CHAPTER TEN
Guilty Pleas
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CHAPTER TEN

GUILTY PLEAS

I. BARGAINING

A. PLEA BARGAINING

1. Statutory Scheme, Ind. Code § 35-35-3

Statutory plea bargain framework has five stages. Stages leading up to sentencing do not always occur in order given.

(1) agreement between prosecuting attorney and defendant for disposition of charge,
(2) submission of agreement to court by prosecuting attorney,
(3) court acceptance or rejection of agreement,
(4) entry of guilty plea by defendant, and
(5) sentencing.

See Ind. Code § 35-35-3-3.

2. Prosecutor Not Required to Bargain

A defendant has no constitutional right to a plea bargain. Coker v. State, 499 N.E.2d 1135, 1138 (Ind. 1987).

When a prosecutor makes a plea bargain, fundamental due process requires he carry out bargain as agreed upon. A prosecutor may be bound by a bargain made by his predecessor or by another member of his staff even if he is unaware of the agreement. Santobello v. New York, 404 U.S. 257, 264, 92 S. Ct. 495, 499 (1971).

> Messersmith v. State, 70 N.E.3d 861(Ind. Ct. App. 2017) (trial court abused its discretion by granting State's request to withdraw plea agreement a month after it had been accepted and judgment of conviction against defendant was entered pursuant to agreement; when defendant enters knowing and voluntary plea, due process requires Government to uphold its side of bargain). See also Puckett v. United States, 556 U.S. 129 (2009).

A prosecutor is not under a duty to plea bargain or to keep an offer open, an offer remains within the prosecutor's discretion. Weatherford v. Bursey, 429 U.S. 545, 97 S. Ct. 837 (1977); Coker v. State, 499 N.E.2d 1135, 1138 (Ind. 1987).

> Petty v. State, 532 N.E.2d 610 (Ind. 1989) (prosecutor had authority to withdraw plea offer before it was reduced to writing and submitted to court, despite allegation defendant tendered consideration in form of foregoing speedy trial request and waiving extradition), *overruled on other grounds by* Whedon v. State, 765 N.E.2d 1276, 1279 (Ind. 2002).

3. Defense Counsel's Duty to Explore Diversion

ABA Standards for Criminal Justice, Defense Function, 4th Edition (2014), Standard 4-6.1

provides:

(a) Defense counsel should be open, at every stage of a criminal matter and after consultation with the client, to discussions with the prosecutor concerning disposition of charges by guilty plea or other negotiated disposition. Counsel should be knowledgeable about possible dispositions that are alternatives to trial or imprisonment, including diversion from the criminal process.

(b) In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest.

See Ind. Code § 33-39-1-8 (withholding of prosecution for person charged with misdemeanor).

"A practice of requiring payment of a fee as an absolute condition of participation in a pretrial diversion program discriminates against indigent persons in violation of the Fourteenth Amendment." Mueller v. State, 837 N.E.2d 198, 205 (Ind. Ct. App. 2005).

a. Decision Not to Pursue a Plea

Where a plea agreement is in the defendant's best interest, defense counsel should explore the possibility with the State, in accordance with an attorney's general duty to act in the client's best interest. While some cases have held that a defense attorney's failure to explore a plea agreement does not automatically mean that counsel was ineffective, e.g., Harris v. State, 437 N.E.2d 44 (Ind. 1982), a conscientious defense attorney should aspire to a higher standard of performance than simply avoiding being found ineffective.

"In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered . . ." Ind. R.Prof. Conduct 1.2(a).

Cf. Missouri v. Frye, 132 S. Ct. 1399 (2012) (because plea negotiation is critical stage of a criminal proceeding, defense attorneys have duty to inform clients about favorable plea offers; failure to do so constitutes ineffective assistance of counsel under the 6th Amendment).

Cf. Burt v. Titlow, 134 S.Ct. 10 (2013) (trial counsel not ineffective where he advised defendant to withdraw guilty plea only after defendant insisted, he was innocent).

b. Judicial Involvement Disapproved

"The participation of a trial judge in the plea-bargaining process does not, as a matter of law, render a guilty plea involuntary. Rather, to determine voluntariness we look again at all the circumstances surrounding the plea. We do so, however, from the perspective that judicial participation in plea bargaining is highly suspect." Anderson v. State, 335 N.E.2d 225, 227 (Ind. 1975).

Garrett v. State, 737 N.E.2d 388 (Ind. 2000) (judge telling defendant before trial, what sentence he would impose if defendant proceeded to trial and was convicted was clearly inappropriate, as punishing defendant for exercising constitutional right is due process violation of the most basic sort).

United States v. Davila, 133 S. Ct. 2139 (2013) (where judge impermissibly participates in plea negotiations, plea must be vacated only if record shows defendant's ability to plead was prejudiced).

Cf. Ellis v. State, 744 N.E.2d 425 (Ind. 2001) (where trial court merely responded to proposed plea agreement without any involvement, trial court's comments as to what plea it would accept did not make defendant's eventual guilty plea involuntary).

c. Continuance to Plea Bargain

See IPDC Pretrial Manual, Chapter 12, Continuances.

4. Indigent has Right to Counsel

Plea bargaining is a "critical stage" in criminal proceeding, and indigent defendants are entitled to appointed counsel.

Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 668 (1978) (uncounseled defendants are considered incapable of intelligent choices when confronted with prosecutorial persuasion at plea bargaining stage because of unequal bargaining strengths).

Indiana Rule of Professional Conduct 3.8 requires the prosecutor to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel[,]" Ind. R.Prof. Cond. 3.8(a), and to "not seek to obtain from an unrepresented accused a waiver of important pretrial rights[,]" Ind. R.Prof. Cond. 3.8(c).

Ind. Code § 35-35-1-1 provides: "A plea of guilty, or guilty but mentally ill at the time of the crime, shall not be accepted from a defendant unrepresented by counsel who has not freely and knowingly waived his right to counsel."

Hood v. State, 546 N.E.2d 847, 849 (Ind. Ct. App. 1989) ("[T]he most important part of the judicial proceeding can occur in jail during plea bargaining. A jailhouse conference with an uncounseled defendant who has not knowingly, voluntarily, and intelligently waived his right to counsel, however, is inherently unfair.") (*citing* Gallarelli v. United States, 441 F.2d 1402, 1405 (3d Cir. 1971)).

Lyles v. State, 382 N.E.2d 991 (Ind. Ct. App. 1978) (defendant's election whether to plead guilty or stand trial may not be intelligently or voluntarily made without consultation with counsel).

a. Ineffective Assistance of Counsel Standard - Defendant Must Show Actual Harm

A defendant is denied the right to counsel under Sixth Amendment, and Art. 1, §13 of Indiana Constitution, where representation by counsel was ineffective.

Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985) (defendant must show that, but for advice of counsel, he would have made different choice).

Willis v. State, 498 N.E.2d 1029 (Ind. Ct. App. 1986) (erroneous advice as to possibility of parole eligibility following murder plea may be ineffective assistance, but defendant failed to show that, but for confusion over sentence, he would have gone to trial).

b. Waiver of Right to Counsel

Waiver of right to counsel must be knowing, intelligent, and voluntary. Martin v. State, 453 N.E.2d 199 (Ind. 1983).

Hill v. State, 451 N.E.2d 683 (Ind. Ct. App. 1983) (defendant's indication that he understood court's advice and did not want an attorney was sufficient to demonstrate waiver of right to counsel).

Catt v. State, 437 N.E.2d 1001 (Ind. Ct. App. 1982) (judge informed defendant he was confronted with misdemeanor charge, where in fact he was charged with felony; held: misinformation robs waiver of counsel of "knowing" quality).

Hopper v. State, 957 N.E.2d 613 (Ind. 2011) (on rehearing; whether a defendant has knowingly and intelligently waived right to counsel during plea agreement stage is determined by the totality of the circumstances, and the "Hopper" advisement, while helpful and necessary in some cases, is not mandatory).

But see Lafler v. Cooper, 132 S. Ct. 1376 (2012) and Missouri v. Frye, 132 S.Ct. 1399 (2012). Lafler and Frye implicitly *overrule* Hopper to the extent Hopper holds that plea negotiations are not a "critical stage" under the Sixth Amendment.

See IPDC Pretrial Manual, Chapter 15 § IV.

c. Cases on Ineffective Assistance of Counsel

Missouri v. Frye, 132 S. Ct. 1399 (2012) (because plea negotiation is critical stage of criminal proceeding, defense attorneys have duty to inform clients about favorable plea offers; failure to do so constitutes ineffective assistance of counsel under 6th Amendment).

Burt v. Titlow, 134 S.Ct. 10 (2013) (trial counsel was not ineffective where he advised defendant to withdraw guilty plea only after defendant insisted he was innocent).

Lafler v. Cooper, 132 S. Ct. 1376 (2012) (where defendant's conviction and sentence are worse than offer defendant rejected because of counsel's ineffectiveness, trial court has discretion to fashion remedy, ranging from enforcing original plea offer to providing no remedy, i.e., leaving intact conviction and sentence that resulted from trial).

Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (counsel was ineffective for failing to advise defendant of potential deportation consequences of pleading guilty).

Lee v. United States, 137 S. Ct. 1958 (2017) (defendant prejudiced by counsel's bad advice about immigration consequences of pleading guilty even though defendant had little chance of being acquitted at trial; decision whether to plead guilty involves assessing respective consequences of a conviction by plea or by trial; when those consequences are, from defendant's perspective, equally dire, even smallest chance of success at trial may look attractive; defendant would have rejected any plea leading to deportation in favor of throwing "Hail Mary" at trial).

Bobadilla v. State, 117 N.E.3d 1272 (Ind. 2019) (IAC for failure to ask about defendant's immigration status and failing to warn him of potential risk of deportation that would accompany his guilty plea to misdemeanor theft and possession of marijuana).

Crowder v. State, 91 N.E.3d 1040 (Ind. Ct. App. 2018) (where defendant's plea agreement required him to surrender right to directly appeal his sentence, Court of Appeals reinstated right because counsel was ineffective by failing to advise defendant that his benefit from plea agreement was illusory).

Woods v. State, 48 N.E.3d 374 (Ind. Ct. App. 2015) (where defendant testified that trial attorney did not communicate plea offer found in attorney's file after attorney had passed away and circumstances of case corroborated defendant's testimony, defendant proved he was denied effective assistance of counsel).

Sial v. State, 862 N.E.2d 702 (Ind. Ct. App. 2007) (counsel ineffective for failing to advise client of penal consequences of pleading guilty to felony theft).

Clarke v. State, 974 N.E.2d 562 (Ind. Ct. App. 2012) (even assuming defendant established special circumstances with respect to his unborn children, considering strength of State's case against him and significant benefit conferred upon him under plea agreement, knowledge of risk of deportation would not have affected reasonable person's decision to plead guilty).

Gulzar v. State, 971 N.E.2d 1258 (Ind. Ct. App. 2012) (while defendant may have shown special circumstances related to his family, he failed to demonstrate prejudice from trial counsel's failure to explain risk of automatic deportation in light of evidence establishing his guilt).

State v. Bonilla, 957 N.E.2d 682 (Ind. Ct. App. 2011) (defendant failed to allege "special circumstances or objective facts" to prove he would have rejected plea had he been informed of immigration consequences of conviction).

Trujillo v. State, 962 N.E.2d 110 (Ind. Ct. App. 2011) (defendant failed to show prejudice from counsel's failure to advise him about adverse immigration consequences of pleading guilty; defendant failed to show he had spouse or children living in United States).

Soucy v. State, 22 N.E.3d 683 (Ind. Ct. App. 2014) (where trial counsel overlooked defense of actual innocence because defendant's threats were never communicated to victim, petition for post-conviction should have been granted and guilty plea vacated).

Harley v. State, 952 N.E.2d 301 (Ind. Ct. App. 2011) (counsel ineffective for not advising defendant about valid defense to non-support charge).

Springer v. State, 952 N.E.2d 799 (Ind. Ct. App. 2011) (attorney's incorrect advice that defendant was facing a maximum sentence of 141 years when he really was facing only 111 years likely affected defendant's decision to plead guilty; convictions vacated).

Manzano v. State, 12 N.E.3d 321 (Ind. Ct. App. 2014) (trial counsel not ineffective for advising defendant to plead guilty to Class A felony child molesting; defendant did not show there was a reasonable chance of acquittal at trial).

Carillo v. State, 982 N.E.2d 461 (Ind. Ct. App. 2013) (defendant did not show prejudice from counsel's failure to advise about potential negative immigration consequences from pleading guilty because 1) evidence of defendant's guilt was overwhelming, 2) plea greatly benefited defendant; 3) defendant failed to show harsh impact of plea on his family at time he entered plea in 1997).

McCullough v. State, 987 N.E.2d 1173 (Ind. Ct. App. 2013) (counsel not ineffective and defendant did not show reasonable probability of acquittal had he gone to trial; thus, plea was intelligent, knowing, and voluntary).

Schmid v. State, 972 N.E.2d 949 (Ind. Ct. App. 2012) (where no firm offer was ever made to defendant by State, trial counsel was not ineffective for failing to communicate informal discussions she had with prosecutor and judge to defendant).

Suarez v. State, 967 N.E.2d 552 (Ind. Ct. App. 2012) (knowledge of potential deportation from guilty plea would not have affected reasonable defendant's decision to plead guilty because State's case was strong and plea agreement substantially benefited defendant).

Mays v. State, 790 N.E.2d 1019 (Ind. Ct. App. 2003) (although it was seriously questionable to advise defendant to plead to offenses that created double jeopardy violation, such advice did not constitute per se ineffective assistance because defendant did not present any evidence to support claim).

Reynolds v. State, 783 N.E.2d 357 (Ind. Ct. App. 2003) (counsel was not ineffective in advising defendant to accept plea agreement in light of high probability State could prove that defendant neglected dependent who died by cocaine overdose).

Willoughby v. State, 792 N.E.2d 560 (Ind. Ct. App. 2003) (counsel was not ineffective because defendant failed to demonstrate that he would likely have proceeded to trial had trial counsel informed him about the single larceny rule).

Graham v. State, 941 N.E. 2d 1091 (Ind. Ct. App. 2011) (remanded to consider whether there were facts that met Segura standard for setting aside a guilty plea based on improper threat of habitual offender enhancement).

Roberts v. State, 953 N.E.2d 559 (Ind. Ct. App. 2011) (defendant could not establish prejudice from counsel's deficient performance where defendant knew State's threat to add habitual offender charge if he didn't plead guilty was empty because as he knew he didn't have requisite prior unrelated convictions, so he could not show threat motivated his decision to plead guilty).

Kistler v. State, 936 N.E. 2d 1258 (Ind. Ct. App. 2010) (defendant did not demonstrate he would not have pled guilty if properly advised that habitual offender charge was invalid).

5. Bargained for Conditions in Plea Agreement

a. Sentence within Bounds of Statute

Defendant may agree to any sentence within the bounds of charging statute, including one in excess of presumptive sentence. Payton v. State, 507 N.E.2d 579 (Ind. 1987).

b. Barring Prosecution on Other Offenses Only if "Related Offenses"

Plea intended to preclude prosecution on other offense will do so only if offenses are "related offenses." Related offenses are offenses which could have been joined for trial. Crose v. State, 482 N.E.2d 763 (Ind. Ct. App. 1985).

c. Charitable Contributions as Condition

Court may accept plea agreements requiring defendants to make charitable contributions to charities of their choice in lieu of fines. Ratliff v. State, 596 N.E.2d 241 (Ind. Ct. App. 1992).

d. Offenses Charged by Prosecution but Not Mentioned in Agreement

The federal constitutional prohibition against double jeopardy does not bar a trial on a greater offense when a plea agreement is reached on a lesser included offense. Ohio v. Johnson, 467 U.S. 493, 104 S. Ct. 2536 (1984).

e. Pass Polygraph

Lockard v. State, 600 N.E.2d 985 (Ind. Ct. App. 1992) (defendant was not entitled to enforcement of plea agreement that required defendant to take and pass polygraph examination before State would be bound by sentence offer; polygraph examiner stated that defendant had failed examination).

f. Waiver of Right to PCR

Provisions waiving right to seek PCR are void and unenforceable. Majors v. State, 568 N.E.2d 1065 (Ind. Ct. App. 1991).

g. Waiver of Right to Appeal Sentence

Defendant may waive right to appeal sentence as part of a plea agreement. Creech v. State, 887 N.E.2d 73 (Ind. 2008); Perez v. State, 866 N.E. 817 (Ind. Ct. App. 2008); but see Wihebrink v. State, 192 N.E.3d 167 (mem.) (Ind. 2022) (David, J., dissenting from denial of transfer in published order questioning validity of appeal waivers and propriety of Court's prior decisions holding defendant's assent to express waiver language in a written plea agreement indicates knowing and voluntary waiver of right to appeal sentence).

Nevertheless, defense attorneys may not disregard a client's instruction to file a notice of appeal from conviction and sentence even though the client agreed to waive the right to appeal as part of their plea agreement. Garza v. Idaho, 139 S. Ct. 738 (2019) ("No appeal waiver serves as an absolute bar to all appellate claims" so a "defendant who has signed an

appeal waiver does not, in directing counsel to file a notice of appeal, necessarily undertake a quixotic or frivolous quest.").

In Garza, defense counsel rendered deficient performance by not filing a notice of appeal in light of defendant's clear requests. Given the possibility that a defendant will end up raising claims beyond an appeal waiver's scope, simply filing a notice of appeal does not necessarily breach a plea agreement. Thus, counsel's choice to override defendant's instructions to file a notice of appeal was not a strategic one. In any event, the bare decision whether to appeal is ultimately the defendants to make.

Games v. State, 743 N.E.2d 1132 (Ind. 2001) (defendant waived his right to challenge his sentence for murder, robbery, conspiracy to commit robbery when he entered plea agreement for sentence between 60 and 118 years; as part of plea agreement, State agreed to drop its request for death penalty; once defendant bargained for reduced charge, he could not challenge sentence on double jeopardy grounds).

But see Class v. United States, 138 S. Ct. 798 (2018) (absent explicit waiver, guilty plea does not waive constitutional claim where claim alleges State had no right to file charges at issue, i.e., alleged violation implicates the State's power to prosecute defendant; here, defendant claimed weapons-related charges violated rights under the 2nd Amendment; because the plea agreement did not waive 2nd Amendment issue, defendant was free to raise issue on appeal).

