C. PLEAS

C.1.a. Preliminary Plea (IC 35-37-7-5(7))

TITLE: Hayre v. State
INDEX NO.: C.1.a.
CITE: (1st Dist., 7-24-86), Ind. App., 495 N.E.2d 550
SUBJECT: Not guilty - Preliminary plea
HOLDING: Initial hearing, unlike arraignment, is not critical stage of process requiring presence of counsel. Instead, Tr. Ct. automatically enters not guilty plea. Here, D, who informed police officer at time of his arrest of his desire to be represented by counsel, was not entitled to have appointed counsel present during initial hearing, at which D contended State was able to discover ring D was wearing & to use that ring as evidence following its later confiscation. Tr. Ct. at initial hearing appointed counsel to represent D, advised D of charge, possible penalties, & D's rights, & noting D's lack of counsel, proceeded to enter preliminary not guilty plea for D. Held, judgment affirmed.

C. PLEAS

C.2. Guilty plea

TITLE: Godinez v. Moran
INDEX NO.: C.2.
CITE: 509 U.S. 389 (1993)
SUBJECT: Guilty plea - competence
HOLDING: Due process does not require that standard for competency to plead guilty and waive right to counsel be higher than or different from competence to stand trial. Standard is whether D has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." D who goes to trial also faces important decisions, so there is no reason for higher standard for Ds who choose to end case with guilty plea. Waiver of right to counsel requires no higher functioning than does decision to waive other constitutional rights. Relevant issue is competence to waive counsel, not to self-representation. Waiver must be more than "competent," however; it must be knowing and intelligent. Blackmun & Stevens, JJ. DISSENT.

TITLE: Rembe v. State
INDEX NO.: C.2.
CITE: (1st Dist. 6/13/85), Ind. App. 478 N.E.2d 1255
SUBJECT: Guilty plea - counts viewed separately
HOLDING: Entire plea need not be vacated simply because plea to 2 of 3 counts was not entered knowingly, voluntarily & intelligently. Each count of indictment/information is regarded as if it were separate indictment/information. Grimm, 401 N.E.2d 686; Smith, 388 N.E.2d 484; Flowers, 48 N.E.2d 56. For purposes of trial, each count is treated & measured separately & D may be found guilty/acquitted on one or more or all of several charges. Id. Ct. finds no reason why procedures utilized in accepting guilty pleas should be exception to that rule. Here, D pled guilty to 2 counts of theft & 1 count of burglary. Because Tr. Ct. did not advise D that minimum sentence for Class D theft could be Class A misdemeanor penalty, it granted PCR on theft counts. Ct. finds advice/interrogation re burglary count "explicit & full." Held, no error in denial of PCR on burglary count.

C. PLEAS

C.2. Guilty plea

C.2.a. Advisements (IC 35-35-1-2)

TITLE: Minor v. State
INDEX NO.: C.2.a.
CITE: (1st Dist., 10-18-94), Ind. App., 641 N.E.2d 85
SUBJECT: Adequate advisement & factual basis for guilty plea
HOLDING: Decision affirmed denial of post-conviction relief, rejecting D's claim that he was neither adequately advised of nor waived his Boykin rights & that Tr. Ct. failed to establish factual basis for guilty plea. After examining record, Ct. concluded that D was adequately & meaningfully advised of & waived his rights, & that Tr. Ct. was not required to use particular words such as "waiver" & "incrimination" when informing D of consequences of pleading guilty, Hampton v. State, Ind. App., 616 N.E.2d 373. Record revealed that at guilty plea hearing, D acknowledged he was admitting to truth of facts alleged in charging information & admitted facts constituting admission of each element of offense, which satisfied requirement that D understand nature of charges.

TITLE: U.S. v. Randolph
INDEX NO.: C.2.a.
CITE: 230 F.3d 243 (6th Cir. 2000)
SUBJECT: Plea Agreement -- Illusory Promises from Government
HOLDING: Due process requires that D's reasonable expectation of benefit from plea agreement be respected, and that he not be held to unconscionable agreement absent proof that his consent to risk of harm resulting from agreement was fully informed. Here, D was involved in multi-state drug conspiracy. He entered plea agreement dismissing drug conspiracy charge in exchange for guilty plea to telecommunications charge and full cooperation in government's investigation. Agreement bound U.S. Attorney for Northern District of Texas not to prosecute for any other offenses, but did not bind any other U.S. Attorney. Based on facts revealed through D's cooperation, U.S. Attorney in Tennessee indicted D on federal drug conspiracy charges, and he was convicted at trial. Sixth Circuit finds that the effect of the agreement was that the government extracted a benefit from D in exchange for an illusory promise, that the D was not fully advised of illusory nature of government's promise, and therefore, agreement was not knowing or voluntary. Tennessee prosecution should have been barred by Texas plea agreement, and conviction is set aside.

TITLE: Weatherford v. State
INDEX NO.: C.2.a.
CITE: (6-30-98), Ind., 697 N.E.2d 32
SUBJECT: Advisement of rights do not apply to sentencing agreements
HOLDING: Formal requirements imposed by Ind. Code 35-35-1-2 when accepting guilty pleas do not apply when accepting sentencing agreements. D who has already been convicted need not be informed that by entering into sentencing agreement he waives his rights to public & speedy trial by jury, or that he waives his right to require State to prove his guilt beyond reasonable doubt at trial at which D may not be compelled to testify against himself. Ind. Code 35-35-1-2(a)(2)(A) & (D). When it appears to Tr. Ct. that sentencing agreement is product of coercion or ignorance, Ct. would likely conclude that agreement should be set aside to prevent manifest injustice. Here, however, D's attempt to show that his sentencing agreement to life without parole was involuntary & unknowing was insufficient to demonstrate that withdrawal of agreement was necessary to correct manifest injustice. Held, judgment affirmed.

C. PLEAS

C.2. Guilty plea

C.2.a.1. In general

TITLE: Boykin v. Alabama
INDEX NO.: C.2.a.1.
CITE: 395 U.S. 238 (1969)
SUBJECT: Guilty plea -- advisements; Boykin rights
HOLDING: Trial judge cannot accept D's guilty plea without affirmative showing that D entered into plea intelligently & voluntarily. Tr. Ct. cannot presume waiver of D's privilege against compulsory self-incrimination, right to jury trial, & right to confront one's accusers from silent record. Here, although D pled guilty to five indictments for common-law robbery, record showed that judge asked no questions of him concerning his plea, & D did not address Ct. Thus, Tr. Ct. erred in accepting plea. Held, conviction reversed.

RELATED CASES: Lime, App., 619 N.E.2d 601 (if Tr. Ct. does not inform D of his Boykin rights, conviction will be vacated without showing of prejudice to D); Belcher, App., 546 N.E.2d 1276 (compliance with Boykin is determined using standard outlined by White, 497 N.E.2d 893: unless record reveals that D knew or was advised at time of his pleas that he was waiving his right to a jury trial, his right of confrontation & his right against self-incrimination, Boykin will require that his conviction be vacated).

TITLE: Dewitt v. State
INDEX NO.: C.2.a.1.
CITE: (9-13-01), Ind., 755 N.E.2d 167
SUBJECT: Guilty plea - claim that D requested bench trial
HOLDING: D's guilty plea was knowing, voluntary, & intelligent despite claim that he made unambiguous request for bench trial & was not formally advised that he was waiving his Boykin rights by pleading guilty. After trial Ct. explained to D that he may withdraw his demand for trial by jury & be tried by Ct., D stated "by the Ct." even if D was confused by language "tried by the Ct.," record showed that D knew, at least by end of hearing, that by pleading guilty he was not getting a bench trial. Although D was not formally advised of his Boykin rights, & did not formally waive them, D clearly knew that he was waiving his right to trial by jury by pleading guilty. Held, transfer granted, Ct. App.' opinion at 739 N.E.2d 189 vacated, denial of post-conviction relief affirmed.

TITLE: Gillespie v. State
INDEX NO.: C.2.a.1
CITE: (2nd Dist.; 10-17-00), Ind. App., 736 N.E.2d 770
SUBJECT: Guilty plea - not required to advice of future federal consequences
HOLDING: Tr. Ct. did not err in denying D relief pursuant to Ind. T.R. 60(B), D's petition for post-conviction relief, & his motion to withdraw guilty plea. Ct. is not required to advise D of collateral or potential consequences of his guilty plea. Here, D, who was police officer, pled guilty to domestic violence on November 28, 1995. In 1996, federal government passed law making it illegal for someone convicted of misdemeanor domestic violence to own firearms. Because D was police officer but could no longer legally own gun, he was discharged from police force. Although D did not know that he could no own gun when he pled guilty, new federal law does not require plea to be vacated because it does not cast doubt on D's innocence nor is it evidence that could have been offered at trial. Moreover, record shows that D knew & understood his rights & entered into intelligent & voluntary plea. It is not duty of Tr. Ct. to predict future legislation that may ultimately surprise D. Held, judgment affirmed.

TITLE: Hall v. State

INDEX NO.: C.2.a.1.

CITE: (06-20-06), Ind., 849 N.E.2d 466

SUBJECT: Guilty plea -- advisements; burden of proof to show advisement of Boykin rights not given

HOLDING: A petitioner who pursues a claim for post-conviction relief challenging a plea of guilty on the ground that he was not advised of his Boykin rights is not entitled to relief solely because the guilty plea record is lost & cannot be reconstructed. Rather, the petitioner has the burden of demonstrating by a preponderance of the evidence that he is entitled to relief. The Ct. reads Parke v. Raley, 506 U.S. 20 (1992), to hold that presumption of regularity afforded to final judgments permits a burden-shifting rule that makes it more difficult for Ds to challenge their guilty pleas many years after the fact in proceedings that are separate & distinct from underlying criminal proceedings. Thus, it is constitutional to require the D to prove that he was not given his Boykin rights, even when the transcript of the proceedings is unavailable, assuming no allegation that the unavailability was caused by governmental misconduct.

Here, D filed a petition for post-conviction relief from a 1983 guilty plea alleging he was not informed of his Boykin rights. At a hearing, judge testified that although he had no recollection of advising D of his Boykin rights, he was aware that Boykin advisements were required & had no knowledge of a proceeding in which he failed to give Boykin. D's attorney at guilty plea hearing testified that trial judge always included Boykin rights, & prosecutor testified he was concerned to ensure Tr. Ct. gave proper advisements. D never testified that he was not properly advised. Thus, D failed to prove, beyond a preponderance of evidence, that he was not advised of Boykin rights. Held, transfer granted, Ct. App.' opinion at 819 N.E.2d 102 vacated, judgment affirmed. Zimmerman, 436 N.E.2d 1087, expressly *overruled*.

RELATED CASES: Damron, App., 915 N.E.2d 189 (Tr. Ct's policy of destroying tapes of guilty plea hearings after 10 years, although in contravention of Indiana Crim. R. 10, did not constitute misconduct; further, D presented no evidence that he was not informed of his Boykin rights at time of his guilty plea); Jackson, App., 826 N.E.2d 120 (while in some instances PCR is a "direct attack," in a situation like this it should be considered collateral attack on conviction & D should bear burden of forwarding evidence of invalidity or a constitutional violation; on rehearing at 830 N.E.2d 920, Ct. distinguished Dalton v. Battaglia, 402 F.3d 729).

TITLE: Jordan v. State
INDEX NO.: C.2.a.1.
CITE: (1/22/87), Ind., 502 N.E.2d 910
SUBJECT: Guilty plea -- statutory advisements; public and speedy trial
HOLDING: D must be advised of his right to public trial before he enters guilty plea; if he is not, guilty plea is involuntarily and unintelligently made. Here, Tr. Ct. advised D of his right to early and speedy trial but did not use word "public." He was also advised that he had right to trial by twelve jurors, right to confront witnesses and right to subpoena witnesses to testify on his behalf. Court concluded that Tr. Ct. adequately advised D of public nature of trial waived by pleading guilty; therefore, guilty plea was voluntarily and intelligently made. Held, denial of post-conviction petition affirmed.

RELATED CASES: Lawson, 498 N.E.2d 1212 (plea agreement stated that D had been advised of his rights to public and speedy trial by jury, and Tr. Ct. also told D that he was waiving his right to trial, thereby demonstrating that he was aware of rights he was waiving).

TITLE: Padilla v. Kentucky
INDEX NO.: C.2.a.1.
CITE: (03-31-10), 130 S. Ct. 1473 (U.S. 2010)
SUBJECT: Ineffective assistance of counsel - immigration consequences of plea
HOLDING: The Sixth Amendment requires criminal defense attorneys to advise their immigrant clients of the possible deportation consequences of a guilty plea. The risk of deportation must be considered an "integral part" of the possible penalty for noncitizen Ds. Drastic measure of deportation is now an inevitable consequence for a vast number of convicted immigrants and is "uniquely difficult to classify as either a direct or a collateral consequence." Thus, advice regarding deportation falls within the Sixth Amendment's right to counsel and is subject to the two-part test of Strickland v. Washington, 446 U.S. 668 (1984). Because immigration law can be complex, when the law is not succinct or straightforward, a criminal defense attorney need do no more than advice a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Here, D was indicted for trafficking in marijuana--an offense designated as an "aggravated felony" under the Immigration and Naturalization Act. Prior to entering a plea of guilty to that offense, D, a 40-year legal permanent U.S. resident, was incorrectly advised by his counsel that the plea would not affect his immigration status. Unfortunately, because the offense was an aggravated felony, D's deportation is mandatory. Court held that D's counsel was constitutionally deficient in assuring him that he would not be deported for his conviction and remanded to allow D the opportunity to meet the prejudice prong under Strickland. Held, Kentucky Supreme Court opinion at 253 S.W.3d 482 reversed and remanded. Alito, J, joined by Roberts, C.J., CONCURRING, believes that because criminal defense attorneys often lack expertise in immigration law, they should instead be expected to exhibit candor about their knowledge (or lack thereof) and to refer clients to more knowledgeable immigration specialists. Scalia, J., joined by Thomas, J, DISSENTING, argued that because the Sixth Amendment only grants a D the right to effective assistance of counsel for defense against a criminal prosecution, and not against "collateral consequences" of prosecution, issues at stake should be remedied through development of new and more targeted statutory provisions.

RELATED CASES: Carrillo, 982 N.E.2d 461 (Ind. Ct. App. 2013) (Guilty plea counsel did not render deficient performance for failing to ask D about his citizenship status where counsel had no reason to believe D was not a citizen); Kawashima, 132 S. Ct. 1166 (2012) (filing false tax return under 26 U.S.C. § 7206 is a crime involving "fraud or deceit," thus qualifying it as an "aggravated felony," subjecting a person to deportation if loss to the government exceeds $10,000).

TITLE: Pharris v. State
INDEX NO.: C.2.a.1.
CITE: (11/21/85), Ind., 485 N.E.2d 79
SUBJECT: Guilty plea -- statutory advisements; right to trial
HOLDING: Although Tr. Ct. is obligated to inform D that result of his plea will be to proceed with judgment and sentencing, precise statutory language need not be used. Here, transcript shows that, although Tr. Ct. did not use precise statutory language of telling D that upon entry of guilty plea Court would proceed with judgment sentences, D was sufficiently informed of all necessary information. He was advised that he was waiving his right to trial, and of his minimum and maximum sentences and possibility of enhancement. D even admitted that he was advised of all of his rights he was waiving. Held, denial of post-conviction relief affirmed.

TITLE: Snowe v. State
INDEX NO.: C.2.a.1.
CITE: (4th Dist. 2/8/89), Ind. App., 533 N.E.2d 613
SUBJECT: Group advisement - no interrogation of D
HOLDING: Tr. Ct. abused its discretion in refusing to allow D to withdraw guilty plea where record contained no indication that D understood Boykin rights & contained no factual basis for plea. D, who was charged with DUI, appeared pro se for arraignment & was advised of her rights through videotape presentation viewed by all Ds in misdemeanor traffic Ct. She then pled guilty, & her plea was accepted, without any colloquy indicating that she understood rights or concept of waiver. Record must disclose that D was informed of Boykin rights & resulting waiver in guilty plea proceedings. Hatton, App., 500 N.E.2d 1283. Waiver cannot be presumed where record is silent as to D's knowledge & understanding of these rights. Ewing, App.358 N.E.2d 204. Role of Tr. Ct. is to determine if D understands rights he/she is waiving & consequences of plea, Watson, App., 463 N.E.2d 535, & Tr. Ct. must do so by interrogating D. En masse advisement of rights has been upheld as acceptable procedure. French, App., 472 N.E.2d 210; James, App., 454 N.E.2d 1225. However, in both cases *cited*, there was personal interrogation of D by Tr. Ct. to determine if D understood rights & concept of waiver. Here, when D indicated she was pleading guilty, Tr. Ct. simply referred her to Alcohol Countermeasure Program & set date for sentencing. Record does not even indicate whether D viewed videotaped advisement of rights, let alone whether she understood it. Ct. of appeals cannot determine from this record whether D's plea was entered knowingly, intelligently, & voluntarily. Held, reversed & remanded. See, also, Griffin, App., 617 N.E.2d 550 (en masse advisement of rights not sufficient for plea unless Ct. makes personal inquiry of D to make sure he heard and understood).

RELATED CASES: Barker, App., 812 N.E.2d 158 (record revealed that Tr. Ct. asked all Ds if they heard & understood their rights, to which they responded "yes." Trial judge also addressed D individually, discussing the specifics of D's plea agreement); N.M., App., 791 N.E.2d 802 (given special status of juveniles & extra protection afforded them, Ct. questioned whether en masse advisement is sufficient to advise juvenile of his rights); Blunt-Keene, App., 708 N.E.2d 17 (PCR granted where record was silent re: D's understanding of her Boykin rights & concept of waiver).

TITLE: Truman v. State
INDEX NO.: C.2.a.1
CITE: (8/15/85), Ind., 481 N.E.2d 1089
SUBJECT: Guilty plea advisements - effect of GBMI
HOLDING: Ct. of appeals (in unpublished opinion) erred in reversing denial of PCR petition. Ct. of appeals held that D's plea of GBMI, entered 7 months before statute took effect, was contrary to then-existing statutes. Majority adopts Judge Shields' unpublished dissenting opinion that GBMI statute (IC 35-36-2-5) adds nothing to guilt finding. Ct. quotes Shields' statement that D's plea may still be unknowing/involuntary because he was misled re effect of plea (D pled GBMI in hopes of receiving psychiatric treatment). Held, reversed & remanded for further proceedings. DeBruler DISSENTS.

TITLE: White v. State
INDEX NO.: C.2.a.1.
CITE: (9/10/86), Ind., 497 N.E.2d 893
SUBJECT: Guilty plea advisements - German *overruled*
HOLDING: Ind. S. Ct. *overrules* German, 428 N.E.2d 234 & pronounces a new standard, which comports with federal law. [Citations omitted.] PCR petitioner must plead specific facts from which finder of fact can conclude by a preponderance of evidence that Tr. judge's failure to make full inquiry in accordance with Ind. Code 35-35-1-2(a) rendered petitioner's decision to plead guilty involuntary or unintelligent. In deciding whether plea was voluntary/intelligent, Ct. looks to all evidence before PCR Ct., including testimony at PCR hearing, transcript of original sentencing & any plea agreements or other exhibits which are part of record. Ct. notes that unless record reveals that D knew or was advised at time of plea that he/she was waiving right to jury trial, right of confrontation & right against self-incrimination, Boykin v. AL, (1969), 395 U.S. 238, 89 S. Ct. 1709 will require vacation of conviction. Opinion traces development of law concerning guilty pleas & notes federal Ct's. now distinguish between failure to inquire about D's understanding of nature of charge & failure to advise properly about range of penalties. Ct. emphasizes that plea hearing conducted in accordance with Ind. Code 35-35-1-2 is best way to assure that D's plea is made voluntarily/intelligently. Here, D contends Tr. judge failed to advise him of minimum sentences but does not claim lack of knowledge of minimum sentences or that such knowledge would have changed decision to plead guilty. D does not allege specific facts suggesting that his decision resulted from coercion or being misled. Transcript contains extensive inquiry re voluntariness of plea. Ct. finds D's claim is an inadequate basis for vacating his conviction. Held, denial of PCR affirmed; German & later case, Austin, 468 N.E.2d 1207, are *overruled*. DeBruler DISSENTS, arguing that *overruling* German takes Ind. backward & settles for second best.

RELATED CASES: Eiland, App., 707 N.E.2d 314, *sum. aff'd* 723 N.E.2d 863 (White supports conclusion that petitioner must show that inadequate advisements or factual basis affected his decision to plead guilty); Snyder, App., 654 N.E.2d 15, *trans.* granted 668 N.E.2d 1214 (guilty plea unintelligent & involuntary where D was not advised that he was waiving his right to jury determination of HO status); Rose, App., 513 N.E.2d 1243 (failure to advise of Boykin right requires vacation of conviction; no showing of prejudice required); Moffett 511 N.E.2d 1089 (D argues White does not meet 3-part test for retroactivity set out in Stovall v. Denno, (1966), 388 U.S. 292, 87 S. Ct. 1817, Ct. does not decide that Stovall applies; Ct. quotes White re costs to society & lack of injustice to D & finds retroactivity is warranted); Burns, 500 N.E.2d 201 (PCR Ct. properly considered transcript of guilty plea hearing held one hour before one in question as evidence that D's decision to plead guilty was intelligent/voluntary); Simpson, 499 N.E.2d 205 (D fails to prove that lack of knowledge of possibility of increased sentence by reason of prior conviction would have changed his decision to plead guilty; held, denial of PCR affirmed; "if [D] has any other basis upon which to establish that his plea was not voluntary or intelligent, he may file a new petition;" DeBruler DISSENTS); Merriweather, 499 N.E.2d 209 (DISSENT by DeBruler contends that majority opinion *overrules* Neeley, 382 N.E.2d 714, which held that voluntariness of guilty plea was to be determined by examining totality of the circumstances; majority fails to employ Neeley standard in reviewing D's claim that he had not been advised of possibility of increased sentence by reason of prior convictions); Freeman, 516 N.E.2d 82 (strict compliance with Ind. Code 9-4-7-9 in advising Ds pleading guilty to DWI is no longer necessary; White standard applies.

TITLE: Williams v. State
INDEX NO.: C.2.a.1.
CITE: (10/11/94), Ind. App., 641 N.E.2d 44
SUBJECT: Guilty plea -- advisements; no need to advice of possible deportation
HOLDING: Indiana's guilty plea statute, Ind. Code 35-35-1-2, sets forth series of determinations that Tr. Ct. must make before accepting guilty plea, including determination that accused has been informed of certain constitutional rights as mandated by Boykin, 395 U.S. 238. Here, Ds argued that they could not have submitted their guilty pleas knowingly, intelligently, and voluntarily when Tr. Ct. did not advise them in plea proceeding of possibility of deportation. Court noted that federal courts have largely considered deportation to be "collateral" consequence of guilty plea. Del Rosario, 498 U.S. 942. In Indiana, appellate courts have held that Tr. Ct. is not required to advise accused of collateral consequences of his plea. Tr. Ct. had no duty to inform noncitizen Ds of deportation consequences of guilty pleas to support finding that those pleas were made knowingly, voluntarily and intelligently. Held, denial of petitions for post-conviction relief affirmed; Hoffman, J., concurring.

RELATED CASES: Bobadilla, 117 N.E.3d 1272 (Ind. 2019) (IAC for failure to ask about D's immigration status and failing to warn him of the potential risk of deportation that would accompany his guilty plea to misdemeanor theft and possession of marijuana; see full review at Y.4.b.2); Trujillo, 962 N.E.2d 110 (Ind. Ct. App. 2011) (agreeing with Williams that Tr. Ct. does not have a duty to inquire whether D understood that a guilty plea might carry with it negative immigration consequences); Sial, App., 862 N.E.2d 702 (D received IAC as result of his attorney's failure to advise him of deportation consequences of his felony theft conviction); Segura, 749 N.E.2d 496 (failure to advise of consequences of deportation can, under some circumstances, constitute deficient performance; whether it is deficient in given case is fact sensitive & turns on number of factors).

TITLE: Williams v. State
INDEX NO.: C.2.a.1.
CITE: (1st Dist. 5/8/85), Ind. App. 477 N.E.2d 906
SUBJECT: Guilty plea (GP) advisements - pre Boykin
HOLDING: In pre Boykin cases, absent an allegation & proof of ineffectual counsel, it is presumed that attorney properly advised client of rights. Campbell, 321 N.E.2d 560; Conley, 284 N.E.2d 803. In addition to record of GP proceeding, Ct. may consider any other proceeding & events in same approximate time frame. Goffner, 387 N.E.2d 1321 (previous Ct. appearances, reading of applicable statutes & charges & PSI report supplied omitted advisements). Here, Ct. finds: (1) presumption that counsel properly advised D & (2) juvenile waiver order entered before GP contains recitation of advice. Held, no error in denial of PCR.

RELATED CASES: Boykin v. AL, (1969), 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274.

C. PLEAS

C.2. Guilty plea

C.2.a.2. Nature of charge/ elements of offense

TITLE: Blackburn v. State
INDEX NO.: C.2.a.2.
CITE: (5/28/86), Ind., 493 N.E.2d 437
SUBJECT: Guilty plea advisements - nature of charge
HOLDING: Voluntary admission of each element of offense is sufficient to support trial judge's determination that D is aware of nature of charge. DeVillez, 416 N.E.2d 846. Here, D acknowledged that he attempted to rob 2 individuals at banks in Indianapolis by spraying them with mace while he was armed with a pellet gun. Held, no error in denial of PCR.

RELATED CASES: Farrell, 495 N.E.2d 530 (Crim L 273.1(4); where D's admission supported murder charge, Tr. Ct. was not required to advise D of lesser included offenses in order to determine whether D understood nature of offense, *citing* Gibson, 456 N.E.2d 1006).

TITLE: Howse v. State
INDEX NO.: C.2.a.2.
CITE: (2nd Dist., 10-25-96), Ind. App., 672 N.E.2d 441
SUBJECT: Guilty plea advisements - understanding elements of attempted murder
HOLDING: D pleading guilty to attempted murder must understand that offense requires proof that D acted with specific intent to kill. In State v. Sanders, 596 N.E.2d 225 (Ind. 1992), Ind. S. Ct. recognized that D must be aware of elements of charge to which he pleads guilty. Here, D argued that he did not understand intent element, & therefore did not understand nature of charge as required by Ind. Code 35-35-1-2(a)(1). At guilty plea hearing, Tr. Ct. read aloud allegations contained in charging information. D, who suffered from mild paranoia, stated that he understood that he was admitting to what Tr. Ct. had read. Prosecutor read aloud from probable cause affidavit, & D agreed that State had accurately described what happened.

Ct. held that D's admission to conduct supporting inference that he acted with requisite intent to kill, coupled with his admissions to facts constituting other elements of attempted murder, was sufficient to establish that he understood nature of charge against him under standards set forth in Sanders. Facts surrounding guilty plea warranted post-conviction Ct.'s finding that D's plea was knowingly, voluntarily & intelligently made. Held, denial of petition for PCR affirmed; Sullivan, J., dissenting.

RELATED CASES: Patton, 810 N.E.2d 690 (D's guilty plea to attempted murder was not knowingly, voluntarily, & intelligently made because D was not sufficiently aware that specific intent to kill victim was an element of the offense).

TITLE: Rogers v. State
INDEX NO.: C.2.a.2
CITE: (3rd Dist., 05-11-05), Ind. App., 827 N.E.2d 78
SUBJECT: "Knowingly" a necessary but not critical element of murder; no PCR on guilty plea
HOLDING: D was not entitled to post-conviction relief despite his claim that he was not sufficiently advised of the definition of "knowingly" prior to acceptance of his guilty plea to murder. Relying on Patton v. State, 810 N.E.2d 690 (Ind. 2004), Ct. looked to federal constitutional requirements of guilty plea advisements set out in Henderson v. Morgan, 426 U.S. 637 (1976): (1) D has a constitutional right to real notice of the true nature of the charge; (2) where the record of the guilty plea hearing contains an explanation of the charge by the Tr. Ct. or a representation by defense counsel that the offense has been explained, the D's right to real notice will have been honored; (3) where intent is a critical element of the offense, notice of that element must be given; & (4) even if notice is required & has not been given & cannot be presumed, a D is not entitled to relief if the error is harmless beyond a reasonable doubt.

Ct. found that "knowingly" is a necessary element of the offense of murder, but not a "critical" element. Further, Ct. did not find ineffective assistance of counsel even if it were accepted that defense counsel did not advise Petitioner of the definition of "knowingly." Since "knowingly" is not a criminal element, such definition was not necessary to render D's plea valid. Even if defense counsel's actions fell below an objective standard of reasonableness, D could not prevail because the evidence does not support that he would have prevailed at trial. D admitted he hit & kicked the victim in the head with the aid of another which with other evidence indicates D knowingly killed the victim. Held, judgment affirmed.

C. PLEAS

C.2. Guilty plea

C.2.a.3. Waiver of trial rights

TITLE: Class v. United States
INDEX NO.: C.2.a.3
CITE: (2/21/2018), 138 S. Ct. 798 (U.S. Supreme Court 2017)
SUBJECT: Guilty plea doesn't automatically waive all constitutional claims
HOLDING: A guilty plea does not automatically waive a challenge to the constitutionality of a statute a D was charged under, if the challenge questions the State's very right to bring the charge.

D was charged with possessing firearms in his Jeep because it was parked on the grounds of the U.S. Capitol building. See U.S.C. § 5104(e)(1). D filed a motion to dismiss, claiming the statute violated his 2nd Amendment right to bear arms. The Tr. Ct. denied the motion. D later pled guilty. The waiver of rights form did not list the right to challenge the constitutionality of the statute as one of the rights D was waiving.

A guilty plea bars appeal of many constitutional claims, such as the right against compulsory self-incrimination, the right to jury trial, and the right to confront one's accusers. Blackledge v. Perry, 417 U. S. 21, 30 (1974); see also Haynes v. United States, 390 U.S. 85, 87 n.2 (1968). However, where, as here, the constitutional claim implicates the very power of the State to prosecute a D, a guilty plea does not waive such a claim absent an explicit waiver of that right. Blackledge, 417 U.S. at 30–31; see Menna v. New York, 423 U.S. 61, 63, n.2 (1975) ("a plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the State may not constitutionally prosecute."); United States v. Broce, 488 U.S. 563,569 (1989) (guilty plea does not bar claim on appeal "where on the face of the record the court ha[s] no power to enter the conviction or impose the sentence."). Because D did not explicitly waive his claim about the statute, he may raise it on direct appeal. Held, cert. granted, opinion of D.C. Circuit Court of Appeals reversed, and remanded.

NOTE: Because the opinion sometimes refers to "federal" Ds and other times just "Ds," the scope of the decision is not clear. However, the opinion cites both state and federal cases and the logic of its analysis would seem to make the decision apply to state court proceedings as well. Breyer, J., joined by Roberts, C.J., Ginsburg, Sotomayor, Kagan, and Gorsuch, JJ.; Alito, J., dissenting, joined by Kennedy and Thomas, JJ., writing, "There is no justification for the muddle left by today's decision," adding, "I fear that today's decision will bedevil the lower courts."

TITLE: Davis v. State
INDEX NO.: C.2.a.3
CITE: (12-31-96), Ind., 675 N.E.2d 1097
SUBJECT: Knowing & voluntary guilty plea - advisement of jury's role in considering death penalty
HOLDING: Post-conviction Ct. did not err in denying D's request to withdraw his guilty plea to murder & attempted murder. D argued that Tr. Ct. did not properly inform him about special role of jury in evaluating appropriateness of death penalty. Although D was advised he was waiving his right to jury trial, he may not have been specifically told he was also waiving opportunity to have jury consider whether it would recommend death penalty. Ct. noted that U.S. Constitution requires only that D be advised of his right to trial by jury, right to confront one's accusers & right against self-incrimination. Boykin v. Alabama, 395 U.S. 238 (1969). By foregoing opportunity for jury to make recommendation on his sentence, D was not giving up a constitutional right that would require a separate advisement. Held, P-C Ct. affirmed.

TITLE: Douglas v. State
INDEX NO.: C.2.a.3.
CITE: (7/31/87), Ind., 510 N.E.2d 682
SUBJECT: Guilty plea advisements - sufficiency of Boykin
HOLDING: Ds were sufficiently advised of their right to speedy trial by jury. See Boone 472 N.E.2d 607; Blankenship, 465 N.E.2d 714. Being advised of right to jury trial is advisement constitutionally mandated by Boykin v. Alabama, (1969), 395 U.S. 238, 39 S. Ct. 1709, 23 L.Ed.2d 274. Ind. S. Ct. in White, 497 N.E.2d 893 held that failure to advise D of a Boykin right will require that conviction be vacated. Here, Ds were advised at arraignment that jury trial was set for 8/20/79. At guilty plea hearing, Ds were advised they had right to jury trial which would commence on set date if they rejected plea agreements. Held, denial of PCR affirmed.

RELATED CASES: Hampton, App., 616 N.E.2d 373 (Ct.'s advisement that D had right to CX witnesses against him was sufficient advisement of confrontation right to accept waiver & guilty plea, even though D was not specifically advised of right to face-to-face confrontation); Stamm, App., 556 N.E.2d 6 (advisement that state must put on witnesses not sufficient to advise D of right to face & cross-examine them); Duncanson, App., 548 N.E.2d 838 (advisement of right to call witnesses & counsel them to appear, & confront state's witnesses, & to choose not to testify does not convey right to jury trial); Woodford, 544 N.E.2d 1355 (advisement that D had right to "see & hear" witnesses against him was adequate; DeBruler, J., DISSENTS arguing D was not advised of cross-examination component of confrontation right).

TITLE: Frazier v. State
INDEX NO.: C.2.a.3.
CITE: (12/9/86), Ind., 500 N.E.2d 1187
SUBJECT: Guilty plea advisements - waiver of trial rights; proof beyond a reasonable doubt
HOLDING: POST-WHITE. D pleads no specific facts which show that Tr. Ct.'s failure to describe standard of proof as "beyond a reasonable doubt" rendered his decision to plead guilty involuntary/unintelligent. Here, Ct. summarizes Tr. Ct.'s advisements to D. In light of those advisements, Ct. finds itself unable to hold that had Tr. Ct. used language "beyond a reasonable doubt" D would not have pled guilty. Held, denial of PCR affirmed. DeBruler DISSENTS, arguing that test set forth in Austin, 468 N.E.2d 1027 is correct.

RELATED CASES: PRE-WHITE: Farrell, 495 N.E.2d 530 (Ct. finds D represented to Tr. Ct. that he understood right to presumption of innocence/requirement that state to prove charge beyond a reasonable doubt, *citing* Martin, 480 N.E.2d 543, Ford, 479 N.E.2d 1307 & Creager, 479 N.E.2d 47).

TITLE: Hatton v. State
INDEX NO.: C.2.a.3
CITE: (4th Dist. 12/11/86), Ind. App., 500 N.E.2d 1283
SUBJECT: Advisements - right against self-incrimination
HOLDING: POST-WHITE. Tr. Ct. erred in denying D's PCR petition where record fails to show D knew of his privilege against self-incrimination or that he knew he was waiving this privilege by pleading guilty. Here, written plea agreement was not signed by D, his attorney or deputy prosecutor. Tr. Ct. did not inquire concerning privilege. Ct. declines to presume entry of D's guilty plea acts as a waiver of right against self-incrimination, distinguishing Kay, 499 N.E.2d 1113. Held, remanded with instructions to grant PCR.

TITLE: Hunt v. State
INDEX NO.: C.2.a.3
CITE: (1/23/86), Ind. App., 487 N.E.2d 1330
SUBJECT: Guilty plea -- waiver of trial rights in misdemeanor cases
HOLDING: Rights enumerated in Boykin, 395 U.S. 238, are applicable to persons accused of misdemeanors as matter of state and federal constitutional law. Rights enumerated in Indiana Constitution, Art. I Section 13 apply to misdemeanor cases because section 13 applies "in all criminal prosecutions." D is entitled to waive these rights, but judge is required to make independent determination, based on record, that D's plea was entered voluntarily and knowingly. Here, D 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. D was not asked if he was literate in reading English language, understood rights he was waiving or had read form. Held, judgment reversed and cause remanded with instructions to vacate guilty plea.

TITLE: James v. State

INDEX NO.: C.2.a.3

CITE: (08/08/19), Ind. Ct. App., 130 N.E.3d 1186

SUBJECT: Defendant sufficiently aware of rights he was waiving when he pleaded guilty to habitual offender enhancement after his jury trial

HOLDING: After a jury convicted him of three felony charges, Defendant pleaded guilty to the habitual criminal offender ("HCO") enhancement. In his petition for post-conviction relief, Defendant argued his guilty plea was involuntary because the trial court had failed to advise him he was waiving his right to confront and cross-examine witnesses and his right against self-incrimination. The Court of Appeals held that even though the trial court did not explicitly advise the defendant of those rights, the record demonstrates he was aware of the rights he was waiving to plead guilty during the HCO phase because he had just exercised those rights during the felony phase.

TITLE: Maloney v. State
INDEX NO.: C.2.a.3
CITE: (8-18-97), Ind., 684 N.E.2d 488
SUBJECT: Guilty plea advisement - sufficient written waiver of rights
HOLDING: Misdemeanor D's signature on waiver of rights form, as allowed by Ind. Code § 35-35- 1-2, adequately demonstrated D's awareness of, & voluntary & intelligent waiver of, his constitutional rights. D's plea of guilty must be intelligent & voluntary, which includes awareness that plea waives D's privilege against self-incrimination, right to jury trial & right to confront accusers. Boykin v. Alabama, 395 U.S. 238 (1969). Boykin does not require Ct. to engage misdemeanor D in oral colloquy to make sure he understands what he is signing, or record to disclose misdemeanant's ability to read & understand waiver form he signs. White, 497 N.E.2d 893. Here, Tr. Ct. did not read rights to D but gave him written copy of rights which clearly & personally advised D of his statutory & constitutional rights. D failed to present any specific facts from which finder of fact could conclude by preponderance of evidence that guilty plea was involuntary or unintelligently made. Record showed that D was high school graduate, owned his own business & had ability to read. Held, transfer granted, Ct. App.' decision at 673 N.E.2d 519 vacated, denial of post-conviction relief affirmed.

