Guilty Pleas in Illinois - The Enigma of Substantial Compliance

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COMMENTS

GUILTY PLEAS IN ILLINOIS—
THE ENIGMA OF SUBSTANTIAL COMPLIANCE

On September 1, 1970, a more detailed procedure specifying the requirements Illinois trial judges must follow in accepting pleas of guilty became effective. The method, embodied in a supreme court rule, requires that the trial judge give the defendant specific admonitions and make certain specific findings. The purpose of this Comment is to objectively portray the present state of this process, discuss and analyze the opinions and attitudes of those charged with the responsibility of its implementation, and make relevant criticisms and suggestions.

Illinois Supreme Court Rule 4021 superseded the former Rule 401, paragraph (b), which previously dealt with pleas of guilty. As pointed out in the Committee Comments to Rule 402,2 the expanded and more specific treatment of guilty pleas required by Rule 402 resulted essentially for two reasons. The first of these reasons was the holding of the United States Supreme Court in Boykin v. Alabama,3 a decision which had a significant impact on guilty plea procedures. In Boykin, the petitioner pleaded guilty to five robbery indictments. The record lacked any indication that the judge questioned the petitioner or that the petitioner addressed the court. Under Alabama law, punishment on a plea of guilty was to be fixed by a jury trial. The state presented eyewitness testimony and cursorily cross-examined the petitioner. The petitioner did not testify; no evidence as to his character and background was presented; and there was no indication that the petitioner had a prior criminal record. The jury found the petitioner guilty on each indictment and sentenced him to death. The Court held that acceptance of a guilty plea in state criminal proceedings without an affirmative showing in the record that the defendant voluntarily and intelligently en-

1. ILL. REV. STAT. ch. 110A, § 402 (1971). Rule 402 was adopted in June, 1970, and became effective as of September 1, 1970. Paragraph (e) was amended, effective September 17, 1970. For the full text of the rule see Appendix A, pp. 93-94 supra.
tered his plea of guilty is a violation of due process. The Court stated:

Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. *Malloy v. Hogan*, 378 U.S. 1. Second, is the right to trial by jury. *Duncan v. Louisiana*, 391 U.S. 145. Third, is the right to confront one's accusers. *Pointer v. Texas*, 380 U.S. 400. We cannot presume a waiver of these three important federal rights from a silent record.

What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in cavassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. 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.

The holding in *Boykin* now incorporated in Rule 402, was not satisfied by the prior Rule 401(b), and, therefore, a change in Rule 401(b) was required.

The second reason for adoption of Rule 402 was the increased attention given to guilty pleas which resulted from negotiations between the prosecutor and defense counsel. While "plea bargaining" was generally considered appropriate, the concealment of such procedures behind an in-court ceremony was looked upon with disfavor. The American Bar Association, for example, stated:

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4. *Id.* at 243-44 (citations omitted).

5. While Illinois, at the time of the *Boykin* decision, was one of the few states which required that an effective waiver of the right to plead not guilty affirmatively appear in the record, Rule 401(b) did not call for the court to place on the record the waiver of the "three important federal rights" mentioned in *Boykin*. See Ill. Rev. Stat. ch. 38, §§ 113-1 to 114-14 (1969). Rule 401(b) reads as follows:

*Procedure on Plea or Waiver.* The court shall not permit a plea of guilty or waiver of indictment or of counsel by any person accused of a crime for which, upon conviction, the punishment may be imprisonment in the penitentiary, unless the court finds from proceedings had in open court at the time waiver is sought to be made or plea of guilty entered, or both, as the case may be, that the accused understands he has a right to be held to answer for the offense on indictment by a grand jury and has understandingly waived that right and consented to his prosecution by information, that he understands the nature of the charge against him, and the consequences thereof if found guilty, and understands he has a right to counsel, and understandingly waives that right. The inquiries of the court, and the answers of the accused to determine whether he understands his rights to be indicted by a grand jury and to be represented by counsel and comprehends the nature of the crime with which he is charged and the punishment thereof fixed by law, shall be taken and transcribed and filed in the case. The transcript, when filed, becomes a part of the common law record in the case.

At the more formal part of the pleading process, the in-court appearance at which the defendant enters his plea, the parties typically act as if no prior negotiations had occurred. Trial judges, although they are aware that negotiation for pleas is a common practice, routinely ask the defendant whether any promises have been made to him. Notwithstanding the fact that the plea has been the subject of negotiation, the defendant usually answers in the negative, and the prosecutor and defense counsel seldom indicate to the contrary .... As a result, the negotiations process remains largely invisible, informal, and not subject to any systematic control.6

Rule 402 deals with this situation as suggested in the ABA Standards,7 by giving formal recognition to guilty plea agreements and by controlling their negotiation.8

The two major objectives of Rule 402 then, are: (1) to satisfy the requirements of the Boykin decision by bringing the guilty plea procedure in Illinois in line with the mandates expressed in the case, and (2) to cause the Illinois guilty plea procedure to be one of openness, thereby negating attacks on the procedure on the ground that it operates behind closed doors without even a cursory appraisal by the court.

THE LAW OF RULE 402

The following discussion sets out in detail the present status of Rule 4029 as it has been defined and interpreted by the Illinois courts. No attempt is made in this section to criticize or otherwise subjectively analyze the decisions relating to Rule 402, as that is the purpose of later portions of this comment. The reason for separating the objective and subjective discussions regarding Rule 402 is that the subjective discussion will concentrate not on the whole, but only on those portions of the rule which, in the opinion of the authors, need to be changed, either in their express terms or in their interpretation. It was felt that by concurrently presenting and analyzing the rule, a blurring might result as to the present status of the rule. Clarity as to the prevailing view of Rule 402 is a major objective of this portion of the discussion, and it was felt that the opinions of the authors should be kept separate so as to further that objective. With that in mind, a discussion follows of Rule 402 as it now stands.

7. ABA Standards, supra note 6, at 61.
9. For the full text of Rule 402 see Appendix A, pp. 93-94 infra.
The Requirement of Substantial Compliance

Rule 402 begins by providing that:

In hearings on pleas of guilty, these must be substantial compliance with the following . . .

This statement, negatively by its terms, does not hold the trial court judge to a strict compliance standard governing the admonition. Instead, the trial court need only substantially comply with the prescriptions of Rule 402. The difference, of course, is a significant one; however, the courts have uniformly upheld the substantial compliance standard.

In People v. Miller, the defendant pleaded guilty to the charge armed robbery, and was sentenced to a prison term of three to seven years. The defendant appealed, contending that the trial court failed to personally admonish him in open court, as required by Rule 402, as to the minimum and maximum sentences for the offense charged. The contention was overruled by the Appellate Court for the Second District, which stated:

Rule 402 provides that 'there must be substantial compliance' with the procedures provided therein. The purpose of the rule, again according to the committee comments, is to make an affirmative showing, in the record, that a defendant voluntarily and understandingly enters his plea of guilty before it is accepted in accordance with the guidelines established by the Supreme Court in Boykin v. Alabama, 395 U.S. 238, and to give visibility to the plea agreement process.

Certainly those goals would include a showing that the defendant has been advised as to the range of the possible penalties for the offense of which he stands charged. We do not agree, however, that Rule 402 requires a strict, literal adherence to every term contained therein if the record shows 'substantial compliance.'

The “substantial compliance” standard, however, is not to be construed as a relaxation of Supreme Court Rule 402. Its effect is to allow for affirmance of trial court decisions involving guilty pleas where the error, under the circumstances of the case, is not of a degree sufficient to require reversal. In this sense, the standard seems to operate on a basis equivalent to the harmless error doctrine which affects other areas of criminal law.

The standard is not to be construed as discretionary, and is not to be

11. Id. at 853, 277 N.E.2d at 899.
13. See ILL. REV. STAT. ch. 110A, § 615(a), the Illinois Supreme Court rule relating to “insubstantial errors.”
invoked at the will of the appellate court. Substantial compliance is not sufficient, for instance, where actual prejudice has resulted to the defendant. On the other hand, however, the absence of prejudice to the defendant does not mean that the trial court has substantially complied with the rule. In *People v. Garcia*,\(^{14}\) the Appellate Court for the Third District stated:

Both the rule and its avowed purpose are operative in areas where prejudice would be difficult to prove and where fairness may not depend on absence of prejudice as a general rule.\(^{15}\)

Nevertheless, the absence of actual prejudice has been deemed of significance in determining substantial compliance by the Third District in *People v. Hickman*,\(^{16}\) and, in general, "it is becoming well settled that 'substantial' rather than 'total' compliance with the requirements [of Rule 402] is adequate in absence of any actual prejudice to the defendant."\(^{17}\)

Clearly, what is substantial compliance in each case depends entirely on the facts and circumstances of the case. The validity of the standard has, however, been established, seemingly, beyond attack.

Many cases determining whether there has been substantial compliance with particular sections of Rule 402 will be discussed throughout the remainder of this comment. It is important to note here, however, the standard under which Rule 402 operates, for it is this standard which gives flexibility to the appellate courts in their review of guilty plea cases. It is believed that the substantial compliance standard has precluded harmony in the decisions interpreting the requirements of Rule 402,\(^{18}\) and these differences will be pointed out in the following sections.

**Rule 402(a)**

Rule 402 (a) provides:

*Admonitions to Defendant*. The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge;


\(^{15}\) Id. at 543, 289 N.E.2d at 638.


\(^{17}\) Id. at 42, 291 N.E.2d at 525. See also *People v. Roebuck*, 10 Ill. App. 3d 641, 295 N.E.2d 32 (1st Dist. 1973); *People v. Wintersmith*, 9 Ill. App. 3d 327, 292 N.E.2d 220 (1st Dist. 1972).

Paragraph (a), then, enumerates those admonitions which must be given to the defendant, in open court, to insure that the guilty plea is both intelligent and voluntary, as required by Boykin.

**Personal Admonition By the Court**

The initial requirement as to admonitions is that they must be given by the court in a personal address to the defendant in open court. The trial judge must inform the defendant of his rights and inform the defendant of what rights are waived by a plea of guilty. In that a personal admonition by the court is required, questions have arisen regarding the adequacy of a written guilty plea form signed by the defendant. The practice of accepting a written guilty plea form in lieu of a personal admonition by the court is not acceptable and does not comply with Rule 402.

In *People v. Cummings*,


20. *Id. at 308, 287 N.E.2d at 293. See also People v. Alequin, 12 Ill. App. 2d 837, 839, 298 N.E.2d 723, 725 (2d Dist. 1973); People v. Leone, 7 Ill. App. 3d 392, 395, 287 N.E.2d 491, 494 (2d Dist. 1972),*
Other methods of admonishment have, however, been held to adequately comply with Rule 402 despite the lack of a complete admonition offered solely by the judge.

In *People v. Torres*, the Second District, only five days after its decision in *Cummings*, held that an admonishment by the defendant's own counsel in the presence of the judge, combined with an interrogation and admonishment by the judge sufficiently met the requirement that the judge shall personally address the defendant.

In yet another case, the Fifth District, in *People v. Larrabee*, affirmed the defendant's conviction, based on a plea of guilty, where the assistant state's attorney undertook a substantial portion of the admonishment in the presence of the trial judge. Rejecting the defendant's contention that this was insufficient compliance with Rule 402, the court stated:

> [It is the duty of the trial court to admonish the defendant concerning the effect and results of entering a guilty plea . . . and it should not be delegated or allowed to go by default to either the prosecutor or the defense attorney . . . Here, [distinguishing a prior case holding that the out of court admonition by the defendant's attorney was insufficient] the trial court heard the explanation and the affirmation by defendant that he understood. The entire exchange was bracketed by inquiries by the trial court directed to the defendant and which elicited responses indicating understanding. By the manner in which the exchange of questions and answers occurred, the trial court incorporated by reference the explanations and admonitions offered by the assistant State's Attorney.]

The decisions in *Torres* and *Larrabee* do not, however, serve as marked exceptions to the requirement that the trial judge personally address the defendant. The partial admonishment by the defendant's attorney in *Torres* and by the assistant state's attorney in *Larrabee* took place in open court before the trial judge. Any such admonishment made out of court would not substitute for a personal admonition by the court.

**Admonition Must Be to the Defendant's Knowledge and Understanding**

The trial judge must be satisfied that the defendant knows and understands the admonitions given. A question has arisen, however, as to what is the proper standard against which the defendant's understand-
ing is to be measured. Admonitions are regarded as sufficient if they are made in such a manner as to be understood by the reasonable person in the defendant's position, i.e., with regard to the defendant's experience, education and ability to understand. The court, in *People v. Torres*, stated:

In *People v. Doyle*, 20 Ill.2d 163, 167, the Illinois Supreme Court stated:

'The remarks and advice of the court must be read in a practical and realistic manner. The essentials have been complied with if an ordinary person in the circumstances of the accused would understand them as conveying the information required by the rule . . . .' While the *Doyle* case referred to the predecessor of Supreme Court Rule 402 [i.e. Rule 401 (b)], the same principle is applicable.

Accordingly, before admonishing the defendant, the court should inquire into the defendant's age and education, determine whether the defendant has ever been in a mental institution, determine whether the defendant is a habitual drunkard or a drug user, and make any other relevant inquiry into the defendant's ability to understand.

**Rule 402 (a) (1) — The Nature of the Charge**

Under Rule 402(a)(1), the defendant must be informed of and understand the nature of the charge. A similar requirement is set forth in Illinois Revised Statutes, Chapter 38, Section 113-1. The United States Supreme Court, in *Smith v. O'Grady*, stated that, "[R]eal notice of the true nature of the charge . . . [is] the first and most universally recognized requirement of due process . . . ." A guilty plea, which constitutes an admission of all elements of the charge, thus requires that the defendant know the law in relation to the facts. Rule 402, however, requires no specific procedure, and the most appropriate procedure for the judge varies from case to case, as the following discussion indicates.

In *People v. Treter*, the trial court stated to the defendant that he was charged with "burglary," and went no further. The Second District affirmed the defendant's conviction, holding that an admonishment as to the nature of the charge is sufficient where the trial judge simply states the name of the charge.

