Appellate Review of Guilty Plea Acceptances in Federal Court: Harmless Error in a Rule 11 Proceeding

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INTRODUCTION

Rule 11 of the Federal Rules of Criminal Procedure governs the taking of guilty pleas in federal court. The rule performs a dual function. On the one hand, it protects defendants by enhancing the fairness of a plea proceeding. On the other, it accords to pleas a measure of finality by regulating plea negotiations and by assuring the maintenance of complete plea-taking.


2. The rule provides strict guidelines for the acceptance of guilty pleas by federal trial judges. See notes 9-19 and accompanying text infra. For the most part, these guidelines reflect due process standards, described by one commentator as follows:

The standards themselves—that the plea be voluntary, intelligent and accurate—are simply enough stated. Defining their substantive content is much more difficult, however, because it reflects multiple and often contradictory concerns about the propriety and fairness of the guilty plea process. Moreover, as courts have sought to regulate the plea process by stretching the traditional standards to cover newly recognized problems, their substantive content has come to have only an attenuated relation to familiar concepts of voluntariness, knowledge, and accuracy.

J. Bond, Plea Bargaining and Guilty Pleas § 3.01, at 74-75 (1975).

3. Fed. R. Crim. P. 11(e). Plea bargaining had long been an "invisible process," in part because of its doubtful constitutionality. See J. Bond, supra note 2, § 1.07; Davis, The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy, 6 Val. U. L. Rev. 111, 119-21 (1972); Erickson, The Finality of a Guilty Plea, 48 Notre Dame Law. 835, 839 (1973). The Supreme Court cleared the uncertainty by recognizing that legitimate inducements to plead guilty do not render a plea involuntary. See Bordenkircher v. Hayes, 98 S. Ct. 663, 668 (1978); Santobello v. New York, 404 U.S. 257, 261-62 (1971); Brady v. United States, 397 U.S. 742, 754-55 (1970). See generally ABA Standards Relating to Pleas of Guilt § 3.1, Commentary at 60-69 (Approved Draft, 1968). A parallel development in the lower appellate courts spawned a variety of circuit rules which fastened on trial judges the duty to inquire into the existence of plea bargaining prior to accepting a guilty plea. These courts believed that the failure to incorporate the terms of a bargain into the plea-taking record left the plea susceptible to voluntariness challenges. Compelled disclosure would not only enhance the likelihood that the defendant understood these terms, but also would facilitate rapid disposition of later allegations that the government failed to live up to its bargain. See Moody v. United States, 497 F.2d 359, 362-65 (7th Cir. 1974); Bryan v. United States, 492 F.2d 775, 780-82 (5th Cir.) (en banc), cert. denied, 419 U.S. 1079 (1974); United
In reviewing alleged plea-taking errors, federal appellate courts must strive to accommodate these concerns. Accordingly, the standard of review should strike some balance between the need to protect a defendant's due process interests and the need for finality.

At present, pleas in federal court are tested against an exceptionally strict standard of review. Any error in the plea proceeding is presumed prejudicial and if challenged, automat-

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4. J. BOND, supra note 2, § 1.05 (extensive appellate litigation generated by plea process reduces its efficacy); Note, supra at 1415 (conceding that liberal policy of allowing post-conviction hearings, advocated in the Note, "may seem quixotic" in view of heavy dependence).
ically affords the defendant an opportunity to plead anew. This presumption sweeps broadly in favor of protecting a defendant's interests. Should an error in the plea-taking appear to be clearly harmless, the presumed fact of prejudice will not accurately reflect the reality of what actually transpired. To the extent the presumption has this effect, it needlessly impairs the finality of a plea.

This comment will suggest a means to reduce this finality cost. Beginning with the premise that insubstantial plea-taking errors should be treated as harmless, the ensuing discussion offers a method of segregating such errors from those which prompted adoption of the presumed prejudice standard. A distinction should be drawn, it is argued, between errors which raise an appreciable doubt with regard to the voluntariness of the plea and those which do not. If an appreciable doubt appears, the presumption controls. If not, the defendant must prove prejudice in fact in order to prevail. This selective screening of errors, it is concluded, will not significantly modify existing review, but will allow for rational disposition of technical plea challenges.

THE PRESUMED PREJUDICE STANDARD

The Plea Hearing

The plea proceeding in federal court involves a meaningful interchange of information between judge and defendant. The purpose of this colloquy is to ensure that a plea is accepted only

8. This finality cost in appellate review may well be offset by the increased likelihood that trial judges will take the plea correctly in the first instance. The McCarthy decision, by automatically penalizing any failure to comply with the rule (as strictly construed), attempts to give meaning to the prophylactic measures embodied in Rule 11. See Boykin v. Alabama, 395 U.S. 238, 244-45 (1969) (Harlan, J., dissenting); McCarthy v. United States, 394 U.S. 459, 465 (1969). The discussion in text refers to the standard's prophylactic aim as a shorthand way of designating this attempt to strengthen the rule.
if informed, voluntary, and accurate. The judge assumes that the defendant's mind is a clean slate, upon which he must impart knowledge regarding the nature of the charge, potential penalties, and the rights waived by plea. The judge then examines the voluntariness of the plea to verify that it was not improperly induced. This latter line of inquiry is supplemented by questioning which elicits the existence and terms of any outstanding plea agreement between defendant and prosecutor. Finally, the judge must make sufficient inquiry to sat-


12. Fed. R. Crim. P. 11(c), (f). An accurate plea is one made with an understanding of the law in relation to the facts. McCarthy v. United States, 394 U.S. 459, 466 (1969). Due process accordingly requires that a defendant be apprised of the elements which constitute an offense, see Henderson v. Morgan, 426 U.S. 637, 647 (1976), so that he may know whether his acts fall within the range of proscribed conduct. 394 U.S. at 467. Cf. Smith v. O'Grady, 312 U.S. 329, 334 (1941) (notice of nature of charge). Rule 11 codifies this concern by requiring that a defendant be informed of and understand the nature of the charge, see Fed. R. Crim. P. 11(c), and by requiring that a judge determine that the plea has a factual basis, see Fed. R. Crim. P. 11(f). Both of these are intended to facilitate the accuracy of inquiry. See Notes of Advisory Committee on 1966 Amendments to Rules, Fed. R. Crim. P. 11, reprinted in 18 U.S.C. app. at 4489-90 (1970) [hereinafter cited as 1966 Advisory Committee Notes]. For a general discussion of this inquiry, see Barkai, Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?, 126 U. Pa. L. Rev. 88 (1977).

isfy himself that the plea has a factual basis.\textsuperscript{16}

The defendant, in turn, must respond personally to all questions asked.\textsuperscript{17} His responses are recorded in a verbatim transcript of the proceedings.\textsuperscript{18} Thus, the record reflects his state of mind at the time of the plea with respect to all due process determinations.\textsuperscript{19}

\textit{The Need for a Strict Standard of Review}

Prior to the adoption of the presumed prejudice standard, trial judges rarely followed this meticulous Rule 11 procedure. Typically, they would engage in cursory examinations, if any, leaving in their wake a trail of records which shed little light on the question of a defendant's understanding at the time of the plea.\textsuperscript{20} These records came under increasing scrutiny as more and more defendants began to challenge their pleas in post-conviction proceedings.\textsuperscript{21} The glaring deficiencies in the records compelled courts to hold post-plea hearings in order to resolve voluntariness doubts.\textsuperscript{22}

The prior review standard did nothing to discourage this widespread noncompliance with Rule 11. Appellate courts,

\textsuperscript{16} FED. R. CRIM. P. 11(f).
\textsuperscript{17} FED. R. CRIM. P. 11(c), (d). See McCarthy v. United States, 394 U.S. 459, 467 (1969); United States v. Vera, 514 F.2d 102, 104 (5th Cir. 1975); note 19 infra.
\textsuperscript{18} FED. R. CRIM. P. 11(g).
\textsuperscript{19} In 1966, Rule 11 was amended to require that a judge address the defendant personally in ascertaining his state of mind at the time of the plea. See 1966 Advisory Committee Notes, supra note 12, at 4489. The amendment cleared the uncertainty over the extent to which a judge could assume that counsel would explain to defendant the elements of the offense and the consequences of the plea. See id. Compare Domenica v. United States, 292 F.2d 483, 486 (1st Cir. 1961) (error to rely on counsel's representation that plea voluntary without verifying with defendant himself) and Julian v. United States, 236 F.2d 155, 158 (6th Cir. 1956) (similar), with Nunley v. United States, 294 F.2d 579, 580 (10th Cir. 1961) (per curiam) (counsel's presence at plea-taking validates an otherwise erroneous procedure), cert. denied, 368 U.S. 991 (1962) and United States v. Von der Heide, 169 F. Supp. 560, 566 (D.D.C. 1959) (court may conclude that defendant pleads voluntarily from counsel's representations). The amended version of the rule clearly condemns any procedure which fails to produce a complete record of a defendant's understanding at the time of the plea. McCarthy v. United States, 394 U.S. 459, 467 (1969); United States v. Vera, 514 F.2d 102, 103 (5th Cir. 1977).
\textsuperscript{22} Note, supra note 20, at 290-91.
applying a totality of circumstances approach, would overlook the gaps in the record if the government could point to factors indicating that the plea was in fact voluntarily made with an understanding of its consequences. If the government was unable to discharge its burden at the appellate level, it could attempt to do so in a voluntariness hearing on remand.