United States v. Broce, 488 U.S. 563, 569 (1989) (plea does not bar claim on appeal where on face of record "court had no power to enter the conviction or impose the sentence").

Douglas v. State, 878 N.E.2d 873 (Ind. Ct. App. 2007) (defendant who pleads guilty without benefit of agreement does not waive constitutional issues for appeal).

Newton v. State, 83 N.E.3d 726 (Ind. Ct. App. 2017) (because juvenile defendant's LWOP sentence was result of plea agreement, he waived right to raise Eighth Amendment claim against LWOP statute).

Crowder v. State, 91 N.E.3d 1040 (Ind. Ct. App. 2018) (where defendant's plea agreement required him to surrender the right to directly appeal his sentence, Court of Appeals reinstated that right because counsel was ineffective for failing to advise Defendant that benefit of plea agreement to defendant was illusory).

Williams v. State, 51 N.E.3d 1205 (Ind. Ct. App. 2016) (Court resolved ambiguity in whether plea deal was open or closed in favor of defendant and thus allowed direct appellate review of her sentence).

Archer v. State, 81 N.E.3d 212 (Ind. 2017) (defendant did not waive her right to appeal amount of restitution order where amount was left blank in plea agreement and agreement did not set forth how restitution was to be determined).

Starcher v. State, 66 N.E.3d 621 (Ind. Ct. App. 2017) (as in Creech, defendant had already made enforceable waiver of his right to appeal sentence by time trial court told defendant he would have the right to appeal at sentencing; thus Court dismissed appeal at State's request).

Wharton v. State, 42 N.E.3d 539, 540 (Ind. Ct. App. 2015) (because defendant's guilty plea was not pursuant to plea agreement and thus he received no benefit for pleading guilty, he did not waive right to raise double jeopardy issue on appeal).

Kunberger v. State, 46 N.E.3d 966 (Ind. Ct. App. 2015) (defendant did not waive direct review of double jeopardy claim by pleading guilty because he pled in open court without benefit of a plea deal).

Ivy v. State, 947 N.E.2d 496 (Ind. Ct. App. 2011) (erroneous advisement that defendant could modify last two years of his sentence to work release program was of no consequence because defendant received benefit of bargain prior to sentencing hearing and defendant did not make any claim that language of plea agreement was confusing or misunderstood).

Bowling v. State, 960 N.E.2d 837 (Ind. Ct. App. 2012) (no error in denying a belated direct appeal to defendant who, along with written plea agreement, signed a written advisement and waiver of rights that contained the language "by pleading guilty you have agreed to waive your right to appeal your sentence so long as the judge sentences you within the terms of your plea agreement").

Brattain v. State, 891 N.E.2d 1055 (Ind. Ct. App. 2008) (trial court is not required to engage in colloquy with defendant regarding intention to waive appellate rights; moreover, appointment of appellate counsel does not invalidate waiver provision).

Hawkins v. State, 990 N.E.2d 508 (Ind. Ct. App. 2013) (knowing and voluntary waiver found where plea agreement explicitly stated defendant was waiving his right to appeal appropriateness of sentence and trial court read that provision at guilty plea hearing and asked defendant if he understood it, distinguishing Ricci and Bonilla, infra).

But see:

Crider v. State, 984 N.E.2d 618 (Ind. 2013) (appeal waiver invalid because it applied only to sentence imposed according to law and defendant did not agree to consecutive habitual offender sentences, which law does not permit).

Ricci v. State, 894 N.E.2d 1098 (Ind. Ct. App. 2008) (distinguishing Creech, Court noted that trial court clearly and unambiguously stated at plea hearing that defendant had not surrendered right to appeal sentence, so purported waiver in plea agreement was nullity);

Bonilla v. State, 907 N.E.2d 586 (Ind. Ct. App. 2009) (defendant did not waive his right to appeal his sentence because trial court made confusing remarks at guilty plea hearing indicating that defendant "may" have waived right to appeal and then advised defendant of rights to appeal and to attorney).

Holloway v. State, 950 N.E.2d 803 (Ind. Ct. App. 2011) (Ricci and Bonilla (above) apply where, despite waiver in plea agreement, trial court told defendant he had right to appeal his sentence and neither defense nor prosecutor objected); see also Abrajan v. State, 917 N.E.2d 709 (Ind. Ct. App. 2009).

McHenry v. State, 152 N.E.3d 41 (Ind. Ct. App. 2020) (a defendant can appeal an "open plea" where the plea agreement leaves sentencing discretion to trial court even if plea

agreement wrongly states that plea is not open plea and appeal is waived).

Clay v. State, 882 N.E.2d 773 (Ind. Ct. App. 2008) (waiver of right to appeal sentence provision in plea agreement was unenforceable with no evidence showing that defendant understood he was waiving that right when he entered into plea agreement).

Holsclaw v. State, 907 N.E.2d 1086 (Ind. Ct. App. 2009) (defendant waived right to appeal appropriateness of sentence through language in guilty plea).

Westlake v. State, 987 N.E.2d 170 (Ind. Ct. App. 2013) (because defendant's plea agreement did not specifically refer to abuse of discretion arguments or include catch-all provision prohibiting sentencing appeals, defendant's waiver of his right to challenge his sentence under Appellate Rule 7(B) did not foreclose argument that trial court abused its discretion by failing to consider mitigator).

Buchanan v. State, 956 N.E.2d 124 (Ind. Ct. App. 2011) (when defendant agreed in his plea agreement that he would be credit restricted felon, he did not waive ability to challenge calculation of credit time on appeal).

h. Waiver of Double Jeopardy Claim

Games v. State, 743 N.E.2d 1132 (Ind. 2001) (defendant waived right to challenge his sentence for murder, robbery, conspiracy to commit robbery when he entered plea agreement for sentence between 60 and 118 years; as part of plea agreement, State agreed to drop its request for death penalty; once defendant bargained for reduced charge, he could not challenge sentence on double jeopardy grounds).

But see Class v. United States, 138 S.Ct. 798 (2018) (absent explicit waiver, a guilty plea does not waive a constitutional claim where the claim alleges the State had no right to file the charges at issue, i.e., the alleged violation implicates the State's power to prosecute a defendant; here, defendant claimed that his weapons-related charges violated his rights under the 2nd Amendment; because the plea agreement did not waive the 2nd Amendment issue, defendant was free to raise the issue on appeal).

See also United States v. Broce, 488 U.S. 563, 569 (1989) (a plea does not bar a claim on appeal where on the face of the record the "court had no power to enter the conviction or impose the sentence").

Wharton v. State, 42 N.E.3d 539, 540 (Ind. Ct. App. 2015) (because defendant's guilty plea was not pursuant to plea agreement and thus, he received no benefit for pleading guilty, he did not waive right to raise double jeopardy issue on appeal).

Kunberger v. State, 46 N.E.3d 966 (Ind. Ct. App. 2015) (defendant did not waive direct review of double jeopardy claim by pleading guilty because he pled in open court without benefit of plea deal). See also Thompson v. State, 82 N.E.3d 376 (Ind. Ct. App. 2017).

i. Waiver of Credit Time

Weidman v. State, 7 N.E.3d 385 (Ind. Ct. App. 2014) (trial court did not err in denying credit for time defendant was on electronic monitoring as condition of release on bond, because he specifically agreed in plea agreement that he was not entitled to that credit

time).

House v. State, 901 N.E.2d 598 (Ind. Ct. App. 2009) (defendant may waive rights, including right to credit time from drug court, in plea agreement if waiver is knowingly and voluntarily).

McAllister v. State, 913 N.E.2d 778 (Ind. Ct. App. 2009) (although trial court believed that plea agreement did not provide for credit time for county jail sentence, there was no such waiver in plea agreement; trial court that already accepted plea agreement had no discretion to deny defendant pre-trial credit time).

6. Communicate Proposals or Developments

Defense counsel should keep the client informed of any plea offers. See Ind. Rule Prof. Conduct, Rule 1.4.

Harris v. State, 437 N.E.2d 44 (Ind. 1982) (casual conversations between defense counsel and deputy prosecutor without authority to offer binding plea bargain were not so binding as to require communication to defendant. Only "proposals" or "developments" must be communicated).

Curl v. State, 400 N.E.2d 775 (Ind. 1980) (reversal where defense counsel failed to inform defendant of plea offer; court would permit defendant to pursue plea negotiations or be retried).

Lyles v. State, 382 N.E.2d 991 (Ind. Ct. App. 1978) (defense counsel's failure to communicate state's plea bargain offer to defendant denied effective assistance of counsel).

See *ABA Defense Function Standards,* 4th ed. (2014), Standard 4-6.2(a), (b), and (c).

7. Statements from Plea Negotiations Generally Inadmissible; Exceptions

Statements from plea negotiations are generally inadmissible under Ind. Evid. R. 410(a) with some exceptions:

(a) Prohibited uses. -- In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea or admission of the charge that was later withdrawn;
(2) a nolo contendere plea;
(3) an offer to plead to the crime charged or to any other crime, made to one with authority to enter into or approve a binding plea agreement; or
(4) a statement made in connection with any of the foregoing withdrawn pleas or offers to one with authority to enter into a binding plea agreement or who has a right to object to, approve, or reject the agreement.

However, under Ind. Evid.R. 410(b), such a statement is admissible

(1) in any proceeding in which another statement made during the same plea or plea

discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

Note: The language of Rule 410 is broader than under Ind. Code § 35-35-3-5 and expanded the scope of the privilege to include statements to those with a right to object to plea agreements, as victims do, and statements "in connection with" a plea agreement. See Indiana Rules of Evidence, Rule 410.

a. Privileged Testimony or Documents

Testimony and documents relating to plea bargaining negotiations are privileged and inadmissible. For a statement to qualify for the privileged information protection, (a) defendant must have been charged with a crime at the time of the statement and the prosecutor and the defendant must have initiated discussions related to a plea agreement; (b) the statement must have been made with the intent of seeking a plea agreement or in contemplation of a proposed agreement; and (c) the statement is privileged if made to someone who has the authority to enter into or approve a binding plea agreement or who has a right to object to or reject the agreement. Gonzalez v. State, 929 N.E.2d 699, 702 (Ind. 2010).

Bell v. State, 622 N.E.2d 450 (Ind. 1993) (defendant's recorded and transcribed confession during questioning for plea bargain was inadmissible at trial), *overruled in part on other grounds by* Jaramillo v. State, 823 N.E.2d 1187 (Ind. 2005).

Stephens v. State, 588 N.E.2d 564 (Ind. Ct. App. 1992) (inculpatory statement made by defendant to probation officer preparing presentence report in anticipation of guilty plea could not be admitted for impeachment at subsequent trial occurring after judge refused to accept plea agreement).

Gonzalez v. State, 929 N.E.2d 699 (Ind. 2010) (letter defendant wrote to victim while victim considered whether to object to plea agreement was privileged under Evidence Rule 410 and Ind. Code § 35-35-3-4).

But see:

Hutto v. Ross, 429 U.S. 28, 97 S. Ct. 202 (1976) (confession made after plea bargain, but not part of bargaining as such, may be admissible if defendant withdraws plea).

Martin v. State, 537 N.E.2d 491 (Ind. 1989) (defendant had been charged at time he made statement to police officer who lacked authority to negotiate on behalf of prosecutor; statements were not part of plea-bargaining process and thus were admissible).

Crandall v. State, 490 N.E.2d 377 (Ind. Ct. App. 1986) (defense counsel's conversations with victims about possible pleas not privileged).

b. Inadmissible by Statutes

Withdrawn or rejected guilty pleas are inadmissible as evidence in any criminal, civil, or

administrative proceeding. Indiana Rules of Evidence 410; Ind. Code § 35-35-1-4(d).

Agreements and oral or written communications relating to agreements are inadmissible at trial if plea is not accepted by court. Ind. Code § 35-35-3-4.

Tyree v. State, 518 N.E.2d 814 (Ind. Ct. App. 1988) (construing Ind. Code § 35-35-1-4(d), trial court committed fundamental error in permitting State to impeach defendant at trial with statements to establish factual basis at guilty plea hearing, when defendant had later withdrawn guilty plea. Because factual basis is required for guilty plea, statements establishing factual basis are inseparable from plea).

Williams v. State, 601 N.E.2d 347 (Ind. Ct. App. 1992) (using clean-up statement by defendant at trial for impeachment purposes as part of plea agreement which has been accepted, but was later withdrawn, was not fundamental error; evidence not substantial part of State's case and defendant did not meet rule for retroactive application of Tyree).

c. Exceptions

(1) Perjury Prosecution

Evid.R. 410(b)(2) provides that a statement made in connection with withdrawn plea or offer is admissible "in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present."

(2) Another Statement from Same Plea has been Admitted

Evid.R. 410(b)(1) provides that statement made in connection with withdrawn plea or offer is admissible "in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together."

d. May Not Use at Sentencing

Stephens v. State, 588 N.E.2d 564 (Ind. Ct. App. 1992) (defendant's inculpatory statement, made to official preparing pre-sentence report pursuant to plea bargain, was inadmissible for impeachment purposes after plea agreement was rejected by trial court).

Hensley v. State, 573 N.E.2d 913 (Ind. Ct. App. 1991) (sentencing court may not consider defendant's history of uncharged crimes when the information was gained through defendant's statements during plea negotiations, and negotiations did not result in accepted plea agreement).

B. STRUCTURING A PLEA BARGAIN

Plea bargain process is controlled in large measure by statute and, to achieve a balance of rights of victims, defendants, and society at large, all parties must follow statutory rules. Ind. Code § 35-31.5-2-236; Ind. Code § 35-35-3-2 to § 35-35-3-7; Badger v. State, 637 N.E.2d 800 (Ind. 1994).

Be careful not to communicate information that might harm the defense.

Weaknesses in the prosecutor's case may incline a prosecutor toward a favorable plea.

1. Plea to Lesser Included Offense (LIO)

A plea to a lesser included offense is a popular plea-bargaining arrangement, often done without agreement as to recommended sentence.

NOTE: If defendant pleads to a set term, after accepting the agreement and the plea, the judge must impose the sentence as provided in the agreement and cannot change the length of a term of incarceration even by granting a "shock probation" after the defendant has begun serving his term of imprisonment. State ex rel. Goldsmith v. Marion Superior Court, 419 N.E.2d 109 (Ind. 1981).

2. Set Term, Open Sentence, or "Cap"

Some sentencing considerations:

- will client be able to take advantage of statutes which allow additional credit time;
- judge;
- violence of crime;
- stature of victim;
- special interest appeal.

A defendant is entitled to appellate review of a trial court's sentencing discretion where the trial court has exercised sentencing discretion. Tumulty v. State, 666 N.E.2d 394, 396 (Ind. 1996); Childress v. State, 848 N.E.2d 1073 (Ind. 2006).

An Indiana appellate court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. App. R. 7(B).

Losch v. State, 834 N.E.2d 1012 (Ind. 2005) (on direct appeal, Indiana Supreme Court reviewed weighing of aggravating and mitigating circumstances after defendant "pleaded guilty under an agreement calling for a sentence from sixty-five years to life without parole" and was sentenced to life without parole).

Childress v. State, 848 N.E.2d 1073 (Ind. 2006) (even where plea agreement sets forth sentencing cap or a sentencing range, trial court must still exercise some discretion in determining the sentence it will impose).

Note: A defendant may waive the right to appeal the appropriateness of their sentence as part of a plea agreement. See Creech v. State, 887 N.E.2d 73 (Ind. 2008).

Akens v. State, 929 N.E.2d 265 (Ind. Ct. App. 2010) (as in Creech, trial court's misstatement that defendant could appeal his sentence was made after it had accepted plea agreement and entered defendant's sentence; thus, defendant had already received benefit of bargain prior to trial court's misstatement).

3. Restitution - Statutory Requirement in Some Circumstances

Fisher v. State, 52 N.E.3d 871 (Ind. Ct. App. 2016) (trial court did not abuse discretion in ordering defendant to pay restitution, even though plea agreement did not call for it, because plea agreement must be read as having been made in contemplation of I.C. 35-48-4-17, which requires restitution in cases where State incurs costs to clean meth labs).

4. Other Plea-Bargaining Options

Plea bargains are limited only by the imagination of the defense lawyer, the "politics" of the case (the prosecutor, court, and victims' opinions), and sentencing rules.

C. CHECKLIST ON POSSIBLE CONSEQUENCES OF CONVICTION

Adapted from Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases*, §205, (1988).1

Defendant should be provided with information concerning all plea consequences that may have any substantial effect on his decision to plead guilty. Counsel must do so prior to the court advising defendant of the consequences of his guilty plea.

Possible consequences of conviction require research in each case concerning:

1. Maximum penalties authorized by law

(1) Imprisonment
(2) Fine
(3) Restitution
(4) Subjection to liability for punishment under statutes such as: habitual offender statutes, criminal sexual deviant, consecutive sentences, or death sentence.

2. Whether term of imprisonment is suspendible under Ind. Code § 35-50-2-2.1 or Ind. Code § 35-50-2-2.2.

Prison terms for some offenses may not be suspended by statute. In some cases, suspendability will depend on whether the person has recent prior convictions or juvenile adjudications.

3. Probation

Applicability of Ind. Code § 35-50-2-2.2(b) regarding ***mandatory probation*** on a suspended sentence for a felony, the ***conditions of probation*** that may be imposed under Ind. Code § 35-7-2-1, and the grounds for revocation. [note, Ind. Code § 35-7-2-1 repealed]

4. Parole

Applicability of Ind. Code § 35-50-6-1 regarding ***parole***, and, in particular, the minimum term in prison required to be served before parole eligibility, and the requirements of the "parole plan" demanded by the parole board as a condition of admission to parole.

5. Good Time Diminution Provision

Ind. Code § 35-50-6-3.3 - person can earn credit time for classes attended and further credit for completing degree.

6. Degrees of Security of Imprisonment

To which a convicted person may be assigned; imprisonment upon revocation of parole; days spent on parole outside institution. Ind. Code § 35-50-6-6.