27. 312 U.S. 329 (1941).
30. *Id.* at 891, 279 N.E.2d at 132. But see *People v. Billops*, 16 Ill. App. 3d
The requirement that the defendant be informed of the nature of the charge was satisfied in *People v. Warship*,\(^{31}\) where the defendant had a copy of the indictment and the judge repeated almost all of the elements of the crime to which the defendant pled guilty.\(^{32}\)

In *People v. Hudson*,\(^{33}\) the Appellate Court for the Fifth District, in distinguishing the requirement of Rule 402(a)(1) that the trial judge determine that the defendant understands the “nature of the charge” from the requirement of Rule 402(c)\(^{34}\) that there be a factual basis for the plea, stated:

> The crux of the requirement of Rule 402(a)(1) is understanding. The nature of the charge consists of two parts: (1) The acts and intent (if any) required to constitute a violation of the provisions of the criminal code, and (2) the alleged acts and intent (if any) with which the alleged acts were committed which are attributed to the defendant in the particular case. These two parts should be explained by the judge to the defendant in open court in laymen's terms. The judge should proceed no further until he is completely satisfied from the defendant's personal remarks in open court that he understands the explanation.\(^{35}\)

On the same day the Fifth District decided *Hudson*, it also stated, in *People v. Ingeneri*,\(^{36}\) that simply supplying the defendant with a copy of the indictment was insufficient to inform the defendant of the nature of the charge. Nevertheless, the court suggested that *reading* the indictment to the defendant may be sufficient under the circumstances of the particular case. The court stated:

> Rule 402(a)(1) requires the court to do more than just inform the defendant of the charge; it also requires the trial judge to inform the defend-

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\(^{32}\) The Appellate Court for the Second District relied primarily on *People v. McCrady*, 131 Ill. App. 2d 836, 267 N.E.2d 515 (3d Dist. 1971), a case which dealt with the predecessor to Rule 402, ILL. REV. STAT. ch. 110A, § 401(b) (1969). In *McCrady*, the trial judge stated only that the defendant was charged with burglary and then proceeded to read off the numbers of the two indictments previously furnished the defendant. The court held that the defendant had been adequately admonished as to the nature of the charge since the charges of burglary were repeated specifically to him, and since defendant had received copies of the complaints and indictments which specifically described the nature of the acts constituting the offenses. *Id.* at 840-41, 267 N.E.2d at 519.

\(^{33}\) 7 Ill. App. 3d 800, 288 N.E.2d 533 (5th Dist. 1972).

\(^{34}\) See notes 85-96 and accompanying text *infra* for a discussion of Rule 402(c).

\(^{35}\) 7 Ill. App. 3d 802, 288 N.E.2d at 535.

\(^{36}\) 7 Ill. App. 3d 809, 288 N.E.2d 550 (5th Dist. 1972).
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ant of the 'nature' of the charge. Since a guilty plea is an 'admission of all the elements of a formal criminal charge' and 'cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts,' McCarthy v. United States, 394 U.S. 459, we believe the trial court must inform the defendant of the essential elements of the crime of which he is charged. In some cases this can be done by a reading of the indictment to the defendant. But it should be pointed out that merely furnishing a copy of the indictment to the defendant would not be sufficient because Rule 402(a) specifically requires the trial court to address the defendant personally in open court. Many times the indictment is couched in technical legal language and when that is the case, we will not assume that the defendant understands this language.37

The First District, on the other hand, in People v. Wintersmith,38 and in People v. Tennyson,39 held that informing the defendant of the nature of the charge does not require a recitation of all the facts and the elements therein, in that Rule 402 requires "only substantial compliance with its provisions."40

A similar position was taken by the Second District in People v. Diaz.41 In holding that each element of the offense charged need not be recited by the trial judge, the court declared:

Relying on People v. Ingeneri (1972), 7 Ill.App.3d 809, 811, defendant argues that when informing a defendant of the nature of the charge, the court must clearly and simply state each material element of the offense in sufficient detail to insure the defendant's ability to understand. We do not agree that either Supreme Court Rule 402 or any constitutional provision requires each element of an offense be explained to a defendant. Rather, in our view, the record as a whole should disclose that the defendant has been advised of the "essence, general character, kind or sort" of the offense to the extent that the particular defendant before the court deciding on the options available to him has a common understanding of the nature of the charge.42

The Fourth District, in People v. Green,43 reversed the trial court judgment on a plea of guilty when the trial court failed to explain the nature of the charge. As to Rule 402(a)(1), the court stated:

Informing the defendant of the nature of the charge requires that the trial judge by reading or paraphrasing the essential allegations of the indictment, explain to the defendant the acts (and the accompanying state of mind where applicable) which the State alleges him to have committed;

37. Id. at 811, 288 N.E.2d at 551-52.
40. See notes 10-18 and accompanying text supra.
42. Id. at 283, 304 N.E.2d at 106 (citations omitted).
it also requires that the court then read or paraphrase and explain to the defendant the applicable section of the Criminal Code which proscribes the conduct attributable to the defendant as alleged in the indictment.\textsuperscript{44}

The Third Circuit has held that the defendant was adequately informed of the nature of the charge against him where it was established in open court by the defense counsel, in the presence of the defendant, that he had gone over the information charging the defendant with misdemeanor theft, and that the defendant acknowledged the truth of the information.\textsuperscript{45}

In summary, it may be concluded from the above cases that what is required to adequately inform the defendant of the "nature of the charge" under Rule 402(a)(1) is not subject to easy resolution. The defendant, the charge itself, and the circumstances of the case may affect the trial court's admonition. According to the case law, supplying the defendant with the indictment or information is not sufficient, yet reading the same may be sufficient. It is generally not required that the court recite all of the elements of the offense charged, yet at least one case says that such a procedure is required. According to one opinion, the statute under which the charge is brought must be read to the defendant.

If a general statement must be made, it is that the nature of the charge must be explained to the defendant in a practical and realistic manner, in terms understandable to the ordinary person in the defendant's circumstances, in an open court procedure adequately and reasonably aimed at informing the defendant of the reason he is before the court.

\textit{Rule 402 (a) (2)—The Penal Consequences}

Under Rule 402(a)(2), the court must explain to the defendant the minimum and maximum sentence to which he is subject under the law, including, when applicable, the effect prior convictions or concurrent sentences may have on his sentence.\textsuperscript{46} The requirement of subpara-

\textsuperscript{44} \textit{Id.} at 419-20, 299 N.E.2d at 537. Just prior to Green, the Fourth District held that the trial court did not comply with Rule 402(a)(1) where the trial judge simply asked whether the defendant understood, "[w]hat you're charged with in these indictments, forgery?" to which the defendant answered, "yes." People v. Krantz, 12 Ill. App. 3d 38, 297 N.E.2d 386 (4th Dist. 1973).

\textsuperscript{45} People v. Trinka, 10 Ill. App. 3d 183, 293 N.E.2d 179 (3d Dist. 1973).

\textsuperscript{46} It is not necessary for the judge to admonish the defendant of the minimum and maximum sentence that might be imposed at a probation revocation hearing. See People v. Evans, 3 Ill. App. 3d 435, 278 N.E.2d 401 (2d Dist. 1972). Nor
graph (2), that the defendant be informed of both the minimum and maximum sentence provided by law, is a marked deviation from Illinois Revised Statutes, Chapter 38, Section 113-4(c), which deals with pleas in general and requires only that the court explain to the defendant "the maximum penalty provided by law." The more complete admonition required under Rule 402(a)(2) is believed to give the defendant "a more realistic picture of what might happen to him."^{47}

It is the judge's duty to personally address the defendant in open court as to the possible sentence. The Second District, however, in the case of People v. Miller,^{48} held that the trial judge substantially complied with the requirements of 402(a)(2) when the assistant state's attorney rather than the judge personally, advised the defendant of the possible sentences applicable to an armed robbery conviction. The court reasoned that it is not necessary that the admonition regarding Rule 402(a)(2) come "from the lips of the trial judge" where it is clear from the record that the defendant has otherwise been advised as to the possible sentence.^{49}

The substantial compliance standard, however, has not been readily applied to the description of the possible sentence. The court in People v. Zboralski,^{50} noted that the degree of compliance required to satisfy Rule 402(a)(2) is now higher than it was at the time of the rule's inception. Clearly, the specific minimum and maximum sentences are required where they are easily stated. Problems arise, however, when the maximum sentence is indeterminate. The courts generally agree that an admonition to the effect that the sentence may be, for example, "from two years to an indeterminate time" is insufficient.^{51} The belief

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^{49} See also People v. Trinka, 10 Ill. App. 3d 183, 293 N.E.2d 179 (3d Dist. 1973), where, citing Miller, the Third District similarly treated an admonition as to the applicable minimum and maximum sentence by the defendant's attorney. Obviously, a complete failure to inform the defendant of the possible sentence is reversible error. People v. Harl, 11 Ill. App. 3d 372, 297 N.E.2d 404 (4th Dist. 1973). An erroneous description as to the penalty may also serve as grounds for reversal. People v. Attwood, 10 Ill. App. 3d 381, 293 N.E.2d 495 (3d Dist. 1973).


is that such an explanation of the possible sentence may mislead the defendant into thinking he might receive the minimum sentence or one similar thereto. The Third District advised, in *People v. Huggins*, that the best way to admonish the defendant, where the sentence is indeterminate, may be to inform the defendant that the sentence may run for a maximum number of years, "such as 10 years or 15 years," or for some other number of years as a maximum, which would at least be equal to a maximum actually imposed by the court.

The cases are divided on the question of whether the defendant must be informed that consecutive sentences might be imposed. The First District, in *People v. Reed*, determined that such an admonishment was not required in that the trial judge had otherwise substantially complied with Rule 402(a)(2). The Fourth District however, in *People v. Zatz*, distinguished Reed on the basis that, unlike the defendant in Reed, defendant Zatz's plea was not as a result of negotiation. The court in Zatz then reversed the trial court and remanded the case with directions that the defendant be allowed to plead anew.

**Rule 402(a)(3)—The Defendant's Right to Plead Not Guilty**

Rule 402(a)(3) provides that the defendant must be informed that he has the right to plead not guilty, to persist in a not guilty plea if one has already been made, or to plead guilty.

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53. Id. at 308, 295 N.E.2d at 361. See also People v. Sullivan, 12 Ill. App. 3d 394, 297 N.E.2d 586 (3d Dist. 1973) (arising under prior Rule 401(b)).

Presumably, if the court gives examples of the maximum sentence which might be imposed, and then sentences the defendant to a term of years greater than the highest example given while admonishing the defendant, the defendant may still claim that he was misled as to the potential maximum.

54. 3 Ill. App. 3d 293, 278 N.E.2d 524 (1st Dist. 1971).


56. The underlying issue of the constitutionality of guilty pleas is beyond the scope of this Comment.

Subparagraphs (3) and (4) of Rule 402(a) deal with the "three important federal rights" enumerated in *Boykin*. The record must show an affirmative waiver of these rights. See notes 2-5 and accompanying text supra.

57. See People v. Larrabee, 7 Ill. App. 3d 726, 288 N.E.2d 538 (5th Dist,
Failure to advise the defendant of the right to plead not guilty is reversible error.\(^5\) Furthermore, the Third District, in *People v. Carle*,\(^5\) held that where the defendant was advised that he had a right to a trial, but was not advised that he had a right to plead not guilty or that he had the right to be confronted with the witnesses against him, the trial court committed reversible error.

**Rule 402(a)(4)—Waiver of Right to Trial and Right to be Confronted With Witnesses**

The trial judge,\(^6\) under Rule 402(a)(4), is required to inform the defendant that by pleading guilty he will not have a trial of any kind and will be, therefore, waiving his right to a jury trial and right to be confronted by the witnesses against him.\(^6\)

In determining that Rule 402(a)(4) comprehends advice and understanding of the waiver of the right to a trial of any kind, it has been stated that an admonition, to the effect that the defendant waives his right to a jury trial, need not also be accompanied by an admonishment that the defendant is also waiving his right to a bench trial.\(^6\)

The failure of the trial court to specifically admonish the defendant of his right to be confronted with the witnesses is not a fatal error where the judge otherwise substantially complies with Rule 402(a)(4).\(^8\)

Neither the rule nor the cases require that the defendant be admonished of his right to remain silent under Rule 402(a)(4). The Second District, in *People v. Caughlin*,\(^6\) stated:

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60. *See People v. Larrabee*, 7 Ill. App. 3d 726, 288 N.E.2d 538 (5th Dist. 1972), where the court held that it was not reversible error for the trial court to allow the State's Attorney to inform the defendant of his right to trial.

61. In *People v. Alequin*, 12 Ill. App. 3d 837, 298 N.E.2d 723 (2d Dist. 1973), the Second District reversed a guilty plea conviction where the judge merely stated that the defendant, by pleading guilty, waived his right to trial, without inquiring of the defendant whether he wanted to waive that right.


64. 7 Ill. App. 3d 389, 287 N.E.2d 499 (2d Dist. 1972).
The rule does not state a requirement that a defendant must be specifically advised that he has the right to remain silent *i.e.*, not to incriminate himself, and the specific statements are not constitutionally required. There is no requirement under *Boykin v. Alabama* (1969), 23 L.Ed.2d 274, 279-80 compelling specific and literal statements of all constitutional rights of an accused involved in a waiver that takes place upon the entry of a guilty plea.65

Finally, neither the terms "trial by jury" nor any other magic words are required to satisfy Rule 402(a)(4). In *People v. Grace*,66 the Second District decided that the trial judge sufficiently complied with the rule where the defendant was advised that he had the right to have his guilt or innocence determined by a jury and that he would be presumed innocent until proven guilty beyond a reasonable doubt.67

*Rule 402 (b)—Voluntariness*

**Rule 402 (b) provides:**

*Determining Whether the Plea is Voluntary.* The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is the result of a plea agreement, the agreement shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea.

In contrast to the practice prevailing prior to the adoption of Rule 402,68 paragraph (b) requires, *inter alia*, that where a tendered plea is the result of plea negotiations, the agreement reached must be stated in open court;69 and failure to do so is, generally, reversible error.70

The primary effect of Rule 402 (b) is that it requires a determination by the trial court that the guilty plea is voluntarily made. Under the

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65. *Id.* at 390, 287 N.E.2d at 500 (citations omitted). *See also* People v. Bolden, 7 Ill. App. 3d 730, 288 N.E.2d 541 (5th Dist. 1972), and the cases cited therein.


69. *See* notes 6-8 and accompanying text *supra*; ABA STANDARDS, *supra* note 6, § 1.5 at 29.

The burden is upon the parties to have their plea agreement made of record. *See* People v. Goodman, 2 Ill. App. 3d 584, 277 N.E.2d 136 (2d Dist. 1971).

70. People v. Ridley, 5 Ill. App. 3d 680, 284 N.E.2d 37 (1st Dist. 1972). *But see* People v. Talbot, 9 Ill. App. 3d 688, 292 N.E.2d 561 (3d Dist. 1973), where the Third District held that no reversible error was committed when the court did not make a record of the plea negotiations until after acceptance of the guilty plea; People v. Dudley, 58 Ill. 2d 57, 316 N.E.2d 773 (1974) (the failure to comply amounted to harmless error).
rule, it is the duty of the court to inquire of the defendant whether any force or threats were used against him and whether any promises were made to him. Here again, however, the substantial compliance standard applied to Rule 402 has had an effect. In the recent appellate court case, *People v. Gibson,* the trial judge asked the defendant whether any "promises" were made to him for his plea of guilty, but neglected to inquire whether any "force or threats" were used. The Second District noted the absence of any Illinois cases involving the omission of inquiry as to force or threats as required by Rule 402 (b). Looking at the entire record, the court concluded that the trial court had substantially complied with Rule 402 and, hence, that the guilty plea was voluntary. A complete failure of the trial court to inquire as to the voluntariness of the defendant's plea may result in the case, on appeal, being remanded to the trial court for the purpose of making such inquiry, or it may require reversal.

