White v. State: And Now for Something Different

Susan Stuart*
Richard Pitts**

I. Introduction

On September 10, 1986, one could almost hear a collective sigh of despair arise from the ranks of criminal defense counsel and public defenders in the state of Indiana. On that day, the Indiana Supreme Court handed down *White v. State*,[1] an opinion that addresses the question of what standard should be employed in adjudging a defendant's petition for post-conviction relief alleging that his guilty plea was not made voluntarily, intelligently and knowingly. Although cases addressing this question are too numerous to mention, *White* differed from many of the others because, once again, the supreme court changed the standard. The *White* case became the fifth such change in less than ten years. The first change occurred in *Neeley v. State*[2] in 1978, followed by *German v. State*[3] in 1981. The Indiana General Assembly then made an addition to the guilty plea statute in 1984.[4] The fourth change occurred in *Austin v. State*,[5] a supreme court opinion attempting to offset the statutory addition. This lack of consistency in the area of post-conviction relief can only lead to an increasingly frustrated criminal bar, particularly because the ramifications of *White* are very problematic given the current uncertain application of the law as well as the loose ends created by the case itself.

This Article will, after a brief exposition of pre-*White* post-conviction relief under Indiana law, analyze *White v. State* as it stands alone and will attempt to unravel some of the issues raised by its holding and retroactive application. Because of the shifting and varied considerations of any single fact situation, the conclusions drawn here are necessarily

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*Associate, Lowe, Gray, Steele and Hoffman, Indianapolis. Former Law Clerk to the Honorable Stanley B. Miller, and the Honorable Patrick D. Sullivan, Indiana Court of Appeals. B.A., Depauw University, 1973; M.Ed., Valparaiso University, 1976; J.D., Indiana University School of Law-Indianapolis, 1982.

**Associate, Lowe, Gray, Steele and Hoffman, Indianapolis. Former Law Clerk to the Honorable Patrick D. Sullivan, Indiana Court of Appeals. A.B., Wabash College, 1983; J.D. Indiana University School of Law-Indianapolis, 1986.

[1] 497 N.E.2d 893 (Ind. 1986).

[2] 269 Ind. 588, 382 N.E.2d 714 (1978).

[3] 428 N.E.2d 234 (Ind. 1981).

[4] *See infra* note 28 and accompanying text.

[5] 468 N.E.2d 1027 (Ind. 1984). *See infra* notes 79-84 and accompanying text.

broad. Indeed, research reveals that there simply is no definitive rule of law in the *White* situation. Consequently, this Article can do nothing more than attempt to shed light on a limited number of discrete issues defense counsel may wish to consider in their guilty plea practice.

II. Background of Post-Conviction Relief in Indiana

The genesis of state post-conviction relief is found in three United States Supreme Court cases. In *Mooney v. Holohan*,[6] the Supreme Court held only that the habeas corpus procedures of California were, standing alone, apparently sufficient to meet the minimum requirements of due process in giving post-conviction litigants some forum in which to vindicate their claims.[7] Probably because of this less than forceful pronouncement, the status of state post-conviction relief remained relatively unchanged until *Young v. Ragen*.[8] In *Young*, the Court pointed out that states are obligated, under the Fourteenth Amendment's due process clause, to give those convicted in state court a clearly defined method by which claims alleging denial of a federal constitutional right could be litigated.[9]

In 1965, the Court was poised to confront squarely the question of whether the lack of a post-conviction remedy was itself a denial of due process. The case was set against the backdrop of an increase in the number of federal habeas corpus actions. After certiorari was granted in *Case v. Nebraska*,[10] the Nebraska legislature enacted a statewide post-conviction procedure. As a result, the Court in *Case* simply vacated the judgment and remanded for reconsideration under the new Nebraska statute.[11] Of particular note is Justice Brennan's concurring opinion, in which he delineated some of the characteristics of an appropriate state post-conviction procedure. Justice Brennan wrote:

> The procedure should be swift and simple and easily invoked. It should be sufficiently comprehensive to embrace all federal constitutional claims. . . . [I]t should eschew rigid and technical doctrines of forfeiture, waiver or default. It should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearings. It should provide for decisions supported by opinions, or fact findings and conclusions of law,

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[6]294 U.S. 103 (1935).
[7]*Id.* at 113.
[8]337 U.S. 235 (1949).
[9]*Id.* at 239.
[10]177 Neb. 404, 129 N.W.2d 107, *cert. granted* 379 U.S. 958 (1965).
[11]Case v. Nebraska, 381 U.S. 336, 337 (1965).

> which disclose the grounds of decision and the resolution of disputed facts. Provision for counsel to represent prisoners . . . would enhance the probability of effective presentation and proper disposition of prisoners' claims.[12]

Similar themes have been sounded by the American Bar Association[13] and the National Conference of Commissioners on Uniform State Laws.[14] The National Conference of Commissioners on Uniform State Laws, in its prefatory notes to the Uniform Post-Conviction Procedure Act, listed the following goals of the act:

> 1. A simple and expeditious procedure;
> 2. A single procedure obviating the need for state habeas corpus or coram nobis proceedings;
> 3. Disposition on the merits of the claims whenever possible;
> 4. Elimination of subsequent post-conviction petitions by the same petitioner concerning the same conviction.[15]

In large measure, the Indiana Rules of Post-Conviction Relief are designed to effectuate the same goals.[16]

Post-conviction relief in Indiana has developed considerably over the last 100 years. During the nineteenth century, courts operated under the premise that a prisoner's word was sufficient to establish guilt.[17] Courts later began to evolve devices for making certain that pleas were not induced by threat or coercion but by voluntary and intelligent choice.[18] In order to process guilty pleas more systematically, the Indiana General

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[12]*Id.* at 346-47 (Brennan, J., concurring) (citations omitted). Justice Brennan also noted that the Nebraska statute was, "plainly an adequate corrective process." *Id.*

[13]*See* American Bar Association, *Standards Relating to Post-Conviction Remedies*, § 4.5 (1967 tentative draft and commentary; American Bar Association, *Standards Relating to Pleas of Guilty* (1967 tentative draft).

[14]*See* UNIF. POST-CONVICTION PROCEDURE ACT § 1 comment, 11 U.L.A. 233, 234 (1980).

[15]UNIF. POST CONVICTION PROCEDURE ACT, Commissioners' Prefatory Note, 11 U.L.A. 477, 479-80 (1966), Commissioners' Prefatory Note.

[16]*See* IND. R. P. POST-CONVICTION REMEDIES 1 § 1(b) (as to unitary remedy); and § 8 (as to single proceeding arising from conviction).

[17]Griffith v. State, 36 Ind. 406, 408 (1871).

[18]White v. State, 497 N.E.2d 893, 895 (Ind. 1986). *See, e.g.*, Crooks v. State, 214 Ind. 505, 15 N.E.2d 359 (1938); Myers v. State, 115 Ind. 554, 18 N.E. 42 (1888). Although the *White* opinion does not elaborate on these developments to protect a defendant, they include the requirement that the guilty plea be transcribed, that the defendant be informed of the ramifications of his guilty plea, and that a route be provided for withdrawing a plea on collateral attack. *See* IND. R. CRIM. P. 10; State v. Lindsey, 231 Ind. 125, 106 N.E.2d 230 (1952).

Assembly enacted Indiana Code section 35-4.1-1-3,[19] setting forth the advisements a trial court must make to the pleading defendant, and Indiana Code section 35-4.1-1-4,[20] specifying the findings a trial court must make in order to establish that a defendant has properly entered his plea.[21]

The first opinion interpreting the requirements set forth in these statutory provisions was *Neeley v. State*.[22] In *Neeley*, the supreme court found the record established that the defendant actually knew about the rights he was waiving. Consequently, the court concluded that even though the trial judge did not follow the statutory requirements to the letter, the defendant, as a result of his knowledge, was not entitled to post-conviction relief.[23]

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[19]Section 3 provided:

The court shall not accept a plea of guilty from the defendant without first addressing the defendant and

(a) determining that he understands the nature of the charge against him;

(b) informing him that by his plea of guilty he is admitting the truth of all facts alleged in the indictment or information or to an offense included thereunder and that upon entry of such plea the court shall proceed with judgment and sentence;

(c) informing him that by his plea of guilty he waives his rights to a public and speedy trial by jury, to face the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to require the state to prove his guilt beyond a reasonable doubt at a trial at which the defendant may not be compelled to testify against himself;

(d) informing him of the maximum possible sentence and minimum sentence for the offense charged and of any possible increased sentence by reason of the fact of a prior conviction or convictions, and of any possibility of the imposition of consecutive sentences;

(e) informing him that the court is not a party to any agreement which may have been made between the prosecutor and the defense and is not bound thereby.

IND. CODE § 35-4.1-1-3 (repealed 1981).

[20]Section 4 provided:

(a) The court shall not accept a plea of guilty without first personally addressing the defendant and determining that the plea is voluntary. The court shall address the defendant and determine whether any promises, force or threats were used to obtain the plea.

(b) The court shall not enter judgment upon a plea of guilty unless it is satisfied from its examination of the defendant that there is a factual basis for the plea.

