement of the federal constitution does not require that the record of the plea hearing demonstrate that the Defendant understood the nature of the charge at the time of the plea, but rather, it requires that the Defendant in fact understood the nature of the charge at the time of the plea.

Id. at 72, 389 N.W.2d at 2.

[13] *See, e.g.*, State v. Bartelt, 112 Wis. 2d 467, 334 N.W.2d 91 (1983), in which the conviction was reversed because the record failed to show that the court had adequately informed the defendant of the maximum possible penalty. The court was concerned primarily with the shortcomings of defense counsel,

> whom the defendant had not met until minutes before the guilty plea was entered . . . . [T]here was no advice given to Bartelt about the rights that he would waive by his plea of guilty, the penalty consequences that might follow the plea, nor any discussion of any defenses which might be posed at trial.

Id. at 469-70, 334 N.W.2d at 92.

[14] For example, many lawyers believe that they, rather than the client, should decide whether to request that lesser included offenses be submitted to the jury. However, this decision can significantly affect the likelihood of conviction of the more serious offense. The issue of lesser included offense requests is discussed later in this Article. For a general discussion of lawyer-client responsibility in decisionmaking, see Chused, Faretta *and the Personal Defense: The Role of a Represented Defendant in Trial Tactics*, 65 CALIF. L. REV. 636 (1977); Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 216-42 (1977); Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

[15] This is what happened in *Bartelt*. *See* 112 Wis. 2d at 467, 334 N.W.2d at 91.

HeinOnline -- 20 U.C. Davis L. Rev. 343 1986-1987

The trial judge's adequate inquiry at the postconviction motion hearing and adequate findings of fact may create an adequately supplemented record for appellate court review. But the result is a double burden on the trial judge—making an adequate record at the time the plea is taken and supplementing that record at the postconviction evidentiary hearing. To the extent that this is unsatisfactory, two alternatives seem possible.

First, trial judges can develop a more adequate record at the time of taking the guilty plea. The trial judge's responsibilities under rule 11 are increasing, but more is required if appellate courts are to be able to rely solely on the record. The judge not only must explain the elements of the offense, but must determine that the defendant understands the charge. The judge not only must explain the plea's consequences, but must determine that the defendant in fact understands those consequences. The judge not only must raise the plea agreement question, but must inquire whether other promises were made and whether the defendant understands the agreement, has made an informed decision, and knows that a "good deal" (*e.g.*, probation) may become a bad deal in the long run.[16]

Second, defense counsel can be given greater responsibility. Judges could question defense counsel to determine whether counsel devoted the time and effort necessary to ensure that the defendant's guilty plea was informed. The postconviction hearing could then focus on the adequacy of defense counsel's representation rather than on the adequacy of the judge's advice to the defendant.

Many trial judges believe that defense counsel should bear the responsibility for the defendant's effective representation. This was discussed at a meeting of the Advisory Committee on the Rules of Criminal Procedure several years ago. Chief Justice Burger, who stopped by to visit informally with the committee, urged the committee to improve the law through rule making rather than await litigation. When asked whether the guilty plea procedure could be changed to place more responsibility on defense counsel, the Chief Justice said: "If you are asking whether you can overrule the Supreme Court I think I have the answer — No." This reflects the fact that some guilty plea requirements are constitutionally mandated, which makes placing greater responsibility on defense counsel difficult. However, since more appellate courts are recognizing harmless error for inadequate explanations or

[16] An illustration of a trial judge's attempt to do this is found in F. REMINGTON, E. KIMBALL, H. GOLDSTEIN & W. DICKEY, CRIMINAL JUSTICE ADMINISTRATION 553-57 (1982).

HeinOnline -- 20 U.C. Davis L. Rev. 344 1986-1987

inquiries, perhaps alternative approaches are not precluded.[17]

One can understand why defense counsel do not voluntarily supplement the record to ensure that the appellate court will uphold the guilty plea on postconviction review. But the trial judge should be able to require defense counsel to respond, on the record, to questions designed to determine whether counsel has given the time and effort necessary to ensure that the defendant is able to make an informed decision to plead guilty. This enables the trial judge to ensure that defense counsel has rendered effective assistance. Although placing greater responsibility on defense counsel may not save the judge time, doing so would increase defendants' ability to make informed decisions. The trial judge's explanation takes place in a stressful in-court situation, and explaining probable consequences is often complicated. Also, increased responsibility explicitly placed on defense counsel, rather than the trial judge, should in the long run have a positive effect on the quality of representation furnished by counsel.