Where the plea is found to be involuntary, it is void, and any subsequent conviction based upon the plea is reversible or at least subject to collateral attack.

An issue of obvious importance under Rule 402(b), then, is whether or not the defendant's guilty plea is in fact voluntary. Numerous cases have dealt with this issue and no attempt will be made here to discuss all of them. The important element to keep in mind, however, when considering cases dealing with the voluntariness of a guilty plea, is the effect of the conduct or events on the defendant's freedom of choice.

Simply because the prosecutor is responsible for some or all of the factors resulting in a plea of guilty, the plea rendered is not involuntary,

71. 11 Ill. App. 3d 875, 297 N.E.2d 31 (2d Dist. 1973).
72. The court did state, however, that the "better practice" would have been to inquire into any force or threats.
77. *Machibroda v. United States,* 368 U.S. 487 (1962); *People v. Washington,* 38 Ill. 2d 446, 232 N.E.2d 738 (1967) (such collateral attack may take the form of a post-conviction hearing). See also *People v. Barr,* 14 Ill. App. 3d 742, 303 N.E.2d 202 (1st Dist. 1973), where the court discussed the status of Rule 402(b) as being of a constitutional nature.
since the state encourages guilty pleas at each important step of the criminal process.\textsuperscript{78} Nor is a plea considered coerced or otherwise involuntary because it is influenced by the defendant's fear of an increased sentence should he be convicted at a trial.\textsuperscript{79} In fact, the United States Supreme Court has held that a plea of guilty may be regarded as voluntary even if the defendant is not willing or able to admit his participation in the alleged criminal conduct.\textsuperscript{80} In that case, the Court stated:

\begin{quote}
[W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.\textsuperscript{81}
\end{quote}

Earlier, the Court had stated:

The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.\textsuperscript{82}

On the other hand, a guilty plea may be invalidated (i.e. considered involuntary) by a prosecutor's unfulfilled promise of a reduced sentence.\textsuperscript{83} Similarly, a misrepresentation by the judge as to the sentence to be imposed may render the plea involuntary.\textsuperscript{84}

\textit{Rule 402(c)—The Factual Bases Determination}

Rule 402 (c) provides:

\textit{Determining Factual Basis for Plea.} The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea.

Quite apart from the question as to whether or not a plea of guilty is voluntary is the question of whether or not there is a factual basis sufficient to support the plea.

The risk that a plea which is obtained without resort to threats or other improper inducements and which is entered with full understanding of the

\begin{itemize}
\item \textsuperscript{78} Brady v. United States, 397 U.S. 742 (1970).
\item \textsuperscript{79} \textit{Id.} See also People v. Scott, 49 Ill. 2d 231, 274 N.E.2d 39 (1971) (fear of a possible death sentence); People v. Martinez, 7 Ill. App. 3d 1075, 289 N.E.2d 76 (1st Dist. 1972) (fear of death penalty).
\item \textsuperscript{81} 400 U.S. at 37.
\item \textsuperscript{82} \textit{Id.} at 31 (citations omitted).
\item \textsuperscript{83} See, e.g., People v. Pier, 51 Ill. 2d 96, 281 N.E.2d 289 (1972).
\item \textsuperscript{84} People v. Washington, 38 Ill. 2d 446, 232 N.E.2d 738 (1967). Withdrawal of a plea of guilty based on force, threats, or unfulfilled promises is not herein discussed.
\end{itemize}
possible consequences might nonetheless be inaccurate . . . . is a matter of concern. The defendant may not completely understand what mental state and acts constitute commission of the offense charged or that he has a valid defense to the charge. A guilty plea may be entered by a psychiatrically disturbed person; unlike a trial of a criminal case, the brief guilty plea process affords the judge little opportunity to detect incompetency unless the defendant is obviously retarded or grossly psychotic. A clearly rational defendant may enter a false plea in the hope of achieving some goal, as where an innocent defendant is seeking to protect another person. These and similar situations, although rare, have been observed from time to time.\textsuperscript{85}

Rule 402(c) recognizes the distinction between the concerns of voluntariness and factual basis determinations and imposes a duty upon the trial judge to determine whether the factual basis supports the plea. A complete failure of the trial court to determine the existence of a factual basis is reversible error.\textsuperscript{88}

Two aspects of Rule 402(c) merit some discussion here. They are: (1) the procedure to be employed in determining whether a factual basis exists; and (2) the time when such inquiry should be made.

As far as the procedure to be used is concerned, it should be noted initially that the rule does not require that the court set out the details of the factual basis in the record. In \textit{People v. Doe},\textsuperscript{87} the First District was faced with the defendant’s contention that the trial court failed to comply with Rule 402(c) by not setting out the factual basis in detail in the record. Basing its decision on the Committee Comments to Rule 402, which state that the factual basis inquiry may be geared to the particular case, the court concluded that a statement in the record by the trial judge to the effect that a factual basis did exist was a sufficient determination. Then, refusing to extend the scope of Rule 402(e), which provides that those proceedings required by Rule 402 to be in open

\textsuperscript{85} ABA \textit{Standards}, \textit{supra} note 6, § 1.6 at 31.

The requirement of Rule 402(c) as to determining whether a factual basis for the plea exists is further to be considered separately from the requirement of Rule 402(a)(1) that the defendant be informed of the nature of the charge. \textit{See, e.g.}, \textit{People v. Hudson}, 7 Ill. App. 3d 800, 288 N.E.2d 533 (5th Dist. 1972).

\textsuperscript{86} \textit{See, e.g.}, \textit{People v. Rollins}, 9 Ill. App. 3d 1011, 293 N.E.2d 733 (1st Dist. 1973) (reversed and remanded with directions that defendant be allowed to plead anew).


\textsuperscript{87} 6 Ill. App. 3d 799, 286 N.E.2d 645 (1st Dist. 1972).
court shall be made of record, the court held that the factual basis need
not be set out in detail in the record because the determination is not
required to be made in open court.\textsuperscript{88}

Probably the best discussion of those procedures by which the factual
basis for a guilty plea may be established is set out in \textit{People v. Hudson}.\textsuperscript{88}
In this case, the defendant unequivocally admitted that he did commit
the crime (armed robbery) to which he pleaded guilty. The fifth dis-
trict held that this admission provided a sufficient factual basis for con-
cluding that the defendant actually committed the crime. As to the pro-
cedure to be employed, the court stated:

Rule 402(c) does not specify any particular method of inquiry into the
factual basis of the plea. The judge may utilize any appropriate procedure
which will assure a record that demonstrates there is a factual basis for
the plea . . . . The method which should normally first be employed is
to ask the defendant if he actually committed the acts with the intent (if
any) required as set out in the indictment and as explained by the judge.
This might also be done by simply having the defendant state what he did.
If the defendant admits or states that he committed \textit{acts with the intent}
(if any) required, then Rule 402(c) is complied with. If the defendant
fails or refuses to admit that he committed the crime or professes his inno-
cence, this method of inquiry alone will not produce a record which shows
compliance with Rule 402(c). But if the defendant persists in his desire
to plead guilty, his plea may still be accepted if a factual basis is otherwise
demonstrated . . . . A factual basis may otherwise be demonstrated (1)
by having the prosecuting attorney summarize the testimony he could pre-
sent to show the defendant committed the crime. (\textit{People v. Bowers}, 47
Ill.2d 585, 268 N.E.2d 13, 14; \textit{People v. Dugan, supra}); (2) by having
the facts stated by witness(es), (\textit{People v. Dugan, supra}); or (3) by ex-
amination of a presentence report. (\textit{People v. Dugan, supra; People v.
Nardi, 48 Ill.2d 111, 268 N.E.2d 389, 391.}) If the third method is used,
the judge should state in open court the material he is relying on in
determining there is a factual basis for the plea. However, a mere per-
functory use of one of the above methods will not insulate a conviction
entered upon a plea of guilty from reversal if the record does not demon-
strate there is a factual basis for the plea.\textsuperscript{90}

The second important aspect of Rule 402(c) concerns the time at

\textsuperscript{88} Id. at 801, 286 N.E.2d at 646. \textit{See also} People v. Price, 9 Ill. App. 3d 693,
292 N.E.2d 752 (3d Dist. 1973) (where the court noted that setting out the factual
basis would be the “better practice”).

\textsuperscript{89} 7 Ill. App. 3d 800, 288 N.E.2d 533 (5th Dist. 1972).

\textsuperscript{90} Id. at 803-04, 288 N.E.2d at 535-36 (citations omitted). \textit{See also} People

The court may accept a guilty plea although the factual basis would not convict
the defendant at a trial. \textit{People v. Hickman, 9 Ill. App. 3d 39, 291 N.E.2d 523
(3d Dist. 1973).}
which the factual basis determination should be made. Rule 402(c) states that the court shall not enter a final judgment on a guilty plea without first making the determination. Nevertheless, factual basis determinations have taken place at hearings in aggravation and mitigation held prior to acceptance of the plea. The Fourth District in People v. Abel, however, noted that, "It is much to be preferred that the factual basis for the plea of guilty be ascertained prior to and separate from the hearing in aggravation and mitigation."

Furthermore, the factual basis determination may be made any time prior to a final judgment on the plea as distinguished from prior to acceptance of the plea. In People v. Price, the court stated:

[The suggestion that the trial court must first determine the factual basis prior to acceptance of a guilty plea under Rule 402(c) is not correct. The factual basis must be determined prior to final judgment.]

In making this statement, reliance was placed on the express terms of Rule 402(c), and no opinion has construed the words of Rule 402(c) to require that the factual basis determination be made prior to acceptance of the plea.

Exactly what constitutes a sufficient factual basis to support a guilty plea is not easily definable. Basically, the trial court must determine to its satisfaction that a factual basis exists. Reversals on the ground that a sufficient factual basis does not exist are quite rare, especially in view of the rule that it is not necessary for the state to produce evidence showing the defendant's guilt beyond a reasonable doubt, as would be required at a trial.

**Rule 402(d)—Plea Agreements**

Subparagraph (d)(2) provides that the trial court which is prohibited, under subparagraph (d)(1), from initiating plea discussions, may, at its discretion, be advised of any tentative plea agreement in advance of the
plea. In the event it is so advised, the trial court may, with the defendant's consent, receive evidence in aggravation and mitigation, and thereafter may indicate its concurrence which must be stated for the record in open court. The court may, alternatively, condition its concurrence upon a later hearing in aggravation and mitigation. If the judge later withdraws his concurrence or conditional concurrence, the defendant must be so advised and given the opportunity to affirm or to withdraw his plea of guilty. Where the defendant does withdraw his plea under these circumstances, the judge is required to excuse himself.

Under subparagraph (d)(3), where there is a plea agreement, but the judge has declined to give or the parties have not sought his concurrence or conditional concurrence to the agreement, the judge must inform the defendant, in open court, at the time the agreement must be stated, as required under Rule 402(b), that the court is not bound by the plea agreement. Further, should the defendant still persist in his plea, the trial judge must inform the defendant that the ultimate disposition of the case may be different from that contemplated by the plea agreement.

There have been few opinions interpreting Rule 402(d), and those of significance will now be discussed. Although subparagraph (d)(1) precludes the judge from initiating plea negotiations, in People v. Abel, the Fourth District affirmed a guilty plea conviction where it may be said that the court did initiate plea negotiations. The appellate court seemed to ignore this fact while recognizing the rule:

Prior to the appointment of counsel and based upon the conversation at the time of the explanation of the foregoing rights the court enquired whether the defendant 'had in mind offering to enter a plea at the time'. Ultimately this case was concluded upon the entry of a plea of guilty arising out of negotiations between defense counsel and the State's Attorney. At this juncture we note that Rule 402(d)(1) contemplates that the trial judge shall not initiate plea negotiations.

No further discussion of subparagraph (d)(1) followed and the court determined that the trial judge had substantially compiled with Rule 402.

The court, under subparagraph (d)(2), may be advised of the plea agreement, but is not under a duty to include the agreement in the record. The court in People v. Goodman held that the burden of making the agreement of record falls upon the parties.

People v. Chesier is an interesting case regarding the general con-

98. Id. at 212, 291 N.E.2d at 843.
99. 2 Ill. App. 3d 584, 588, 277 N.E.2d 136, 139 (2d Dist. 1971).
100. 3 Ill. App. 3d 523, 278 N.E.2d 93 (3d Dist. 1972).
duct of plea negotiations. The defendant's plea to a charge of attempted robbery resulted from plea negotiations to which the trial judge indicated no concurrence. The State offered to recommend a sentence of from two to eight years if the defendant would not ask for probation and would waive a hearing in aggravation and mitigation. The State indicated, however, that it would request a sentence of from three to ten years if the defendant requested probation or asked for a hearing in aggravation and mitigation. The defendant did request probation which, after a hearing, was denied. The prosecution then recommended a three to seven year sentence, and this sentence was imposed by the court.

On appeal, the court upheld the conviction and the sentence against the defendant's claims of inducement and improper conduct on the part of the prosecutor. The court concluded that the record failed to sustain the defendant's charges, stating:

[T]he defendant entered his plea of guilty with a full understanding of its consequences and . . . he was aware of the fact that the court was not bound by a recommendation of the prosecution.101

The correctness of the court's decision was questioned in a dissenting opinion filed by Justice Stouder.102

Finally, in People v. Hickman,103 the court held that the failure of the trial court to indicate its concurrence or non-concurrence with a plea negotiation was not, under the facts, reversible error, reasoning that the court had substantially complied with Rule 402 (d).

Rule 402(e)—Making a Record

Rule 402(e) provides:

Transcript Required. In cases in which the defendant is charged with a crime punishable by imprisonment in the penitentiary, the proceedings required by this rule to be in open court shall be taken verbatim, transcribed, filed, and made a part of the common-law record.

This paragraph was derived from former Rule 401 and is presently required by Boykin v. Alabama.104

The requirements of Rule 402(e) have been held to apply to probation revocation proceedings at which the defendant admits to violations of the conditions to probation.105

101. Id. at 525, 278 N.E.2d at 95.
102. Id. at 526-28, 278 N.E.2d at 95-96.
Rule 402(f)—Subsequent Admissibility

Rule 402(f) provides that a plea discussion which does not result in a plea of guilty, any unaccepted or withdrawn plea of guilty, or a reversed judgment on a guilty plea, are not admissible against the defendant in any criminal proceeding.\(^{106}\)

RULE 402 AND ITS INTEGRATION INTO THE LEGAL PROCESS

After only a cursory reading of the foregoing, one cannot help but feel an uncertainty about the interpretation and application of Rule 402. In order to verify this feeling, the authors undertook an in depth survey of all the reported Illinois appellate and supreme court decisions containing one or more 402 issues.\(^{107}\) The authors sent detailed questionnaires to the appellate court judges,\(^{108}\) circuit court judges,\(^{109}\) state appellate defenders,\(^{110}\) and state's attorneys\(^{111}\) in order to ascertain the attitudes of

\(^{106}\) There will be no further discussion of Rule 402(f).