(c) A plea of guilty shall not be deemed to be involuntary under subsection (a) of this section solely because it is the product of an agreement between the prosecution and the defense.

IND. CODE § 35-4.1-1-4 (repealed 1981).

[21]Act of Apr. 23, 1973, Pub. L. No. 325, § 4, 1973 Ind. Acts 1750, 1789-90. Perhaps, not coincidentally, these statutory provisions were enacted shortly after the bedrock guilty plea case of Boykin v. Alabama, 395 U.S. 238 (1969).

[22]269 Ind. 588, 382 N.E.2d 714 (1978).

[23]*Id.* at 595-96, 382 N.E.2d at 718.

In 1981, the Indiana Supreme Court overruled *Neeley* in *German v. State*,[24] stating that "it is the duty of the trial judge to comply strictly with the terms of IND. CODE § 35-4.1-1-3 . . . ."[25] The court ultimately held that the failure of the trial judge to "[a]ddress the defendant according to the requirements and determine that the defendant understands the charges against him" required that the guilty pleas be vacated and the matter be tried.[26]

In response to the strict requirement set forth in *German*, the Indiana General Assembly added the following language to Indiana Code section 35-35-1-2:[27] (c) Any variance from the requirements of this section that does not violate a constitutional right of the defendant is not a basis for setting aside a plea of guilty.[28]

Such a change "cut at the heart of the *German* decision, which had described the judge's obligation to advise defendants as 'statutory.'"[29] In answer to the legislature's action, the supreme court, in *Austin v. State*,[30] declared the "harmless error" provision set forth in Indiana Code section 35-35-1-2(c) a nullity on the premise the advisements set forth in subsection 35-35-1-2(a)[31] are of constitutional dimen-

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[24]428 N.E.2d 234 (Ind. 1981).

[25]*Id.* at 236.

[26]*Id.* at 236-37.

[27]In 1981, the legislature repealed sections 35-4.1-1-3 and 35-4.1-1-4 and replaced them with sections 35-35-1-3 and 35-35-1-2 respectively. Act of May 5, 1981, Pub. L. No. 298, §§ 4, 9, 1981 Ind. Acts 2314, 2366-67, 2391.

[28]Act of Feb. 29, 1984, Pub. L. No. 179, § 1, 1984 Ind. Acts 1486, 1487 (codified at IND. CODE § 35-35-1-2(c) (Supp. 1987)).

[29]White v. State, 497 N.E.2d 893, 896 (Ind. 1986) (citing German v. State, 428 N.E.2d 234, 237 (Ind. 1981)).

[30]468 N.E.2d 1027 (Ind. 1984).

[31]This section provides:

> (a) The court shall not accept a plea of guilty or guilty but mentally ill at the time of the crime without first determining that the defendant:
> (1) understands the nature of the charge against him;
> (2) has been informed that by his plea he waives his rights to:
> (A) a public and speedy trial by jury;
> (B) confront and cross-examine the witnesses against him;
> (C) have compulsory process for obtaining witnesses in his favor; and
> (D) require the state to prove his guilt beyond a reasonable doubt at a trial at which the defendant may not be compelled to testify against himself;
> (3) has been informed of the maximum possible sentence and minimum sentence for the crime charged and any possible increased sentence by reason of the fact of a prior conviction or convictions, and any possibility of the imposition of consecutive sentences; and
> (4) has been informed that if:
> (A) there is a plea agreement as defined by IC 35-35-3-1; and
> (B) the court accepts the plea;
> the court is bound by the term of the plea agreement.

IND. CODE § 35-35-1-2(a) (Supp. 1987).

sion.[32] This ruling set the stage for the *White* court's divergence from prior law in its interpretation of the statute and of the standard by which a trial court's advisements are to be measured.

III. *White v. State*, The Case

Randy White pleaded guilty, in September 1981, to charges of burglary and theft and received consecutive sentences of ten and two years, respectively.[33] Two years later, White filed a petition for post-conviction relief seeking to set his plea aside on the ground that the trial court failed to advise him of the possible minimum sentences applicable to each charge if he had elected to go to trial rather than to plead guilty.[34] He claimed the absence of this advisement rendered his plea involuntary, unintelligent, and unknowing.[35] The trial court denied the petition, and White appealed. In an unpublished memorandum opinion,[36] the Indiana Court of Appeals agreed with White and reversed the trial court, thereby giving him the opportunity to withdraw his plea.[37] After the denial of its rehearing petition,[38] the State sought transfer to the supreme court, evidently to curb a rising tide of identical post-conviction relief petitions presenting the same fatal flaw.[39] This time, the State succeeded.

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[32]The *Austin* court stated:

> An accused's entitlement to such advisements, therefore, flows from his due process right to be sheltered from the consequences of a guilty plea entered on less than an informed judgment and not from the legislative inclusion of it in its codification. The legislature may, as a matter of public policy, require advisements that are not of such dimension, but it could not eliminate the requirements of those essential to an informed judgment, which includes the one omitted by the court that accepted the guilty plea.

468 N.E.2d at 1028.

[33]*White*, 497 N.E.2d at 894.

[34]*Id.* Post-conviction relief is afforded defendants under Rule 1 of the Indiana Rules of Procedure for Post-Conviction Remedies.

[35]497 N.E.2d at 894. In a footnote, the supreme court intimates it may as well abandon the "knowingly" element for measuring the validity of a guilty plea. *Id.* n.1. There is a question as to the wisdom of this statement in the face of constitutional considerations. *See* Johnson v. Zerbst, 304 U.S. 458 (1938). Inasmuch as this statement is mere dictum, this Article will continue to adhere to the tripartite terminology. *See also* Ind. Code § 35-35-1-4(c)(3) (Supp. 1987).

[36]White v. State, 465 N.E.2d 228 (Ind. Ct. App. 1984).

[37]White v. State, 465 N.E.2d 228 (Ind. Ct. App. 1984), *reh. denied*, 484 N.E.2d 82 (Ind. Ct. App. 1985).

[38]484 N.E.2d at 82.

[39]*E.g.*, Jones v. State, 478 N.E.2d 676 (Ind. 1985); Williams v. State, 468 N.E.2d 1036 (Ind. 1984); Austin v. State, 468 N.E.2d 1027 (Ind. 1984).

The supreme court, comprised of new members since the earlier cases involving the same problem,[40] invoked a new standard for reviewing guilty pleas:

> A petitioner who claims that his plea was involuntary and unintelligent but can only establish that the trial judge failed to give an advisement in accordance with § 35-35-1-2 has not met his burden of proof. He needs to plead specific facts from which a finder of fact could conclude by a preponderance of the evidence that the trial judge's failure to make a full inquiry in accordance with § 35-35-1-2(a) rendered his decision involuntary or unintelligent. Of course, unless the record reveals that the defendant knew or was advised at the time of his plea that he was waiving his right to a jury trial, his right of confrontation and his right against self-incrimination, *Boykin*[41] will require that his conviction be vacated.[42]

When compared to the standards assumed and discarded through the years, *White*'s pronouncement obviously instituted a radical change in the method of reviewing a guilty plea on collateral attack. The major questions raised by this change are, how and why did the court arrive at this new standard?

First, the *White* court declared that most of the statutory advisements in Indiana Code section 35-35-1-2 lack constitutional foundation, citing *Boykin v. Alabama*.[43] This statement is contrary to the *Austin* declaration.[44] The court explains that *Boykin* identified only three rights of which a defendant need be advised as mandated by the United States Constitution—"the right to a trial by jury, the right to confront one's accusers, and the right against self-incrimination."[45] From this statement, the *White* court concluded that the other advisements in Indiana Code section 35-35-1-2 are thus not guaranteed by the United States Constitution. By further extrapolation, the opinion also concluded that they did not derive from the Indiana Constitution, particularly because the words "due process" appear nowhere in it.[46] The court then engaged

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[40]Justices Shepard and Dickson joined the court in 1985 and 1986, respectively, replacing Justices Hunter and Prentice who voted in the majority in Jones v. State, 478 N.E.2d 676 (Ind. 1985); Williams v. State, 468 N.E.2d 1036 (Ind. 1984); and Austin v. State, 468 N.E.2d 1027 (Ind. 1984).

[41]Boykin v. Alabama, 395 U.S. 238 (1969).

[42]*White*, 497 N.E.2d at 905.

[43]395 U.S. 238 (1969).

[44]497 N.E.2d at 897.

[45]*Id.*

[46]*Id.*

in a circuitous discussion refuting the rationale of *Austin v. State*, done apparently in order to undermine the *Austin* court's declaration that the *German* standard of strict adherence to the statutory procedure is undisputedly a province of the courts alone because of its constitutional dimensions and is therefore outside the realm of the legislature's "harmless error" codification.[47] Having thereby "weakened" the *German* standard, the *White* court continued in this vein to what appears to be the true purpose of the opinion—a criticism of the application of the strict *German-Austin* review.