7. Civil Disabilities Imposed by State Law1

(1) Loss of occupational licenses, or ineligibility for future licensing.
(2) Loss of a driver's license, and the ineligibility for future licensing.
(3) Loss of public office or employment, and ineligibility for future public office or employment. Ind. Const. Art. 2 §8.
(4) Loss of voting rights. (See Richardson v. Ramirez, 418 U.S. 24 (1974) and compare Hunter v. Underwood, 471 U.S. 222 (1985)).
(5) Criminal registration requirements, including the requirement that the defendant register as a sex offender under Ind. Code § 11-8-8 *et seq.*
(6) Whether the defendant will be required to submit a sample for a DNA database as a result of the conviction under Ind. Code § 10-13-6-1 *et seq.*

8. Liabilities under Federal Law or Regulation

(1) Ineligibility for military service,
(2) Ineligibility for public office or employment,
(3) Liability to deportation (if an alien).
(4) Ineligibility to possess a firearm under federal law, even though state law might not forbid it.

9. Forfeiture Statutes Condemning Automobiles and Other Property

10. Privately Imposed Sanctions

(1) Higher insurance rates;
(2) Restrictions on employment, residence, admission to professions, admissions to educational institutions, etc.

11. Eligibility for Alternative Sentencing

(1) Alcohol or drug abuse, Ind. Code § 12-23-6.1, § 12-23-7.1; § 12-23-8.1.
(2) Restitution, Ind. Code § 35-38-2-2.3(a)(6) and Ind. Code § 35-50-5-3.
(3) Intermittent sentencing, Ind. Code § 35-38-2-2.3(d).
(4) Medical or psychiatric treatment, Ind. Code § 35-38-2-2.3(a)(2). See IPDC Sentencing Law Manual.
(5) Home detention, Ind. Code § 35-38-2.5-5.
(6) Community corrections program, Ind. Code § 35-38-2.6-3.

12. Consequences for foreign nationals - Immigration

Grounds of inadmissibility are found at 8 U.S.C. § 1182. Grounds of deportation are found at 8 U.S.C. § 1227. Aggravated felonies are found at 8 U.S.C. § 1101(a) (43).

(1) Will a conviction be grounds for deportation of a lawful permanent resident alien?
(2) Will a conviction be grounds of inadmissibility for noncitizens of the U.S.?
(3) Will a conviction make the non-citizen defendant ineligible for U.S. citizenship?
(4) Will a conviction make the non-citizen ineligible for asylum and withholding?

See IPDC, *Immigration Consequences of Criminal Convictions*.

13. Conviction admissible in civil trial?

(1) A conviction on guilty plea to a felony is admissible in civil cases. Ind. R. Evid. 803(22) and Ind. Code § 34-39-3-1. See IPDC Pretrial Manual, Chapter 10 § II.A.5, *below*.

II. GUILTY PLEAS

A. PLEADING GUILTY

Guilty plea is admission of incriminating facts alleged. Guilty pleas should be cautiously received. Harshman v. State, 232 Ind. 618, 115 N.E.2d 501 (1953).

1. Plea "Conviction"

Guilty plea recognized as a "conviction." State v. Boze, 482 N.E.2d 276 (Ind. Ct. App. 1985).

2. Client's Decision

The decision to plead guilty or not belongs to the client, and if the attorney is unable to persuade the client to accept a favorable plea offer, even though the attorney may believe that the plea is in the client's best interest, the lawyer must defend the client vigorously and raise every defense client legitimately has.

Counsel cannot plead client guilty (Ind. Code § 35-35-2-1(a)(3)(B)), or not guilty (Ind. Code § 35-35-2-1(a)(3)(A)), against client's will. Ind. R. Prof. Conduct 1.2(a). See Ross v. State, 456 N.E.2d 420, 421 (Ind. 1983) and Jones v. Barnes, 463 U.S. 745, 751, 753 n.6, 103 S.Ct. 3308 (1983) (dictum).

3. Factual Investigation and Legal Analysis Is Required

It is improper for an attorney to advise the defendant to plead guilty without first conducting a factual investigation and legal analysis to determine if the prosecutor could establish guilt. Abraham v. State, 91 N.E.2d 358 (Ind. 1950).

> Von Moltke v. Gillies, 332 U.S. 708, 68 S. Ct. 316 (1948) (prior to advising client to plead guilty, counsel must make independent examination and evaluation of facts, pleadings, and the law).

An independent evaluation should be performed even if the defendant expresses a desire to plead guilty. The decision to plead guilty should be based on a determination of legal guilt, not on defendant's moral belief concerning his guilt or his own assessment of his legal guilt.

4. Court's Acceptance Only if Knowing, Intelligent, and Voluntary

Court may not accept a guilty plea unless defendant enters it voluntarily with complete understanding of nature of charge and consequences of his plea. Ind. Code § 35-35-1-3 (voluntariness and factual basis) and Ind. Code § 35-35-1-2 (advisement of rights). See IPDC Pretrial Manual, Chapter 10 § III, *below*.

Godinez v. Moran, 509 U.S. 389, 113 S. Ct. 2680, 2687, n.12 (1993) (purpose of "knowing and voluntary" inquiry to determine whether defendant actually does understand significance and consequences of particular decision and whether decision uncoerced).

Johnson v. Zerbst, 304 U.S. 458, 468, 58 S. Ct. 1019, 1025 (1938) (criminal defendant may not plead guilty unless he does so "competently and intelligently").

Patton v. State, 810 N.E.2d 690 (Ind. 2004) (inadequate notice of nature of charge when evidence at plea hearing did not show defendant's awareness that specific intent to kill was essential element of attempted murder; error not harmless beyond reasonable doubt).

Harris v. State, 762 N.E.2d 163 (Ind. Ct. App. 2002) (guilty plea was made knowingly and voluntarily despite defendant's claim he would not have entered his guilty plea had he known he would be placed on parole upon release from prison).

Blackburn v. State, 493 N.E.2d 437 (Ind. 1986) (voluntary admission of each element of offense sufficient to support trial judge's determination defendant was aware of nature of charge).

a. Court Must Record with Electronic Recording Device

Court must make an adequate record to show that the defendant entered guilty plea knowingly and voluntarily. See CR 10 (guilty plea to felony or misdemeanor to be recorded by electronic recording device). See IPDC Pretrial Manual, Chapter 10 § IV.B.4, *below*.

Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969) (waiver of federal constitutional Boykin rights cannot be presumed from silent record).

Suarez v. State, 947 N.E.2d 500 (Ind. Ct. App. 2011) (defendant had right to full recording of guilty plea hearing when defense counsel detected an irregularity in Spanish-to-English translation, and part of Spanish portion was excluded).

Diaz v. State, 934 N.E.2d 1089 (Ind. 2010) (post-conviction trial court erred by excluding certified translator's chart, which summarized her conclusions that translation at guilty plea hearing was inaccurate, supporting defendant's claim that plea was not knowing and intelligent).

Ponce v. State, 9 N.E.3d 1265 (Ind. 2014) (even though defendant said he understood Spanish translation of Boykin rights, plea was not knowing, intelligent, and voluntary because the translation was inaccurate and "wholly inadequate"); See also Bautista v. State, 163 N.E.3d 892 (Ind. Ct. App. 2021) (plea not knowing and intelligent when Spanish translation did not accurately convey right of confrontation).

State v. Vickers, 963 N.E.2d 1135 (Ind. Ct. App. 2012) (absence of recording of guilty plea hearing to show defendant waived right to counsel was insufficient to grant post-conviction relief).

b. Accepting Guilty Plea - Accepting Plea Agreement

Judge may reject guilty plea in exercise of sound judicial discretion. Snyder v. State, 500 N.E.2d 154, 157 (Ind. 1986). Acceptance of plea agreement is discretionary. Phillips v. State, 441 N.E.2d 201 (Ind. 1982).

Hunter v. State, 60 N.E.3d 284 (Ind. Ct. App. 2016) (trial court erred in concluding it lacked discretion to accept parties' agreement styled as "Recommendation of Plea"; substance, not form, of document defines nature of document; because document was indeed plea agreement, trial court had discretion to reject it).

Spencer v. State, 634 N.E.2d 72 (Ind. Ct. App. 1994) (not error to eventually reject agreement and set matter for trial; defendant clearly advised that if court accepted agreement it would be bound by its terms, and by accepting guilty plea, court was not accepting plea agreement).

Cf.

Steele v. State, 638 N.E.2d 1338 (Ind. Ct. App. 1994) (trial court could not accept guilty plea without accepting plea agreement and its terms; court stated it accepted defendant's guilty plea, it did not verbalize that it accepted plea agreement or its sentencing terms; defendant's plea was dependent upon receiving 4-year sentence, defendant must receive benefit of the bargain).

See IPDC Pretrial Manual, Chapter 10 § IV.B.1.a, *below*.

5. Used as Admission in Civil Cases

Indiana permits a conviction on a plea of guilty to a felony to be admitted in civil cases. Ind. Evid. R. 803(22) and Ind. Code § 34-39-3-1.

Kimberlin v. DeLong, 637 N.E.2d 121 (Ind. 1994) (criminal felony judgment may be admitted in evidence but not necessarily conclusive proof in civil trial of factual issues determined by criminal judgment, and transcript of evidence not necessarily admissible).

6. Duty to Inform of Plea Offer

Missouri v. Frye, 132 S. Ct. 1399 (2012) (because plea negotiation is critical stage of criminal proceeding, defense attorneys have a duty to inform clients about favorable plea offers; failure to do so constitutes ineffective assistance of counsel under 6th Amendment).

Woods v. State, 48 N.E.3d 374 (Ind. Ct. App. 2015) (where defendant testified that trial attorney did not communicate plea offer found in attorney's file after attorney died and circumstances of case corroborated defendant's testimony, defendant proved he was denied effective assistance of counsel).

Trial counsel's failure to inform defendant about a plea offer from State prior to his retrial constituted ineffective assistance of counsel. Dew v. State, 843 N.E.2d 556 (Ind. Ct. App. 2006) (*citing* Lyles v. State, 382 N.E.2d 991 (Ind. Ct. App. 1978)).

B. PLEADING GUILTY BUT MENTALLY ILL (GBMI)

Defendant may plead guilty but mentally ill at time of crime. See Ind. Code § 35-35-2-1(a)(3)(C) and Ind. Code § 35-36-2-5.

1. "Mentally Ill" Defined

Ind. Code § 35-36-1-1 provides:

> "Mentally ill" means having a psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior and impairs the person's ability to function. The term includes having an intellectual disability.

2. Cf. Insanity Defense

Ind. Code § 35-41-3-6 defines the defense of insanity:

(a) A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense.
(b) As used in this section, "mental disease or defect" means a severely abnormal mental condition that grossly and demonstrably impairs a person's perception, but the term does not include an abnormality manifested only by repeated unlawful or antisocial conduct."

3. Consequences of GBMI Finding or Plea

Under Ind. Code § 11-10-4-2, the DOC shall provide care and treatment for every confined offender determined to be mentally ill.

Ind. Code § 35-36-2-5 does not give right to treatment but affords opportunity to receive necessary psychiatric treatment while sentence carried out. Harris v. State, 499 N.E.2d 723, 726 (Ind. 1986).

Georgopolus v. State, 735 N.E.2d 1138 (Ind. 2000) (while defendant found guilty but mentally ill at time of crime is sentenced the same as defendant found guilty, physician must evaluate guilty but mentally ill defendant before the trial court may sentence him. Also, at DOC, guilty but mentally ill defendant must be further evaluated and treated as is psychiatrically indicated for his mental illness).

4. Competence to Plead GBMI

Defendant must be competent to stand trial in order to plead guilty or GBMI. Godinez v. Moran, 509 U.S. 389 (1993).

See IPDC Pretrial Manual, Chapter 3 § IV.

Defendant must waive rights and enter plea knowingly and voluntarily. Godinez v. Moran, 509 U.S. 389 (1993) and Johnson v. Zerbst, 304 U.S. 458, 468 (1938).

> See Truman v. State, 481 N.E.2d 1089 (Ind. 1986) (cause remanded because of possibility defendant's plea unknowing and involuntary because misled as to effect of plea; defendant said he "decided to plead guilty but mentally ill in hopes of receiving psychiatric treatment.") (Note that certain language in the Truman opinion was questioned in Georgopolus v. State, 735 N.E.2d 1138, 1141 n.1 (Ind. 2000)).

5. Sentencing

Wall v. State, 573 N.E.2d 890 (Ind. 1991) (trial court followed statute and did not act inconsistently when it sentenced defendant to enhanced term of 60 years on plea of guilty but mentally ill to murder charge, recommended minimum security facility, and evaluation and treatment for his mental illness).

Whitt v. State, 497 N.E.2d 1059 (Ind. 1986) (defendant found guilty of murder but mentally ill could be sentenced to statutory maximum 60-year term, even though sentence exceeded life expectancy, as defendant would benefit from therapy received in prison even if he were never released).

a. Treatment Does Not Preclude Death Penalty

> Harris v. State, 499 N.E.2d 723 (Ind. 1986) (defendant's plea of guilty but mentally ill afforded opportunity for defendant to receive necessary psychiatric treatment while sentence being carried out but did not foreclose imposition of death penalty).

C. WITHDRAWING GUILTY OR NOT GUILTY PLEAS

1. Withdrawal of Not Guilty Plea

Ind. Code § 35-35-1-4(a) provides: "A motion to withdraw a plea of not guilty for the purpose of entering a plea of guilty, or guilty but mentally ill at the time of the crime, may be made orally in open court and need not state any reason for the withdrawal of the plea."

a. Order Reviewable Upon Appeal from Final Judgment

> Order of court upon motion made under this subsection is not a final judgment and is not appealable but is reviewable upon appeal from a final judgment subsequently entered. Ind. Code § 35-35-1-4(e).

2. Withdrawal of Guilty Plea Prior to Sentencing

a. Court's Discretion

Ind. Code § 35-35-1-4(b) provides that court may allow defendant to withdraw plea for any fair and just reasons unless the State has been substantially prejudiced by reliance upon the defendant's plea. Centers v. State, 501 N.E.2d 415 (Ind. 1986). The trial court may, on its own motion, set aside a guilty plea if the defendant asserts innocence after the plea has been accepted but prior to sentencing. Beech v. State, 702 N.E.2d 1132 (Ind. Ct. App. 1998).

Milian v. State, 994 N.E.2d 342 (Ind. Ct. App. 2013) (no abuse of discretion in denying motion to withdraw plea where plea was knowing, intelligent, and voluntary and, after many warnings about perils of self-representation, trial court allowed defendant to argue motion pro se with standby counsel).

Atchley v. State, 622 N.E.2d 502 (Ind. 1994) (defendant admitted he set fire causing death, described in detail how it was done, and expressed regret for having caused deaths. Denying motion to withdraw guilty plea was not error, despite defendant's claim he had not seen agreement until entering courtroom, that he relied on attorney's advice to plead guilty, that he did not understand meaning of "omnibus hearing," and that he was not guilty of murder because he did not murder anyone).

Gross v. State, 22 N.E.3d 863 (Ind. Ct. App. 2015) (defendant did not overcome presumption of validity accorded to trial court's denial of his motion to withdraw his guilty pleas; defendant said he was satisfied with counsel's advice, his mental health conditions would not affect his ability to understand the proceedings, and he made the decision to plead freely and voluntarily).

Jeffries v. State, 966 N.E.2d 773 (Ind. Ct. App. 2012) (no abuse of discretion in denying withdrawal of plea where one habitual charge was invalid, as other habitual charge was valid and potential sentence on that habitual count and other charges could have exceeded 40-year sentence defendant received by pleading guilty).

Brightman v. State, 758 N.E.2d 41 (Ind. 2001) (although State had also sought to set aside defendant's guilty plea based upon alleged breach of agreement, judicial estoppel did not bar State from opposing defendant's motion to withdraw plea).

Mechling v. State, 16 N.E.3d 1015 (Ind. Ct. App. 2015) (State was not estopped from enforcing provision in plea agreement in which defendant waived right to appeal his sentence, even though State failed to object to trial court's erroneous statement at end of sentencing hearing that defendant had right to appeal his sentence);

Gipperich v. State, 658 N.E.2d 946 (Ind. Ct. App. 1996) (trial court properly determined that defendant's self-serving statements after guilty plea hearing were incredible and constituted attempt to manipulate system).

Coomer v. State, 652 N.E.2d 60 (Ind. 1995) (court rejected defendant's claim of involuntariness based on defendant's belief that defense counsel was unprepared for trial, and that prospect of going to trial with this lawyer had been so disquieting that defendant was effectively coerced into accepting State's plea offer).

Watson v. State, 526 N.E.2d 701 (Ind. 1988) (denying motion to withdraw guilty plea was not error, despite claim that possibility of 100-year sentence if case went to trial frightened defendant such that he was willing to plead guilty and receive a 40-year sentence; defendant understood agreement and charges and admitted to each crime).

(1) Defendant Maintains Innocence

If the defendant maintains his innocence after guilty plea but before sentencing, trial court, in its discretion, may decline to set aside plea. Bewley v. State, 572 N.E.2d 541, 543 (Ind. Ct. App. 1991). A guilty plea requires an unqualified admission of guilt. Patton v. State, 517 N.E.2d 374, 376 (Ind. 1987). Accepting a "plea of guilty when the defendant both pleads guilty and maintains his innocence . . . constitutes reversible error." Ross v. State, 456 N.E.2d 420, 423 (Ind. 1983).

McMillan v. State, 95 N.E.3d 161 (Ind. Ct. App. 2018) (trial court may, on its own motion, set aside guilty plea if defendant asserts his innocence after plea has been accepted but before sentencing).

Ellis v. State, 67 N.E.3d 643 (Ind. 2017) (post-conviction court should have set aside defendant's guilty plea where he maintained innocence at guilty plea and sentencing hearings).

Wilson v. State, 160 N.E.3d 222 (Ind. Ct. App. 2020) (trial court did not abuse its discretion at sentencing hearing on plea agreement for voluntary manslaughter when it rejected plea agreement after expressing concern whether defendant had entered plea knowingly and voluntarily based on her statements in PSI about acting in self-defense when she shot victim).

Patton v. State, 517 N.E.2d 374 (Ind. 1988) (error not to set aside guilty plea in capital case where defendant denied intent to kill before sentencing).