\(^{107}\) The authors' search included a perusal of all the Illinois Supreme Court reporters ending with 56 Ill. 2d 461 and of all the appellate court reporters ending with 17 Ill. App. 3d 830. Appendix B, p. 94 infra, is a compilation of the totals of all the data derived from this search. Appendix C, pp. 95-98 infra, also a derivative of the case search, compares the number of guilty plea cases to the total number of criminal cases for the years of 1971, 1972, 1973, and 1974.

\(^{108}\) For the purposes of this Comment, results and remarks obtained from these questionnaires will be interspersed throughout. The word "sampling" will be used to denote this source. The authors are reproducing the responses exactly as they appear on the questionnaires. Little attempt has been made to make grammatical or stylistic corrections.

Of the 36 questionnaires sent to the appellate court judges, unfortunately, only 5 were returned. Therefore, no percentage computation was felt necessary. That is not to say that the responses received were not useful. On the contrary, the opinions of those responding appellate judges were quite constructive and will be noted when appropriate. A copy of the questionnaire sent to the appellate court judges is on file at the offices of the DePaul Law Review.

\(^{109}\) Since Cook is the only county with a criminal division, the authors sent 5 questionnaires to each chief judge of the remaining twenty judicial circuits, requesting that they be dispersed to those full circuit court judges who primarily handle criminal matters. Questionnaires were also sent to each of the 21 Cook County circuit court criminal judges. The response was quite satisfactory and sufficient enough for the authors to draw some clear conclusions. Of the 121 questionnaires sent, 43 were returned. A copy of that questionnaire is on file at the offices of the DePaul Law Review.

\(^{110}\) Upon completion of the statistical analysis of the reported decisions, the authors found that 83% of the appeals were handled by public defense counsel. Thus, the questionnaires were sent to all the public defenders at the appellate level in Illinois. Fortunately, 44% of those sent were returned—16 out of 36. A copy of that questionnaire is on file at the offices of the DePaul Law Review.

\(^{111}\) To 14 of the various offices of the state's attorneys, the authors sent a total of 85 questionnaires. Unfortunately, the response was a disappointing 15% or 13
those charged with the responsibility of implementing the rule.

Before discussing the results and conclusions, however, it would be appropriate at this point to note the purposes and goals to which the practice of pleading guilty is directed so that one can maintain a proper frame of reference throughout this analysis.

The specific reasons for Rule 402, as discussed in the beginning of this comment, are lesser included, though not necessarily less important, considerations involved in the practice of pleading guilty. Since this practice is a relatively late arrival in the history of the administration of criminal justice and as such serves to replace, among other things, the sacred right to a determination of guilt by a jury of one's peers, the following factors must be an integral part of the deliberation of every guilty plea proceeding.

First, the plea must be accurate. Precautions must be taken to make sure that the defendant is guilty of the offense charged and that he is voluntarily pleading guilty to that offense. This requirement is essential to the maintenance of a legitimate system of administration of criminal justice.

Second, the defendant must be treated fairly. If the defendant is treated fairly, he will not perceive the process as a mechanical, ritualistic experience but rather one which encourages a willingness to accept the responsibility for, and consequences of his actions. If the process is such that one will view it as something other than fair and reasonable, that process will become an immediate and many times irreconcilable impedence to the goal of rehabilitation, thus providing the defendant with a convenient rationalization for his harmful behavior.

Third, the process must be as certain as possible. If the process is predictable, it will inevitably aid in providing fair representation for both the defendant and the state. The institutionalization of a process that is congruent with the first two factors will better enable the actors to perceive their roles. Once these roles are perceived and experienced, the expectations of the participants will become informally recognized and the process will become more certain. This certainty would also eliminate time consuming and costly assertions of error which would upset the desired finality of lower court judgments.

out of 85. It should be noted therefore that the total percentage figure in Appendix D, pp. 98-99 infra, is influenced by the higher return of circuit court questionnaires. A copy of the state's attorneys' questionnaire is on file at the offices of the DePaul Law Review.

112. See text accompanying notes 1-8 supra.
Finally, the guilty plea procedure should be efficient. For the experience to be a meaningful one, in terms of rehabilitation of the defendant, a drawn out mini-trial could place too heavy an emphasis on stigmatization and retribution which would in most cases be counter-productive. On the other hand, too short a proceeding would give the defendant the impression that he or she is being “railroaded” into jail. This form of “selling out” would diminish the legitimacy of the institution in the defendant’s eyes and would rightfully cause the defendant to question the fairness of his treatment. A carefully balanced procedure would serve the best interest of both the state and the defendant.113 Thus, the term efficient is not limited solely to the consideration of the court calendar and speed of disposition. To circumscribe the appellation efficient so narrowly would be a functional misdefinition and would do little in the way of correcting behavior. Those who equate the term efficient solely with the notion of clearing the courts’ calendars should take notice of the fact that to expedite guilty plea proceedings at the expense of providing a fair and reasonable hearing is itself inefficient.114

Illinois Supreme Court Rule 402 is unquestionably the most laudable effort to make guilty plea proceedings fair, certain, accurate and effective. Initially, this can be gleaned from the specificity in the terms of the rule itself. However, due to the unique nature of the subject matter with which the rule deals (persons admitting guilt) and other institutional factors, the application of the specific and apparently clear terms has been anything but uniform. This lack of uniformity has resulted in a procedure that is not always accurate, certain or fair. It has also been the catalyst for greater confusion and thus more appeals. The purpose of this section is to describe that which brought the authors to state these assertions. It should be noted, however, that the preceding conclusions are based upon analysis of the reported decisions and questionnaires. The fact that many cases are not appealed and that many result in Anders briefs115 attests to the notion that many judges and attorneys are mindful

113. The most experienced counsel will attest to the fact that selecting the number of witnesses to testify is a crucial task, as too many will diminish the effect of the key witness' testimony. This avoidance of attrition must also be attained in guilty plea proceedings if they are to have a positive rehabilitative effect on the defendant who is pleading guilty.

114. This correlation can be inferred from the high rate of recidivism experienced nationwide. Although not the sole origin of this phenomenon, the guilty plea hearing is an integral part of the process that is supposed to “correct” people's behavior.

115. Anders v. California, 386 U.S. 738 (1967) (requiring public defense counsel to write a brief describing the possible issues on appeal and stating why the appeal was insubstantial). Of the 212 cases surveyed, 25 of the 189 affirmed cases
GUILTY PLEAS IN ILLINOIS

of the significance of this guilty plea procedure. The focus here is on the proper institutionalization of the values of such a procedure, something that the authors feel has not occurred nor appears to be imminent.

On September 1, 1970 Illinois Supreme Court Rule 402 relating to guilty pleas became effective. From that day hence, the trial judge became required to administer specifically pronounced admonitions while ascertaining certain other information for the record. As is true with legislative enactments, many of the terms of the rule called for interpretation and definition. Judicial construction combined with the fact that Rule 402 was more elaborate than its predecessor, made more appellate litigation inevitable. In 1971, only 9 of the 73 guilty plea appeals in the appellate courts pertained to Rule 402—this time lag is indicative of the burdensome appellate case load. By 1972, however, the total number of 402 cases in the appellate courts had already exceeded its predecessor's 1971 appeals by 7. Thus, the 1972 appeals were almost 7 times the number reported in 1971. In 1973 the number of 402 appeals increased 44% over 1972. Given the greater specificity of the terms of the rule, these facts do not appear significant. However, a discussion with the Administrator of the Office of the State Appellate Defender revealed that 255 of their cases pending as of May 1, 1974, contained one or more 402 issues. All other things being equal, if decisions were rendered by December, 1974, in three-fourths of those cases pending, an increase of 116% over 1973 could result. Regardless of this speculation, the number of appeals still pending represents a significant increase over the previous year's figures.

were the result of an Anders brief. Not one was reversed. It should be noted, however, that of the public defenders who responded to the questionnaire, 56% felt that the Anders brief puts the public defender in an unsatisfactory position.

116. For this discussion, Illinois Supreme Court statistics will be excluded since only two decisions have been rendered by this court regarding Rule 402.

117. See Appendix C, pp. 95-96 infra. In 1971, 1% of the total appellate court criminal cases were 402 cases. In 1972, 8% of the total appellate court criminal cases were 402 cases. In 1973, 11% of the total appellate court criminal cases were 402 cases. By March 1974, 402 cases represented 16% of the total number of reported Illinois criminal cases.

118. The breakdown was as follows: First District—17, Second District—60, Third District—41, Fourth District—63, and Fifth District—74.

119. This increase does not take into account the fact that approximately 17% of the appeals are represented by private defense counsel. For the compilation of this data, motor vehicle and municipal ordinance violations were excluded.

120. Of the 212 cases reported and used in the survey for this Comment, 54 were abstract opinions. See Ill. Sup. Cr. R. 23. Given the prediction that the number of decisions will increase, there is good reason to believe that appellate courts will rely more heavily on the use of memorandum opinions, the precedential value of which is less meaningful for appellate counsel.
years of experience with the rule and 212 reported decisions is that the number of appeals has not stabilized and a leveling off does not appear imminent.

The uncertain state of the rule to date is also depicted by the high rate at which cases involving guilty plea appeals are reversed. Of the total number of guilty plea appeals,121 28% resulted in reversals. Since many of the appeals involved one or more 402 issues, the authors further dissected the decisions and found that of the different 402 issues discussed, 31% were considered adequate grounds for reversal.122 Thus, there are many more unresolved problems than the raw case reversal rate indicates. Since more than one of every four appeals result in a reversal and a remandment, it takes little insight to realize that the effect of the adoption of Rule 402 was to place an additional strain on the administration of criminal justice in Illinois. In order to get a proper perspective of the causes of this dilemma and to determine whether such a result was unavoidable, other aspects of this area must be examined.

As the objective analysis of this paper points out, there is substantial disagreement among the various appellate courts as to the interpretation of the different subsections of Rule 402.123 For example, some courts require that the essential elements of the charge be recited to properly admonish the defendant, while others find that merely stating the name of the charge is sufficient. Some courts have even hedged on the express language of the rule and allowed the state's attorney, instead of the trial judge, to admonish the defendant.124

When studying 402 court opinions, one is constantly confronted with the term "substantial compliance." It is inevitable, as the rule specifies that its requirements must be satisfied by "substantial compliance." In effect, "substantial compliance" is a medium through which the attitudes of the appellate court judges toward Rule 402 are translated. The manipulation of each court's concept of the guilty plea process is thus achieved through the use of this discretionary denomination. Some courts have

121. Since five opinions were reversed on other grounds, the total number of cases used for this computation was 207.
122. See Appendix B, p. 94 infra for the relevant data. It should be noted that appellate and supreme court opinions do not always discuss each and every issue that is raised.
124. Thus the application of the fiction of "incorporation by reference." People v. Larrabee, 7 Ill. App. 3d 726, 729, 288 N.E.2d 538, 540 (5th Dist. 1972).
strictly interpreted the rule—most notably the Fifth District—while others have broadly circumscribed the scope of the rule and have viewed the entire record to ascertain, in essence, whether substantial justice has been achieved.

It would be far too myopic, however, to say that the problem lies solely with the phrase "substantial compliance." That, like similar phrases, is a device which allows the judge to accommodate the law to the particular defendant. To bring to light the causes of this dilemma, one must travel beyond the words of the rule and into the court room. It is from the interaction of the participants that one can divine the human aspect of that which surfaces at the appellate level as but a symptom couched in legalese.

One of the most significant ramifications of the rule is the altering of the trial judge's role which, in turn, implies that the proceeding be conducted in an almost non-adversarial milieu. That the full burden has been placed on the trial judge's shoulders is attested to by Judge John R. Wright of the Seventh Judicial Circuit, who states that

The rule is bad in that it makes the judge be an advocate. Because the State's Attorney sits back and lets the judge do it all; the judge must solicit the facts to prove the case. Then the judge passes judgment on whether he has proven his case, i.e. is the plea voluntary, etc. Hence when the case goes to the appellate court it is really a trial by the appellate court on the record to see if the trial judge properly proved up his case.

Thus, there are those who feel that this switch in roles is neither warranted nor beneficial. Although the following statement of a circuit

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125. The change in the rule from "the court finds from the proceeding had in open court" (ILL. REV. STAT. ch. 110A, § 401(b) (1969)) to "[t]he court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of and determining that," envisions a more affirmative role for the judge in guilty plea proceedings. (Emphasis added).

In response to a question about his expectations of the effect of the rule at the trial level when adopted, Judge John L. Moore of the Fifteenth Judicial Circuit stated, "Trouble!"

126. This quotation, as those that will follow, was taken from the questionnaires. No quotation has been made without the express authority of the respondent. It should be noted at this point that the authors requested that the respondents answer the questions not with regard to what they believed to be the status of the law, but rather what they felt the law surrounding Rule 402 should be.

127. Judge Albert G. Webber III of the Sixth Judicial Circuit, in reply to whether he was satisfied with a nonadversarial hearing, stated:

No. The parties know much more about the case and the defendant and his record. More emphasis is needed and more reliance should be placed on representations of counsel.

In a more lengthy statement, Judge John R. Wright of the Seventh Judicial Circuit, commented:

The proof should be made adversely by the State's Attorney and defense
court judge begins to discuss the rule approvingly, the statement alludes to his discontent with the burden he must now shoulder:

I have felt that Rule 402 is a good rule, but would require that where counsel for defendant appears to be able, he should be required to make a statement for the record that he, as counsel, has fully and accurately advised the accused as to every right he may have in connection with the charge and that he, counsel for defendant, has also fully advised the accused as to each and every element of Rule 402.

When faced with a 402 appeal, the appellate court judge is also confronted with coping with this role change. The degree to which the appellate court judge believes that this change is proper will directly affect his definition of "substantial compliance." Needless to say, the rule has created a good deal of apprehension at the trial level and tension between the lower and appellate courts. One circuit court judge goes so far as to say that

The rule that judges should not practice law or give legal advice should apply to criminal defendants. Also the practice required by Rule 402 makes it appear that the judge is trying to help the defendant escape a penalty by avoiding a necessary step toward the rehabilitation, i.e. the acknowledgement of guilt. The practice is repugnant.