TITLE: Pre-White cases
INDEX NO.: C.2.a.3
CITE: none
SUBJECT: Guilty plea advisements - waiver of trial rights; exact language not required
HOLDING: Used in advising D of trial rights); Wright, 490 N.E.2d 732 (same holding); Cole, 485 N.E.2d 128 (same holding); Gosnell, 483 N.E.2d 445 (Tr. Ct.'s language held adequate to meaningfully convey D's privilege against self-incrimination); Jones, 479 N.E.2d 539 (where judge prefaced advisements with phrase "in a trial" or "if you proceed to trial," D was informed guilty plea surrendered trial rights); Garringer, 455 N.E.2d 335; Saperito, App., 490 N.E.2d 1138 (Crim L 1116, 1167(5); Tr. judge did not advise D of speedy trial & no trial date was set, therefore, denial of PCR was error; Ct. rejects state's contention error is harmless & distinguishes Dunfee, App., 482 N.E.2d 499: there, no constitutional right was involved, *citing* Austin, 468 N.E.2d 1027; Hoffman DISSENTS); Grimes, App., 468 N.E.2d 606 (Ct. finds substantial compliance with required advisement that by pleading guilty, D admits truth of facts alleged); Albright 463 N.E.2d 270 (Tr. Ct. did not err in failing to advise D of right to jury trial where D had previously waived jury trial, but later withdrew not guilty plea & pled guilty); Kidder, 456 N.E.2d 427.

TITLE: Snyder v. State
INDEX NO.: C.2.a.3.
CITE: (5th Dist., 7-31-95), Ind. App. 654 N.E.2d 15
SUBJECT: Guilty plea advisement - right to jury trial of HO status
HOLDING: Guilty plea was unintelligent & involuntary where D was not advised that, by pleading guilty to underlying offenses, he was waiving his right to have jury determine his status as HO. PCR Ct. concluded that D was not entitled to be advised of this & affirmed his conviction. Ct. disagreed & held that due process requires that accused be advised or made aware that his guilty plea to underlying offense waives his right to jury trial of pending HO allegation. In so holding, Ct. noted that HO jury hearing is "jury trial" within meaning of Ind. Code 35-35-1-2, which sets forth required advisements when accepting guilty plea. HO proceeding is evidentiary hearing in every sense, & jury's decision therein is conclusive of whether State satisfied its burden of proving HO status. Held, PCR Ct. reversed, convictions vacated.

NOTE: Ind. S. Ct. granted transfer at 668 N.E.2d 1214 & summarily affirmed opinion of Ct. App. except as to relief ordered. Ct. affirmed Tr. Ct.'s judgment denying post-conviction relief with respect to guilty pleas entered on felony counts but vacated habitual finding.

RELATED CASES: Pryor, 949 N.E.2d 366 (Ind. Ct. App. 2011) (D's advisement of right to jury trial in "this case" was more comprehensive than that provided in Snyder and contemplated all stages of proceedings including the HO determination); Jones, App., 810 N.E.2d 777 (D who waived jury trial on underlying charges did not voluntarily, knowingly & intelligently waive jury on habitual charge that had been discussed in plea negotiations but not filed at time of waiver); O'Connor, App., 796 N.E.2d 1230 (Fact that D was aware that habitual could be filed if settlement was not reached was not enough to show D knowingly, voluntarily & intelligently waived her right to a jury trial as to HO enhancement with sufficient awareness of the relevant circumstances surrounding its entry & its consequences).

TITLE: Youngblood v. State
INDEX NO.: C.2.a.3
CITE: (8/8/89), Ind., 542 N.E.2d 188
SUBJECT: Boykin rights - silent record rehabilitated at PCR hearing
HOLDING: Guilty plea record which is silent as to advisement of Boykin rights may be rehabilitated by testimony at PCR hearing. Record of D's guilty plea hearing shows that D acknowledged that his attorney had advised him of his rights but contained no indication that D understood rights he was waiving by pleading guilty. Ind. S. Ct. has held that, unless record reveals that D knew or was advised at time of plea that he/she was waiving right to jury trial, right to confrontation, & right against self-incrimination, Boykin would require conviction to be vacated. White, 497 N.E.2d 893. Although record does not reveal any advisement of Boykin rights, during PCR hearing D's trial lawyers testified that they had explained Boykin rights to D before his plea. In Boykin v. AL, (1969), 395 U.S. 238, 89 S. Ct. 1709, 23 L.Ed.2d 274, U.S S. Ct. wrote that requiring record which reveals D knew about certain rights & waived them was simple extension of previously adopted rule concerning waiver of counsel: "Presuming waiver from silent record is impermissible. Record must show, or there must be an allegation & evidence which show, that an accused was offered counsel but intelligently & understandingly rejected the offer." (*Quoting* Carnley v. Cochran, (1962), 369 U.S. 506, 82 S. Ct. 884, 8 L.Ed.2d 70.) Federal circuits have held that knowing waiver may be established through later presentation of evidence. [Citations omitted.] Once D has demonstrated that plea hearing was not conducted in accordance with Boykin, state may affirmatively prove in PCR hearing that plea was voluntary & intelligent, obviating need to vacate plea. [Citation omitted.] Held, *denial* of PCR affirmed. DeBruler, J., DISSENTS.

C. PLEAS

C.2. Guilty plea

C.2.a.4. Maximum/minimum/enhanced sentence

TITLE: Arnold v. State
INDEX NO.: C.2.a.4
CITE: (2d Dist. 6/13/89), Ind. App., 539 N.E.2d 969
SUBJECT: Advisement - potential consecutive sentence
HOLDING: Tr. Ct. was not required to advise D that guilty plea sentence & earlier suspended sentence might have to be served consecutively if guilty plea resulted in probation revocation. At time Tr. Ct. accepted D's guilty pleas & entered judgment it could not anticipate ultimate disposition of probation revocation issue. D's probation was revoked after guilty plea was accepted, but before D was sentenced for charged offenses. Although Ct. handling D's probation violation had discretion either to continue probation or order suspended sentence to be executed, see Ind. Code 35-38-2-3; Jackson, 420 N.E.2d 1239, guilty plea Ct. was required to order that sentence for instant crimes be served consecutive to executed sentence ordered by probation Ct. In Morlan, 499 N.E.2d 1084, Ind. S. Ct. held that parole board's action revoking parole was "collateral consequence" of guilty plea, so that guilty plea Ct. did not have to advise Morlan of possibility that parole might be revoked triggering consecutive sentences. D need only be advised of effect of prior convictions which directly affect sentence rendered upon guilty plea. Id. See also Fulmer, 519 N.E.2d 1236; Kendrick, 529 N.E.2d 1311; Jones, App., 536 N.E.2d 1051. Although it seems to Ct. App. that advisements with respect to determinable & almost certain consequences, albeit collateral, would better assure intelligent & informed pleas, precedent dictates that such advisements are not required.

TITLE: Bobbitt v. State
INDEX NO.: C.2.a.4
CITE: (4th Dist.; 3-28-00), Ind. App. 725 N.E.2d 521
SUBJECT: Guilty plea - advisement of incorrect maximum sentence; reversal not required
HOLDING: Ct. did not err in denying D post-conviction relief based on Tr. Ct.'s misstatement of maximum sentence. Post-conviction relief on basis of overstatement of possible maximum sentence has only been granted when D was erroneously induced to believe he would benefit from pleading guilty. U.S. v. Fuller, 769 F.2d 1095 (5th Cir. 1985). Here, Tr. Ct. advised D that maximum sentence for his crimes was twelve years, when actually, maximum sentence was ten years. Because D's plea agreement was for four years & ninety days -- far less than maximum allowable sentence of ten years, D was not erroneously induced to believe he would benefit from pleading guilty. Held, judgment affirmed.

TITLE: Followell v. State
INDEX NO.: C.2.a.4
CITE: (09/20/91), Ind., 578 N.E.2d 646
SUBJECT: Guilty plea - necessary advisement lacking
HOLDING: Post-Conviction Relief (PCR) Ct. erred in determining that failure to advise D at guilty plea hearing that his criminal history could serve as aggravator did not require overturning plea, because standard was wrong. At guilty plea hearing Ct. advised D of the maximum 20 year sentence Ct. could impose, but did not specifically tell him that criminal history could be an aggravator. Ct. then imposed 20 year sentence, & listed D's juvenile adjudications, & misdemeanor conviction as two of factors Ct. found to support enhancement. At PCR hearing, in front of same sentencing judge, Ct. denied petition because judge concluded that his decision to enhance original sentence was based largely on other aggravators, not the prior juvenile & misdemeanor convictions. PCR Ct. made no mention of effect of omission of advisement on D's decision to plead. S. Ct. rejected that reasoning, noting that issue was whether D would still have pled guilty if he had had missing advisement. Held, remanded for reconsideration of petition on issue of whether D would have changed plea, J. Givan, DISSENTING.

TITLE: Golden v. State
INDEX NO.: C.2.a.4.
CITE: (1st Dist. 4/6/87), Ind. App. 506 N.E.2d 47
SUBJECT: Guilty plea advisements - enhanced sentence
HOLDING: Ct. rejects D's contention that Tr. Ct.'s failure to advise him of possibility of increased sentence due to prior convictions requires vacation of guilty plea. Here, offense occurred in early 1976, prior to both enactment & effective date of current criminal code, which became law on 10/1/87. Ct. finds no provision in statutes then in effect for enhancement of sentence for entering to commit a felony or to make sentence consecutive with other sentences. Rihl, App., 413 N.E.2d 1046. Ct. also notes D has failed to sustain burden under White, 497 N.E.2d 893 of proving that if he had been advised of rights which he claims were omitted, he would not have pled guilty. Held, denial of PCR affirmed.

RELATED CASES: Harris, App., 616 N.E.2d 25 (Where Tr. Ct. advised D of minimum & maximum sentences & that Ct. would consider any prior criminal history he had in imposing sentence, failure to advise him specifically of possibility of consecutive & enhanced sentence due to presence of prior conviction did not render guilty plea involuntary & unintelligent. D did not show his decision to plead would have been different if specific advisement had been given.)

TITLE: Grant v. State

INDEX NO.: C.2.a.4.

CITE: (3d Dist. 01/27/92), Ind. App. 585 N.E.2d 284

SUBJECT: Error in advising on maximum sentence at Guilty Plea (GP) hearing did not require vacation of plea

HOLDING: Although judge erred in advising D that maximum sentence he could receive was 90 years instead of 60 years, in light of terms of plea, such error did not require vacation of GP. D was charged with 3 Class B burglaries, & was advised that if they were unrelated he could receive maximum sentence of 20 years on each, plus HO enhancement of 30 years. Plea agreement called for plea to 1 count & dismissal of other 2, & D was sentenced to presumptive 10-year term with 8 years suspended & 8 years probation. Subsequently, his probation was revoked & full sentence ordered executed. D was not actually eligible for habitual enhancement because all of felonies occurred before conviction on any one of them. Ct. found that judge's advisement was clearly erroneous, but that D failed to show advisement prejudiced him to extent it rendered his GP decision involuntary & unintelligent. Ct. found it incredible that had D been told of proper 60-year maximum sentence, instead of 90 year maximum, he would have rejected plea with maximum of 20 years. Held, denial of post-conviction relief affirmed.

RELATED CASES: Kistler, 936 N.E. 2d 1258 (Ind. Ct. App. 2010) (Ct. could not say that D demonstrated that he would not have pled guilty even if properly advised that habitual offender charge was invalid, nor has he shown facts that support a reasonable probability that the hypothetical reasonable D would have elected to go to trial if properly advised).

TITLE: Hutchinson v. State
INDEX NO.: C.2.a.4
CITE: (12/22/86), Ind., 501 N.E.2d 1062
SUBJECT: Guilty plea advisements - enhanced sentence
HOLDING: Post-WHITE. When sentence recommended by state & imposed by Tr. Ct. is not enhanced because of prior convictions, then D has failed to demonstrate that such advisements would have aided decision to plead guilty. Cf. Garrett, 499 N.E.2d 1121; Creager, 479 N.E.2d 47. Here, at guilty plea hearing, D told Tr. Ct. he did not have any prior convictions. State indicated D did have one felony conviction. Presumptive sentence was enhanced by 5 years. In response to Tr. judge's inquiry why state was requesting increased penalty, state responded that seriousness of crime & manner in which it was committed justified sentence. Tr. Ct. is not required to inform D of possible effect of prior convictions unless they bear directly upon length of sentence imposed in plea agreement. Hatton, 498 N.E.2d 398; Blackburn, 493 N.E.2d 437. Held, denial of PCR affirmed. DeBruler DISSENTS without opinion.

TITLE: Jones v. State
INDEX NO.: C.2.a.4
CITE: (4/25/86), Ind., 491 N.E.2d 542
SUBJECT: Guilty plea advisements - parole
HOLDING: Tr. Ct. did not err by failing to advise D that under mandatory special parole time D conceivably could serve entire 15-year sentence. Law does not require advisement re possible future effects parole statutes will have on individual's incarceration. See Greer, 428 N.E.2d 787. See also Greer v. Duckworth, (N.D. Ind. 1983), 555 F. Supp. 725; Romine, 431 N.E.2d 780. Held, no error in denial of PCR.

TITLE: Owens v. State
INDEX NO.: C.2.a.4
CITE: (2d Dist. 11/26/86), Ind. App. 500 N.E.2d 756
SUBJECT: Guilty plea advisements - effect of prior convictions; indeterminate sentence
HOLDING: Where sentence was indeterminate & could not be enhanced/enlarged, omission of advisement re effect of prior convictions did not affect character of guilty plea. Wright, 490 N.E.2d 732. Here, D had alleged in his third PCR petition that such error was fundamental. Held, denial of PCR affirmed.

TITLE: State v. Cozart
INDEX NO.: C.2.a.4
CITE: (12-10-08), Ind., 897 N.E.2d 478
SUBJECT: Guilty plea advisements - court need not advise when minimum is non-suspendible
HOLDING: Post-conviction court erred in vacating D's conviction based on Tr. Ct.'s failure to advise that the minimum sentence was non-suspendible. Generally speaking, if a Tr. Ct. undertakes the steps dictated by statute, a post-conviction petitioner will have a difficult time overturning his guilty plea on collateral attack. However, Ds 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.

Here, D pled open to a Class A felony. D had a prior felony, and thus, was non-suspendible below the minimum of twenty years. However, D's attorney erroneously advised his client that the "open" plea allowed Tr. Ct. to disregard the mandatory minimum and gave Tr. Ct. the discretion to sentence D from zero to fifty years. At the sentencing hearing, D and his counsel realized his misadvise and moved to withdraw the plea. Tr. Ct. denied the motion to withdraw, but subsequently granted D post-conviction relief because it failed to advise D of the minimum and maximum sentences. However, Tr. Ct. was only required to give D statutory advisements set forth in Ind. Code 35-35-1-2 or required by the constitutions, and Tr. Ct. did so. Thus, post-conviction court clearly erred in finding it failed to properly advise D.

But D also alleged that his plea was a product of ineffective assistance of counsel due to his counsel's mis-advice and that Tr. Ct. erred by denying the motion to withdraw guilty plea. Although D very well may be entitled to relief under one or more of the alternative theories and does present at least a "colorable claim" that he is entitled to relief on the IAC claim, Tr. Ct.'s findings did not address the alternative claims. Thus, the case must be remanded to the post-conviction court for an entry of findings of fact and conclusions of law addressing D's remaining claims. Held, judgment reversed and remanded for further proceedings.

TITLE: Stoltz v. State
INDEX NO.: C.2.a.4
CITE: (4th Dist., 11-14-95), Ind. App. 657 N.E.2d 188
SUBJECT: Guilty plea advisement - driver's license suspension
HOLDING: Tr. Ct.'s failure to advise D that conviction would result in automatic 10-year suspension of his driver's license by Bureau of Motor Vehicles (BMV) did not render D's guilty plea involuntary as denial of Fifth Amendment due process rights. *Citing* decisions in Wright v. State, (1986), Ind. App., 495 N.E.2d 804, & Allender v. State, (1990), Ind. App., 560 N.E.2d 545, Ct. held that automatic suspension of driver's license as habitual traffic offender was not direct punishment imposed by Ct. as result of guilty plea, but instead a collateral consequence of conviction. Suspension of D's driver's license was matter exclusively in hands of BMV commissioner. Held, denial of post-conviction relief affirmed.

TITLE: Woodard v. State
INDEX NO.: C.2.a.4.
CITE: (2nd Dist., 03-09-93), Ind. App. 609 N.E.2d 1185
SUBJECT: Failure to advice of consecutive sentence possibility not fatal to plea
HOLDING: Although D was not advised on record of possibility of consecutive sentences, where she did not show that she did not know of possibility, & that if she had known it would have changed her decision to plead, it was not error for Post-Conviction Relief (PCR) Ct. to deny her petition for relief. Guilty plea counsel testified that he could not remember whether he had specifically discussed possibility of consecutive sentences with D, but that it was risk factor in determining whether to proceed with trial & that it would not have been possible for case to have evolved as it did without discussion of consecutive versus concurrent sentences. He also said that before trial was set, he showed D copy of proposed plea bargain recommendation that she receive one 2-year sentence, three 10-year sentences, & two 15-year sentences, with one of 15- year sentences to be consecutive to three 10-year sentences.

D bears burden of showing that Tr. Ct.'s failure to give statutory advisement rendered plea decision involuntary or unintelligent, White, 497 N.E.2d 893. Despite Tr. Ct.'s omission of advisement, record contained sufficient evidence for PCR Ct. to conclude that D was aware of possibility of consecutive sentences, & that omission would not have made difference in decision to plead. Held, denial of PCR relief affirmed, remanded for resentencing on other issue.

RELATED CASES: Harris, App., 762 N.E.2d 163 (failure to mention in plea agreement fact that D would be placed on parole upon his release from prison was not fatal to plea).

C. PLEAS

C.2. Guilty plea

C.2.a.5. Explanation of court's role

TITLE: McFarland v. State
INDEX NO.: C.2.a.5
CITE: (12/22/86), Ind., 501 N.E.2d 1047
SUBJECT: Guilty plea advisements - Ct. not a party / not bound
HOLDING: POST-WHITE. Although record clearly demonstrates that Tr. Ct. did not give advisement required by Ind. Code 35-4.1-1-3, D has not demonstrated that omission of advisement materially impacted upon his decision to plead guilty. White, 497 N.E.2d 893. To prevail, D must prove that any erroneous or omitted advisement, if corrected, would have changed his decision to enter plea. Holiday, 498 N.E.2d 1239. Held, *denial* of PCR affirmed. Givan & Shepard CONCUR IN RESULT without opinion.

RELATED CASES: Lawson, 498 N.E.2d 1212 (Tr. Ct. rejection and then later acceptance of plea agreement showed that Tr. Ct. was not party to plea agreement).

C. PLEAS

C.2. Guilty plea

C.2.a.6. Time of advisements

TITLE: McNary v. State
INDEX NO.: C.2.a.6
CITE: (3d Dist. 6/16/86), Ind. App., 493 N.E.2d 824
SUBJECT: Guilty plea advisements - timing
HOLDING: Ct. rejects state's argument that it should look to sentencing hearing, held one month after guilty plea was accepted, to determine whether D was properly informed of possibility of consecutive sentences & of enhanced sentenced. Maleck, 358 N.E.2d 116; Collins, App., 394 N.E.2d 211 (determination of voluntariness can be meaningful only if made before plea is entered & accepted). Here, Ct. finds D's other arrests were discussed only with regard to probation & not as to effect upon sentence imposed. Held, denial of PCR reversed. Hoffman CONCURS IN RESULT.

C. PLEAS

C.2. Guilty plea

C.2.b. Factual basis (IC 35-35-1-3)

TITLE: Buchanan v. State
INDEX NO.: C.2.b.
CITE: (3/19/86), Ind. App., 490 N.E.2d 351
SUBJECT: Guilty plea -- factual basis lacking elements of offense
HOLDING: Ct. shall not enter judgment upon plea of guilty unless it is satisfied from its examination of D or evidence presented that there is factual basis for plea. Ind. Code 35-35-1-3(b). Where D states that he understands nature & elements of crime charged & that his guilty plea is admission of truth of matters contained within criminal information filed against him, such admission is sufficient to establish factual basis for plea. Lombardo, 429 N.E.2d 243. Here, D was charged with armed robbery. Although D denied he had gun in possession, he made earlier statement to contrary, & in colloquy, admitted guilt to charges read by judge. Sufficient factual basis was found even after State admitted there was none. Held, conviction affirmed.

RELATED CASES: Oliver, App., 843 N.E.2d 581 (sufficient factual basis supported D's guilty plea to theft, where State read charging information to D, who indicated that he understood it & that he understood that by pleading guilty he was admitting to truth of allegations in charging information); Jones, App., 693 N.E.2d 605 (sufficient factual basis where D claimed he did not really have gun but accepted facts in p.c. affidavit as true); Stroud, 450 N.E.2d 992 (touching not shown in battery case; no error in refusing to accept plea to battery where D did not know whether stick he threw hit victim).

TITLE: Carter v. State
INDEX NO.: C.2.b
CITE: (3rd Dist., 11-28-00), Ind., 739 N.E.2d 126
SUBJECT: Guilty plea - D's assertion of innocence before plea accepted
HOLDING: Tr. Ct. did not abuse its discretion in denying D permission to withdraw his guilty plea before plea was formally accepted. Judge may not accept guilty plea when D both pleads guilty & maintains his innocence at same time. Ross, 456 N.E.2d 420 (Ind. 1983). However, an admission of guilt under oath that is later contradicted by assertion of innocence may be reliable & adequate for entering conviction. Trueblood, 587 N.E.2d 105 (Ind. 1992). Relying on Brooks, 577 N.E.2d 980 (Ind. Ct. App. 1991), D argued that he had absolute right to withdraw his guilty plea prior to its formal acceptance. Ct. disapproved of Brooks, noting that Ds who make impulsive or ill- advised plea decisions & regret their actions upon later reflection are adequately protected by right to request permission to withdraw plea under Ind. Code 35-35-1-4(b) & (e) & to appeal conviction if permission is denied. Denial is reviewable under abuse of discretion standard. Owens, 426 N.E.2d 372 (Ind. 1981). Here, D pled guilty & provided detailed factual foundation for that plea. Later, at sentencing hearing, D sought to withdraw his plea, saying he was innocent. As in Owens, Ct. found no abuse of discretion in denial of D's request. Held, transfer granted, Ct. App.' decision at 724 N.E.2d 281 summarily affirmed, judgment of Tr. Ct. affirmed.

TITLE: Larry v. State
INDEX NO.: C.2.b.
CITE: (05/1/85) Ind., 477 N.E.2d 94
SUBJECT: Guilty plea - factual basis
HOLDING: Tr. Ct. erred in denying D's PCR petition. Factual basis for plea to Class A robbery (bodily injury (BI) to person robbed or BI to any other person) did not exist where BI was to officer attempting to apprehend D. Hill 424 N.E.2d 999. Held, denial of PCR reversed. DISSENT by Givan, joined by Pivarnik, contends robbery is still in progress during pursuit, thus officer was victim directly threatened by robbers in perpetration of robbery. Thus, factual basis for plea exists.

RELATED CASES: Jones, App., 603 N.E.2d 888 (D's own testimony about prior Ct. proceedings insufficient to provide factual basis for operating as HTO. See card at K.9.c.2); Lockard, App., 600 N.E.2d 985 in concurrence, J. Sullivan *cited* Trueblood, 587 N.E.2d 105, as creating authority for accepting guilty pleas which are in "best interests" of D. But see, Atchley, 622 N.E.2d 502 where Ct. reaffirmed prior holdings that Indiana does not allow "best interests" pleas); Rudolph, App., 565 N.E.2d 338 (factual basis did not exist for guilty plea to driving while license suspended for life because of statutory changes; for further discussion, see card at K.9.c.2); Harvey 498 N.E.2d 1231 (denial of PCR was proper where D was aware of possible deficiencies in factual basis & urged Ct. to accept plea); Jordan, App., 485 N.E.2d 1386 (factual basis did not exist for guilty plea to forgery; for further discussion of Jordan, see card at K.4.j).

TITLE: Roe v. State
INDEX NO.: C.2.b
CITE: (8/31/92), Ind. App., 598 N.E.2d 586
SUBJECT: Guilty plea -- factual basis for habitual offender
HOLDING: Information and facts alleged at guilty plea hearing must be sufficient to support guilty plea to being habitual offender (HO). Under HO statute, State must prove, or D must admit, each subsequent felony was committed after sentencing was imposed for prior felony. Youngblood, 515 N.E.2d 522. Here, HO information set forth dates D was convicted of two prior felonies, but it failed to show dates he committed prior felonies. Facts alleged in charging information and at guilty plea hearing were insufficient to find D to be HO; therefore, Tr. Ct. erred when it accepted D's guilty plea to being HO and enhanced D's sentence. Held, guilty plea and accompanying plea agreement vacated.

TITLE: Snowe v. State
INDEX NO.: C.2.b
CITE: (4th Dist. 2/8/89), Ind. App., 533 N.E.2d 613
SUBJECT: Factual basis - silent record
HOLDING: Factual basis was insufficient for acceptance of guilty plea where there is no indication in record that anything took place other than offer & acceptance of plea. D, who was charged with DUI, appeared pro se for arraignment & was advised of her rights through videotape presentation viewed by all Ds in misdemeanor traffic Ct. She then pled guilty, her plea was accepted, sentencing was deferred, & she was diverted to Alcohol Countermeasures Program. D appeals denial of motion to withdraw guilty plea, arguing that there was insufficient factual basis for acceptance of plea. Tr. Ct. may not accept guilty plea without adequate factual basis. Stockey, 508 N.E.2d 793. On appeal, reviewing Ct. makes standard sufficiency determination. Id. Factual basis may be established through testimony of D, as well as other evidence. Dearman, 500 N.E.2d 1161. Factual basis may be established by having state read charging information, if D admits truth of allegations. Silvers, 499 N.E.2d 249. Here, there was no testimony from D, no reading of allegations, & no reference to probable cause affidavit. Record shows nothing other than offer & acceptance of plea. Held, factual basis was insufficient for acceptance of guilty plea.

TITLE: State v. Eiland
INDEX NO.: C.2.b.
CITE: (5th Dist., 3-16-99), Ind. App., 707 N.E.2d 314, *sum. aff'd* 723 N.E.2d 863
SUBJECT: D must prove prejudice resulting from lack of factual basis
HOLDING: In post-conviction proceedings, petitioner who proves that factual basis for her guilty plea was not established must also demonstrate that she was prejudiced by this error. Purpose of factual basis requirement is to ensure that when plea is accepted there is sufficient evidence that Ct. can conclude that D could have been convicted had she stood trial. Butler, 658 N.E.2d 72. Justice would not be served by requiring that conviction be vacated in every case where Tr. Ct. has failed to ensure that adequate factual basis for guilty plea is contained in record. Rather, burden should be on person who initially pled guilty to crime to come forward with evidence establishing that she was prejudiced by lack of factual basis. Evidence proving that D did not commit crime to which she pled guilty would meet this burden. Any other evidence establishing that D would not have pled guilty had factual basis inquiry been undertaken would also be relevant. Holding in White, 497 N.E.2d 893, supports conclusion that petitioner must show that inadequate factual basis affected his decision to plead guilty.

Here, D presented no evidence indicating that she was prejudiced by lack of factual basis. Further, D made no showing that she was prejudiced from Tr. Ct.'s failure to advise her that by pleading guilty she was waiving her constitutional rights. Although record did not specify whether D was advised of Boykin rights, post-conviction Ct. raised issue sua sponte at hearing & State was not given opportunity to prove that D was informed regarding her Boykin rights prior to her plea. Held, grant of post-conviction relief reversed & remanded to give D opportunity to prove prejudice & to give State opportunity to prove that D was informed of her Boykin rights prior to entry of her guilty plea.

RELATED CASES: Marin, 210 N.E.3d 857 (Ind. Ct. App. 2023) (D was not prejudiced by State's error in using language that included both criminal and non-criminal behavior in establishing factual basis for guilty plea to attempted sexual misconduct with minor; D had adequately been made aware of and understood charges and elements of the offense to which he pleaded guilty); Cooper, 935 N.E.2d 146 (Ind. 2010) (rejecting D's argument that the factual basis supporting his plea to driving while HTV was inadequate because the witness who testified at the plea hearing did not specifically state that the events took place in Marion County or that they occurred in 1999; both the year and county were read to D at outset of hearing and officer testified he observed D at a readily recognizable address in Indianapolis and D acknowledged these statements).

TITLE: Turner v. State
INDEX NO.: C.2.b
CITE: (11/04/91), Ind., 580 N.E.2d 665
SUBJECT: Guilty plea - factual basis prior to 1973
HOLDING: Guilty plea entered prior to effective date of Ind. Code 35-35-1-3(b), establishing requirement for factual basis, is not subject to collateral attack on basis that presently available record doesn't satisfy requirements of statute, reversing Ct. of appeals decision in Turner (1991), Ind. App., 568 N.E.2d 1046. Harshman, (1953), 232 Ind. 618, 115 N.E.2d 501, did not create factual basis requirement for all guilty pleas subsequent to 1953, but held only that Ct. could not accept guilty plea from D who had no memory of crime unless there was additional evidence supporting guilt. Hathaway, 251 Ind. 374, 241 N.E.2d 240, held that D who admitted commission of charged crime & never claimed lack of memory was not entitled to later withdraw his plea just because no other evidence that he committed crime was presented. Although Hathaway is no longer good law after enactment of statute, it was law prior to statute. In contrast to Harshman, D in instant case pled guilty as charged & never claimed lack of memory, as Harshman had. Ct. found D's case closer to Hathaway, & noted situation was more adequate in terms of factual basis. Held, Ct. of appeals decision vacated & post-conviction Ct. affirmed, DeBruler, J., dissenting on this issue.

C. PLEAS

C.2. Guilty plea

C.2.b.1. Admission of guilt

TITLE: Bates v. State
INDEX NO.: C.2.b.1.
CITE: (1/5/88), Ind., 517 N.E.2d 379
SUBJECT: Guilty plea - factual basis; admission of guilt
HOLDING: Tr. Ct. properly accepted guilty plea where D did not admit to element of offense. D pled guilty to criminal deviate conduct as a Class A felony but did not admit to threat or use of deadly force. Further, D's trial counsel characterized plea as "best interest plea." Accused enters best interest plea when he/she maintains innocence but pleads guilty to accept advantageous bargain. Such pleas are allowed in federal system. Alford v. NC, (1970), 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162. In IN, however, acceptance of guilty plea made together with protestation of innocence is reversible error. Ross, 456 N.E.2d 420; see also Patton, 517 N.E.2d 374, (card at C.2.b.1). Fact that D's counsel called plea "best interest plea" is not determinative. D indicated that he understood his plea was admission that he committed crime charged. When Tr. Ct. said, "you do not admit that it was forcibly done," D replied, "Yes, sir." This is not protestation of innocence rendering plea invalid under Ross. While D never admitted use of deadly weapon, he likewise never denied it. Record, including victim's statement admitted on D's own motion, reveals sufficient factual basis for conviction, & D never protested his innocence. Held, plea properly accepted. Denial of PCR petition affirmed.

TITLE: Butler v. State
INDEX NO.: C.2.b.1.
CITE: (3rd Dist., 08-10-94), Ind. App., 638 N.E.2d 826
SUBJECT: Habitual Substance Offender (HSO) guilty plea - factual basis
HOLDING: Evidence was insufficient to show one of D's prior convictions was at least A misdemeanor, & therefore factual basis for guilty plea was insufficient, despite fact D admitted he had two prior "DUI" convictions. After D's sentence was enhanced due to HSO status, he filed PCR petition based on new counsel's investigation that revealed one of prior convictions relied on for HSO was class C misdemeanor. HSO status requires proof D has two prior unrelated substance offense convictions that are either felonies or class A misdemeanors. Documents submitted to PCR Ct. (but not guilty plea Ct.) could not confirm or refute contention that second conviction was C misdemeanor. Information & Summons alleged violation of operating with BAC>.10 (class C misdemeanor) but described violation of driving while intoxicated. Sentence imposed was 60 days, maximum penalty for C misdemeanor, with 50 days suspended. When guilty plea Ct. asked D if he had a prior record, he said he had two prior DUIs..

State must present documentation of prior convictions to support HSO guilty plea, unless documentation is unavailable, Jones v. State, App., 603 N.E.2d 888, & to establish prior conviction, parole evidence alone is insufficient; Ct. records must be produced unless unavailable. Although at PCR hearing, deputy prosecutor testified that under usual procedures of prosecutor's office, second offense would be charged as A misdemeanor, Ct. found PCR hearing is not procedure allowing fundamentally flawed guilty plea to be rehabilitated. Because there was no evidence as to legal classification of offenses, D's admission as to status as HSO did not provide sufficient factual basis to support plea. Held, reversed & remanded to allow withdrawal of plea.

TITLE: Gumm v. State
INDEX NO.: C.2.b.1
CITE: (2nd Dist., 9-28-95), Ind. App., 655 N.E.2d 610
SUBJECT: Factual basis sufficient for plea to Operating as Habitual Traffic Offender (HTO)
HOLDING: Post-conviction Ct. did not err in determining that sufficient factual basis existed for D's guilty plea to operating after finding of HTO status. *Citing* Jones v. State, (1992), App., 603 N.E.2d 888, D argued that his admissions at guilty plea hearing, without more, were insufficient to support guilty plea. D pointed to State's failure to present any records supporting its contentions regarding D's HTO status, & its failure to produce evidence proving that D knew that he drove while his license was suspended. Notwithstanding Jones decision, Ct. noted that factual basis for guilty plea need not be established beyond reasonable doubt & State may be relieved of strict burden to prove factual basis. Frazier v. State, (1986), Ind., 490 N.E.2d 315. Furthermore, in post- conviction proceeding, D did not challenge determination of HTO status; he did not assert that he did not have his driving privileges suspended as result of HTO determination; & he did not claim that he was not driving while suspended. It was clearly in D's best interests to plead to single count in return for dismissal of other four charges, & receipt of minimal executed sentences. Held, denial of PCR petition affirmed, Chezem, J., concurring in result.

Note: *Citing* Trueblood v. State, (1992), Ind., 587 N.E.2d 105, Ct.'s opinion suggests that Indiana has adopted "best interest" standard for analyzing guilty pleas, as enunciated in North Carolina v. Alford, (1970), 400 U.S. 25.

RELATED CASE: Cooper, 935 N.E.2d 146 (Ind. 2010) (rejecting D's argument that the factual basis supporting his plea to driving while HTV was inadequate because the witness who testified at the plea hearing did not specifically state that the events took place in Marion County or that they occurred in 1999; both the year and county were read to D at outset of hearing and officer testified he observed D at a readily recognizable address in Indianapolis and D acknowledged these statements); Wilson, App., 707 N.E.2d 318 (adequate factual basis for plea not established; remanded for D to prove prejudice; see Eiland, at C.2.b); Hendrickson, App., 660 N.E.2d 1068 (sufficient factual basis established for operating moped as HTO).

TITLE: Madden v. State
INDEX NO.: C.2.b.1.
CITE: (5th Dist., 6-26-98), Ind. App., 697 N.E.2d 964
SUBJECT: Guilty plea supported by sufficient factual basis
HOLDING: Post-conviction Ct. did not err in determining that Tr. Ct.'s acceptance of D's guilty plea to murder was supported by sufficient factual basis. At guilty plea hearing, D acknowledged that he understood that entry of his guilty plea was admission of truth of facts alleged in information, which stated that he "knowingly" shot victim in head & face with gun "held in his hand." D also testified that he was aware that at time he pointed gun at victim, he placed victim in position of substantial risk. He unequivocally stated that he was guilty of murder after hearing investigator testify that at least one of bullets exited from barrel that was only six inches from victim's head. Held, judgment affirmed.

TITLE: McMillan v. State
INDEX NO.: C.2.b.1.
CITE: (2/28/2018), 95 N.E.3d 161 (Ind. Ct. App. 2018)
SUBJECT: Tr. Ct.'s authority to revoke acceptance of plea agreement before sentencing
HOLDING: Tr. Ct. may, on its own motion, set aside a guilty plea if the D asserts his innocence after the plea has been accepted but prior to sentencing. Beech v. State, 702 N.E.2d 1132 (Ind. Ct. App. 1998). In this case, Tr. Ct. did not err in revoking its acceptance of of plea agreement and forcing D to go to trial for Level 1 felony neglect of a dependent. Record reflects that Tr. Ct. believed that D did not admit that he was subjectively aware of a high probability that his conduct would result in his three-month-old son's health or life being at risk or in danger. Based on D's letters to Tr. Ct. and his statements at a subsequent hearing, Tr. Ct. found that D asserted his innocence to State's allegation that he knowingly or intentionally deprived his son of necessary food and/or medical care, which resulted in son's death. Although State argued in favor of the plea agreement at the trial level, this does not relieve Tr. Ct. of its obligation to ensure that D's guilty plea was an unqualified admission of his guilt. Held, judgment affirmed.

TITLE: Melton v. State
INDEX NO.: C.2.b.1.
CITE: (1st Dist., 04-05-93), Ind. App., 611 N.E.2d 666
SUBJECT: Factual basis sufficient for plea to Operating with BAC .10% or above
HOLDING: Because D admitted he consumed alcohol & operated motor vehicle, & agreed that he smelled of alcohol & 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. D was originally charged with OWI as D felony, & written plea agreement called for him to plead to that, but agreement was orally amended to Operating with BAC .10% as C misdemeanor. Issue was whether D's admission that he "knowingly & intentionally" operated vehicle with BAC of .10% provided adequate factual basis for plea. Ct. found reasonable inferences from D's admissions were that he knew how much alcohol he consumed & as consequence, knew his BAC exceeded statutory limit. Ct. determined that Ind. Code 35-35-1-3(b), regarding factual bases, imposes no requirements as to type or quality of evidence necessary for factual basis & declined to follow rule of Jones (1992), App., 603 N.E.2d 888, holding that documentary evidence of prior "adjudication" was necessary to factual basis for plea to crime proscribed by Ind. Code 9-4-13-14. While D may not know exact alcohol level of his blood, by knowing quantity of alcohol consumed & degree of impairment, he can surely know beyond reasonable doubt that he has exceeded statutory limit.

RELATED CASES: Minor v. State, App., 641 N.E.2d 85 (D acknowledged he was admitting to truth of facts alleged in charging information & admitted facts constituting admission of each element of offense, which satisfied requirement that D understand nature of charges).

TITLE: Patton v. State
INDEX NO.: C.2.b.1.
CITE: (12/30/87), Ind., 517 N.E.2d 374
SUBJECT: Guilty plea - factual basis; admission of guilt
HOLDING: Tr. Ct. must set aside guilty plea in capital case when D denies any intent to kill at sentencing hearing. D was charged with murder & rape & was sentenced to death. At guilty plea hearing, charging information & affidavit of probable cause were read & D admitted facts as true. Tr. Ct. accepted facts & entered conviction. At sentencing hearing, however, D testified that he did not intend to kill victim. D argues that Tr. Ct. should have set aside D's guilty plea. Because guilty plea is judicial admission obviating need for trial, guilty pleas should be cautiously received. Harshman, 115 N.E.2d 501. IN Tr. Ct's. may not accept guilty plea from D who pleads guilty & maintains innocence at same time. Ross, 456 N.E.2d 420. Although plea & contradiction here were separate in time, principle of Ross must apply to sentencing hearing in capital case. Decision to permit withdrawal of guilty plea rests within discretion of Tr. Ct. Centers, 501 N.E.2d 415. Tr. Ct. abuses its discretion when it fails to set aside guilty plea in capital case when D denies criminal intent at sentencing. See 31 A.L.R. 4th 504. Held, reversed & remanded.