This state of affairs impelled the Supreme Court, in McCarthy v. United States, to adopt the presumed prejudice standard. The Court condemned the then existing practices, reasoning that they drained judicial resources and burdened defendants with difficult proof problems. In contrast, the Court opted for a standard of review that resolved all doubts in the record concerning the voluntariness of the plea in favor of the defendant. This newly adopted standard has the practical effect of rendering any error in the plea proceeding prejudi-

24. Id. The shortcomings of the prior practice have been described as follows: "Because the trial records on challenged pleas were largely barren of any affirmative showing of voluntariness, other than perhaps the defendant's unresisting presence before the trial judge, the most unimaginative of convicted defendants was able to make allegations sufficient to, at least, require a hearing." Note, supra note 20, at 290-91.
25. 394 U.S. 459, 471-72 (1969). The defendant in McCarthy pled guilty to willful tax evasion, but at sentencing, made statements which cast doubt on the willfulness of his conduct. Prior to accepting the plea, the trial judge had not determined that defendant understood the nature of the charge. In upholding the conviction, the court of appeals held that Rule 11 did not require a judge to address the defendant personally in determining his understanding of the charge. The Court, holding the omission erroneous, reversed. Id. at 467. In doing so, it emphasized the possibility that the defendant may have been guilty of only a lesser-included offense, one which lacked a mens rea element. Id. at 471.
26. Id. at 469-72. In criticizing post-plea voluntariness hearings, the Court emphasized that "[t]here is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him." Id. at 470 (emphasis in the original).
27. The Court stated:

We thus conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew not only will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.

Id. at 471-72.
cial, affording a defendant who exposes the error on direct appeal an opportunity to enter a new plea. Thus, the standard serves to encourage trial judges to make the constitutionally required determination of voluntariness embodied in Rule 11.29 This procedure protects the defendant's due process interests.30 Moreover, the strengthened record discourages, or at least permits summary disposition of, the often frivolous post-conviction attacks on the plea.31

As a result, the justification for treating any plea-taking error as prejudicial ultimately lies in the incentive this provides for trial judges to use proper procedures in the first instance. In emphasizing this long-term preventative aim, the Court did not closely analyze the more immediate impact the adopted standard would have at the appellate level. The following section considers this impact. Specifically, it discusses the standard's major shortcoming: its failure to afford appellate courts sufficient latitude to uphold a plea conviction when an admitted error in the plea-taking appears clearly harmless.

REVIEW OF TECHNICAL CHALLENGES

Technical Errors in a Plea Proceeding

Common sense suggests that a plea proceeding might involve an entire spectrum of potential errors. Some of these clearly would not raise the voluntariness concerns which prompted the McCarthy Court to adopt the presumed prejudice standard.32 Typically, an error not raising voluntariness concerns involves erroneous advice given a defendant respecting the consequences of his plea.

Such an error might not be material. For example, Rule 11 requires a judge to inform a defendant of the consequences of his plea,33 and it has been deemed error to delegate any part of

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28. The Court did not limit its holding to the direct appeal context, but the great majority of circuits have so interpreted it. See notes 60-65 and accompanying text infra.
29. The Court noted that the Rule 11 procedure is designed to assist judges in making the due process determination that a plea is "truly voluntary" and "to produce a complete record . . . of the factors relevant to that determination." 394 U.S. at 465.
30. Id. at 472.
31. Id. at 465, 472.
32. See note 29 supra. "Voluntariness" is here employed, as in McCarthy, in a broad sense, so that it overlaps significantly with the intelligence and accuracy determinations. See note 82 infra.
this duty to the prosecutor. Such an error could conceivably raise voluntariness doubts. In the usual case, however, the error would appear harmless. Moreover, the particular facts of the plea hearing might reinforce this conclusion. The plea may have been offered pursuant to an agreement arrived at after months of negotiation. The defendant, as a repeat offender, may have ample familiarity with criminal processes. Or, the judge may have delegated only a portion of his duties and may have conducted an otherwise meticulous examination.

Similarly, a material error might be rendered harmless by subsequent events. Consider the case of erroneous advice with regard to the potential maximum penalty for a particular

34. United States v. Hart, 566 F.2d 977, 978 (5th Cir. 1978) (error to delegate duty to inform defendant of nature of charge and consequences of plea). Contra, United States v. Hamilton, 568 F.2d 1302, 1306-07 (9th Cir.) (per curiam) (permitting partial delegation), cert. denied, 98 S. Ct. 46 U.S.L.W. 3751 (June 5, 1978); United States v. Lambros, 544 F.2d 962, 965-66 (8th Cir. 1976) (allowing trial judge to adopt extensive record built by prosecutor), cert. denied, 430 U.S. 930 (1977). This conflict carries over from one which existed under a prior version of Rule 11, which required a judge, prior to accepting a guilty plea, to address the defendant personally and determine that the plea was made with an understanding of its consequences. See Fed. R. Crim. P. 11, 383 U.S. 1097 (1966). Compare United States v. Crook, 526 F.2d 708, 709-10 (5th Cir. 1976) (per curiam), with United States v. Yazbeck, 524 F.2d 641, 643 (1st Cir. 1975) (per curiam) (dictum) and United States v. Frontero, 452 F.2d 406, 415 & n.7 (5th Cir. 1971) (dictum).

35. For example, a prosecutor may induce a guilty plea by striking an off-the-record plea agreement with an uncounseled first offender. He might promise a specific sentence, knowing that the particular judge does not accept such agreements. He might further convince the defendant to deny the existence of the agreement in open court as part of the “deal.” In such a case, judicial interrogation might expose the sham, along with the improper inducement, whereas prosecutorial questioning would not.

36. He might, for example, direct the prosecutor to inform the defendant of potential penalties. See, e.g., United States v. Hamilton, 568 F.2d 1302, 1306-07 (9th Cir.) (per curiam), cert. denied, 98 S. Ct. 46 U.S.L.W. 3751 (June 5, 1978).

37. See, e.g., United States v. Turner, 572 F.2d 1284, 1286 (8th Cir. 1978) (per curiam) (error harmless where potential maximum period of incarceration failed to exceed disclosed maximum); Keel v. United States, 572 F.2d 1135, 1136 (5th Cir. 1978) (prejudice presumed irregardless of actual sentence imposed); United States v. Alejandro, 569 F.2d 1200, 1201-02 (2d Cir. 1978) (per curiam) (presuming prejudice, though total possible period of supervision actually imposed failed to exceed disclosed maximum); Del Vecchio v. United States, 556 F.2d 106, 111-13 (2d Cir. 1977) (error harmless in collateral proceeding); Bell v. United States, 521 F.2d 713, 715 (4th Cir. 1975) (error harmless on motion to vacate sentence), cert. denied, 424 U.S. 918 (1976); Bachner v. United States, 517 F.2d 589, 596-97 (7th Cir. 1975); id. at 599 (Stevens, J., concurring); Arias v. United States, 484 F.2d 577, 578-79 (7th Cir. 1973) (failure to advise of parole ineligibility cured by repeal of statute prior to conviction), cert denied, 418 U.S. 905 (1974); Johnson v. Wainright, 456 F.2d 1200, 1201 (5th Cir. 1972) (per curiam) (sentence imposed equalled stated maximum, though court understated actual maximum). Cf. Paige v. United States, 443 F.2d 781, 783 (4th Cir. 1971) (in pre-McCarthy case finding error where court affirmatively misled defendant).
crime. This would normally raise voluntariness concerns, but it need not. Assume, for instance, that a defendant who faces potentially thirty years imprisonment is told that he faces fifteen, but is given only a five year sentence. In such a case, the actual penalty imposed eliminates any appreciable doubt with respect to the effect of the error on the decision to plead guilty.