Questions concerning the relative responsibilities of the trial judge and defense counsel also arise in informing the defendant of appellate and postconviction rights.

B. *The Defendant's Right to Appeal or to Request Postconviction Relief*

In most jurisdictions, the trial judge must, on the record, inform the convicted offender of her appellate and postconviction rights. Rule 32 of the Federal Rules of Criminal Procedure states: "After imposing sentence in a case . . . the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis."[18] The federal rule also implements a defendant's decision to appeal: "If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant."[19]

Explaining appellate and postconviction rights is difficult, especially in jurisdictions in which those rights are so complicated that lawyers do not fully understand them. Here, as with the guilty plea process, defense counsel should have the major responsibility for ensuring that the convicted defendant makes an informed decision whether to appeal. Some courts now place the burden of explanation on counsel and man-

---

[17] Rule 11(h) now contains a specific harmless error provision.

[18] FED. R. CRIM. P. 32(a)(2).

[19] *Id.*

HeinOnline -- 20 U.C. Davis L. Rev. 345 1986-1987

date that the trial judge ensure that counsel has done so. For example, in Wisconsin the defendant and counsel must sign a form indicating that they discussed appellate and postconviction rights.[20] A proposal requiring the trial judge to ensure that the defendant, before leaving for prison, has actually decided whether to appeal, was not adopted.[21] Therefore, some defendants reach prison unsure whether they have appealed their conviction.[22]

The trial judge should have some responsibility to ensure that the convicted defendant understands her appeal and postconviction review rights. But defense counsel should have the primary responsibility for explaining and actually assisting the client in making her decision. Federal Rule of Criminal Procedure 32, providing that the clerk will prepare and file the notice of appeal, can be helpful, but only if defense counsel has discussed appeal with the defendant and the defendant has made an informed decision to pursue an appeal.

In some jurisdictions, trial counsel may routinely file the notice of appeal, leaving it to postconviction counsel to decide whether to pursue the appeal and what issues to raise. This alternative requires defense counsel to routinely file the notice of appeal so that the client may make an informed decision later. If this is done, there is no longer a need for the judge to explain appeal rights at the conclusion of the trial.

In any event, the judge should ascertain that counsel has assisted the defendant in making an informed decision or has ensured that postconviction counsel will assist. Either alternative is preferable to the judge trying to explain postconviction rights to the defendant, which is the current rules' purpose.

---

[20] 3 WIS. JURY INSTRUCTIONS-CRIM., SM-33 (1983).

[21] *See* Kempinen, *The Role of Trial Counsel Under the New Rules of Appellate Criminal Procedure: The Decision to Appeal*, 58 WIS. B. BULL. 19, 20 (1985), in which the author recommends that trial counsel should ensure that a decision is in fact made; *see also* Comment, *The Decision to Appeal a Criminal Conviction: Bridging the Gap Between the Obligations of Trial and Appellate Counsel*, 1986 WIS. L. REV. 399.

[22] The Wisconsin Law School Legal Assistance to Institutionalized Persons Program's experience is that about 25% of the prison inmates are uncertain about their appeal status. Some seem unaware that they were even informed of their right to appeal, probably because the advice is given in the stressful periods immediately following the imposition of sentence.

HeinOnline -- 20 U.C. Davis L. Rev. 346 1986-1987

C. *The Defendant's Right to Have a Lesser Included Offense Submitted to the Jury*

After the United States Supreme Court decided *Beck v. Alabama*,[23] the Wisconsin Jury Instructions Committee urged Wisconsin trial judges[24] to discuss lesser included offenses with defense counsel and the defendant before deciding what alternative verdicts to give to the jury.[25] Some defense counsel "roll the dice," asking for a jury instruction requiring, for example, that they must either find the defendant guilty of first degree murder or find her not guilty. Often counsel does not discuss the issue with the defendant, removing from the defendant the decision of whether to "go for broke" or ask for a lesser included offense instruction.[26] Asking for such an instruction decreases the chance of an

---

[23] 447 U.S. 625 (1980), *discussed in* Note, Beck v. Alabama: *The Right to a Lesser Included Offense Instruction in Capital Cases*, 1981 WIS. L. REV. 560.