TITLE: Pendrick v. State
INDEX NO.: C.2.b.1.
CITE: (4/26/83), Ind., 447 N.E.2d 1084
SUBJECT: Guilty plea - factual basis; admission of guilt
HOLDING: Tr. Ct. did not err in finding/inferring requisite factual basis for knowing/intentional killing where D admitted striking victim with metal club 7 or 8 times "[t]o hurt him," although D "didn't want him dead." Here, Ct. finds case similar to Higgason, 435 N.E.2d 558 (D who pled guilty to second degree murder denied he intended to kill victim when he fired 3 shotgun blasts at victim; held, malice & purpose inferred from conduct). Held, no error in *denial* of PCR.

RELATED CASES: Underhill 477 N.E.2d 284.

TITLE: Ross v. State
INDEX NO.: C.2.b.1.
CITE: (12/2/83), Ind., 456 N.E.2d 420
SUBJECT: Guilty plea - factual basis; admission of guilt
HOLDING: A judge may not accept a plea of guilty when D both pleads guilty & maintains his/her innocence. Here, D raises issue in PCR petition. D *cites* Boles, 303 N.E.2d 645 for proposition Ct. may accept guilty plea from D who also maintains his/her innocence, provided there is overwhelming evidence against D. Ct. finds recitation of NC v. Alford, (1970) 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 in Boles opinion was merely dictum. Language caused confusion, as appellate Ct.'s understood it to *overrule* Harshman, 115 N.E.2d 501. See Anderson, App., 396 N.E.2d 960; Liffick, App., 367 N.E.2d 34. Ct. points to footnote 11 in Alford: "States may bar their Ct's. from accepting guilty pleas from any Ds who assert their innocence." See also US v. Bednarski, (CA1 1971) 445 F.2d 364. Held, denial of PCR affirmed. CONCURRING IN RESULT, DeBruler finds Boles & Harshman consistent & would refer Tr. Ct. judges to statute re guilty pleas for guidance. Ind. Code 35-35-1-3(b).

RELATED CASES: McWhorter, 945 N.E.2d 1271 (Ind. Ct. App. 2011) (Tr. Ct. did not err in accepting guilty plea to residential entry even though D said at guilty plea hearing that he had permission to enter garage and may have been mistaken about where he was, because D also admitted that he knowingly and intentionally broke into victims' residence, that the victims did not know him, and that his memory of events was unclear); Oliver, App., 843 N.E.2d 581 (record did not reveal that D 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"); Wingham, App., 780 N.E.2d 1164 (D's guilty plea was erroneously accepted because D maintained innocence); Carter, App., 724 N.E.2d 281 (Where Tr. Ct. has followed procedures outlined in guilty plea statutes, & where D's guilty plea is knowing & voluntary, his later assertion of innocence does not require Tr. Ct. to set aside his guilty plea); Bland, App., 708 N.E.2d 880 (despite D's comment that he did not believe his driver's license was suspended for life, D admitted that evidence showed otherwise & that notice of suspension was mailed to his last known address); Beech, App., 702 N.E.2d 1132 (Tr. Ct. may, on its own motion, set aside guilty plea if D asserts his innocence after plea has been accepted but prior to sentencing); Mayberry, App., 542 N.E.2d 1359 (statement of innocence made after acceptance of guilty plea does not require setting aside guilty plea); Harris, App., 671 N.E.2d 864 (D maintained innocence at presentence interview & at sentencing, not prior to acceptance of guilty plea); King, App., 537 N.E.2d 503 (because D was charged as accomplice, factual basis existed where D admitted to participating in offenses generally, even though he denied committing certain acts); Cross, App., 521 N.E.2d 360 (D's claim of innocence, noted only in pre-sentence report, was sufficient to require Tr. Ct. to inquire further to resolve inconsistency); Moredock, 540 N.E.2d 1230 (D's conflicting account of offense in pre-sentence report does not require vacating plea on PCR); Garry, App., 502 N.E.2d 497 (Tr. Ct. erred in accepting D's guilty plea where D continued to maintain innocence; held, *denial* of PCR reversed).

C. PLEAS

C.2. Guilty plea

C.2.b.2. Denial of guilt or lack of memory

TITLE: Ellis v. State
INDEX NO.: C.2.b.2.
CITE: (1/26/2017), 67 N.E.3d 643 (Ind. 2017)
SUBJECT: Guilty plea set aside because D claimed innocence
HOLDING: Post conviction court should have set aside Defendant's guilty plea where he maintained his innocence at both the guilty plea and sentencing hearings. Defendant and his cousin Shawn Alexander were charged with two counts of attempted murder and two counts of attempted robbery resulting in serious bodily injury, where the State alleged they forced Jerry Atwood and Jason Kleinrichert into an abandoned building, took a pocketknife from Kleinrichert's pocket, and slashed Atwood's and Kleinrichert's throats. The State's theory was that Defendant acted as an accomplice, not the principal, at least with regard to the throat slashings. While Defendant later pled guilty to all four counts, he also maintained his innocence, saying, "I didn't do nothing, you know, sir. I was involved to the point that I did hit somebody, but I didn't cut nobody. I did not rob nobody, sir." And when specifically asked about his knowledge of and participation in Alexander's attacks on the victims, Defendant claimed, "I did tell him don't do it, sir, you know." Later at sentencing, Defendant again expressed his innocence and indicated he wished to withdraw his plea, but after an extended colloquy, he decided to not withdraw his guilty plea. The trial court sentenced him to 100 years with 60 years suspended.

"Accept[ing] 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). A guilty plea requires an unqualified admission of guilt. Patton v. State, 517 N.E.2d 374, 376 (Ind. 1987). Here, Defendant's statements constitute a denial of culpability that cannot be ignored, even though he pled guilty. See Norris v. State, 896 N.E.2d 1149, 1154 (Ind. 2008) (Boehm, J., concurring in result). Thus, Defendant never made a reliable admission of guilt. Carter v. State, 739 N.E.2d 126, 130 (Ind. 2000). Held, *trans.* granted and judgment reversed.

TITLE: Gibson v. State
INDEX NO.: C.2.b.2.
CITE: (3/26/86), Ind., 490 N.E.2d 297
SUBJECT: Guilty plea - factual basis; lack of memory
HOLDING: Ct. rejects D's contention that his inability to remember details re burglary constitutes an insufficient factual basis for his guilty plea. D failed to protest his innocence; therefore, factual basis existed. See Ross 456 N.E.2d 420 (Tr. Ct. cannot accept guilty plea where D cannot plead guilty & maintain innocence at same time). Evidence other than D's sworn testimony can serve as adequate basis for accepting guilty plea. Sims, App., 422 N.E.2d 436; Comstock, App., 8422 N.E.2d 395. See Owens, 426 N.E.2d 372. Here, D's admissions of guilt, his agreement with prosecutor's version of facts & uncontroverted testimony from co-D's trial showing D's involvement constitute sufficient factual basis. Held, no error.

TITLE: Hooker v. State

INDEX NO.: C.2.b.2

CITE: (3/21/2019), 120 N.E.3d 639 (Ind. Ct. App. 2019)

SUBJECT: D did not protest innocence when pleading guilty - "breaking" element of burglary satisfied

HOLDING: D did not simultaneously maintain his innocence and plead guilty when he testified at guilty plea hearing that the door to the residence was open but he had to "squeeze" to get through the door. D also made some conflicting statements about whether he was guilty, but eventually told the judge he wanted to plead guilty and the judge accepted his plea. D sought post-conviction relief, arguing that the Tr. Ct. erred in accepting an unreliable guilty plea.

Court of Appeals held that although walking through an open door would not satisfy the "breaking" element of a burglary conviction, "squeezing" through the door would count as "breaking."

Court found D's testimony sufficient to qualify the breaking element of burglary. Court also noted that D had agreed to a factual basis that included the element of breaking and told the judge he wanted to plead guilty. Held, denial of petition for post-conviction relief affirmed. Bailey, J., dissenting, believes the guilty plea was unreliable as a matter of law and that it was the Tr. Ct.'s responsibility to determine exactly what D meant by "squeezing" and whether it involved any force that would satisfy the breaking element.

TITLE: Johnson v. State
INDEX NO.: C.2.b.2.
CITE: (01-24-12), 960 N.E.2d 844 (Ind. Ct. App. 2012)
SUBJECT: Improper guilty plea - protestation of innocence
HOLDING: Tr. Ct. erred in accepting D's guilty plea to Class A felony child molesting, where he pled guilty and maintained his innocence at the same time. When State asked D during his guilty plea hearing if he admitted to touching the child's vagina with his mouth or tongue, which elevated the offense from a Class C to a Class A felony, he said, "[N]o I don't plead guilty to that, no. I touched her with my hand." Then, when State followed up by asking D if he understood that by pleading guilty he was admitting that the child said that his tongue contacted her vagina, he said, "Yes, but I didn't do that, no." While D stated that if the child was called to testify, she would say that his tongue contacted her vagina, he did not admit to doing so and specifically denied this act. Based on these exchanges, D has consistently maintained his innocence to Class A felony child molesting.

D's acknowledgment that the victim would testify at trial that his tongue touched her vagina, which would otherwise satisfy factual basis requirement, does not negate his protestations of innocence to the Class A felony. Moreover, no separate showing of prejudice is required for protestation-of-innocence claims because to accept a plea of guilty when the D both pleads guilty and maintains his innocence at the same time constitutes reversible error. Ross v. State, 456 N.E.2d 420 (Ind. 1983). Prejudice is inherent in protestation-of-innocence claims. Held, judgment reversed and remanded.

RELATED CASES: Ellis, 67 N.E.3d 643 (Ind. 2017) (Post conviction court should have set aside D's guilty plea where he maintained his innocence at both the guilty plea and sentencing hearings).

TITLE: Stewart v. State
INDEX NO.: C.2.b.2.
CITE: (1/28/88), Ind. App., 517 N.E.2d 1230
SUBJECT: Guilty plea -- denial of guilt; how to avoid court's rejection of plea
HOLDING: If D cannot recall events or elements of offense not satisfied in factual basis during guilty plea hearing, finding of protestation of innocence/rejection of plea may be avoided if factual basis may be established by having D admit to facts recited by prosecutor or police officer, or where D indicates he understands nature of crime charged and his guilty plea constitutes admission of charge. Here, deputy prosecutor summarized evidence against D; Court then asked D if he wanted to question State's evidence, and whether he had heard evidence. D stated that he did not want to question it and that it was accurate. Thus, record supported Court's finding that factual basis existed for D's guilty plea. Held, conviction affirmed and petition for post-conviction relief affirmed.

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

TITLE: Williams-Bey v. State
INDEX NO.: C.2.b.2.
CITE: (3/28/2016), 51 N.E.3d 1261 (Ind. Ct. App. 2016)
SUBJECT: D's protestation of innocence as to Class B-level enhancement for escape
HOLDING: Post-conviction court clearly erred when it found that D's statements denying culpability for Class B-level enhancement for escape with which he was charged failed to amount to a protestation of innocence. In being examined as to the accuracy of the factual basis during change-of-plea hearing, D stated he was aware that an officer was harmed in the process of arresting him after he fled from custody, but acknowledged that it occurred only in the process of the arrest, suggesting that it was not intended. Whether it is required that a D had the intent to cause the injury in order to support the "inflicting injury" enhancement remains unsettled. Cf. Moore v. State, 49 N.E.3d 1095(Ind. Ct. App 2016) and Smith v. State, 21 N.E.3d 121 (Ind. Ct. App. 2014) with Whaley v. State, 843 N.E.2d 1 (Ind. Ct. App. 2006).

Regardless, D's statements during the change-of-plea hearing were intended to deny culpability for the enhancement, not merely to clarify his legal position. Therefore, the Tr. Ct.'s order denying post-conviction relief was reversed. Held, denial of post-conviction relief reversed and remanded to vacate guilty plea in its entirety.

TITLE: Wingham v. State
INDEX NO.: C.2.b.2.
CITE: (12-31-02), Ind. App., 780 N.E.2d 1164
SUBJECT: Improper guilty plea - denial of guilt
HOLDING: D's guilty plea to operating while intoxicated was erroneously accepted because D maintained innocence. Judge may not accept guilty plea when D both pleads guilty & maintains innocence at same time. Ross v. State, 456 N.E.2d 420 (Ind. 1983). Here, D was arrested after his car rear-ended another car which had rear-ended car in front of it. At guilty plea hearing, D stated that he was not intoxicated, to which Ct. responded, "do you understand that one of elements of this crime is that you were intoxicated at time you were driving vehicle & if you plead guilty today, you admit that you were intoxicated?" D responded, "yes." Ct. did nothing further to establish D's guilt. Court's question concerning effect of guilty plea as admission, & D's response that he understood, were not sufficient to retract or overcome his denial that he was in fact intoxicated. Thus, Tr. Ct. erred by accepting tendered guilty plea in face of D's unambiguous denial that he was intoxicated. Held, denial of post-conviction relief reversed & remanded.

RELATED CASES: Ellis, 67 N.E.3d 643 (Ind. 2017) (Post conviction court should have set aside D's guilty plea where he maintained his innocence at both the guilty plea and sentencing hearings); Huddleston, 951 N.E.2d 277 (Ind. Ct. App. 2011) (guilty plea to murder as accomplice invalid where D said that when he handed knife to his accomplice, he did not know or intend that accomplice would murder the victim).

C. PLEAS

C.2. Guilty plea

C.2.c. Voluntariness (IC 35-35-1-3)

TITLE: Alhusainy v. Superior Court
INDEX NO.: C.2.c.
CITE: 143 Cal. App. 4th 385; 48 Cal. Rptr. 3d 914 (Cal. App. 2006)
SUBJECT: Guilty plea void due to condition banishing D from state
HOLDING: The California Court of Appeals issued a writ of mandate directing the Tr. Ct. to vacate its order denying the withdrawal of a plea agreement to charges of making a criminal threat and felony child abuse that included a term that sentencing would be postponed as long as Petitioner stayed outside of California. One of the conditions of Petitioner's plea bargain was that sentencing would be postponed and that Petitioner would be released on his own recognizance on condition he leave and remain outside of California. The Tr. Ct. gave Petitioner the option to appear for sentencing but made it clear he could avoid imposition of sentence if he did not and a bench warrant would only be issued for within California. The guilty plea occurred in 2002 and sentencing was continued from year to year through 2005, until Petitioner returned to California and was arrested in 2006. Court found that withdrawal of the guilty plea was warranted because the condition requiring petitioner to leave the state was constitutionally improper, and the plea required him to commit another felony, specifically to flee the jurisdiction to avoid sentencing. However, Court agreed with the Tr. Ct. that the motion to disqualify the trial judge from further proceedings was untimely but nevertheless directed, under the California Code of Civil Procedure, that further proceedings be heard before another trial judge, if Petitioner so requested. The Court reasoned in part that the Tr. Ct. had participated in facilitating the void plea and the commission of a new crime and that there was a question as to whether the judge's indicated sentence of four years demonstrated an animus toward Petitioner inconsistent with judicial objectivity.

TITLE: Bautista v. State
INDEX NO.: C.2.c.
CITE: 163 N.E.3d 892 (Ind. Ct. App. 2021) 01/29/2021
SUBJECT: Involuntary guilty plea - inadequate translation for Spanish-speaking defendant
HOLDING: Defendant's guilty plea to child molesting was not knowingly, intelligently, and voluntarily entered because the Spanish translation he received at his guilty plea hearing did not adequately advise him of one of the rights required by Boykin v. Alabama, 395 U.S. 238 (1969), namely, the right to confront the witnesses against him. Although interpreter's translation informed Defendant that he could ask questions, it failed to specify to whom Defendant may ask questions. The translation failed to make any mention of the witnesses against him or use other words that would convey a similar meaning. Thus, it did not effectively communicate that Defendant had the right to confront or cross-examine the witnesses against him. The defendant does not bear the burden to establish that he did not know he was waiving his Boykin rights; rather, a defendant who demonstrates that the trial court failed to properly give a Boykin advisement during the guilty plea hearing has met his threshold burden for obtaining post-conviction relief. Ponce v. State, 9 N.E.3d 1265, (Ind. 2014).

Here, Defendant carried his initial burden of demonstrating that he failed to receive an adequate advisement at the guilty plea hearing that he had the right to confront and cross-examine the witnesses against him, and the State failed to show that the record as a whole nonetheless demonstrated that Defendant understood this right and that he was waiving it by pleading guilty. Held, denial of post-conviction relief reversed and remanded with instructions to vacate guilty plea.

C. PLEAS

C.2. Guilty plea

C.2.c.1. In general

TITLE: Anderson v. State
INDEX NO.: C.2.c.1.
CITE: (10/8/75), Ind., 335 N.E.2d 225
SUBJECT: Guilty plea -- voluntariness; insufficient record
HOLDING: Tr. Ct. is required to determine presence of knowledge and voluntariness before guilty plea is accepted or refused by Court. Nicholas, 300 N.E.2d 656. While it is desirable that trial judge personally advise D of his rights as enumerated in Boykin, 395 U.S. 238, this is not hard and fast rule. Rather, record may otherwise affirmatively show that D who enters guilty plea does so knowingly and voluntarily. Williams, 325 N.E.2d 827. Although record showed that trial judge, while presiding over D's trial, conducted plea bargaining negotiations, record did not disclose all circumstances surrounding guilty plea. On contrary, D's petition to enter plea of guilty was self- contradictory. Record was so lacking as to require reversal so that sound record affirmatively demonstrating voluntariness could be made. Held, judgment reversed, and new trial ordered.

TITLE: Beldon v. State
INDEX NO.: C.2.c.1.
CITE: (3rd Dist., 11-21-95), Ind. App., 657 N.E.2d 1241
SUBJECT: Guilty plea involuntary - waiver of juvenile's rights
HOLDING: Juvenile D's guilty plea to operating vehicle with .10% BAC or greater was not made knowingly, voluntarily, or intelligently, where juvenile unilaterally waived his own rights in contravention of Ind. Code 31-6-7-3 (now Ind. Code 31-32-5-1). Statute permits waiver of juvenile's rights by either juvenile's counsel or his parent or guardian, but it does not authorize minor to waive his own rights. Deckard v. State, (1981), Ind. App., 425 N.E.2d 256. Here, 16-year-old D appeared, without counsel, for initial hearing wherein he received en masse advisement of his fundamental rights & Waiver of Rights form. D thereafter indicated to Tr. Ct. his desire to plead guilty, signed waiver form, & Tr. Ct. accepted his plea. Record was devoid of any evidence indicating that D's parent or guardian waived D's rights on his behalf. Because waiver was improperly executed, D's guilty plea was fundamentally defective. Ct. rejected D's claim of involuntariness as to subsequent, unrelated guilty plea to operating while intoxicated. Held, affirmed in part, reversed in part, & remanded.

RELATED CASES: D.E.,962 N.E.2d 94 (Ind. Ct. App. 2011) (no error in accepting D.E.'s plea agreement without a parent having signed it when the child was represented by counsel and counsel signed the plea agreement along with the child; Ct. rejected argument that D.E.'s parents' rights were thwarted by the statute, which allowed appointed counsel to waive D.E.'s right to a fact-finding adjudication).

TITLE: Dillehay v. State
INDEX NO: C.2.c.1.
CITE: (2nd Dist., 10-31-96), Ind. App., 672 N.E.2d 956
SUBJECT: Guilty plea - voluntariness; effect of incorrect advisement
HOLDING: Reviewing Ct. must consider all facts & circumstances, including misadvise, to determine whether D voluntarily & intelligently pled guilty. Lockhart v. State, 274 N.E.2d 523 (1971); Likens v. State, 378 N.E.2d 24 (1978). Here, defense counsel's incorrect advice concerning potential sentences did not render guilty plea invalid, nor did misadvise render plea bargain illusory. D was charged with multiple offenses stemming from at least three separate drug transactions. Counsel erroneously advised D that sentences for two offenses must be consecutive, & miscalculated maximum sentence at 179 years when actual total was 152 years. Ct. rejected D's retrospective belief that she would have gone to trial & risked maximum sentence had she known minimum was 20 rather than 40 years. Plea agreement offered D substantial reduction from maximum sentence & avoided multiple felony convictions. Although consecutive sentences were not mandatory, Tr. Ct. had discretion to impose sentence consecutively. Further, D understood that charge to which she was pleading guilty carried minimum 20-year sentence. Therefore, sentencing misinformation did not render D's guilty plea involuntary & unintelligent. Held, denial of post-conviction relief affirmed; Sullivan, J., concurring.

RELATED CASES: Clarke, 974 N.E.2d 562 (Ind. Ct. App. 2012) (even assuming D has established special circumstances with respect to his unborn children, considering the strength of the State's case against him and the significant benefit conferred upon him under the plea agreement, Ct. concluded that the knowledge of the risk of deportation would not have affected a reasonable D's decision to plead guilty); Suarez, 967 N.E.2d 552 (Ind. Ct. App. 2012) (knowledge of potential deportation from guilty plea would not have affected a reasonable D's decision to plead guilty because State had a strong case against D and plea agreement gave substantial benefit to him); Springer, 952 N.E.2d 799 (Ind. Ct. App. 2011) (attorney's incorrect advice that D was facing a maximum sentence of 141 years when he really was facing only 111 years likely affected D's decision to plead; convictions vacated); Hacker, App., 906 N.E.2d 924 (given strength of State's case against him and substantial benefit D received from plea agreement, D failed to meet his burden that trial counsel's misadvise about maximum sentence he faced "materially affected" his decision to plead guilty); Harris, App., 762 N.E.2d 163 (guilty plea was made knowingly & voluntarily despite D's claim that he would not have entered his guilty plea had he known that he would be placed on parole upon his release from prison).

TITLE: Edmonson v. State
INDEX NO.: C.2.c.1.
CITE: (11/9/2017), 87 N.E.3d 534 (Ind. Ct. App. 2017)
SUBJECT: Laches finding improper; PCR claim denied on the merits
HOLDING: Post-conviction court erred by finding that laches bar Defendant's petition, but denial of PCR was still proper because Defendant's petition lacks merit. In 1993, Defendant pled guilty to two B misdemeanors, public intoxication and criminal mischief. While on probation, he was convicted of murder. In imposing a 60-year sentence, the trial court cited Defendant's two misdemeanor convictions as aggravating factors. In 1996, the Indiana Supreme Court ruled that this was proper. Defendant did not file a PCR petition to challenge the misdemeanor convictions until 2016. He claimed he was entitled to relief because the trial court that accepted his guilty pleas failed to advise him that his misdemeanor convictions could be used as aggravating factors for a future conviction and sentence.

The trial court erred in ruling that laches barred Defendant's PCR petition. While the trial court properly concluded Defendant's 23-year delay in filing the petition was unreasonable – McCollum v. State, 671 N.E.2d 168, 170 (Ind. Ct. App. 1997), *trans. denied* - the State failed to show that the delay would prejudice its efforts to retry Defendant if he prevailed on collateral review. The State offered no evidence to support its claim about prejudice. See Lacy v. State, 491 N.E.2d 520, 521-22 (Ind. 1986).

Nonetheless, Defendant's PCR claim has no merit. Indiana does not require a court to inform a defendant of possible collateral consequences, such as the possibility of habitual offender status or that his convictions could be used to increase future sentences. See Owens v. State, 437 N.E.2d 501, 504 (Ind. Ct. App. 1982); Williams v. State, 641 N.E.2d 44, 46 (Ind. Ct. App. 1994). Held, judgment affirmed.

TITLE: Gosnell v. State
INDEX NO.: C.2.c.1.
CITE: (9/29/82), Ind., 439 N.E.2d 1153
SUBJECT: Guilty plea - voluntariness; erroneous advice of counsel
HOLDING: Defense counsel's advice that upon plea of guilty D would be eligible for parole sooner for life sentence for second degree murder than for life sentence for first degree murder did not invalidate guilty plea or amount to ineffective assistance of counsel. D did not testify at PCR hearing that he pled guilty because of his understanding about parole. Trial counsel testified that D freely confessed, wanted to plead guilty & would have done so without regard to extent of parole rights. Ct. comments representations by counsel occurred prior to his plea & cannot be truly reflective of [D's] understanding at the time of his plea." Evidence does not lead unerringly to result that plea should be vitiated. Held, no error in denial of PCR.

RELATED CASES: Black, 54 N.E.3d 414 (D failed to show counsel gave bad advice about potential sentence and that such advice rendered his plea involuntary; even if counsel had given inaccurate information, D failed to show that the advice affected his decision to plead guilty).

TITLE: Mescher v. State
INDEX NO.: C.2.c.1.
CITE: 3rd Dist., 10-20-97), Ind. App., 686 N.E.2d 413
SUBJECT: Guilty plea - voluntariness; videotaped advisement
HOLDING: D, who was shown videotape advisement of rights & later claimed he understood those rights, knowingly & voluntarily entered into plea agreement & waived right to counsel. Tr. Ct. must determine for itself without surmising D has been informed of each right he is about to waive & must preserve colloquy on record. In addition, Tr. Ct. must establish that D who has chosen to waive his right to counsel is aware of nature, extent & importance of right & consequences of waiving it; merely informing D of his constitutional rights is insufficient. Sedberry, App., 610 N.E.2d 284. Here, videotape advised D of his presumption of innocence, right to confrontation, right to trial by jury, privilege against self-incrimination, right to counsel & right to proceed without counsel. In addition, videotape stated that counsel would be provided for him at no cost, & that if he intended to retain counsel, he must do so within ten days. Finally, videotape advised D that by pleading guilty, he would waive those rights. Because at hearing D claimed he understood rights discussed on video & proceeded to plead guilty, he did so voluntarily. Held, conviction affirmed.

RELATED CASES: Barker, App., 812 N.E.2d 158 (record revealed that Tr. Ct. asked all Ds if they heard & understood their rights, to which they responded "yes." Trial judge also addressed D individually, discussing the specifics of D's plea agreement).

TITLE: State v. Sanders
INDEX NO.: C.2.c.1.
CITE: (07/20/92), Ind., 596 N.E.2d 225
SUBJECT: Voluntariness of guilty plea
HOLDING: Post-conviction Relief (PCR) Ct. erred in setting aside D's guilty plea on the ground it was not knowing or voluntary, because petitioner's verified petition alone is not sufficient to support such action, granting transfer and vacating Ct. App. decision at 587 N.E.2d 166. D pled guilty to involuntary manslaughter (IM), but was never formally charged with IM, instead pleading guilty to it as lesser-included offense of murder. Verified petition was admitted into evidence at PCR hearing, with understanding that it was not being admitted for the truth of matters stated therein. Ct. App. affirmed PCR Ct.'s relief, finding that PCR Ct.'s judgment could rest on verified petition alone, relying on State v. Keith (1985), Ind. App., 482 N.E.2d 751. S. Ct. found reliance on Keith, misplaced, as it did not permit Ct. to rely on D's petition as evidence of facts alleged. Ct. further found petition should be denied because absent D's verified petition, there was insufficient evidence to support PCR Ct.'s finding that plea was not knowing, voluntary and intelligent.

RELATED CASES: Hendrickson, App., 660 N.E.2d 1068 (D's guilty plea to operating moped as HTO was made knowingly, intelligently, & voluntarily).

C. PLEAS

C.2. Guilty plea

C.2.c.2. Inducements/threats

TITLE: Brown v. State
INDEX NO.: C.2.c.2.
CITE: (9/21/83), Ind., 453 N.E.2d 254
SUBJECT: Guilty plea - voluntariness; inducements (threat of habitual/death penalty)
HOLDING: State's use of threat to proceed with habitual charges against D was a "justifiable exploitation of legitimate bargaining leverage" to induce D to accept plea agreement; thus, Tr. Ct. did not err in denying D's PCR petition alleging plea was involuntarily made. Bordenkircher v. Hayes, (1978) 434 U.S. 357, 98 S. Ct. 663, 54 L.Ed.2d 604; Norris, 394 N.E.2d 144; McMahan, 382 N.E.2d 154; Howard, 377 N.E.2d 628; Davis, App., 418 N.E.2d 256. Here, D was originally charged with 4 counts of burglary & 1 count each of rape & criminal deviate conduct. D rejected state's offer to recommend concurrent terms of 8 years. State then filed 2 habitual counts. D pled guilty as charged & accepted 6 concurrent terms of 15 years in exchange for dismissal of the 2 habitual counts. Only if a threatened habitual charge lacks probable cause would it void guilty plea. Holmes, 398 N.E.2d 1279; Davis. Probable cause supported 2 habituals in this case. Held, *denial* of PCR affirmed.

RELATED CASES: Groves, App., 787 N.E.2d 401 (Ct. rejected D's argument that his guilty plea was made under coercive pressure of threat of capital punishment & had no legitimate basis); Murphy, 477 N.E.2d 266 (plea not involuntary due to threat of habitual); Champion 478 N.E.2d 681 (prosecutor's threat of charging accomplice with death penalty was legitimate; state must possess power to carry out threat at moment plea is entered, *citing* Gibson 456 N.E.2d 1006 & Nash, App., 429 N.E.2d 666) notwithstanding later change in law, referring to Enmund v. FL, a U.S. S. Ct. case concerning accomplice liability & applicability of the death penalty).

TITLE: Daniels v. State
INDEX NO.: C.2.c.2.
CITE: (12/29/88), Ind., 531 N.E.2d 1173
SUBJECT: Guilty plea -- voluntariness; threats
HOLDING: Bargained plea, motivated by improper threat, is to be deemed illusory and denial of substantive rights. At moment plea is entered, State must possess power to carry out any threat which was factor in obtaining plea agreement which was accepted; lack of that real power is what makes threat illusory and causes representation to take on characteristics of trick. Champion, 478 N.E.2d 681. Here, D claimed that his guilty plea was induced by threats of death penalty and that he received no benefits in exchange for his guilty plea. D also claims that he would have been eligible for clemency or parole at same time whether he was convicted of murder in first degree or murder in second degree. However, while it may be that eligibility for clemency or parole would occur at same time in both first and second degree murder, one convicted of second degree murder would be more likely to receive clemency or become paroled than would one convicted of murder in first degree. Thus, plea agreement did provide D benefit of increased possibility of earlier clemency or parole. Held, *denial* of post-conviction relief affirmed.

TITLE: Jeffries v. State
INDEX NO.: C.2.c.2.
CITE: (2nd Dist., 3-26-01), Ind. App., 744 N.E.2d 1056
SUBJECT: Voluntariness of guilty plea - unfulfilled or unfulfillable promise
HOLDING: Terms of plea agreement, once accepted by Tr. Ct., are binding upon Ct. only insofar as such terms are within power of Tr. Ct. to order. Griffin v. State, 461 N.E.2d 1123 (Ind. 1984). Here, D's plea agreement included provision that State would recommend two-year executed sentence for separate probation violation in another Ct. D ultimately received three-year aggregate sentence for probation violation, which he claimed constituted breach of plea agreement. Ct. held that D would not be entitled to specific performance of plea agreement term calling for two-year sentence for probation violation, as that term was beyond Tr. Ct.'s power to honor. However, Tr. Ct. made promise to D that if he were not sentenced to two years on probation violations in other Ct., it would set aside plea. Thus, Ct. remanded to post-conviction Ct. to determine whether D was induced to plead guilty by Tr. Ct.'s unfulfilled promise & whether D's guilty plea should be set aside for lack of voluntariness. Held, reversed & remanded.

RELATED CASES: Cornelious, App., 846 N.E.2d 354 (D's guilty plea was involuntary based on misrepresenation at guilty plea hearing that he could directly appeal a speedy trial issue despite his plea); Lineberry, App., 747 N.E.2d 1151(Tr. Ct. erred by not allowing D to withdraw his guilty plea, which was involuntary because it was improperly induced by promise that he could appeal denial of his motion to suppress; see full review at C.2.d.2)).

TITLE: Murphy v. State
INDEX NO.: C.2.c.2.
CITE: (5/1/85), Ind., 477 N.E.2d 266
SUBJECT: Guilty plea -- voluntariness; threat of habitual offender filing
HOLDING: Possibility of filing habitual offender charge, when supported by probable cause, is legitimate bargaining tool by which State may induce guilty pleas. Brown, 453 N.E.2d 254. Here, Court rejected D's claim that guilty plea was not voluntary because State "threatened" him with possibility of habitual offender. Held, denial of petition for post-conviction relief affirmed.

TITLE: Neville v. State
INDEX NO.: C.2.c.2.
CITE: (10/8/82), Ind., 439 N.E.2d 1358
SUBJECT: Guilty plea - voluntariness; inducements (reduced sentence)
HOLDING: "A guilty plea, if induced by promises . . . which deprive it of the character of a voluntary act, is void." Machibroda v. US, (1962) 368 U.S. 487, 82 S. Ct. 510, 7 L.Ed.2d 473. Frustration of expectation of lesser penalty, without more, will not affect validity of plea. Dube, 275 N.E.2d 7. Here, D alleged in PCR that prosecutor promised D would receive lesser sentence than that received by accomplice if he pled guilty. D pled guilty & received same sentence as accomplice. At both guilty plea & PCR hearings, D said no promise had been made to him in exchange for his plea. Ct. finds D failed to carry burden of proving guilty plea was induced by promise regarding sentence. Held, denial PCR affirmed.

TITLE: Reeves v. State
INDEX NO.: C.2.c.2.
CITE: (1/7/91), Ind. App., 564 N.E.2d 550
SUBJECT: Guilty plea -- voluntariness; punishment in excess of law
HOLDING: State may lawfully threaten D with habitual offender charge to induce him to accept plea bargain. However, in order to make lawful threat of habitual filing, State must have legitimate basis for such charge. Nash, App., 429 N.E.2d 666. If bargained plea is motivated by threat of punishment in excess of that authorized by law, agreement is illusory and constitutes denial of substantive rights. Lack of real power makes threat illusory and causes representation to take on characteristics of trick. Daniels, 531 N.E.2d 1173. Threat by prosecutor to do what law will not permit, if it motivates D who is ignorant of impossibility, renders plea involuntary, and that in effect, D is deceived into making plea, and deception prevents his act from being true act of volition. Where counsel is ineffective, plea is not voluntary because it is not made with knowledge of factors pertinent to proper determination to plead guilty or not. Hammond, 528 F.2d 15. Here, D asserted that his attorney was ineffective because he advised D that he would face habitual charge for which he was not eligible, if he refused to accept plea bargain and that if he was charged as habitual offender, he could get sentences totaling sixty years, when in reality, presumptive habitual offender enhancement is thirty years. D's plea was involuntary, due to ineffective assistance of counsel. Held, denial of D's petition for post-conviction relief reversed.

RELATED CASES: Roberts, 953 N.E.2d 559 (Ind. Ct. App. 2011) (D knew that he was not an habitual offender, thus State's threat to amend charges to include HO allegation was not his motivation for pleading guilty; D cannot establish prejudice due to trial counsel's deficient performance); Marshall, App., 590 N.E.2d 627 (illusory threat of multiple convictions was not per se basis for relief from guilty plea, but rather illusory threat must be motivating factor for plea; D failed to meet his burden of proving pleas were induced by improper threat).

TITLE: Powell v. State
INDEX NO.: C.2.c.2.
CITE: (3d Dist. 5/23/84), Ind. App., 463 N.E.2d 529
SUBJECT: Guilty plea - voluntariness; inducements (less favorable offers)
HOLDING: Fact that prosecutor offered D second less favorable plea bargain after first morning of trial did not render D's acceptance involuntary. Here, D was charged with theft. Prosecutor offered D 8 years (possible 10 + 10 or - 4). D rejected offer. Second offer was 9 years. D accepted offer. D contends tactic of increasing penalty after rejection constitutes coercion. Ct. finds process is within legitimate gambit of prosecutor's discretion in utilizing bargaining process. Goals served by process include: savings of time/expense (Ct./prosecutor/jurors/witnesses). Early disposition by plea & attendant savings are diminished as preparation & trial proceed. Held, no error in denial of PCR petition.

RELATED CASES: Rose, App., 488 N.E.2d 1141 (prosecutor properly threatened to reduce offer of 6 years with 3 years suspended to 6 years with 2 years suspended if D took officer's deposition, *citing* Powell; Miller CONCURS, finding "some merit" to D's position that prosecutor should not be permitted to condition more advantageous plea bargain offer on counsel's agreement to forego investigation of state's case & noting tactic does not promote search for truth; however, D did not plead guilty in this case, so he was not prejudiced by offer).

C. PLEAS

C.2. Guilty plea

C.2.c.3. Mental condition at time of plea

TITLE: Bautista v. State
INDEX NO.: C.2.c.3.
CITE: (01/29/21), Ind. Ct. App., 163 N.E.3d 892
SUBJECT: Involuntary guilty plea - inadequate translation for Spanish-speaking defendant
HOLDING: Defendant's guilty plea to child molesting was not knowingly, intelligently, and voluntarily entered because the Spanish translation he received at his guilty plea hearing did not adequately advise him of one of the rights required by Boykin v. Alabama, 395 U.S. 238 (1969), namely, the right to confront the witnesses against him. Although interpreter's translation informed Defendant that he could ask questions, it failed to specify to whom Defendant may ask questions. The translation failed to make any mention of the witnesses against him or use other words that would convey a similar meaning. Thus, it did not effectively communicate that Defendant had the right to confront or cross-examine the witnesses against him. The defendant does not bear the burden to establish that he did not know he was waiving his Boykin rights; rather, a defendant who demonstrates that the trial court failed to properly give a Boykin advisement during the guilty plea hearing has met his threshold burden for obtaining post-conviction relief. Ponce v. State, 9 N.E.3d 1265, (Ind. 2014).

Here, Defendant carried his initial burden of demonstrating that he failed to receive an adequate advisement at the guilty plea hearing that he had the right to confront and cross-examine the witnesses against him, and the State failed to show that the record as a whole nonetheless demonstrated that Defendant understood this right and that he was waiving it by pleading guilty. Held, denial of post-conviction relief reversed and remanded with instructions to vacate guilty plea.

TITLE: Starks v. State
INDEX NO.: C.2.c.3.
CITE: (12/16/85), Ind., 486 N.E.2d 491
SUBJECT: Guilty plea - competency
HOLDING: Tr. Ct. employed proper standard in determining D was competent to plead guilty. Here, Tr. Ct. appointed 2 psychiatrists to evaluate D's present competency & competency on date D pled guilty. Psychiatrists testified D was competent & Tr. Ct. entered finding that D was capable of assisting in defense & making rational decisions. Ct. rejects D's contention that Tr. Ct. employed standard re competency to stand trial (IC 35-36-3-1). Tr. Ct. also cited Adcock, 436 N.E.2d 799 (consideration of factors relevant to competency to plead guilty). Tr. Ct. findings related to D's history of mental illness, lower learning capacity & inability to make good judgments. Held, no error in denial of PCR petition.