The error may pertain to a defendant's knowledge of consequences in a case where attendant circumstances raise a compelling inference that the defendant must have been aware of the omitted information. For example, contrary to the procedures of Rule 11, a judge might fail to inform the defendant that his right to counsel at trial is waived by the entry of a guilty plea. Normally, this might affect the decision to plead guilty. But what if the defendant had an attorney, previously appointed by the court? What if he offered his plea on the eve of trial, when he might be supposed to be aware of counsel's trial preparation efforts? Undoubtedly, a defendant would be aware of the undisclosed right under these circumstances.

These examples, which are by no means exhaustive, dem-

38. If the penalty imposed exceeds the disclosed maximum, the plea is of course invalid. See J. Bond, supra note 2, § 3.39 (virtually all courts agree that defendant must know minimum and maximum sentence judge may impose).

Even if the sentence does not exceed the disclosed maximum, the plea may be involuntary. This would be so if a plea agreement guaranteed a specific sentence and the sentence imposed exceeded this agreed upon disposition. See United States ex rel. Baker v. Finkbeiner, 551 F.2d 180, 182-83 (7th Cir. 1977) (habeas petition); United States ex rel. Brown v. Morris, 443 F. Supp. 425, 426-27 (N.D. Ill. 1978) (same). In such a case, the defendant might be entitled to withdraw his plea or to compel specific performance of the agreement. See generally J. Bond, supra at § 7.19.

39. The issue is problematic, however, under the presumed prejudice standard. Compare United States v. Turner, 572 F.2d 1284, 1285 (8th Cir. 1978) (per curiam) (applying manifest injustice test, error harmless) and Bell v. United States, 521 F.2d 713, 715 (4th Cir. 1975) (on motion to vacate sentence, error harmless), cert. denied, 424 U.S. 918 (1976), with United States v. Alejandro, 569 F.2d 1200, 1201-02 (2d Cir. 1978) (per curiam) (error presumed prejudicial). Commentators have suggested that absence of reliance on the erroneous information renders the error harmless. See J. Bond, supra note 2, § 7.07(1) (summarizing case law); Note, supra note 20, at 317.

40. A defendant who is unaware of his right to counsel might be deterred from exercising his right to trial by the unsettling prospect of having to face the unfamiliar trial setting alone. This likelihood is greater if the defendant is indigent and undereducated.


42. A failure to mention any one of the rights waived by plea might, depending on the circumstances, be rendered harmless if the plea is taken after or shortly prior to commencement of trial. See United States v. Alejandro, 569 F.2d 1200, 1202 (2d Cir. 1978) (per curiam) (dictum). At issue is not so much the importance of the right as
onstrate that the circumstances surrounding a particular plea might remove any appreciable doubt that a particular error affected the decision to plead guilty. Such an error can fairly be labeled as technical.

These technical attacks on a plea have presented difficulties when tested against the standard of presumed prejudice. The strong inclination to uphold the plea and the competing desire to faithfully implement the strict review standard cause appellate courts to treat such challenges unevenly. Although the great majority agree that they cannot apply differing review standards in accordance with the magnitude of the error, they

the defendant's awareness of that right. The right to trial by jury, for example, is fundamental. Ballew v. Georgia, 98 S. Ct. 1029, 1033 (1978). Yet a judge's failure to obtain an explicit waiver of that right would not prejudice a defendant who pleaded not guilty, electing to have a jury trial, and later substituted a plea of guilty.

In the absence of compelling circumstances, however, waiver should not too readily be implied. For example, an explicit waiver of the right to trial implicitly waives the right to confront one's accusers. Arguably, the failure to inform of the subsumed right might be cured by express mention of the greater right. See 1975 Advisory Committee Notes, supra note 3, at 1303. When Rule 11 did not require specific mention of the rights, many courts used the implied waiver concept in order to validate a plea. See J. Bond, supra note 2, § 3.05[1]. It will be difficult to excuse such an omission under the amended rule, however, absent circumstances which clearly justify imputing an awareness of the omitted right to a defendant (such as when the plea is offered after commencement of trial). In the usual case, the implied waiver argument is probably insufficient to cure an omission.


4. See, e.g., United States v. Del Prete, 567 F.2d 928, 929 (9th Cir. 1978) (per curiam) (dictum); United States v. Aldridge, 553 F.2d 922, 922 (5th Cir. 1977) (per curiam); United States v. Journet, 544 F.2d 633, 634 (2d Cir. 1976); United States v. Boone, 543 F.2d 1090, 1092 (4th Cir. 1976). These cases involved the question of whether the advice provisions of amended Rule 11 were subject to the same strict standard of review which governed the provisions of the rule interpreted in McCarthy.

In a slightly different context, the Eighth Circuit has excused a trial judge's erroneous failure to inquire into the existence of a plea agreement, stating: "[N]ot every failure of a district court to comply with . . . Rule [11] entails the setting aside of a conviction with leave to withdraw a plea of guilty." United States v. Scharf, 551 F.2d 1124, 1130 (8th Cir.) (direct appeal from denial of post-sentence motion to withdraw guilty plea), cert. denied, 434 U.S. 824 (1977). Instead of vacating the conviction, the Scharf court remanded for an evidentiary hearing in order to determine whether the terms of the bargain were fulfilled. This procedure, and the court's holding, appear at odds with McCarthy. See Coody v. United States, 570 F.2d 540, 541 (5th Cir. 1978) (per curiam); notes 25-31 and accompanying text supra. The Scharf court tested the validity of the plea against the "manifest injustice" standard outlined in Fed. R. Crim. P. 32(d). Rule 32(d) permits the withdrawal of a guilty plea for any "fair and just" reason prior to sentencing, but only for manifest injustice thereafter. See United States v. Morgan, 567 F.2d 479, 492-93 (D.C. Cir. 1977). See generally J. Bond, supra note 2, §§ 7.02-.07. However, a judge's failure to comply with the requirements for acceptance
have implemented the controlling standard in different ways. Some apply the strict standard regardless of the consequences. Others employ devices by which to avoid the strictures of the presumed prejudice standard when it would yield undesirable results.

**Inflexible Review of Technical Challenges**

*The inflexible model of review.* Under this model\(^\text{45}\) any deviation from the letter of Rule 11 renders the plea vulnerable. The reviewing court limits its scrutiny to the record of the plea proceeding\(^\text{46}\) in order to determine whether there has been strict compliance with the rule’s requirements.

Regarding advice as to plea consequences, for instance, the trial judge must go through a two-step process with respect to each element of the rule. If he does not inform a defendant of, and determine that he understands,\(^\text{47}\) the nature of the charge,\(^\text{48}\) of a guilty plea is a recognized exception to the manifest injustice standard. *Id.* § 7.07[2]. Such an error must be tested against the presumed prejudice standard.

There is no express time limit for bringing a Rule 32(d) motion. It may be brought before or after the statutory time limit for an appeal from the judgment of conviction. Thus an appeal from the denial of a Rule 32(d) motion may be treated as a direct appeal or as a collateral attack, depending on its timeliness. In direct review, courts continue to be bound by the presumed prejudice standard. Many courts, including the Eighth Circuit, have refused to apply the presumed prejudice standard in collateral proceedings. *E.g.*, United States v. Ortiz, 545 F.2d 1122, 1123 (8th Cir. 1976) (per curiam); McRae v. United States, 540 F.2d 943, 944-45 (8th Cir. 1976), *cert. denied*, 429 U.S. 1045 (1977). See notes 60-65 and accompanying text *infra*. In excusing the trial judge’s failure to comply with Rule 11, the Scharf court incorrectly relied on these precedents without noting the different procedural context. 551 F.2d at 1130.