Another area that brings into focus the problem of the trial judge's concept of his role is plea negotiations. Until the adoption of Rule 402(d), guilty procedures in Illinois lived a veiled existence as the illegitimate child of the trial package. Although 402(d) has not been particularly troublesome either in its interpretation or application, and the number of appeals arising from it are few, the sampling has indicated a sharp divergence of opinion. The requirements of Rule 402(d), to the extent that they control plea negotiations are indeed novel. More important, however, is the fact that subsection (d) provides a more realistic approach to plea discussion and negotiations. Under Rule 402(d), any tentative plea agreement may be brought to the attention of the trial judge, at the judge's discretion, upon a request by the parties. It is then up to the judge to indicate, in open court, his concurrence or conditional concurrence with the proposed disposition of the case. The judge must, how-
ever, inform the defendant that the trial court is not bound by the plea agreement where the judge's concurrence has not been indicated. Above all, the trial judge must refrain from initiating plea discussions, as to do so would violate Rule 402(d)(1).

Based upon the responses to the questionnaires, it may be said that participation in plea negotiations by the trial judge is generally favored. Responses to the question of whether it is proper for the trial judge, upon request and with the defendant's permission, to participate in plea discussions centered mainly on two alternative views. Most judges questioned favored participation on the theory that it helps in clarifying the understanding of the parties as well as expediting disposition of the cases. Judge Glenn T. Johnson, appellate court judge for the First Judicial District, Fourth Division, stated that the judge's participation in plea discussions "is essential in order that both sides may have a clear understanding as to the fruits of the conference." One circuit court judge stated that such participation on a case-by-case level is a "practical necessity."

On the other hand, many judges opposed participation in plea negotiations, some flatly stating that they never get involved in plea discussions of any kind. The general feeling of these judges was that by participating in plea negotiations, the trial judge cannot remain an unbiased participant, and is, therefore, unable to make an objective evaluation of the resulting plea agreement.

Judge Thomas J. Moran, appellate judge in the Second District, summed up the position of a number of the minority of judges who disfavor participation by the judge when he stated, "the trial judge should not be a party to a 'contract' upon which he must later sit in judgment."

One circuit court judge, in supporting his view that the trial judge should not participate, emphasized the effect the trial judge might have on the defendant. This Second Circuit judge stated that by participating in plea discussions "the court tends to become an adversary. [A] dominant judge working with [the] prosecutor can intimidate the defendant."

Finally, Judge Albert G. Webber III of the Sixth Judicial Circuit went so far as to say that the judge's participation makes the proceedings "too close to the star chamber."

Public defenders tended to favor participation mainly on the theory that it increases the predictability of the post-plea outcome of the case.

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128. Overall 64% of the judges, state's attorneys, and public defendants favored the judge's participation in plea negotiations.

129. 60% of the public defenders favored the judge's participation.
Thus, while most of the judges, state’s attorneys and public defenders who responded to the questionnaires favored the trial judge’s participation, the pro and con opinions were widely divergent. Opinions were, in general, either strongly for or strongly against the judge’s participation. The significance of this result may not be attributed simply to personal opinions on the matter of the trial court’s participation. Conceivably, a uniform understanding of the trial judge’s function at plea discussions is lacking. The feeling of many judges that participation in the plea negotiations may lead to prejudice could result from these judges perceiving their role at this point in the guilty plea proceedings differently than those judges who did not feel they would be prejudiced by such participation.

What has become apparent is that the rule has brought to the surface problems that are inherent in the development of an adequate guilty plea process. These conflicts were inevitable and necessary to resolve some of the practices inconsistent with the policies underlying guilty pleas. Judge Allan L. Stouder of the Third District Court of Appeals has commented:

Many of the problems have arisen because some trial court judges do not like the rule and consequently the rule has been ignored or the compliance has been grudging and [ineffectual. I think trial judges might well prefer that most of the areas covered by 402 should be left to be resolved between the defendant and his attorney. Because the Bench and Bar have been somewhat negligent in the representation of those accused of crime particularly if compensation thereof was limited or non-existent, we have now by evolutionary means institutionalized our awareness of these deficiencies.

While these and other factors have led to considerable resistance to the new rule,130 some feel that bringing guilty pleas out into the open, with the trial judge in control of the proceeding, is the best way “to establish that the defendant understands the consequences of his acts.”131 Those who accept the basic premises upon which the rule was founded exude frustration over the course it has taken. The general tenor of many of the public defenders’ responses seems to disparage the trial

130. When asked if they would prefer a guilty plea process whereby the manner in which the trial court satisfies Rule 402 is specifically predetermined (a procedure similar to patterned jury instructions), 79% of the circuit court judges responded in the affirmative. When asked for a solution to the increase of appeals, some judges felt that the “Supreme Court should make a new rule,” rather than work with the present rule.

131. Judge Paul C. Verticchio of the Seventh Judicial Circuit made this response after acknowledging that he was satisfied that the rule contemplated an essentially non-adversarial hearing.
judges for failing to enforce the explicit terms of the rule¹³² and the appellate court judges for diluting the rule's effectiveness through the vehicle of "substantial compliance."¹³³

In an interesting variation on this non-adversarial theme, some of the public defenders believe that the state's attorneys should be as careful a guardian of the trial record as defense counsel. A public defender commented:

In view of the fact that many trial judges do not fully comply with Rule 402, the state's attorney should view his function as assuring that no omissions are made by the trial judge. In particular the state's attorney should make sure that any plea agreement is fully and clearly stated on the record and . . . that a factual basis for the plea is fully established on the record.

Kent Osborne, assistant appellate defender for the Third District, cogently sums up what must be considered a prevalent attitude of the defense side:

I don't think I do my clients much good by reversing their guilty pleas, but appellate defenders have at least stimulated proper compliance with 402 at the trial level. After a while any trial judge is going to get tired of having his guilty plea reversed and remanded.

The discontent is not limited, however, to defense counsel. One state's attorney, with thirteen years of experience, bristled when he stated that the best approach to reduce the number of appeals would be to supply the trial judge with pattern admonitions "and suspend the judge for six months, without pay, if he fluffs his job." Thus, the acceptance of this new role formation by the adversaries is not a function of one's clientele.

There is also apparent support for the rule from many circuit court judges. Although one could argue that those circuit court judges who responded to the questionnaires were the most disheartened by the rule, 82% felt that the rule, as it now exists, is fair and effective. Since 65%

¹³². One public defender, when responding negatively to the question of whether a uniform application of a well defined and specific guilty plea procedure would significantly reduce the number of appeals, stated that "402 is not difficult. The problem is with judges whose only concern has been moving cases along quickly."

Later that same public defender, in response to a similar question, noted:

The problem has been that trial judges don't want to take the time. Either they are concerned about the docket, or they are unconcerned about people who confess to being criminals. 402 is pretty straightforward.

¹³³. In response to the question, "What would be the best approach to decrease the number of appeals," one public defender stated, "enforcement of the existing rule by the appellate courts."

A more detailed discussion of this attitude and its causes can be found in the text beginning with note 135 infra.
of that same sampling felt that a uniform application of a well defined and specific guilty plea procedure would significantly decrease the number of appeals, one must conclude that a great number of circuit court judges take issue with the lack of certainty in application rather than the rule itself. This conclusion is buttressed by the fact that of the questionnaires' alternatives dealing with structural changes of the rule, only 26% favored restructuring the rule, only 13% favored amendments that would more precisely define its terms, and only 9% favored amendments that would include new or expanded requirements. The overwhelming choice, preferred by 83%, was supplying the trial judge with patterned admonitions. This last alternative would do nothing to the rule itself, but would directly affect its application.134

Further evidence of positive feelings toward the rule is supplied by other responses in the sampling. Although clearly supported by appellate case law, 80% of the circuit court judges sampled indicated that a written statement submitted by the defendant waiving certain rights was an unsatisfactory substitute for the judge ascertaining the waiver by personally questioning the defendant. This preference showed that those sampled concurred with the concept of the judge as a more active participant. This attitude is also illustrated by Judge John W. Rapp, Jr. of the Fifteenth Judicial Circuit who, when responding to the question of whether he felt that a uniform application of a well defined and specific guilty plea procedure would decrease the number of appeals, stated that "we already have one as far as I am concerned—Rule 402."

Regardless of this role conflict and the fact that there are those at the trial level who do support the present rule, there is yet another obstacle to overcome. The appellate courts are not interpreting Rule 402 so that it can be applied with a sufficient degree of certainty.135 If one is to assume that the rule does envision the aforementioned role change, the appellate court should realize this fact and act to alleviate as much of the strain as possible. Instead, in the words of the Third District Court of Appeals, "the decisions interpreting and applying Rule 402 are not completely harmonious and the rule itself as a developing principle has not yet achieved its intended purpose."136

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134. See Appendix D, pp. 96-99 infra, for a breakdown of the questionnaire responses.
135. When later discussing an approach to resolving the problem of application, the authors will give attention to the conflicts ensuing from the specific subsections of the rule.
136. People v. García, 8 Ill. App. 3d 542, 543, 289 N.E.2d 637, 638 (3d Dist. 1972). In García, the court affirmed the conviction but conditioned it upon the virtually impossible task of determining whether the plea was voluntary. Since none
This inconsistency is experienced at every level of interaction. Instead of aiding the trial judges through a difficult period of readjustment, the appellate courts have added to their anxieties. As one state's attorney notes:

As it stands now, with no uniformity, the appellate courts must substitute their judgment for that of the trial court in each case. By a uniform procedure I believe this problem would be alleviated.

When asked the best way to decrease the number of appeals, three of the five responding appellate court judges felt that the trial judge should be supplied with patterned admonitions. One appellate court judge felt that the trial judge should be supplied with patterned admonitions, that the rule should be restructured and that the rule should be amended by adding more precise definitions. The fifth responding appellate court judge, Thomas J. Moran of the Second District felt that:

Because of the many seemingly inconsistent appellate court opinions on what constitutes a proper admonition under the Rule, it would be helpful if the Supreme Court would review the Rule (either under Rule 302(b) or by petition for leave to appeal) and establish what it means by "substantial compliance."

When asked if a uniform application of a well defined and specific guilty plea procedure would significantly decrease the number of appeals in this area, 65% of the circuit judges responded in the affirmative as well as 85% of the state's attorneys and 75% of the public defenders: a total of 71%. When asked if they would prefer a guilty plea process whereby the manner in which the trial court satisfies Rule 402 is specifically predetermined (e.g., what must be given to satisfy the re-

of this could have been part of the common law record, such a remand is tantamount to sanctioning a hearing, the testimony of which, would be based upon hearsay allegations and testimony of witnesses with faded memories.

The proper remedy should be a reversal with the direction to allow the defendant to plead anew if he or she so desires. The defendant should be allowed the opportunity to plead anew for it "not only will insure that every accused is afforded those procedural safeguards, but also [it] will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate." McCarthy v. United States, 394 U.S. 459 (1969), cited with approval in People v. Krantz, 12 Ill. App. 3d 38, 40-41, 297 N.E.2d 386, 388 (4th Dist. 1973).

There is even a degree of disdain leveled at the appellate courts from the lower courts. In response to whether one's expectations as to the effect of Rule 402 when adopted were realized, one circuit court judge stated, "In most part. Reviewing Court tends to abuse this power by picking out or adding technicalities not provided by Rule 402."

Later that same judge, in response to whether a uniform application of a well defined specific guilty plea procedure would significantly reduce the appeals, stated, "No. As soon as you get rules fixed, Reviewing Court would change the rules by interpretation."
quirement that the defendant be admonished regarding the nature of the charge; similar to patterned instructions), 79% of the circuit court judges responded in the affirmative as well as 92% of the state's attorneys and 43% of the public defenders\textsuperscript{138}; a total of 73%. When asked if they felt that appellate court decisions have defined and interpreted the rule in such a way as to make it predictable, the circuit court judges split evenly, while 64% of the state's attorneys and 64% of the public defenders responded in the negative. In light of the preceding responses, the circuit court judges' last reaction might appear somewhat incongruous. The authors are led to believe, however, that this discrepancy may be explained by the fact that each individual district's position appears relatively certain, though inconsistent when compared with the posture of the other districts. Nonetheless, the overwhelming response in favor of supplying the trial judge with patterned admonitions (83% of the circuit court judges, 100% of the state's attorneys and 67% of the public defenders)\textsuperscript{139} evidences a lack of uniformity and attests to the need for more certain procedures.\textsuperscript{140}

Given the present circumstances, the institutional pressure of reversal on circuit court judges has become an increasing source of anguish. Judge Donald W. Morthland of the Sixth Judicial Circuit stated:

\textit{It seems to me that many of the reversals under 402 imply incompetent representation by the Bar. I can't believe that this is the case and the implication is unfortunate.}\textsuperscript{141}

\textsuperscript{138} The reason for this response appears to stem from the apprehension that the admonishments by the trial judge will become too mechanistic if they are patterned. One public defender perceptively noted that:

Patterned instructions may well solve an administrative problem but they won't solve the due process problem. Coping with the latter however—by making judges take an interest in the defendant's perception of understanding of what is happening—will solve both problems.

\textsuperscript{139} See Appendix D, pp. 96-99 infra.

\textsuperscript{140} The fact that appellate courts have gone beyond the terms of the rule and have looked to the whole record can be considered one source of frustration for those who feel that a strict interpretation of the rule is necessary to attain the previously mentioned goals of a meaningful guilty plea procedure. In response to whether he was satisfied that the rule contemplated control of the proceedings by the trial judge in an essentially non-adversarial hearing, one public defender stated:

No. Because the case law has allowed one to look elsewhere in the record—such as in probation reports and the prosecutor's comments—to fill in the gaps in the judges' admonitions.

In defense of this position, one circuit court judge commented that:

All prior proceedings (e.g. motion to suppress) before the same judge should become part of the proceedings and usable in determining factual basis, voluntariness, etc.

\textsuperscript{141} The feeling that Judge Morthland expresses is consonant with the authors' view that this area is not simple, but, rather, a matrix of complex relations.
For those not satisfied with 402's new role structure, appellate court interpretation has been perceived as a coercive agent. One Seventh Circuit judge noted that

From the wording of the Rule the judge's participation could be minimal. It doesn't work out this way for many judges because of our interest of not looking too stupid in the appellate court.

This judge's experiences led him to believe that the rule was not effective and fair as it was "not fair to the prosecution since there are too many chances for error."

Unfortunately, one consequence of this perplexity has been an undercurrent directed toward eliminating the defendant's right to appeal upon the conclusion of a proper guilty plea hearing. Such a solution begs the problem. Appeals, especially in this area, have served to clarify the difficulties. Even if the supreme court were inclined to make a change in the rule, that court would need the guidance that appellate court decisions would provide. The reticularity of this situation could not have been discovered had the right to appeal been dissolved.