Trueblood v. State, 587 N.E.2d 105 (Ind. 1992) (no abuse of discretion for trial court to refuse to set aside guilty plea in capital case when defendant pleaded guilty during trial but later denied guilt before sentencing; other evidence supported guilt finding; distinguishing Patton, *supra*).

b. Exception - Showing of Manifest Injustice

Ind. Code § 35-35-1-4(b) provides that court shall allow defendant to withdraw plea of guilty whenever defendant proves withdrawal is necessary to correct a manifest injustice. Flowers v. State, 528 N.E.2d 57 (Ind. 1988).

Snowe v. State, 533 N.E.2d 613 (Ind. Ct. App. 1989) (trial court abused discretion in refusing to allow defendant to withdraw plea when court did not determine whether plea was knowingly, voluntarily, and intelligently made, or establish factual basis for plea; trial court should not have accepted defendant's plea).

Turner v. State, 843 N.E.2d 937 (Ind. Ct. App. 2006) (trial court erred in denying defendant's motion to withdraw his guilty plea before sentencing because it was necessary to correct manifest injustice; trial court should have granted defendant's motion to give him fair opportunity to vindicate Art. 1, Sec. 11 constitutional right

against unreasonable search and seizure as enunciated in Litchfield v. State, 824 N.E.2d 356 (Ind. 2005)).

(1) Must Hold Hearing

Fletcher v. State, 632 N.E.2d 1164 (Ind. Ct. App. 1994) (court abused discretion in denying motion to withdraw guilty plea without holding hearing. In summarily denying motion, court denied defendant opportunity to present evidence to prove withdrawal was necessary to avoid manifest injustice).

c. Motion Must be Written, Verified and Supported

Motion must be in writing, verified, and supported by specific facts. Ind. Code § 35-35-1-4(b); Flowers v. State, 528 N.E.2d 57, 59 (Ind. 1988).

Marshall v. State, 590 N.E.2d 627 (Ind. Ct. App. 1992) (unverified written motion denied).

d. Burden of Proof

Burden of proof is on movant. Preponderance of the evidence standard governs. Ind. Code § 35-35-1-4(e).

Lawson v. State, 498 N.E.2d 1212 (Ind. 1986) (trial court is "sole judge" of weight of evidence and credibility of witnesses).

e. Order Granting or Denying Motion to Withdraw is Appealable

After entry of plea of guilty, or GBMI, but before imposition of sentencing, the grant or denial of motion to withdraw plea is a final judgment from which the defendant or State may appeal. Ind. Code § 35-35-1-4(e).

3. Withdrawal after Sentencing

"After being sentenced following a plea of guilty, or guilty but mentally ill at the time of the crime, the convicted person may not as a matter of right withdraw the plea." Ind. Code § 35-35-1-4(c).

a. Withdrawal on Showing of Manifest Injustice

When necessary to correct a manifest injustice, plea may be withdrawn after sentencing. Ind. Code § 35-35-1-4(c).

Pursuant to Ind. Code § 35-35-1-4(c), withdrawal of plea is necessary to correct manifest injustice whenever:

(1) defendant was denied effective assistance of counsel,
(2) plea was not entered or ratified by the defendant,
(3) plea was not knowing or voluntary,
(4) prosecuting attorney failed to abide by plea agreement, or
(5) plea and judgment are void, or voidable, for any other reason.

Ivy v. State, 861 N.E.2d 1242 (Ind. Ct. App. 2007) (manifest injustice not created where defendant plead guilty to 100-year cumulative sentence in return for dismissal of all remaining counts and State failed to dismiss remaining counts including four death penalty counts until long after defendant filed motion to dismiss; although State did not dismiss the remaining counts, it did not prosecute defendant on them, nor did it oppose defendant's motion to dismiss those charges).

Johnson v. State, 734 N.E.2d 242 (Ind. 2000) (refusal to set aside guilty plea before sentencing did not constitute manifest injustice).

Bland v. State, 708 N.E.2d 880 (Ind. Ct. App. 1999) (defendant's oral motion to withdraw guilty plea did not comply with requirements of statute and defendant failed to establish by a preponderance of the evidence that denial of his motion would result in manifest injustice).

Weatherford v. State, 697 N.E.2d 32 (Ind. 1998) (defendant's attempt to show that his sentencing agreement was involuntary and unknowing was insufficient to show that withdrawal of agreement was necessary to correct manifest injustice).

Wirthlin v. State, 99 N.E.3d 699 (Ind. Ct. App. 2018) (because defendant did not knowingly, intelligently, and voluntarily waive right to counsel at initial or guilty plea hearings, trial court erred in denying his motion to withdraw guilty plea).

b. Motion Treated as PCR Petition

A motion to vacate the judgment and withdraw the plea after sentencing is treated as a petition for post-conviction relief. Need not allege and it need not be proved that convicted person is innocent or has a valid defense. Ind. Code § 35-35-1-4(c).

c. Order Appealable

Order of court upon motion made under Ind. Code § 35-35-1-4(c) shall constitute final judgment from which State or defendant may appeal. Ind. Code § 35-35-1-4(e).

4. *Sua Sponte* Vacation of Guilty Plea Prior to Judgment

Patton v. State, 517 N.E.2d 374, 376 (Ind. 1987) (in capital case, trial court abuses discretion when it fails to set aside guilty plea after defendant denies criminal intent at sentencing; court should have instead set matter for trial).

Wilson v. State, 160 N.E.3d 222 (Ind. Ct. App. 2020) (trial court did not abuse its discretion at sentencing hearing on plea agreement for voluntary manslaughter when it rejected plea agreement after expressing concern about whether defendant had entered plea knowingly and voluntarily based on her statements in PSI about acting in self-defense when she shot victim).

Cf.

Cox v. State, 530 N.E.2d 328 (Ind. Ct. App. 1988) (decision to permit withdrawal of guilty plea rests within sound discretion of trial court; it has power to set aside accepted guilty plea prior to judgment; but here trial court abused discretion by vacating guilty plea on own motion over defendant's objection where defendant was advised of rights, admitted each

element of robbery, entered guilty plea on court's assurance he would receive 10-year sentence, and did not contradict his admission of guilt after entering plea).

5. Counsel's Refusal to Assist in Withdrawing Plea Not Always IAC

Attorney has duty to continue to represent client in what attorney perceives to be client's best interest. Refusing to assist client in attempt to withdraw plea when attorney believes it is against client's best interests does not necessarily constitute abandonment and ineffective assistance of counsel.

> Atchley v. State, 622 N.E.2d 502, (Ind. 1994) (counsel's refusal to assist defendant in attempt to withdraw guilty plea was not an improper abandonment of client or IAC. Attorney advised client against withdrawing plea, appeared at hearing on motion, and argued that withdrawal was against client's best interests. Court would not say attorney abandons client by refusing to go along with course of action attorney feels is not in client's best interests. Attorney stayed by client's side and tried to represent him in manner he thought best. No constitutional right to attorney who blindly follows client's instructions).

NOTE: If attorney and the client disagree on significant matters of strategy and the attorney chooses to make a record of the circumstances (such as the advice, reasons, and conclusions reached), record should be made in a way that protects the client's interests and the confidentiality of the attorney-client relationship.

See *ABA Defense Function*, Standard 4-5.2, 4th ed. (2014) (specific guidance on who makes decisions as to control and direction of the defense).

D. CHALLENGING GUILTY PLEA

1. Post-Conviction Relief

PCR is the most frequent method to challenge plea after sentencing. Petition must allege specific facts to show:

(1) plea was not voluntary; or
(2) plea was not intelligent; or
(3) defendant was misled by court, prosecutor, or defense counsel; or
(4) plea advisement error was not by law ***and*** caused a different result.

White v. State, 497 N.E.2d 893, 905-06 (Ind. 1986).

A defendant alleging that his counsel's deficient performance led him to enter a guilty plea instead of going to trial must establish a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Jae Lee v. United States, 137 S.Ct. 1958 (2017).

See also State v. Pearson, 191 N.E.3d 892 (Ind. Ct. App. 2022) (evidence supported post-conviction court's judgment defendant did not intelligently enter plea and would not have relied on counsel's advice to plead guilty had he known counsel was facing disciplinary issues and anticipating resigning from bar).

a. Laches is Defense to PCR

State must plead and prove laches by preponderance of evidence. Holmes v. State, 591 N.E.2d 594 (Ind. Ct. App. 1992).

State must show that the delay was unreasonable and caused prejudice to the State. See Day v. State, 576 N.E.2d 1256 (Ind. Ct. App. 1991).

Higgason v. State, 631 N.E.2d 539 (Ind. Ct. App. 1994) (evidence defendant was knowledgeable about post-conviction rights coupled with fact that only remaining living witness had little memory about crime was sufficient to establish affirmative defense of laches).

Oliver v. State, 843 N.E.2d 581 (Ind. Ct. App. 2006) (defendant unreasonably delayed seeking post-conviction relief and State would be prejudiced by delay).

Thompson v. State, 31 N.E.3d 1002 (Ind. Ct. App. 2015) (delay in prosecuting PCR petition—as opposed to delay in filing petition - may be considered when deciding applicability of doctrine of laches; held: 22-year delay in prosecuting PCR prejudiced State and supported trial court's finding of laches).

2. Constitutional Grounds to Vacate Plea

a. Failure to Advise of Boykin Rights

Boykin requires court to advise an accused that guilty plea waives:

(1) right to jury trial,
(2) right of confrontation,
(3) privilege against self-incrimination.

See Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969).

Youngblood v. State, 542 N.E.2d 188 (Ind. 1989) (guilty plea record that is silent as to advisement of Boykin rights may be rehabilitated by testimony at PCR hearing; during PCR trial, lawyers who represented defendant during plea testified they had explained rights to defendant).

Hall v. State, 849 N.E.2d 466 (Ind. 2006) (petitioner who pursues claim for post-conviction relief challenging plea of guilty on ground he was not advised of Boykin rights not entitled to relief solely because guilty plea record is lost and cannot be reconstructed; petitioner has burden of proving he is entitled to relief by preponderance of evidence).

State v. Damron, 915 N.E.2d 189 (Ind. Ct. App. 2009) (trial court's policy of destroying recordings of guilty plea hearings after 10 years, although in contravention of Indiana Criminal Rule 10, did not constitute misconduct).

b. Failure to Ensure Defendant Understands Waiver of Rights

A guilty plea must be vacated if the trial court failed to ensure that the accused

understood that a guilty plea waives Boykin rights. White v. State, 497 N.E.2d 893 (Ind. 1986).

In misdemeanor cases defendant may waive rights in Ind. Code § 35-35-1-2(a) unless there are constitutional problems with plea. Ind. Code § 35-35-1-2(b), (c).

c. Failure to Follow Statutory Procedure

Failure to follow statutory procedure or advise of statutory rights causes vacation of plea only if the accused can show he would not have entered plea but for the failure. Allen v. State, 498 N.E.2d 1214 (Ind. 1986).

See IPDC Pretrial Manual, Chapter 10 § III.B., *below*.

d. Failure to Advise of Deportation Consequences

Due to the complexity of immigration law, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences; however, when the deportation consequence is truly clear, the duty to give correct advice is equally clear. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

Conclusory testimony at post-conviction hearing that the defendant would not have pleaded guilty had he known that deportation was a possible consequence of pleading guilty to a felony is insufficient to merit post-conviction relief. Segura v. State, 749 N.E.2d 496 (Ind. 2001). To succeed, defendant must show special circumstances or specific facts showing that if his attorney had properly advised him of penal consequences of a guilty plea, there was a reasonable probability that he would have chosen to proceed to trial. Id.

NOTE: In Bobadilla v. State, 117 N.E.3d 1272 (Ind. 2019), the Court clarified that the prejudice inquiry is a **subjective test** that looks at this particular defendant's special circumstances. Id. at 1286-87 (*citing* Lee v. United States, 137 S. Ct. (2017)). Bobadilla thus explicitly disapproved of contrary language in Segura, which said the inquiry is objective and judged according to a hypothetical reasonable defendant. Id. at 1287.

Sial v. State, 862 N.E.2d 702 (Ind. Ct. App. 2007) (presence of wife and daughter in defendant's life and fact he lived in country as permanent resident for over twenty years were sufficient special circumstances to make requisite showing).

Clarke v. State, 974 N.E.2d 562 (Ind. Ct. App. 2012) (even assuming defendant established special circumstances with respect to unborn children, considering strength of State's case and significant benefit conferred upon him under plea agreement, knowledge of risk of deportation would not have affected reasonable defendant's decision to plead guilty).

Gulzar v. State, 971 N.E.2d 1258 (Ind. Ct. App. 2012) (while defendant may have shown special circumstances related to his family, in light of evidence establishing guilt, he could not show prejudice from counsel's failure to explain risk of automatic deportation); see also Kaushal v. State, 112 N.E.3d 1138 (Ind. Ct. App. 2018).

State v. Bonilla, 957 N.E.2d 682 (Ind. Ct. App. 2011) (defendant failed to allege "special circumstances or objective facts" to prove he would have rejected plea had he been informed of immigration consequences of conviction).

Trujillo v. State, 962 N.E.2d 110 (Ind. Ct. App. 2011) (defendant failed to show prejudice from counsel's failure to advise him about adverse immigration consequences of pleading guilty; defendant failed to show he had spouse or children living in United States).

Carrillo v. State, 982 N.E.2d 461 (Ind. Ct. App. 2013) (guilty plea counsel did not provide deficient performance by failing to ask defendant about his citizenship status when counsel had no reason to believe defendant was not U.S. citizen).

Chaidez v. United States, 133 S. Ct. 1103 (2013) (Padilla created new rule of criminal procedure and thus not applied retroactively to cases already final on direct review per rule announced in Teague v. Lane, 109 S.Ct. 1060 (1989)).

Suarez v. State, 967 N.E.2d 552 (Ind. Ct. App. 2012) (knowledge of potential deportation due to guilty plea would not have affected reasonable defendant's decision to plead guilty because State's case was strong and plea agreement substantially benefited defendant).

E. CHALLENGING SENTENCE

1. Direct Appeal

An indigent defendant who pleads guilty without a plea agreement, or whose plea agreement leaves sentencing discretion to the judge, has the right to court-appointed counsel to appeal the court's sentencing decision. Tumulty v. State, 666 N.E.2d 394, 396 (Ind. 1996); Ind. App. R. 7; Halbert v. Michigan, 125 S. Ct. 2582 (2005).

A sentencing issue, which could have been presented on direct appeal but was not, is not available to raise in a petition for post-conviction relief under PC1. "[T]he proper procedure for an individual who has pled guilty in an open plea to challenge the sentence imposed is to file a direct appeal or, if the time for filing a direct appeal has run, to file an appeal under P.C.R. 2." Collins v. State, 817 N.E.2d 230, 232-233 (Ind. 2004).

Defendant may waive the right to appeal sentence as part of a plea agreement. Creech v. State, 887 N.E.2d 73 (Ind. 2008); Perez v. State, 866 N.E.2d 817 (Ind. Ct. App. 2007). However, Creech reaffirmed case law invalidating provisions in plea agreements that waive post-conviction rights. See, e.g., Majors v. State, 568 N.E.2d 1065 (Ind. Ct. App. 1991). A general waiver of the right to appeal a sentence in a plea agreement, when contained in the same sentence as an unenforceable waiver of post-conviction relief, is insufficiently explicit to establish a knowing and voluntary waiver of the right to appeal a sentence. Johnson v. State, 145 N.E.3d 785 (Ind. 2020).

Archer v. State, 81 N.E.3d 212 (Ind. 2017) (defendant did not waive right to appeal amount of restitution order when amount was left blank in plea agreement and agreement did not set forth how restitution would be determined).

Crowder v. State, 91 N.E.3d 1040 (Ind. Ct. App. 2018) (Court of Appeals reinstated right

to directly appeal sentence defendant had surrendered under terms of plea agreement because counsel was ineffective for failing to advise defendant his benefit from plea agreement was illusory).

2. Motion to Correct Sentence

In case of erroneous sentence, defendant may file either motion to correct his sentence or petition for post-conviction relief. Marts v. State, 478 N.E.2d 63 (Ind. 1985).

A motion to correct erroneous sentence is appropriate only when the sentence is "erroneous on its face." A motion to correct sentence would not preclude the defendant from filing a later petition for post-conviction relief where warranted. Robinson v. State, 805 N.E.2d 783 (Ind. 2004).

Ind. Code § 35-38-1-15 permits a defendant to file a motion to correct sentence so long as it is in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence. Purpose of motion is to provide prompt, direct access to uncomplicated legal process for correcting occasional erroneous or illegal sentence. Watkins v. State, 588 N.E.2d 1342, 1344 (Ind. Ct. App. 1992).

Reffett v. State, 571 N.E.2d 1227, 1229 (Ind. 1991) (sentence violating express terms of plea agreement is facially erroneous and may be attacked by motion to correct erroneous sentence). See also Robinson v. State, 805 N.E.2d 783 (Ind. 2004).

a. Illegal Sentence

A defendant may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence. Lee v. State, 816 N.E.2d 35 (Ind. 2004); Stites v. State, 829 N.E.2d 527 (Ind. 2005).

However, where the defendant did not bargain for illegal consecutive sentences, the claim is not waived. Crider v. State, 984 N.E.2d 618 (Ind. 2013).

Crider v. State, 984 N.E.2d 618 (Ind. 2013) (distinguishing Lee and Stites, *supra*, waiver of right to appeal contained in plea agreement is unenforceable where sentence imposed is contrary to law and defendant did not bargain for sentence).

Fisher v. State, 52 N.E.2d 871 (Ind. Ct. App. 2016) (trial court did not abuse discretion ordering defendant to pay restitution, even though plea agreement did not call for it, because plea agreement must be read as having been made in contemplation of I.C. § 35-48-4-17, which requires restitution in cases where State incurs costs to clean meth labs).

Williams v. State, 42 N.E.3d 107 (Ind. Ct. App. 2015) (defendant could not claim plea was not knowing, intelligent, and voluntary based on counsel's allegedy wrong advice that he was eligible for HSO enhancement because defendant received substantial benefit from plea deal).