C. PLEAS

C.2. Guilty plea

C.2.d. Withdrawal of plea (IC 35-35-1-4)

TITLE: Alhusainy v. Superior Court
INDEX NO.: C.2.d.
CITE: 143 Cal. App. 4th 385; 48 Cal. Rptr. 3d 914 (Cal. App. 2006)
SUBJECT: Guilty plea void due to condition banishing D from state
HOLDING: The California Court of Appeals issued a writ of mandate directing the Tr. Ct. to vacate its order denying the withdrawal of a plea agreement to charges of making a criminal threat and felony child abuse that included a term that sentencing would be postponed as long as Petitioner stayed outside of California. One of the conditions of Petitioner's plea bargain was that sentencing would be postponed and that Petitioner would be released on his own recognizance on condition he leave and remain outside of California. The Tr. Ct. gave Petitioner the option to appear for sentencing but made it clear he could avoid imposition of sentence if he did not and a bench warrant would only be issued for within California. The guilty plea occurred in 2002 and sentencing was continued from year to year through 2005, until Petitioner returned to California and was arrested in 2006. Court found that withdrawal of the guilty plea was warranted because the condition requiring petitioner to leave the state was constitutionally improper, and the plea required him to commit another felony, specifically to flee the jurisdiction to avoid sentencing. However, Court agreed with the Tr. Ct. that the motion to disqualify the trial judge from further proceedings was untimely but nevertheless directed, under the California Code of Civil Procedure, that further proceedings be heard before another trial judge, if Petitioner so requested. The Court reasoned in part that the Tr. Ct. had participated in facilitating the void plea and the commission of a new crime and that there was a question as to whether the judge's indicated sentence of four years demonstrated an animus toward Petitioner inconsistent with judicial objectivity.

TITLE: Badger v. State
INDEX NO.: C.2.d.
CITE: (6/29/94), Ind., 637 N.E.2d 800
SUBJECT: Withdrawal of plea -- Tr. Ct.'s discretion to enforce
HOLDING: Although Tr. Ct. has discretion to grant prosecution's Motion to Withdraw Recommendation of Plea Agreement, Ct's. must enforce agreements between prosecutor & D, even if those agreements are oral & therefore outside statutory framework, either if State has materially benefitted from terms of agreement or if D has relied on terms of agreement to his substantial detriment. Here, D was convicted of burglary, conspiracy, & robbery. After hearing evidence & argument at hearing on prosecutor's Motion to Withdraw Plea Agreement, trial judge specifically found that D would not be prejudiced by withdrawal of agreement & that D had not detrimentally relied on agreement. Thus, Tr. Ct. did not abuse discretion & properly granted prosecutor's motion. Held, conviction affirmed.

TITLE: Kinman v. State

INDEX NO.: C.2.d.

CITE: (05/27/20), Ind. Ct. App., 149 N.E.3d 619

SUBJECT: Denial of motion to withdraw plea agreement containing "poorly worded" language affirmed

HOLDING: Language in plea agreement to habitual offender should state the highest felony sentence will be "enhanced" using the wording of the statute and not consecutive. Nonetheless, Court affirmed trial court's denial of Defendant's motion to withdraw his plea agreement which he filed both before and after sentencing, finding he had entered the plea knowingly and voluntarily.

TITLE: Tyree v. State
INDEX NO.: C.2.d.
CITE: (2d Dist. 2/1/88), Ind. App., 518 N.E.2d 814
SUBJECT: Impeachment - use of D's testimony at guilty plea hearing
HOLDING: Statement made by D to establish factual basis at guilty plea hearing are not admissible at trial if plea is withdrawn or rejected. Here, D was allowed to withdraw plea before sentencing, & at trial, Tr. Ct. allowed state to use D's statements from guilty plea hearing for impeachment. Plea of guilty or guilty but mentally ill which is withdrawn or rejected is not admissible in any other proceedings. Ind. Code 35-35-1-4(d). Because factual basis is required for guilty plea, statements establishing factual basis are inseparable from plea. Ct. App. finds additional authority for this view in other jurisdictions. If statements from guilty plea hearing are admitted, jurors will recognize that D once pled guilty. People v. George, (Mich. App. 1976), 245 N.W.2d 65. Furthermore, when guilty plea is vacated, it is nullity, as is everything which transpired pursuant to plea. Id. MS & MO have rules similar to Ind. Code 35-35-1-4(d), & exclude statements from guilty plea hearing. Ind. Code 35-35-1-4(d) was adopted from ABA standards which have since been amended to include statements made in connection with plea. These changes are "clarifications" rather than additions. Finally, compelling of statements establishing factual basis is justified because plea constitutes waiver of 5th Amend. privilege. When plea becomes nullity, compelled statements should not be admissible. 2 LaFave & Israel, Criminal Procedure, §20.5, (1984). Admission of these statements at trial was fundamental error. Held, reversed & remanded.

RELATED CASES: Beeks, App., 721 N.E.2d 339 (as in Williams, App., 601 N.E.2d 347, Ct. rejected retroactive application of Tyree to D's case).

C. PLEAS

C.2. Guilty plea

C.2.d.1. Prior to sentencing

TITLE: Atchley v. State
INDEX NO.: C.2.d.1.
CITE: (10-26-93), 622 N.E.2d 502
SUBJECT: Withdrawal of guilty plea not required
HOLDING: Tr. Ct. did not err in denying D's motion to withdraw guilty plea, because his protestations of lack of memory applied only to certain details of crime, & he admitted to officers that he set fire causing death, & described in detail how it was done. He also expressed his regret for having caused deaths of 5 people. Following arrest, D gave statement to police, confessing to setting hotel fire.

After D entered plea to 5 counts of felony murder, he wrote letter to judge stating 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," & that he was not guilty of murder because he did not murder anyone. Ct. distinguished Harshman, 115 N.E.2d 501, & it's progeny because here D only had lack of memory as to some parts of offense, & there was evidence of his guilt.

RELATED CASES: Garcia, 193 N.E.3d 1046 (Ind. Ct. App. 2022) (because D did not provide any evidence in support of his claim of mental duress and Tr.Ct. had questioned him at guilty plea hearing and found him to be coherent, D did not meet his high hurdle to show that failure to grant motion to withdraw guilty plea would result in a manifest injustice); Gross, 22 N.E.3d 863 (Ind. Ct. App. 2014) (D did not overcome the presumption of validity accorded Tr. Ct.'s denial of his motion to withdraw his guilty pleas; D 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, 966 N.E.2d 773 (Ind. Ct. App. 2012) (no abuse of discretion in denying withdrawal of plea where one habitual charge was invalid, because other habitual charge was valid and potential sentence on that habitual count and other charges could have exceeded 40-year sentence D received by pleading guilty); Brightman, 758 N.E.2d 41 (although State had also sought to set aside D's guilty plea based upon an alleged breach of plea agreement, judicial estoppel did not bar State from opposing D's motion to withdraw his guilty plea); Beech, App.,702 N.E.2d 1132 (Tr. Ct. may, on its own motion, set aside guilty plea if D asserts his innocence after plea has been accepted but prior to sentencing); Gipperich, App., 658 N.E.2d 946 (Tr. Ct. properly determined that D's self-serving statements after guilty plea hearing were incredible & constituted attempt to manipulate system); Coomer, 652 N.E.2d 60 (Ct. rejected D's claim of involuntariness based on D's belief that defense counsel was unprepared for trial, & that prospect of going to trial with this lawyer had been so disquieting that D was effectively coerced into accepting State's plea bargain.)

TITLE: Campbell v. State
INDEX NO.: C.2.d.1.
CITE: (10/2/2014), 17 N.E.3d 1021 (Ind. Ct. App. 2014)
SUBJECT: Tr. Ct. has authority to rescind accepted plea agreement
HOLDING: Tr. Ct. did not abuse its discretion by permitting State to withdraw from plea agreement, even though it had already accepted the agreement and entered judgment of conviction. D pled to murder in exchange for dismissal of eight other counts, and as part of the deal he agreed to testify against his four co-Ds. Prior to his sentencing hearing, D refused to testify against a co-D and was found in direct criminal contempt. Tr. Ct. subsequently granted State's motion to withdraw from plea agreement.

Looking to contract law, Court found that the provision obligating D to testify in his co-Ds' trials would be rendered meaningless if he could unilaterally breach the plea agreement after acceptance by Tr. Ct. and still receive the same benefits as if he had fully performed. To hold otherwise would "undermine the integrity and credibility of the criminal justice system." Held, grant of State's motion to withdraw from plea agreement affirmed.

TITLE: Centers v. State
INDEX NO.: C.2.d.1.
CITE: (12/16/86), Ind., 501 N.E.2d 415
SUBJECT: Withdrawal of guilty plea before sentencing
HOLDING: Tr. Ct. did not abuse discretion by denying D's motion to withdraw guilty pleas prior to sentencing. Once accused enters plea of guilty, that plea cannot be withdrawn without leave of Ct. Peters v. Koepke, (1901), 156 Ind. 35. Ind. Code 35-35-1-4 provides that withdrawal of guilty plea must be allowed when necessary to correct manifest injustice. Here, D contends his pleas were not knowingly & voluntarily made, indicating manifest injustice. Ct. rejects D's assertions (plea not reduced to writing, misinformation re consecutive sentences & unavailability of crucial evidence until after entry of guilty plea), which D maintains indicate manifest injustice. Held, conviction affirmed.

RELATED CASES: Milian, 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 going pro se, Tr. Ct. allowed D to argue motion pro se with standby counsel); McGraw, 938 N.E.2d 1218 (Ind. Ct. App. 2010); Johnson, 734 N.E.2d 242 (refusal to set aside guilty plea prior to sentencing did not constitute manifest injustice); Bland, App., 708 N.E.2d 880 (D's oral motion to withdraw guilty plea did not comply with requirements of statute & D failed to establish by preponderance of evidence that denial of his motion would result in manifest injustice); Weatherford, 697 N.E.2d 32 (D's attempt to show that his sentencing agreement was involuntary & unknowing was insufficient to show that withdrawal of agreement was necessary to correct manifest injustice); Watson, 526 N.E.2d 701 (because plea of guilty entered due to threat of higher sentence does not render plea involuntary, no error in denying motion to withdraw guilty plea); Smith, App., 596 N.E.2d 257 (even though state conceded it would not be prejudiced by withdrawal of plea, & plea had not yet been accepted by Tr. Ct., it was not abuse of discretion to deny withdrawal of plea where D did not show factual basis was missing or that plea was not made freely & voluntarily); Smith, App., 593 N.E.2d 1208 (withdrawal of guilty plea motion must be in writing, & there is no equal protection argument for any difference between standard for withdrawal in capital cases versus others); Trueblood 587 N.E.2d 105 (withdrawal of guilty plea not required in all capital cases); Flowers, 528 N.E.2d 57; Patton, 517 N.E.2d 374 (finding withdrawal of guilty plea prior to sentencing mandatory in capital cases where D denies guilt at sentencing. For discussion, see card at C.2.b.1). But see Bewley, App. 572 N.E.2d 541 (finding Patton applies only to capital cases, & upholding Tr. Ct.'s refusal to allow withdrawal of plea at sentencing).

TITLE: Cox v. State
INDEX NO.: C.2.d.1.
CITE: (3d Dist. 11/23/88), Ind. App., 530 N.E.2d 328
SUBJECT: Sua sponte vacation of guilty plea - improper without grounds
HOLDING: Tr. Ct. erred in sua sponte vacating D's guilty plea without D's consent. Decision to permit withdrawal of guilty plea is within discretion of Tr. Ct. Patton 517 N.E.2d 374 (card at C.2.b.1). Further, Tr. Ct. has duty to vacate guilty plea sua sponte when D at capital sentencing hearing denies element of intent. Id. Tr. Ct. has power to vacate guilty plea sua sponte where there is evidence in record that plea was not entered voluntarily, intelligently, & knowingly. See Annot., Power or Duty of State Ct., Which Has Accepted Guilty Plea, To Set Aside Such Plea on Its Own Initiative Prior to Sentencing or Entry of Judgment, 31 A.L.R.4th 504 (1984). Here, Tr. Ct.'s entry vacating D's plea indicated that plea was involuntary but did not say why. Ct. of Appeals can find no evidence of involuntariness in record. Held, reversed with instructions to reinstate guilty plea.

TITLE: Douglas v. State
INDEX NO.: C.2.d.1.
CITE: (4-24-96), Ind., 663 N.E.2d 1153
SUBJECT: Refusal to accept guilty plea during trial - no error
HOLDING: Tr. Ct. did not err in denying D's request to plead guilty during trial. Language of Ind. Code 35-35-1-4(a) seems to allow withdrawal of not guilty plea at any time & thus, by implication, eliminate Tr. Ct.'s discretion to deny motion. However, subsection 4(a) of statute should be read in harmony with subsection 4(b), which provides that Ct.'s ruling on motion is reviewable only for abuse of discretion. Because abuse of discretion standard is available in subsection 4(b), it should apply to subsection 4(a) as well. Here, Tr. Ct. could have been concerned that request was ruse aimed at challenging conviction later on grounds that plea was made involuntarily or unknowingly. Held, judgment affirmed.

RELATED CASES: Newsome, App., 797 N.E.2d 293 (no error in refusing D's guilty pleas to two counts of incest & one count of child molesting on morning of trial; D argued that rejection of these pleas prejudiced him as to two weaker Class B felony rape charges because it compromised D's credibility with the jury once DNA evidence was entered that he fathered a child during a prior incestuous relationship with his daughter).

TITLE: Dunn v. State
INDEX NO.: C.2.d.1.
CITE: (5/26/2015), 33 N.E.3d 1074 (Ind. Ct. App. 2015)
SUBJECT: State not entitled to withdrawal of plea
HOLDING Tr. Ct. abused its discretion by granting the State's request to withdraw a plea agreement after it had been accepted by the Tr. Ct., but before sentencing. Once a Tr. Ct. accepts a plea agreement, it shall be bound by its terms. Only in limited instances, such as when the D asserts his innocence or violated an express term of the agreement, it is within the Tr. Ct.'s discretion to revoke the plea.

Here, D and the State, through deputy prosecutor Kelley, entered into a plea agreement which was accepted by the Tr. Ct. Prosecutor Kelley signed an affidaivt representing that the State had notified the victim of the agreement. However, at sentencing, a different prosecutor (Baldwin) claimed that the victim had not been notified and moved to withdraw the plea. To the extent it was error to accept the plea when the victim had not been notified, the State invited the error. As such, the Tr. Ct. erred in granting the State's request to withdrawal the plea agreement. Held, judgment reversed and remanded for sentencing; Barnes, J., dissenting on basis that the withdrawal of the plea was proper because the plea was accepted in violation of the victim's Indiana constitutional right to be notified.

RELATED CASES: Messersmith, 70 N.E.3d 861 (Ind. Ct. App. 2017) (State's withdrawal of plea agreement after entry of judgment violated due process).

TITLE: Fletcher v. State
INDEX NO.: C.2.d.1.
CITE: (5-1-95), Ind., 649 N.E.2d 1022
SUBJECT: Withdrawal of guilty plea - hearing discretionary
HOLDING: Tr. Ct. did not err in summarily denying D's motion to withdraw guilty plea without holding hearing, granting transfer & reversing Ct. App. decision at 632 N.E.2d 1164. D submitted affidavits to support motion to withdraw OWI guilty plea, but State did not file any counter-affidavits. Statute governing withdrawal of guilty pleas contains no express language for hearing. Convening hearing is merely discretionary option of Tr. Ct. Ind. Code 35-35-1-4(b). D's express acknowledgment that he was operating vehicle while intoxicated constituted admission that his condition was such as to endanger others on road, thus satisfying factual basis for acceptance of guilty plea. Evidence establishing distinct showing of actual endangerment was not required. Held, transfer granted, judgment of Tr. Ct. affirmed.

TITLE: Knight v. State
INDEX NO.: C.2.d.1.
CITE: (1/27/23), Ind. Ct. App., 202 N.E.3d 475
SUBJECT: No abuse of discretion in denying motion to withdraw guilty plea and ordering restitution
HOLDING: Following Defendant's guilty plea to level 5 felony burglary and habitual-offender enhancement, the trial court did not abuse its discretion in ordering restitution in the amount of $6490.00 and in denying his motion to withdraw his guilty pleas. Defendant's plea agreement was completely silent on the issue of restitution. It required concurrent sentences for the two burglary counts and a two-year cap on his sentence for the habitual enhancement, but the ultimate length and executed portion of the sentence, court costs and fines were left to the trial court's discretion.

Court also affirmed the denial of Defendant's motion to withdraw his guilty pleas, filed one day before his sentencing hearing. Defendant claimed that after having "time to reflect" on his guilty plea, he desired to go to trial because he maintained his innocence and had felt pressured to accept the plea agreement because he was nervous about going to trial and the potential sentence he might have received if convicted. But Defendant's post-plea assertion of innocence did not require setting aside his otherwise knowing and voluntary guilty plea. Beech v. State, 702 N.E.2d 1132, 1136 (Ind. Ct. App. 1998). And "these types of pressures are normal ones that face any defendant when considering a plea offer." Court also rejected Defendant's claim that his decision to plead guilty changed when he realized he was ineligible for community corrections. There is no indication that the State ever promised to recommend community-corrections placement, nor did the trial court mention that possibility during the guilty plea hearing. Held, judgment affirmed.

TITLE: Marshall v. State

INDEX NO.: C.2.d.1.

CITE: (4/21/92), Ind. App., 590 N.E.2d 627

SUBJECT: Withdrawal of guilty plea prior to sentencing; motion must be written, verified and supported

HOLDING: At any time prior to imposing sentence, Tr. Ct. may allow D to withdraw his guilty plea "for any fair and just reason unless the state has been substantially prejudiced by reliance upon the D's plea." Ind. Code 35-35-1-4(b). Motion to withdraw guilty plea "shall be in writing and verified." Here, D made written but unverified motion to withdraw his plea. Therefore, motion was properly denied. Held, denial of petition for post-conviction relief affirmed.

RELATED CASES: Primmer, App., 857 N.E.2d 11 (D never filed a motion, much less a written, verified motion, to withdraw his guilty plea).

TITLE: McMillan v. State
INDEX NO.: C.2.d.1.
CITE: (2/28/2018), 95 N.E.3d 161 (Ind. Ct. App. 2018)
SUBJECT: Tr. Ct.'s authority to revoke acceptance of plea agreement before sentencing
HOLDING: Tr. Ct. may, on its own motion, set aside a guilty plea if the D asserts his innocence after the plea has been accepted but prior to sentencing. Beech v. State, 702 N.E.2d 1132 (Ind. Ct. App. 1998). In this case, Tr. Ct. did not err in revoking its acceptance of of plea agreement and forcing D to go to trial for Level 1 felony neglect of a dependent. Record reflects that Tr. Ct. believed that D did not admit that he was subjectively aware of a high probability that his conduct would result in his three-month-old son's health or life being at risk or in danger. Based on D's letters to Tr. Ct. and his statements at a subsequent hearing, Tr. Ct. found that D asserted his innocence to State's allegation that he knowingly or intentionally deprived his son of necessary food and/or medical care, which resulted in son's death. Although State argued in favor of the plea agreement at the trial level, this does not relieve Tr. Ct. of its obligation to ensure that D's guilty plea was an unqualified admission of his guilt. Held, judgment affirmed.

TITLE: Peel v. State
INDEX NO.: C.2.d.1.
CITE: (07-07-11), 951 N.E.2d 269 (Ind. Ct. App. 2011)
SUBJECT: Denial of oral motion to withdraw guilty plea before sentencing - no error
HOLDING: Tr. Ct. did not abuse its discretion when it applied Ind. Code § 35-35-1-4(b) in considering and denying D's motion to withdraw guilty plea. Ind. Code § 35-35-1-4(b) lets a D withdraw a plea "[a]fter entry of a plea of guilty . . . but before imposition of sentence." Id.; see also Brightman v. State, 758 N.E.2d 41, 44 (Ind. 2001). The "entry" of a plea and a court's subsequent "acceptance" of the plea are "two distinct phases of the plea process." Taylor v. State, 843 N.E.2d 937, 941 (Ind. Ct. App. 2006). A motion to withdraw guilty must be in writing and verified. Ind. Code § 35-35-1-4(b).

Here, Tr. Ct. took D's guilty plea to Class C felony non-support of a dependent under advisement and set the matter for sentencing. At the beginning of the sentencing hearing, D's counsel orally moved to withdraw the guilty plea. Tr. Ct. denied the motion. D is incorrect that Ind. Code § 35-35-1-4(b) applies only after "entry of judgment" on a plea. On the contrary, the statute plainly governs any time after a plea is entered. ("[a]fter entry of a plea of guilty . . . but before imposition of sentence, the court may allow the D to withdraw his plea . . . .") Thus, D's plea was "entered" when he offered it to the Tr. Ct. See Brightman, 758 N.E.2d at 44; see also Ind. Code § 35-35-3-3(a). Accordingly, Ind. Code § 35-35-1-4(b) applied to D's motion, including its requirement that motions to withdraw guilty plea be written and verified. D's failure to do so results in waiver of the issue. Held, judgment affirmed.

TITLE: Rhoades v. State
INDEX NO.: C.2.d.1.
CITE: (12-31-96), Ind., 675 N.E.2d 698
SUBJECT: Denial of motion to withdraw guilty plea - sufficient factual basis
HOLDING: Tr. Ct. did not abuse discretion in denying D's motion to withdraw her guilty plea to operating vehicle with controlled substance in blood. Standard of review for denial of motion to withdraw guilty plea, which is less stringent than standard applicable for reviewing conviction, is whether there is sufficient factual basis for the plea. Sufficient factual basis exists when there is evidence about elements of the crime from which a Ct. could reasonably conclude that D is guilty. Butler v. State, 658 N.E.2d 72 (Ind. 1995). In finding factual basis for D's guilty plea insufficient, Ct. App. erroneously applied much higher standard applicable to reviewing conviction. Tr. Ct. here was presented with ample evidence of D's guilt, including facts that D was involved in auto accident, pipe found in her front seat smelled of burnt marijuana, & her urine contained marijuana metabolites. Held, transfer granted, Ct. App. opinion at 661 N.E.2d 608 vacated, judgment affirmed.

TITLE: Smith v. State
INDEX NO.: C.2.d.1.
CITE: (1st Dist., 10-8-99), Ind. App., 717 N.E.2d 239
SUBJECT: Illegal plea agreement - void & unenforceable; sentence exceeded statutory maximum
HOLDING: Tr. Ct. erred in denying D's motion to withdraw his guilty plea prior to sentencing, where plea agreement imposed illegal sentence & was therefore facially invalid. At sentencing hearing, D moved to withdraw his guilty plea to two counts of nonsupport as class D felonies, because imposition of five-year sentence was greater than that allowed by Ind. Code 35-50-1-2(c). Statute limits consecutive terms of imprisonment arising out of episode of criminal conduct to presumptive sentence for felony which is one class of felony higher than most serious of felonies for which person has been convicted. Maximum sentence permissible in this case was four years, which is presumptive sentence for Class C felony. Plea agreement into which D entered imposed sentence of five years, & sentence was illegal in violation of express statutory authority. Watkins, App., 588 N.E.2d 1342. Plea agreements made in violation of statute are void & unenforceable, even where D knowingly & voluntarily assents to very terms that render them invalid. Sinn, App., 609 N.E.2d 434. Held, reversed & remanded for further proceedings.

TITLE: Snowe v. State
INDEX NO.: C.2.d.1.
CITE: (4th Dist. 2/8/89), Ind. App., 533 N.E.2d 613
SUBJECT: Withdrawal of guilty plea - Boykin rights; factual basis
HOLDING: Tr. Ct. abused its discretion in refusing to allow D to withdraw guilty plea where record contained no indication that D understood Boykin rights & contained no factual basis for plea. D, who was charged with DUI, appeared pro se for arraignment & was advised of her rights through videotape presentation viewed by all Ds in misdemeanor traffic Ct. She then pled guilty, her plea was accepted, sentencing was deferred, & she was diverted to Alcohol Countermeasures Program. Prior to sentencing, D filed, by counsel, verified motion to withdraw guilty plea, which was denied. D appeals this denial. Denial is reviewable only for abuse of discretion. Ind. Code 35-35-1-4(b). D argues that Tr. Ct. abused discretion in denying motion to withdraw plea because there is no indication it was made knowingly & intelligently & no factual basis. Record simply indicates that when D indicated that she was pleading guilty, Tr. Ct. told her she was being referred to Alcohol Countermeasures Program & set date for sentencing. Tr. Ct. did not determine whether plea was knowing, voluntary, & intelligently made, or to establish factual basis for plea. Tr. Ct. should not have accepted D's plea, & abused discretion in refusing to allow her to withdraw it. Held, reversed & remanded.

TITLE: Turner v. State
INDEX NO.: C.2.d.1.
CITE: (4th Dist., 03-10-06), Ind. App., 843 N.E.2d 937
SUBJECT: Withdrawal of guilty plea prior to sentencing - trash search
HOLDING: Tr. Ct. erred in denying D's motion to withdraw his guilty plea prior to sentencing, because it was necessary to correct a manifest injustice. Tr. Ct. should have granted D's motion to give him a fair opportunity to vindicate his Article 1, Section 11 constitutional right against unreasonable search & seizure as enunciated in Litchfield v. State, 824 N.E.2d 356 (Ind. 2005). Litchfield represents a significant development in Indiana constitutional law because it prohibits police from randomly searching & seizing trash containers & holds that there must be an evidentiary foundation for such activity, i.e., articulable, individualized suspicion that trash may contain evidence of criminal conduct. Here, police seized D's trash based on unidentified sources who stated that there "might" be drug dealing at his residence. This information amounts to nothing more than a general hunch & clearly does not rise to level of articulable suspicion required to search D's trash under Litchfield. D's case was not yet final when Litchfield was decided & has a credible defense under new constitutional rule announced in that case, which was unavailable at time he had entered his guilty plea. Thus, D met & overcame presumption in favor of denial of motion to withdraw guilty plea. Held, judgment reversed; Baker, J., dissenting.

RELATED CASES: Craig, App., 883 N.E.2d 218 (Tr. Ct. abused its discretion in denying D's motion to withdraw his guilty plea to being a habitual offender based on new Indiana S. Ct. opinion regarding improper double enhancement).

C. PLEAS

C.2. Guilty plea

C.2.d.2. After sentencing

TITLE: Ivy v. State
INDEX NO.: C.2.d.2.
CITE: (1st Dist.; 01-28-07), Ind. App., 861 N.E.2d 1242
SUBJECT: Plea agreements - failure to dismiss remaining counts did not create manifest injustice
HOLDING: Trial Ct. did not err in denying D's petition for post-conviction relief. "[A] Ct. shall vacate the judgment & allow the withdrawal [of a plea agreement] whenever the convicted person proves that withdrawal is necessary to correct a manifest injustice. . . . [W]ithdrawal of the plea is necessary to correct a manifest injustice whenever: . . . (4) the prosecuting attorney failed to abide by the terms of a plea agreement." Ind. Code 35-35-1-4(c).

Here, D pled guilty to two murder counts, receiving a 100-year cumulative sentence, in return for the dismissal of all remaining counts. However, State failed to dismiss the eight remaining counts, including four death penalty counts until 2004 when D filed a Motion to Dismiss. State's failure did not create a manifest injustice requiring reversal of a nearly thirty-year-old plea agreement, conviction & sentence. Although State did not dismiss the remaining counts, it did not prosecute D on them, nor did it oppose D's motion to dismiss those charges in 2004. While State violated the letter of the agreement, it did not violate the spirit of the agreement. Held, judgment affirmed.

TITLE: Lineberry v. State
INDEX NO.: C.2.d.2.
CITE: (2nd Dist., 5-14-01), Ind. App., 747 N.E.2d 1151
SUBJECT: Withdrawal of guilty plea - improper inducement
HOLDING: Tr. Ct. erred by not allowing D to withdraw his guilty plea, which was involuntary because it was improperly induced by promise that he could appeal denial of his motion to suppress. It was undisputed that State's promise that D could proceed with appeal of suppression issue was part of inducement that led D to plead guilty. Fact that D was misled into believing he could plead guilty & still appeal denial of motion to suppress allows Ct. to find that his plea was involuntary despite fact that he was given statutory warnings. State v. Moore, 678 N.E.2d 1258 (Ind. 1997). Held, judgment reversed, remanded with instructions to grant request to withdraw guilty plea; Sullivan, J., concurring.

RELATED CASES: Cornelious, App., 846 N.E.2d 354 (unfulfillable promise of an appeal of speedy trial issue was material to D's decision to plead guilty).

TITLE: Messersmith v. State
INDEX NO.: C.2.d.2
CITE: (2/15/2017), 70 N.E.3d 861 (Ind. Ct. App. 2017)
SUBJECT: State's withdrawal of plea agreement after entry of judgment violated due process
HOLDING: 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 the agreement. Trial court has discretion to revoke plea agreements after judgment has been entered only in limited instances, such as when the defendant asserts his innocence or violated an express term of the agreement.

Here, the State failed to confer with the victim before entering the proffered plea agreement. In arguing that trial court properly granted its motion to withdraw plea agreement, State noted that trial court accounted for victim's rights under Article 1, Section 13 of Indiana Constitution and Ind. Code § 35-40-5-3. However, victim's rights must yield to a defendant's due process rights, and when a defendant enters a knowing and voluntary plea, the Government is obligated to uphold its side of the bargain. Puckett v. United States, 556 U.S. 129 (2009). Held, judgment reversed.

TITLE: Neville v. State
INDEX NO.: C.2.d.2.
CITE: (4th Dist., 3-19-96), Ind. App., 663 N.E.2d 169
SUBJECT: Withdrawal of guilty plea after sentencing
HOLDING: By pleading guilty to dealing in cocaine, D waived his right to challenge scope of search of his residence & seizure of cocaine. D's challenge to pre-trial rulings of Tr. Ct. did not fall within statutory parameters of Ind. Code 35-35-1-4(c), which provides for withdrawal of guilty plea whenever D proves that withdrawal is necessary to correct manifest injustice.

RELATED CASES: Barnes, App., 738 N.E.2d 1093 (Ct. rejected claim that manifest injustice occurred requiring withdrawal of guilty plea because D was not aware that actual jail time was part of sentence & that his counsel was ineffective for failing to properly inform him of sentence); see, Coomer, 652 N.E.2d 60 (finding no manifest injustice even though defense counsel misinformed D about possible sentence for crime to which he pled guilty when Tr. Ct. clearly explained penalty range and D indicated he understood explanation); Walker, App., 420 N.E.2d 1374 (Tr. Ct.'s rejection of nonbinding sentence recommendation did not entitle petitioner to withdraw guilty plea).

TITLE: State v. Jones
INDEX NO.: C.2.d.2.
CITE: (4th Dist., 2-25-03), Ind. App., 783 N.E.2d 784
SUBJECT: Dismissal of charges following plea agreements - statute of limitations
HOLDING: State appealed dismissal of welfare fraud cases in two separate causes due to statute of limitations violations, one of which Ct. found to be erroneous. Both Shaw & Jones entered into plea agreements & Tr. Ct. raised issue of statute of limitations, ultimately dismissing both. Jones' dismissal was appropriate because Jones' plea was accepted by Tr. Ct., judgment of conviction was entered, & she was sentenced before she filed her motion to dismiss. Further, proceedings that took place at Tr. Ct. are now treated on appeal as grant of post-conviction relief pursuant to Ind. Code 35-33-1-4. Tr. Ct. found that because Jones was never advised, by Ct. or her counsel, that case was filed outside statute of limitations, she did not enter guilty plea knowingly & voluntarily. Therefore, Tr. Ct.'s decision to withdraw guilty plea was not clearly erroneous. Shaw's situation differed from Jones's, because her plea agreement was never accepted by Tr. Ct., it was only taken under advisement & her motion to dismiss occurred before acceptance of plea, entering of conviction, & sentencing. Shaw, unlike Jones, was therefore unable to prove that withdrawal of her plea was necessary to correct manifest injustice pursuant to Ind. Code 35-35-1-4(b), because information, on its face, alleged acts which were within applicable statute of limitations. Therefore, Tr. Ct. abused its discretion in withdrawing Shaw's plea & dismissing her case. Held, as to Jones, judgment affirmed; as to Shaw, judgment reversed & remanded.

TITLE: State v. Sturgeon
INDEX NO.: C.2.d.2.
CITE: 605 N.W.2d 589 (Wis. Ct. app. 1999)
SUBJECT: Brady Violation Justifies Withdrawal of Guilty Plea After Sentencing
HOLDING: The Wisconsin Court of Appeals has held that the state's failure to disclose written evidence of the D's pretrial denials of criminal intent and notice that police officers remembered those denials justifies post-sentencing withdrawal of D's guilty plea. D was arrested for participating in a burglary in which he knocked on the back door of a house and asked for a fictitious person while two co-Ds entered through the front door and stole a purse. In a post-arrest statement, D admitted his involvement, but said he didn't know what his co-Ds were up to and didn't know that the person he asked for was fictitious. The officer who reduced this statement to writing did not include D's denials of criminal intent. D was interviewed a second time and again denied criminal intent, but the transcript of this interview was not disclosed to the defense prior to the guilty plea, despite a timely discovery request. Faced with his admission of involvement and his co- D's proffered testimony that he was in on the planned burglary D entered a guilty plea. Later, after learning that the transcript of the second interview existed, and that officers present at the first interview remembered his denials of criminal intent, D sought to withdraw his plea, alleging that the state's Brady violation had caused him to plead guilty. The state first denied a Brady violation, arguing that the exculpatory information was not within their exclusive control. They argued that the D could have asked the officers about the interviews at his preliminary hearing or suppression hearing, but the Court rejects this argument, noting that the purpose of these hearings was not to develop exculpatory evidence that the state denied existed. The state further argued simply that the D knew what he had said, to which the Court responded, "we see a marked difference between a D's exculpatory version of an event presented to his lawyer and the fact that the prosecution has in its exclusive possession evidence which independently corroborates that version." Turning to the issue of whether the discovery violation caused D's guilty plea, the Court stated that the appropriate inquiry is "whether there is a reasonable probability that, but for the failure to disclose, the D would have refused to plead and would have insisted on going to trial." Among the factors to be considered, the Court listed the following: (1) the relative strength and weakness of the state's case and the D's; (2) the persuasiveness of the withheld evidence; (3) D's stated reasons, if any, for pleading guilty; and (4) the thoroughness of the plea colloquy. After weighing all the factors, the Court allowed the D to withdraw his guilty plea.

TITLE: Walker v. State
INDEX NO.: C.2.d.2.
CITE: (4th Dist., 3-17-03), Ind. App., 784 N.E.2d 1040
SUBJECT: Withdrawal of guilty plea - accomplice liability & doctrine of mandated consistency
HOLDING: D argued that Tr. Ct. erred in refusing to allow him to withdraw his guilty plea Tr. Ct.'s refusal to allow D to withdraw his guilty plea to robbery as Class B felony did not result in manifest injustice a because there was no longer a factual basis for it under doctrine of mandated consistency, which required that when principal & accessory were tried separately, accessory could not be convicted of crime greater than that of which principal was convicted. Essentially, D argued that because co-D pled guilty to robbery as Class C felony, a lesser offense not involving deadly weapon, it was manifestly unjust not to allow him to withdraw his guilty plea to robbery as Class B felony as it was based on co-D having a gun. However, D's argument failed because Ind. Code 35-41-2-4, accomplice liability statute, superseded application of common law doctrine of mandated consistency. Accomplice liability statute allows person to be convicted of offense regardless of whether co-D has not been prosecuted for offense, has not been convicted of offense, or has been acquitted of offense. Held, judgment affirmed.

TITLE: Wirthlin v. State
INDEX NO.: C.2.d.2.
CITE: (4/11/2018), 99 N.E.3d 699 (Ind. Ct. App.IN 2018)
SUBJECT: Erroneous denial of motion to withdraw guilty plea -invalid waiver of right to counsel
HOLDING: D did not knowingly, intelligently, and voluntarily waive his right to counsel at the initial or guilty plea hearings, thus as a result, Tr. Ct. erred in denying his motion to withdraw his guilty plea. D appeared pro se at his initial hearing on three Level 6 drug-related charges and requested a speedy trial, indicating multiple times he was not sure if he would hire an attorney. D expressed a desire to resolve his case quickly by pleading guilty so he could take care of his ailing father. That same day he began plea negotiations with the prosecutor and agreed, without consulting an attorney, to plead guilty to a possession charge and one count of dealing. He also signed a document regarding his rights at the guilty plea stage, including the right to counsel. At the plea hearing, D told the judge he understood that he was waiving his right to counsel and Tr. Ct. accepted the guilty plea and sentenced him to an aggregate four years, with 16 months suspended to probation. Approximately seven months later, D, by counsel, moved to withdraw his plea, arguing it was based on "his misunderstanding that a waiver of counsel was necessary to quickly resolve the case." The Tr. Ct. denied the motion, finding D had been advised of his right to counsel orally and in writing.

Ind. Code § 35-35-1-1 states that a guilty plea "shall not be accepted from a D unrepresented by counsel who has not freely and knowingly waived his right to counsel." See also Laffler v. Cooper, 566 U.S. 156 (2012) (holding that plea negotiations are a critical stage to which right to counsel applies). Here, D never explicitly waived his right to counsel orally, but only said he was "not sure" what he would do about an attorney. More than once, D indicated that he was unable to afford an attorney, and despite the fact that he did not explicitly request appointment of a public defender, Tr. Ct. erred by improperly burdening him with the obligation to do so.

Similarly, D's signature on written forms advising him of his right to counsel also did not constitute explicit and thorough waivers. Rather, those documents were boilerplate advisement of rights that "do not, and cannot, suffice to fulfill the Tr. Ct.'s responsibility to ensure knowing, intelligent, and voluntary waiver of counsel." Further, the Tr. Ct. never inquired into D's "decision" to waive his right to counsel, nor did it work with D when he expressed confusion and uncertainty about the process. Thus, D did not knowingly, intelligently, and voluntarily waive his right to counsel and it was necessary to grant his motion to withdraw the plea to correct a manifest injustice, namely, that he was denied the effective assistance of counsel. Ind. Code § 35-35-1-4(c). Held, judgment reversed and remanded with instructions to withdraw D's plea, vacate his convictions and sentence and to continue the proceedings.