\(^{45}\) The models discussed in text signify only general methods of approaching any given Rule 11 issue. No one model is systematically followed in any given circuit. Only the Fifth Circuit has recently begun to employ a nearly uniform methodology (inflexible review). Nor do courts employ this terminology. The classification has utility as an analytical tool, however, and facilitates an issue-oriented discussion of patterns of review.

\(^\text{46}\) See, *e.g.*, United States v. Coronado, 554 F.2d 166, 174 (5th Cir.), *cert. denied*, 434 U.S. 870 (1977).

\(^\text{47}\) In United States v. Hart, 566 F.2d 977 (5th Cir. 1978), the trial judge apparently covered every element of Rule 11, except that he allowed the prosecutor to advise the defendant of the nature of the charge, potential penalties, and the rights waived by plea. Following this disclosure, the judge addressed the defendant and determined that he understood each of these matters. The reviewing court held this procedure erroneous, concluding that “the court must both personally inform the defendant of the charges against him, his rights, and the consequences of his plea and personally determine that the defendant understands these charges, rights, and consequences.” *Id.* at 978 (emphasis in the original). A literal, two-part inquiry with respect to each element of the rule is also suggested in United States v. Adams, 566 F.2d 962, 964 (5th Cir. 1978) (dictum).

\(^\text{48}\) A mere reading of the indictment will rarely serve to inform the defendant of the nature of the charge. A judge has an affirmative duty to patiently explain the
potential penalties,\(^49\) and each of the litany of rights waived by plea,\(^50\) the plea is defective. Any attempt to delegate these duties constitutes reversible error.\(^51\) Should an error occur, the plea remains vulnerable for an indefinite period of time without regard to the nature of the error.\(^52\) Even if attacked collateral-

\(^49\) See United States v. Alejandro, 569 F.2d 1200, 1201-02 (2d Cir. 1978) (per curiam) (failure to adequately explain special parole term). Under the inflexible approach, the court will not consider the fact that the erroneous penalty advice was rendered nonprejudicial by the actual penalty imposed. See id. at 1202 & n.2 (Hays, J., dissenting).

\(^50\) See United States v. Adams, 566 F.2d 962, 966 & n.5 (5th Cir. 1978); United States v. Journet, 544 F.2d 633, 634 (2d Cir. 1976); United States v. Boone, 543 F.2d 1090, 1092 (4th Cir. 1976). The extreme to which the strict construction approach lends itself is suggested by one court's interpretation of Rule 11's command that a defendant be informed of "the right to confront and cross-examine witnesses against him." See Fed. R. Crim. P. 11(c)(3). "Although the right to cross-examine may be subsumed in the confrontation right, the statute requires that both be mentioned." United States v. Adams, 566 F.2d at 966 n.5 (dictum). The subtleness of the distinction, and the remote impact it might have on the typical defendant's choice to plead guilty, capture the literalness of the approach.

\(^51\) Coody v. United States, 570 F.2d 540, 541 (5th Cir. 1978) (per curiam) (routine questions on subject of understanding insufficient).

\(^52\) Keel v. United States, 572 F.2d 1355, 1137 (5th Cir. 1978). See Coody v. United States, 570 F.2d 540, 540-41 (5th Cir. 1978) (per curiam) (presuming prejudice in collateral review); Sassoon v. United States, 561 F.2d 1154, 1157 (5th Cir. 1977) (same); Bunker v. Wise, 550 F.2d 1155, 1157 (9th Cir. 1977) (same). With the exception of Keel, these cases do not attach special significance to the collateral procedural
ally, the reviewing court will not consider the prejudicial effect of the delay on the government's ability to reprosecute.\(^5\)

**Inflexible review assessed.** This literal implementation of the presumed prejudice standard threatens, by its very rigidity, to transform the plea proceeding into a ritualistic ceremony.\(^4\)

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\(^5\) Potential prejudice to the government is accorded great weight by courts which refuse to apply the presumption in collateral attacks. E.g., Del Vecchio v. United States, 556 F.2d 106, 111 n.8 (2d Cir. 1977). Similarly, it may justify denial of a defendant's motion to withdraw a properly accepted plea under the manifest injustice standard of **FED. R. CRIM. P. 32(d)**. See J. Bond, *supra* note 2, § 7.14. The impaired ability to retry may result from the death or disappearance of key witnesses, the loss or destruction of material evidence, or any one of a number of other factors.

In upholding state procedural rules designed to ensure that all substantive claims are raised at trial, the Supreme Court has remarked that defense counsel sometimes deliberately refrain from raising claims in the hope of attacking the conviction at a more opportune moment. See Wainwright v. Sykes, 433 U.S. 72, 89-91 (1977) ("sandbagging"). This tactic might effectively be employed in the challenge of plea-taking procedures. In jurisdictions which presume prejudice in collateral review, one faced with overwhelming evidence of guilt might, knowing that his plea was improperly accepted, wait for an advantageous moment to gain the opportunity to replead. Whether the typical defendant, or his counsel, would in fact calculate in this manner cannot be known, but the possibility exists.

\(^4\) Of course, the congressional revision of Rule 11 prescribes an exact ritual which is mandatory in its terms. 8 **MOORE'S FEDERAL PRACTICE** ¶ 11.03[1][b], at 11-64 (2d R. Cipes ed. 1977). See United States v. Adams, 566 F.2d 962, 969 (5th Cir. 1978) (Gee, J., concurring) (amended rule intends a litany). The current formulation was, moreover, arrived at by Congress after it considered repeated warnings by spokesmen for the drafters of the proposed amendments that its course would ultimately prove harmful to defendants. One spokesman cautioned:

> In the view of the Advisory Committee it is not desirable to mandate a judge to go through a long ritual which tends to get automatic and routine. Rather, within the limits allowed by law, a judge should be given flexibility to accomplish the objective of the rule, namely, that of ensuring that the defendant is making an informed plea. In almost all cases, defendants are represented by counsel who should share with the judge the responsibility for informing the defendant of the consequences of his action. In the event that a judge, in an individual case, fails to inform a defendant of an important consequence of his plea, there is opportunity to raise the issue in the court of appeals. There is nothing in the rule, as proposed, which prevents the judge from adding other advice in appropriate cases.

**Federal Rules of Criminal Procedure: Hearings Before the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 151-52 (1975)** (Prof. LaFave). See Amendments to **Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 194 (1975)** (Prof. Remington) ("It is far more important to tell the judge what he must do, as a minimum, and to leave to the judge and to defense counsel the responsibility for giving a defendant additional advice when the facts of a particular case makes [sic] it desirable to do so.").
A trial judge must dispense checklist justice in order to comply with such a standard. The risk of attempting to tailor the proceeding to meet the needs of an individual defendant is great; any failure to utter the approved language in its entirety produces a fatal misstep.\(^5\)

This model's singleminded literalness also erodes the appellate courts' capacity to prevent manipulation of the appellate process.\(^5^6\) Thus, a defendant who had unrealized expecta-
tions of sentencing leniency may gain a second opportunity to plead by simply challenging the plea proceeding, even though he could not likely prove an abuse of discretion were he to attack the sentence directly. This is undesirable if the purported error appears clearly harmless and if the attack is motivated solely by frustrated sentencing hopes.

In addition, this mode of review may, by its disregard of the finality principle, promote as many post-conviction attacks as did the pre-McCarty practice of accepting pleas in a summary manner. Thus, instead of challenging a woefully inadequate record under a flexible review standard, as was the pre-McCarty practice, a defendant now simply attacks minor deficiencies under a strict standard in order to gain the opportunity to enter a new plea. When implemented in this manner, the presumed prejudice standard does not reduce the number of post-conviction attacks, as the McCarty Court intended, but merely shifts the basis of such an attack.

The inflexible approach, in attempting to faithfully adhere to the presumed prejudice standard, overprotects a defendant's due process interests. The price is paid in terms of finality. This approach fails to recognize that appellate courts must strike some balance between protecting a defendant's interests...
and promoting the rational administration of justice. In losing sight of this fact, it proves unworkable in a criminal justice system so heavily dependant on plea convictions.

Flexible Review of Technical Challenges

The majority of appellate courts employ either, or both, of two dissimilar means in order to offset the finality cost of the presumed prejudice standard. If a plea is attacked collaterally, they disregard the presumption and require a showing of actual prejudice before vacating the sentence. Conversely, if a plea is attacked on direct appeal, they use interpretive means to attain the functional equivalent of a harmless error doctrine.