Newton v. State, 83 N.E.3d 726 (Ind. Ct. App. 2017) (because juvenile defendant's LWOP sentence was result of plea agreement, he waived right to raise Eighth Amendment claim against the LWOP statute).

Arnold v. State, 27 N.E.3d 315 (Ind. Ct. App. 2015) (after vacating HO enhancement, trial court should have vacated entire plea because result was that defendant's 20-year sentence was reduced to 8 years, and where defendant initially faced potential sentence of at least 50 years).

Koontz v. State, 975 N.E.2d 846 (Ind. Ct. App. 2012) (although defendant was exposed to combined term of imprisonment and probation that exceeded statutory limits, Court of Appeals said it was not its "place to categorically declare the Supreme Court's position inapplicable to misdemeanors").

Kline v. State, 875 N.E.2d 435 (Ind. Ct. App. 2007) (where defendant benefitted from plea, fact that some sentences were for misconduct or molestation of higher class of felony than statute in existence at time of offense did not render plea void).

Gonzales v. State, 831 N.E.2d 845 (Ind. Ct. App. 2005) (guilty plea was not invalid, because defendant struck a favorable bargain with the State in that he was convicted of a lesser crime and gave up the right to challenge imposition of unauthorized consecutive sentences).

Russell v. State, 34 N.E.3d 1223 (Ind. 2015) (even though 10-year cap in Defendant's plea agreement was based on erroneous application of I.C. § 35-50-1-2(c), the agreement was enforceable because defendant pled guilty knowingly, intelligently, and voluntarily, and he received benefit of bargain).

Stites v. State, 829 N.E.2d 527 (Ind. 2005) (as in Lee, *supra*, Defendant received benefit so can't complain now; claims of involuntariness and IAC are "merely a subset" of defendant's claim her plea was void).

3. Original Action

State ex rel. Goldsmith v. Marion County Superior Ct., 275 Ind. 545, 419 N.E.2d 109 (1981) (State allowed to attack sentences entered in violation of plea agreements through an original action).

F. IMPOSING MORE SEVERE PENALTY AFTER CONVICTION SET ASIDE

1. PCR Rule

Post-Conviction Rule 1, section 10 provides:

(a) If prosecution is initiated against a petitioner who has successfully sought relief under this rule and a conviction is subsequently obtained, or

(b) If a sentence has been set aside pursuant to this rule and the successful petitioner is to be resentenced, then the sentencing court shall not impose a more severe penalty than that originally imposed unless the court includes in the record of the sentencing hearing a statement of the court's reasons for selecting the sentence that it imposes which included reliance upon identifiable conduct on the part of the petitioner that occurred after the imposition of the original sentence, and the court shall give credit for time served.

(c) The provisions of subsections (a) and (b) limiting the severity of the penalty do not apply when:

(1) a conviction, based upon a plea agreement, is set aside;
(2) the state files an offer to abide by the terms of the original plea agreement within twenty (20) days after the conviction is set aside; and
(3) the defendant fails to accept the terms of the original plea agreement within twenty (20) days after the state's offer to abide by the terms of the original plea agreement is filed.

McBroom v. State, 530 N.E.2d 725 (Ind. 1988) ("more severe penalty" after post-conviction relief from murder conviction prohibited; State accepted guilty plea to murder without pursuing confinement charge which arose from circumstances giving rise to murder charge; after post-conviction relief was obtained, State added confinement charge).

Newville v. State, 511 N.E.2d 1047 (Ind. 1987) (defendant, who successfully challenged his plea agreement in post-conviction action, could not be sentenced to total executed time greater than what he received in original plea agreement, pursuant to state law as it existed at time petition for post-conviction relief was filed).

Ogburn v. State, 549 N.E.2d 389 (Ind. Ct. App. 1990) (after defendant's sentence was set aside in post-conviction relief proceeding, trial court erred by imposing more severe sentence without including in record a statement of identifiable conduct occurring after imposition of original sentence that court relied upon to impose more severe sentence).

2. Statute

Ind. Code § 35-50-1-5 provides that sentencing court may impose a more severe penalty than that originally imposed.

G. GUILTY PLEA CONVICTION AS PREDICATE FELONY IN HABITUAL OFFENDER PROCEEDING

Accused may challenge predicate felony conviction in a habitual offender proceeding when the conviction is constitutionally invalid. Kindred v. State, 540 N.E.2d 1161, 1182 (Ind. 1989).

1. Collateral Challenge to Conviction

Conviction is deemed to be constitutionally invalid only when the following criteria are satisfied:

(1) court records reflecting the proceedings which led to the prior conviction, on their face, must raise a presumption that the conviction is constitutionally infirm; and
(2) apparent constitutional infirmity must be of the type which undermines both the integrity and reliability of the determination of guilt.

NOTE: Where the conviction is based on a guilty plea, the infirmity must affect that part of the guilty plea which constitutes the admission of guilt. Kindred v. State, 540 N.E.2d 1161, 1182 (Ind. 1989).

a. Example

Record does not affirmatively show that appellant was advised of his privilege against

self-incrimination or of his right to confront his accusers. This predicate felony conviction thus raises a presumption of constitutional infirmity in satisfaction of the first criterion.

Defendant would satisfy the second criterion where it can be shown, for instance, that the defendant was not represented by counsel and did not knowingly and intelligently waive representation at the time of the prior felony conviction.

NOTE: Violation of Boykin rights does not undermine integrity and reliability of determination of guilt. It affects only waiver part of guilty plea. For violation of Boykin rights, defendant must attack predicate conviction through appeal or PCR in court of conviction. Kindred v. State, 540 N.E.2d 1161 (Ind. 1989).

III. JUDGE'S RESPONSIBILITIES PRIOR TO ACCEPTING GUILTY PLEA

A. DETERMINE COMPETENCY

A defendant must be competent to stand trial before being permitted to plead guilty. Godinez v. Moran, 509 U.S. 389, 113 S.Ct. 2680 (1993).

Schuman v. State, 265 Ind. 586, 357 N.E.2d 895 (1976) (where petitioner's mental condition was questionable, trial court erred in not determining competency before accepting guilty plea).

1. Hearing

a. Discretionary if no Request

Absent petition to determine competency, court has discretion in deciding whether hearing needed to determine defendant's competence before accepting guilty plea.

Payton v. State, 507 N.E.2d 579 (Ind. 1987) (although defendant had petitioned for and received assistance in evaluating defendant's mental condition, acceptance of guilty plea without first ordering competency evaluation was proper where court thoroughly questioned defendant prior to entry of plea).

b. Required if Grounds to Believe Defendant has Insufficient Comprehension

Court having sufficient grounds to believe defendant does not have sufficient comprehension to understand guilty plea hearings shall immediately hold a hearing to resolve issue. Patterson v. State, 500 N.E.2d 1191 (Ind. 1987) (*citing* Lloyd v. State, 270 Ind. 227, 383 N.E.2d 1048 (1979)).

2. Determining Competency to Plead Guilty

Indiana courts have used varying standards to determine competency to plead guilty.

a. "Understand and Assist"

Godinez v. Moran, 509 U.S. 389, 113 S. Ct. 2680 (1993) (due process does not require higher or different standard for competence to plead guilty and to waive right to counsel

from competence to stand trial; standard is whether defendant has "sufficient present ability to consult with his lawyer with reasonable degree of rational understanding" and has "rational" as well as factual understanding of proceedings against him).

Gibson v. State, 490 N.E.2d 297 (Ind. 1986) (court equated competency to plead guilty with "understand and assist" standard of competency to stand trial).

b. "Capacity to Make Decision"

Starks v. State, 486 N.E.2d 491 (Ind. 1985) (competency to stand trial standard non-dispositive in determination of competency to plead guilty; court found evidence of capacity to make rational decisions).

Adcock v. State, 436 N.E.2d 799 (Ind. 1982) (question of competency to stand trial is fundamentally different from question of whether defendant can freely and intelligently plead guilty; also consider elements such as understanding consequences of plea and having capacity to choose between alternatives presented at guilty plea proceedings).

Note: *Competence to Plead Guilty and to Stand Trial: A New Standard When a Criminal Defendant Waives Trial*, 68 Va. L.Rev. 1139 (1982).

3. Effect of Ingestion of Drugs

Patterson v. State, 500 N.E.2d 1191 (Ind. 1987) (no evidence offered by defendant; court not required to make inquiry whether defendant under influence of drugs or alcohol).

Lloyd v. State, 270 Ind. 227, 383 N.E.2d 1048 (1979) (defendant claimed he had been under influence of drugs when he entered guilty plea; attorney and judge testified defendant never displayed outward signs of intoxication and had ability to comprehend proceedings).

Middleton v. State, 567 N.E.2d 141 (Ind. Ct. App. 1991) (court was unaware that defendant was under influence of heroin at plea hearing; defendant's responses during colloquy were not unusual).

B. ADVISEMENTS

1. Statutory Advisements

Ind. Code § 35-35-1-2 provides:

(a) The court shall not accept a plea of guilty or guilty but mentally ill at the time of the crime without first determining that the defendant:

(1) understands the nature of the charge against the defendant;

(2) has been informed that by the defendant's plea the defendant waives the defendant's rights to:

(A) a public and speedy trial by jury;

(B) confront and cross-examine the witnesses against the defendant;

(C) have compulsory process for obtaining witnesses in the defendant's favor; and

(D) require the state to prove the defendant’s guilt beyond a reasonable doubt at a

trial at which the defendant may not be compelled to testify against himself or herself;

(3) has been informed of the maximum possible sentence and minimum sentence for the crime charged and any possible increased sentence by reason of the fact of a prior conviction or convictions, and any possibility of the imposition of consecutive sentences;

(4) has been informed that the person will lose the right to possess a firearm if the person is convicted of a crime of domestic violence (Ind. Code § 35-31.5-2-78); and

(5) has been informed that if:

(A) there is a plea agreement as defined by Ind. Code § 35-31.5-2-236; and
(B) the court accepts the plea;

the court is bound by the terms of the plea agreement at the time of sentencing and with respect to sentence modification under Ind. Code §35-38-1-17.

(b) A defendant in a misdemeanor case may waive the rights under subsection (a) by signing a written waiver.

(c) Any variance from the requirements of this section that does not violate a constitutional right of the defendant is not a basis for setting aside a plea of guilty.

a. Failure to Inform of Boykin Rights - Conviction Vacated

If trial court does not inform defendant of Boykin rights, conviction will be vacated without showing of prejudice to defendant. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969); State v. Lime, 619 N.E.2d 601 (Ind. Ct. App. 1993).

(1) Right to Jury Trial

Douglas v. State, 510 N.E.2d 682 (Ind. 1987) (being advised of right to jury trial constitutionally mandated by Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969)).

Young v. State, 143 N.E.3d 965 (Ind. Ct. App. 2020) (stipulation for repeat sexual offender and habitual offender enhancements was guilty plea that required knowing, voluntary, and intelligent personal waiver of the right to jury trial).

(2) Right of Confrontation (Indiana Constitution "Face to Face")

Stamm v. State, 556 N.E.2d 6 (Ind. Ct. App. 1990) (requirement defendant know or be advised of right to confrontation at time of pleading guilty not satisfied unless defendant understands, from information given to him or circumstances of taking of plea, that were he to have trial, he would have right to physically face witnesses who testify against him; trial court failed to use words "confront" or "cross-examine").

Rose v. State, 513 N.E.2d 1243 (Ind. Ct. App. 1988) (inadequate advisement of right of confrontation requires reversal; defendant advised he could subpoena witnesses and could defend himself against charges).

(3) Privilege Against Self-Incrimination

Belcher v. State, 546 N.E.2d 1276 (Ind. Ct. App. 1990) (trial court's advisement of defendant, that he would not have to do anything he did not want to if he were to have trial by jury, that he could just sit at table, and that he would not have to prove anything, adequately and meaningfully conveyed to defendant his privilege against self-incrimination).

See also White v. State, 497 N.E.2d 893 (Ind. 1986) (*citing* Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969)).

b. Advisements Not Conforming to Statute

Ind. Code § 35-35-1-2(c) provides: "Any variance from the requirements of this section that does not violate a constitutional right of the defendant is not a basis for setting aside a plea of guilty." The formal requirements and advisements imposed by this statute when accepting guilty pleas do not apply when accepting sentencing agreements for those who have already been convicted. Weatherford v. State, 697 N.E.2d 32 (Ind. 2018).

White v. State, 497 N.E.2d 893 (Ind. 1986) (despite judge's failure to comply with court's obligations at guilty plea hearing, petitioner was not entitled to have convictions for burglary and theft vacated; petitioner did not allege specific facts suggesting plea was result of coercion or being misled, or circumstances calling into question judge's assertion that plea was voluntary).

c. Failure to Advise Minimum is Non-Suspendable

State v. Cozart, 897 N.E.2d 478 (Ind. 2008) (post-conviction court erred in vacating defendant's conviction based on trial court's failure to advise that the minimum sentence was non-suspendible. Generally speaking, if a trial court undertakes the steps dictated by statute, a post-conviction petitioner will have a difficult time overturning his guilty plea on collateral attack. However, defendants who can prove that they were actually misled by the judge, the prosecutor, or defense counsel about the choices before them will present colorable claims for relief).

2. Group Advisements

The trial court has the responsibility of creating a record showing that the defendant personally and individually heard and understood the Boykin rights and concept of waiver.

Griffin v. State, 617 N.E.2d 550 (Ind. Ct. App. 1993) (*en masse* advisement of rights not sufficient for plea unless court makes personal inquiry of defendant to make sure he heard and understood).

Snowe v. State, 533 N.E.2d 613 (Ind. Ct. App. 1989) (record does not indicate whether defendant viewed videotaped advisement of her rights, let alone whether she understood them).

Hunt v. State, 487 N.E.2d 1330 (Ind. Ct. App. 1986) (defendant did not knowingly and intelligently waive rights prior to pleading guilty to misdemeanor traffic offense despite signing court-prepared form which listed his rights and contained statement indicating he

understood them; defendant not asked if he understood rights he was waiving, had read form or was literate in reading English language).

3. Statutory Advisements - Possible Error

Failure to give following advisements does not automatically invalidate plea but may be a factor in determining whether the plea was voluntary and intelligent.

a. Maximum, Minimum and Consecutive Sentence

Fulmer v. State, 519 N.E.2d 1236 (Ind. 1988) (of parole regulations affecting length of time actually to be served).

White v. State, 497 N.E.2d 893 (Ind. 1986) (of minimum sentence).

Farrell v. State, 495 N.E.2d 530 (Ind. 1986) (of lesser included offenses and punishments for same).

Jones v. State, 491 N.E. 2d 542 (Ind. 1986) (of punishments for crimes charged, other than offenses to which defendant pleads).

Scott v. State, 632 N.E.2d 761 (Ind. Ct. App. 1994) (court suggested in dicta that trial judge should advise defendants who elect to plead guilty of possible consequences of consecutive terms under I.C. § 35-50-1-2(b)).

Woodard v. State, 609 N.E.2d 1185 (Ind. Ct. App. 1993) (failure of consecutive sentence possibility not fatal to plea).

Grant v. State, 585 N.E.2d 284 (Ind. Ct. App. 1992) (although judge erred in advising defendant maximum sentence, he could receive was 90 years instead of 60 years, error did not require vacation of plea).

Arnold v. State, 539 N.E.2d 969 (Ind. Ct. App. 1989) (trial court not required to advise defendant that present sentence and earlier suspended sentence might have served consecutively if guilty plea resulted in probation revocation).

Freeman v. State, 516 N.E.2d 82 (Ind. Ct. App. 1987) (conviction for DWI would be sent to motor vehicle commissioner; no showing defendant would have changed plea if given advisement).

Owens v. State, 437 N.E.2d 501 (Ind. Ct. App. 1982) (later liability under habitual offender statute).

b. Prior Convictions

Followell v. State, 578 N.E.2d 646 (Ind. 1991) (post-conviction court erred in failing to consider whether defendant would have pled guilty had he been fully advised his criminal history could be used to enhance presumptive sentence).

Cf.

Wright v. State, 490 N.E.2d 732 (Ind. 1986) (where sentence indeterminate and could not

be enhanced/enlarged, omission of advisement about effect of prior convictions did not affect character of guilty plea); accord Owens v. State, 500 N.E.2d 756 (Ind. Ct. App. 1986).

Burns v. State, 500 N.E.2d 201 (Ind. 1986) (of increased sentence because of prior convictions).

Golden v. State, 506 N.E.2d 47 (Ind. Ct. App. 1987) (no provision in statutes in effect at time of crime for enhancement of sentence for entering to commit a felony or to enhance sentence because of prior convictions).

c. Proof Beyond Reasonable Doubt

Frazier v. State, 500 N.E.2d 1187 (Ind. 1986) (appellant did not allege or prove that trial court's failure to explain that elements of offense would have to be proven beyond a reasonable doubt rendered his decision to plead guilty involuntary or unintelligent).

d. Public and Speedy Trial

Jordan v. State, 502 N.E.2d 910 (Ind. 1987) (circumstances indicate that defendant was adequately advised of the public nature of trial he waived).

Cf.

Saperito v. State, 490 N.E.2d 1138 (Ind. Ct. App. 1986) (record did not support conclusion defendant knowingly waived right to speedy trial by pleading guilty where no trial date had been set when guilty plea was accepted, and defendant's right to speedy trial omitted from trial court's admonishment of rights that were being waived by plea).

e. Court Not Bound by Agreement

McFarland v. State, 501 N.E.2d 1047 (Ind. 1986) (defendant has not demonstrated that the trial court's failure to give the required statutory advisements impacted the decision to plead guilty).

f. Waiver of Trial

Pharris v. State, 485 N.E.2d 79 (Ind. 1985) (failure to conduct evidentiary hearing on motion for post-conviction relief was harmless error where defendant's claim that sentencing court's failure to advise him it would proceed with judgment and sentencing upon acceptance of defendant's guilty plea was without merit).

C. VOLUNTARINESS

1. Plea must be Voluntary

Determination of voluntariness can be meaningful only if made before plea entered and accepted. McNary v. State, 493 N.E.2d 824 (Ind. Ct. App. 1986).

Anderson v. State, 335 N.E.2d 225 (Ind. 1975) (voluntariness, determined from all circumstances surrounding plea).