The court acknowledged the ease with which *German* can be applied by "being easy to remember and easy to apply."[48] The court then set forth the disadvantages to its application: common sense dictates that some of the trial court's omissions are harmless, and post-conviction relief proceedings are being abused by defendants who are exercising their rights on the basis of these picayune errors.[49] In search of an alternative to the *German* "prophylactic" rule, the supreme court turned to the federal courts for guidance for a more appropriate standard.

The *White* opinion noted the fundamental inquiries federal courts have made into the voluntary, knowing and intelligent basis for a defendant's plea. For example, the Seventh Circuit Court of Appeals, in *United States v. Wetterlin*,[50] looked to the totality of the circumstances surrounding the plea to determine whether the defendant understood his rights.[51] This issue was framed in *Hill v. United States*[52] as, "Was the error in the proceeding a fundamental defect which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure?"[53] The *White* opinion makes clear that these formulations of the fundamental issue arose in a context similar to that of *German* and *Austin*—the impact of a "statutory" list of advisements.

In the federal courts, however, this list of advisements takes the form of Rule 11 of the Federal Rules of Criminal Procedure.[54] Starting

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[47] *Id.* at 897-900. *See Austin*, 468 N.E.2d at 1028-29. *See also supra* notes 27-32 and accompanying text.

[48] White, 497 N.E.2d at 900.

[49] *Id.*

[50] 583 F.2d 346, 354 (7th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979).

[51] 497 N.E.2d at 902.

[52] 368 U.S. 424 (1962).

[53] *White*, 497 N.E.2d at 902 (citing *Hill*, 368 U.S. 424 (1962).

[54] FED. R. CRIM. P. 11. Rule 11 (c) provides:

(c) Advice to the Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory

with *McCarthy v. United States*,[55] in which the United States Supreme Court declared that a failure to comply with an early version of Rule 11 mandated vacation of a plea on direct appeal, the federal circuit courts eventually reached a *German*-like conclusion that, under an amended version of Rule 11, any violation of the rule was per se prejudicial even on collateral attack.[56] However, the Supreme Court, in *United States v. Timmreck*,[57] wholeheartedly rejected that conclusion where the trial court had failed to inform a defendant of a mandatory special parole term. The Court declared that where, as in *Timmreck*, the trial court has committed only a violation of Rule 11's "formal" requirements, collateral relief from a guilty plea was not available.[58] In the context of *Timmreck*'s holding, the *White* court cites to various situations where other federal courts have come to similar conclusions, by requiring a defendant to show prejudice,[59] by declaring that reality rather than ritual must govern review,[60] or by finding the lack of a certain advisement is harmless error.[61] Rounding out its discussion and reaching its ultimate conclusion, as set forth previously, the *White* opinion quoted from a recent case from the Supreme Court, *United States v. Mechanik*,[62] which denounced

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minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and if necessary, one will be appointed to represent him; and

(3) that he had the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he has pleaded, that his answers may later be used against him in a prosecution for perjury or false statement.

[55]394 U.S. 459 (1969).

[56]*See, e.g.*, Timmreck v. United States, 577 F.2d 372 (6th Cir. 1978), *rev'd* 441 U.S. 780 (1979).

[57]441 U.S. 780 (1979).

[58]*Id.* at 785.

[59]497 N.E.2d at 904 (citing United States v. Caston, 615 F.2d 1111 (5th Cir. 1980)).

[60]*Id.* (citing United States v. Frazier, 705 F.2d 903 (7th Cir. 1983)).

[61]*Id.* (citing United States v. Stead, 748 F.2d 355 (6th Cir. 1984)).

[62]475 U.S. 66 (1986).

the cost to society created by retrials as well as their detrimental effect upon the criminal justice system.[63]

Armed with these precedents—the United States Supreme Court denunciation of new trials and its own newly formulated standard—the Indiana Supreme Court applied its new declaration to Randy White's petition and found that petition wanting. The court's review of the transcript revealed that White had made no other case for withdrawal of his plea beyond the mere assertion that the trial court failed to make the single advisement set forth in Indiana Code section 35-35-1-2(a) regarding minimum sentencing.[64] White presented no facts to show he indeed did not know what the minimum sentences were nor had he alleged any other facts indicating his guilty plea was anything but intelligent, voluntary and knowing. Specifically, White did not claim that *but for* the trial court's error he would have decided to go to trial rather than to plead guilty.[65] Therefore, the supreme court concluded, Randy White had not borne his burden of showing by a preponderance of the evidence that his petition for post-conviction relief should have been granted and his plea withdrawn.[66]

IV. Evaluation of *White*

Upon preliminary analysis of *White*, one's first instinct is to dismiss it as incorrect on the basis of its flawed foundation and strained logic. The federal case law cited by the court vacillates from standard to standard, none of which the *White* court ever really adopted. In addition, the opinion made no distinction between cases decided on direct appeal, such as in *McCarthy v. United States*,[67] and cases decided on collateral attack, such as *United States v. Timmreck*.[68] Ultimately, this distinction is of little moment, but it casts an additional cloud on an opinion that also relied on the rationale of a case that did not involve a guilty plea at all, *United States v. Mechanik*.[69] These minor problems aside, one is further confronted with the decision's strained efforts to substantiate its credibility by attacking the *Austin v. State*[70] and *German v. State*[71] opinions.

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[63] *White*, 497 N.E.2d at 905.
[64] *Id.* at 906. *See supra* note 31.
[65] 497 N.E.2d at 906.
[66] *Id.*
[67] 394 U.S. 459 (1969).
[68] 441 U.S. 780 (1979).
[69] 475 U.S. 66 (1986).
[70] 468 N.E.2d 1027 (Ind. 1984).
[71] 428 N.E.2d 234 (Ind. 1981).

A. White's Interpretation of Austin *and* German *and its Effect*

To reiterate briefly, the Indiana Supreme Court in *German* held that the then-extant advisement statute, Indiana Code section 35-4.1-1-3,[72] mandated strict compliance by a trial court,[73] in order to determine that a guilty plea was entered voluntarily, knowingly and intelligently. As to the specific facts involved in *German*, this decision meant that advisements present in a written plea agreement were inadequate.[74] Considering the mandatory language of the statute—"The court *shall not* accept a plea of guilty from the defendant without first addressing the defendant"[75]—this result seems only logical. This wording is not discretionary, and the *German* holding is akin to the result the United States Supreme Court reached in *McCarthy v. United States*,[76] a case of direct appeal from a trial court's failure to follow Federal Rule 11. Shortly after *German*, and probably as its logical consequence, the Indiana legislature passed into law an amended advisement statute that includes mandatory language[77] similar to the earlier version but also adds the following: "Any variance from the requirements of this section that does not violate a constitutional right of the defendant is not a basis for setting aside a plea of guilty."[78] As a response to that enactment, the Indiana Supreme Court declared the new provision a nullity in *Austin*.[79] Although the *White* court intimates the *Austin* court backed away from its *German* rationale of strict construction of the mandatory language of the statute in order to pronounce a new rationale,[80] a careful reading shows the *White* court misconstrued *Austin*.

Austin stated that strict construction of the mandatory language is a reason for requiring strict compliance with the advisement. However,

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[72]*See supra* notes 19-26 and accompanying text.

[73]"We hold that it is the duty of the trial judge to comply strictly with the terms of IND. CODE § 35-4.1-1-3. . . ." 428 N.E.2d at 236.

[74]*Id.*

[75]*See supra* note 19.

[76]394 U.S. 459 (1969). The Supreme Court declared:

> [W]e hold that a defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11. This decision is based solely upon our construction of Rule 11 and is made pursuant to our supervisory power over the lower federal courts; we do not reach any of the constitutional arguments petitioner urges as additional grounds for reversal.

Id. at 463-64.

[77]"The court shall not accept a plea of guilty or guilty but mentally ill at the time of the crime, without first determining that the defendant . . ." IND. CODE § 35-35-1-2(a) (Supp. 1987).

[78]*Id.* § 35-35-1-2(c).

[79]468 N.E.2d 1027, 1029 (Ind. 1984).

[80]497 N.E.2d 893, 899 (Ind. 1986).

it is not the *only* reason.[81] Not having had reason to reach the constitutional issue prior to that time—as courts are wont to do[82]—the *Austin* court plucked up its courage and did just that. In holding that Dotsie Austin was entitled to an advisement of his minimum possible sentences, the court stated:

> An understanding of the range of possible sentences is, among other factors, essential to an informed judgment as to whether or not to enter a guilty plea. This is self-evident. An accused's entitlement to such advisements, therefore, flows from his *due process right* to be sheltered from the consequences of a guilty plea entered on less than an informed judgment and not from the legislative inclusion of it in its codification. The legislature may, as a matter of public policy, require advisements that are not of such dimension, but it could not eliminate the requirements of those essential to an informed judgment, which includes the one omitted by the court that accepted the guilty plea.[83]

The *Austin* court further found the legislature's harmless error provision in Indiana Code section 35-35-1-2(c) a nullity for a second reason—the harmless error doctrine is within the exclusive domain of the courts and therefore outside the domain of the legislature.[84] The *White* court attempted to tear this reasoning apart.