Reinstatement of prejudice standard in collateral proceedings. In collateral review, most appellate courts will not apply the presumed prejudice standard. The rationale for this position is bottomed on the fact that the Supreme Court adopted the standard in a case involving a direct appeal. Relying on a subsequent Supreme Court dictum in Davis v. United States, the courts have been quick to distinguish collateral attacks because of their differing procedural posture.

59. See notes 5-6 and accompanying text supra.
60. See United States v. White, 572 F.2d 1007, 1009 (4th Cir. 1978) (per curiam); Del Vecchio v. United States, 556 F.2d 106, 110-11 (2d Cir. 1977); United States v. Hamilton, 553 F.2d 63, 65 (10th Cir.), cert. denied, 434 U.S. 834 (1977); United States v. Watson, 548 F.2d 1058, 1063-64 (D.C. Cir. 1977); McCrue v. United States, 540 F.2d 943, 945 (8th Cir. 1977), cert. denied, 429 U.S. 1045 (1977); Bachner v. United States, 517 F.2d 589, 592-93 (7th Cir. 1975). Cf. Bell v. United States, 521 F.2d 713, 714 (4th Cir. 1975) (reviewing motion to vacate sentence, court endorses harmless error without considering appropriate standard of review), cert. denied, 424 U.S. 918 (1976). Those circuits which have applied the presumption in collateral review have normally done so without expressly considering the propriety of the standard in that context. See Del Vecchio v. United States, 556 F.2d at 111 n.8 (citing cases). But see Keel v. United States, 572 F.2d 1135, 1137 (5th Cir. 1978); Castro v. United States, 396 F.2d 345, 349 (9th Cir. 1968) (en banc) (dictum).
61. 417 U.S. 333, 346 (1974), noted in 88 Harv. L. Rev. 213 (1974). The Davis Court stated that a failure to comply with the formal requirements of a rule of criminal procedure did not warrant collateral relief, absent any indication "that the defendant was prejudiced by the asserted technical error." 417 U.S. at 346. The standard adopted for a showing of prejudice was "whether the claimed error was 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether '[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.' " Id. (dictum) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).
62. The distinction had been recognized in the Rule 11 context prior to Davis. See Manley v. United States, 432 F.2d 1241, 1246 (2d Cir. 1970) (Friendly, J., concurring in result). Though perceived by an occasional judge, the courts overlooked it and continued to presume prejudice in collateral review. See, e.g., Irizarry v. United States, 508 F.2d 960, 964 (2d Cir. 1974). In view of the nearly unanimous reinstatement of the
In making this distinction, these courts recognize the need to accord some degree of finality to pleas attacked long after accepted. Differing standards are employed in the respective circuits, but all require a collateral petitioner to demonstrate that an asserted plea-taking error prejudiced him in some material way.

Interpretive avoidance in direct appeals. In direct review, the binding effect of the presumed prejudice standard cannot be disregarded. Accordingly, many courts use interpretive means to indirectly achieve results which might have been reached directly under a harmless error doctrine.

Given compelling facts, these courts avoid the rigors of the presumed prejudice standard through the process of characterization. The technique is familiar to all lawyers and judges. In the review of plea proceedings, it operates as follows. A finding of error is fatal to the plea. The reviewing court has no discretion to uphold the conviction once a departure from established procedure is characterized as error. However, the court may

prejudice standard since Davis (beginning with Gates v. United States, 515 F.2d 73, 80 (7th Cir. 1975) (dictum)), the pre-Davis pattern is probably best explained by the fact that courts felt bound by McCarthy's broad language and simply did not venture to second-guess the Supreme Court.

The reasoning of these cases is exemplified by Judge Feinberg who, after describing Rule 11's defendant-protective purpose, stated:

On the other hand, rigid enforcement of the Rule many years after the plea has been taken erodes the principle of finality in criminal cases and may allow an obviously guilty defendant to go free because it is impossible, as a practical matter, to retry him. . . . This is not a result that commends itself to many people, including judges. Accordingly, courts have been struggling—in the last few years particularly—to accommodate this clash of policies in applying the Rule.

Del Vecchio v. United States, 556 F.2d 106, 109 (2d Cir. 1977) (citations and footnote omitted). These considerations do not apply in direct review; in that context, "[t]he price of a short delay and some extra expense is a modest one to pay to correct the error of a government official (a district judge)." Id.

The concept of harmless error is embodied in FED. R. CRIM. P. 52(a), and applies generally to all federal procedural rules. Only in the plea-taking area have the courts carved out a firm exception. See, e.g., United States v. Journet, 544 F.2d 633, 636 (2d Cir. 1976) (guilty plea is "special"). The reinstatement of the prejudice standard in collateral review represents a significant inroad on this excepted area, underscoring the importance of the finality principle.

Parenthetically, finality concerns figured prominently in the Supreme Court's refusal to apply McCarthy retroactively. See Halliday v. United States, 394 U.S. 831, 833 (1969) (per curiam) (emphasizing large number of constitutionally valid convictions that may have been obtained without full Rule 11 compliance). Cf. Castro v. United States, 396 F.2d 345, 349 (9th Cir. 1968) (en banc) (denying retroactive application to a circuit rule of presumed prejudice).
interpret the language of Rule 11 in any reasonable manner. Whenever the language is susceptible to more than one interpretation, an apparent departure from the letter of the rule may be characterized as a form of marginal compliance. Since

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66. As one commentator has pointed out: "The cases are legion in which courts have held that McCarthy dictates that the record show 'full' compliance with [Rule 11]. . . . What constituted full compliance proved more troublesome, however." J. Bond, supra note 2, § 3.05[1].

Until its revision in 1975, the nebulous language of Rule 11 reflected little more than the broad commands of due process. In relevant part, it read:

The court . . . shall not accept [a plea of guilty] without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . . The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.


Given its generality, it is hardly remarkable that courts could interpret it in such a manner as to reach desired results. The classic instance involves the narrow reading given to the word "consequences" and the resulting exclusion of many indirect consequences from the advice requirements of the rule. See J. Bond, supra at §§ 3.05[2], 3.38.

The use of interpretation as a genuine outcome-determinative device, however, becomes manifest in two special situations. The first involves specific Rule 11 language which is given a liberal reading in a close case. E.g., United States v. Hamilton, 568 F.2d 1302 (9th Cir.) (per curiam), cert. denied, 98 S. Ct. 46 U.S.L.W. 3751 (June 5, 1978). In Hamilton, the judge carefully advised the defendant with regard to all Rule 11 matters except penalties. The prosecutor provided the penalty information and the judge determined on the record that the defendant understood that advice. Neither the judge nor the prosecutor informed the defendant of the possibility of consecutive sentences, though the prosecutor separately described the penalties on each of the two counts. The court found this procedure consistent with Rule 11's command that the court "address the defendant personally in open court and inform him of, and determine that he understands . . . the maximum possible penalty provided by law." See Fed. R. Crim. P. 11(c)(1). In sanctioning the partial delegation of the judge's disclosure duties, it concluded that "[r]equireing the court to inform a defendant of penalties does not necessarily mean that the words must literally issue from the judge's lips." 568 F.2d at 1306. Regarding the failure to advise of the possible cumulation of sentences, the court concluded that the implicit explanation contained in the separate description of penalties on each count sufficiently apprised the defendant of the maximum possible penalty. Id. at 1306. Cf. Paradiso v. United States, 464 F.2d 498, 415 (3d Cir. 1973) (interpreting pre-amendment version of rule). For other cases of this first variety, see Kloner v. United States, 555 F.2d 730, 734 (2d Cir.) (reviewing court strains to excuse trial judge's failure to ascertain factual basis for plea), cert. denied, 429 U.S. 942 (1976); United States v. Brogan, 519 F.2d 28, 30 (6th Cir. 1975) (per curiam) (substantial compliance found, though judge failed to explain nature of charge), cert. denied, 423 U.S. 1305 (1975); United States v. Maggio, 514 F.2d 80, 86-87 (5th Cir.) (pre-amendment command that judge determine that defendant understands nature of charge satisfied when judge, though failing to mention charge at plea-taking, had presided over mistrial of same defendant on identical charge), cert. denied, 423 U.S. 1032 (1975).