Cornelious v. State, 846 N.E.2d 354 (Ind. Ct. App. 2006) (defendant's guilty plea was involuntary based on misrepresentation at guilty plea hearing that he could directly appeal a speedy trial issue despite his plea; Court analogized case to Lineberry v. State, 747 N.E.2d 1151 (Ind. Ct. App. 2001), which held guilty plea was improperly induced by promise that defendant could appeal denial of his motion to suppress).

Dillehay v. State, 672 N.E.2d 956 (Ind. Ct. App. 1996) (plea was voluntary and intelligent, even though counsel gave incorrect advice about maximum sentence, minimum sentence, and whether consecutive sentences were required, because plea agreement gave defendant substantial reduction from maximum sentence and avoided multiple felony convictions; incorrect advice that consecutive sentences were mandatory did not render plea involuntary because trial court had discretion to impose consecutive sentences).

See also Lockhart v. State, 274 N.E.2d 523 (Ind. 1971); Likens v. State, 378 N.E.2d 24 (Ind. Ct. App. 1978); Springer v. State, 952 N.E.2d 799 (Ind. Ct. App. 2011); Hacker v. State, 906 N.E.2d 924 (Ind. Ct. App. 2009); and Harris v. State, 762 N.E.2d 163 (Ind. Ct. App. 2002).

Ind. Code § 35-35-1-3 provides in pertinent part:

(a) The court shall not accept a plea of guilty or guilty but mental ill at the time of the crime without first determining that the plea is voluntary. The court shall determine whether any promises, force, or threats were used to obtain the plea.
(b) A plea of guilty or guilty but mental ill at the time of the crime shall not be deemed to be involuntary under subsection (a) solely because it is the product of an agreement between the prosecution and the defense.

2. Threats

Bargained plea, motivated by improper threat, deemed illusory and denial of substantive rights. Champion v. State, 478 N.E.2d 681, 683 (Ind. 1985).

Daniels v. State, 531 N.E.2d 1173 (Ind. 1988) (at moment plea is entered, State must possess power to carry out any threat which a factor in was obtaining plea agreement which was accepted; lack of real power makes threat illusory and causes representation to take on characteristics of a trick).

But see Roberts v. State, 953 N.E.2d 559 (Ind. Ct. App. 2011) (even though State threatened defendant with invalid habitual offender enhancement, defendant admitted he knew threat was invalid, so State's threat to add a habitual offender count could not have reasonably been defendant's main motivation to plead guilty four days before trial.).

Dube v. State, 257 Ind. 398, 275 N.E.2d 7, 9 (1971) (plea bargaining must not be used as coercive force to obtain pleas of guilty but must be result of agreement which both sides find mutually beneficial).

a. Punishment in Excess of Law Illusory Agreement

If bargained plea motivated by threat of punishment in excess of that authorized by law, plea agreement illusory and constitutes denial of substantive rights. Reeves v. State, 564 N.E.2d 550 (Ind. Ct. App. 1991).

Marshall v. State, 590 N.E.2d 627 (Ind. Ct. App. 1992), *trans. denied* (illusory threat of multiple convictions is not per se basis for relief from guilty plea, but rather the illusory threat must be motivating factor for plea; defendant failed to meet his burden of proving pleas were induced by improper threat).

b. Threat of Habitual Charge/Death Penalty

Threat of habitual charge or the death penalty to induce defendant to plead guilty is a recognized and accepted exercise of prosecutorial bargaining leverage, not wrongful coercion. Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663 (1978).

Champion v. State, 478 N.E.2d 681 (Ind. 1985) (threatening death penalty for non-trigger man in felony murder case permitted under Indiana law).

Murphy v. State, 477 N.E.2d 266 (Ind. 1985) (habitual offender charge).

Brown v. State, 453 N.E.2d 254 (Ind. 1983) (State must have basis for pursuing habitual offender charge).

c. Promises and Erroneous Advice

Neville v. State, 439 N.E.2d 1358 (Ind. 1982) (alleged unfulfilled promise of lesser sentence relative to co-defendant in exchange for plea not proven).

Gosnell v. State, 439 N.E.2d 1153 (Ind. 1982) (erroneous advice of defense counsel as to parole rights does not render plea involuntary).

Black v. State, 54 N.E.3d 414 (Ind. Ct. App. 2016) (defendant failed to show counsel gave bad advice about potential sentence or that such advice rendered plea involuntary; even if counsel had given inaccurate information, defendant failed to show that advice affected his decision to plead guilty).

Hacker v. State, 906 N.E.2d 924 (Ind. Ct. App. 2009) (given strength of State's case and substantial benefit defendant received from plea agreement, defendant failed to meet his burden that trial counsel's bad advice about maximum sentence he faced "materially affected" his decision to plead guilty).

Nash v. State, 429 N.E.2d 666 (Ind. Ct. App. 1981) (when accepting guilty plea to 19 counts of theft, trial court erred in failing to determine if pleas were result of promises, especially when prosecutor had erroneously represented in plea negotiations that defendant was subject to eight habitual offender counts for which there was no legal basis).

d. Coercion by Court

White v. State, 497 N.E.2d 893 (Ind. 1986) (action of court which constitutes coercion is basis for reversal of conviction or plea).

e. Plea to Uncharged Lesser-Included Offense

State v. Sanders, 596 N.E.2d 225 (Ind. 1992) (plea to involuntary manslaughter as lesser-

included offense of murder was knowingly, voluntarily, and intelligently entered, even though at time of guilty plea hearing there was no charging document that charged defendant with involuntary manslaughter; during guilty plea hearing, state read statutory definition of involuntary manslaughter, and defendant was aware of the elements of the offense when he pled guilty).

f. Offer of Higher Sentence During Trial

Responding to rejection of initial plea offer with offer of higher sentence once trial begins is within the proper scope of bargaining. Powell v. State, 463 N.E.2d 529 (Ind. Ct. App. 1984); Rose v. State, 488 N.E.2d 1141 (Ind. Ct. App. 1986).

Centers v. State, 501 N.E.2d 415 (Ind. 1986) (some degree of intimidation and confusion will always be present at plea hearings; oppressive courtroom atmosphere, and confusion occasioned by last minute changes in agreement which was not reduced to writing does not render plea involuntary; withdrawal, even if motion made prior to sentencing, may be denied).

D. FACTUAL BASIS

1. Indiana - Factual Basis Required in All Guilty Pleas (after 1973)

Ind. Code § 35-35-1-3(b) (formerly Ind. Code § 35-4.1-1-4 effective 1973) provides:

> The court shall not enter judgment upon a plea of guilty or guilty but mentally ill at the time of the crime unless it is satisfied from its examination of the defendant, or the evidence presented that there is a factual basis for the plea.

Stroud v. State, 450 N.E.2d 992 (Ind. 1983) (trial court correctly rejected plea agreement where no factual basis supported plea).

Rhoades v. State, 675 N.E.2d 698 (Ind. 1996) (trial court may find sufficient factual basis to support guilty plea when there is evidence about elements of crime from which court could reasonably conclude that defendant is guilty; standard of review for sufficiency of evidence to support conviction is not same as standard for reviewing whether evidence is sufficient to sustain guilty plea).

Cf.

Melton v. State, 611 N.E.2d 666 (Ind. Ct. App. 1993) (because defendant admitted he consumed alcohol and operated motor vehicle, agreed he smelled of alcohol and failed field sobriety/dexterity tests, there was sufficient factual basis to accept plea to operating with BAC .10%, even without actual evidence of percentage of alcohol in blood).

State v. Cooper, 935 N.E.2d 146 (Ind. 2010) (where defendant was read charging information for operating vehicle while driving privileges were suspended as habitual traffic violator and admitted to such charges after arresting officer's testimony, there was sufficient factual basis for guilty plea).

2. When Defendant Maintains Innocence at Guilty Plea Hearing

a. Court Must Reject Plea

"A judge may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time. To accept such a plea constitutes reversible error." Trueblood v. State, 587 N.E.2d 105 (Ind. 1992). See also Ellis v. State, 67 N.E.3d 643 (Ind. 2017). This rule is designed to prevent conviction and sentencing without trial of citizens who tell the judge they committed no crime. Ross v. State, 456 N.E.2d 420 (Ind. 1983).

Williams-Bey v. State, 51 N.E.3d 1261 (Ind. Ct. App. 2016) (defendant's statements during change-of-plea hearing were intended to deny culpability for enhancement, not merely to clarify legal position; thus, post-conviction court clearly erred when it found defendant's statements denying culpability for Class B-level enhancement for escape with which he was charged failed to amount to protestation of innocence).

Huddleston v. State, 951 N.E.2d 277 (Ind. Ct. App. 2011) (guilty plea to murder as accomplice invalid where defendant said that when he handed knife to accomplice, he did not know or intend that accomplice would murder the victim).

McWhorter v. State, 945 N.E.2d 1271 (Ind. Ct. App. 2011) (trial court did not err in accepting guilty plea to residential entry even though defendant said he had permission to enter garage and may have been mistaken about where he was because defendant also admitted he knowingly and intentionally broke into victim's house); see also Hooker v. State, 120 N.E.3d 639 (Ind. Ct. App. 2019) (defendant's admission he had to "squeeze" to get through door satisfied breaking element of burglary, making plea reliable admission of guilt).

Atchley v. State, 622 N.E.2d 502 (Ind. 1993) (without independent evidence of guilt, court may not accept guilty plea from defendant who professes innocence in same breath).

Oliver v. State, 843 N.E.2d 581 (Ind. Ct. App. 2006) (record did not reveal that defendant simultaneously protested his innocence while pleading guilty when he stated he did not know how items got in hallway but referred to items as "stolen).

Carter v. State, 724 N.E.2d 281 (Ind. Ct. App. 2000) (where trial court has followed procedures outlined in guilty plea statutes and where defendant's guilty plea is knowing and voluntary, his later assertion of innocence does not require trial court to set aside his guilty plea).

Huddleston v. State, 951 N.E.2d 277 (Ind. Ct. App. 2011) (guilty plea to murder as accomplice invalid where defendant said that when he handed knife to his accomplice, he did not know or intend that accomplice would murder the victim).

Johnson v. State, 960 N.E.2d 844 (Ind. Ct. App. 2012) (trial court erred in accepting defendant's guilty plea to Class A felony child molesting where he pled guilty yet maintained his innocence, by denying act that elevated the offense to Class A felony made, agreement invalid).

b. May Accept Plea If Defendant Does Not Affirmatively Maintain Innocence

Where defendant does not affirmatively maintain innocence, evidence other than defendant's testimony may be accepted in support of guilty plea. It is not a legal requirement that the defendant be able to completely remember all of the events and/or happenings leading up to the crime.

(1) Other Evidence of Guilt

Stockey v. State, 508 N.E.2d 793 (Ind. 1987) (defendant testified homicide victim struck him on head, defendant blacked out, and was told he had killed victim when he regained consciousness. Court relied on his admission to facts, and his statements to family and others that he had killed a man).

(2) "I Don't Recall" Plus Additional Evidence

Bates v. State, 517 N.E.2d 379 (Ind. 1988) (not protestation of innocence where defendant neither admitted nor denied use of deadly weapon; other evidence provided factual basis for plea; characterization of plea as "best interest" plea by defense counsel does not render improper acceptance of plea by court).

Gibson v. State, 490 N.E.2d 297 (Ind. 1986) (defendant can plead guilty and say, "I don't remember," if additional evidence supports defendant's guilt).

c. Denial of Guilt After Guilty Plea Hearing

(1) Death penalty cases

Patton v. State, 517 N.E. 2d 374 (Ind. 1988) (where defendant denied intent to kill at capital sentencing hearing, trial court was required to vacate guilty plea).

Trueblood v. State, 587 N.E.2d 105, 108 (Ind. 1992) (there is no *per se* rule to evaluate the reliability of guilt determinations in capital cases; the decisions must be made on the facts of each case. A capital plea must be more carefully and fully explored on the record than a plea to a term of years. "A later request to withdraw such a plea calls for examining whether the plea was given truthfully and intelligently and whether the request to withdraw arises out of genuine misapprehension or out of a desire to manipulate." Distinguishing Patton.).

PRACTICE POINTER: See *Defending a Death Penalty Case*, by IPDC, for more information about guilty pleas in capital cases.

(2) Non-Capital Offenses

Patton rule does not apply.

Smith v. State, 596 N.E.2d 257 (Ind. Ct. App. 1992) (court of appeals would not extend to non-capital offenses rule that trial court in capital case must set aside guilty plea when defendant protests his innocence at sentencing hearing even though statement not made contemporaneously with the plea of guilty).

d. Assertion of Innocence Made to Probation Officer in Pre-Sentence Report

Moredock v. State, 540 N.E.2d 1230 (Ind. 1989) (acceptance of guilty plea from defendant who protests innocence to probation officer in out-of-court presentence interview not basis for post-conviction relief).

Hatcher v. State, 523 N.E.2d 446 (Ind. Ct. App. 1988) (unsworn, out-of-court statement in presentence investigation report not protestation of innocence), *aff'd*, 540 N.E.2d 1241 (Ind. 1989).

Cross v. State, 521 N.E.2d 360 (Ind. Ct. App. 1988) (where court takes guilty plea under advisement, denial of guilt in presentence report triggers duty to inquire and resolve inconsistency). But see Moredock v. State, 540 N.E.2d 1230 (Ind. 1989).

3. Factual Basis Lacking for Elements of Offense - Reversal Required

Where both plea and other evidence indicate factual basis lacking for essential element of charge on which plea entered, reversal required.

Larry v. State, 477 N.E.2d 94 (Ind. 1985) (bodily injury to officer chasing defendant after robbery not valid predicate for aggravated Class A robbery plea).

Stroud v. State, 450 N.E.2d 992 (Ind. 1983) (touching not shown in battery case; no error in refusing to accept plea to battery where defendant did not know whether stick he threw hit victim).

Cf.

Harvey v. State, 498 N.E.2d 1231(Ind. 1987) (constructive possession of sawed-off shotgun inferable from facts admitted by defendant; defense counsel urged court to accept plea because of beneficial nature of bargain).

Pendrick v. State, 447 N.E.2d 1084 (Ind. 1983) (defendant denied intent to kill and that he was in his right mind, but admitted intending to hurt victim, and striking victim eight times with metal club. Held: intent to kill found).

Buchanan v. State, 490 N.E.2d 351 (Ind. Ct. App. 1986) (defendant denied he had gun in possession, although he made earlier statement to contrary, and earlier in colloquy admitted guilt to charges read by judge; sufficient factual basis found even after State admitted there was none).

4. Habitual Offender

Information and facts alleged at guilty plea hearing must be sufficient to support defendant's guilty plea to being a habitual offender.

Roe v. State, 598 N.E.2d 586 (Ind. Ct. App. 1992) (guilty plea court erred when it accepted defendant's plea and enhanced his sentence by 30 years for habitual offender adjudication; State did not allege, and no evidence, defendant's prior unrelated felonies and present underlying felony occurred in the sequence mandated by statute).

5. How to Avoid Court's Rejection of Plea

If defendant can't recall, or elements of offense not satisfied in factual basis during guilty plea hearing, finding of protestation of innocence and rejection of plea may be avoided if:

(1) counsel asks whether defendant has any reason to dispute information in police report, probable cause affidavit, etc., or

(2) factual basis may be established by having defendant admit to facts recited by prosecutor or police officer, or where defendant indicates he understands nature of crime charged and his guilty plea constitutes admission of charge. Stewart v. State, 517 N.E.2d 1230 (Ind. 1988); Stockey v. State, 508 N.E.2d 793 (Ind. 1987); Patterson v. State, 500 N.E.2d 1191 (Ind. 1987).

Rhoades v. State, 675 N.E.2d 698 (Ind. 1996) (test for sufficient factual basis is whether there is evidence about the elements of the crime from which a court could reasonably conclude that the defendant is guilty).

Stott v. State, 486 N.E.2d 995 (Ind. 1985) (variance between defendant's account and State's allegations as to minor details not going to essential element of offense not denial of guilt by defendant).

Snowe v. State, 533 N.E.2d 613 (Ind. Ct. App. 1989) (factual basis insufficient for acceptance of guilty plea where no indication in record anything took place other than offer and acceptance of plea).

6. Alford or "Best Interest" Plea

Under United States Constitution, defendant's plea of guilty need not be supported by strong evidence of factual basis for plea but need only represent voluntary and intelligent choice among alternative courses of action open to defendant. Higgason v. Clark, 984 F.2d 203 (7th Cir. 1993).

If pleading defendant denies commission of crime, a strong factual basis is a necessary substitute for the admission of guilt.

North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160 (1970) (accused may plead guilty without admitting acts of crime or even protesting innocence if he intelligently concludes his interest so requires and record strongly evidences guilt. No right to have guilty plea accepted).

a. Not Accepted in Indiana

An Indiana judge may not accept an Alford plea. Ross v. State, 456 N.E.2d 420 (Ind. 1983); Carter v. State, 739 N.E.2d 126 (Ind. 2000).

IV. PLEA AGREEMENTS - PROCEDURAL ISSUES

A. WITHDRAWAL OF PLEA AGREEMENT BY PROSECUTOR

1. Before Reduced to Writing and Filed with Court

Prosecution has absolute authority to withdraw plea agreement before it is reduced to writing and submitted to the trial court. Court may consider state's motion to withdraw plea agreement as factor in determining whether to accept or reject plea. Petty v. State, 532 N.E.2d 610, 63 (Ind. 1989), *overruled in part on other grounds by* Whedon v. State, 765 N.E.2d 1276, 1279 (Ind. 2002).

2. Filed but Not Yet Accepted by Court

Badger v. State, 637 N.E.2d 800 (Ind. 1994) (permitting state to withdraw plea agreement that had been signed by parties and filed with court but not yet accepted by judge was not error; state had not materially benefitted from agreement and there was no finding of detrimental reliance by defendant).

Mendoza v. State, 869 N.E.2d 546 (Ind. Ct. App. 2007) (when prosecutor moved to dismiss charges, plea agreement was not a binding contract because it had not yet been accepted by trial court, thus either party could move to withdraw from agreement).

See also Coker v. State, 499 N.E.2d 1135 (Ind. 1987) (even an immediate acceptance of plea bargain by defendant does not create right to have agreement enforced).