First, the *White* opinion interpreted the *Austin* court's "due process" right as being the bundle of advisements given to a defendant, then went on to show that not all those rights are afforded by the Constitution.[85] To the extent that not all these advisements are explicitly within the federal Constitution, the *White* court is correct.[86] After reaching this conclusion, the court also declared that the Indiana Constitution does not offer this "due process" right either. The court then explained how the *Austin* court's misapprehension of due process makes the opinion "not fully reliable."[87] The *White* court made one fundamental error in its analysis. It failed to consider the full *Austin* pronouncement that "[a]n accused's *entitlement* to such advisement . . . flows from his *due process right*. . . ."[88]

It is a basic tenet of criminal law that a guilty plea must be voluntary, knowing and intelligent; otherwise it has been obtained in violation of

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[81]468 N.E.2d at 1028.
[82]*See, e.g.*, McCarthy v. United States, 394 U.S. 459 (1979).
[83]468 N.E.2d at 1028 (Emphasis added).
[84]*Id.* at 1029.
[85]497 N.E.2d at 897.
[86]*See infra* notes, 118-22 and accompanying text.
[87]497 N.E.2d at 898.
[88]468 N.E.2d at 1028 (Emphasis added).

the individual's due process rights.[89] The *White* court missed the point when it focused on the discrete advisements. It is the "waiver of . . . 'a known right or privilege'"[90] that is the constitutionally protected right with which *Austin* was concerned. The *Austin* court's decision to require, on *due process* grounds, an advisement of the minimum sentencing a defendant may be waiving in order to engender a proper plea was within its prerogative to interpret constitutional law and was within the bounds of dicta pronounced by *Boykin v. Alabama*.[91] Similarly, the *White* court's decision that due process was not better served by requiring this advisement waiving a right not explicitly set forth in the Constitution was *its* prerogative. It would have been much simpler to just say so, rather than to find a flaw in *Austin*, because there is adequate precedent for *White*'s reasoning.

The primary fact in *White* that must be remembered is that it concerned a *collateral* attack on a guilty plea, *vis-a-vis* a petition for post-conviction relief, not a direct appeal. The extent to which the *White* court recognized this fact exists in its citation to federal cases concerned with collateral attacks on pleas.[92] As the *White* case indicates and independent research reveals, there is no single method of approaching review of a guilty plea on collateral attack, be it by habeas corpus, motion to vacate sentence[93] or a petition for post-conviction relief. Traditionally, collateral attack on a guilty plea in the federal system requires a showing of a constitutional or jurisdictional defect rendering the judgment void, "a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure."[94] The translation to an Indiana post-conviction procedure framework is found generally in the rules for post-conviction remedies:

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[89]*See, e.g.*, Henderson v. Morgan, 426 U.S. 637, 647 (1976); Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969); McCarthy v. United States, 394 U.S. 459, 466 (1969).

[90]*McCarthy*, 394 U.S. at 466 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[91]A majority of criminal convictions are obtained after a plea of guilty. If these convictions are to be insulated from attack, the trial court is best advised to conduct an on the record examination of the defendant which should include, inter alia, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to constitute the offenses for which he is charged and the *permissible range of sentences*. Commonwealth ex rel. West v. Rundle, 428 Pa. 102, 105-06, 237 A.2d 196, 197-98 (1968).

395 U.S. at 244 n.7 (Emphasis added).

[92]*E.g.*, United States v. Timmreck, 441 U.S. 780 (1978); Hill v. United States, 368 U.S. 424 (1962).

[93]28 U.S.C. § 2255 (1982).

[94]Hill v. United States, 368 U.S. at 428; United States v. Timmreck, 441 U.S. at 783.

> (a) Any person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims:
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> (1) that the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state;
>
> (2) that the court was without jurisdiction to impose sentence;
>
> . . .
>
> (6) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;
>
> may institute at any time a proceeding under this Rule to secure relief.[95]

In the specific context of a collateral attack on a guilty plea, the goal is to determine whether the defendant entered his plea voluntarily, knowingly and intelligently,[96] as a matter of due process.[97] The entry of conviction upon a plea not so entered is fundamental error,[98] thereby creating justification for reversal by collateral attack. The major contention is what process is due to a guilty plea petitioner: what must a guilty plea defendant know in order to make a voluntary choice of pleading guilty rather than the alternative of standing trial?[99]

In Indiana, the legislature has determined a statutory framework, as discussed above, within which a trial court must work in order to satisfy itself that the guilty plea defendant has been accorded his due process rights.[100] Basically, these statutes require a trial court to assure itself that an unrepresented defendant has knowingly waived his right to counsel,[101] that there is a factual basis for the plea,[102] that the plea was not induced by promises, threats or force,[103] that the defendant understands the nature of the charge against him,[104] and that he waives certain rights and sentencing alternatives that might otherwise be available to him.[105] Unfortunately, despite the ease with which a trial court and

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[95]IND. R. P. POST-CONVICTION REMEDIES 1 § 1.

[96]Henderson v. Morgan, 426 U.S. 637, 644-45 (1976); Boykin v. Alabama, 395 U.S. 238, 243 (1964); Davis v. State, 446 N.E.2d 1317, 1321 (Ind. 1983); Brown v. State, 435 N.E.2d 582, 584 (Ind. Ct. App. 1982).

[97]*Henderson*, 426 U.S. at 647.

[98]*Brown*, 435 N.E.2d at 584.

[99]North Carolina v. Alford, 400 U.S. 25, 31 (1970).

[100]*See supra* note 31 and accompanying text.

[101]IND. CODE § 35-35-1-1 (Supp. 1987).

[102]IND. CODE § 35-35-1-3 (Supp. 1987).

[103]IND. CODE § 35-35-1-3(a) (Supp. 1987).

[104]IND. CODE § 35-35-1-2(a)(1) (Supp. 1987).

[105]IND. CODE § 35-35-1-2(a)(2) (Supp. 1987).

a prosecutor could follow these steps, many pleas have been accepted without compliance with them, the *White* case being just one example of many. *German* and *Austin* provided one answer to these errors by mandating strict compliance with the statutes.[106] *White* provides another by implying the statutes incorrectly call for more from trial courts than due process requires.[107]

One must remember that, after all is said and done, the interpretation of the Constitution is the sole province of the courts.[108] Regardless of how the legislature may interpret it, the courts remain the final arbiters of its construction and, thus, of adjudging a guilty plea defendant's rights to due process. To that end, the *White* court has declared that certain portions of the statutes are immutably required by due process: "[U]nless the record reveals that the defendant knew or was advised at the time of his plea that he was waiving his right to a jury trial, his right of confrontation and his right against self incrimination, *Boykin* will require that his conviction be vacated," or if the plea is entered "after coercion, judicial or otherwise."[109] The absence of the other legislative requirements from a guilty plea record, such as the advisement of Randy White's minimum possible sentence, is relegated to the fuzzy zone of "colorable claims for relief"[110] upon which a petitioner may prevail only by showing, by a preponderance of evidence, that he has actually been misled in choosing to plead guilty over his alternatives.[111] To the extent that this conclusion conforms to accepted procedures on post-conviction relief, the Indiana Supreme court appears to be correct. However, insofar as *White* purports to reflect a proper standard of attacking a guilty plea, it is incorrect.

The issue ultimately is whether the defendant voluntarily, knowingly, and intelligently elected to plead guilty. Therefore, the inquiry should be whether, given the evidence in the record at the post-conviction proceeding, the petitioner has shown by a preponderance of the evidence that he was not accorded due process. To put the onus on the petitioner at the post-conviction proceeding to show he was actually misled, as *White* requires, is to further relieve the trial court and the prosecution from establishing an adequate record of the plea proceedings as mandated by *Boykin* and its collateral attack progeny.[112] Certainly, a defendant's having been misled could be part of the evidence establishing the lack

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[106]*See supra* notes 72-84 and accompanying text.

[107]497 N.E.2d at 897.

[108]Fountain Park Co. v. Hensler, 199 Ind. 95, 107, 155 N.E. 465, 469 (1927).

[109]497 N.E.2d at 905.

[110]*Id.* at 906.

[111]*Id.*

[112]*See supra* notes 93-99 and accompanying text.

of voluntariness and intelligence of his plea. But to make this single inquiry, in addition to the four immutable requirements set forth above,[113] runs contrary to the clear message of *Boykin*.

This procedural distinction is, of course, merely an intellectual diversion, when in fact the issue in *White* is whether the trial court's failure to follow the statute is essentially harmless error.[114] In other words, is the absence of an advisement of a minimum possible sentence a denial of due process? Although a liberal and well-devised opinion from the Indiana Court of Appeals has described all the statutory provisions as of constitutional dimension,[115] the fact remains that the Indiana Supreme Court, as the highest court in the state, is the final authority in this state on the parameters of due process set forth in both the state and federal constitutions. In *White*, the supreme court simply disagreed with the court of appeals and implicitly declared that, given the facts of Randy White's case, the error in failing to advise him of his minimum possible sentence was not of constitutional dimension *vis-a-vis* due process. The trial court's error was not sufficient to afford White collateral relief.[116]

This *result* on the basis of harmless error and lack of prejudice has sufficient precedent,[117] even if *White*'s underlying rationale does not. What remains to be seen is *White*'s application in instances of other omissions from the statutory advisements.