[24] For the past 25 years, a group of 12 Wisconsin trial judges have met 10 times a year to deal with jury instructions and other issues of importance to the trial judge in criminal cases, including the judge's responsibility in deciding what alternative offenses to submit to the jury.

[25] 3 WIS. JURY INSTRUCTIONS-CRIM., SM-6 (1980).

[26] The commentary to Standard 4-5.2 of the Defense Function states the following:

> It is also important in a jury trial for the defense lawyer to consult fully with the accused about any lesser included offenses the trial court may be willing to submit to the jury. Indeed, because this decision is so important as well as so similar to the defendant's decision about the charges to which to plead, the defendant should be the one to decide whether to seek submission to the jury of lesser included offenses. For instance, in a murder prosecution, the defendant, rather than the defense attorney, should determine whether the court should be asked to submit to the jury the lesser included offense of manslaughter.

ABA STANDARDS, *supra* note 6, § 4-68.

Further guidance is provided by several of the provisions in *Ethical Considerations*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980). Ethical Consideration 7-7 provides in part:

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions of his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer.

With respect to consultation, Ethical Consideration 7-8 states in part:

> A lawyer should exert his best efforts to ensure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. . . . In the final analysis, however,

HeinOnline -- 20 U.C. Davis L. Rev. 347 1986-1987

acquittal, but also decreases the chance of a murder conviction and a penalty of death or a life sentence.[27] The new Wisconsin procedure is designed to ensure that counsel has in fact discussed the issue with the defendant and to ensure that the defendant knows her options and is satisfied with her choice.

The California Supreme Court went further and held that, even without defense counsel's request for an instruction, it is error for the judge to fail to instruct on all necessarily included offenses. Such a failure "deprives a defendant of the 'constitutional right to have the jury determine every material issue presented by the evidence.' "[28] Responding to the assertion that defense counsel bears this responsibility and may decide on strategic grounds not to request a lesser included offense instruction, the court said: " 'Our courts are not gambling halls but forums for the discovery of truth.' . . . It is the obligation of trial counsel to assist the court in presenting all relevant instructions to the jury. At the same time, it is the trial court which bears ultimate responsibility. . . ."[29]

Perhaps California's decision to place the burden on the trial judge is wise. But doing so is not inconsistent with insisting that defense counsel spend the time and effort necessary to ensure that the defendant makes an informed decision. Judicial review of that decision may provide a safeguard, but defense counsel should bear the basic responsibility.

D. *The Accuracy and Adequacy of Sentencing Information in the Presentence Report*

Rule 32 of the Federal Rules of Criminal Procedure mandates that the trial judge determine, before sentencing, that "the defendant and his counsel have had the opportunity to read and discuss the presentence investigation report."[30] Historically, the sentencing judge was not re-

---

> the lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client and not for himself.

[27] See Nichols v. Gagnon, 710 F.2d 1267 (7th Cir. 1983), for an unsuccessful effort to demonstrate that a failure to give a lesser included offense instruction constitutes a violation of federal due process. In his opinion, Judge Posner discusses the probabilities that the failure to give the lesser included offense instruction will jeopardize an innocent person and concludes, on the facts of the case, that there is no adequate showing of a "fundamental miscarriage of justice." *Id.* at 1272.

[28] People v. Wickersham, 32 Cal. 3d 307, 335, 650 P.2d 311, 327, 185 Cal. Rptr. 436, 452 (1982).

[29] *Id.* at 335, 650 P.2d at 326, 185 Cal. Rptr. at 451-52.

[30] FED. R. CRIM. P. 32(a)(1)(A).

HeinOnline -- 20 U.C. Davis L. Rev. 348 1986-1987

quired to disclose the report to the defendant or counsel.[31] Today both counsel and the defendant receive a copy of the report.