C. PLEAS

C.2. Guilty plea

C.2.d.3 Resentencing

TITLE: Moore v. State
INDEX NO.: C.2.d.3.
CITE: (4th Dist., 10-9-97), Ind. App. 686 N.E.2d 861
SUBJECT: Withdrawal of plea - jurisdiction to resentence
HOLDING: Tr. Ct. lacked jurisdiction to vacate D's sentences & reinstate original charges after Tr. Ct. accepted his guilty plea, sentenced him & transferred jurisdiction to Department of Corrections ("DOC"). With very little exception, trial judge has no authority over D after he pronounces sentence; jurisdiction over D goes to DOC. Dier, 524 N.E.2d 78. Here, D entered into binding plea agreement with State which D later breached by refusing to testify for State in another case. However, D's breach occurred after Tr. Ct., upon motion by State, dismissed four counts against D & ordered D into custody of DOC to begin serving his sentence on other counts. Because there has been no Ind. law which grants Tr. Ct. jurisdiction over D after it pronounces sentence based upon breach of plea agreement, D's action of breaching plea agreement did not, by itself, give Tr. Ct. jurisdiction to vacate D's convictions & sentences & to reinstate original charges. Held, denial of petition for post-conviction relief reversed & cause remanded.

C. PLEAS

C.2. Guilty plea

C.2.e. Record

TITLE: Diaz v. State
INDEX NO.: C.2.e.
CITE: (09-29-10), 934 N.E.2d 1089 (Ind. 2010)
SUBJECT: Voluntariness of plea - inadequate translation for Spanish-speaking D; presenting chart as demonstrative evidence
HOLDING: Post-conviction Tr. Ct. erred by excluding certified translator's chart, which summarized her conclusions that translation at guilty plea hearing was inaccurate. Testimony reflecting the content of an expert report is not hearsay, Wilbur v. State, 460 N.E.2d 142 (Ind. 1984), so certified interpreter's chart was demonstrative evidence, not hearsay. Wise v. State, 719 N.E.2d 1192, 1196 (Ind. 1999).

D's native language is Spanish. Based on translation at guilty plea hearing, D thought he pleaded guilty to only one crime but actually pleaded guilty to two crimes. D's petition for post-conviction relief claimed his plea was not knowing and intelligent because translation was inaccurate. D also claimed trial counsel was ineffective. Even though Tr. Ct. allowed interpreter to testify about alleged problems with translation, erroneous exclusion of interpreter's chart from hearing was not harmless because it undermined benefit of interpreter's expertise. Such charts should normally be used as a matter of course. "When the question at issue is the accuracy of the interpretation at a plea hearing, we see the use of a chart or a similar demonstrative exhibit as being nearly inevitable." Evidence did not reveal whether translation at guilty plea was accurate. Thus, Court directed Tr. Ct. to "commission its own translation of the plea hearing and sentencing hearing" and rehear such evidence to determine if plea was knowing and voluntary. Held, transfer granted, memorandum Court of Appeals' opinion vacated, judgment reversed and remanded for a new post-conviction hearing.

RELATED CASES: Ponce, 9 N.E.3d 1265 (Ind. 2014) (even though D said he understood Spanish translation of Boykin rights, plea was not knowing, intelligent, and voluntary because the translation was inaccurate and "wholly inadequate").

TITLE: Wells v. State
INDEX NO.: C.2.e.
CITE: (3rd Dist., 10-31-05), Ind. App., 836 N.E.2d 475
SUBJECT: Judgment of conviction omits HTV conviction - scrivener's error
HOLDING: Tr. Ct.'s acceptance of guilty plea that "inadvertently" left out a Class C felony HTV charge was not in violation of Ind. Code 35-50-2-7, which establishes a maximum penalty of 3 years for a Class D felony, where D was sentenced to 8 years. D entered a plea agreement with the prosecutor to plead guilty to OWI causing serious bodily injury, a Class D felony, & being HTV, a Class C felony with a second related Class D felony to be dismissed. The plea called for an 8-year sentence with 4 suspended & a lifetime suspension of D's driver's license. Probation department objected to the plea & it was withdrawn, substituting an open plea to the OWI causing serious bodily injury charge. The HTV conviction was apparently inadvertently left out of the plea, as the parties spoke at the plea & sentencing hearing as if it was included. Neither the modified plea agreement nor the judgment of conviction & abstract of judgment referenced the HTV charge. However, the judgment & abstract both showed an 8-year sentence being imposed. Without citation to any legal authority, Ct. concluded error in excluding HTV was "scrivener's error" & remanded to the Tr. Ct. as to do otherwise would render the colloquy during the hearings meaningless. Ct. ordered remand in order for the clerical error to be corrected with the option of the parties to vacate the agreement in its entirety & enter into an agreement that mirrors their intent. Held, judgment affirmed in part & remanded for further proceedings; Riley, J., dissenting, would not allow HTV conviction to be added despite apparent mistake. Where terms of a contract are clear & unambiguous, they are conclusive of intent & Ct. will not construe the contract or look to extrinsic evidence. Griffin, App., 756 N.E.2d 572.

Note: It appears jeopardy would have attached after the Tr. Ct. accepted the guilty plea without a contingency. See Zehr, App., 662 N.E.2d 668, Steele, App., 638 N.E.2d 1338 (once guilty plea accepted prior to sentencing Tr. Ct. could not reject after reviewing PSI report); Reffett, 571 N.E.2d 122; Roark, App., 829 N.E.2d 1078.

C. PLEAS

C.2. Guilty plea

C.2.e.2 Crim. Rule 10

TITLE: Hall v. State
INDEX NO.: C.2.e.2.
CITE: (06-20-06), Ind., 849 N.E.2d 466
SUBJECT: Guilty plea -- advisements; burden of proof to show advisement of Boykin rights not given
HOLDING: A petitioner who pursues a claim for post-conviction relief challenging a plea of guilty on the ground that he was not advised of his Boykin rights is not entitled to relief solely because the guilty plea record is lost & cannot be reconstructed. Rather, the petitioner has the burden of demonstrating by a preponderance of the evidence that he is entitled to relief. The Ct. reads Parke v. Raley, 506 U.S. 20 (1992), to hold that presumption of regularity afforded to final judgments permits a burden-shifting rule that makes it more difficult for Ds to challenge their guilty pleas many years after the fact in proceedings that are separate & distinct from underlying criminal proceedings. Thus, it is constitutional to require the D to prove that he was not given his Boykin rights, even when the transcript of the proceedings is unavailable, assuming no allegation that the unavailability was caused by governmental misconduct.

Here, D filed a petition for post-conviction relief from a 1983 guilty plea alleging he was not informed of his Boykin rights. At a hearing, judge testified that although he had no recollection of advising D of his Boykin rights, he was aware that Boykin advisements were required & had no knowledge of a proceeding in which he failed to give Boykin. D's attorney at guilty plea hearing testified that trial judge always included Boykin rights, & prosecutor testified he was concerned to ensure Tr. Ct. gave proper advisements. D never testified that he was not properly advised. Thus, D failed to prove, beyond a preponderance of evidence, that he was not advised of Boykin rights. Held, transfer granted, Ct. App.' opinion at 819 N.E.2d 102 vacated, judgment affirmed. Zimmerman, 436 N.E.2d 1087, expressly *overruled*.

RELATED CASES: Damron, App., 915 N.E.2d 189 (Tr. Ct's policy of destroying tapes of guilty plea hearings after 10 years, although in contravention of Indiana Crim. R. 10, did not constitute misconduct; further, D presented no evidence that he was not informed of his Boykin rights at time of his guilty plea); Jackson, App., 826 N.E.2d 120 (while in some instances PCR is a "direct attack," in a situation like this it should be considered collateral attack on conviction & D should bear burden of forwarding evidence of invalidity or a constitutional violation; on rehearing at 830 N.E.2d 920, Ct. distinguished Dalton v. Battaglia, 402 F.3d 729).

C. PLEAS

C.2. Guilty plea

C.2.e.3. Sufficiency of record

TITLE: Boykin v. Alabama
INDEX NO.: C.2.e.3.
CITE: 395 U.S. 238 (1969)
SUBJECT: Guilty plea -- adequate record
HOLDING: Several federal constitutional rights are involved in waiver that takes place when plea of guilty is entered in state criminal trial: first is privilege granted against compulsory self- incrimination guaranteed by Fifth Amendment & applicable to states by reason of Fourteenth; second is right to trial by jury; & third is right to confront one's accusers; waiver of these three important federal rights cannot be presumed from silent record. U.S.C.A. Const. Amends. 5, 14. Here, when D pleaded guilty, judge asked no questions of D concerning his plea, & D did not address Ct. Held, conviction reversed. Harlan & Black, JJ. dissented.

TITLE: Garcia v. State
INDEX NO.: C.2.e.3.
CITE: (7/12/79), Ind., 391 N.E.2d 604
SUBJECT: Guilty plea -- sufficiency of record
HOLDING: Trial judge must make true & complete transcript of entire guilty plea proceeding. IRCP 10. Here, D, who spoke only Spanish, entered plea of guilty to murder in second degree. D claimed that trial judge did not make true & complete transcript in that record did not show places where trial judge stopped to allow partial translation. Ct. held that while it would be better practice for Tr. Ct. to insure that transcript showed each time D stopped speaking to allow translation to be made, it did not feel that this transcript was necessarily incomplete. Ct. found record to be complete within meaning of Rules of Criminal Procedure because it was apparently impossible for Ct. reporter to take down any Spanish words, record was complete as to all English words that were spoken & showed complete record of advisement of rights & factual basis of plea, & judge also asked second interpreter to discuss proceeding with D & ascertain whether or not he understood everything. Held, no error & denial of post-conviction relief affirmed.

TITLE: Graham v. State
INDEX NO.: C.2.e.3.
CITE: (1st Dist. 9/27/84), Ind. App., 468 N.E.2d 604
SUBJECT: Guilty plea - sufficiency of record
HOLDING: Tr. Ct. did not err in denying D's PCR petition alleging improper advisement of rights in violation of Ind. Code 35-4.1-1-3 [now Ind. Code 35-35-1-2] & Boykin v. AL where D did not attempt to reconstruct record. Here, actual recording of guilty plea proceedings was destroyed & tape recycled pursuant to Ct.'s policy. Only existing record was docket entry. D contends docket entry constitutes insufficient and/or silent record. See Hollingshed 365 N.E.2d 1215; Barfell, App., 399 N.E.2d 377. When record of guilty plea proceeding is lost, D must attempt to reconstruct record pursuant to AR 7.2(A)(3)(C). Zimmerman 436 N.E.2d 1087. Loss of record neither requires vacation of plea nor is equivalent of silent record. Held, denial of PCR affirmed.

RELATED CASES: Vickers, 963 N.E.2d 1135 (Ind. Ct. App. 2012) (absence of recording of guilty plea hearing to show D waived right to counsel was insufficient to grant PCR; court must examine other evidence in record, which here, did not establish that D met his burden to show he did not waive right to counsel); Hall, 849 N.E.2d 466 (petitioner alleging he was not advised of Boykin rights in guilty plea from which he is no longer serving sentence is not entitled to relief solely because guilty plea transcript is lost & cannot be reconstructed); Curry, 674 N.E.2d 160 (denial of PCR proper, where D failed to establish that all persons present at guilty plea hearing had died or could not remember details of proceedings).

TITLE: Kunberger v. State
INDEX NO.: C.2.e.3.
CITE: (12/2/2015), 46 N.E.3d 966 (Ind. Ct App. 2015)
SUBJECT: Double jeopardy claim unreviewable because of bare-bones record
HOLDING: Court was unable to review D's double jeopardy claim because the record from his guilty plea hearing did not contain enough facts to determine if one act – the strangulation of his ex-girlfriend – was the basis for his convictions for strangulation, domestic battery, and criminal confinement.

The factual basis established at the hearing consisted of D merely admitting the elements of the offense, leaving no basis to see if there was a reasonable possibility that facts used to establish one offense – the strangulation – were used to establish the elements of the other offenses – domestic battery and criminal confinement. See Garrett v. State, 992 N.E.2d 710, 719 (Ind. 2013) and Richardson v. State, 717 N.E.2d 32, 53 (Ind. 1999). Even if the Court were to use the facts recited in the probable cause affidavit, it still would not be able to determine if the strangulation was the basis of all three offenses. Held, judgment affirmed.

C. PLEAS

C.3. Plea bargaining

TITLE: Debro v. State
INDEX NO.: C.3.
CITE: (1-27-05), Ind., 821 N.E.2d 367
SUBJECT: Plea agreement calling for withheld judgment/deferred sentence upheld
HOLDING: Tr. Ct. did not err in enforcing "deferred sentencing" plea agreement, which was conditioned on D not committing any criminal offenses. If D had fulfilled terms of his agreement, then charge to which he pleaded guilty would have been dismissed. Agreement was revoked after D was charged with battery. Ind. Code 35-38-1-1(a) provides that after verdict, finding, or plea of guilty, if new trial is not granted, Tr. Ct. shall enter a judgment of conviction. Statute does not explicitly set a time limit.

Considering statutes & court rules concerning Tr. Ct.'s authority to delay sentence on a plea or verdict of guilty, Court held that, absent express statutory authorization, Tr. Ct. may not withhold judgment, but is required to enter judgment of conviction immediately unless a temporary postponement is dictated by good cause shown or the interest of justice so requires. In so holding, Court disapproved of language in Lighty v. State, 727 N.E.2d 1094 (Ind. Ct. App. 2000), declaring that practice of withheld judgments "finds no sanction in the law" & suggesting that a withheld judgment is a nullity per se. Here, although plea agreement was in clear violation of Ind. Code 35-38-1-1(a), agreement provided D with a significant benefit: the possibility of no criminal conviction for his admitted criminal conduct. Having failed to fulfill his part of the agreement, D may not now be heard to complain.

Court also held that the same due process rights afforded to Ds in context of probation revocation, e.g., confrontation & cross-examination, inure also to benefit of Ds in proceedings to enforce a deferred sentence or withheld judgment. Held, transfer granted, Ct. App.' opinion at 784 N.E.2d 1029 vacated, judgment affirmed.

RELATED CASES: Addington, App., 869 N.E.2d 1222 (probationary period was tolled by agreement, so D could not later complain that imposition of sentence following termination of participation in drug court was untimely).

TITLE: Fisher v. State
INDEX NO.: C.3.
CITE: (3/31/2016), 52 N.E.3d 871 (Ind. Ct. App. 2016)
SUBJECT: Statute requires restitution even if plea agreement did not
HOLDING: Tr. Ct. did not abuse discretion in ordering D to pay restitution, even though the plea agreement did not call for it, because the plea agreement must be read as having been made in contemplation of Ind. Code 35-48-4-17, which requires restitution in cases where the State incurs costs to clean meth labs.

Police found a makeshift meth lab in D's vehicle. A State Police lab team incurred $1,432.49 in costs to clean up the lab. D pled guilty to Class B felony attempted dealing in meth. The Tr. Ct. ordered D to pay the lab's cleanup costs.

While it is generally true a Tr. Ct. cannot order restitution if a plea agreement does not call for it – See Edsall v. State, 983 N.E.2d 200, 208-09 (Ind. Ct. App. 2013) - it is also true that Ind. Code § 35-48-4-17 requires a Tr. Ct. to order restitution for cleanup costs incurred by law enforcement in meth cases. A plea agreement, like all contracts, must be construed as having been made in contemplation of applicable law. E.g., Mouch v. Ind. Rolling Mill Co., 93 Ind. App. 540, 151 N.E. 137, 138-29 (1926) (holding that statutes that exist at the time a contract is made must be read into the contract unless expressly excluded by the contractual language). Here, D's plea agreement was entered into in 2015, more than a decade after the 2003 enactment of the statutory requirement to pay restitution for meth lab cleanups. See Ind. Code 35-48-4-17. Thus, the plea agreement implicitly incorporated this statutory restitution requirement. See Lee v. State, 816 N.E.2d 35, 38 (Ind. 2004). Therefore, the Tr. Ct. did not err by ordering restitution. Held, judgment affirmed.

TITLE: Lee v. State
INDEX NO.: C.3.
CITE: (10-19-04), Ind., 816 N.E.2d 35
SUBJECT: Illegal sentence did not render conviction void
HOLDING: Although a plea agreement made in violation of a statute is void & unenforceable, it is also true that if a contract contains an illegal provision that can be eliminated without frustrating the basic purpose of the contract, the Ct. will enforce the remainder of the contract. Harbour v. Arelco, Inc., 678 N.E.2d 381 (Ind. 1997). These principles apply even where the illegal or otherwise objectionable provision is prohibited by statute. Here, Tr. Ct. lacked authority to order D's sentences to be served consecutively, because at time of conviction, Ind. Code 35-50-1-2 prohibited Tr. Ct's. from imposing consecutive sentences unless a Ct. was contemporaneously imposing two or more sentences. Kendrick, 529 N.E.2d 1311. However, D did not claim that his guilty plea was entered into unknowingly, unintentionally, or involuntarily, & that he would have gone to trial had he known Tr. Ct. lacked authority to order consecutive sentences. Evidence against D on robbery charge was overwhelming, and by agreeing to plead guilty in exchange for State dismissing a habitual offender allegation, D reduced his penal exposure by thirty years.

Ct. held that in this case, D was not entitled to have his illegal sentence severed from plea agreement & ordered to run concurrently with unrelated conviction. D may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, & then later complain that it was an illegal sentence. Collins, 509 N.E.2d 827. Held, transfer granted, Ct. App.' decision at 792 N.E.2d 603 vacated, denial of post-conviction relief affirmed.

RELATED CASES: Fisher, 52 N.E.3d 871 (Ind. Ct. App. 2016) (even though plea agreement did not mention restitution, trial court properly ordered D to pay restitution costs for meth lab cleanup, pursuant to Ind. Code 35-48-4-17, because the plea agreement must be construed as having been made in contemplation of applicable law. See Id); Williams, 42 N.E. 3d 107 (Ind. Ct. App. 2015) (D could not claim plea was not knowing, intelligent, and voluntary because counsel allegedly was wrong to tell him he was eligible for HSO enhancement because D received substantial benefit from plea deal); Arnold, 27 N.E.3d 315 (Ind. Ct. App. 2015) (after vacating HO enhancement, Tr. Ct. should have vacated entire plea because result was that D's 20 year sentence was reduced to 8 years, and where D initially faced potential sentence of at least 50 years; see full review, this section); Crider, 984 N.E.2d 618 (Ind. 2013) (distinguishing Lee and Stites (below), a waiver of the right to appeal contained in a plea agreement is unenforceable where the sentence imposed is contrary to law and the D did not bargain for the sentence); Koontz, 975 N.E.2d 846 (Ind. Ct. App. 2012) (although D was exposed to a combined term of imprisonment and probation that exceeded statutory limits, "we do not believe it is our place to categorically declare the supreme court's position inapplicable to misdemeanors"); Kline, App., 875 N.E.2d 435 (where D benefitted from plea, fact that some sentences were for misconduct or molest of a higher class of felony than the statute in existence at time of offense did not render plea void); Gonzales, App., 831 N.E.2d 849 (guilty plea was not invalid, because D struck a favorable bargain with the State in that he was convicted of a lesser crime & gave up the right to challenge imposition of unauthorized consecutive sentences); Stites, 829 N.E.2d 527 (as in Lee, D received benefit & can't complain now; claims of involuntariness & IAC are "merely a subset" of D's claim her plea was void).

TITLE: Russell v. State
INDEX NO.: C.3.
CITE: (6/29/2015), 34 N.E.3d 1223 (IN 2015)
SUBJECT: Plea agreement - enforceable even if based on State's mistake
HOLDING: The plea agreement made between the State and D, and accepted by the Tr. Ct. is not void due to a misstatement of the law included in its sentencing provision. If a D pleads guilty knowingly, intentionally, and voluntarily, and the D gets the benefit of the bargain with the State when the State errs, there is no compelling reason to set aside the conviction on the grounds that the sentence is later determined to be invalid or to have contained a mistake of law. Here, over the course of three months, D committed extreme acts of abuse and neglect on three teenage boys he adopted. He pleaded guilty to five counts of class C felony neglect of a dependent, two counts of class C felony criminal confinement, three counts of class D felony criminal confinement and class D felony neglect of a dependent. The parties entered into and the Tr. Ct. accepted the plea under the erroneous belief that the sentence was capped at ten years under Ind. Code § 35-50-1-2(c) limiting the length of consecutive sentences in a criminal episode. However, the abuse was clearly not part of one episode of criminal conduct. Although the Tr. Ct. mistakenly applied the sentencing cap of Ind. Code § 35-50-1-2(c), its acceptance of the ten-year plea agreement indicated its willingness to accept a deal less than consecutive maximum sentences in order to spare the victims from the ordeal of trial, ensure some amount of imprisonment, save limited judicial resources, or other valid reasons. Because D indisputably entered into the plea agreement knowingly, intelligently and voluntarily and benefitted from the State and Tr. Ct.'s mistake, the plea agreement is valid and enforceable. Held, transfer granted, Court of Appeals' opinion at 11 N.E.3d 938 vacated, judgment affirmed; Massa, J., dissenting on basis that the Tr. Ct. should have the opportunity to reconsider the sentence imposed under the correct sentencing law.

TITLE: State v. Arnold
INDEX NO.: C.3.
CITE: (2/27/2015), 27 N.E.3d 315 (Ind. Ct. App. 2015)
SUBJECT: Setting aside HO enhancement required vacating entire guilty plea
HOLDING: After granting D's request to set aside the habitual offender enhancement in his guilty plea, the Tr. Ct. erred in denying the State's request to vacate the entire plea. The State had earlier agreed to drop a charge of class A felony attempted murder in exchange for D pleading to three C felonies and to being an habitual offender, resulting in a twenty-year sentence. The fact that one part D's plea deal, the habitual offender enhancement, was no longer enforceable did not mean the entire agreement was void if the unenforceable provision of the agreement was severable from the valid portion of the agreement without frustrating the basic purpose of the agreement. See Lee v. State, 816 N.E.2d 35, 38-39 (Ind. 2004).

D was charged with attempted murder, and faced a potential fifty-year sentence, because he committed "a horrific act." "He got in a truck [and] . . . ran over people. He backed up, ran over more people. Backed up and tried to run over another person. He has a violent history." In vacating the habitual offender enhancement but keeping the rest of the plea intact, the Tr. Ct. reduced the sentence the parties bargained for from twenty years to eight years. The State would not have entered an agreement without the habitual offender enhancement, so eliminating the enhancement frustrated the basic purpose of the agreement. Held, judgment reversed.

TITLE: Stites v. State
INDEX NO.: C.3.
CITE: (1st Dist., 6-23-05), Ind., 829 N.E.2d 527
SUBJECT: Illegal sentence did not render plea void - D gained benefit
HOLDING: In 1985, Petitioner pled guilty to murder & agreed to a consecutive sentence with another murder in a second county. This constituted an illegal sentence as consecutive sentences at the time were limited to those occasions where a Ct. was meting out two or more terms of imprisonment at one time & the Ct. App. reversed the PCR Ct.'s denial of PCR on this ground. Petitioner avoided the death penalty due to the plea agreement. On transfer, Indiana S. Ct. affirmed the PCR Ct. noting the cases relied on by the Ct. App. were overturned by Lee v. State, 816 N.E.2d 35 (Ind.2004) (Rejecting holdings in Sinn, Thompson, & Badger). Lee held that "a D may not enter a plea agreement calling for an illegal sentence, benefit from the sentence, & then later complain that it was an illegal sentence." D here, as in Lee, received benefit from plea & cannot complain now. Similarly, her claims of involuntariness & IAC "are merely a subset" of her claim that her plea was void because it called for consecutive sentences. Because Tr. Ct. did have the authority to order consecutive sentences under the terms of the plea, Petitioner's argument fails. Held, transfer granted, Ct. App.' opinion at 810 N.E.2d 1083 vacated, judgment affirmed.

RELATED CASES: Parham, 913 N.E.2d 770 (Ind. Ct. App. 2009) (D gave up right to challenge imposition of unauthorized consecutive habitual offender enhancements, because 35-year sentence provided for in plea agreement was substantially less than the possible maximum 58-year sentence D could have received); Primmer, App., 857 N.E.2d 11 (in appeal of sentence for child molesting & being a repeat sexual offender, Ct. *sua sponte* found that D's aggregate 18-year sentence was illegal); Borders, App., 854 N.E.2d 888 (illegal sentence of consecutive HSO enhancements did not invalidate plea).

C. PLEAS

C.3. Plea bargaining

C.3.a. In general

TITLE: Hood v. State
INDEX NO.: C.3.a.
CITE: (11/27/89), Ind. App., 546 N.E.2d 847
SUBJECT: Guilty plea -- plea bargaining; right to counsel
HOLDING: Accused has right to counsel at critical stages in judicial process and plea bargaining is critical stage. Gallarelli, 441 F.2d 1402. Counsel or effective waiver of counsel is sine quo non of permissible plea bargaining. Grades, 398 F.2d 409. Ds advised by counsel and protected by other safeguards are presumptively capable of intelligent choices when confronted with prosecutorial persuasion. Conversely, uncounseled Ds are considered incapable of intelligent choices because of unequal bargaining strengths. Bordenkircher, 434 U.S. 357. Uncounseled D is generally uninformed of such things as legal consequences of his conduct, likelihood of conviction, probable punishment if convicted and other matters appropriately discussed by D and his attorney in order that any decision to plead guilty might be intelligently made; therefore, most important part of judicial proceeding can occur in jail during plea bargaining. Jailhouse conference between State and uncounseled D who has not knowingly, voluntarily, and intelligently waived his right to counsel is unfair. Furthermore, it is idle to speculate whether counsel could have, if present, worked out better deal. Consequently, Gallarelli court held that agreement made with uncounseled D irremediably infects all subsequent proceedings.

Here, State plea bargained with D, who was uncounseled, and made D's waiver of his right to counsel condition of plea agreement. Although it is not improper to threaten habitual offender charge to induce plea bargaining generally, threat here was made to uncounseled D who was required to proceed without assistance of counsel to avoid habitual offender charge. Held, conviction reversed, and cause remanded with instructions to vacate D's guilty plea.

RELATED CASES: Lyles, App., 382 N.E.2d 991 (D's election whether to plead guilty or stand trial may not be intelligently or voluntarily made without consultation with counsel).

TITLE: Ohio v. Johnson

INDEX NO.: C.3.a.

CITE: (6/11/84), 467 U.S. 493

SUBJECT: Guilty plea -- plea agreement; offenses charged by prosecution but not mentioned in agreement

HOLDING: Double jeopardy clause of Fifth & Fourteenth Amendments affords D protection against second prosecution for same offense after acquittal, protection against second prosecution for same offense after conviction, & protection against multiple punishments for same offense. In contrast to double jeopardy protection against multiple trials, final component of double jeopardy -- protection against cumulative punishments -- is designed to ensure that sentencing discretion of courts is confined to limits established by legislature. Because substantive power to prescribe crimes & determine punishments is vested with legislature, question under double jeopardy clause whether punishments are "multiple" is essentially one of legislative intent. Hunter, 459 U.S. 359. Where D is retried following conviction, double jeopardy clause's protection against cumulative punishments insures that after subsequent conviction D received credit for time already served. Pearce, 395 U.S. 711.

Here, D was indicted on one count each of murder, involuntary manslaughter, aggravated robbery & grand theft. Over State's objection, Tr. Ct. accepted guilty pleas to charges of involuntary manslaughter & grand theft; State also granted D's motion to dismiss two most serious charges on ground that because of D's guilty plea, further prosecution on more serious offenses was barred by double jeopardy. Ct. noted that while double jeopardy clause may protect D against cumulative punishments for convictions on same offense, clause does not prohibit State from prosecuting respondent for such multiple offenses in single prosecution. In addition, double jeopardy does not bar trial on greater offense when plea agreement is reached on lesser included offense. Held, dismissal of murder & aggravated robbery charges reversed & remanded for further proceedings; Brennan, J., concurring in part & dissenting in part; & Stevens & Marshall, JJ. Dissenting.

TITLE: Payton v. State
INDEX NO.: C.3.a.
CITE: (5/15/87), Ind., 507 N.E.2d 579
SUBJECT: Guilty plea -- bargained for conditions in plea agreement
HOLDING: D may lawfully enter into any plea agreement which remains within bounds of charging statute whether it be for minimum or maximum penalty provided. Here, D was represented by counsel at time of his plea. Agreement was signed by prosecuting attorney, D's counsel and D. Tr. Ct. thoroughly questioned both appellant and hi counsel before accepting plea. D received exactly what he agreed to and Court saw nothing in record or in briefs to indicate that D was misled or harmed in any way by agreement. Held, conviction affirmed; DeBruler, J., concurring in result.

RELATED CASES: Crose, App., 482 N.E.2d 763 (plea intended to preclude prosecution on other offense will do so only if offenses are "related offenses"; related offenses are offense which could have been joined for trial).

TITLE: Thore v. Howe
INDEX NO.: C.3.a.
CITE: 466 F.3d 173 (1st Cir. 2006)
SUBJECT: ' 1983 action not necessarily estopped due to criminal plea
HOLDING: The First Circuit U.S. Court of Appeals held the doctrine of judicial estoppel does not necessarily preclude a plaintiff in a civil rights action from taking a position that is inconsistent with facts admitted as part of the Plaintiff's plea agreement in a criminal prosecution. The Court noted, among other things, that plea negotiations involve fact bargaining and that the judge who accepts the guilty plea does not necessarily accept all the facts proffered as the factual basis for the plea. Plaintiff pleaded guilty to assaulting police officers with his car following an incident in which his car collided with police cars that had boxed him in as he attempted to evade arrest. The Plaintiff subsequently filed a civil rights action pursuant to 42 U.S.C. ' 1983, alleging that officers used excessive force when they shot him in the neck during the incident. Specifically, Plaintiff claimed that the officers were not in fear for their safety when they opened fire on him and in support offered a deposition of an eyewitness who said that it was the police cars that impacted the plaintiff's car, and that the officers were no longer at risk of injury from the car when they opened fire. A federal district court dismissed Plaintiff's claim on ground that he was judicially estopped from asserting a version of events inconsistent with one to which he agreed in the criminal case. The Court disagreed with this reading of the law analyzing New Hampshire v. Maine, 532 U.S. 742 (2001), which noted the purpose of the judicial estoppel doctrine is to protect the integrity of the judicial process. Interpreting its own precedent, the Court noted the doctrine should not be applied unless the party's two positions are directly inconsistent, and the party succeeded in the earlier proceeding in persuading a court to adopt its position. The Court noted the fact-bargaining that exists in plea negotiations leads "guilty pleas [to] not necessarily establish absolute historic facts; what is stated in a plea agreement is an agreed upon version of the facts that, while it avoids misrepresentation, is sufficient to support the entry of the plea."

Court also noted that state and federal procedural rules requiring a judge to ascertain the existence of a factual basis for a guilty plea do not require the judge to accept all the facts proffered in support of the plea. Although not automatically foreclosed from facts inconsistent with those underlying a prior guilty plea, the Court found no abuse of discretion by district court in its dismissal based on judicial estoppel. The record of the state proceeding indicated that the plea judge had in fact accepted the full factual proffer to which the plaintiff agreed, and this was inconsistent with the version alleged in the civil suit.

[**Note**: BNA's *Criminal Law Reporter* notes that the Fourth Circuit has apparently taken a different position on this issue. Lowery v. Stovall, 92 F.3d 219 (4th Cir. 1996).]

TITLE: Town of Newton v. Rumery
INDEX NO.: C.3.a.
CITE: 480 U.S. 386, 107 S. Ct. 1187, 94 L.Ed.2d 405 (1987)
SUBJECT: Plea agreements - dismissal of charges in return for release of liability
HOLDING: Promise is unenforceable if interest in enforcement is outweighed by public concerns.

Here, Rumery was charged with tampering with witness. Plea agreement entered where state dismissed charges in return for release of liability. Rumery then filed action under 42 U.S.C. section 1983 arguing plea agreement was unenforceable. Release-dismissal agreements (R-DA) are not inherently coercive. Criminal Ds are often required to make difficult choices that effectively waive constitutional rights. D's choice to enter into R-DA may reflect highly rational judgment that certain benefits of plea exceed speculative benefits of civil action. Court finds Rumery was successful businessman, was not in jail, was represented by highly skilled attorney who drafted agreement, considered agreement for 3 days before signing, & benefits which accrued to Rumery under agreement indicate voluntary decision free of coercion. Court rejects Rumery's argument that R-DAs offend public policy because they tempt prosecutors to trump up charges in reaction to D's civil rights claim, suppress evidence of police misconduct, & leave unremedied deprivations of constitutional rights. Argument improperly presumes prosecutorial wrongdoing. R-DAs may actually further legitimate prosecutorial & public interests to extent they protect public officials from burdens of defending unjust claims/ease burdens of allocating scarce resources. Held, R-DAs are not unenforceable where agreement was voluntary, there is no evidence of prosecutorial misconduct & enforcement of agreement would not adversely affect relevant public interests. O'Connor, CONCURS IN PART & IN JUDGMENT (burden of proof on state); Stevens, joined by Brennan, Marshall & Blackmun, DISSENTS.

TITLE: U.S. v. Ruiz
INDEX NO.: C.3.a.
CITE: 536 U.S. 622, 122 S. Ct. 2450, 153 L.Ed.2d 586 (2002)
SUBJECT: Disclosure of impeachment evidence inapplicable at plea stage
HOLDING: United States Constitution did not require the Government to disclose material impeachment evidence prior to entering a "fast track" plea agreement with Respondent. The Government was not required to disclose its potential case, and thus the value of the evidence impeaching the Government's case was unknown. Further, Respondent's guilty plea under the plea agreement, with its accompanying waiver of constitutional rights, could have been accepted as knowing and voluntary despite any misapprehension by Respondent concerning the specific extent or nature of the impeachment evidence. Requiring disclosure of the evidence would improperly force the Government to disclose witness information and engage in substantial trial preparation prior to plea bargaining. Held, 9th Circuit opinion at 241 F.3d 1157 reversed.

C. PLEAS

C.3. Plea bargaining

C.3.b. Plea agreement (IC 35-35-3-1)

TITLE: State v. Rivers
INDEX NO.: C.3.b.
CITE: 283 Conn. 713, 913 A.2d 185 (Conn. 2007)
SUBJECT: Taking 5th did not violate plea to testify truthfully
HOLDING: Connecticut Supreme Court held that D, who agreed as part of a plea bargain to cooperate with the authorities' investigation of his co-Ds and acknowledged that the deal would be void "in the event" he testified for the State and was untruthful, did not breach the agreement by refusing to testify. Ordering specific performance of the deal, Court said that the agreement expressly addressed only the veracity of any testimony D might give, not whether he would give any. Court determined the State, not D, breached the plea agreement. Noting plea bargains are governed by contract law principles, Court noted that when the language of an agreement is unambiguous, a court is obligated to give it effect. Language that is ambiguous, however, must be construed against the drafter, which in the case of a plea agreement is the State.

C. PLEAS

C.3. Plea bargaining

C.3.b.1. Necessity of written agreement (IC 35-35-3-3)

TITLE: Richardson v. State
INDEX NO.: C.3.b.1.
CITE: (4th Dist. 12/13/83), Ind. App., 456 N.E.2d 1063
SUBJECT: Plea agreement - necessity of written agreement
HOLDING: Where Lake County prosecutor refused to reduce plea agreement to writing & D's attorney was forced to establish agreement's terms by stating them for record in open Ct. (as prosecutor had suggested attorney do), & prosecutor made no objection to alleged misstatement of terms, prosecutor waived right to contend plea agreement was not as D's attorney stated it. Here, there was dispute over whether prosecutor had agreed not to file any additional charges in connection with any other transaction in which D may have been involved. D was tried & convicted of conspiracy following denial of his motion to dismiss charge. Agreement should be reduced to writing. Spalding, App., 330 N.E.2d 774. Both parties must see that agreement's terms are recorded accurately. State v. Groat, App., 412 N.E.2d 323; Hewitt, App., 403 N.E.2d 882. Held, reversed & remanded; dismissal of charge ordered.

RELATED CASES: Shepperson, App., 800 N.E.2d 658 (oral agreement must be enforced either if the State has materially benefitted from the terms of the agreement or if D has relied on terms of the agreement to his substantial detriment); Parker, App., 542 N.E.2d 1026 (failure to file written agreement in felony case waives right to specific performance of agreement); Centers 501 N.E.2d 415 (Ct. notes Ind. Code 35-35-1-4 "clearly states agreement must be in writing & policy is undoubtedly wise & should be enforced;" however, failure to reduce agreement to writing alone is not sufficient ground for rejection, *citing* Davis, App., 418 N.E.2d 256).

C. PLEAS

C.3. Plea bargaining

C.3.b.3. Binding/non-binding

TITLE: Alhusainy v. Superior Court
INDEX NO.: C.3.b.3.
CITE: 143 Cal. App. 4th 385; 48 Cal. Rptr. 3d 914 (Cal. App. 2006)
SUBJECT: Guilty plea void due to condition banishing D from state
HOLDING: The California Court of Appeals issued a writ of mandate directing the Tr. Ct. to vacate its order denying the withdrawal of a plea agreement to charges of making a criminal threat and felony child abuse that included a term that sentencing would be postponed as long as Petitioner stayed outside of California. One of the conditions of Petitioner's plea bargain was that sentencing would be postponed and that Petitioner would be released on his own recognizance on condition he leave and remain outside of California. The Tr. Ct. gave Petitioner the option to appear for sentencing but made it clear he could avoid imposition of sentence if he did not and a bench warrant would only be issued for within California. The guilty plea occurred in 2002 and sentencing was continued from year to year through 2005, until Petitioner returned to California and was arrested in 2006. Court found that withdrawal of the guilty plea was warranted because the condition requiring petitioner to leave the state was constitutionally improper, and the plea required him to commit another felony, specifically to flee the jurisdiction to avoid sentencing. However, Court agreed with the Tr. Ct. that the motion to disqualify the trial judge from further proceedings was untimely but nevertheless directed, under the California Code of Civil Procedure, that further proceedings be heard before another trial judge, if Petitioner so requested. The Court reasoned in part that the Tr. Ct. had participated in facilitating the void plea and the commission of a new crime and that there was a question as to whether the judge's indicated sentence of four years demonstrated an animus toward Petitioner inconsistent with judicial objectivity.

TITLE: Badger v. State
INDEX NO.: C.3.b.3.
CITE: (06-29-94), Ind., 637 N.e.2D 800
SUBJECT: State's withdrawal of plea agreement proper
HOLDING: Tr. Ct. did not err in permitting State to withdraw plea agreement that had been signed by parties & filed with Ct., but not yet accepted by judge, granting transfer & reversing decision at 622 N.E.2d 236. S. Ct. first noted issue was not actually as stated by Ct. App. (whether State could unilaterally & as of right withdraw agreement) but was whether Tr. Ct's. have discretion to grant State's motion to withdraw plea agreement.