One interesting modification of this view was expressed by Judge Paul

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142. Judge Albert G. Webber III, of the Sixth Judicial Circuit, has suggested that:

The rule should provide that "substantial compliance" waives all errors except jurisdiction and that the plea is immune to collateral attack by post-conviction petition, habeas corpus, etc.

It has been held, in an abstract opinion stemming from a post-conviction petition, that:

Record establishing defendant's entry of guilty plea thereby manifested waiver of all non-jurisdictional errors, including subsequent post-conviction allegation of incompetency of counsel with whom defendant expressed no displeasure at time of plea.


Since this was an abstract opinion, the precedent for such a decision was omitted. In Rogers, the defendant contended that counsel was incompetent, and thus the plea involuntary, as no witnesses were called on the defendant's behalf. The italicized portion of the statement is a misleading general statement. As prior case law points out, this statement refers only to infringement of constitutional rights afforded the defendant, usually arising from pre-guilty plea proceedings (hearing on motions to suppress, etc.). These cases have arisen on appeal when the defendant loses a motion to suppress, enters a plea of guilty and then later tries to attack the voluntariness of the plea on direct appeal, instead of going to trial and then taking a direct appeal. See, e.g., People v. Wilson, 29 Ill. 2d 82, 193 N.E.2d 449 (1963); People v. Deweese, 27 Ill. 2d 332, 189 N.E.2d 247 (1963).

It would be an error, however, to believe that a guilty plea waives the right of the defendant to file a direct appeal based on some violation of Rule 402. Though not raised as yet, 402(a), (b), and (c) all go to the defendant's knowledge, understanding, and voluntariness—requirements of constitutional magnitude since Boykin v. Alabama, 395 U.S. 238 (1969). It is curious that this was not the grounds upon which People v. Rogers rested.
C. Verticchio of the Seventh Judicial Circuit who stated that:

It is this court's opinion that 402 protects the rights of the defendant . . . however, there should be a provision that upon 402 being fully complied with and all rights of the defendant protected that the defendant waive any right to appeal. Unless this provision is made part of 402 in the future the unlimited number of appeals from guilty pleas will continue to burden the appellate court. (emphasis added)

This variation of full compliance and complete protection adds another dimension to the right to appeal issue, for it points out a path that must eventually be crossed: when a fair and effective guilty plea procedure has been institutionalized, what will be the most accurate and efficient means of verification? Although a lesser consideration, the method devised to police these procedures should be an integral component of a process that is fair, effective, efficient and which provides a sufficient amount of certainty for the participant in terms of the finality of the judgment.

The evidence put forth in this section leads the authors to conclude that the appellate courts have made the trial judges' new role even more uncertain. Bound by the fact that in most cases the defendant is guilty, the appellate courts find it difficult, if not absurd, to reverse because of what is considered to be a technical non-compliance. Often-times, the courts recognize the fact that affirming the particular fact pattern before them means that the spirit of the rule is being betrayed—"while we do not approve any relaxation of Supreme Court Rule 402, where the error under the circumstances of a particular case is not of sufficient magnitude, there should be no reversal." In effect, there is a gap between the rule and court room practice, and appellate court interpretation is providing a precedent to perpetuate this hiatus. Because of these circumstances, the authors are led to believe that the solution cannot be found in the appellate courts.

RESOLVING THE PROBLEM OF APPLICATION

Appellate court litigation has been quite valuable in circumscribing this enigma. However, given, among other things, the unusually high increase in the number of appeals and the high rate of reversals, no unity of approach has been formulated from the judicial process. When one is concerned with implementing an effective and fair guilty plea procedure, these factors cause dismay. There should be no reason for ap-

pealing a guilty plea on grounds of technical non-compliance. Needless to say, these appeals are inefficient as well as costly.

To resolve this problem, attention must be focused on the trial level, and consideration must be given to the purpose of the proceeding and to the two main participants: the defendant and the judge. However, before the trial judge can be effective, regard must be given to the dynamics of this transaction. The judge, a significant actor in the administration of criminal justice, is faced with making some very crucial determinations regarding the degree of culpability and potential for rehabilitation of the defendant. In most cases the defendant’s behavior is non-conforming and violent. In order to make the essential decisions with which the judge is charged, the judge must understand the many facets of sociopathic behavior and violence in this society. Then he must begin to formulate and implement, respectively, his own unique theory and method of interpersonal dispute resolution. Unless approached in this coherent fashion, the problem of dealing with one who commits an offense against society can never be challenged in any meaningful way.

In structuring a hearing that will not only be accurate and certain, but

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144. Of the 212 guilty plea appeals, 45 opinions were void of reliance on any specific subsection of the rule. Thus, many reported decisions were of no precedential value and were considered to be of little value generally. It should be noted that there were two decisions in which the court noted that the state failed to submit a brief. In both cases, the judgments were affirmed.

In response to whether they thought that guilty plea appeals took up more time than they should, given their responsibility to effectively represent the remainder of their caseload, 82% of the state’s attorneys responded in the affirmative while only 29% of the public defenders so responded. One could read the public defenders’ response as originating from their institutional biases and as a result of the feeling that the question implied that the defendants were not worthy of the appeal process.

In light of their ever-increasing caseload and the feeling, as expressed by one public defender, that:

I have felt for some time that the trial judge should be provided with something like patterned instructions, because it seems so senseless to have to reverse guilty pleas when the result is that the defendant pleads guilty all over again. ... I don’t think I do my clients much good by reversing their guilty pleas, but appellate defenders have at least stimulated proper compliance with 402 at the trial level,[145] the general response of the public defenders appears somewhat suspect.

145. There have been many interesting and relevant studies that would be of considerable help. See, e.g., E. Liebow, Tally’s Corner: A Study of Negro Streetcorner Men (1967). There has also been a concerted attempt from other disciplines to alert those in the legal profession to various discoveries about human behavior so that a coherent approach from the legal community can be implemented. Cf. J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1973) (A book written by psychiatrists, it focuses on the “development of guidelines to decisionmaking in law concerned with the selection and manipulation of a child’s external environment as a means of improving and nourishing his internal environment.” Id. at 7).
also a first step toward the rehabilitation of the defendant, the authors believe that a certain symmetry of order and humanity must be present. The adjudication of guilt without regard for the treatment of the person and his attitudes toward himself and others is the first step away from rehabilitation. Although there are a number of those whose potential for rehabilitation is negligible, there are a vast number who can be reached. Coupled with the fact that when a stranger is placed in a small group situation where all but that stranger are experienced members of that group, the chances of having some influence on the individual are exceedingly good.\textsuperscript{146} It is all, however, a function of that group’s ability to understand the defendant’s situation and then guide him toward an awareness of a more personally meaningful perspective.\textsuperscript{147}

The authors’ model of interaction envisions participation by all the actors in the proceeding. The trial judge’s role, however, is crucial. He must transform advocates to counselors and touch the defendant in such a way as to make him a willing receptor. The trial judge must be able to comprehend the facts of the case as presented by the counselors and the defendant and then collimate these views into a coherent and meaningful thought-form for the defendant. Combined with the judge’s higher position of authority and the respectful and fairly devised proceeding, much can be assimilated by a defendant who is treated as an individual of worth.\textsuperscript{148}

\textsuperscript{146} The impact of the aura of the courtroom is verified in Hetzler & Kanter, \textit{Informality and the Court: A Study of the Behavior of Court Officials in The Processing of Defendants, Politics and Crime} 76 (S. Sylveste, Jr. & E. Sagarin, eds. 1974) (The nonverbal and informal aspects of courtroom behavior are scrutinized and the authors conclude that “the determination of guilt or innocence actually takes place in an atmosphere of implied guilt . . . directly influencing the formal determination of guilt. \textit{Id.} at 82).

\textsuperscript{147} The law does not exist in a void. For the law to be effective, the scope of adjudication must be expanded to envelope the entire problem. What the authors are implying is that the techniques of group therapy and interaction should become an integral part of the defendant’s “courtroom” experience. There is a wealth of literature on group interaction and behavior that can help begin this inquiry. \textit{See, e.g.}, G. Egan, \textit{Face to Face: The Small-Group Experience and Interpersonal Growth} (1973); D. Watson & R. Tharp, \textit{Self-Directed Behavior: Self-Modification for Personal Adjustment} (1972).

\textsuperscript{148} Not until recently have legal scholars begun to pursue the path upon which social scientists ventured years earlier. In his article, critical of Packer’s “Battle Model” of criminal procedure, John Griffiths explores an alternative view: the Family Model. Griffiths, \textit{Ideology in Criminal Procedure, or A Third “Model” of the Criminal Process}, 79 \textit{Yale L.J.} 359 (1969). Therein Griffiths isolates intimacy as one of the key factors essential in helping the offender obtain self-control. Rather than exile the offender, the chief result of current criminal procedure, Griffiths explores the unification of criminal law, procedure and penology so that the offender can become a meaningful part of the community. \textit{Id.} at 380. \textit{See also} A. Maslow,
The express terms of Rule 402 portray such a proceeding. The hearing, as perceived by the rule, is in harmony with the concept that the defendant be a knowing and willing participant and that the trial judge be certain that the defendant's participation is a result of a knowledgeable and voluntary decision. If the defendant does not view the decision to participate as one resulting from such conditions, the ensuing intercourse will be tainted. Thus a great onus is rightfully placed on the trial judge.

A Model for Interaction

At present there is no sequence of events required by the rule. The factual basis as well as the negotiation agreement may be discussed after the plea is accepted. There is no purposefully constructed procedure to be institutionalized. The authors believe that this proceeding must flow in a coherent and logical manner; coherent and logical to the defendant as well as to the officers of the court. The following is a model for a patterned guilty plea proceeding that the authors feel will effectuate the aforementioned goals of rehabilitation, accuracy, certainty, fairness and efficiency. It will also enable the trial judge to create a milieu that is conducive to open and honest intercourse.

I. Preliminary Interview

Assuming that the judge has been notified that the defendant desires to plead guilty, the judge should first ascertain some basic information about the defendant. He should acquaint himself with some essential elements of the defendant's personal history: name, age, occupation, education, place of birth, etc. This will better enable the judge to gear the proceedings toward the level of understanding of that particular defendant.

II. The Defendant: Having the Benefit of a Considered Decision

Initially, the defendant must be given a meaningful opportunity to decide whether he or she wants to take part in the proceeding and thus forego the trial process. Before the court can consider whether the de-

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149. In the terms of the rule, "to personally address the defendant in open court. . . ."

fendant's decision to plead guilty is voluntary, the defendant must be knowledgeable of the consequences of such an action. It is the duty of the court, as the personification of the group's highest ranking authority, to explain to the defendant, in language on a par with his or her ken, the consequences of the plea. Since many defendants are of a certain socio-economic class, the most effective and efficient method of communication would be to use patterned statements tailored to those defendants. Based on the institutional reactions of the circuit and appellate court judges and their responses to the sampling, there is a great deal of support for such a proposition. Of those surveyed by the authors, 4 of the 5 appellate court judges, 83% of the circuit court judges, 100% of the state's attorneys, and 67% of the public defenders favored implementation of patterned instructions: an overall total of 82%.

These admonitions should contain an amount of information sufficient for a defendant to knowingly, and thus voluntarily, assume the consequences of a guilty plea. In effect, this means that an educational ex-

151. There is much evidence that most of the people who pass through the criminal courts are of the same socio-economic, and therefore educational, level. Such can even be derived from the fact that of the 212 guilty plea appeals, only 35 defendants were represented by private counsel, and one must assume that some were appointed.

152. The authors have purposely avoided the use of the term "admonition" for these purposes due to its negative connotation. Webster's unabridged dictionary defines admonition as "a warning or caution against specific faults, or a reprimand." Such is not the purpose of 402(a)(1)-(4).

153. Before constructing a patterned statement, a great deal of effort should be expended in understanding the defendant. Projects should be set up to study how the different inquisitorial models cope with this communications problem. The projects should focus on such models as the continental system, successful juvenile adjudication and preliminary hearing procedures.

At present an analogous inquiry is being pursued at the DePaul University College of Law. Based on an unpublished paper by Jeffrey M. Libit, JUROR COMMUNICATION: A FUNCTIONAL SEMANTIC APPROACH TO THE ANALYSIS OF JUROR INSTITUTIONAL LANGUAGE (1973), a study of the effect of the language of the Illinois Patterned Instructions on jurors is being conducted. More of these studies are necessary to verify the truth of many legally sanctioned procedures that are based solely on unverified assumptions.

154. This rebirth of the inquisitorial model is conditional. Unlike the continental system, the defendant here may choose whether he or she will pursue a plea of guilty. Of course such a statement must be tempered by the fact of plea bargaining, but in most cases, to say that the process is coercive, discounts the fact that the defendant's alternative is an expensive trial with no assurance of a verdict of not guilty. It is usually one of the defense counsel's tactics of last resort, and in some cases indicates the state's perception of the strength or weakness of its case. Nevertheless, it is well established that a defendant is not considered coerced if he is provided with sufficient knowledge of the consequences. North Carolina v. Alford, 400 U.S. 25 (1970); People v. Province, 16 Ill. App. 3d 314, 306 N.E.2d 66 (5th Dist. 1974) (abstract). Also, a plea is not considered involuntary when the defendant
change between the judge and the defendant must take place. Like any successful learning process, it must not be one-sided. The court should not only set forth clear statements of the consequences of pleading guilty but also should actively solicit responses to be assured of the defendant's understanding.\textsuperscript{165}

There is certain information that \textit{must} be conveyed to the defendant so that an intelligent and considered decision may be made. The defendant must be given sufficient information about the charges so that he or she can relate them to the facts. Thus, merely stating the name of the charge or reciting the statement would be inadequate. A patterned statement should be so structured as to allow the judge to insert the name of the charge followed by a statement of the essential elements. To make certain that the defendant, in his or her own mind, relates the legal elements with the particular facts of the situation, the judge should provide a brief, factual, hypothetical example that would constitute a violation of the offense in question.

The sampling regarding this statement disclosed the following opinions:

| Enumerate that which you would include in \textit{your} definition of the nature of the charge: (check one or more) (answer by percentage) |
|---|---|---|---|---|
| Cir. | SA | PD | Total |
| a. reading the indictment | 70 | 69 | 75 | 72 |
| b. stating just the name of the charge | 37 | 15 | 19 | 30 |
| c. reading the statute | 33 | 8 | 50 | 32 |
| d. stating the essential elements | 79 | 62 | 94 | 80 |
| e. reading the statutory defenses | 26 | 15 | 56 | 31 |
| f. relating that which has been checked above to the facts | 21 | 15 | 69 | 31 |

Of the total number of 402 issues raised and discussed on appeal, 12\% were \textit{402(a)(1)}, nature of the charge, issues. The continued appellate litigation in this area could easily be resolved by a patterned statement. No court has gone further than to require a statement of the essential elements; thus the suggested procedure would not be in any way offensive to prior appellate court decisions. The authors have rejected as inadequate the mere reading of the indictment, as the indictment is couched

claims that he would have gotten a higher sentence if he went to trial. People v. Ferguson, 15 Ill. App. 3d 773, 305 N.E.2d 366 (1st Dist. 1973) (abstract); People v. Singleton, 4 Ill. App. 3d 46, 280 N.E.2d 260 (5th Dist. 1972); People v. Chernier, 3 Ill. App. 3d 523, 278 N.E.2d 93 (3rd Dist. 1972). For the state's attorney or judge to state that a higher sentence would be imposed if a trial were requested, however, must be considered so unconscionable as to deprive the defendant of a reasonable opportunity to make a voluntary decision.

in language that in no way can be considered fathomable by the average defendant.