A more ingenious use of interpretation is found in the type of case in which specific Rule 11 language has been strictly construed by one panel and a subsequent panel in the same circuit faces a minor error on the point. Compare United States v. Journet, 544 F.2d 633, 634 (2d Cir. 1976) (defendant must be specifically informed of "each and
no error is found, the presumption does not come into play. By making use of this device, courts can give effect to an unacknowledged harmless error doctrine whenever the strict review standard would yield undesirable results.\(^6^7\)

**Flexible review assessed.** The flexible approach strikes a balance between protecting a defendant's due process interests and giving effect to finality concerns. The reinstatement of the prejudice standard\(^6^8\) in collateral proceedings gives explicit recov-

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\(^6^7\) Being bound by *McCarthy*, the courts do not articulate the fact that they are avoiding the effect of the presumed prejudice standard. That this at least partially explains the results reached is evident from several factors. First, the cases finding marginal compliance typically involve compelling facts: a meticulous examination coupled with a slight departure from prescribed procedure. See note 75 and accompanying text *infra*. When this is not the case, the plea will fall, notwithstanding the court's belief that the error was harmless. See, e.g., United States v. Boone, 543 F.2d 1090, 1091 (4th Cir. 1976). Secondly, whenever courts are not bound by *McCarthy*, they readily acknowledge the harmlessness of errors of the type sometimes classified as marginal procedures in direct review. See, e.g., Bachner v. United States, 517 F.2d 589, 592-93 (7th Cir. 1975) (collateral review) (error cured by subsequent events); Davis v. United States, 470 F.2d 1128, 1130-31 (3d Cir. 1972) (pre-*McCarthy* plea) (no harm in delegating some of judge's duties).

\(^6^8\) In spite of all it has to commend it, justification of this development under *McCarthy* remains problematic. The Supreme Court has yet to consider the issue, though it has denied certiorari in several of the cases. See United States v. Hamilton, 553 F.2d 63 (10th Cir.), cert. denied, 434 U.S. 834 (1977); McRae v. United States, 540 F.2d 943 (8th Cir. 1976), cert. denied, 429 U.S. 1045 (1977). The uncertainty stems from the fact that the *McCarthy* Court did not purport to limit its holding to the precise procedural context it faced. On the contrary, the purposes underlying the presumption, along with its defendant-protective concerns, suggest an expansive application. Moreover, one month after *McCarthy* was decided, the Court denied relief in a collateral attack on nonretroactivity grounds, but did not otherwise intimate that relief was unavailable. See Halliday v. United States, 394 U.S. 831, 833 (1969) (per curiam).

In spite of all this, the present Court is likely to approve of the reinstatement of the prejudice standard in collateral review. The trend originated with a dictum by the Court, see note 61 supra, and has since gained a near unanimity in the circuits, see note 60 supra. Furthermore, it is consistent with other recent trends on the Court. See, e.g., Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (cutback in habeas corpus relief); Stone v. Powell, 428 U.S. 465, 494 (1976) (same). Cf* Manson v. Brathwaite*, 432 U.S. 98, 113 (1977) (inflexible exclusionary rules now disfavored).
ognition to the finality principle. Because the interest in finality outweighs the defendant’s interest when the magnitude of the error is not great, appellate courts have sufficient latitude to dispose of technical attacks. This discourages frivolous post-conviction attacks without altogether depriving a defendant of a remedy. It also protects the societal interest in convicting the factually guilty by taking into account the government’s weakened ability to reprosecute after the lapse of time.

Interpretive avoidance, in turn, gives silent recognition to the finality principle when a plea is challenged directly. Even though the prejudice to the government in having to reprosecute is not likely to be great, the use of the technique manifests a reluctance to overturn a plea for insubstantial reasons. This gives an added dimension of durability to pleas that discourages technical challenges. Moreover, it prevents manipulation of the appellate process by defendants seeking a second opportunity to plead for reasons unrelated to the plea-taking error.

Significantly, flexible review does not greatly impair the utility of the presumption as a device by which to regulate plea-taking procedures at the trial level. Removing the presumption from collateral review leaves intact its more timely felt impact in the direct appeal context. In contrast, the prospect of reversal in the distant future has uncertain impact on trial court behavior.

Similarly, in direct appeals, interpretive avoidance is employed cautiously in order to safeguard McCarthy’s prophylactic avoidance.

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69. See note 63 supra.


71. See note 63 supra. A factually guilty defendant is one who commits a voluntary act (defined as criminal) with the requisite intent. See Barkai, supra note 12, at 99. Although a defendant’s offer to plead guilty does not always ensure that he is in fact guilty, see id. at 100 & n.72, the correlation is probably sufficiently high that factual guilt can be presumed in the normal case.

72. See, e.g., Del Vecchio v. United States, 556 F.2d 106, 109 (2d Cir. 1977).

73. This reluctance can probably be attributed to the fact that there is no absolute right to withdraw a plea of guilty, either before or after sentencing. See note 56 supra. It becomes most apparent when a court upholds a plea in a direct appeal from the denial of a pre-sentence motion to withdraw. See United States v. Saft, 558 F.2d 1073, 1081 (2d Cir. 1977); United States v. Michaelson, 552 F.2d 472, 477 (2d Cir. 1977). Normally, such a motion is routinely granted. United States v. Morgan, 567 F.2d 479, 493 (D.C. Cir. 1977) (even if plea properly accepted, withdrawal to be “freely allowed” and granted “as a matter of course”).

74. See note 56 supra.
lactic aim. An appellate court will excuse an apparent departure from Rule 11 procedure only if compliance is meticulous and the departure slight and clearly harmless.\textsuperscript{75} It will, moreover, add a stern warning that trial judges are best advised to follow the better practice of complying literally with Rule 11.\textsuperscript{76} Such sparing use should not lessen the incentive for careful compliance.

Though the flexible approach weakens the absolute prophylactic effect of the presumed prejudice standard, it remains faithful to the \textit{McCarthy} analysis. In an important caveat, the \textit{McCarthy} Court emphasized that matters of reality, not mere ritual, were to control in the review of plea proceedings.\textsuperscript{77} Flexible review gives reasonable effect to this precaution without defeating the purpose of the strict review standard.

\textbf{Limits on flexible review in direct appeals.} In direct appeals, the mandatory Rule 11 language and the strict review standard have the combined effect of greatly lessening the capacity of appellate courts to uphold a plea when a technical error is challenged.\textsuperscript{78} In such a case, the court can scarcely find marginal compliance in the face of a clear, though technical, violation of the rule.

Thus, a court’s capacity to modify the prima facie mean-


\textsuperscript{76} E.g., United States v. Hamilton, 568 F.2d 1302, 1307 (9th Cir.) (per curiam), cert. denied, 98 S. Ct. 46 U.S.L.W. 3751 (June 5, 1978); United States v. Coronado, 554 F.2d 166, 173-74 nn. 11 & 12 (5th Cir.), cert. denied, 434 U.S. 870 (1977); Klener v. United States, 535 F.2d 730, 734 (2d Cir.), cert. denied, 429 U.S. 942 (1976); United States v. Maggio, 514 F.2d 80, 88 (5th Cir.), cert. denied, 423 U.S. 1032 (1975); Paradiso v. United States, 482 F.2d 409, 413-15 (3d Cir. 1973). The practice of upholding a plea while chastizing the trial court’s conduct in the particular case comports with recognized principles of appellate review. In discussing post-trial appeals, one commentary explains these considerations as follows:

The aim of securing technical regularity must . . . be tempered by the aim of preserving the judicial system’s capacity to reach effective and final decision. When an appellate court encounters procedural irregularity that is harmless in the case before it but which should not be condoned, its opinion may properly give guidance for future cases.

ABA \textbf{STANDARDS RELATING TO APPELLATE COURTS} § 3.11, Commentary at 21 (Approved Draft, 1977) [hereinafter cited as ABA \textbf{APPELLATE STANDARDS}].

\textsuperscript{77} See 394 U.S. at 467 n.20; notes 102-103 infra.