Ct. found five stages in bargaining process, 1) creation of agreement itself; 2) submission of agreement to Ct.; 3) Ct.'s acceptance or rejection of agreement; 4) actual entry of guilty plea; & 5) sentencing. State has absolute authority to withdraw felony agreement before it is reduced to writing & submitted to Tr. Ct. Offer & acceptance by parties do not compel acceptance by Tr. Ct., & agreement is binding contract only when Ct. accepts it. After looking at procedural statutes & rules governing motions, Ind. Code 35-35-2-1(b), 35-35-2-2, & TR 7(B), Ct. determined State's motion was properly made, & that Tr. Ct. could consider motion as factor in determining whether to accept or reject plea. Ct. noted that Tr. Ct's. must enforce even oral agreements between State & Ds, if either State has materially benefitted from agreement or D has detrimentally relied on agreement. Here, Ct. found no such enrichment or detrimental reliance, & that Tr. Ct. did not abuse its discretion in granting motion to withdraw agreement, DeBruler, J., dissenting, on ground State must state ground in support of its motion. Note: Ct. also noted there was no term in agreement precluding either party from seeking withdrawal of agreement prior to acceptance of Ct. Whether such clause would be enforceable or acceptable to State remains to be seen but might be worth try.

RELATED CASES: Epperson, App., 530 N.E.2d 743 (Tr. Ct. erred in allowing State to withdraw plea agreement, where D pled guilty as agreed, simply because prosecutor learned after D pled that State made a bad deal).

TITLE: Barker v. State

INDEX NO.: C.3.b.3.

CITE: (9/17/2013), 994 N.E.2d 306 (Ind. Ct. App. 2013)

SUBJECT: Sentence exceeded plea agreement cap - home detention counts as part of executed sentence

HOLDING: Tr. Ct. violated plea agreement's 40-year cap on D's executed sentence by ordering 120 days of home detention in addition to his 40-year executed sentence. D pleaded guilty to Neglect of a Dependent Causing Death, a class A felony, with a plea agreement calling for a 40-year cap on his executed sentence and for other charges to be dropped. Tr. Ct. imposed a 45-year sentence with 40 years executed in the DOC and the remainder on probation, with 120 days of home detention as a condition of probation. Pursuant to Ind. Code 35-38-2.5-5(e)(effective 7/01), D is entitled to receive credit for time served on home detention.

Courts may order home detention as a condition of probation, but home detention must be considered executed time rather than time suspended to probation. Held, judgment reversed and remanded for a sentencing order that does not exceed the 40-year cap on executed portion of D's sentence.

TITLE: Bartzis v. State
INDEX NO.: C.3.b.3.
CITE: (3d Dist. 1/26/87), Ind. App., 502 N.E.2d 1347
SUBJECT: Plea agreement - binding on judge once accepted
HOLDING: Tr. Ct. erred by refusing to carry out terms of plea agreement after Tr. Ct. had accepted D's guilty plea. Here, Tr. Ct. accepted written plea agreement at guilty plea hearing. At sentencing hearing, Tr. Ct. conducted second hearing on whether it would accept plea bargain, & after considering evidence (child molesting victim's mother testified she felt pressured into acquiescence of plea to probation; prior unrelated offense uncovered in PSI), Tr. Ct. rescinded its acceptance of plea agreement & vacated D's guilty plea. Judge recused himself from further participation & D was tried, found guilty & sentenced to executed 7-year term. Statutory & case law is clear that Tr. Ct. is bound once it accepts plea agreement with terms that are within Tr. Ct.'s power to grant. Ind. Code 35-35-3-3(d); Griffin, 493 N.E.2d 439; Phillips, 441 N.E.2d 201; State ex rel. Goldsmith v. Marion County Superior Ct., 419 N.E.2d 109. Held, case reversed & remanded with instructions to comply with terms of plea agreement. Garrard CONCURS, noting that Ind. Code 35-35-3-3 contemplates filing of plea agreement with Tr. Ct. & ordering of PSI which is received before Tr. Ct. acts to accept or reject plea.

RELATED CASES: Kline, App., 875 N.E.2d 435 (by entering convictions on plea & conducting a full sentencing hearing, the judge accepted the plea & could not reject the plea after pronouncing sentence); Kazmier, App., 863 N.E.2d 912 (after D waived his right to jury trial in exchange for State's agreement to withdraw its motion to add domestic violence charge, Tr. Ct. did not err in finding at sentencing that D's battery was a "crime of domestic violence" under Ind. Code 35-41-1-6.3); In Re J.A.W., App., 504 N.E.2d 334 (Infants 199; Ct. rejects D's contention that he should have been allowed to withdraw plea where judge added additional term (recommendation to DOC that D's commitment continue until age 21); judge's recommendation had no binding effect upon DOC, therefore D shows no harm, *citing* Mott, 405 N.E.2d 986).

NOTE: CF. conflicting decision in Reffett at C.3.b.3.

TITLE: Bowers v. State
INDEX NO.: C.3.b.3.
CITE: (11/25/86), Ind., 500 N.E.2d 203
SUBJECT: Specific performance of plea agreements
HOLDING: Disputes involving plea agreements are not necessarily resolved by abstract application of contract law, but principles of contract formation, breach, and remedies can provide helpful guidance. Here, prosecutor entered into agreement with D whereby prosecutor would "dismiss" charges related to D's arrest for burglary if D would provide information sufficient to obtain search warrant for residence of another. D supplied information which proved fruitful in obtaining and executing search warrant which in turn resulted in that other person's arrest for possession of marijuana that day. Contrary to terms of agreement, State filed information against D for burglary. By reneging on promise to abate criminal proceedings, Prosecutor's conduct impaired reliability and usefulness of important prosecutorial tool and tended to undermine integrity and credibility of criminal justice system to extent compelling reversal in this case. Held, denial of D's motion to dismiss reversed and cause remanded with instructions to grant D's motion to dismiss.

RELATED CASES Puckett v. U.S., (03-25-09), U.S., 07-9712 (if D does not object at plea or sentencing hearing to prosecutor's breaching plea agreement, D, on appeal, must show the breach was plain error under Federal Rule of Criminal Procedure 52(b)); Wright, App., 700 N.E.2d 1153 (D met his burden of proving that he was entitled to have circuit Ct. case dismissed pursuant to plain language of superior Ct. plea agreement); Epperson, App., 530 N.E.2d 743 (Tr. Ct. erred by allowing State to withdraw plea agreement and reinstate charge against D; although criminal D has no constitutional right to plea bargain, or to have agreement specifically enforced, contract principles and due process rights must be considered; here, D's decision to plead guilty to burglary and theft rested on prosecutor's promise to dismiss criminal recklessness charge); Spivey, 553 N.E.2d 808 at C.3.f.

TITLE: Branham v. State
INDEX NO.: C.3.b.3.
CITE: (5th Dist., 8-23-04), Ind. App., 813 N.E.2d 809
SUBJECT: Reservation of right to appeal in plea agreement - no specific performance
HOLDING: D was not entitled to specific performance of the reservation of right to appeal denial of his pre-trial motion for discharge, which was contained within his plea agreement & reflected in judgment of conviction. Although Tr. Ct. is bound by terms of plea agreement that it accepts, Tr. Ct. cannot be forced to provide a benefit that it does not have power to confer. Lineberry v. State, 747 N.E.2d 1151 (Ind. Ct. App. 2001). D cannot question pre-trial orders after a guilty plea is entered. Ford v. State, 618 N.E.2d 36 (Ind. Ct. App. 1993). Ind. Code 35-35-1-2(a)(2)(A) provides in part that a Tr. Ct. shall not accept a guilty plea without first determining that D has been informed that by his plea he waives his rights to public & speedy trial by jury. Moreover, right to speedy trial cannot exist or be enforced apart from right to trial, & any claim of a denial thereof is waived upon a plea of guilty. Wright v. State, 496 N.E.2d 60 (Ind. 1986). Because D did not move to withdraw his guilty plea & did not raise issue of voluntariness of his plea, Ct. did not address that issue. Held, judgment affirmed.

RELATED CASES: Sweet, 10 N.E.3d 10 (Ind. Ct. App. 2013) (D's guilty plea foreclosed claim that trial counsel was ineffective at suppression hearing; D in essence challenges evidence underlying conviction, which a guilty plea precludes); Rogers, 958 N.E.2d 4 (Ind. Ct. App. 2011) (D waived ex post facto claim by pleading guilty; limited exception to waiver rule in Douglas v. State, 878 N.E.2d 873, 878 (Ind. Ct. App. 2007) did not apply); Alvey, 911 N.E.2d 1248 (Ind. 2009) (Indiana Supreme Court resolves conflict in Court of Appeals by holding that a Tr. Ct. lacks the authority to allow Ds the right to appeal the denial of a motion to suppress evidence when a D enters a guilty plea, even where a plea agreement maintains that such an appeal is permitted; disapproving of Jones v. State, 866 N.E.2d 339 (Ind. Ct. App. 2007); S.A. v. State, 654 N.E.2d 791 (Ind. Ct. App. 1995); Holsclaw, 907 N.E.2d 1086 (Ind. Ct. App. 2009) D cannot challenge the denial of a motion to dismiss after pleading guilty); Starr, App., 874 N.E.2d 1036 (even if there had been an express representation by either State or Tr. Ct. to D that he could challenge his convictions on direct appeal, Ct. would not enforce such a representation because such a challenge became moot upon D's plea of guilty).

TITLE: Carneal v. State
INDEX NO.: C.3.b.3.
CITE: (1st Dist., 01-17-07), Ind. App., 859 N.E.2d 1255
SUBJECT: Plea agreement- not binding on Ct. in another state
HOLDING: Trial Ct. did not abuse its discretion by refusing to grant credit time for time served in Illinois despite an Illinois plea agreement that the Illinois sentence was to run concurrent with the Indiana sentence. Credit is to be applied for confinement time that is a result of the charge for which the D is being sentenced. In essence, each Ct. is responsible only for crediting time in confinement as a result of the charge for which the Ct. is sentencing the D. Willoughby v. State, 626 N.E.2d 601 (Ind. Ct. App. 1993).

Here, D was sentenced for a crime in Illinois which also served as a basis for a probation revocation in Monroe County, Indiana. The Illinois Ct. ordered the Illinois sentence concurrent with any time to be received on Indiana probation revocation. However, after D completed his Illinois sentence, trial Ct. sentenced D in Indiana & refused to give him any credit time for the time served in Illinois. Although the decision not to award credit for the Illinois time served conflicts with the Illinois plea agreement, neither the State of Indiana nor Monroe Circuit Ct. was a party to the Illinois plea agreement, & neither were bound by its terms. Held, judgment affirmed; Sullivan, J., dissenting on the basis that, pursuant to the principle of judicial comity, Indiana must give effect to the Illinois plea agreement.

TITLE: Griffin v. State
INDEX NO.: C.3.b.3.
CITE: (10-11-01), Ind. App., 756 N.E.2d 572
SUBJECT: Plea agreement - State's promise to not file other charges
HOLDING: It was improper for State to file charge where plea agreement included promise by State to not file certain charges. D had been confidential informant for police but was then set up himself. State agreed to not file charge if D would testify in other two cases. Plea agreement is contract binding upon both parties & when terms of contract are clear & unambiguous, they are conclusive of that intent, & Ct. will not construe contract or look to extrinsic evidence. Wright v. State, 700 N.E.2d 1153 (Ind. Ct. App. 1998). Ultimately, D did not testify because State did not call upon him to do so. State argued that D did not perform other obligations. However, nowhere are these obligations identified in plea agreement or correspondence between parties that were incorporated into plea by reference. If agreement did not reflect prosecutor's intent, it was his obligation to correct it. Held, conviction reversed.

RELATED CASES: Grider, 976 N.E.2d 783 (Ind. Ct. App. 2012) (Tr. Ct. erred when it imposed a consecutive 19-year sentence that violated the terms of D's plea agreement, which provided that her sentence would "be open to the Court with all counts to run concurrently"; even if the provision were ambiguous, any ambiguity is resolved in favor of D).

TITLE: Griffin v. State
INDEX NO.: C.3.b.3.
CITE: (4/19/84), Ind., 461 N.E.2d 1123
SUBJECT: Plea agreement; State's promise must be within Courts' power to grant
HOLDING: Terms of plea agreement are binding upon Tr. Ct. when accepted by Tr. Ct. insofar as such terms are within power of Tr. Ct. to order. Ind. Code 35-5-6-2(b); Ind. Code 35-35-3-3(d). D pled guilty to voluntary manslaughter and battery. Written plea bargain agreement included provision that State would recommend to Tr. Ct. that D serve his period of confinement in noncontiguous state penal institution. This agreement was not breached when D was committed to custody of Indiana Department of Corrections, since agreement simply provided that State would recommend to Tr. Ct. that D be incarcerated out of state. Also, Tr. Ct. was not bound to incarcerate D outside of Indiana, as Court had absolutely no power to dictate terms of D's incarceration. Ind. Code 11-10-2-2. Held, conviction affirmed.

RELATED CASES: Saylor, App., 565 N.E.2d 348 (Court advised D that it had no authority to order concurrent Indiana and Kentucky sentences); Spivey, 553 N.E.2d 508 (State was not bound by its agreement to forego prosecution on murder charge in exchange for guilty plea to robbery once D breached his obligation under agreement to truthfully reveal details of murder).

TITLE: Pannarale v. State
INDEX NO.: C.3.b.3.
CITE: (10/16/94), Ind., 638 N.E.2d 1247
SUBJECT: Binding effect of plea agreement -- sentence modification
HOLDING: Plea agreements between criminal Ds and prosecutors are designed to induce D to plead guilty, typically in return for promise of less than maximum sentence. Plea agreement is contractual in nature, binding D, State and Tr. Ct. Goldsmith, 419 N.E.2d 109. Prosecutor and D are contracting parties, and Tr. Ct.'s role with respect to their agreement is described by statute: If court accepts plea agreement, it shall be bound by its terms. Ind. Code 35-35-3-3(e). After sentence has been imposed pursuant to plea agreement combining recommendation of specific term of years, sentence may not be altered upon subsequent motion unless agreement contained specific reservation of authority for trial judge.

Here, in exchange for State's dismissal of some pending charges, D pleaded guilty to dealing in cocaine in exchange for prosecutor recommendation of sentence not exceeding ten years. Three years later, D petitioned for reduction of his sentence pursuant to sentence reduction statute, Ind. Code 35-38-1-23. Tr. Ct. denied petition. Ct. App. held that consideration of request for sentence reduction were prohibited. However, D and prosecutor did not agree on specific term of incarceration. Instead, plea agreement provided that Tr. Ct. could sentence D for up to ten years. Court thus retained considerable amount of discretion in determining specific number of years to be imposed. Held, Ct. App.' decision at 627 N.E.2d 828 vacated in part and remanded to Tr. Ct.

RELATED CASES: Rivera, 20 N.E.3d 857 (Ind. Ct. App. 2014) (Tr. Ct.'s decision to sentence D to time served for technical violation of community corrections was not a sentence modification, but a consequence of violation of his initial sentence and fell within Tr. Ct.'s discretion; see full review at E.6.k); Owens, App., 886 N.E.2d 64 (State waived its right to approve D's petition for sentence modification and did not forfeit its right to object to such a modification).

TITLE: Petty v. State
INDEX NO.: C.3.b.3.
CITE: (1/11/89), Ind., 532 N.E.2d 610
SUBJECT: Guilty plea -- oral agreement not binding unless consideration given
HOLDING: Plea agreement statutes contemplate written agreements, Ind. Code 35-35-3-3, and acceptance of oral offer does not create binding agreement. Elmore, 375 N.E.2d 660. Furthermore, even offer and acceptance by parties do not mandate acceptance by Court. Coker, 499 N.E.2d 1135. However, in Bowers, 500 N.E.2d 203, Court used principles of equity and contract to enforce prosecutor's pledge not to prosecute suspect arrested for burglary if he would supply information for search warrant aimed at another suspect; to have held otherwise would have substantially neutralized utility of such promises as way of procuring cooperation. Here, D alleged that there was plea agreement between him and State, and that he tendered consideration in form of foregoing speedy trial request and waiving extradition. In reality, there was little indication that D was ever interested in speedy trial, and he would have been transported eventually regardless of whether he agreed with extradition; this did not put D in Bowers parameters. Therefore, prosecutor had authority to withdraw plea offer before it was reduced to writing and submitted to Tr. Ct. Held, conviction affirmed; DeBruler, J., concurred in result.

RELATED CASES: Roeder, App., 696 N.E.2d 62 (D's voluntary return to jurisdiction did not constitute detrimental reliance on plea).

TITLE: Reffett v. State

INDEX NO.: C.3.b.3.

CITE: (05/17/91), Ind., 571 N.E.2d 1227

SUBJECT: Felony plea agreement - binding even though accepted prior to obtaining presentence report

HOLDING: D is entitled to enforce plea agreement where Ct. has accepted guilty plea, approved plea agreement & found D guilty pursuant to plea, all prior to ordering & reviewing presentence report, & trial judge may not subsequently revoke his acceptance of plea after reviewing report; vacating Reffett, App., 557 N.E.2d 1068. D was charged with operating motor vehicle while intoxicated (OWI) as Class D felony & operating while driving privileges were suspended (OWS) as habitual traffic offender, Class D felony. Agreement called for plea to OWI, dismissal of OWS charge, & recommendation of 23-month sentence, to be served concurrently with prior sentence imposed. After questioning D as to voluntariness of plea & explaining binding nature of Ct.'s acceptance, judge accepted plea agreement, finding D guilty of OWI, & postponing sentencing until presentence report was done. Report indicated long list of convictions for OWI & public intoxication, & when Judge saw this, he rescinded acceptance, entered plea of not guilty, & set case for trial. After further negotiation, D entered into new plea agreement altering sentence to 2 years to be served consecutively to prior sentence. Ct. accepted this plea & sentenced accordingly.

S. Ct. found that Ct. should have considered presentence report prior to accepting plea agreement, but found that once plea is accepted, Ct. is bound by all its terms, & failure to have presentence report doesn't strip Ct. of power to accept plea. Held, case remanded for sentencing pursuant to first agreement.

RELATED CASES: Roark, App., 829 N.E.2d 1078 (after accepting plea agreement & entering judgment, Tr. Ct. could not reject the plea prior to sentencing when PSI came back showing a more extensive criminal history than known when the plea was accepted)

TITLE: Richardson v. State
INDEX NO.: C.3.b.3.
CITE: (4th Dist. 12/13/83), Ind. App., 456 N.E.2d 1063
SUBJECT: Plea agreement - binding on another prosecutor
HOLDING: Tr. Ct. erred in denying D's motion to dismiss conspiracy charge in Porter County where D 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 D may have been involved. Ind. Code 35-3.1-1-10(d), now Ind. Code 35-34-1-10(d), provides that D 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 35-3.1-1-10(e), now Ind. Code 35-34-1-10(e): 2 or more offenses within jurisdiction of same Ct. & which could have been joined in one prosecution. Ct. rejects state's contentions that plea bargain should not be binding on prosecutor in another county & that D's relief should be limited to withdrawal of guilty plea in Lake County. Statute imposes no requirement that subsequent prosecution be in county where plea agreement was made. Ct. holds as matter of law evidence entitles D to dismissal under Ind. Code 35-3.1-1-10(d). Held, reversed & remanded; dismissal of charge ordered.

RELATED CASES: Cf. Crose, App., 482 N.E.2d 763 (where special prosecutor (SP) agreed to dismiss unrelated pending charges if D pled guilty, proper remedy for D who was tried & convicted on unrelated charges is withdrawal of first guilty plea; SP had no power to bargain on charges beyond case to which he was assigned; case includes good discussion of law).

TITLE: Santobello v. New York
INDEX NO.: C.3.b.3.
CITE: 404 U.S. 257 (1971)
SUBJECT: Guilty plea -- plea agreement binding on another prosecutor
HOLDING: When guilty plea rests in any significant degree on promise or agreement of prosecutor, so that it can be said to be part of inducement or consideration, such promise must be fulfilled. F.R.C.P. 11, 18 U.S.C.A. Here, D bargained & negotiated for particular plea in order to secure dismissal of more serious charges, but also on condition that no sentence recommendation would be made by prosecutor. Prosecutor was going to make no recommendation as to sentence on two felony counts; however, second prosecutor replaced first one & recommended maximum sentence. Staff lawyers in prosecutor's office have burden of "letting the left hand know what the right hand is doing" or has done. That breach of agreement was inadvertent does not lessen its impact. Held, conviction vacated & case remanded with instructions that D be given opportunity to replead to original charges in indictment.

TITLE: Spencer v. State
INDEX NO.: C.3.b.3.
CITE: 3rd Dist., 05-11-94, Ind. App., 634 N.E.2d 72
SUBJECT: Acceptance of agreement not required
HOLDING: Where Tr. Ct. entered D's guilty plea & conviction, but said it would decide whether to accept plea agreement after sentencing hearing & presentence report, & that if it did not accept agreement, former not guilty plea would be reinstated & conviction vacated, it was not error to eventually reject agreement & set matter for trial, Johnson, 457 N.E.2d 196. There is distinction between accepting guilty plea & accepting plea agreement, & D has no absolute right to have guilty plea accepted. Acceptance of plea agreement is even more discretionary. D was clearly advised that if Ct. accepted agreement, it was bound by its terms, & that by accepting guilty plea, Ct. was not accepting agreement. Therefore, acceptance of guilty plea & entry of conviction did not bind Ct. to accept plea agreement. Ct. also found requirements of Ind. Code 35-35-1-2 did not apply to render Tr. Ct.'s actions erroneous.

TITLE: St. Clair v. State
INDEX NO.: C.3.b.3.
CITE: (02-17-09), 901 N.E.2d 490 (Ind. 2009)
SUBJECT: Word "recommend" does not make plea agreement open
HOLDING: Once Tr. Ct. approved plea agreement that recommended a three-year sentence, it was bound to impose the sentence specified in the agreement and was not authorized to impose any other sentence. D did not point to any substantial evidence that he, his lawyer, prosecutor, or judge intended or understood that agreement gave Tr. Ct. "broad discretion" to impose any sentence within statutory or other legal limits. His central argument that parties intended an open agreement rests on agreement's use of the word "recommend," which must mean something that is nonbinding. Because no plea agreement is binding until Tr. Ct. accepts it, D's definition would cover both open and fixed agreements. Furthermore, Court has heard numerous cases in which plea agreements are quoted or described as recommending a sentence that it treated as fixed agreements. See, e.g., Pannarale v. State, 638 N.E.2d 1247 (Ind. 1994). Finally, plea agreement fashioned by parties uses "recommend" only in the sentencing section, which is also the only section that binds the State to act. While it could be more explicit that the court has no discretion to alter the terms of the agreement--only to accept it or reject it in its entirety--the normal use of the word "recommend" in Indiana plea bargaining clearly justifies its use here. Parties clearly did not intend to present an open plea agreement to court, but rather one that specified a particular sentence if court approved agreement and accepted the plea. Held, transfer granted, Court of Appeals' opinion at 880 N.E.2d 1214 vacated, judgment affirmed.

TITLE: Steele v. State
INDEX NO.: C.3.b.3.
CITE: (1st Dist., 08-25-94), Ind. App., 638 N.E.2d 1338
SUBJECT: Acceptance of terms of plea agreement required
HOLDING: Where plea agreement was filed with Tr. Ct., & judge accepted D's guilty plea but ordered pre-sentence investigation & later sentencing, it was error for Tr. Ct. to reject sentencing recommendation at subsequent sentencing. Agreement called for D to plead guilty to Class C burglary in exchange for 4-year sentence. At guilty plea hearing plea agreement was filed & Tr. Ct. found D guilty of Class C burglary. When D appeared at subsequent sentencing, Tr. Ct. rejected 4-year term in agreement, & D then agreed to amend agreement to 8 years. In PCR petition D alleged Ct. erred in failing to comply with original agreement & that plea was not knowingly made, but PCR Ct. denied petition.

Ct. rejected State's argument that at plea hearing Tr. Ct. accepted guilty plea, but not agreement, but Ct. found guilty plea was dependent on agreement, & offered contingent on receiving 4-year sentence. Tr. Ct. could not accept plea without accepting agreement's terms, because if it did, D would not get benefit of bargain. If Tr. Ct. was not satisfied with agreement, it could have rejected guilty plea & set matter for trial. Once Ct. accepted plea agreement, it could not later rescind its acceptance, Reffett, Ind., 571 N.E.2d 1227. Although statute requires Tr. Ct. to receive pre-sentence report before it accepts plea, failure to follow procedure does not allow Tr. Ct. to rescind agreement after getting report, Reffett, *supra*, at 1230. Ct. also rejected State's argument that D waived error by failing to object to amendment of agreement, noting waiver argument was rejected in Reffett because there was no sense in requiring D to go to trial to preserve claim. Held, cause remanded with instruction to sentence under original agreement.

RELATED CASES: Shepperson, App., 800 N.E.2d 658 (by accepting oral plea agreement, Tr. Ct. was bound by its terms, even though failure to file written agreement in felony cases waives right to specific performance); Benson, App., 780 N.E.2d 413 (record revealed unequivocally that Tr. Ct. accepted D's guilty plea, plea agreement, & that it entered judgment against D; D was denied effective assistance of appellate counsel for failure to raise Tr. Ct.'s unilateral rejection of plea agreement; see full review at Y.4.c); Rogers, App., 715 N.E.2d 428 (Tr. Ct. erred in failing to sentence D in accordance with plea agreement which it had accepted); Lee, App., 652 N.E.2d 113 (Tr. Ct. erred in rejecting plea agreement after accepting D’s guilty plea & entering judgment of conviction, where D was not informed that Tr. Ct. was not party to plea agreement, & there was no indication that acceptance of guilty plea was conditional in any way).

TITLE: Stone v. State
INDEX NO.: C.3.b.3.
CITE: (3/12/2015), 27 N.E.3d 341 (Ind. Ct. App. 2015)
SUBJECT: Tr. Ct. erred in rescinding acceptance of plea agreement
HOLDING: Tr. Ct. abused its discretion when, after accepting a plea agreement and entering judgment thereon, it withdrew its acceptance because D failed to appear at a pre-sentencing investigation. As a general rule, the binding nature of a court-accepted plea agreement prevents Tr. Ct.s from revoking such an agreement and vacating a previously-entered judgment of conviction—even if the D has yet to be sentenced. See, e.g., Reffett v. State, 571 N.E.2d 1227, 1229-30 (Ind. 1991) and Kline v. State, 875 N.E.2d 435, 437 (Ind. Ct. App. 2007). However, trial judges may rescind plea agreements under limited circumstances, where: 1) a D asserts his innocence at the sentencing hearing, see Beech v. State, 702 N.E.2d 1132, 1136 (Ind. Ct. App. 1998), and 2) a D violates one of the express terms of his plea agreement by refusing, for example, to testify at the trial of one of his co-Ds. See Campbell v. State, 17 N.E.3d 1021, 1024-25 (Ind. Ct. App. 2014). Because these exceptions do not apply here, the Tr. Ct. erred in withdrawing its acceptance of the plea agreement. Held, judgment reversed and Tr. Ct. directed on remand to enter judgments of conviction and impose sentence in accord with terms of the plea agreement.

RELATED CASES: McMillan, 2018 Ind. App. LEXIS 79 (Ind. Ct. App. 2018) (Tr. Ct. properly revoked acceptance of D's guilty plea before sentencing; see full review at C.2.d.1).

TITLE: Valenzuela v. State
INDEX NO.: C.3.b.3.
CITE: 898 N.E.2d 480 (Ind. Ct. App. 2008)
SUBJECT: Violation of plea agreement - sentence exceeded cap
HOLDING: Tr. Ct. violated terms of plea agreement when it sentenced D to an aggregate sentence of forty-five years, with thirty-two years executed. Plea agreement, which superseded previous negotiations, required State to "make the following recommendation as [to] the sentence to be imposed: Cap of Thirty-Five Years (35)." Having exceeded that cap by imposing a forty-five-year sentence, Tr. Ct. improperly exceeded the plain terms of D's plea agreement. Even if plea agreement were ambiguous, Court will strictly construe the agreement against its drafter, the State, rather than rely on extrinsic evidence to discern the intent of the parties. Thus, Court construed the term "Cap of Thirty-Five Years" to be a cap on the total term of D's sentence. Held, reversed and remanded for resentencing.

C. PLEAS

C.3. Plea bargaining

C.3.b.4. Other

TITLE: Coleman v. State
INDEX NO.: C.3.b.4.
CITE: (02-15-21), 162 N.E.3d 1184 (Ind. Ct. App. 2021)
SUBJECT: No abuse of discretion to add condition of probation not specified in plea agreement
HOLDING: After Defendant pleaded guilty to Level 6 felony strangulation, trial court did not abuse its discretion in ordering that he attend and complete classes in anger management or conflict resolution, even though plea agreement did not include any conditions of probation. First, the court addressed a motion Defendant filed to strike a portion of the State's brief that cited to information contained in the probable cause affidavit. Noting that the strict rules of evidence do not apply to sentencing hearings and that the review of his sentence does not rely on any facts he disputes, the court denied the motion. Next, the court found that the requirement to attend anger management or conflict resolution classes as a condition of probation is an administrative or ministerial condition. It is an obligation that is rehabilitative in nature and does not materially add to the punitive obligation of his sentence. Held, no abuse of discretion.

TITLE: Creech v. State
INDEX NO.: C.3.b.4.
CITE: (05-21-08), 887 N.E.2d 73 (Ind. 2008)
SUBJECT: D may waive right to appeal sentence as part of plea agreement
HOLDING: Through a plea agreement, D can waive his right to appeal a discretionary sentencing decision, as long as the waiver is knowing and voluntary. *Citing* United States v. Hare, 269 F.3d 859 (7th Cir. 2001), Court noted that a D's waiver of appellate rights can be a substantial benefit to both the D and society. Here, D knowingly and voluntarily waived his right to appeal, despite judge's statements at close of sentencing hearing that he retained the right to appeal. These statements had no effect on D's guilty plea and are not grounds for allowing D to circumvent the express terms of his plea agreement. D did not claim that language of plea agreement was unclear or that he misunderstood the terms of the agreement at the time he signed it. Held, transfer granted, judgment affirmed.

Note: Court reaffirmed case law invalidating provisions in plea agreements that waive post-conviction rights. See Majors v. State, 568 N.E.2d 1065 (Ind. Ct. App. 1991).

RELATED CASES: Wihebrink, 181 N.E.3d 448 (Ind. Ct. App. 2022) (an appeal waiver, despite a challenge to aggravators or mitigators found by Tr. Ct. at the time of sentencing, is enforceable because such a challenge is not one of illegality) (questioning validity of appeal waivers, which are prospective in nature, and propriety of Court's prior decisions holding that a defendant's assent to the express waiver language in a written plea agreement indicates she knowingly and voluntarily waives her right to appeal the sentence); Nolan, 177 N.E.3d 881 (Ind. Ct. App. 2021) (a defendant waives his/her right to appeal a restitution order after signing a plea agreement leaving all terms of the sentence to the trial court's discretion); Merriweather**,** 151 N.E.3d 1281 (Ind. Ct. App.) (as in Bonilla, below, Ct, found no waiver of right to appeal sentence despite waiver in plea agreement, where Tr. Ct. told D he had right to appeal his sentence and neither defense nor prosecutor objected); McHenry, 152 N.E.3d 41 (Ind. Ct. App. 2020) (Defendant can appeal "open plea" where plea agreement leaves sentencing discretion to trial court even if plea agreement wrongly states that plea is not an open plea and appeal is waived), Johnson, 145 N.E.3d 785 (Ind. 2020) (a general waiver of a right to appeal a sentence in 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); Idaho v. Garza, 139 S. Ct. 738 (2019) (defense lawyer's refusal to file requested appeal constitutes ineffective assistance, despite D's appeal waiver; see full review, this section); Archer, 81 N.E.3d 212 (Ind. 2017) (D 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, 66 N.E.3d 621 (Ind. Ct. App. 2017) (As in Creech, D had already made an enforceable waiver of his right to appeal sentence by the time trial judge at sentencing told D he would have the right to appeal; thus Court dismissed the appeal at the State's request); Williams, 51 N.E.3d 1205 (Ind. Ct. App. 2016) (Court resolved ambiguity in whether plea deal was open or closed in favor of D and thus allowed direct appellate review of her sentence); Melching**,** 16 N.E.3d 1015 (Ind. Ct. App. 2014) (State was not estopped from enforcing provision in plea agreement in which D waived right to appeal sentence even though State failed to object when, at end of sentencing hearing, Tr. Ct. erroneously advised D that he had right to appeal his sentence; see full review, this section); Hawkins, 990 N.E.2d 508 (Ind. Ct. App. 2013) (knowing and voluntary waiver found where plea agreement explicitly stated that D was waiving his right to appeal appropriateness of sentence and Tr. Ct. read that provision at guilty plea hearing and asked if D understood it; distinguishing Ricci and Bonilla (below), Ct. held that Tr. Ct.'s advisements to D were neither conflicting nor ambiguous); Westlake, 987 N.E.2d 170 (Ind. Ct. App. 2013) (because D's plea agreement did not specifically refer to abuse of discretion arguments or include a catch-all that prohibited sentencing appeals, D's waiver of his right to challenge his sentence under Appellate Rule

7(B) did not foreclose his argument that the Tr. Ct. abused its discretion by failing to consider a mitigator); Brown, 970 N.E.2d 791 (Ind. Ct. App. 2012); Bowling, 960 N.E.2d 837 (Ind. Ct. App. 2012) (no error in denying a belated direct appeal to D 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"); Buchanan, 956 N.E.2d 124 (Ind. Ct. App. 2011) (when D agreed in his plea agreement that he will be credit restricted felon, he did not waive his ability to challenge calculation of his credit time); Holloway, 950 N.E.2d 803 (Ind. Ct. App. 2011) (Ricci and Bonilla (below) apply where, despite waiver in plea agreement, Tr. Ct. told D he had right to appeal his sentence and neither defense nor prosecutor objected); Ivy, 947 N.E.2d 496 (Ind. Ct. App. 2011) (erroneous advisement that D could modify the last two years of his sentence to a work release program was of no consequence because D received benefit of his bargain prior to sentencing hearing and D did not make any claim that language of plea agreement was confusing or misunderstood); Akens, 929 N.E.2d 265 (Ind. Ct. App. 2010) (as in Creech, Tr. Ct.'s misstatement that D could appeal his sentence was made after it had accepted the plea agreement and entered D's sentence; thus, D already had received the benefit of his bargain prior to Tr. Ct.'s misstatement); Abrajan, App., 917 N.E.2d 709 (Ind. Ct. App. 2009) (where D's plea agreement waives the right to appeal his sentence, Ct. will not enforce the waiver if Tr. Ct. advised D about his right to appeal during both the plea and sentencing hearings where neither the prosecutor nor defense counsel alerted Tr. Ct. to the error); Bonilla, 907 N.E.2d 586 (Ind. Ct. App. 2009) (D did not waive his right to appeal his sentence because Tr. Ct. made confusing remarks at guilty plea hearing indicating that D "may" have waived right to appeal and then advised D of rights to appeal and to attorney); Holsclaw, App., 907 N.E.2d 1086 (D waived right to appeal appropriateness of sentence through language in guilty plea); House, 901 N.E.2d 598 (Ind. Ct. App. 2009) (D can waive statutory right to earn credit time during any incarceration due to his participation in drug court); Ricci, App., 894 N.E.2d 1089 (distinguishing Creech, Ct. noted that Tr. Ct. here clearly and unambiguously stated at plea hearing that D had not surrendered the right to appeal his sentence; purported waiver in plea agreement is a nullity); Brattain, App., 891 N.E.2d 1055 (Tr. Ct. is not required to engage in colloquy with D re: intention to waive appellate rights; moreover, appointment of appellate counsel does not invalidate waiver provision).

TITLE: Disney v. State
INDEX NO.: C.3.b.4.
CITE: (1st Dist. 10/28/82), Ind. App., 441 N.E.2d 489
SUBJECT: Plea agreement - conditions of probation
HOLDING: A condition of probation which imposes a substantial obligation of a punitive nature is a part of sentence & must be specified in plea agreement. Thus, it is error for Tr. Ct. to include restitution/reparation as condition of probation when there was no mention of such in plea recommendation. A Tr. Ct. is not bound to accept a plea agreement but once agreement is accepted by Ct., Ct. may not change terms. Ind. Code 35-5-6-2(b) [now Ind. Code 35-35-3-3]; State ex rel. Goldsmith v. Marion Superior Ct. 419 N.E.2d 109. Here, Tr. Ct. accepted plea recommendation which did not include/specify that restitution/reparation was a term of probation & later imposed $500 restitution (medical expenses & lost wages to rape victim) as condition of probation. Held, remand with instructions to grant PCR petition to extent that restitution requirement be stricken from probation order.

RELATED CASES: Jackson, 968 N.E.2d 328 (Ind. Ct. App. 2012) (Tr. Ct. erroneously imposed community service as a condition of probation, which was not included in written plea agreement; Tr. Ct. cannot vary terms of plea agreement simply by seeking D's verbal assent); S.S., App., 827 N.E.2d 1168 (Tr. Ct. erred in imposing informal home detention after accepting juvenile D's plea to carrying a handgun without a license in exchange for receiving a suspended commitment); L.W., App., 798 N.E.2d 904 (Juvenile Ct. did not err in placing D on informal home detention as condition of suspended commitment, even though this condition was not part of plea agreement; see full review at U.11.e); Briscoe, App., 783 N.E.2d 790 (Tr. Ct. erroneously imposed $2000 fine on D as part of sentence, because it was not provided for in plea agreement); Freije, 709 N.E.2d 323 (Tr. Ct. violated plea agreement by including home detention & 650 hours of community service work as conditions of D's probation); Morris, 985 N.E.2d 364 (Ind. Ct. App. 2013); Sinn, App., 693 N.E.2d 78 (Tr. Ct. erred in ordering D to pay restitution when plea agreement contained no provision allowing such order); Antcliff, App., 688 N.E.2d 166 (where plea agreement expressly provides that Ct. has discretion in establishing terms of probation, Ct. may impose home detention as condition of probation without condition being mentioned in plea agreement itself).

TITLE: Garza v. Idaho

INDEX NO.: C.3.b.4.

CITE: (2/27/2019), 139 S. Ct. 738 (U.S. 2019)

SUBJECT: Despite appeal waiver, defense lawyer's refusal to file requested noticed of appeal constitutes ineffective assistance

HOLDING: Defense attorneys may not disregard their clients' instructions to file appeals from criminal convictions and sentences even when the clients had agreed to waive appeals as part of their plea agreements. "No appeal waiver serves as an absolute bar to all appellate claims...A D who has signed an appeal waiver does not, in directing counsel to file a notice of appeal, necessarily undertake a quixotic or frivolous quest."