B. The Advisements Required by Due Process

The *White* court set forth four advisements and/or inquiries absolutely mandated by due process. They are advisement of a defendant's waiver of his right to a jury trial, his right of confrontation, and his right against self-incrimination and, impliedly, an inquiry as to whether the plea has been coerced.[118] The three advisements of waiver were borne of the federal Constitution and are explicitly set forth in *Boykin v. Alabama*.[119] The absence of any of these advisements in a plea proceeding is a clear violation of due process, thereby voiding the conviction based

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[113]*See supra* text accompanying note 109.

[114]*See White*, 497 N.E.2d at 905. *See also* United States v. Timmreck, 441 U.S. 780, 783 (1978) ("Such a violation is neither constitutional nor jurisdictional."); Hill v. U.S., 368 U.S. 424, 428 (1962).

[115]Jones v. State, 467 N.E.2d 757 (Ind. Ct. App. 1984).

[116]*White*, 497 N.E.2d at 905-06.

[117]*E.g.*, Hill v. Lockhart, 474 U.S. 42 (1985); United States v. Timmreck, 441 U.S. at 783.

[118]*See supra* note 109 and accompanying text.

[119]395 U.S. at 243. *See also* McCarthy v. United States, 394 U.S. 459, 466 (1969).

thereon.[120] The inquiry into whether a defendant has been coerced is the implied converse of an inquiry into voluntariness. This, too, has been deemed essential to due process in *Brady v. United States*.[121] The Indiana statutes require certain other advisements not set forth in *White*.[122] Some of them should have been listed in *White* as evocative of due process; others were rightfully omitted, insofar as *White* applies only to collateral proceedings.

Evidently, Randy White appeared at his plea proceeding with counsel; therefore, the advisement of waiver providing that "[a] plea of guilty . . . shall not be accepted from a defendant unrepresented by counsel who has not freely and knowingly waived his right to counsel" was not at issue.[123] *Rice v. Olson*[124] elevated the knowing waiver of this constitutional right to the status of an element of due process in the guilty plea setting. Although the *White* scenario did not need to address this matter, the case's reliance on the *Boykin* factors as being absolute rights leads to the conclusion that if the matter should arise in the proper situation, the Indiana Supreme Court would find prima facie reversible error in the absence of waiver of counsel.

Another element not addressed by *White* but still undeniably an element of due process in the guilty plea proceeding is whether the defendant "understands the nature of the charge against him."[125] It was early established in *Smith v. O'Grady*[126] that a defendant must understand the nature of the charge against him before he can voluntarily and intelligently plead guilty. The Supreme Court later applied this requirement to collateral attacks in *Henderson v. Morgan*.[127] Under the circumstances, the Indiana Supreme Court can do no less than recognize this factor also, despite its omission from the list in *White*. The constitutional mandate interpreted by the United States Supreme Court demands it.

One advisement in Indiana Code section 35-35-1-2 that has not yet been treated as of constitutional dimension in the guilty plea setting is the waiver of a "public and speedy trial by jury."[128] *Barker v. Wingo*[129]

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[120]*Boykin*, 395 U.S. at 243.

[121]397 U.S. 742 (1970).

[122]*See supra* note 31 and accompanying text.

[123]IND. CODE § 35-35-1-1 (Supp. 1987).

[124]324 U.S. 786, 791 (1945).

[125]IND. CODE § 35-35-1-2(a)(1) (Supp. 1987). Closely associated with this determination is the element requiring that "[t]he court shall not enter judgment upon a plea of guilty . . . unless it is satisfied from its examination of the defendant or the evidence presented that there is a factual basis for the plea." IND. CODE § 35-35-1-3(b) (Supp. 1987).

[126]312 U.S. 329, 334 (1941).

[127]426 U.S. 637, 645 (1976); *see also* North Carolina v. Alford, 400 U.S. 25 (1970).

[128]IND. CODE § 35-35-1-2(a)(2)(A) (Supp. 1987).

[129]407 U.S. 514, 515-16 (1972).

clearly established a state court defendant's right to a speedy trial under the Sixth Amendment; sound policy supports the argument in favor of raising this right to the status of the *Boykin* rights.[130] For example, many defendants do not make bail and must remain incarcerated in local jails until trial and sentencing. Notoriously, these local jails—even in rural areas—present such awful conditions that a defendant would willingly plead guilty to gain transport to a perhaps less troublesome facility. A defendant would surely want to know that a speedy trial is available to him in order for him to make an informed choice whether to plead guilty or to wait shortly for a trial. However, until the United States Supreme Court adopts the position that the right to a speedy trial is constitutionally mandated in the due process waiver of a pleading defendant, it is highly unlikely, as evidenced by *White*, that the Indiana Supreme Court will take such a position.[131] Additionally, one could argue that a defendant could infer his right to a speedy trial by the speed with which the state will allow him to plead guilty.

The next advisement of Indiana Code section 35-35-1-2, and the primary subject of *White*, is the advisement of the minimum and maximum sentences and the possibility of increased or consecutive sentences.[132] The *Boykin* majority alluded to the constitutional dimension of this generic advisement in dictum when it cited to a state court opinion: "the trial court is best advised to conduct an on the record examination of the defendant which should include . . . the permissible range of sentences."[133] However, in the absence of actually misleading a defendant into pleading guilty because of his misunderstanding of the possible sentences,[134] the failure to make this advisement is usually relegated to a designation as a technical violation only.[135] The usefulness of further

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[130]*See* the dissent from the Supreme Court's denial of certiorari in Johnson v. Ohio, 419 U.S. 924 (1974). Justice Douglas, joined by Justices Brennan and Marshall, states that enumeration in *Boykin* is "illustrative, not exhaustive" and should therefore include the right to a speedy trial. 419 U.S. at 926 (Douglas, J., dissenting).

[131]However, the Indiana Supreme Court, relying on the holding of German v. State, 428 N.E.2d 234 (Ind. 1981), held that on a petition for post-conviction relief, a defendant's plea of guilty would be vacated where the trial judge accepting such plea failed to inform the defendant that by so pleading, he was thereby waiving his right to a speedy trial. Hayenga v. State, 463 N.E.2d 1383, 1384 (Ind. 1984).

[132]IND. CODE § 35-35-1-2(a)(3) (Supp. 1987).

[133]Boykin v. Alabama, 395 U.S. at 244 n.7 (1969) (quoting Commonwealth *ex rel.* West v. Rundle, 428 Pa. 102, 105-06, 237 A.2d 196, 197-98 (1968)).

[134]*See, e.g.*, United States v. Sharon, 812 F.2d 1233 (9th Cir. 1987) (special parole not described); United States v. Hawthorne, 806 F.2d 493 (3d Cir. 1986) (failure to inform of imposition of restitution).

[135]*See, e.g.*, United States v. Timmreck, 441 U.S. 780 (1979). *See also* Hill v. Lockhart, 474 U.S. 52 (1985).

argument that this advisement is paramount to a defendant's due process rights is minimal.

The final element set forth in the Indiana statutes declares that if a trial court accepts a plea premised upon an agreement, the court is bound by the terms of that agreement.[136] As a practical matter, this information is essentially superfluous. Why would a defendant choose to enter into a plea agreement if he did not fully intend to get what he bargained for? This information probably has little to do with any due process rights but is merely a vestige of the prior advisement that a trial court was *not* bound by any plea agreements.[137] The failure to make this earlier advisement *was* a violation of due process.[138] Under the current version of the statute this advisement has little actual value for purposes of establishing grounds for collateral attack.

Although the foregoing elements were established by the Indiana legislature and do not all have *per se* constitutional derivation, most of the factors do have precedential force from the federal courts in their interpretation of the United States Constitution by reason of the Fourteenth Amendment[139] as well as by direct mandate from the Due Process Clause of the Fifth Amendment.[140] Of course, not only are states bound by the Constitution in their interpretation of constitutional rights, particularly those of due process, but they may also require a higher standard. Inasmuch as the Indiana Supreme Court has impliedly declared in *White* that the General Assembly will not govern the definition of due process in creating a higher standard than that required of federal courts, the question remains whether there exists anything else which is inherent in due process which the supreme court may also have ignored.

The Indiana Constitution has been oft-neglected in the consideration of a pleading defendant's due process rights. Two sections are of particular application in such a case:

> All courts shall be open; and every person, for injury done to him in his person, property, or reputation shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and

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[136]IND. CODE § 35-35-1-2(a)(4) (Supp. 1987).

[137]IND. CODE § 35-4.1-1-3(e) (repealed 1981).

[138]*See, e.g.*, Pharms v. State, 477 N.E.2d 334 (Ind. Ct. App. 1985).

[139]*See, e.g.*, Robbins v. State, 251 Ind. 313, 321, 241 N.E.2d 148, 153 (1968). For federal cases involving state court defendant, *see, e.g.*, Boykin v. Alabama, 395 U.S. 244 (1969); Henderson v. Morgan, 426 U.S. 637 (1976).