\textsuperscript{78} This combined impact was virtually nonexistent under the pre-1975 version of the rule. \textit{See} note 66 supra. Ever since the rule was amended to prescribe a set ritual, \textit{see} note 54 supra, the problem has frequently cropped up. \textit{See} cases cited note 44 supra.
ing of Rule 11 is inherently limited. It can rationally bend the language of the rule only so far. If the language is vague, interpretive means can be utilized to reach desired results. If clear and specific, however, the wording must be completely disregarded in order to uphold the plea. At this point, the court must draw the line.

The limits become strikingly evident with regard to a judge's duty to advise of the rights waived by plea. Any failure to mention the entire litany of enumerated rights violates Rule 11's clear command that this be done. Little interpretive flexibility remains by which to excuse the failure.

In such a case, if the omission appears to be clearly harmless, the presumed prejudice standard puts the reviewing court in the untenable position of either vacating a conviction on technical grounds or of openly recognizing a harmless error doctrine. Neither choice seems palatable—the former because it appears to give the defendant an undeserved chance to replead, the latter because it seems to defy a clear mandate of the Supreme Court.

The following section proposes a method by which to eliminate this technical basis of attack in direct appeals. In giving limited recognition to a harmless error doctrine, the proposal seeks to cure the review standard's occasionally undesirable impact at the appellate level. In outlining the advantages of the proposed cure, the section concludes that it can be implemented consistently with the McCarthy analysis.

A PROPOSED THRESHOLD TEST

The Suggested Analysis

The difficult problems raised by technical attacks in direct appeals can be resolved by requiring that a threshold test be met before the presumption of prejudice attaches. This barrier, properly limited, will screen nonmeritorious claims without lessening a trial judge's incentive to comply with Rule 11's prophylactic measures.

79. See note 66 supra.
80. The rule commands that a judge inform a defendant, and determine that he understands, the following: right to counsel (if unrepresented); right to plead not guilty (or to persist in that plea); right to jury trial, along with right to counsel; right of confrontation and cross-examination; privilege against self-incrimination; and right to court trial. Fed. R. Crim. P. 11(c)(2), (3), (4).
81. See, e.g., United States v. Saft, 558 F.2d 1073 (2d Cir. 1977); United States v. Michaelson, 552 F.2d 472 (2d Cir. 1977).
The suggested approach calls for a two-part analysis. The reviewing court must initially determine whether an asserted plea-taking error raises an appreciable doubt with regard to the voluntariness\(^82\) of the plea. An appreciable doubt is raised when the error creates a possibility that a normal defendant might not have pled guilty but-for the error. If this threshold test is met, the presumption of prejudice controls and automatically affords the defendant an opportunity to plead anew. If not, the defendant may still attempt to demonstrate that, given his special circumstances, the error in fact affected his decision to plead guilty.\(^83\)

The test has two notable features. First, the appreciable doubt standard erects a minimal barrier between the defendant and the presumption. The mere possibility of doubt will trigger the presumption. It is irrelevant that the reviewing court concludes that the error probably did not affect the decision to plead guilty. This low threshold strictly limits the test’s screening function. In applying the test, an appellate court may preliminarily examine the record before it in order to isolate for special treatment only the unusual case involving a slight Rule 11 error which appears prima facie harmless. In the overwhelming number of cases, the presumption of prejudice will remain operative.

Second, although the threshold is low, it is objectively framed. Its initial screening function would be impaired if the court was forced to consider subjective factors in the first instance. The objective formulation is also unlikely to harm the defendant’s interests. It has no effect unless the error is prima facie harmless. Once triggered, it can at worst deny to a defen-
dant the benefit of the presumption and put him to his proof. Under these circumstances, it is not unreasonable to require a defendant to demonstrate that his case falls outside the norm.

The notion of appreciable doubt may be illustrated by a series of examples. Assume that a judge erroneously delegates a substantial portion of his disclosure duties to the prosecutor so that the prosecutor in effect conducts the entire Rule 11 examination. Such an error would raise an appreciable doubt with regard to the voluntariness of the plea. The possibility exists that a reasonable defendant might not have pled guilty but-for the atmosphere of subtle coercion created by extensive prosecutorial questioning. While this seems improbable, it is not for the reviewing court to engage in such speculation in the face of a clear violation of Rule 11.

Consider also the case where the judge conducts the entire examination, except that he delegates the duty to disclose several of the rights waived by a plea. Although this might violate the letter of Rule 11, an atmosphere of subtle coercion can hardly be said to permeate the proceeding. In this instance, an appreciable doubt is not raised. The possibility that the error might have affected the decision of a normal defendant to plead guilty is nonexistent. Any speculative doubt which might exist would be insufficient to survive the objective prong of the threshold test. The defendant would have to prove, without benefit of the presumption, that the remote possibility of doubt was real in his particular case.

An identical analysis would govern a judge’s failure to mention one of the enumerated rights. For example, a failure to advise of the right to counsel would, because of the importance of the right, normally raise an appreciable doubt with regard to the voluntariness of the plea. But the threshold

84. See cases cited note 51 supra.
86. One of the announced aims of the McCarthy standard is to eliminate the need for such speculation. See 394 U.S. at 471 (scrupulous compliance removes need).
87. See United States v. Hamilton, 568 F.2d 1302 (9th Cir.) (per curiam) (penalties), cert. denied, 98 S. Ct. 46 U.S.L.W. 3751 (June 5, 1978); United States v. Hart, 566 F.2d 977 (5th Cir. 1978).
89. In the sense that it would bear on an informed choice whether or not to plead guilty. See note 82 supra.
barrier would remove the presumption of prejudice in a case where the plea had been offered after commencement of trial by a defendant represented by counsel. Any appreciable doubt is, in such a case, dispelled by the circumstances surrounding the plea.

Similarly, a failure to advise of the nature of the charge would routinely raise an appreciable doubt. But this should not be so if the plea were offered after the conclusion of a mistrial on the identical charge.

Comparison with Current Flexible Review

The appreciable doubt standard will perform the same selective screening function presently achieved by interpretive techniques. It will ferret out those cases in which application of the presumption leads to seemingly irrational results. In so doing, it serves the same need as does interpretive avoidance. It gives added durability to the plea by insulating it from insubstantial attacks. This in turn discourages such attacks and helps prevent manipulation of the appellate process. In short, it lessens the sometimes undesirable impact that the presumed prejudice standard may have on appellate review of plea proceedings by injecting into that review an element of common sense realism.

But it does so more effectively than does the interpretive process. It is, first of all, more forthright in its assessment of any Rule 11 error. Instead of bending the language of the rule in order to find a sometimes fictional "compliance," it reaches sensible results through a frank acknowledgement that a technical error should be treated as harmless. This permits an open discussion of the dispositive, or persuasive, factors which produce any given result. These can accordingly be assessed in

90. Cf. United States v. Saft, 558 F.2d 1073, 1081 n.10 (2d Cir. 1977) (plea offered on eve of trial).
93. See note 56 supra.
94. In the context of a motion to withdraw a properly accepted guilty plea, for instance, courts examine such factors as the lapse of time, prejudice to the government, dissatisfaction with sentence, absence of counsel, and the existence and terms of a plea agreement. See J. Bond, supra note 2, §§ 7.13-.18. Other factors which are presently considered in determining the voluntariness of a plea (age, intelligence, education, criminal background, and length of incarceration, see id. §§ 3.27-.32) could receive added emphasis.
light of the concerns underlying Rule 11. Also, the rule itself can be construed more soundly if the interpretive process is not employed as an outcome-determinative device. All this should enhance consistency in decisionmaking and better inform litigants of the factors which go into a decision.

In addition, the threshold test will not be subject to the language constraints which limit the utility of the interpretive process. At present, the disposition of an appeal may turn on the fortuity of whether the Rule 11 provision violated is worded specifically or vaguely. If specific, the plea falls; if vague, it may be upheld. The interpretive avoidance device is only able to screen technical challenges if the rule's language is malleable. In contrast, the threshold test will screen any technical challenge which fails to raise voluntariness doubts. This is so even if the provision violated is quite explicit in its command.

For these reasons, the proposed test would appear to be the preferred means of accomplishing a selective screening under the presumed prejudice standard. Interpretive avoidance has one advantage over the proposed test, however, which appellate courts might find decisive. It screens insubstantial claims without having to acknowledge the idea of harmless error, an important factor under a governing standard which purports to abolish that concept. The following discussion considers whether the presumed prejudice standard will permit open recognition of a limited screening function.