Here, defense counsel rendered deficient performance by not filing a notice of appeal in light of D's clear requests. Given the possibility that a D 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 D'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 D's to make. Held, Idaho Supreme Court opinion at 405 P. 3d 576 reversed and remanded. THOMAS, J., joined by ALITO and GORSUCH, JJ., DISSENTING, believe defense counsel in this case acted appropriately, protecting D from the possibility of a longer sentence.

NOTE: In Creech v. State, 887 N.E.2d 73 (Ind. 2008), the Indiana Supreme Court held that Ds may waive the right to appeal sentence as part of a plea agreement. Garza retained a right to appeal at least some issues despite his waivers. Thus, prejudice from failing to file a notice of appeal was presumed pursuant to Roe v. Flores-Ortega, 528 U. S. 470 (2000), even though Garza had fewer possible claims than other appellants.

TITLE: Johnson v. State

INDEX NO.: C.3.b.4.

CITE: (05/22/2020), Ind., 145 N.E.3d 785

SUBJECT: D did not knowingly waive right to appeal sentence by signing general waiver of right to appeal

HOLDING: Per Curiam. In Creech v. State, 887 N.E.2d 73 (Ind. 2008), and Collins v. State, 817 N.E.2d 230 (Ind. 2004), Indiana Supreme Court held that a defendant who pleads guilty may waive the right to appellate review of his or her sentence only if this waiver is knowing and voluntary. Here, Court reaffirmed the critical role of the trial court in safeguarding the validity of such waivers, holding that trial court erred in denying Defendant's motion to file a belated notice of appeal. Defendant entered into a plea agreement which included a term stating he waived his right to appeal and post-conviction relief. The trial court advised Defendant of the rights he would be giving up by pleading guilty, including his right to appeal his conviction and/or sentence for Level 4 felony dealing in methamphetamine. Defendant filed for permission to file a belated appeal, stating he was only recently made aware of his right to appeal his sentence. Under the circumstances, Court found the general waiver of Defendant's right to appeal in plea agreement, "particularly when contained in the same sentence as an unenforceable waiver of post-conviction relief, insufficiently explicit to establish a knowing and voluntary waiver of Johnson’s right to appeal his sentence." Held, transfer granted, remanded with instructions to grant Defendant's motion for permission to file a belated notice of appeal; Slaughter, J., dissenting without a separate opinion, would have expressly adopted the Court of Appeals ruling.

RELATED CASES: Williams, 164 N.E.3d 724, (Ind. 2021) ((to constitute a valid waiver of the right to appeal a sentence, the plea agreement, guilty plea and sentencing hearing colloquy, and sentencing order must be clear and consistent as to whether a defendant waives only the right to appeal the conviction or the right to appeal the conviction and sentence).

TITLE: Kimberlin v. DeLong
INDEX NO.: C.3.b.4.
CITE: (6/13/94), Ind., 637 N.E.2d 121
SUBJECT: Guilty plea -- use as admission in civil cases
HOLDING: While criminal felony judgment may be admitted in evidence, such conviction is not necessarily conclusive proof in civil trial of factual issues determined by criminal judgment, and evidence transcript is not necessarily admissible. Here, D contended that Tr. Ct. erroneously granted plaintiffs' motion for partial summary judgment by misconstruing Ind. Code 34-3-18-1 to provide that evidence of prior criminal felony final judgment creates conclusive and irrebuttable presumption of liability in civil proceeding. Court retreated from implied holding in Hawkins, 608 N.E.2d 1358, which by implication affirmed civil Tr. Ct.'s use of criminal trial transcript (not just final judgment) and entry of final judgment without further evidence at trial. Held, Ct. App.' reversal of wrongful death judgment affirmed; DeBruler, J., concurring in part and concurring in result, Givan, J., concurring in part and dissenting in part, Shepard and Givan, C.J. and J., concurring in result.

Note: This case could possibly be used to argue that plea agreement is same as conviction, and therefore that plea agreement may be admitted into evidence in civil trial.

TITLE: Majors v. State
INDEX NO.: C.3.b.4.
CITE: (1st Dist. 03/7/91), Ind. App., 568 N.E.2d 1065
SUBJECT: Waiver of right to seek PCR in plea agreement
HOLDING: Although provisions in plea agreements which waive right to seek post-conviction relief are void & unenforceable, where D's plea was otherwise voluntary & he was not actually prevented from seeking relief, vacation of conviction on grounds of waiver provision is not required. Held, conviction affirmed.

RELATED CASES: Creech, 887 N.E.2d 73 (reaffirming Majors but holding that D may waive right to appeal sentence as part of plea agreement); Clay, App., 882 N.E.2d 773 (waiver of right to appeal sentence provision in plea agreement was unenforceable where there was no evidence showing that D understood that he was waiving that right when he entered into plea agreement); Perez, App., 866 N.E.2d 817 (finding that Majors' statement re: waiver of PCR was dicta, Ct. held D properly waived right to appeal sentence).

TITLE: Mechling v. State
INDEX NO: C.3.b.4.
CITE: (9/16/2014), 16 N.E.3d 1015 (Ind. Ct. App. 2014)
SUBJECT: State not estopped from enforcing sentence waiver in plea agreement
HOLDING: State was not estopped from enforcing provision in plea agreement in which D waived the right to appeal his sentence, even though the State failed to object to Tr. Ct.'s erroneous statement at end of sentencing hearing that D had a right to appeal his sentence.

A D may waive the right to appellate review of his sentence. Creech v. State, 887 N.E.2d 73, 76 (Ind. 2008), and D does not dispute that his waiver was knowing, intelligent, and voluntary. Estoppel prevents a person who has induced another person to act in a particular way from later adopting an inconsistent position or course of conduct that injures the other person. Town of New Chicago v. City of Lake Station, ex rel. Lake Station Sanitary Dist., 939 N.E.2d 638, 653 (Ind. Ct. App. 2010), *trans. denied*. Here, D failed to show how he was harmed by the State's failure to object to the Tr. Ct.'s erroneous advisement.

Further, the State's failure to object does not make it fundamentally unfair to enforce D's waiver. "Silence will not form the basis of . . . . estoppel unless the silent party has a duty to speak." Id. Here, the State had no duty to speak because Tr. Ct.'s erroneous advisement had no legal effect on D's plea agreement. "'[S]ubsequent actions by the Tr. Ct. following a D's plea are presumed to have no effect on the plea transaction, even in cases where a D is erroneously advised that he has a right to appeal.' Brattain v. State, 891 N.E.2d 1055, 1057 (Ind. Ct. App. 2008) (*citing* Creech, 887 N.E.2d at 77)." Held, judgment affirmed.

TITLE: Ratliff & Heavrin v. State
INDEX NO.: C.3.b.4.
CITE: (1st Dist. 07-20-92), Ind. App., 596 N.E.2d 241
SUBJECT: Charitable donation as condition of plea agreement
HOLDING: Under circumstances, it was not error for Ct. to accept plea agreements requiring Ds to make charitable contributions to charities of their choice in lieu of fines, because 1) even if terms were improper, Ds invited error by asking Ct. to accept terms of agreements; 2) both Ds were able to select recipients of their donations; & 3) there is no statutory prohibition on such donations & suspension of fines is discretionary & can be based on reasonable conditions. Both Ds pled guilty to operating while intoxicated & entered into agreements calling for making of donations to charity of their choice in lieu of fines. While there is no statutory authority for ordering Ds to make such contributions, it has been approved in some instances where suspension of fine was discretionary, Campbell, App., 551 N.E.2d 1164. Such options are not always proper, however, & Advisory Opinion of Indiana Commission on Judicial Qualifications disapproved of agreement calling for contribution to county "victim fund" because it had practical effect of being "pay off" to receive decisional favor. Additionally, such contributions have been found improper if they conflict with penalties imposed by statute, i.e., where suspension of fine is not discretionary. In instant case, fact that Ds chose recipients of donation made fear of appearance of "pay off" to chosen entity no problem, & imposition & suspension of fines was discretionary, making contributions reasonable condition of suspension.

TITLE: Starcher v. State
INDEX NO.: C.3.b.4.
CITE: (12/29/2016), 66 N.E.3d 621 (Ind. Ct. App. 2017)
SUBJECT: Waiver of right to appeal sentence
HOLDING: A defendant can waive the right to appeal a sentence, and the courts will enforce a knowing, voluntary and intelligent waiver of the right to appeal one's sentence when it is a condition of the plea agreement. Creech v. State, 887 N.E.2d 73, 75 (Ind. 2008). But the Court of Appeals will not enforce a Creech waiver in a plea agreement if the defendant pleaded guilty after the trial judge advised him he would still have the right to appeal his sentence. Ricci v. State, 894 N.E.2d 1089 (Ind. Ct. App. 2008).

Here, the plain terms of Defendant's plea agreement demonstrate that he waived his right to appellate review of his two-year sentence for maintaining a common nuisance and possession of a synthetic drug. The trial judge accepted Defendant's guilty plea and only later, at the sentencing hearing, told Defendant he would have the right to appeal his sentence. Defendant had already made an enforceable waiver of his rights under Appellate Rule 7(B) by that time; thus, the Court of Appeals dismissed the appeal at the State's request. Held, appeal dismissed.

TITLE: Weidman v. State
INDEX NO.: C.3.b.4.
CITE: (4/28/2014), 7 N.E.3d 385 (Ind. Ct. App. 2014)
SUBJECT: Plea agreement waived credit time claim
HOLDING: Tr. Ct. did not err in denying credit for the time D was on electronic monitoring as a condition of his release on bond, because he specifically agreed in his plea agreement that he was not entitled to that credit time. Thus, D waived his right to claim that he was entitled to credit for the time he was on electronic monitoring. To allow such a challenge now would permit the D to benefit from the terms of the plea agreement without upholding his end of the bargain struck in the plea agreement. And D did benefit; in exchange for his plea, the State dismissed serious charges, and Tr. Ct. ordered the sentences on some of D's convictions to be served concurrently. Held, judgment affirmed.

C. PLEAS

C.3. Plea bargaining

C.3.c. Role of judge/prosecutor/state officials/ defense counsel

TITLE: Ellis v. State
INDEX NO.: C.3.c.
CITE: (3-23-01), Ind., 744 N.E.2d 425
SUBJECT: Judicial participation in plea bargaining - voluntariness of plea
HOLDING: Where Tr. Ct. merely responded to proposed plea agreement that had been previously negotiated by parties without any involvement by Ct., Tr. Ct.'s comments as to what plea it would accept did not make D's eventual guilty plea involuntary. Upon hearing testimony of rape victim at guilty plea hearing, judge explained that he would not accept plea which was submitted to Ct. but would accept plea to different sentence. Tr. Ct. did not pressure D to enter or even consider guilty plea & did not engage in any unnecessary & unwise editorializing. After explaining what sentences he would accept, judge declined to accept proposed agreement & reset hearing. Two months later, D pled guilty under different agreement.

Ind. Code 35-35-3-3 contemplates that Tr. Ct. will approve plea agreement or reject agreement & move case along towards trial or different proposed agreement. While judicial involvement in plea negotiations can certainly go too far, judge may offer guidance as to what sentence it might find marginally acceptable. ABA Standards for Criminal Justice 14- 3.3 (3d ed. 1997). When Ct. exercises its discretion to reject plea agreement, it is in both parties' interests that Ct. explain its reasons. Here, faced with proposed sentence that fell outside range considered reasonable, Tr. Ct. merely advised parties of low end of that range, as guidance to any further negotiations. It did so in an impartial way that carried no express or implied threat of punishment. Held, transfer granted, denial of post-conviction relief affirmed.

TITLE: Garrett v. State
INDEX NO.: C.3.c.
CITE: (11-2-00), Ind., 737 N.E.2d 388
SUBJECT: Plea bargaining - role of judge; vindictive sentencing
HOLDING: Judge telling D, prior to trial, what sentence judge plans to impose if jury finds D guilty was clearly inappropriate. Judicial participation in plea bargaining has been heavily criticized by Ct's. & commentators. Stacks, 175 Ind. App. 525, 372 N.E.2d 1201 (1978). In addition, it is well settled that to punish person for exercising constitutional right is due process violation of most basic sort. Moreover, it is constitutionally impermissible for Tr. Ct. to impose more severe sentence because D has chosen to stand trial rather than plead guilty. Hill, 499 N.E.2d 1103, 1107 (Ind. 1986). Here, day of trial, judge had extensive dialogue with D about whether D should accept plea of twenty years or go to jury trial. During conversation, judge told D that if jury found him guilty, judge would impose maximum sentence of eighty years. Judge also inquired into what defense D was going to present to jury. S. Ct. does not condone trial judge's inquiry & comments regarding D's defense or depth of Ct.'s inquiry regarding D's decision to go trial. However, because D did not object to Tr. Ct.'s pre-trial comments or seek change of judge, issue is waived. Held, judgment affirmed.

RELATED CASES: U.S. v. Davila, 133 S. Ct. 2139 (2013) (where judge impermissibly participates in plea negotiations, plea must be vacated only if record shows D's ability to plead was prejudiced); Ellis, 744 N.E.2d 425 (see full review, this section).

TITLE: Page v. State
INDEX NO.: C.3.c.
CITE: (2nd Dist., 2-24-99), Ind. App., 706 N.E.2d 230
SUBJECT: Claim of sentencing error rejected - plea agreement with sentencing cap
HOLDING: Post-conviction Ct. did not err in its denial of D's claim that Tr. Ct. improperly sentenced him. Plea agreement was negotiated whereby D was to receive sentence of no more than six years executed. Tr. Ct. sentenced D to ten years with eight years suspended. After Tr. Ct. revoked D's probation & ordered him to serve remaining eight years of his original ten-year sentence, D challenged validity of his plea agreement. D argued that plea agreement had set six- year sentencing cap & that Tr. Ct. violated terms of this agreement by sentencing him to ten years with eight years suspended. At guilty plea hearing, Tr. Ct. questioned D as to his understanding of plea agreement, & D indicated he understood that his sentence would not exceed six years executed. Tr. Ct. was bound by terms of plea agreement & properly sentenced D in accordance with agreement, because D was required to actually serve two years executed. Held, denial of petition for post-conviction relief affirmed. Brook, J., dissenting, concluded that D was neither sufficiently informed of nor understood sentencing provisions of his plea agreement.

TITLE: United States v. Bradley
INDEX NO.: C.3.c.
CITE: 455 F.3d 453 (4th Cir. 2006)
SUBJECT: Judge's influence in plea negotiations improper
HOLDING: The U.S. Court of Appeals for the Fourth Circuit held that trial judge's initiation of and participation in plea negotiations affected D's substantial rights. The trial involved multiple Ds. One D facing charges of conspiracy and distribution and possession with intent to distribute crack cocaine agreed to plead guilty to the conspiracy count, with the prosecution recommending a ten-year sentence. During the plea hearing, this D stated he was pleading guilty to the ten years and the trial judge explained that he was pleading guilty to an offense that carried a mandatory minimum sentence of 10 years and a maximum sentence of life without parole with the prosecutor just making a non-binding recommendation to the court. D no longer wanted to plead guilty. The parties proceeded to trial and after a co-conspirator testified, the judge dismissed the prosecutor to speak directly with Ds and their counsel. The judge listed the evidence the government planned to present at trial, his view of the strength of the government's case based on the strength of the co-conspirators testimony, and inferences that they may want to consider pleas if available. Different counsel of Ds described their plea negotiations with the government and problems in getting an acceptable set term of years. The judge then recalled the prosecutor and expressed his concern that a miscarriage of justice would likely occur if the Ds continued to trial's end with a likely life sentence occurring. The prosecutor and Ds again discussed plea possibilities but were unable to reach an agreement. Further statements were made to encourage Ds to plead by the trial judge. The Tr. Ct. made informal contacts with a state court judge to ensure that related state charges ran concurrently for one D and encouraged the government to dismiss a firearms count to limit the mandatory minimum sentence for another.

Court noted that Fed. Rule of Crim. Proc. 11 prohibits a judge from participating in plea negotiations. The primary inquiry in this case, as no dispute existed that the judge violated the rule, was whether the error affected the Ds substantial rights and affected the fairness, integrity or public reputation of the judicial proceedings. United States v. Olano, 507 U.S. 725 (1993). Court found a "reasonable probability" that, without the judge's considerable initiative and involvement, Ds would not have pleaded guilty. Further, Court could not find any case where the judicial involvement in plea negotiations equaled this case and characterized the trial judge as an "advocate for the pleas rather than a neutral arbiter." Court discounted the strength of the government's case and the willing participation of defense counsel. While not necessarily finding coercive intent on the trial judge's part, the unequal position of the trial judge and the accused "at once raise a question of fundamental fairness."

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

TITLE: U.S. v. Dean
INDEX NO.: C.3.c.
CITE: 80 F.3d 1535 (11th Cir. 1996)
SUBJECT: Plea Agreement -- Court Can Accept Plea But Reduce "Excessive Fine"
HOLDING: Where D pled guilty to failing to file customs form required when transporting more than $10,000 out of country, pursuant to agreement under which government would recommend low sentence and D would withdraw claim to get seized money back, Court properly set aside D's promise after accepting plea agreement. Under Fed. R. Crim. P. 11(e)(1)(B), agreements under which government agrees only to make particular sentencing recommendation are not binding on court. Court was clearly free to modify sentence, but government argued court was not free to alter terms of plea agreement. Court reasoned that forfeiture here was punishment, and government could not impose punishment without judicial review.

C. PLEAS

C.3. Plea bargaining

C.3.c.1. Duties of judge

TITLE: Hunter v. State
INDEX NO.: C.3.c.1.
CITE: (7/21/2016), 60 N.E.3d 284 (Ind. Ct. App. 2015)
SUBJECT: Tr. Ct. had discretion to reject plea agreement
HOLDING: The Court, sua sponte, found the Tr. Ct. erred in stating it lacked discretion to reject the parties' plea agreement, which was styled "Recommendation of Plea." The document said D would plead guilty to possession of a firearm by a serious violent felon in exchange for the State dropping other charges. Apparently, the styling of the document convinced the Tr. Ct. that its hands were tied, even if it wanted to reject the agreement: "[I] . . . would note [that] . . . my presentence report from my probation department [said] I should reject this, when in fact I don't even have that kind of discretion." The Tr. Ct. did, in fact, have discretion because the substance of a document governs over its form, including its caption. See Fajardo v. State, 859 N.E.2d 121, 126-28 (Ind. 2007) and Preferred Prof. Ins. Co. v. West, 23 N.E.3d 716, 732 (Ind. Ct. App. 2014). Here, the document clearly set forth a quid pro quo arrangement where each party received a benefit, making the document a conventional plea agreement, which the Tr. Ct. had authority to reject. Held, judgment affirmed.

TITLE: Phillips v. State
INDEX NO.: C.3.c.1.
CITE: (11/4/82), Ind., 441 N.E.2d 201
SUBJECT: Guilty plea -- accepting plea agreement; aggravated sentence
HOLDING: Tr. Ct. may exercise its discretion to either accept or reject plea agreement and sentence recommendation therein, but if Court accepts such agreement, it is strictly bound by sentencing provision of agreement and is foreclosed from any further exercise of sentencing discretion. Goldsmith, 419 N.E.2d 109. Usually, Tr. Ct. must submit statement explaining its rationale wherever it mitigates or aggravates sentence; however, when Tr. Ct. finds recommended and agreed-to sentence acceptable, that fact in and of itself justifies imposition of aggravated sentence. Munger, 420 N.E.2d 1380. Here, Tr. Ct. advised D that he could be charged as habitual offender if he pleaded guilty to forgery, and that because of this, thirty additional years could be added to his sentence. D pleaded guilty pursuant to plea agreement whereby State recommended that he be convicted as charged and sentenced to maximum term of eight years and that State would not pursue against D additional forgery or habitual criminal charge. However, eight-year sentence imposed was aggravated term. Court held that agreement, standing alone, justified imposition of D's enhanced sentence and no explanation was necessary. Held, Ct. App. decision at 436 N.E.2d 1199 vacated; DeBruler, J., dissenting.

RELATED CASES: Steele, App., 638 N.E.2d 1338 (when Tr. Ct. accepted plea, it necessarily accepted plea agreement and became bound by its terms, even though Tr. Ct. did not verbalize accepted plea agreement or sentencing in terms).

TITLE: Reffett v. State
INDEX NO.: C.3.c.1.
CITE: (5/17/91), Ind., 571 N.E.2d 1227
SUBJECT: Effect of Tr. Ct.'s failure to consider presentence report before accepting plea
HOLDING: IC 35-35-3-3(a) provides that if contents of plea agreement indicate that prosecuting attorney anticipates that D intends to enter plea of guilty to felony charge, court shall order presentence report required by Ind. Code 35-38-1-8 and may hear evidence on the plea agreement. Here, Tr. Ct. accepted plea and approved plea agreement without first ordering and reviewing presentence report; judge then rescinded his acceptance and sentenced D based on later plea agreement. Although Tr. Ct. should not have accepted plea agreement until it had reviewed presentence report, once it accepted plea agreement, Court could not revoke its acceptance. Ind. Code 35-38-1-8. Held, denial of D's motion to correct erroneous sentence reversed, and case remanded to Tr. Ct. with instructions to sentence D in accordance with first plea agreement.

TITLE: Snyder v. State
INDEX NO.: C.3.c.1.
CITE: (11/19/86), Ind., 500 N.E.2d 154
SUBJECT: Guilty plea -- role of judge; no duty to accept plea
HOLDING: D has no absolute right to have guilty plea accepted, and trial judge may reject plea in exercise of sound judicial discretion. Santobello, 404 U.S. 257. When Tr. Ct., after complying with guilty plea statute and taking evidence on factual basis for plea, rejects plea bargain, Court will presume that Tr. Ct. has properly evaluated propriety of accepting it. Meadows, 428 N.E.2d 1232. Here, D's guilty plea was rejected based on concern that D would later attempt to have guilty plea set aside due to D's ingestion of drugs or alcohol. Court held that this was not abuse of discretion even though D, who had history of consumption of alcohol and drugs, stated to trial judge he was not under influence of either alcohol or drugs at time he entered his guilty plea. Held, denial of petition for post-conviction relief affirmed; DeBruler, J., concurring.

RELATED CASES: Spencer, App., 634 N.E.2d 72 (no error to eventually reject agreement and set matter for trial; D was clearly advised that if Tr. Ct. accepted agreement it would be bound by its terms, and by accepting guilty plea, Tr. Ct. was not accepting plea agreement); Steele, App., 638 N.E.2d 1338 (Tr. Ct. could not accept guilty plea without accepting plea agreement and its terms; however, Tr. Ct. did not verbalize that it accepted plea agreement or its sentencing terms, and D never received benefit of bargain).

TITLE: Stroud v. State
INDEX NO.: C.3.c.1.
CITE: (7/6/83), Ind., 450 N.E.2d 992
SUBJECT: Plea bargain - duties of judge; rejection
HOLDING: Tr. Ct. did not err in rejecting plea agreement where no factual basis supported plea. D has no absolute right to have guilty plea accepted. Tr. Ct. has discretion to reject plea. Meadows, 428 N.E.2d 1232. Here, D pled guilty to battery with a recommended 5-year sentence. Prosecution dropped 4 pending charges. D admitted throwing stick at victim but did not know whether it struck victim. Held, no error.

RELATED CASES: Smith 486 N.E.2d 465 (Crim L 1023(2); where prosecutor & defense counsel informally approached judge with GMBI/20-year plea in murder case & judge said he would reject it & why, such statements do not constitute judicial ruling subject to appeal).

TITLE: Walker v. State
INDEX NO.: C.3.c.1.
CITE: (6/3/81), Ind. App., 420 N.E.2d 1374
SUBJECT: Plea agreement -- rejection of prosecutor's sentencing recommendation
HOLDING: Pursuant to plea agreement, D pleaded guilty to burglary charge. Tr. Ct. accepted his plea but rejected prosecutor's recommendation to sentence D to five-year term of imprisonment. Rather, Tr. Ct. sentenced D to Indiana Department of Correction for period of eight years, *citing* aggravating circumstances of D's history of criminal activity and recent parole violation. Tr. Ct.'s rejection of prosecutor's non-binding sentence recommendation did not entitle D to withdraw guilty plea because parties did not condition Tr. Ct.'s acceptance of guilty plea upon imposition of particular sentence, Court entertained 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 Tr. Ct. by plea agreement was to entertain prosecutor's sentence recommendation when exercising its sentencing discretion. Held, denial of petition for post-conviction relief affirmed.

C. PLEAS

C.3. Plea bargaining

C.3.c.2. Duties of prosecutor

TITLE: Coker v. State
INDEX NO.: C.3.c.2.
CITE: (11/20/86), Ind., 499 N.E.2d 1135
SUBJECT: Guilty plea - duties of prosecutor; withdrawing offer
HOLDING: D was not denied constitutional rights by prosecutor's withdrawal of proposed guilty plea. Here, state offered 10-year sentence in exchange for guilty plea. D's co-D later pled guilty & agreed to testify against her. D then authorized counsel to accept state's offer, but upon tendering acceptance to prosecutor, prosecutor informed defense counsel that 10-year sentence was no longer acceptable & that offer was now for 15-year sentence. At sentencing hearing, prosecutor insisted that original offer is open only until original trial date, & that D initially rejected offer. Defense counsel disputed any discussion of termination date. Criminal D has no right to engage in plea bargaining. Prosecutor is under no duty either to plea bargain at all or to keep offer open, as offer remains within discretion of prosecutor. [Citations omitted.] In Mabry v. Johnson (1984), 467 U.S. 504, 104 S. Ct. 2543, 81 L.Ed.2d 437, U.S. S. Ct. held that D's acceptance of prosecutor's proposed plea bargain does not create constitutional right to have bargain specifically enforced. Ct. concludes even immediate acceptance of original offer by D would have created no right to have bargain specifically enforced & prosecution was under no duty to keep offer open. Held, denial of PCR affirmed. DeBruler DISSENTS without opinion.

RELATED CASES: Kernan, 138 S. Ct. 4 (U.S. Supreme Court 2017) (even if State violated Constitution by amending charges after D pled guilty (but before D was sentenced), Supreme Court precedent did not require specific performance of plea agreement), Mendoza, App., 869 N.E.2d 546 (Trial Ct. did not err in denying D's motion to dismiss, which contended that State improperly withdrew from plea agreement & dismissed & refiled charges against him); Frye, 132 S.CT.1399 (U.S. 2012) (D has no right to plea offer).

TITLE: Crose v. State
INDEX NO.: C.3.c.2.
CITE: (9/12/85), Ind. App., 482 N.E.2d 763
SUBJECT: Plea bargaining; role of special prosecutor
HOLDING: Statutory language clearly contemplates that special prosecutor has same powers as regular prosecutor only to extent of particular investigation for prosecution for which he was appointed. Special prosecutor has no power to bargain on charges beyond case to which he was assigned. Here, special prosecutor agreed to dismiss unrelated pending charges if D pleaded guilty. However, D was tried and convicted on unrelated charges. Court held that proper remedy was withdrawal of first guilty plea. Held, conviction affirmed.

RELATED CASES: Kernan, 138 S. Ct. 4 (U.S. Supreme Court 2017) (even if State violated Constitution by amending charges after D pled guilty (but before D was sentenced), Supreme Court precedent did not require specific performance of plea agreement).

TITLE: Epperson v. State
INDEX NO.: C.3.c.2.
CITE: (11/21/88), Ind. App., 530 N.E.2d 743
SUBJECT: Duty of prosecutor to fulfill plea agreement -- consideration and inducement
HOLDING: It is clear that criminal D has no constitutional right to engage in plea bargaining. Prosecutor has no duty to plea bargain or to keep offer open for any length of time. Furthermore, D's acceptance of proposed plea agreement does not create constitutional right to have bargain specifically enforced. Coker, 499 N.E.2d 1138. However, plea agreement is contract. Bielak, 660 F.Supp. 818. When plea rests in any significant degree on promise or agreement of prosecutor so that it can be said to be part of inducement or consideration, such promise must be fulfilled. Verrusio, 803 F.2d. 885. Terms of plea agreement must be interpreted in light of parties' reasonable expectations, and resolution of each case depends upon essence of particular agreement and government's conduct relating to its obligation in that case. Bielak, 660 F.Supp. 818. Here, D and State entered into agreement wherein D agreed to plead guilty to burglary and theft changes in exchange for State's nolle prosequi of criminal recklessness charge. D pleaded guilty to burglary and theft and State filed Motion to Nolle Prosequi criminal recklessness charge. State later moved to withdraw plea agreement and reinstate cause of action for criminal recklessness. Prosecutor's failure to adhere to promise which induced guilty plea constituted breach of plea agreement. Resolution of such case depends in part on government's conduct relating to its obligation. Court could not justify allowing State to renege on its plea agreement. Held, conviction reversed.

RELATED CASES: Kernan, 138 S. Ct. 4 (U.S. Supreme Court 2017) (even if State violated Constitution by amending charges after D pled guilty (but before D was sentenced), Supreme Court precedent did not require specific performance of plea agreement), Wright, App., 700 N.E.2d 1153 (where D produced uncontroverted evidence that State was aware of dealing charges pending in another Ct. at time plea recommendation was made, D was entitled to have those charges dismissed pursuant to plain language of plea agreement).

TITLE: Griffin v. State
INDEX NO.: C.3.c.2.
CITE: (10-11-01), Ind. App., 756 N.E.2d 572
SUBJECT: Plea agreement - State's promise to not file other charges
HOLDING: It was improper for State to file charge where plea agreement included promise by State to not file certain charges. D had been confidential informant for police but was then set up himself. State agreed to not file charge if D would testify in other two cases. Plea agreement is contract binding upon both parties & when terms of contract are clear & unambiguous, they are conclusive of that intent, & Ct. will not construe contract or look to extrinsic evidence. Wright v. State, 700 N.E.2d 1153 (Ind. Ct. App. 1998). Ultimately, D did not testify because State did not call upon him to do so. State argued that D did not perform other obligations. However, nowhere are these obligations identified in plea agreement or correspondence between parties that were incorporated into plea by reference. If agreement did not reflect prosecutor's intent, it was his obligation to correct it. Held, conviction reversed.

TITLE: Lee v. State
INDEX NO.: C.3.c.2.
CITE: (4/16/87), Ind., 506 N.E.2d 37
SUBJECT: Plea agreement -- role of prosecution to correct misstatement of facts
HOLDING: State and D entered into plea agreement wherein State agreed to remain silent during sentencing except to correct any misstatement of fact by D or his counsel. At sentencing hearing, both Tr. Ct. and defense counsel referred to victim as "dealer" or "drug dealer." State objected to this characterization and described victim in favorable terms. Court held that State did not breach plea agreement but merely attempted to correct what it perceived to be misstatement of facts regarding victim. Held, denial of post-conviction relief affirmed.

TITLE: Richardson v. State

INDEX NO.: C.3.c.2.

CITE: (12/13/83), Ind. App., 456 N.E.2d 1063

SUBJECT: Guilty plea -- oral agreement; prosecutor's duty to object if terms not accurately recorded

HOLDING: Failure to reduce plea agreement to writing can lead to misapprehension, mistake or calculated misrepresentation, and thus, in interests of justice, terms of such agreements should be placed in record before sentence is imposed on one pleading guilty. Spalding, 330 N.E.2d 774. It is incumbent on both parties to see that plea agreement's terms are recorded accurately. Groat, 412 N.E.2d 323. Here, prosecutor refused to reduce plea agreement to writing and D's attorney was forced to establish agreement's terms by stating them for record in open court. Deputy prosecutor had duty to speak out if he felt agreement's terms were not being recorded accurately, and since he did not do so, State waived right to contend that plea agreement was not as D's attorney represented. Held, conviction reversed and cause remanded with instructions to enter judgment of dismissal in D's favor.

TITLE: Ryan v. State
INDEX NO.: C.3.c.2.
CITE: (6/26/85), Ind., 479 N.E.2d 517
SUBJECT: Guilty plea - duties of prosecutor; sentencing recommendation
HOLDING: Prosecutor did not violate terms of plea agreement (to make no sentence recommendation [SR]) by permitting victim's mother to address Tr. Ct. at D's sentencing hearing & request maximum penalty. Here, D contends prosecutor's express promise included implicit promise that victim's family would not make SR, *citing* Chowder v. NY (1971), 404 U.S. 257, 92 S. Ct. 495, 30 L.Ed.2d 427 & US v. Cook (CA7 1982), 668 F.2d 317. Ct. distinguishes Chowder (successor prosecutor bound by predecessor's promise to make no SR) & Cook (prosecutor's promise to refrain from offering evidence to aggravate sentence was indirectly breached where probation officer incorporated into PSI damaging info contained in prosecutor's file). Person making SR in D's case was not prosecutor or someone acting in cooperation with prosecutor. Prosecutor has statutory duty to notify victim/family of sentencing hearing & to advise Ct. of their desire to speak. Ind. Code 35-35-3-2. Held, no error in denial of PCR.

RELATED CASES: Evans, App., 751 N.E.2d 245 (State did not breach promise to make no sentencing recommendation, despite police officer's statement at sentencing hearing reflecting his personal opinion regarding sentence D should receive); Harris, App., 671 N.E.2d 864 (State did not breach promise to make no sentencing recommendation, despite detective's statement to Tr. Ct. reflecting his personal opinion regarding sentence D should receive).

TITLE: Santobello v. New York
INDEX NO.: C.3.c.2.
CITE: 404 U.S. 257 (1971)
SUBJECT: Guilty plea -- plea agreement binding on another prosecutor
HOLDING: When guilty plea rests in any significant degree on promise or agreement of prosecutor, so that it can be said to be part of inducement or consideration, such promise must be fulfilled. F.R.C.P. 11, 18 U.S.C.A. Here, D bargained & negotiated for particular plea in order to secure dismissal of more serious charges, but also on condition that no sentence recommendation would be made by prosecutor. Prosecutor was going to make no recommendation as to sentence on two felony counts; however, second prosecutor replaced first one & recommended maximum sentence. Staff lawyers in prosecutor's office have burden of "letting the left hand know what the right hand is doing" or has done. That breach of agreement was inadvertent does not lessen its impact. Held, conviction vacated & case remanded with instructions that D be given opportunity to replead to original charges in indictment.

RELATED CASES: Richardson, 456 N.E.2d 1063 (agreement not to indict bars prosecutors from other counties from filing related charges under joinder statute Ind. Code 35-34-1-10; Tr. Ct. erred in denying D's motion to dismiss conspiracy charge in Porter County where D 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 D may have been involved).

TITLE: State v. Bracht
INDEX NO.: C.3.c.2.
CITE: 573 N.W.2d 176 (S.D. 1997)
SUBJECT: Plea Agreement -- Prosecutor's Promise Not to Resist Defense Request
HOLDING: Prosecutor's promise, as part of plea agreement, not to "resist" defense request for suspended sentence was breached when prosecutor, at sentencing hearing, stated that he was not "resisting" defense request, but asked court to impose "sentence similar to what you would impose in other cases." Cf. State v. Talley, No. 64893-0 (Wash. S. Ct. 1/8/98) (Prosecutor's participation in court-ordered sentencing hearing, presenting required evidence and candidly answering court's questions, did not on its own breach promise not to suggest sentence. Prosecutor walks fine line in this situation and must do nothing to undercut plea agreement in presentation of evidence or wording of answers to court.)

TITLE: State v. Carreno-Maldonado
INDEX NO.: C.3.c.2.
CITE: 135 Wn. App. 77, 143 P.3d 343 (Wash. Ct. App. 2006)
SUBJECT: Prosecutor's remarks for victims breached plea
HOLDING: The Washington Court of Appeals held that prosecutors may not offer unsolicited information at a sentencing hearing that undercuts the State's obligations under a plea agreement even if they are purporting to speak for the victims and insist that they are adhering to an agreed-upon sentencing recommendation. D agreed to plead guilty with the State agreeing to recommend sentences at the low or midpoint of the standard ranges for certain counts. At sentencing, the deputy prosecutor assured the Tr. Ct. that the State stood by its sentencing recommendation, but then speaking on "behalf of the victims" referred to D's "very extreme violent behavior" in committing crimes that were "so heinous and violent [that] it showed a complete disregard and respect for these women." Although denying it was influenced by these remarks, the Tr. Ct. entered a sentence beyond the State's recommendation. Since a plea agreement is a contract, the State has a duty to act in good faith, which requires the State "not to undercut the terms of the agreement explicitly or implicitly by conduct evidencing an intent to circumvent the terms of the plea agreement." Court rejected State's argument that no breach occurred because the prosecutor was speaking on behalf of the victims. While Washington provides crime victims a right to speak for themselves both statutorily and constitutionally, "they do not provide the State with the right to speak for the victims when they have decided not to speak and have not requested assistance in otherwise communicating with the court such as by presenting a victim impact statement." The Court acknowledged that a prosecutor who simply aids crime victims to exercise their rights does not breach a plea agreement. Lastly, the Court reversed the conviction and did not find harmless error despite trial judge's insistence that he was not influenced by the prosecutor's remarks, as harmless-error analysis does not apply when the State breaches a plea agreement.

C. PLEAS

C.3. Plea bargaining

C.3.c.4. Duties of defense counsel

TITLE: Harris v. State
INDEX NO.: C.3.c.4.
CITE: (7/13/82), Ind., 437 N.E.2d 44
SUBJECT: Plea bargain - duty of defense counsel to pursue/communicate
HOLDING: Casual conversations between deputy prosecutor (without authority to negotiate) & defense counsel are not of such a binding nature as to require communication to D. Only "proposals" or "developments" must be communicated. ABA Standard 4-6.1(b) does not impose an absolute duty upon counsel to pursue plea negotiations. Duty to negotiate arises only after counsel has evaluated strength of state's case. Here, Ct. held defense counsel had no duty to communicate to D prosecutor's comment that case was unfortunate set of circumstances & it would perhaps be appropriate if D (charged with second degree murder) pled guilty to voluntary manslaughter. Held, no error.

RELATED CASES: Dew, App., 843 N.E.2d 556 (trial counsel's failure to inform D about a plea offer from State prior to his retrial constituted ineffective assistance of counsel); Gibbs, 483 N.E.2d 1365 (card at D.21.f); Curl, 400 N.E.2d 775 (reversal where D's counsel fails to inform D of plea offer; Court would permit D to pursue plea negotiations or be retried); Lyles, 382 N.E.2d 991 (defense counsel's failure to communicate State's plea bargain offer to D denied effective assistance of counsel).