[140]"No person shall . . . be deprived of life, liberty or property, without due process of law. . ." U.S. CONST. amend. V. For two examples of federal defendants, see McCarthy v. United States, 394 U.S. 459 (1969) and United States v. Timmreck, 441 U.S. 780 (1979). However, both of these cases focused upon FED. R. CRIM. P. 11.

without delay.[141]

> In all criminal prosecutions, the accused shall have a right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.[142]

The combined meaning of these two provisions tracks fairly closely with the same rights set forth above and interpreted within the United States Constitution.[143] The state rights identical to the federal rights would receive similar application by the supreme court. For example, the state right to jury trial must be announced to a pleading defendant.[144] On the other hand, there seems little doubt that as to the interpretation of the federal right to a speedy and public trial, the Indiana Supreme Court would treat the same state constitutional provision with like regard. That is, such a right is not within the meaning of due process.[145] It does not appear, from the tenor of *White*, that the supreme court will expand the Indiana Constitution's "due course of law" beyond that prescribed for the United States Constitution's "due process of law."[146] However, there is one very serious deficiency in Indiana's criminal procedure which either will have to actually be rectified or must also be included in a pleading defendant's advisement: the right to a direct appeal.

The Indiana Constitution has been interpreted and applied by Indiana courts as giving criminal defendants the right to appeal.[147] Although there is contradictory authority on the issue,[148] the most recent statement on the matter appears in *Judy v. State*.[149] In that case the supreme court reviewed Steven Judy's waiver of his right to appeal his death penalty case. Acknowledging that review of the death penalty phase itself was not waiveable, the court declared that Judy's waiver of his right to

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[141]IND. CONST. art. 1, § 12.

[142]*Id.* at § 13.

[143]*See supra* notes 118-21 and accompanying text.

[144]*See supra* notes 31 and accompanying text.

[145]*See supra* notes 128-31 and accompanying text.

[146]*See* White, 497 N.E.2d at 897 n.4, and cases cited therein ("due process" is interchangeable with "due course").

[147]*See* Judy v. State, 275 Ind. 145, 157, 416 N.E.2d 95, 101 (1981); Peterson v. State, 246 Ind. 452, 456, 206 N.E.2d 371, 372 (1965); Woods v. State, 426 N.E.2d 107 (Ind. Ct. App. 1981); *see also* IND. CODE § 35-38-4-1 (Supp. 1987).

[148]*See, e.g.*, Robbins v. State, 251 Ind. 323, 325, 242 N.E.2d 925, 927 (1969); *In re* Pisello, 155 Ind. App. 484, 488, 293 N.E.2d 228, 230 (1973).

[149]275 Ind. 145, 416 N.E.2d 95 (1981).

appeal his conviction must be *knowing, intelligent* and *voluntary.*[150] Although the court declared in an earlier case, *Riner v. Raines,*[151] that the right to appeal a criminal conviction is not a necessary element of due process,[152] the *Judy* decision belies that interpretation. This issue would ordinarily be of no moment but for the fact that pleading defendants are typically confined to challenging their pleas by collateral attack rather than by direct appeal.

For reasons that are unclear, in the early 1980's the Indiana appellate courts began ruling that a criminal defendant could not attack his plea by a motion to correct error and direct appeal.[153] Evidently, these holdings express the courts' beliefs that the language in the Indiana Rules of Civil Procedure and of Criminal Procedure pertaining to the appeal from judgments referring directly to "trial," "verdict," or "decision,"[154] should be interpreted to preclude those instances where one pleads guilty rather than proceeds to trial. It is difficult to understand these holdings, however, in light of the clearly constitutional dimensions of the right, and the language of Indiana Code section 35-38-4-1(a): An appeal to the supreme court or the court of appeals may be taken by the defendant: (1) as a matter of right from any judgment in a criminal action; and (2) in accordance with this chapter.[155]

A plea by a criminal defendant is just as much a conviction as if he had gone to trial.[156] Furthermore, the rule for post-conviction relief affords guilty plea defendants the opportunity to file a belated appeal.[157] It is therefore perplexing why attacks on guilty pleas are reduced to the realm of petitions for post-conviction relief.

This examination of the law leads to the inevitable conclusions that the appellate courts are wrong and that the law does afford pleading defendants the opportunity to appeal, or that the law actually does not afford this right. In either circumstance, the law is equally clear that if defendants convicted after trial do have the right, but defendants convicted after pleading do not, then the pleading defendants are being denied their rights under equal protection of the law.[158] Although the

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[150]*Id.* at 150, 416 N.E.2d at 97 (emphasis added).

[151]274 Ind. 113, 409 N.E.2d 575 (1980).

[152]*Id.* at 118, 409 N.E.2d at 578.

[153]*See, e.g.*, Stone v. State, 444 N.E.2d 1214 (Ind. Ct. App. 1983); Woods v. State, 426 N.E.2d 107 (Ind. 1981).

[154]*See* IND. R. CIV. P. 59.

[155]IND. CODE § 35-38-4-1 (Supp. 1987).

[156]*See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 242 (1969).

[157]IND. R. P. POST-CONVICTION REMEDIES 2 § 1 provides: "Any defendant convicted after a trial or plea of guilty may petition the court of conviction for permission to file a belated motion for new trial . . ."

[158]"No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1.

initial premise of the following statement regarding due process is flawed in the wake of *Judy*, it is hard to deny the ultimate import of this declaration by the Indiana Supreme Court: "[T]he right to appeal in criminal cases is not a necessary element of due process although *to the extent that a state provides such a right, the equal protection clause would require all affected to be treated alike.*"[159] Thus, this right is elevated to a federal due process issue, and the failure of the Indiana courts to advise of this right is reversible error.

Two options are open to cure this serious flaw in the system. The ideal solution would be for the courts to interpret the Indiana Constitution to include the right to appeal and thereafter to apply such a right equally among defendants. The second option would be for the General Assembly to amend the appropriate statutes and trial rules to invoke clearly this due process right to pleading defendants. Merely to advise a pleading defendant that by pleading guilty he *waives* the right to appeal because this right concerns the procedure *surrounding the plea* is *not* an option. Rather, a pleading defendant must be informed of his right to a direct appeal *which may be waived* if such waiver is voluntary, knowing and intelligent.[160]

The ramifications of properly inserting this right in the matter of due process may have little or no practical effect on current procedure. It is fairly common knowledge that most attacks on guilty pleas fall outside the limitations for a direct appeal, either with respect to the passage of time[161] or as a substantive matter of the belated appeals requirements.[162] Collateral attacks are typically lodged when a defendant discovers he may be charged as an habitual offender[163] if he cannot avoid an earlier guilty plea conviction. The absence of an advisement regarding the defendant's right to appeal constitutes fundamental error as a denial of equal protection under the law. Failure of a trial court to make a record of this right ranks with a similar failure to make the *Boykin* advisements in mandating reversal. Futhermore, the effect on the possibilities open to defendants who can timely perfect an appeal could be enormous because *McCarthy v. United States*[164] clearly mandates reversal for *any* omission from the federal guilty plea statutes if brought on direct appeal.

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[159]Riner v. Raines, 274 Ind. 113, 118, 409 N.E.2d 575, 578 (1980) (emphasis added).

[160]*But see* United States v. Frazier, 705 F.2d 903, 908 n.8 (7th Cir. 1983) (in which the opinion appears to deal with the right to appeal a related motion to suppress, but uses unfortunately broad language such that it *could* be construed as the right to appeal the plea).

[161]IND. R. CIV. P. 59.

[162]IND. R. P. POST-CONVICTION REMEDIES 2.

[163]IND. CODE § 35-50-2-8 (Supp. 1987).

[164]394 U.S. 459, 463-64 (1969).

Although it addresses the construction of the federal rule and its specific terms, the import of the *McCarthy* opinion is that an appealing defendant should not have to bear the burden of disproving the voluntariness of his plea. Rather, all resort to fact-finding is eliminated and the court must determine error on the plea record alone.[165] Omissions are *prima facie* reversible error. The same result would be particularly appropriate in Indiana where the motion to correct error does not contemplate additional fact-finding after judgment, except for newly discovered evidence.[166]

The problem that continues to fester in all this, of course, is the effect of the recent statutory amendment providing: "Any variance from the requirements of this section that does not violate a constitutional right of the defendant is not a basis for setting aside a plea of guilty."[167] Can the courts apply this "harmless error" standard to get around the mandate of *McCarthy v. United States*?[168]

A differently composed Indiana Supreme Court concluded, in *Austin v. State*,[169] that the General Assembly "may not fetter the judiciary with its concept of harmless error"[170] and declared Indiana Code section 35-33-1-2(c) a nullity. Although criticized heartily by the *White* court,[171] *Austin* was without doubt correct in this regard. The due process accorded to pleading defendants is, by and large, governed by the advisement of waiver of federal constitutional rights. This advisement procedure itself emanates from the Constitution. In most respects then, the "harmless error" provision is an empty vessel—it applies to virtually nothing raised in the statutes. The "harmless error" provision is also of no moment in light of the clear import of the language of the Supreme Court in *Chapman v. California*[172] when it addressed a state constitutional provision undercutting a federal constitutional right: "With faithfulness to the constitutional union of the states, we cannot leave to the States the

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[165]*Id.* at 469.