**Justification Under Current Standard**

The Supreme Court adopted the presumed prejudice standard in its supervisory capacity and may accordingly modify it as it deems proper. Until it chooses to act, the question remains whether the proposed test can be reconciled with the McCarthy standard which presently binds intermediate appellate courts.

The test cannot be squared with certain language in the McCarthy opinion. The Court repeatedly stated that a failure to comply with Rule 11 would be presumed prejudicial. It did

95. See text accompanying notes 29-31 & note 82 supra.
96. See note 66 supra. The potentially conflicting results, circuit as well as intra-circuit, become vividly apparent in the context of the delegation issue. See cases cited notes 34, 51, 66 & 85 supra.
97. See notes 78-81 and accompanying text supra.
99. Id. at 463-64 & n.9, 471-72.
not intimate that some errors might be less harmful than others. Moreover, it condemned the practice of searching the plea-hearing record for factors by which to draw speculative inferences regarding a defendant's understanding at the time of the plea. Thus, the Court appeared to reject the notion that an error could be cured by circumstances surrounding the plea. Finally, several circuits, applying McCarthy, have expressly rejected the view that errors could be ranked by degree of potential harm.

Notwithstanding this seemingly formidable backdrop, the McCarthy opinion can be read to authorize an appropriately circumscribed screening device. In discussing the nature of the inquiry required under Rule 11, the Court intimated that appellate courts carefully consider the myriad of fact patterns which might arise in a plea proceeding. It left to Rule 11 and to future case law the formulation of specific guidelines to govern plea proceedings, warning that matters of reality, not mere ritual, were to control in the review of plea proceedings.

Thus, the Court set forth a broad policy formulation, but gave lower courts sufficient leeway to implement it so as to do justice in any particular case. That the sweeping language was not meant to be read in a vacuum is evident from the fact that applying the presumption without regard to matters of reality does not discourage post-conviction attack. Instead, it merely shifts the basis of the challenge. It is therefore imperative that reviewing courts give meaningful effect to the Court's caveat.

The most effective way of doing this is through explicit

100. Id. at 464-67.
101. See cases cited note 44 supra.
102. 394 U.S. at 467 n.20. See Note, supra note 20, at 292.
103. 394 U.S. at 467 n.20. In affording this leeway, the McCarthy Court implicitly recognized the need to implement the presumed prejudice standard in accordance with varying fact patterns. This is consistent with sound appellate practice. One commentary remarks:

The appellate courts have two functions: to review individual cases to assure that substantial justice has been rendered, and in connection therewith to develop the law for general application in the legal system . . . . [T]hese functions are to an important degree differentiated. The intermediate appellate court has primary responsibility for review of individual cases . . . . [T]he supreme court exercises a function of selective review, the purposes of which are to maintain uniformity of decision among subordinate courts and to reformulate decisional law in response to changing conditions and social imperatives.

ABA APPPELLATE STANDARDS, supra note 76, § 3.00, Commentary at 4.
104. See notes 57-58 and accompanying text supra.
sanction of a device which ferrets out insubstantial challenges. This will do no more than make explicit what many courts are presently doing anyway; and, as noted earlier, it has decided advantages over current practice.\textsuperscript{105}

Moreover, the proposed test specifically tracks the factors which motivated the Court to adopt the presumed prejudice standard. The Court sought to ensure that plea hearing records reflected a plea's voluntariness and all factors relevant to that determination.\textsuperscript{106} The proposed test, in screening only those cases in which no appreciable doubt is raised with regard to the voluntariness of the plea, will not conflict with the concerns underlying the presumed prejudice standard.

Nor will it resurrect the problems which existed under the pre-McCarthy review standard. Because the test tracks the Court's concerns, it necessarily gives very limited recognition to the concept of harmless error. This narrow recognition differs substantially from the pre-McCarthy practice of permitting the government to prove that any plea-taking error was harmless.\textsuperscript{107} Its narrow scope should adequately safeguard the defendant's due process interests.\textsuperscript{108} Moreover, a post-plea voluntariness hearing rarely will have to be held in order to resolve disputed facts. Normally, the objective prong of the threshold test will permit screening at the appellate level, obviating the necessity for a remand.

Finally, the threshold test will not contravene the presumption's prophylactic purpose. The appreciable doubt stan-

\begin{footnotesize}
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\item \textsuperscript{105} See notes 93-97 and accompanying text supra.
\item \textsuperscript{106} 394 U.S. at 465-67. The importance of limiting the presumption to errors that are in some way material is underscored by the fact that this was done by the first court of appeals to adopt a standard of presumed prejudice. See Heiden v. United States, 353 F.2d 53, 55 (9th Cir. 1965) (en banc). The McCarthy Court endorsed the reasoning of Heiden, but made no mention of the materiality requirement. See 394 U.S. at 468-70.
\item \textsuperscript{107} See notes 23-24 and accompanying text supra.
\item \textsuperscript{108} A harmless error rule has its most pernicious effect on a defendant's rights when it permits a reviewing court to engage in "unguided speculation" with regard to the prejudicial impact of an error. See Holloway v. Arkansas, 98 S. Ct. 1173, 1181 (1978) (presuming prejudice where harmless error rule not susceptible to "intelligent, even-handed application"). Such a rule is thus normally applied only to trial errors, which have a more "readily identifiable" scope. \textit{Id.}; see \textit{id.} at 1180 (Powell, J., dissenting) (majority presumes prejudice because of "the difficulty of a \textit{post-hoc} reconstruction of the record"). Implicit in the Holloway Court's reasoning, and supportive of the text, is the approval of a harmless error rule which permits a reviewing court to intelligently assess the prejudicial effect of an error. The proposed test, having limited scope and applied only to open-court proceedings which are recorded verbatim, is capable of such application.
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dard is so readily met that trial judges will retain ample incentive to comply closely with proper plea-taking procedures.\textsuperscript{109}

Thus, an appellate court may implement the proposed test consistently with the \textit{McCarthy} analysis. The Court’s precaution that matters of reality should control sufficiently authorizes the use of a selective screening device which neither conflicts with the underlying concerns of the presumed prejudice standard nor impairs its prophylactic aim. Furthermore, the Court’s sweeping language did not prevent lower courts in collateral proceedings from refusing to apply the standard when its aims would not be furthered and its costs would be too high.\textsuperscript{110} This analog could also be utilized by intermediate appellate courts in refusing to apply the standard to the proposed limited class of direct appeals.\textsuperscript{111}

\textbf{CONCLUSION}

The presumed prejudice standard enhances the fairness of a federal plea proceeding and thus lessens the likelihood that a plea conviction will be subjected to post-conviction attack. The standard’s unbending character, however, makes it imperative that appellate courts initially examine the nature of a plea-taking error before invoking the severe penalty of reversal. Otherwise, the automatic grant of relief too readily permits the standard to become an avenue by which plea withdrawal may be gained for reasons unrelated to the asserted error. In terms of finality, this proves unsatisfactory in our present criminal justice system.

This comment offers a method of insulating pleas from insubstantial attack whenever a defendant’s legitimate due process interests are not implicated. Under the proposed analysis, appellate courts first examine the effect of a plea-taking error before applying the presumption of prejudice. Only if the preliminary assessment reveals doubt with regard to the voluntariness of the plea will the error be presumed prejudicial. Otherwise, it will be treated as harmless.

This call for a more discriminating review provides needed reform within the parameters of existing review patterns. Its adoption will reduce the finality cost of the present standard

\textsuperscript{109} See text accompanying notes 82-83 \textit{supra}.

\textsuperscript{110} See notes 60-65 and accompanying text \textit{supra}.

\textsuperscript{111} A fortiori the Supreme Court should consider realigning the standard with these suggestions in mind whenever it reconsiders the issue.
without jeopardizing its defendant-protective aims. Appellate courts, having these considerations in mind, accomplished a similar reform in collateral review. To do so in direct review would give meaningful scope to the *McCarthey* Court's admonition that lower courts take cognizance of the realities underlying a plea proceeding.

George Grellas
Rule 11. Pleas

(a) Alternatives.

A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) Nolo Contendere.

A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant.

Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

1. the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
2. if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
3. that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
4. that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and
5. that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.
(d) Insuring That the Plea is Voluntary.

The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or
(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the oppor-
tunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea.

Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings.

A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.