The defendant must then be made aware of the penal consequences of his or her plea. This is one of the most crucial considerations of the guilty plea process. For the defendant, all the choices boil down to: how much can I get? Rule 402(a)(2), however, informs the defendant of but the bare minimum penal consequences of tendering a plea: "the minimum and maximum prescribed by law [and some jurisdictions do not require an explanation of the term "indeterminate"], including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences."^{156}

It is the authors' belief, well supported by the sampling, that this statement should include more. It is in regard to the consequences of a guilty plea that a patterned statement can be most effective. In a running monologue, the patterned statement should set out at least the following: (1) that if the plea is accepted, a sentence must be imposed; (2) that if a trial is pursued and the defendant is found not guilty, he or she will be set free and that charge cannot be reinstated; (3) that if a plea is accepted, the charges dropped or accepted cannot be later reinstated; (4) the statutory minimum and maximum for each charge along with examples if the maximum is indeterminate; (5) that, if more than one charge is involved, they can run consecutively or concurrently (when applicable); (6) that there is a possibility of probation (when applicable); (7) that the present status of probation (when applicable) will be revoked, probation would no longer be possible and that an extra sentence of "X" number of years could be added to the new sentence; and (8) that the defendant has the right to have a pre-sentence investigation made and to present evidence in aggravation and mitigation.^{157} Of course, this statement, like patterned jury instructions, would be shaped by the facts, and it is the responsibility of the trial judge to verify the defendant's understanding of these statements. A breakdown of responses to supplying these alternative statements is set out in Appendix D.

In language that the defendant could comprehend, the recital of a clear scenario of the trial package would better enable him or her to plead knowingly. A patterned statement would have the effect of reducing the number of "penal consequences" appeals which currently constitute 12% of the issues raised in 402 appeals. Application of this comprehensive statement would also evidence a respect for the defendant as

157. See Appendix D, pp. 96-99 infra, for a full breakdown of responses to the questionnaires' request.
an individual. By so informing the defendant, the trial judge could humanize the proceeding and convey a sense of worth: that the defendant is able to make a rational choice when given the opportunity. Such is a significant factor in dismantling a mechanistic approach to human relations while imparting a sense of justice.

It has been held that the court need not admonish the defendant of the minimum or maximum at a probation revocation hearing. Of all the questions in this sampling, that issue produced one of the most decisive responses. When asked whether an admonition as to the possible sentence to be imposed on a defendant pleading guilty to a charge of violation of probation should be given, all of the appellate court judges responding to that question, 95% of the circuit court judges, 54% of the state's attorneys and 94% of the public defenders favored the admonition: a total of 87%. Since the standard of proof required to substantiate a violation of probation is less than that for conviction of the very same offense, there is no reason why the defendant should not be afforded the same knowledge of the penal consequences as one pleading to the substantive offense. When pleading guilty to a violation of probation, the potential consequences are usually greater since the defendant may later be prosecuted for the substantive offense as well.

The final information, necessary for the defendant to make a knowing plea, revolves around the consequences of the choice: what will be waived. The rule requires that the defendant be informed of the fact that he or she has "the right to plead not guilty or to persist in that plea if it has already been made, or to plead guilty; and . . . that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to trial by jury and the right to be confronted with the witnesses against him." To tender a voluntary plea the court must be sure that the defendant understands that which he or she is waiving. It is the authors' contention that a description of the criminal trial process, understandable to the particular defendant, must be given. A patterned statement should contain a brief yet complete description of at least the following: the right to a bench or jury trial; the right to be proven guilty beyond a reasonable doubt; the right to counsel at trial, and free counsel if indigent; the right to remain silent; the right to select a jury; the right to subpoena witnesses; the right to cross examine witnesses; the right to present any legal or factual defense; and the right to plead not guilty. A breakdown of responses

to the inclusion of these various rights in a penal consequences statement is provided in Appendix D. It should be noted here that over 75% of the responses consistently favored their inclusion.

Appeals relating to waiver of rights (402(a)(3) and (a)(4)) issues equalled approximately 16% of the total issues raised. The application of a patterned statement would therefore deal with what is now 40% of the issues raised on appeal.\(^{160}\) Many of these various rights, however, have been included in some trial judges’ admonitions—the Criminal Bench Book for Trial Judges suggests that many of these rights be explained, i.e. the right to jury or bench trial, right against self-incrimination, etc.\(^{161}\) The Bench Book, however, is not binding as an approved patterned statement would be. Thus, the Bench Book has not the effect of institutionalizing a uniform procedure.

One of the reasons for inconsistent application of the rule’s subsections (402(a)(1)-(4)) is the fact that the appellate courts have held that, in light of many records, it is not reversible error and it is substantial compliance for a trial court to omit an admonition regarding one entire subsection.\(^{162}\) Those interpretations tend to lessen any hope of institutionalizing the rule. Cognizant of this fact, Judge Thomas J. Moran of the Second District Court of Appeals has suggested that the rule be restructured “by inserting after the word ‘with’ in the opening sentence, the words ‘each of’ ” thus changing the rule to read:

In hearings on pleas of guilty, there must be substantial compliance with each of the following:

The authors agree that this minor change of wording is a necessary step toward the evolution of a more accurate and certain guilty plea proceeding.\(^{163}\)

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\(^{160}\) Of the 212 cases, 12% were 402(a)(1), 12% were 402(a)(2) and 16% were 402(a)(3)-(a)(4).

\(^{161}\) The right against self-incrimination is part of the Boykin package, and is so noted in the Committee Comments to Rule 402. The appellate courts, however, have not considered the omission of that admonition to be sufficient grounds for reversal. People v. Fair, 17 Ill. App. 3d 109, 308 N.E.2d 162 (1st Dist. 1974); People v. Peterson, 16 Ill. App. 3d 1025, 307 N.E.2d 405 (3d Dist. 1974).


\(^{163}\) There is some authority in support of Judge Moran’s suggestion. See, e.g., People v. Green, 12 Ill. App. 3d 418, 299 N.E.2d 535 (4th Dist. 1973) (402(a)(1) and 402(c) must be determined separately).
III. The Trial Court—Acceptance of an Adequate Plea

This final phase of the proceeding is most significant. It is here that the trial judge must determine to his satisfaction whether the defendant is guilty as charged and if the defendant is pleading voluntarily. The authors envision this stage as the point where the judge and counselors can have the most positive effect on the defendant. If handled correctly, the different perspectives of the participants can help sort out the events and factors that precipitated the charge. It is the purpose of this section to lay a foundation for a more humanistic approach toward the "adjudication" of a defendant. Needless to say, effective direction of group interaction is a learned skill; however, if the "law" is to solve problems it must study behavior and divine patterns from the many stories that daily unfold before the bench.

The authors have devised an open-ended plan for the acceptance of pleas to allow the counselors and the judge to freely interact. Thus, planned or patterned statements would serve no useful purpose. Rather a structure of events has been devised to assure 1) that the facts are honestly disclosed, 2) that the plea is uncoerced, 3) that there is full disclosure of any agreements and 4) that there will have been complete and open discussion of the circumstances and consequences, when the proceeding has been completed.

Before this prototype procedure is disclosed, it is necessary to discuss the relationship of the determination of voluntariness to the finding of a factual basis. Voluntariness deals with the freedom of choice of the defendant. There are two forms of involuntariness. The first is the most obvious type: overt threats, promises or coercion that cause a defendant to plead rather than select a trial. The second is a more insidious form of coercion for it deals with facts which, if understood and appreciated by the defendant, would have caused him not to plead guilty. This second form of involuntariness may be exemplified by the situation where the "defendant may not completely understand what mental states and acts constitute commission of the offenses charged or that he has a valid defense to the charge." The only way to flush out the truth in these situations is to have a complete discussion of the circumstances surrounding the commission of the offense. To make a competent

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164. There is also the possibility that an apparently rational defendant "may enter a false plea in the hope of achieving some goal, as where an innocent defendant is seeking to protect another person." ABA STANDARDS, supra note 6, at 31.

165. Id.

166. It is for this reason that the authors believe that the defendant's participation is a necessity. Accord, ABA STANDARDS, supra note 6, at § 1.1a at 13.
finding and conduct an effective and efficient hearing, a full disclosure
of the factors is imperative. This will serve to assure that the defendant
relates the facts to the law from the nature of the charge statement, and also will verify that the defendant is being properly represented. Thus, a proper finding of voluntariness is very much dependent on a full

is also one reason why the practice of allowing a stipulation to the factual basis is unsound.

When asked if stipulating to a factual basis is proper, 92% of the state's attorneys and 50% of the public defenders responded in the affirmative. Unfortunately, the wording of this question makes the responses less significant as the phrase—stipulate to a factual basis—could be interpreted to mean either a statement that the facts are stipulated with no actual recital of what occurred or a statement of the facts recited into the record and a statement by the defendant verifying it. The more likely interpretation is the second. Unfortunately, in the authors' view, 70% of the circuit court judges felt that nothing more than a stipulation should be required to show compliance with determining the factual basis.

The case law has gone so far as to find a proper factual basis for a plea where the record contained no detailed facts, but did include a self-serving statement by the trial judge that he had made a finding of a factual basis. People v. Doe, 6 Ill. App. 3d 799, 286 N.E.2d 645 (1st Dist. 1972). Contra, People v. Walraven, 11 Ill. App. 3d 1085, 297 N.E.2d 198 (3d Dist. 1973).

"Substantial compliance" has been interpreted to allow the appellate courts to uphold a factual basis determination by viewing the record as a whole. People v. Freeman, 15 Ill. App. 3d 100, 303 N.E.2d 598 (5th Dist. 1973); People v. Barr, 14 Ill. App. 3d 742, 303 N.E.2d 202 (1st Dist. 1973). Courts have also gone so far as to assume voluntariness when the defendant has been sufficiently admonished pursuant to 402(a). People v. Ellis, 16 Ill. App. 3d 282, 306 N.E.2d 53 (2d Dist. 1974), leave to appeal granted, (filed May 16, 1974, no. 72-216).

These decisions have done little in the way of reinforcing 402(c) and making it a vehicle for a proper fact finding and voluntariness determination.


168. The phenomenon of poor representation should be a subject of particular concern for everyone. Justice Stouder of the Third District Court of Appeals notes that:

I think trial judges might well prefer that most of the areas covered by 402 should be left to be resolved between the defendant and his attorney. Because the bench and bar have in the past been somewhat negligent in the representation of those accused of crime particularly if compensation thereof was limited or nonexistent, we have now by evolutionary means institutionalized our awareness of these deficiencies.

The problem of poor representation extends far beyond the scope of Rule 402 and into the heart of the system of criminal justice in Illinois: the allocation of resources as well as the attitudes toward correction.

Unless Rule 402 is approached in the manner proposed herein, transcripts will be void of the data so necessary for proper disposition of the case and appellate review. A full record is necessary, because there are situations when the judge and attorneys overlook facts sufficient to constitute a defense or are unaware of the law. See, e.g., People v. Drake, No. 73-67 (filed Aug. 1973, 2d Dist.) (where defense counsel and trial judge stated that intoxication is not a defense where there is evidence of intoxication).
Once one accepts that notion, another obstacle must be hurdled. According to appellate court interpretation, a factual basis can be determined after actual acceptance of the plea. The courts have ruled that according to 402(c), final judgment means that the factual basis can be established any time up to sentencing. Thus, a factual basis can be established in a hearing in aggravation and mitigation held days after the plea was actually accepted. This interpretation is an unfortunate blow to the proper institutionalization of a guilty plea procedure at the trial level as well as to the positive experiences that can be derived from a meaningful hearing.

There is a great deal of support for a restructuring of 402(c) by the judiciary. One reason is that, presently, 402(c) is functionally and theoretically incongruent with the way the proceedings were meant to operate. In order to determine whether this interpretation was well received, the authors asked the respondents of the sampling to note when they thought the factual basis should be determined. The overall percentage results were: 73%—before any form of acceptance of the plea, 14%—any time before the mittimus is authorized (“final judgment”—what is now the interpretation), 27%—when determining if the defendant understands the nature of the charge and 14%—when determining if the defendant’s plea is voluntary. Thus three of the four choices required the trial judge to determine the factual basis before any adjudication of guilt. Only 14% of the respondents concur with the present interpretation of 402(c). It is for these reasons that the authors have purposely structured a model that would disallow such a practice.

In order to properly facilitate this third phase, the authors believe that the state’s attorney should be required to submit, after the patterned statements and responses discussed above, but prior to this phase, a writ-

169. Responding to whether it is possible for the trial judge to determine if a plea is voluntary before a factual basis is determined, 77% of the state’s attorneys and 56% of the public defenders answered yes. It is the authors’ belief that the term voluntary was not defined as broadly by the respondents as stated herein.


172. The reason why the total is over 100% is because some respondents checked more than one selection.
ten statement describing to the court the facts that would have been proved had a trial been requested. The judge should first ask whether, now that the statements and acknowledgments have been completed, the defendant still desires to plead guilty. If the answer is in the affirmative, the trial judge should then be required to elicit the facts of the occurrence from the defendant. Careful scrutiny of the accounts of the state and the defendant would serve to verify the validity of each report and assure that the defendant's plea is truly voluntary.

When placed in this unfamiliar setting, the external pressure tends to cause more truthful responses. Thus if conducted properly, the hearing will better enable the judge to discern any factual or legal defenses and appraise the defendant of their existence. The judge will also be better able to discover if the defendant has been coerced into the plea.173

Once the defendant completes the description of the occurrence, the judge should be required to relate the facts to the law for both the record and the parties. A verbal agreement by all parties that the statement is correct should then be included in the record. Then the judge should inquire about the status of any plea agreements. If the parties have negotiated an agreement, the court should require that all the terms and reasons for the agreement be disclosed and made of record. At this time section (d)(2) of Rule 402 becomes fully operative.