[166]IND. R. CIV. P. 59(A)(6).

[167]IND. CODE § 35-35-1-2(c) (Supp. 1987).

[168]A similar provision is currently in place in FED. R. CRIM. P., Rule 11(h): "Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." To date, the Supreme Court has not addressed a challenge to the validity of this provision although it has been used in matters of direct appeal by lower courts. *See, e.g.*, United States v. Fentress, 792 F.2d 461, 465 (4th Cir. 1986); United States v. De le Puente, 755 F.2d 313, 314-15 (3d Cir. 1985); *but see* United States v. Ramos, 810 F.2d 308, 312 (1st Cir. 1987) (this circuit may not follow Rule 11(h) when defendant moves to withdraw his plea).

[169]468 N.E.2d 1027 (1984).

[170]*Id.* at 1029.

[171]White v. State, 497 N.E.2d 893, 897-99 (Ind. 1986).

[172]386 U.S. 18 (1967).

formulation of the authoritative laws, rules, and remedies assigned to protect people from infractions by the States of federally guaranteed rights."[173] This is not to say the Indiana courts may not find a violation of a constitutional right is harmless error pursuant to the judicially formulated Rule 61 of the Indiana Rules of Civil Procedure.[174] That ability is specifically reserved in *Chapman*.[175] However, that case *does* negate subsection 2(c) and denies to the General Assembly the power to formulate a rule of its own. Thus, subsection 2(c) can have no legal effect on the review of a guilty plea in Indiana, either on collateral attack or direct appeal. But can the Indiana courts still find "harmless error" on direct appeal?

Because *McCarthy v. United States*[176] was not decided on constitutional grounds but on rules of statutory construction, the answer to that question has not yet been decided by the Supreme Court. However, the very nature of a direct appeal is going to make it extremely difficult to find harmless error because review is confined to the guilty plea record. Thus, almost *any* omission from the statutes is error for lack of evidence otherwise. The defendant has no burden to produce anything *but* the record. Realistically, a challenge to the ever thorny failure to advise of the minimum or maximum sentences will be naught if the defendant was sentenced within the parameters of the possible sentences, as in *White*. Such failure will probably still be deemed harmless error pursuant to Rule 61. Except for being within the general due process considerations regarding an advisement of the consequences of a plea, this advisement is not otherwise supported by an independent constitutional right. So, unless the Indiana Supreme Court changes its mode of review drastically in the near future, it is hardly likely it will follow *McCarthy*'s method of statutory construction to require strict adherence to the statute on this particular element, even on direct appeal. All the other elements, however, have been specifically denominated to be of federal dimension and not omissible in such instance.[177] Thus, the Indiana Supreme Court will have to re-examine some of its current practices applicable to collateral attack when faced with a direct appeal.

C. Retroactive Application

One of the major questions arising from *White* is whether its standard should be applied retroactively, that is, to all reviews of guilty pleas

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[173]*Id.* at 21.

[174]IND. R. CIV. P. 61.

[175]386 U.S. at 21-22.

[176]394 U.S. 459 (1969).

[177]*See supra* notes 118-121 and accompanying text.

without regard to when they were entered. The *White* court hinted at the answer to this question in its disposition of Randy White's petition: "If appellant has any other basis upon which to establish that his plea was not voluntary and intelligent, he may file a new petition."[178] Similar notations were made in subsequent cases decided by the Indiana Supreme Court.[179]

Patton v. State,[180] an Indiana Court of Appeals case, was the first to confront the problem of retroactivity. Patton's appellate brief reached the court after the *White* decision, and in it he argued that *White* should be limited to a prospective application only. The court of appeals disagreed, providing, however, only the rationale noted above: the *White* standard was applied to Randy White's petition.[181] This stands, the court concluded, as precedent for the proposition that *White* has been given retroactive effect. The court determined that *White* was to be applied retroactively, despite the fact that the *White* court did not elucidate the reasons for retroactivity. The *Patton* court went no further in its explication of the problem.[182]

Even though the precedent for retroactivity has been established, inquiry into the question remains fruitful, particularly given that the *Patton* decision does not address the precise contours of the argument which may be made.

The prior case of *German v. State*[183] was given prospective application only. The supreme court, in *Martin v. State*,[184] held that "there is no sound reason for retroactive application of *German*."[185] The decision to apply *German* prospectively should shed some light on the rationale behind the decision to apply *White* retroactively.

It should be noted that, as a general matter, constitutional prohibitions against *ex post facto* laws do not apply to judicial precedent. The focus of *ex post facto* prohibitions is upon the legislature and the

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[178]White v. State, 497 N.E.2d 893, 906 (Ind. 1986).

[179]*E.g.*, Simpson v. State, 499 N.E.2d 205, 206 (Ind. 1986); Reid v. State, 499 N.E.2d 207, 208 (Ind. 1986); Merriweather v. State, 209, 211 (Ind. 1986).

[180]507 N.E.2d 624 (Ind. Ct. App. 1987).

[181]*Id.* at 626.

[182]*Id.*; *see also* Buskirk v. State, 511 N.E.2d 305 (Ind. 1987). Although the *Buskirk* case occurred outside the survey period, it is noteworthy because Justice Pivarnik's opinion held *White* to be retroactive. Unfortunately, *Buskirk* cited *Patton* as precedent. *Id.* at 305. The *Patton* court stated, "Explication of the policy and its constitutional ramifications is best left to the highest court of our state." 507 N.E.2d at 626.

[183]428 N.E.2d 234 (Ind. 1981).

[184]480 N.E.2d 543 (Ind. 1985) (clarifying conflict between Johnson v. State, 471 N.E.2d 1107 (Ind. 1984) and William v. State, 468 N.E.2d 1036 (Ind. 1984)).

[185]*Martin*, 480 N.E.2d at 547.

desire to limit its authority.[186] The litigant seeking to compel, as with the *German* standard, or avoid, as with the *White* standard, retroactivity is thus left to a common law, or perhaps due process, approach to the issue. The latter analysis usually employs three factors, none of which apparently predominate. They are: (a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.[187]

The purpose of *German*'s requirement of strict compliance with the statute relating to guilty pleas was two-fold. It was designed to insure proper advice to the pleader and create ease of appellate review.[188] *German* did not affect the fact-finding process. *White*, on the other hand, does affect the fact-finding process intimately. The ultimate fact to be found in a post-conviction proceeding for review of a guilty plea is whether the plea was entered knowingly, voluntarily and intelligently.[189] *White* directly bears upon this issue. *White* asked, would the petitioner have pleaded guilty if the omitted advisement had been given?[190] A finding of a potential change in plea is highly probative on the issue of whether the plea was entered voluntarily and intelligently. Thus, the purpose to be served by the new standards is to reflect accurately the voluntariness of the plea. The purpose of the *White* standard, therefore, is to serve as a more accurate barometer of the correct result. That is, was the guilty plea accepted correctly? This purpose militates strongly in favor of a retroactive application. Standards which bear upon the fact-finding process should generally be applied uniformly and retroactively.[191]

However, under the foregoing, unfairness can and probably did result to petitioners in a position such as White. This is a component of the second portion of the analysis, the factor of the degree of reliance by petitioners. Usually, the test applied is whether there was reliance by law enforcement officials, especially in the area of search and seizure law. However, Judge Shields in *Bryant v. State*[192] aptly noted that when the rule (or standard) under consideration is more restrictive in nature, the analysis more germane is the degree of the reliance by defendants (or petitioners).

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[186]*See* Sumpter v. State, 264 Ind. 117, 340 N.E.2d 764, *cert. denied*, 425 U.S. 952 (1976).

[187]Bryant v. State, 446 N.E.2d 364, 367 (Ind. Ct. App. 1983) (*quoting* Stovall v. Denno, 388 U.S. 293 (1967)). *See generally* Rowley v. State, 483 N.E.2d 1078 (Ind. 1985).

[188]*Martin*, 480 N.E.2d at 547.

[189]*See supra* notes 89 and accompanying text.

[190]497 N.E.2d at 906.

[191]*See* Desist v. United States, 394 U.S. 244 (1969).

[192]446 N.E.2d 364, 367 (Ind. Ct. App. 1983).

Randy White's brief, and those in other cases which follow closely the *White* decision, demonstrate the degree of petitioners' reliance. White did resist transfer on the ground that the issue of reexamination of the standard of *German* and *Austin* was not appropriately before the Indiana Supreme Court. Yet White seemed to argue only that *German* and *Austin* mandated vacation of his plea.[193] Thus, the degree of reliance was substantial. Moreover, the new rule, while having its basis in prior case law, is a radical and abrupt departure from immediate prior precedent. *German* and *Austin* were overruled by name and in full.