3. Accepted by Court but Before Sentencing

Trial court abused its discretion by granting State's request to withdraw a plea agreement after it had been accepted by the trial court but before sentencing; once a trial court accepts a plea agreement, it is bound by its terms. Dunn v. State, 33 N.E.3d 1074 (Ind. Ct. App. 2015).

B. ACCEPTING PLEA AGREEMENTS

Plea agreement is between prosecuting attorney and defendant concerning disposition of felony or misdemeanor charge. Prosecuting attorney submits to court written agreement together with any recommendation; must submit agreement before defendant has entered guilty plea. Ind. Code § 35-35-3-3(a).

1. Felony Charges

a. File Written Agreement

A written plea agreement shall be filed with court prior to defendant entering plea of guilty. Ind. Code § 35-35-3-3(a).

Petty v. State, 532 N.E.2d 610, 612 (Ind. 1989) (Ind. Code § 35-35-3-3 contemplates written plea agreements).

b. Bound by Oral Agreement

Failure to file a written agreement does not relieve defendant or the State from duty to abide by oral agreement. Centers v. State, 501 N.E.2d 415 (Ind. 1986) and Richardson v. State, 456 N.E.2d 1063 (Ind. Ct. App. 1983).

c. Court Must Consider Presentence Report

Court required to consider presentence report before accepting any felony guilty plea, except to a Level 6 felony. Ind. Code § 35-38-1-8; Ind. Code § 35-35-3-3(a); and Ind. Code § 35-38-1-8(c).

(1) Exception - Where Court Has Accepted Plea

Where plea agreement contains a term regarding sentence, the trial court is still bound if it accepts the plea before the presentence report is filed. Reffett v. State, 571 N.E.2d 1227 (Ind. 1991).

2. Misdemeanor Charges

a. Agreement May be Oral

See Ind. Code § 35-35-3-3(c).

b. No Automatic Change of Judge When Plea Agreement Rejected

Although the language of Ind. Code § 35-35-3-3(d) requires the trial court to grant a motion for change of judge within 10 days of rejection of plea, Crim. Rule 12 takes precedence over the statute and governs.

State ex rel. Stidham v. County Court of Clark County, 523 N.E.2d 429 (Ind. 1988) (I.C. § 35-35-3-3(d) is a procedural rule subject to CR 12, which requires a showing of cause before allowing a change of judge).

See IPDC Pretrial Manual, Chapter 5, for procedure and an explanation of why a decision on change of judge is not "discretionary."

c. Applicability of Court Approval Procedures

Ind. Code § 35-35-3-3(b) requires court to reject plea agreement before the case is resolved by trial or guilty plea. Neither the content of the plea agreement, the hearing, nor the presentence report is part of the record unless the court approves the plea agreement.

Ind. Code § 35-35-3-3(b) may or may not apply to misdemeanors. Reference to "presentence report" under Ind. Code § 35-38-1-8 (which applies only to felony cases) and separate subsection (c) expressly referencing misdemeanors suggests that Ind. Code § 35-35-3-3(b) applies only to felony plea agreements. No restrictions are set out in text of Ind. Code § 35-35-3-3(b), as they are in subsection (a) [felonies only], and (c) and (d) [misdemeanors only].

3. Must First Tell Defendant that Court Bound if Accepted

The trial court must accept or reject the plea agreement as filed. The trial court may not accept a plea agreement without first telling the defendant that the court will be bound by the terms of the agreement upon its acceptance. Ind. Code § 35-35-1-2(a) (5). See Badger v. State, 637 N.E.2d 800, 802 (Ind. 1994).

a. Once Accepted, Then Bound

If court accepts agreement, it becomes bound by terms of agreement. Ind. Code § 35-35-3-3(e).

Griffin v. State, 461 N.E.2d 1123 (Ind. 1984) (court bound by all terms within its legal power to control; a plea agreement provision that the State will recommend incarceration in another state is not binding on the court).

Kline v. State, 875 N.E.2d 435 (Ind. Ct. App. 2007) (trial court erroneously rejected plea agreement after entering convictions and announcing sentence which did not comport with agreement).

Stone v. State, 27 N.E.3d 341 (Ind. Ct. App. 2015) (trial court erred in rescinding plea agreement; limited situations that allow trial court to rescind agreement when (1) defendant maintains his innocence or (2) violates a term of plea agreement did not exist here).

State v. Arnold, 27 N.E.3d 315 (Ind. Ct. App. 2015) (after setting aside habitual offender enhancement in defendant's plea, trial court erred in not granting the State's request to vacate entire plea; under modified plea deal, defendant would serve only 8 years, not the 20 years the parties bargained for, thus frustrating the basic purpose of agreement).

b. Court Must Clearly State Acceptance or Rejection

Reffett v. State, 571 N.E.2d 1227 (Ind. 1991) (judge obligated to sentence defendant in accordance with agreement, where trial court declared, "the court accepts a plea of guilty and accepts the plea agreement and finds the defendant guilty of operating a motor vehicle while intoxicated, a Class D Felony").

Bartzis v. State, 502 N.E.2d 1347, 1349 (Ind. Ct. App. 1987) (court had clearly accepted both guilty plea and plea agreement).

(1) Conditional Acceptance - Not Binding

Johnson v. State, 457 N.E.2d 196 (Ind. 1983) (trial court accepted guilty plea and ordered presentence investigation; judge advised defendant that, if after presentence investigation he decided not to accept plea agreement, defendant could withdraw his plea and former not guilty plea would be reinstated; held, language used sufficient to convey court not bound by agreement and could either accept or reject it: "The court's statement clearly showed that the acceptance of the plea was tentative and ineffective without further proceedings of the court").

Wilson v. State, 160 N.E.3d 222 (Ind. Ct. App. 2020) (it was within the trial court's discretion to reject the plea agreement even though there was ambiguity as to whether the trial court had accepted the plea and entered judgment or taken the plea under advisement; trial court's oral comments at the guilty plea hearing and the CCS entry for that day are not conclusive as to whether the trial court accepted defendant's plea agreement or took it under advisement; where, as here, the trial court makes clear at sentencing that it had only taken the plea agreement under advisement at the earlier guilty plea hearing, the defendant has an affirmative duty to object or otherwise make a record that the plea agreement had in fact already been accepted).

Cf.

C.B. v. State, 988 N.E.2d 379 (Ind. Ct. App. 2013) (for juvenile cases, conditional agreements are an acceptable and important tool).

Spencer v. State, 634 N.E.2d 72 (Ind. Ct. App. 1994) (court clearly advised defendant that it was not accepting plea agreement at the time defendant entered guilty plea).

(2) If Court Accepts Guilty Plea, Must Accept Agreement that Contains Term Regarding Sentencing

Steele v. State, 638 N.E.2d 1338 (Ind. Ct. App. 1994) (when trial court accepted plea, it necessarily accepted plea agreement and became bound by its terms, even though trial court did not verbalize accepted plea agreement or its sentencing terms, to do otherwise denies defendant right to receive benefit of his bargain; defendant had agreed to plead guilty to Class C burglary in exchange for State's recommendation of 4 year sentence, written plea agreement filed at guilty plea hearing where defendant found guilty of Class C burglary).

4. Making a Record - Felony or Misdemeanor Charges

Criminal Rule 10 provides:

> Whenever a plea of guilty to a felony or misdemeanor charge is accepted from any defendant who is sentenced upon said plea, the judge shall cause the entire proceeding in connection with such plea and sentencing, including questions, answers, statements made by the defendant and his attorney, if any, the prosecuting attorney and the judge to be recorded by an electronic recording device. The court may in its discretion also require the entire proceeding be recorded by the court reporter in shorthand or by stenographic notation.
>
> If a transcription of the recorded matters has not been prepared, certified and filed in the criminal proceeding, the electronic recording of all oral matters, together with a log denoting the individuals recorded and the meter location of crucial events, shall be maintained as a confidential court record for ten years in all misdemeanors or fifty-five years in all felony cases.
>
> Whenever the record of the proceedings is transcribed, it shall be prepared in a form similar to that in general use as a transcript of evidence in a trial. When so transcribed, the same shall be submitted to the judge who shall certify that it is a true and complete transcript of such proceedings and shall order the same filed as a part of the record and

cause an order book entry of the filing thereof to be made by the clerk.

In any proceeding questioning the validity of such plea of guilty or judgment rendered thereon, such transcription shall be taken and considered as the record of the proceedings transcribed therein and upon appeal the original may be incorporated without copying as a part of the record in such appeal over the certificate of the clerk.

C. BINDING EFFECT OF ACCEPTED AGREEMENT

1. Court is Bound

Once it accepts plea agreement, trial court is bound by terms that are within court's power to grant. Court cannot reject, enhance, or diminish provisions of agreement. Ind. Code § 35-35-3-3(e).

Reffett v. State, 571 N.E.2d 1227 (Ind. 1991) (court should have considered presentence report prior to accepting plea agreement, but once plea is accepted, court is bound by all its terms, and could not revoke its acceptance).

Barker v. State, 994 N.E.2d 306 (Ind. Ct. App. 2013) (trial court violated plea agreement's 40-year cap on defendant's executed sentence by ordering 120 days of home detention in addition to his 40-year executed sentence; courts may order home detention as a condition of probation, but home detention must be considered executed time rather than time suspended to probation).

Couch v. State, 977 N.E.2d 1013 (Ind. Ct. App. 2012) (admission at sentencing hearing of testimony about uncharged misconduct did not circumvent plea agreement, as there was no evidence trial court used testimony to enhance defendant's sentences and order some to be served consecutively).

Grider v. State, 976 N.E.2d 783 (Ind. Ct. App. 2012) (trial court erred when it imposed consecutive sentences totaling 19 years, where agreement provided sentence would "be open to the Court with all counts to run concurrently"; even if the provision were ambiguous, any ambiguity inures to the benefit of the defendant).

State v. Daniels, 680 N.E.2d 829 (Ind. 1997) (trial court had not "accepted" plea agreement where judge signed a plea motion accepting plea agreement but never communicated this to parties and later set case for trial, and there was no order book entry reflecting the acceptance of the plea).

Hatton v. State, 499 N.E.2d 259 (Ind. 1986) (court cannot enhance sentence proposed under accepted agreement).

Valenzuela v. State, 898 N.E.2d 480 (Ind. Ct. App. 2008) (trial court violated terms of plea agreement when it exceeded 35-year sentencing cap in agreement and imposed 45-year sentence).

In re J.A.W., 504 N.E.2d 334 (Ind. Ct. App. 1987) (court did not violate plea agreement by recommending that D.O.C. detain juvenile until age 21 years of age, where agreement called for commitment to Indiana Boy's School but was silent as to length of commitment and D.O.C. had exclusive jurisdiction regarding possible parole).

Bartzis v. State, 502 N.E.2d 1347 (Ind. Ct. App. 1987) (overturning guilty verdict reached after trial court rescinded its acceptance of plea agreement).

a. Cannot Impose Punitive Conditions of Probation Outside Agreement

Conditions of probation that impose a substantial punitive obligation cannot be imposed if not specified in plea agreement. Freije v. State, 709 N.E.2d 323, 324 (Ind. 1999); Disney v. State, 441 N.E.2d 489 (Ind. Ct. App. 1982); Jackson v. State, 968 N.E.2d 328 (Ind. Ct. App. 2012); Briscoe v. State, 783 N.E.2d 790 (Ind. Ct. App. 2003); Sinn v. State, 693 N.E.2d 78 (Ind. Ct. App. 1998); and S.S. v. State, 827 N.E.2d 1168 (Ind. Ct. App. 2005).

Cf. L.W. v. State, 798 N.E.2d 904 (Ind. Ct. App. 2003) (juvenile court did not err in placing juvenile on informal home detention as condition of suspended commitment, even though this condition was not part of plea agreement).

If the plea agreement specifies that the trial court has discretion to establish the conditions of probation, both parties take their chances and the court is within the express terms of the plea agreement in imposing some, all, or none of the lawful conditions. Freije v. State, 709 N.E.2d 323 (Ind. 1999); Antcliff v. State, 688 N.E.2d 166 (Ind. Ct. App. 1997).

b. May Impose Ministerial Terms of Probation

Even though not specified in a plea agreement, administrative or ministerial terms of probation such as notifying the court of changes in address or place of employment are within court's authority to impose at sentencing. Freije v. State, 709 N.E.2d 323 (Ind. 1999) and Disney v. State, 441 N.E.2d 489 (Ind. Ct. App. 1982).

Buck v. State, 580 N.E.2d 730 (Ind. Ct. App. 1991) (although plea agreement did not state explicitly that defendant was to be placed on probation, agreement implicitly granted a probationary suspension of sentence rather than a suspended sentence; trial court did not err in revoking probation for failure to inform court of current address).

Obligations or probation terms ancillary to criminal proceeding and to plea agreement need not be specified in plea agreement. These appear to be terms that are not within the court's direct control.

Wright v. State, 495 N.E.2d 804 (Ind. Ct. App. 1986) (in DWI cases, Bureau of Motor Vehicle administrative action suspending defendant's license for 10 years was ancillary to sentence).

c. Subsequent Petition for Modification of Sentence

Court has authority to modify "open-end" plea agreement where defendant does not agree to serving set term of years.

Walker v. State, 420 N.E.2d 1374 (Ind. Ct. App. 1981) (trial court's rejection of prosecutor's non-binding sentence recommendation did not entitle post-conviction relief petitioner to withdraw guilty plea, where parties did not condition court's acceptance of guilty plea upon imposition of particular sentence, court retained full

sentencing discretion even if it accepted guilty plea, plea agreement itself did not state definite sentence but merely empowered prosecutor to advocate imposition of sentence of five years or less, and only duty imposed upon trial court by plea agreement was to entertain prosecutor's sentence recommendation when exercising its sentencing discretion).

See Ind. Code § 35-38-1-17(e) ("[I]f the convicted person was sentenced under the terms of a plea agreement, the court may not, without the consent of the prosecuting attorney, reduce or suspend the sentence and impose a sentence not authorized by the plea agreement").

See also Ind. Code § 35-35-1-2(a)(5), effective July 1, 2018:

(a) The court shall not accept a plea of guilty or guilty but mentally ill at the time of the crime without first determining that the defendant:

[…]

(1) has been informed that if:

(A) there is a plea agreement as defined by Ind. Code § 35-31.5-2-236; and

(B) the court accepts the plea;

the court is bound by the terms of the plea agreement at the time of sentencing and with respect to sentence modification under Ind. Code § 35-38-1-17.

See also Ind. Code § 35-35-3-3(e), which prohibits reduction of any sentence imposed pursuant to plea agreement. Badger v. State, 637 N.E.2d 800, 802 (Ind. 1994).

The trial court may not impose a sentence greater or lesser than provided in the plea agreement, but the court may later modify the sentence within the range in the original agreement.

Pannarale v. State, 638 N.E.2d 1247 (Ind. 1994) (plea agreement provided that trial court could sentence defendant for up to ten years but did not specify an exact term; trial judge here could have sentenced defendant to fewer years of incarceration when he initially passed sentence in 1989, so he retained authority to later reduce the ten-year sentence actually imposed).

State v. Smith, 71 N.E.3d 368 (Ind.2017) (unambiguous terms of defendant's plea agreement precluded converting felony conviction to a misdemeanor pursuant to amended version of I.C. § 35-50-2-7(d)).

Rodriguez v. State, 129 N.E.3d 789 (Ind. 2019) (when defendant enters fixed plea where trial court has no discretion, defendant cannot later ask trial court to modify sentence when trial court did not have discretion when accepting plea agreement). See also State v. Stafford, 128 N.E.3d 1291 (Ind. 2019).

2. Prosecution Bound by Accepted Plea Agreement

a. Breach by State

Prosecutor's failure to adhere to any promise which induced a guilty plea would constitute a breach of plea agreement, rendering the plea involuntary.

Griffin v. State, 756 N.E.2d 572 (Ind. Ct. App. 2011) (State breached agreement by filing charge after promising to not do so if defendant testified in two other cases; defendant did not testify but only because State did not call him; nothing in record supported State's claim that defendant failed to honor other promises he made as part of plea deal).

Lee v. State, 506 N.E.2d 37 (Ind. 1987) (prosecutor did not violate agreement which called for State to remain silent except to correct factual misstatements when prosecutor objected to characterization of victim as "dealer" or "drug dealer").

Ryan v. State, 479 N.E.2d 517 (Ind. 1985) (prosecutor allowing victim's mother to speak at sentencing did not violate plea agreement not to make sentence recommendation; prosecutor has a duty under the victim's rights statute).

Cf.

Spivey v. State, 553 N.E.2d 508 (Ind. Ct. App. 1990) (State was not bound by its agreement to forgo prosecution on murder charge in exchange for guilty plea to robbery once defendant breached his obligation under agreement to truthfully reveal details of murder).

Campbell v. State, 17 N.E.3d 1021 (Ind. Ct. App. 2014) (even though trial court had already accepted plea agreement and entered judgment of conviction, defendant's subsequent breach warranted State's withdrawal from plea agreement before imposition of sentence).

b. Binding on Another Prosecutor

Ind. Code § 35-34-1-10(d) provides that defendant pleading guilty to one offense is entitled to dismissal of prosecution for related offense if guilty plea was entered on basis of plea agreement in which prosecutor agreed not to prosecute other potential related offenses. Related offenses are defined in Ind. Code § 35-34-1-10(e): 2 or more offenses within jurisdiction of same court and which could have been joined in one prosecution.

Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495 (1971) (successor prosecutor bound).

Richardson v. State, 456 N.E.2d 1063 (Ind. Ct. App. 1983) (agreement not to indict bars prosecutors from other counties from filing related charges under joinder statute I.C. § 35-34-1-10; dismissal of charge ordered; trial court denied defendant's motion to dismiss conspiracy charge in Porter County where defendant pled guilty in Lake County to selling cocaine in return for prosecutor's agreement not to file any additional charges in connection with other transactions in which defendant may have been involved. Statute imposes no requirement that subsequent prosecution be in

county where plea agreement was made).