Despite increased access to the report, some defense counsel do not discuss it with the defendant. Often this is because the judge has agreed to probation and defense counsel is unaware of the presentence report's importance to the defendant if probation is later revoked and a prison sentence imposed.[32] Ensuring that defense counsel has discussed the report with the defendant and has concluded that the information is accurate and adequate is important not only to the defendant, but also to the sentencing judge and to the correctional system.[33]

---

[31] During the 1960's, when Ed Barrett was reporter, the vast majority of federal judges, influenced by their probation officers, were strongly opposed to disclosure of the presentence report to the defendant or to defense counsel. The 1966 amendment made clear that the judge may, but need not, disclose the report. This was the first of several amendments that ultimately came to mandate disclosure.

[32] Even highly able and experienced defense counsel failed until recently to appreciate that the report will have a continuing effect upon the client, whatever the sentence is, and therefore that ensuring its accuracy and adequacy is important. This will be even more true under the new federal sentencing guidelines, which will make length of sentence depend upon the real offense (usually set forth in the presentence report), rather than the "legal offense" for which the defendant was convicted.

[33] Although the case law is limited, there is some indication that courts are requiring a showing that the report was read and discussed. In United States v. Rone, 743 F.2d 1169 (7th Cir. 1984), the court noted that prior to the 1983 amendment, rule 32 required only that the court *permit* the defendant or defense counsel to read the presentence report upon request. The new subdivision (a)(1)(A) requires that the sentencing court "determine that the defendant and his counsel have had the opportunity to read and discuss the . . . report." *Id.* at 1172. The court noted that the Advisory Committee stated that this subsection now imposes "upon the sentencing court the additional obligation of determining that the defendant and his counsel have had an opportunity to read the presentence investigation report." *Id.* The *Rone* court concluded by setting forth a procedure it insists the lower courts follow to comply with rule 32.

> In the interest both of establishing a clear record and of carrying out the terms and intent of the amendments, therefore, the rule requires a definite yet simple procedure. The district court at the sentencing hearing need directly ask the defendant only three questions — whether he or she has had an opportunity to read the report, whether the defendant and defense counsel have discussed the report and whether the defendant wishes to challenge any facts in the report.

Id. at 1174.

In a special concurrence, Circuit Judge Edwards found it necessary to indicate that he interprets the amended rule 32 to "requir[e] the District Judge to address the Defendant personally and thus learn from him that he has had time to read and understand the report." *Id.* at 1176 (Edwards, J., concurring specially).

A New York district court recently held that the trial court failed to comply with rule 32 as amended because it "did not determine, by directly questioning [the defend-

HeinOnline -- 20 U.C. Davis L. Rev. 349 1986-1987

E. Possible Conflict When the Same Attorney Represents Several Defendants

A number of states mandate that the trial judge ensure, on the record, that no conflict exists in any case in which a single lawyer or law firm represents more than one defendant. The trial judge must go further than merely determining that a defendant is willing to waive any right to separate representation. "Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."[34]

This issue differs from the decision to plead guilty, to request a lesser included offense, to ask for postconviction relief, or to question the presentence report's accuracy or adequacy. In those situations, defense counsel should provide effective assistance to enable the defendant to make an informed decision on a matter with significant consequences. With respect to conflicts resulting from representation of multiple defendants, the lawyer probably is unable to give adequate, objective advice. The lawyer may have a greater interest in one defendant than another. For example, in representing a corporation, an attorney might find it helpful to control testimony of codefendants, who might otherwise cooperate with the prosecution. Thus, the trial judge must bear the responsibility of ensuring that no conflict exists. For this reason, rule 44 clearly places the primary responsibility on the trial judge.

CONCLUSION

In a relatively recent article,[35] United States District Judge William W. Schwarzer concludes:

> In any event, the constitutional mandates for effective representation and fair trial procedures are facts, as is occasional incompetence of trial counsel. Courts must deal with the resulting problems, and to the extent that the trial court is able to provide preventive relief, the interests of justice as well as economy and efficiency will be served.[36]

He recommends that the trial judge play a proactive role. Among his suggestions are: "The judge has a duty to conduct a hearing to satisfy himself, regardless of the representations of counsel, that the waiver is

---

ant], whether or not he had read the presentence report proposed by the Probation Department." Gonzalez v. United States, 623 F. Supp. 715, 717 (S.D.N.Y. 1985).