Once all these relevant facts are elicited, the judge should again ask the defendant if he or she still wishes to plead guilty. If so, the judge should state whether the plea will be accepted and why. If the plea is not the result of an agreement, it should not be conditionally accepted. Only when there is an agreement should the acceptance of a plea be conditioned on evidence heard in aggravation and mitigation. If the plea is not a result of an agreement, the defendant should be told of his right to present evidence in aggravation and mitigation and to have a pre-sentence investigation report compiled.174

173. See People v. Mims, 10 Ill. App. 3d 147, 294 N.E.2d 32 (1st Dist. 1973) (abstract) (where the defendant contended that his private counsel stated that he would not represent him unless he pleaded guilty).

174. If a uniform guilty plea proceeding, like the one posed herein, is adopted, there would be less of a reason to further restructure Rule 402. The authors feel, however, that if restructuring is considered, section (c) should be revamped to provide the following:

(c)(1) Prior to the hearing, the State's Attorney shall submit, in writing, an offer of proof reciting that which the State would have proven had there been a trial.

(2) Following the admonishments pursuant to section (a), the Court shall personally address the defendant in open court and determine if there is a factual basis for the acceptance of the plea.
This suggested patterned guilty plea procedure should have the effect of almost totally eliminating appeals that arise from 402(a), while decreasing the number of appeals arising from 402(b) and (c), due to the fact that the findings should be more elaborate. Since the average guilty plea, on appeal, consumes a total of between 12 and 20 hours of research, brief and opinion writing, and argument, the decrease of appeals would inevitably result in a reallocation of resources so necessary to alleviate the burdensome caseload of all concerned.

There is a justified concern that patterned statements would result in a mechanical proceeding. The proceeding described herein requires that only those statements that are intended to educate the defendant of the consequences of the plea be strictly administered. It is also required that they be in the jargon best suited for the average defendant. There is a great deal of latitude in the balance of the proceeding due to the fact that each situation and defendant is different. The propriety of the trial judge's factual basis and voluntariness findings will not be barred from attack since appellate review would still be available as a viable method for affirmation and modification. This procedure, however, envisions a decrease in appeals because of the greater visibility of a more embellished dialogue among the participants.

What is and should be the root of concern is not these procedures but the people who implement them. Ambivalent participants end the proceeding before it begins. The strength of the suggested model is that it presents an orderly progression of events which should, if forthrightly implemented, be perceived as fair and legitimate while allowing the group to interact in a meaningful sense. For the experience to be meaningful to the defendant, the proceeding must be perceived as part of the vehicle of rehabilitation. To view the encounter as one solely for the purposes of retribution and stigmatization is of questionable moral as well as practical worth.

**Reflection**

The changes, of almost a technical nature, suggested herein are obviously not extreme. In fact, they are merely a refinement: a result of

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(3) The factual basis determination must be made prior to any form of acceptance of the plea.

175. To date, issues appealed on the grounds of a violation of 402(b)-(c) have equalled 35% of the issues raised on appeal.

176. These are rough figures derived from the responses to the questionnaires.

177. Schwartz & Skolnick, Two Studies of Legal Stigma, The Other Side 103 (H. Becker ed., 1964) ("the indirect effects of sanctions can be powerful, that they can produce unintended harm or unexpected benefit, and . . . the results are related
the natural aging process of judicial interpretation. What is most significant about the suggested procedure is that it is constructed with an awareness of the need for discretion so that a concerned, experienced and knowledgeable judge will best be able to guide a meaningful guilty plea to fruition.

The scope of judicial inquiry has always been considered to encompass those factors that will most effectively aid in arriving at a just resolution. This end requires that a fair and final solution be found. The high rate of recidivism caused by, among other things, reinforced anti-social behavior and rejection by the greater society must cause the judge to widen the perimeters of his courtroom. As the knowledge and understanding of man increases, so will the dimension of theories about human existence and behavior. These expanded and deepened concepts of man, his behavior and rationale are now in the process of extensive verification and embellishment. Sources of this regard, as well as continuing research, proliferate.

In light of these profound perspectives, what is just, in terms of a proper and real resolution, is no longer a simple prescription. The American's complex physical and psychological interdependence in an age of unprecedented high population density is clearly mirrored in the criminal courts. Instead of absolving itself from the responsibility of constructing a just resolution by reflecting the onus back onto the defendant, the judiciary must become involved. And if any real success is to be achieved, it cannot be done without the help of the trial judge. Although there are some technical changes in the guilty plea procedure in Illinois that are necessary, the most meaningful alteration must come from within each member of the judiciary, as a result of the embracing of institutional values that emphasize an ethic of multifarious understanding and expertise. The inculcation of such values would, thus, better enable the appellate courts to sit as purviewers of the sophistication and technique of skilled and experienced judges, using their advantageous position in society's best interest.178

Edward Albert*
Richard Wimmer**

178. The authors wish to gratefully thank those judges and attorneys who, in response to the questionnaires, evidenced the understanding of the great value of self-criticism.

* Mr. Albert, a member of the New York Bar, was Survey Editor of the De Paul Law Review, 1973-74.

** Mr. Wimmer, a member of the Illinois Bar, was an Associate Editor of the De Paul Law Review, 1973-74.
PLEAS OF GUILTY

In hearings on pleas of guilty, there must be substantial compliance with the following:

(a) Admonitions to Defendant. The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

1. the nature of the charge;
2. the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;
3. that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and
4. that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him.

(b) Determining Whether the Plea is Voluntary. The court shall not accept a plea of guilty without first determining that the plea is voluntary. If the tendered plea is the result of a plea agreement, the agreement shall be stated in open court. The court, by questioning the defendant personally in open court, shall confirm the terms of the plea agreement, or that there is no agreement, and shall determine whether any force or threats or any promises, apart from a plea agreement, were used to obtain the plea.

(c) Determining Factual Basis for Plea. The court shall not enter final judgment on a plea of guilty without first determining that there is a factual basis for the plea.

(d) Plea Discussions and Agreements. When there is a plea discussion or plea agreement, the following provisions, in addition to the preceding paragraphs of this rule, shall apply:

1. The trial judge shall not initiate plea discussions.

2. If a tentative plea agreement has been reached by the parties which contemplates entry of a plea of guilty in the expectation that a specified sentence will be imposed or that other charges before the court will be dismissed, the trial judge may permit, upon request of the parties, the disclosure to him of the tentative agreement and the reasons therefor in advance of the tender of the plea. At the same time he may also receive, with the consent of the defendant, evidence in aggravation or mitigation. The judge may then indicate to the parties whether he will concur in the proposed disposition; and if he has not yet received evidence in aggravation or mitigation, he may indicate that his concurrence is conditional on that evidence being consistent with the representations made to him. If he has indicated his concurrence or conditional concurrence, he shall so state in open court at the time the agreement is stated as required by paragraph (b) of this rule. If the defendant thereupon pleads guilty, but the trial judge later withdraws his concurrence or conditional concurrence, he shall so advise the parties and then call upon the defendant either to affirm or to withdraw his plea of guilty. If the defendant thereupon withdraws his plea, the trial judge shall recuse himself.

3. If the parties have not sought or the trial judge has declined to give his concurrence or conditional concurrence to a plea agreement, he shall inform the defendant in open court at the time the agreement

is stated as required by paragraph (b) of this rule that the court is not bound by the plea agreement, and that if the defendant persists in his plea the disposition may be different from that contemplated by the plea agreement.

(e) Transcript Required. In cases in which the defendant is charged with a crime punishable by imprisonment in the penitentiary, the proceedings required by this rule to be in open court shall be taken verbatim, transcribed, filed, and made a part of the common-law record.

(f) Plea Discussions, Plea Agreements, Pleas of Guilty Inadmissible Under Certain Circumstances. If a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is withdrawn, or if judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any resulting agreement, plea, or judgment shall be admissible against the defendant in any criminal proceeding.

APPENDIX B
REPORTED RULE 402 ILLINOIS COURT OPINIONS

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1. Includes Illinois Supreme Court opinions to 56 Ill. 2d 461 and appellate court opinions to 17 Ill. App. 3d 830.
2. Two cases do not indicate the defense counsel.
3. Five appellate cases were not clear as to whether they were 402 or 401(b) cases.
4. Forty-nine appellate cases included in these statistics did not indicate which specific section of 402 was considered.
APPENDIX C

COMPARISON OF THE NUMBER OF GUILTY PLEA CASES TO THE TOTAL NUMBER OF CRIMINAL CASES FOR THE YEARS 1971-74

ILLINOIS SUPREME COURT

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ILLINOIS APPELLATE COURTS

1971

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<th>Ill. Sup. Ct. Rptr. Vol.</th>
<th>No. Ill. No. 401(b)</th>
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1. These statistics exclude cases arising from motor vehicle and municipal ordinance violations.
APPENDIX D

PERCENTAGE ANALYSIS OF QUESTIONNAIRE RESPONSES

I. Responses relating to the purpose and effectiveness of Rule 402

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<th>PD</th>
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<tr>
<td></td>
<td>%</td>
<td>%</td>
<td>%</td>
<td>%</td>
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<tr>
<td>Do you feel that Rule 402 is an effective and fair rule as it now exists?</td>
<td>yes—82</td>
<td>54</td>
<td>67</td>
<td>73</td>
</tr>
<tr>
<td></td>
<td>no—18</td>
<td>46</td>
<td>33</td>
<td>27</td>
</tr>
<tr>
<td>Do you feel that appellate court decisions have defined and interpreted Rule 402 in such a way as to make its application predictable?</td>
<td>yes—50</td>
<td>36</td>
<td>36</td>
<td>45</td>
</tr>
<tr>
<td></td>
<td>no—50</td>
<td>64</td>
<td>64</td>
<td>54</td>
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<tr>
<td>Do you feel that a uniform application of a well defined and specific guilty plea procedure would significantly decrease the number of appeals in this area?</td>
<td>yes—65</td>
<td>85</td>
<td>75</td>
<td>71</td>
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<tr>
<td></td>
<td>no—35</td>
<td>15</td>
<td>25</td>
<td>29</td>
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<tr>
<td>If so, what would be the best approach:</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>restructure the existing Rule 402</td>
<td>26</td>
<td>10</td>
<td>0</td>
<td>16</td>
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<tr>
<td>amend it with more precise definitions</td>
<td>13</td>
<td>10</td>
<td>42</td>
<td>20</td>
</tr>
<tr>
<td>amend it by including new or expanded requirements</td>
<td>9</td>
<td>0</td>
<td>25</td>
<td>11</td>
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<tr>
<td>supply the trial judge with patterned admonitions</td>
<td>83</td>
<td>100</td>
<td>67</td>
<td>82</td>
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<tr>
<td>Would you prefer a guilty plea process whereby the manner in which the trial court satisfies Rule 402 is specifically predetermined (e.g. as to what must be given to satisfy the requirement that the defendant be admonished as to the nature of the charge; similar to patterned jury instructions)?</td>
<td>yes—79</td>
<td>92</td>
<td>43</td>
<td>73</td>
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<tr>
<td></td>
<td>no—21</td>
<td>8</td>
<td>57</td>
<td>27</td>
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<tr>
<td>Do you think that the proper standard with regard to admonitions be that they be directed to the knowledge and understanding of a reasonable person?</td>
<td>yes—46</td>
<td>83</td>
<td>13</td>
<td>45</td>
</tr>
<tr>
<td></td>
<td>no—54</td>
<td>17</td>
<td>88</td>
<td>55</td>
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<tr>
<td>(A negative response here indicated that the standard should be that the admonition be directed to the knowledge and understanding of the particular defendant.)</td>
<td></td>
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</table>
II. Nature of the Charge Admonition—402(a)(1)

Enumerate that which you would include in your definition of the nature of the charge: (check one or more)

- reading the indictment
- stating just the name of the charge
- reading the statute
- stating the essential elements
- reading the statutory defenses
- relating that which is checked above to the facts

III. Penal Consequences Admonition—402(a)(2)

Enumerate that which you would include in an admonition regarding the penal consequences of tendering a plea of guilty: (check one or more)

- that a sentence must be imposed if the plea is accepted
- that if found not guilty by a bench or jury trial, the defendant will be set free
- that upon acceptance of a plea of guilty the charges dropped or accepted can not be reinstated
- the statutory minimum and maximum of each charge
- that, if more than one charge, they can run consecutively
- that, if more than one charge, they can run concurrently
- the possibility of probation
- the effect of this present charge on present probationary status
- the effect of this present charge on the possibility of probation
- where the maximum is indeterminate, examples should be given (e.g., 2-10, 2-20, 2-60)
- possible good time per offense charged
- possible good time per offense charged
- estimate time for parole eligibility
- that the defendant has the right to present evidence in a hearing in aggravation and mitigation
- that if probation has been revoked, the defendant will not be eligible for probation upon a plea of guilty to a second offense
- where the maximum is indeterminate, examples should be given (e.g., 2-10, 2-20, 2-60)
- possible good time per offense charged
- estimate time for parole eligibility
- that the defendant has the right to present evidence in a hearing in aggravation and mitigation

IV. Waiver of Rights Admonition—402(a)(3) & (a)(4)

Enumerate that which you would include in an admonition that would explain those procedures that the defendant
would waive when pleading guilty
right to a bench trial 83 100 94 89
right to a jury trial 100 100 100 100
right to confront witnesses 100 92 100 99
right to subpena witnesses 69 46 88 69
right to present any possible defenses, legal or factual 71 46 94 72
right to remain silent 90 62 88 85
right to a speedy trial 52 15 69 49
right to defend oneself at trial 50 23 63 48
right to be represented by an attorney at trial 83 85 69 80
right to free public defender, if indigent 74 62 69 70
right to select a jury 60 46 50 55
right to plead not guilty 86 77 88 85
right to be proven beyond a reasonable doubt 90 77 94 89
right to statutory presentence investigation report 45 23 56 46

Do you think that a written waiver of rights and one that shows compliance with the present rule is sufficient in lieu of ascertaining the same information for the record by the trial judge?

V. Voluntariness and Factual Basis Determinations

Do you think that the factual basis should be determined:

(more than one was checked by the respondents)
before any form of acceptance of the plea 74 17 63 73
any time before the mittimus is authorized (before “final judgment”) 12 25 0 14
when determining if the defendant understands the nature of the charge 14 33 38 27
when determining if the defendant’s plea is voluntary 12 17 6 14

Do you think that something more than a stipulation should be required to show substantial compliance with determining the factual basis? yes—30 no—70

VI. Plea Agreements

Do you think that it is proper for a trial judge, upon request, to participate in a pre-hearing conference with the State’s Attorney and the Defense Counsel (with the permission of the defendant)?

yes—66 no—34

In such a pre-hearing conference, do you think it is proper for the trial judge to consider circumstances that would normally be heard in a hearing in aggravation and mitigation?

yes—73 no—27
If the trial judge does not participate in a negotiation conference and later, after the plea is tendered, hears circumstances of aggravation and mitigation and then decides to refuse to accept the agreement, should he recuse himself?

If the trial judge refuses to accept a plea agreement for any reason, should the rule require that he recuse himself?

Do you believe that plea negotiations should be made on the record?