PRACTICE POINTER: In multi-jurisdictional cases, consider seeking agreements from all prosecutors.

c. Special Prosecutor

Crose v. State, 482 N.E.2d 763 (Ind. Ct. App. 1985) (where special prosecutor agreed to dismiss unrelated pending charges if defendant pled guilty, remedy for defendant who was tried and convicted on unrelated charges is withdrawal of first guilty plea; special prosecutor has no power to bargain on charges beyond case to which he was assigned).

d. Court in another State

Carneal v. State, 859 N.E.2d 1255 (Ind. Ct. App. 2007) (no abuse of discretion in refusing to grant credit time for time served in Illinois despite Illinois plea agreement stating Illinois sentence was to run concurrent with Indiana sentence; defendant had been sentenced for crime in Illinois that also served as basis for probation violation in Indiana).

e. Failure to Object to Prosecutor's Breach of Agreement at Hearing

Puckett v. United States, 556 U.S. 129 (2009) (if defendant does not object at plea or sentencing hearing to prosecutor's breaching of plea agreement, defendant, on appeal, must show the breach was plain error under Federal Rule of Criminal Procedure 52(b).

D. SPECIFIC ENFORCEMENT OF BARGAIN

Plea agreement is a contract. Epperson v. State, 530 N.E.2d 743, 745 (Ind. Ct. App.1988).

Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

1. When Court Must Enforce Agreement

Courts must enforce agreements between prosecution and defendant, *even if those agreements are oral and outside statutory framework*, either if:

(1) State has materially benefitted from terms of agreement, or
(2) defendant has relied on terms of agreement to his substantial detriment.

See Badger v. State, 637 N.E.2d 800, 803 (Ind. 1994); Petty v. State, 532 N.E.2d 610 (Ind. 1989); and Bowers v. State, 500 N.E.2d 203 (Ind. 1986).

Steele v. State, 638 N.E.2d 1338 (Ind. Ct. App. 1994) (trial court could not accept guilty plea without accepting plea agreement and its terms, defendant must receive benefit of bargain; court stated it accepted defendant's guilty plea, it did not verbalize that it accepted plea agreement or its sentencing terms; defendant's guilty plea made dependent upon receiving 4-year sentence).

St. Clair v. State, 901 N.E.2d 490 (Ind. 2009) (once a trial court approved plea agreement that recommended three-year sentence, it was bound to impose sentence specified in

agreement and was not authorized to impose any other sentence; plea agreement's use of the word "recommend" did not make the agreement open).

2. Prerequisites to Enforcing Plea Agreement

a. File Written Agreement

Failure to file written agreement in felony case waives right to specific performance of the agreement. Parker v. State, 542 N.E.2d 1026 (Ind. Ct. App. 1989) and Hughes v. State, 508 N.E.2d 1289 (Ind. Ct. App. 1987).

b. Prosecutor Must Have Apparent Authority to Bind State

Crose v. State, 482 N.E.2d 763 (Ind. Ct. App. 1985) (even though actual authority of special prosecutor was limited to single case, his apparent authority to bind State was sufficient to bind State, if agreement was otherwise enforceable; specific performance, however, not appropriate in this case).

c. State's Promise Must be Within the Court's Power to Grant

Griffin v. State, 461 N.E.2d 1123 (Ind. 1984) (court had no power to order defendant's incarceration outside Indiana).

Saylor v. State, 565 N.E.2d 348 (Ind. Ct. App. 1991) (court advised defendant that it had no authority to order concurrent Indiana and Kentucky sentences).

Starr v. State, 874 N.E.2d 1036 (Ind. Ct. App. 2007) (even if there had been express representation by either State or trial court to defendant that he could challenge his convictions on direct appeal, court would not enforce such representation because such challenge became moot upon defendant's plea of guilty).

Raley v. State, 86 N.E.3d 183 (Ind. Ct. App. 2017) (even though defendant's plea agreement did not designate him as sexually violent predator for pleading guilty to child molesting, he is sexually violent predator ("SVP") as a matter of law. I.C. § 35-38-1-7.5 (2014). Thus, trial court did not err in denying defendant's motion to enforce the plea agreement).

Branham v. State, 813 N.E.2d 809 (Ind. Ct. App. 2004) (defendant was not entitled to specific performance of provision in plea agreement that reserved the right to appeal denial of his pre-trial motion for discharge; although trial court is bound by terms of plea agreement that it accepts, it cannot be forced to provide a benefit that it does not have power to confer).

Alvey v. State, 911 N.E.2d 1248 (Ind. 2009) (defendant could not appeal trial court's denial of his pretrial motion to suppress after he pleaded guilty to underlying charges against him).

Holsclaw v. State, 907 N.E.2d 1086 (Ind. Ct. App. 2009) (defendant cannot challenge the denial of a motion to dismiss after pleading guilty).

Starr v. State, 874 N.E.2d 1036 (Ind. Ct. App. 2007) (even if there had been express

representation by either State or trial court that defendant could challenge his convictions on direct appeal, court would not enforce such representation because defendant's guilty plea made such challenge moot).

Carneal v. State, 859 N.E.2d 1255 (Ind. Ct. App. 2007) (neither State nor trial court bound by plea agreement in Illinois stating that time served for Illinois offense was to run concurrently to probation violation that resulted in this case).

3. Specific Performance - Court's Discretion

Specific performance of plea bargain is not required as constitutional matter. Kernan v. Cuero, 138 S.Ct. 4 (2017); Santobello v. New York, 404 U.S. 257 (1971); Mabry v. Johnson, 467 U.S. 504, 507-08, 104 S.Ct. 2543, 2546 (1984); and Coker v. State, 499 N.E.2d 1135, 1138 (Ind. 1986).

Crose v. State, 482 N.E.2d 763 (Ind. Ct. App. 1985) (specific performance may not be only or most appropriate relief in all circumstances).

However, contract principles and due process rights must be considered. Epperson v. State, 530 N.E.2d 743 (Ind. Ct. App. 1988).

Bowers v. State, 500 N.E.2d 203 (Ind. 1986) (prosecutor could not refuse to honor agreement to abate criminal proceedings against suspect who had fully performed his obligation under agreement by providing information sufficient to obtain search warrant for residence, and thus agreement would be equitably enforced).

a. Waiver of Rights

Petty v. State, 532 N.E.2d 610 (Ind. 1989) (agreement to waive speedy trial rights and extradition is not detrimental reliance sufficient to require specific performance of plea agreement).

b. Pass Polygraph Before Bound by Sentence Offer

Lockard v. State, 600 N.E.2d 985 (Ind. Ct. App. 1992) (defendant was not entitled to enforcement of plea agreement that required defendant to take and pass polygraph examination before State would be bound by sentence offer; polygraph examiner stated that defendant had failed examination).

c. False Statements

Spivey v. State, 553 N.E.2d 508 (Ind. Ct. App. 1990) (defendant who made false statements about involvement in robbery and murder had no right to specifically enforce plea agreement which clearly required him to make truthful statements about these events).

d. Cases Granting Specific Performance

Bowers v. State, 500 N.E.2d 203 (Ind. 1986) (prosecutor's agreement to drop charges in exchange for information which proved fruitful was specifically enforceable. Information provided probable cause for search for marijuana and arrest of suspect; prosecutor's

promise was "pledge of the public faith ... not to be lightly disregarded").

Epperson v. State, 530 N.E.2d 743 (Ind. Ct. App. 1988) (trial court erred by allowing state to withdraw plea agreement and reinstate charge against defendant; although criminal defendant has no constitutional right to plea bargain, or to have agreement specifically enforced, contract principles and due process rights must be considered, U.S. v. Verrusio, 803 F.2d 885 (7th Cir. 1986); here, defendant's decision to plead guilty to burglary and theft rested upon prosecutor's promise to dismiss criminal recklessness charge).

4. Enforce Plea Agreement by Interlocutory Appeal or Original Action

Enforce plea agreement by interlocutory appeal under Appellate Rule 4 [now Appellate Rule 14], (Bowers v. State, 500 N.E.2d 203 (Ind. 1986)).

Or, where appropriate, by an original action for a writ of mandate under Original Action Rule 2. State ex rel. Goldsmith v. Marion Superior Court, 419 N.E.2d 109 (Ind. 1981).

V. VICTIMS

A. DISCUSSIONS WITH STATE'S WITNESSES

1. State Cannot Obstruct Communications between Witnesses and Defense

Witnesses do not "belong" to either party. It is improper for a prosecutor, defense counsel, or anyone acting for either side, to suggest to a witness that the witness not submit to an interview by opposing counsel.

A prosecutor may tell a witness that he or she may contact the prosecutor before talking to defense counsel. The prosecutor may also request an opportunity to be present at defense counsel's interview of a witness but may not make his or her presence a condition of holding the interview.

See ABA Prosecution Function Standard, Standard 3-3.44th Ed. (2014). Commentary.

Standard 3-3.4(h) provides:

> The prosecutor should not discourage or obstruct communication between witnesses and the defense counsel, other than the government's employees or agents if consistent with applicable ethical rules. The prosecutor should not advise any person, or cause any person to be advised, to decline to provide defense counsel with information which such person has a right to give. The prosecutor may, however, fairly, and accurately advise witnesses as to the likely consequences of their providing information, but only if done in a manner that does not discourage communication.

a. Indiana Rules of Professional Conduct

Discussions with unrepresented victim are allowed by Indiana Professional Conduct Rule 4.3. However, during a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel. Unsophisticated victims may perceive attempt to negotiate for restitution as an attempt to

bribe them. Exercise care in discussions with the victim(s).

Rule 4.3 provides, in part:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Rule 4.4(a) provides:

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

See IPDC Pretrial Manual, Chapter 7 § I.B.2 and § I.B.4.

2. State Not Entitled to Interview Defendant

Prosecutor is not entitled to interview a defendant represented by counsel who declines such an interview. The Fifth Amendment to the U.S. Constitution and Article 1, Section 14 of the Indiana Constitution guarantee the privilege against self-incrimination.

PRACTICE POINTER: Advise every defendant, in every case, to decline every interview with the prosecutor or law enforcement unless counsel is present. The prosecutor and other law enforcement officials may be very persistent in seeking to interview the client without notifying defense counsel. See Texas v. Cobb, 121 S. Ct. 1335 (2001).

Rule 3.4(f) provides:

> A lawyer shall not:
>
> […]
>
> (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
>
> (1) the person is a relative or an employee or other agent of a client; and
>
> (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

See Chapter 7, I.B.3.

3. Negotiations with Victim Not Privileged

Negotiations with victim are not privileged communications.

> Crandell v. State, 490 N.E.2d 377 (Ind. Ct. App. 1986) (prosecutor's assent to discussions did not render them privileged; victim allowed to testify in detail about what defense attorney said about crime, defendant, etc.).

B. VICTIM'S RIGHTS

1. Generally

Article 1, Section 13(b) of the Indiana Constitution reads: "Victims of crime, as defined by law, shall have the right to be treated with fairness, dignity, and respect throughout the criminal justice process; and, as defined by law, to be informed of and present during public hearings and to confer with the prosecution, to the extent that exercising these rights does not infringe upon the constitutional rights of the accused."

See Ind. Code § 35-40, dealing with victim's rights. This article generally places a duty on the prosecutor to ensure that the victims of crime are treated fairly and notified of their rights, including the right to pursue restitution, to make a statement in the presentence report, and the right to information on the disposition of the case.

Victim's rights legislation (Ind. Code § 35-35-3-2 *et seq*.) gives no additional rights to defendant. Ind. Code § 35-35-3-5(c). Intent is to give victim opportunity to have some input into sentence. Schwass v. State, 554 N.E.2d 1127, 1129 (Ind. 1990).

> Ryan v. State, 479 N.E.2d 517 (Ind. 1985) (prosecutor did not violate plea agreement not to make sentence recommendation by allowing victim's mother to speak to trial court; prosecutor has a duty under the victim's rights statute; this was not an attempt to subvert agreement).

2. Victim Defined

For purposes of Ind. Code § 35-40, "victim" means a person that has suffered harm as a result of a crime that was perpetrated directly against the person. The term does not include someone that has been charged with a crime arising out of the same occurrence. Ind. Code § 35-40-4-8.

For purposes of Ind. Code § 35-35-3, "[v]ictim means a person who has suffered harm as a result of a crime." Ind. Code § 35-31.5-2-348(a). See also Ind. Code § 35-31.5-1-1.1 ("Except as otherwise provided, the definitions in this article apply throughout this title and to all other statutes relating to penal offenses.")

Where the victim is deceased or is under the age of 18, where the victim is a corporation or other organization, or where there are more than three victims. See Ind. Code § 35-35-3-6.

3. Victim's Rights - Pleas Involving Felony Charges

If a plea agreement proposal recommends dismissal of a felony charge, or a plea to less than the presumptive sentence, victims have a right to notice of pending discussions with defense attorney, Ind. Code § 35-35-3-2(a) (1), and a right to notice of contents of recommendation before it is filed. Ind. Code § 35-35-3-2(a) (2).

Victim(s) must also be notified of their right to be present, and of their right to address court in person or in writing when court considers recommendation. Ind. Code § 35-35-3-2(a) (3). If more than three persons are victims, prosecutor must follow notification procedure as to three he believes suffered most. Ind. Code § 35-35-3-6(b). Where a victim is missing, prosecutor need only certify to his reasonable effort to locate victim or next of kin. Ind. Code

§ 35-35-3-7.

a. Rights at Sentencing Hearing

As part of recommendation submitted to court, prosecutor must certify he offered to show proposed recommendations and offered opportunity to present opinion. Ind. Code § 35-35-3-5(a). If the victim is in court, the victim must be advised of rights to speak in court and given opportunity to make a statement about the crime and the sentence. If unable to attend hearing, victim may mail written statements to court, which must be included in pre-sentence report. Ind. Code § 35-35-3-5(b).

NOTE: Ind. Code § 35-35-3-5(b) applies to felony or misdemeanor case. Noncompliance not grounds for post-conviction relief. Ind. Code § 35-35-3-5(c).

C. VICTIM'S RIGHTS - SENTENCING ISSUES

1. Presentence Report

A victim has the right to make a written or oral statement for use in the preparation of the pretrial report, and to read presentence reports relating to the crime committed against the victim, except for those parts of the report containing the source of confidential information, information about another victim, or other information determined confidential or privileged by the judge in a hearing. Ind. Code § 35-40-5-6.

Object on federal confrontation clause grounds to any victim statements that are offered or used against your client without the opportunity for cross-examination. A victim's written and oral statements are likely "testimonial hearsay" and inadmissible against a defendant who has not had the opportunity to confront and cross-examine the declarant. See Crawford v. Washington, 124 S.Ct. 1354 (2004).

2. Victim Representative Defined

Ind. Code § 35-38-1-2(e) provides: "Upon entering a conviction for a felony, the court shall designate a victim representative if the victim is deceased, incapacitated, or less than eighteen (18) years of age."

Ind. Code § 35-38-1-2(a) provides:

> As used in this chapter, "victim representative" means a person designated by a sentencing court who is:
>
> (1) a spouse, parent, child, sibling, or other relative of; or
> (2) a person who has had a close relationship with;
>
> the victim of a felony who is deceased, incapacitated, or less than eighteen (18) years of age.

3. Victim Impact Statement

Ind. Code § 35-38-1-8.5(c) provides:

The probation officer shall prepare a victim impact statement for inclusion in the convicted

person's presentence report. The victim impact statement consists of information about each victim and the consequences suffered by a victim or a victim's family as a result of the crime.

The victim impact statement contemplated by Ind. Code § 35-38-1-8.5(d) will typically contain testimonial hearsay which should be inadmissible against a defendant who has not had the opportunity to confront and cross-examine the declarant. Object on federal confrontation clause grounds to any victim statements that are offered or used against your client without the opportunity for cross-examination. See Crawford v. Washington, 124 S.Ct. 1354 (2004).

> Flinn v. State, 563 N.E.2d 536 (Ind. 1990) (presentence investigation report, which included statement from investigating officer that defendant was not "sick" but knew his actions were wrong, and statements from victims reflecting their feeling that defendant had preyed upon them with no regard for the ruinous consequences of his acts, did not unduly prejudice defendant who was given the opportunity to review the report and respond to it).

See Ind. Code § 35-38-1-8.5(e) for required information about each victim.

4. Right to Make Statement at Sentencing

It is at the victim's discretion whether to be present and to be heard at proceedings under Ind. Code § 35-40, but the absence of the victim at a court proceeding does not preclude the court from holding the proceeding. Ind. Code § 35-40-11-1. A victim may be heard by oral statement, written statement, or audio or videotaped statement. Ind. Code § 35-40-11-2.

> But see Crawford v. Washington, 124 S.Ct. 1354 (2004) (testimonial hearsay is inadmissible under federal confrontation clause against defendant who has not had opportunity to confront and cross-examine declarant).

PRACTICE POINTER: Permitting a victim to make a testimonial statement in a sentencing proceeding by audiotape, videotape, or written statement when the victim is not present or subject to cross-examination may violate the defendant's rights under the Indiana Constitution, Article 1, Section 13 and the Fifth Amendment to the U.S. Constitution. Defense counsel should object on these bases (and possibly others).

Ind. Code § 35-38-1-8(b) provides: "A victim present at sentencing in a felony or misdemeanor case shall be advised by the court of a victim's right to make a statement concerning the crime and the sentence."

Ind. Code § 35-38-1-12 (before imposing sentence court shall offer victim, if present, opportunity to make statement concerning crime and sentence).

> Abney v. State, 553 N.E.2d 479 (Ind. 1990) (defendant not denied fair sentencing hearing by fact that victim who testified was public defender, where almost all matters discussed were matters known to prosecutor, probation officer, and trial judge, except for fact that his parents had been due to arrive at his home approximately one hour after burglary was committed and might have been physically harmed if they had arrived earlier).
>
> Griffin v. State, 583 N.E.2d 191 (Ind. Ct. App. 1992) (not error to allow victim of attempted rape to speak at length at sentencing hearing on her views of female attorney

representing defendant and the criminal justice system; aggravating factors specified by judge adequately support the enhanced sentence).

5. Notice of Order to Reduce or Suspend Sentence

Ind. Code § 35-38-1-17(f) provides:

If the court sets a hearing on a petition under this section, the court must give notice to the prosecuting attorney and the prosecuting attorney must give notice to the victim (as defined in Ind. Code § 35-31-5-2-348) of the crime for which the convicted person is serving the sentence.