[34] FED. R. CRIM. P. 44 (c); *see also* 3 WIS. JURY INSTRUCTIONS-CRIM., SM-45, Inquiry in Multiple Representation Cases (1982).

[35] Schwarzer, *supra* note 6.

[36] *Id.* at 665.

HeinOnline -- 20 U.C. Davis L. Rev. 350 1986-1987

the product of the defendant's decision, reached on the basis of competent legal advice."[37]

The trend toward greater trial judge responsibility likely will have a greater impact on state judges as a result of recent changes in federal habeas corpus law.[38] The United States Supreme Court requires exhaustion of state court procedures.[39] Unless state procedures are exhausted, federal habeas corpus is unavailable unless there was "cause" for the failure and "prejudice" to the petition resulting therefrom.[40]

This requires state trial judges to take steps to ensure that defendants do not have "cause" (often ineffective assistance of counsel) for failing properly to use state court procedures. This is reflected in Professor Melzer's suggestion:[41] "[The] approach would be to increase the responsibility of the trial judge to see that important federal constitutional issues that should be raised are raised."[42]

The primary objective in giving greater trial judge responsibility is safeguarding the defendant's interests. This is best achieved by ensuring that defense counsel effectively assisted the defendant. Knowing of the right to appeal is not enough; the judge must ensure that counsel assisted the defendant in making an informed decision whether to appeal. Reading the presentence report is not enough; the judge must ensure that counsel discussed the report with the defendant and that counsel has impressed upon the defendant the importance of bringing to the judge's attention any inaccuracies or inadequacies. That defendant knows of her right to a less serious offense instruction is not enough; the judge must ensure that defense counsel discussed this with the defendant and that she made an informed decision. In guilty plea practice, methods are needed to give defense counsel greater responsibility. Asking the defendant and defense counsel whether they discussed these issues, when, and for how long, is one alternative. We need "skillful and imaginative legal planning, bottomed in cooperative utilization, rather than utter disregard of defense counsel's responsibilities."[43]

---

[37] *Id.* at 657.

[38] *See* Remington, *Change in the Availability of Federal Habeas Corpus — Its Significance for State Prisoners and State Correctional Programs*, ____ MICH. L. REV. ____ (forthcoming 1987).

[39] *See* 3 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 27.7 (1985).

[40] *Id.* § 27.4 (d), at 1040.

[41] Meltzer, *State Court Forfeitures of Federal Rights,* 99 HARV. L. REV. 1128 (1986).

[42] *Id.* at 1235.

[43] Adams v. United States, 399 F.2d 574, 579 (D.C. Cir. 1968). In the actual quote, Judge McGowan was urging police to enlist the aid of the judge to accomplish legiti-

HeinOnline -- 20 U.C. Davis L. Rev. 351 1986-1987

Creating the necessary procedures is not easy, especially since state trial judges lack the resources available to federal judges. This need led the Conference of State Court Chief Justices to recommend in 1979 that Congress create a state justice institute to assist state courts in effectively carrying out their increased responsibilities. The State Justice Institute Act was first introduced in Congress in 1980. During the summer of 1986, "in a sudden reversal of administration policy President Reagan named nine nominees to the board of directors of the State Justice Institute, clearing the way for the agency to begin operations as soon as the appointments are confirmed by the Senate."[44] Evidently Chief Justice Burger's strong support of the State Justice Institute gained Congressional and Reagan Administration support.

Hopefully the Institute will create opportunities to reevaluate the trial judge's role in criminal cases. Ensuring that the defendant is able to make an informed decision cannot be done by the trial judge alone. There must be greater responsibility on the part of defense counsel to provide assistance to the defendant in decisions regarding pleas, whether to appeal, whether to request lesser included offense instructions, and whether the presentence report is adequate and accurate.

---

mate investigative objectives.

[44] National Center for State Courts, Washington Memorandum, Vol. 12, No. 1, July 21, 1986.

HeinOnline -- 20 U.C. Davis L. Rev. 352 1986-1987