TITLE: Hill v. Lockhart
INDEX NO.: C.3.c.4.
CITE: 474 U.S. 52 (1985)
SUBJECT: Guilty plea -- ineffective assistance of counsel; D must show actual harm
HOLDING: Where D enters guilty plea upon counsel's advice, voluntariness of plea depends on whether advice was within range of competence demanded of attorneys in criminal cases. McMann, 397 U.S. 759. Ct. in Strickland, 466 U.S. 668 adopted two-part standard for evaluating claims of ineffective assistance of counsel: D must show that counsel's representation fell below objective standard of reasonableness, & that there is reasonable probability that but for counsel's unprofessional errors, result of proceeding would have been different. Here, D claimed error of counsel was erroneous advice as to eligibility for parole under sentence agreed to in plea bargain. Ct. held that two-part Strickland test applies to challenge to guilty pleas; however, D's allegations were not sufficient to satisfy Strickland requirement of "prejudice" because he did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty & insisted on going to trial, & because he alleged no special circumstances that might support conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty. Held, denial of habeas relief hearing affirmed; White & Stevens, JJ. concurring.

RELATED CASES: Lee v. U.S., 137 S. Ct. 1958 (2017) (D was prejudiced by counsel's bad advice about immigration consequences of pleading guilty, even though D had little chance of being acquitted at trial; see full review in this section), Willis, App., 498 N.E.2d 1029 (erroneous advice as to possibility of parole eligibility following murder plea may be ineffective assistance, but D failed to show, but for confusion over sentence, he would have gone to trial); Van Cleave, 674 N.E.2d 1293 (issue was whether conviction may be set aside if post-conviction Ct. concludes that there is reasonable probability D would not have pleaded guilty but for deficient performance, or whether D must establish reasonable probability that ultimate result would have been different had counsel met reasonableness standard; Ct. concluded that showing of prejudice necessary to establish constitutional claim requires that D show reasonable probability that he would not have been convicted at trial).

TITLE: Lee v. U.S.
INDEX NO.: C.3.c.4.
CITE: (6/23/2017), 137 S. Ct. 1958 (2017)
SUBJECT: D prejudiced by bad advice about immigration consequences of plea deal
HOLDING: Defendant was prejudiced by counsel's bad advice about the immigration consequences of pleading guilty, even though Defendant had little chance of being acquitted at trial.

Based on a tip, officers obtained a warrant to search Defendant's home where they found drugs, cash, and a loaded gun. During plea negotiations, Defendant's lawyer repeatedly told him he would not be deported if he pled guilty, so Defendant pled to possession of ecstasy with intent to distribute, which resulted in a shorter sentence than if he had been convicted at trial. However, despite counsel's assurances, Defendant had in fact pled to an "aggravated felony" under the Immigration and Nationality Act, 8 U. S. C. §1101(a)(43)(B), so he was subject to mandatory deportation. See §1227(a)(2)(A)(iii).

In later habeas proceedings, Defendant testified that "deportation was the determinative issue" and that that he would have proceeded to trial had known his plea would subject him to mandatory deportation. See Hill v. Lockhart, 474 U.S. 52, 59 (1985). The District Court and 6th Circuit both agreed that Defendant received bad advice but held that he was not prejudiced, with the 6th Circuit reasoning that "no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence."

The decision whether to plead guilty involves assessing the respective consequences of a conviction by plea or by trial. See INS v. St. Cyr, 533 U.S. 2389, 322-23 (2001). When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. Defendant would have rejected any plea leading to deportation in favor of throwing a "Hail Mary" at trial.

While courts should not upset a plea agreement solely because of a defendant's post hoc claims he would have pled differently but for counsel's mistakes, Defendant here has shown a reasonable possibility that would have rejected the plea offer had he known it would lead to mandatory deportation. See Padilla v. Kentucky, 559 U.S. 356, 372 (2010). Held, cert. granted, 6th Circuit opinion at 825 F.3d 311 reversed, and case remanded. Roberts, C.J., Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ; Thomas, J., dissenting, joined by Alito, J.; Gorsuch, J., not participating.

RELATED CASES: Hill, 474 U.S. 52 (1985) (D was prejudiced by counsel's bad advice about immigration consequences of pleading guilty, even though D had little chance of being acquitted at trial; see full review in this section); Willis, App., 498 N.E.2d 1029 (erroneous advice as to possibility of parole eligibility following murder plea may be ineffective assistance, but D failed to show, but for confusion over sentence, he would have gone to trial); Van Cleave, 674 N.E.2d 1293 (issue was whether conviction may be set aside if post-conviction Ct. concludes that there is reasonable probability D would not have pleaded guilty but for deficient performance, or whether D must establish reasonable probability that ultimate result would have been different had counsel met reasonableness standard; Ct. concluded that showing of prejudice necessary to establish constitutional claim requires that D show reasonable probability that he would not have been convicted at trial).

TITLE: Missouri v. Frye
INDEX NO.: C.3.c.4.
CITE: (03-21-12), 132 S.CT.1399 (U.S. 2012)
SUBJECT: Ineffective assistance for failure to communicate favorable plea offer; plea negotiations a critical state of criminal proceedings
HOLDING: Because plea negotiation is a critical stage of a criminal proceeding, defense attorneys have a duty to inform their clients about favorable plea offers. Failure to do so constitutes ineffective assistance of counsel under the 6th Amendment. Here, Frye's lawyer failed to tell him about a plea offer that included a sentence of 90 days or less. The offer expired, and Frye later pled guilty to a less favorable deal.

The 6th Amendment right to effective assistance of counsel extends to all critical states of a criminal proceeding. Montejo v. Louisiana, 566 U.S. 778, 786 (2009). The negotiation of a plea is a critical stage for purposes of claims related to effectiveness of counsel. Padilla v. Kentucky, 130 S. Ct. 1473 (2010). The Strickland two-part test governs ineffective assistance claims in the plea bargain context. Hill v. Lockhart, 477 U.S. 52 (1985).

Hill and Padilla differ because the attorneys in those cases gave bad legal advice. Here, Frye's counsel failed to communicate a plea offer, yet there is no right to a plea deal. See Weatheford v. Bursey, 429 U.S. 545, 561 (1977). Further, even though Frye lost favorable deal, he still had an opportunity for a "full and fair trial," or as he ultimately chose, a plea deal, albeit a less favorable one. Nonetheless, because more than 90% of federal and state convictions are the result of guilty pleas, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." Plea negotiation, not the trial, is almost always the "critical point" for the D. "[P]lea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel necessary to that the Sixth Amendment requires in the criminal process at criminal stages."

To establish prejudice, Frye must show that 1) he would have accepted the plea bargain, 2) there was a reasonable possibility that prosecutors would not have withdrawn the offer before trial, and 3) the Tr. Ct. would have accepted the deal. These factors shall be addressed on remand. KENNEDY, J., joined by BREYER, GINSBURG, KAGAN, and SOTOMAYOR, J.J.; SCALIA, J., DISSENTING, joined by ROBERTS, C.J., AND THOMAS and ALITO, J.J. Cert. granted, Court of Appeal of Western District of Missouri affirmed.

RELATED CASES: Woods, 48 N.E.3d 374, (Ind. Ct. App. 2015) (where D testified that trial attorney did not communicate a plea offer found in attorney's file after attorney had passed away and the circumstances of the case corroborated D's testimony, D proved that he was denied effective assistance of counsel; reversed and remanded to place D in same position as when prosecutor offered plea; May, J., dissenting); Carrillo, 982 N.E.2d 461 (Ind. Ct. App. 2013) (Guilty plea counsel did not render deficient performance for failing to ask D about his citizenship status where counsel had no reason to believe D was not a citizen); Schmid, 972 N.E.2d 949 (Ind. Ct. App. 2012) (where no firm offer was ever made to D by the prosecution, trial counsel was not ineffective for failing to communicate the informal discussions she had with the prosecutor and judge to D).

C. PLEAS

C.3. Plea bargaining

C.3.d. Evidence of negotiations/D's statements (IC 35-35-3-4)

TITLE: Barton v. State
INDEX NO.: C.3.d.
CITE: (7/18/2022), Ind. Ct. App., 192 N.E.3d 970
SUBJECT: Defendant waived any restrictions on the admissibility of his pretrial diversion agreement at jury trial
HOLDING: The State charged Defendant with two counts of Level 6 felony non-support of a dependent. While represented by counsel, Defendant entered into a written pretrial diversion agreement under which the parties agreed that the State would withhold prosecution on the non-support charges as long as Defendant complied with certain terms and conditions, including committing no new offenses, within eighteen months. One portion of the written agreement stated: "[Defendant] acknowledges this filed document may be used in Court against the Defendant." The State later withdrew from the plea agreement because Defendant committed a new offense. When Defendant was unable to establish a factual basis for the non-support charges at his guilty plea hearing, the case was set for a jury trial. Over Defendant's objection, the diversion agreement was admitted into evidence as an exhibit at trial. Defendant argued on appeal that it was ambiguous whether he agreed to the admissibility of the diversion agreement in a criminal trial when: (1) he only acknowledged that the Diversion Agreement may be used against him in court but did not agree to its admissibility; (2) the Diversion Agreement only provided that it "may" be used against him but did not foreclose the possibility that it would not be used against him; and (3) the use of the term "Court" could be reasonably interpreted as some form of judicial proceeding other than a trial on guilt. Construing the diversion agreement as a contract between the State and Defendant, the Court of Appeals held it was not ambiguous. "We conclude that the clear intent of the parties in entering into this provision, as manifested by its unambiguous language, was that Barton agreed that if he failed to successfully complete the terms of the Agreement, the Diversion Agreement could be used for any purpose in a proceeding in court, which would include being admitted into evidence at a trial to determine his guilt in a criminal proceeding." Slip op. 14. The Court further concluded that the record did not show Defendant entered the agreement under duress or involuntarily, distinguishing Bell v. State, 622 N.E.2d 450 (Ind. 1993), which found a confession, made as part of guilty plea negotiations was inadmissible and involuntary. The Court also did not agree that the admission of the diversion agreement violated Indiana Evidence Rule 403 because the danger of unfair prejudice was cured by the trial court's admonition to the jury that it not speculate on the reasons why the diversion agreement had been terminated. Even if admitting the agreement was an error, the Court concluded it would have been harmless in light of the strength of the State's case and the weakness of Defendant's affirmative defense regarding his ability to pay. Held: convictions affirmed.

TITLE: Bell v. State
INDEX NO.: C.3.d.
CITE: (10-14-93), Ind., 622 N.E.2d 450, *overruled* on other grounds as noted in 823 N.E.2d 1187
SUBJECT: Confession from unconsummated plea bargain inadmissible
HOLDING: Confession given by D during questioning for plea bargain D later refused to sign inadmissible at trial. Following arrest, D agreed to talk to police about charges against him. He was advised of Miranda rights, told detective he would make statement only if he received "deal," & eventually asked police to call prosecutor. After negotiations, D & prosecutor arrived at agreement. Agreement, that prosecutor signed, required D to make truthful & factual statement & testimony. After accepting agreement, D gave recorded confession, but once statement was transcribed, he refused to sign, saying his signature would be tantamount to perjury. Confession was admitted at trial, over D's objection.

Ct. found statement was given to police in course of plea bargaining, & therefore could not be used against him at trial. Confession was both involuntary under 5th Amend. & privileged under Ind. Code 35-35-3-4, that makes communication concerning plea agreements inadmissible at trial if agreement does not culminate in approval by Ct. Purpose of statute is to facilitate final disposition of charges through communicative process of negotiation free of legal consequences, Chase, 528 N.E.2d 784, 786, & policy protects both State & D, Wright, 363 N.E.2d 1221. Ct. also noted rule of inadmissibility mirrored federal counterpart, Fed. R. Crim.P. 11(e)(6)(D) & was consistent with IRE 410. Judicial approval & acceptance of agreement were lone events that could lift "protective cloak of inadmissibility" from confession.

Ct. also found confession was involuntary & inadmissible under 5th Amend. privilege against compulsory self-incrimination where confession is obtained by promises of immunity or mitigation of punishment. Because D's statement resulted from direct or implied promises of prosecutor, it was involuntary & inadmissible, Givan, J., dissenting.

TITLE: Chase v. State
INDEX NO.: C.3.d.
CITE: (9/27/88), Ind., 528 N.E.2d 784
SUBJECT: Negotiations - D's statements prior to charging
HOLDING: Tr. Ct. did not err in admitting statements made by D to police before he was charged, to initiate negotiations. D's girlfriend was arrested & charged with dealing controlled substance. D contacted police officer & DEA officer & told them his girlfriend was just acting as his courier. D offered his biggest drug connection in exchange for her release. D was later charged with dealing & conspiracy to deal based in part on his own statements to these officers. At trial, officers were allowed to testify regarding their conversations with D. On appeal, D argues that these statements were protected as part of plea negotiations. Statements made by D in course of plea negotiations are not admissible at trial if plea is not ultimately accepted. Ind. Code 35-35-3-4; Wright, 363 N.E.2d 1221; Hineman, App., 292 N.E.2d 618; Moulder, App., 289 N.E.2d 522. However, statements made prior to filing of charge, to police officer without authority to enter into binding agreement, are not part of plea-bargaining process. Process does not begin until persons with authority to make binding agreement agree to negotiate, after filing of criminal charge. Unilateral offer of evidence to induce negotiations is not protected. Held, conviction affirmed.

RELATED CASES: Martin 537 N.E.2d 491.

TITLE: Crandell v. State
INDEX NO.: C.3.d.
CITE: (1st Dist. 3/25/86), Ind. App., 490 N.E.2d 377
SUBJECT: Plea bargaining - evidence of negotiations
HOLDING: Telephone conversation between D's counsel & victim did not constitute privileged communications concerning plea bargaining; therefore, Tr. Ct. did not err in admitting evidence of conversations. Here, with permission of prosecutor, counsel contacted battery victim & asked what it would take (apology; leaving the county) to keep D out of jail. Victim responded that was not up to him & he would not agree to anything short of D doing time. Any statements relating to plea bargaining process are inadmissible. Moulder, App., 289 N.E.2d 522. D is also precluded from offering into evidence any communication relating to plea bargain negotiations unless D enters plea of guilty not withdrawn. Hineman, App., 292 N.E.2d 618; A.B.A. Standard for Criminal Justice 14-3.4 (2d ed. 1980). Ct. looks to essential nature of communication to determine if it is related to plea negotiations. Moulder. Communication must have as ultimate purpose reduction of punishment/other favorable treatment from state to D. Party may not seek to exclude communications made under guise of plea bargaining. Lowery, 478 N.E.2d 1214; Moulder. Held, no error.

TITLE: Gilliam v. State
INDEX NO.: C.3.d.
CITE: (1st Dist., 4-27-95), Ind. App., 650 N.E.2d 45
SUBJECT: Statements to police admissible - not made in connection with plea negotiations
HOLDING: Statements made by D to detective 48 hours before trial, in which he admitted participation in charged crimes, were admissible. Ind. Evidence Rule 410 prohibits admission of "any statement made in connection with" plea offer. During one-hour communication, only approximately half of that time was devoted to discussing possibility of plea agreement. Tr. Ct. suppressed any statements made by D during his attempt to reach possible plea agreement but admitted other statements regarding participation in crimes. Tr. Ct. did not err in determining that statements relevant to charged crimes were not made in connection with D's attempt to negotiate plea agreement. Unlike its federal counterpart, Ind. Evidence Rule 410 does not limit its protection to statements made in course of plea discussions with prosecuting attorney. Nevertheless, Ct. followed common law rule that allows admission of statements made to police officer who had no authority to enter into binding plea agreement. Martin v. State, 537 N.E.2d 491. Here, D's statements were not privileged plea negotiations because detective neither had authority to negotiate on behalf of prosecutor nor did he enter into any agreement with D. Held, conviction affirmed.

TITLE: Gonzalez v. State
INDEX NO.: C.3.d.
CITE: (05-19-10), Ind., 929 N.E.2d 699
SUBJECT: D's apology letter privileged - evidence of plea negotiations
HOLDING: Tr. Ct. erred in admitting D's apology letter at trial. D wrote letter while victim considered whether to object to plea agreement, which Tr. Ct. eventually rejected. Letter was privileged under Evidence Rule 410 and Ind. Code 35-35-3-4, even though it was written to victim, not someone with authority to enter binding plea bargain, i.e., the prosecutor, as required by Martin v. State, 537 N.E.2d 491, 493 (Ind. 1989). Rule 410 expanded scope of privilege to include statements to those with right to object to plea agreements, as victims do under Ind. Code 35-35-3-5, because language of Rule 410 is broader than Ind. Code 35-35-3-4. Statutory privilege included only statements "concerning a plea agreement," but Rule 410 extended privilege to statements "in connection with" a plea agreement. Broadening scope of privilege advances its purposes, encouraging candor and facilitating plea agreements. To achieve privileged status, statements must also be made: 1) after charges are filed and negotiations have begun and 2) with intent to seek plea agreement or in contemplation of agreement.

Here, D drove his pickup truck, while intoxicated, into a school bus operated by Evansville-Vanderburgh School Corporation (EVSC). D agreed to plead guilty to two of three charges. Before the sentencing hearing, D wrote a letter of apology to EVSC. Tr. Ct. rejected plea and admitted letter at trial. D was found guilty of criminal mischief and operating while intoxicated, the crimes to which he earlier agreed to plead guilty.

As a victim of the accident, EVSC had a right to express its opinion about proposed agreement. D wrote EVSC to persuade it to accept agreement. The letter's ultimate purpose was to reduce punishment, see Gilliam v. State, 650 N.E.2d 45, 49 (Ind. Ct. App. 1995), making it privileged as a communication made "in connection with" his guilty plea. However, the error was harmless, because there was overwhelming, uncontroverted evidence of D's guilt. Held, transfer granted, Court of Appeals' opinion at 908 N.E.2d 313 vacated, conviction affirmed.

TITLE: Hensley v. State
INDEX NO.: C.3.d.
CITE: (1st Dist. 06/27/91), Ind. App., 573 N.E.2d 913
SUBJECT: Admissibility of failed plea negotiation statement at sentencing
HOLDING: "Cleanup" statement concerning D's criminal activities in other counties, given as condition of obtaining plea agreement which later broke down, was not admissible at D's sentencing hearing after conviction at trial. Although such evidence may be admissible under federal & at least one state jurisdiction, Ct. referred to A.B.A. Standards for Criminal Justice, Standards Relating to Pleas of Guilty (14-3.4) & determined statement was inadmissible under Indiana law. Held, conviction affirmed, & remanded with instructions for sentencing reconsideration.

TITLE: Mundt v. State

INDEX NO.: C.3.d.

CITE: (4th Dist., 04-19-93), Ind. App., 612 N.E.2d 566

SUBJECT: Derivative evidence from clean-up statement given as part of failed plea negotiations admissible

HOLDING: Testimony of Co-D, who became known to authorities because of clean-up statement given by D pursuant to plea agreement later voided, was admissible at subsequent trial of D. Part of original agreement called for D to give "clean-up" statement about uncharged burglaries & thefts. D testified at probable cause hearing against Co-D, detailing how he & Co-D attempted burglary at issue. Co-D was then arrested, & for some reason D's plea bargain broke down. At D's trial, State called Co-D to testify against D, & testimony was admitted over objection. Ct. rejected D's argument that Co-D's testimony should not have been admitted because it was derived from his withdrawn guilty plea. Ind. Code 35-35-1-4(d) provides that withdrawn guilty pleas are inadmissible in other proceedings, & Ind. Code 35-35-3-4 further provides that plea agreement or any communication concerning it, may not be admitted if plea agreement does not end in approval by Tr. Ct. Ct. found purpose behind rules is to promote negotiated disposition of criminal caseload by protecting D from inadvertent self-incrimination, because otherwise Ds would be unwilling to participate for fear incriminating statements could come back to haunt them. Ct. found, however, that D's statements were not "guilty plea" or factual basis underlying plea, but were instead statements identifying Co-D came after agreement was reached. Ct. held that once bargain had been struck between D & State, & negotiations had ended, statutory protections no longer applied. Held, conviction affirmed.

TITLE: Stephens v. State
INDEX NO.: C.3.d.
CITE: (2d Dist. 03/23/92), Ind. App., 588 N.E.2d 564
SUBJECT: D's statement for presentence report - inadmissible for impeachment where plea
HOLDING: Inculpatory statement made by D to probation officer (PO) 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. D charged with multiple drug counts, agreed to plead guilty pursuant to plea agreement. Before accepting plea, judge appropriately ordered presentence report prepared. During interview with PO, D admitted possessing & selling cocaine. Judge rejected plea agreement, & when D testified at subsequent trial, inculpatory presentence report was admitted for impeachment purposes. Incriminating statements made during plea negotiation process are privileged & inadmissible if D does not subsequently plead guilty. Moulder, 154 Ind. App. 248, 289 N.E.2d 522, Ind. Code 35-35-3-4. Rationale for rule is belief that plea agreements should be encouraged as essential part of justice system. Same policy shows legislature intended to include any communication necessary to effectuate plea agreement, within privileged communications contained in Ind. Code 35-35-3-4. Statements made during presentence interview should fall within this category, because report is required before acceptance of guilty plea, & PO is required to gather information concerning "`circumstances attending the commission of the offense.'" Because Ct. found evidence of guilt was not overwhelming, error in admission of statement was reversible error.

TITLE: Tyree v. State
INDEX NO.: C.3.d.
CITE: (2d Dist. 2/1/88), Ind. App., 518 N.E.2d 814
SUBJECT: Impeachment - use of D's testimony at guilty plea hearing
HOLDING: Statement made by D to establish factual basis at guilty plea hearing are not admissible at trial if plea is withdrawn or rejected. Here, D was allowed to withdraw plea before sentencing, & at trial, Tr. Ct. allowed state to use D's statements from guilty plea hearing for impeachment. Plea of guilty or guilty but mentally ill which is withdrawn or rejected is not admissible in any other proceedings. Ind. Code 35-35-1-4(d). Because factual basis is required for guilty plea, statements establishing factual basis are inseparable from plea. Ct. of appeals finds additional authority for this view in other jurisdictions. If statements from guilty plea hearing are admitted, jurors will recognize that D once pled guilty. People v. George, (Mich. App. 1976), 245 N.W.2d 65. Furthermore, when guilty plea is vacated, it is nullity, as is everything which transpired pursuant to plea. Id. MS & MO have rules similar to Ind. Code 35-35-1-4(d) & exclude statements from guilty plea hearing. Ind. Code 35-35-1-4(d) was adopted from ABA standards which have since been amended to include statements made in connection with plea. These changes are "clarifications" rather than additions. Finally, compelling of statements establishing factual basis is justified because plea constitutes waiver of 5th Amend. privilege. When plea becomes nullity, compelled statements should not be admissible. 2 LaFave & Israel, Criminal Procedure, §20.5, (1984). Admission of these statements at trial was fundamental error. Held, reversed & remanded.

RELATED CASES: Beeks, App., 721 N.E.2d 339 (as in Williams, App., 601 N.E.2d 347, Ct. rejected retroactive application of Tyree to D's case).

TITLE: U.S. v. Mezzanatto
INDEX NO.: C.3.d.
CITE: 513 U.S. 196 (1995)
SUBJECT: Evidence - Statements made in course of plea negotiations - use for impeachment
HOLDING: General rule against trial use of statements made by D in course of aborted plea negotiations, Fed. R. Ev. 410 & Fed. R. Crim.P. 11(e)(6), can be waived by D, at least insofar as impeachment use of statements is concerned. As condition of plea bargaining, D here entered into agreement that statements could be used for impeachment purposes if negotiation failed. Seven-member majority holds that rule against use of such statements can be subject to knowing, voluntary, and intelligent waiver. Three members of minority would limit such waivers to use of statements for impeachment purposes. Majority rejects D's argument that rules establish guarantee of fair procedure that cannot be waived, writing that enforcement of waiver in this instance enhanced truth-seeking process. Majority further rejects argument that allowing waiver will discourage Ds from entering into plea negotiations, contrary to purpose of rule. Majority agrees that encouraging plea negotiations is goal of rule but writes that disallowing waivers could well discourage prosecutors from negotiating. Best way to encourage plea negotiations is to allow parties to enter into knowing and voluntary negotiations without arbitrary limitations. Souter & Stevens, JJ. DISSENT. Cf. Ind. Code 35-35-3-4.

TITLE: Williams v. State
INDEX NO.: C.3.d.
CITE: (3rd Dist., 10-26-92), Ind. App., 601 N.E.2d 347
SUBJECT: Admissibility of clean-up statement made pursuant to failed plea agreement
HOLDING: Use at trial for impeachment purposes, of clean up statement given by D as part of plea agreement which had been accepted, but was later withdrawn, was not fundamental error. D was charged with robbery in 1973. After trial where statement was admitted, conviction was affirmed on direct appeal in unpublished decision. In PCR petition, D requested reconsideration of issue in light of Tyree, App., 518 N.E.2d 814, where Ct. held that factual basis given during guilty plea hearing could not be used for impeachment at subsequent trial after negotiations broke down.

Although questioning whether case fell within Tyree, Ct. found D did not meet rule for retroactive application of case. Tests for retroactive application are whether challenged evidence was "`substantial part of the State's case and had likely impact upon the verdict...,'" Brown, App., 587 N.E.2d 693, 698, and whether new rule involves "`procedures ... without which the likelihood of an accurate conviction is seriously diminished...,'" Daniels, 561 N.E.2d 487, 490.

Ct. found impeaching evidence was not substantial part of State's case and was not offered as evidence of D's guilt or innocence. Even without impeaching statement, there was sufficient evidence for jury to find D guilty. Therefore, D was not entitled to retroactive application on Tyree, Sullivan, J., DISSENTING, and Staton, J. CONCURRING in result.

RELATED CASES: Beeks, App., 721 N.E.2d 339 (as in Williams, impeaching evidence was not substantial part of State's case & did not likely have impact upon verdict).

C. PLEAS

C.3. Plea bargaining

C.3.e. State's right to vacate guilty plea for D's non-compliance

TITLE: Ricketts v. Adamson

INDEX NO.: C.3.e.

CITE: 483 U.S. 1 (1987)

SUBJECT: Breach of plea agreement / double jeopardy

HOLDING: Here, D was charged with first degree murder. He entered into plea agreement with state whereby D plead guilty to second degree murder & agreed to testify against accomplices. State agreed to drop request for death penalty & recommend specified prison term. D testified as promised. Accomplices' convictions were reversed by state appellate court. D refused to testify at retrial. Agreement provided that if D refused to testify, entire agreement would be null/void & original charge would automatically be reinstated. State revoked plea agreement & procured conviction of first-degree murder & death sentence. Court finds jeopardy attached when D was sentenced originally for second degree murder. Absent special circumstances, double jeopardy clause would have precluded prosecution of D for first degree murder because of conviction for lesser included offense. Brown v. OH (1977), 432 U.S. 161, 168, 97 S. Ct. 2221, 53 L.Ed.2d 187. Court finds agreement's provision that in event of breach, parties would be returned to position occupied prior to agreement results in there being no available double jeopardy defense. Further, agreement specifying that charges may be reinstated given certain circumstances is equivalent to waiver of double jeopardy defense. Held, Double Jeopardy Clause is not violated by enforcement of agreement. Brennan, joined by Marshall, Blackmun, & Stevens, DISSENTS.

C. PLEAS

C.3. Plea bargaining

C.3.f. D's right to enforce plea agreement

TITLE: Bowers v. State
INDEX NO.: C.3.f.
CITE: (11/25/86), Ind., 500 N.E.2d 203
SUBJECT: Plea agreement - prosecutor repudiates agreement to drop charges
HOLDING: Interlocutory appeal; transfer granted. Ind. S. Ct. vacates Ct. App. decision at 489 N.E.2d 526. By reneging on his promise to abate criminal proceedings, Prosecutor's conduct impaired reliability/usefulness of an important prosecutorial tool & tended to undermine integrity/credibility of criminal justice system to an extent compelling reversal. Here, D was arrested & later that day, prosecutor & D entered into oral agreement whereby prosecutor would "dismiss" charges related to D's arrest if D would provide information sufficient to obtain search warrant for residence of another suspect. D supplied requested information which proved fruitful in obtaining/executing search warrant, which in turn resulted in suspect's arrest for possession of marijuana. Contrary to terms of agreement, state filed information against D for burglary. D filed motion to dismiss based on agreement with prosecutor, but Tr. Ct. denied motion. Ct. looks to contract law & remedies for guidance. Inability to restore consideration following prosecutor's breach would preclude award of traditional contract remedies & could warrant equitable relief of specific performance. Ct. examines policy reasons for plea bargaining & notes prosecutor has discretion whether or not to prosecute & under statute, Tr. Ct. shall order dismissal of indictment at prosecutor's motion. "[P]romise of state official in public capacity is pledge of public faith & is not to be lightly disregarded." Ct. notes decision is not in conflict with Abner, 479 N.E.2d 1254, which involved enforcement of grant of immunity to procure testimony against co-conspirator. Held, reversed & remanded with instructions to grant D's motion to dismiss.

TITLE: Epperson v. State
INDEX NO.: C.3.f.
CITE: (1st Dist. 11/21/88), Ind. App., 530 N.E.2d 743
SUBJECT: Plea agreement - state improperly allowed to withdraw
HOLDING: Tr. Ct. erred by allowing state to withdraw plea agreement & reinstate charge against D. D plead to unrelated burglary & theft charges in exchange for dismissal of criminal recklessness charge. Three weeks later, state filed motion to withdraw plea agreement & reinstitute cause of action, on grounds that plea agreement had resulted from mutual mistake of fact regarding willingness of potential state's witness to cooperate. Motion was granted, & charge was reinstated. On appeal, D argues that plea agreement should have been enforced. Criminal D has no constitutional right to plea bargain, or to have agreement specifically enforced. Cooker, 499 N.E.2d 1135. However, both contract principles & due process rights must be considered. US v. Verrusio, (CTA 7 1986), 803 F.2d 885; US v. Bielak, (N.D. Ind. 1987), 660 F. Supp. 818. Promises which induce guilty pleas must be fulfilled in order to satisfy voluntariness of guilty plea standard, Ryan, 479 N.E.2d 517, although specific performance is not always necessary. Crose, 482 N.E.2d 763. Here, it is clear that D's decision to plead guilty to burglary & theft rested upon prosecutor's promise to dismiss criminal recklessness charge. Prosecutor's filing of motion to reinstitute that charge constituted breach of plea agreement. Resolution of case depends upon government's conduct relating to its obligation. Bielak, *supra*. D bargained with state in good faith, & after D fulfilled his part of agreement, state learned it had made "bad deal" through no fault of D. Agreement should be specifically enforced. Held, reversed & remanded.

TITLE: Lockard v. State
INDEX NO.: C.3.f.
CITE: (10/21/92), Ind. App., 532 N.E.2d 610
SUBJECT: Passing polygraph as condition of plea agreement
HOLDING: Plea agreement should not be lightly disregarded. However, if Court is to enforce agreement, D must honor his obligations under agreement. Spivey, App., 553 N.E.2d 508. Here, plea agreement specifically required D to pass polygraph examination to demonstrate his truthfulness in his clean-up statement before State would agree to sentence offer. At sentencing hearing, polygraph examiner stated that D had failed examination because D was not completely truthful. Since it was requirement that D take and pass polygraph examination, Tr. Ct. did not err in denying D's motion to enforce plea agreement. D failed to meet his obligations under plea agreement and should, therefore, not receive benefits from it. Held, guilty plea affirmed; Sullivan, J., concurring.

TITLE: Petty v. State
INDEX NO.: C.3.f.
CITE: (1/11/89), Ind., 532 N.E.2d 610
SUBJECT: Specific enforcement - not warranted by waiver of speedy trial & extradition
HOLDING: Agreement to waive speedy trial rights & extradition is not detrimental reliance sufficient to require specific performance of plea agreement as was granted in Bowers, 500 N.E.2d 203. Even assuming D's unwritten plea agreement with state was enforceable, D did not show any inclination to assert speedy trial rights long after State reneged on agreement, & only issue in extradition hearing, identity, would clearly have been resolved against D. Affirmed.

TITLE: Raley v. State
INDEX NO.: C.3.f.
CITE: (10/13/2017), 86 N.E.3d 183 (Ind. Ct. App. 2017)
SUBJECT: Defendant SVP by operation of law despite no designation in plea agreement
HOLDING Even though Defendant's plea agreement did not designate him as a sexually violent predator for pleading guilty to child molesting, he is a sexually violent predator ("SVP") as a matter of law. Ind. Code § 35-38-1-7.5 (2014). Thus, the trial court did not err in denying Defendant's motion to enforce the plea agreement.

It is true that once a trial court accepts a plea agreement, it is bound by its terms "insofar as said terms are within the power of the trial court to order." Griffin v. State, 461 N.E.2d 1123, 1124 (Ind. 1984). However, the SVP designation is a separate statutory classification that has nothing to do with the terms of the parties' plea agreement and does not render the agreement void. Thus, the terms of the plea agreement did not preclude SVP status, nor could the trial court have excused Defendant from being designated as an SVP pursuant to Indiana Code section 35-38-1-7.5. The court did not have the power to ignore a statutory mandate. Held, judgment affirmed.

TITLE: State v. Rivers
INDEX NO.: C.3.f.
CITE: 283 Conn. 713, 931 A.2d 185 (Conn. 2007)
SUBJECT: Taking 5th did not violate plea to testify truthfully
HOLDING: Connecticut Supreme Court held that D, who agreed as part of a plea bargain to cooperate with the authorities' investigation of his co-Ds and acknowledged that the deal would be void "in the event" he testified for the State and was untruthful, did not breach the agreement by refusing to testify. Ordering specific performance of the deal, Court said that the agreement expressly addressed only the veracity of any testimony D might give, not whether he would give any. Court determined the State, not D, breached the plea agreement. Noting plea bargains are governed by contract law principles, Court noted that when the language of an agreement is unambiguous, a court is obligated to give it effect. Language that is ambiguous, however, must be construed against the drafter, which in the case of a plea agreement is the State.

TITLE: Speer v. State
INDEX NO.: C.3.f.
CITE: (7-31-01), Ind. App., 753 N.E.2d 705
SUBJECT: Specific enforcement of plea agreement
HOLDING: Tr. Ct. erred in ordering D to serve 17 years & additional 896 days of house arrest time, because some of that time reflected penalty for probation violation which State agreed in plea bargain that it would not seek revocation for & remainder of time represented time explicitly included in maximum 12-year term provided in plea. Plea agreement provided that: 1) D's total executed sentences imposed for offense that gave rise to plea & probation violations in two other cases could not exceed 12 years & 2) State would not seek to revoke D's probation in other two prior plea agreements. Therefore, in light of plea agreement provisions, Tr. Ct. abused discretion in sentencing D. Held, remanded with instructions for resentencing for total time not to exceed 12 years.

TITLE: Spivey v. State
INDEX NO.: C.3.f.
CITE: (2d Dist. 4/30/90), Ind. App., 553 N.E.2d 508
SUBJECT: Plea agreement - specific enforcement
HOLDING: D who made false statements about involvement in robbery & murder had no right to specifically enforce plea agreement which clearly required him to make truthful statements about these events. D & accomplice robbed restaurant & accomplice shot manager. D was arrested & charged with murder & robbery, but pursuant to plea agreement, murder charge was dismissed. Plea required D to give truthful statement, in all respects, regarding robbery & murder, & D gave statement in which he indicated that he did not know accomplice would shoot manager & that he had told him not to do so. After accomplice was arrested, D made statement indicating that they had agreed to shoot manager if he recognized accomplice that D suggested to accomplice that shooting would be necessary, & that he gave accomplice gun. State, considering plea agreement void, tried D on both murder & robbery charges, resulting in conviction on both. On appeal, D argues that plea agreement should have been specifically enforced. While promise of public official is not to be lightly disregarded, allowing D to retain benefit of bargain while relieving himself of burden would operate as fraud upon Ct. [Citations omitted.] Indiana Ct's. have not considered this issue, but numerous federal Ct's. have held that government may properly prosecute in such situations. D's plea agreement specifically provided that if D "show[ed] deception" with regard to events surrounding robbery-murder, agreement was void. Truthful revelation of details of murder was clearly requirement of plea agreement, & D's initial statement was false by D's own admission. Held, conviction affirmed. Chezem, J., CONCURS IN RESULT.

RELATED CASES: Campbell, 17 N.E.3d 1021 (Ind. Ct. App. 2014) (even though Tr. Ct. had already accepted plea agreement and entered judgment of conviction, D's subsequent breach warranted State's withdrawal from plea agreement prior to imposition of sentence; see full review at C.2.d.1).

C. PLEAS

C.4. GBMI (Guilty but mentally ill) (IC 35-35-1-1; Ind. Code 35-35-2-1(a)(3)(C))

TITLE: Archer v. State
INDEX NO.: C.4.
CITE: (11-19-97), Ind., 689 N.E.2d 678
SUBJECT: Plea to guilty but mentally ill - required findings
HOLDING: Tr. Ct. is required to make finding that D was guilty but mentally ill at time of offense when it accepts D's plea of guilty but mentally ill. Walton, 650 N.E.2d 1134. Mentally ill in this context is defined by statute as "having a psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior & impairs the person's ability to function." Ind. Code 35-36-1-1. Here, sentencing Ct. made required finding of mental illness at time it accepted D's plea & then orally at sentencing hearing. Held, conviction affirmed, sentence reduced.

TITLE: Harris v. State
INDEX NO.: C.4.
CITE: (11-5-86), Ind., 499 N.E.2d 723
SUBJECT: Death sentence after accepting plea to guilty but mentally ill - no error
HOLDING: Those who are found guilty but mentally ill are not Ds who, at time of their crime, fully lacked capacity to conform their behavior to law as compared to those found to be insane, & thus, mentally ill Ds may be deterred by death penalty from committing murder. Here, D's plea of guilty but mentally ill merely afforded opportunity for D to receive necessary psychiatric treatment while his sentence was being carried out, but such right to treatment did not foreclose imposition of death penalty upon D convicted of intentionally killing victim while committing rape & kidnaping. Held, judgment affirmed & remanded on other grounds; DeBruler, J., concurring in part & dissenting in part.

TITLE: Truman v. State
INDEX NO.: C.4.
CITE: (8/15/85), Ind., 481 N.E.2d 1089
SUBJECT: Pleas - GBMI
HOLDING: Ct. of appeals (in unpublished opinion) erred in reversing denial of PCR petition. Ct. of appeals held that D's plea of GBMI, entered 7 months before statute took effect, was contrary to then-existing statutes. Majority adopts Judge Shields' unpublished dissenting opinion that GBMI statute (IC 35-36-2-5) adds nothing to guilt finding. Ct. quotes Shields' statement that D's plea may still be unknowing/involuntary because he was misled re effect of plea (D pled GBMI in hopes of receiving psychiatric treatment). Held, reversed & remanded for further proceedings. DeBruler DISSENTS.