White does seek to ameliorate the harshness that the abrupt change caused. Randy White was given, somewhat cryptically, a second chance to vindicate his position. The disposition does give White the opportunity to refile his petition, provided he has "any *other* basis upon which to establish that his plea was not voluntary and intelligent."[194] The extent to which this gives White the chance to relitigate the voluntariness of his plea, particularly concerning the issues which he raised in his first appeal, is problematic. As *Patton* noted, there are pitfalls in relitigation, not the least of which are waiver and estoppel.[195] Nevertheless, Randy White was given the chance to at least reopen his case despite the problems which reopening may create.

The third component of the retroactivity analysis is that of the burden on the administration of justice. The *White* court viewed the overturning of guilty pleas as an inordinate burden to the system. The court wrote:

> Routine reversal of convictions on technical grounds imposes substantial costs on society. Chief Justice Designate Rehnquist recently enumerated these costs, and we paraphrase his description of them. Jurors, witnesses, judges, lawyers, and prosecutors may be required to commit further time and other resources to repeat a trial which has already taken place. The victims are caused to relive frequently painful experience in open court. The erosion of memory and the dispersal of witnesses may well make a new trial difficult or even impossible. If the latter is the case, an admitted perpetrator will be rewarded with freedom from prosecution. Such results prejudice society's interest in the prompt administration of justice, reduce the deterrent value of any pun-

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[193] *White*, 497 N.E.2d at 895.

[194] *Id.* at 906 (emphasis added).

[195] In *Patton*, the petitioner argued that, beyond waiver and estoppel, he might be subject to an increased sentence under the revised rules. Patton's argument made in the context of requesting a remand for the purpose of meeting the *White* standard, was rejected. 507 N.E.2d 624, 627 (Ind. Ct. App. 1987).

ishment, and hamper the rehabilitation of wrongdoers.[196]

Fortunately, the court which created *German* and *Austin* concurred in this assessment. In limiting *German* to prospective application only, the court wrote in *Martin v. State*:

> Retroactive application could only result in the vacating of many judgments resting upon guilty pleas actually given knowingly and voluntarily or if not so given, nevertheless, given under circumstances rendering deficiency in the advisements harmless error. The burden upon the administration of justice in such cases is overwhelming.[197]

Thus, even though the *Martin* and *White* courts disagreed as to the result to be reached regarding prospective and retrospective application of the respective standards, both agreed in their assessment of the burden to the administration of justice with regard to the standard.

The traditional analysis of retroactive application of precedent therefore suggests that *White* be given full retroactive effect. *White* bears upon the ultimate issue of the correctness of a guilty plea, seeks to limit by its own terms the harshness of overturning *German* and *Austin*, and will work a reduction, in the long run, of vacation of guilty pleas and the resultant full criminal litigation. Retroactive application is probably the correct result, particularly because the *White* court overruled *Austin* and thus foreclosed any contentions of whether the court's decision impairs vested, substantive rights to persons having pleaded guilty under the previous standards.

V. Effect of *White* on Indiana Post-Conviction Procedure

As stated earlier, the Indiana Rules of Procedure for Post-Conviction Remedies are designed to effectuate the following goals: a simple and expeditious procedure; a single procedure obviating the need for state *habeas corpus* or *corum nobis* proceedings; disposition on the merits of the claims whenever possible; and elimination of subsequent post-conviction petitions by the same petitioner concerning the same conviction.[198]

One must wonder to what extent the changed standard of review announced by *White v. State* will serve these goals. Two caveats are in order. First, *White* is merely a change in the way in which guilty pleas are taken in terms of the requisite advisements. Second, and relatedly, *White* is not procedural. It does nothing to change the manner of

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[196] *White*, 497 N.E.2d at 905.

[197] *Martin v. State*, 480 N.E.2d 543, 547 (Ind. 1985).

[198] *See supra* text accompanying notes 15-16.

processing post-conviction cases. Nevertheless, *White* may, as a practical matter, have an impact on the degree to which the post-conviction relief rules serve the stated and implicit goals.

First, *White*'s immediate impact is to impose a new threshold technical requirement with regard to pleading. To be successful, a petitioner must allege facts which could, if proven, lead to the conclusion that, but for the omitted advisement, the petitioner would not have pleaded guilty.[199] Though the pleading requirement may be relatively simple, it is still a threshold requirement. Inartful or unaware pleaders, particularly those appearing *pro se*, could lose the opportunity to litigate fully their claim should they fail to allege both the necessary result and cause. That is, the defendant *must* allege that a plea of guilty would not have been entered if the trial court had given its constitutionally required advisement. Setting to one side the issue of the propriety of requiring such proof, there is little doubt that disposal of claims on pleading grounds has become a much greater possibility. This approach appears to be in conflict with the stated desire to dispose of claims on their merits.

Second, *White* actually increases, rather than decreases, the probability of subsequent petitions concerning the same guilty plea. As noted, the standard for guilty pleas has changed five times in less than ten years.[200] While the reality may differ from the perception, the perception must be that a second petition for post-conviction relief gives at least some opportunity for further review under a new and different standard. The *White* case itself demonstrates this. Randy White was given, in the court's disposition, a new opportunity to allege and prove facts which would meet the standard.[201] Thus, White's case results in two trial court decisions and inevitable appellate court reviews. This result was extended to all cases in which trial court disposition had not yet occurred when White was handed down.[202] It may fairly extend to all potential litigants seeking a "second bite at the apple" under a new standard, regardless of whether that standard actually increases the chances of success (which

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[199] *White*, 497 N.E.2d at 905 ("[The petitioner] needs to *plead* specific facts from which a finder of fact could conclude. . . ." (emphasis added)).

[200] *See supra* notes 1-5 and accompanying text.

[201] *White*, 497 N.E.2d at 906.

[202] *E.g.*, Simpson v. State, 499 N.E.2d 205, 206 (Ind. 1986); Reid v. State, 499 N.E.2d 207, 208 (Ind. 1986); Merriweather v. State, 499 N.E.2d 209, 211 (Ind. 1986). In all three cases, the court wrote:

> We note that appellant's petition for post-conviction relief and proceedings thereon were predicated on case law existing before our recent decision in *White* which reviewed and revised the applicable burden of pleading and proof. Therefore, if appellant has any other basis upon which to establish that his plea was not voluntary and intelligent, he may file a new petition.

it does not). As more of the issues raised by *White* become settled, litigation may decrease. Yet, at present, there can be little doubt that more, not less, litigation is the immediate result of *White*. Certainly there is no empirical evidence to suggest that post-*White* pleaders will be deterred from pursuing any available post-conviction relief.

Finally, the *White* standard begs for full factual litigation. Assuming that a petitioner has shown an omitted advisement, the trial court's work is not done as it was under *German/Austin*.[203] The court must still inquire as to whether the petitioner's plea would have reasonably changed. Further, assuming that the petitioner would testify in the affirmative in this regard, it is then incumbent upon the State to demonstrate the reasonableness of the position that the petitioner would not have changed the plea. This evidence, in the nature of rebuttal evidence, must be objective in nature and will probably center on the facts and circumstances of the plea agreement, the petitioner's prior involvement, if any, with the criminal justice system,[204] and the strength of the proof of the crime itself. None seems necessarily amenable to summary factual determination, and could lead to virtually a full trial on the crime charged. Though one must keep in mind the desire to provide for disposition on the merits, that goal of post-conviction relief statutes is not necessarily served by increasing the factual determinations needed for ultimate resolution. Increasing the litigable fact questions may also be a disservice to the goal of an expeditious procedure.

In summary, *White* does have an impact upon the post-conviction procedure as a whole, despite the fact that it is only changing the standard of appellate review. It imposes an additional pleading and proof requirement upon petitioners, causes an increase (at least for the present) in the number of post-conviction relief decisions which must be made and also opens up the possibility of much more involved factual determinations.[205]

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[203]*See supra* notes 72-84 and accompanying text.

[204]*See* Burns v. State, 500 N.E.2d 201 (Ind. 1986) (correct advisement in previous guilty plea hearing cured error of omitted advisement in case under review).

[205]One other effect of *White* upon the post-conviction process should be noted. In three cases in the survey period, appellate courts held that denial of post-conviction relief in a summary fashion was inappropriate when a public defender has been appointed to represent a petitioner but has not yet amended the *pro se* petition. Holliness v. State, 496 N.E.2d 1281 (Ind. 1986); Stoner v. State, 506 N.E.2d 837 (Ind. Ct. App. 1987); Colvin v. State, 501 N.E.2d 1149 (Ind. Ct. App. 1986). As noted in *Stoner*, "The rationale is a *pro se* petitioner seeking post-conviction relief is given leave to amend his petition as a matter of right by Indiana Rule of Post-Conviction Relief 1, § 4(c)." 506 N.E.2d at 838.

Under *White*, the court may look to the entire record to ascertain whether the plea was correctly accepted. 497 N.E.2d 893, 905. In determining if a petitioner would not

VI. Conclusion

White is susceptible to attack on numerous grounds, not the least of which is that it represents yet another change in guilty plea review. Beyond the difficulties of this fifth change in ten years which *White* creates, the case rests on faulty precedent and an ineffective refutation of *Austin* and *German*.

Nevertheless, *White* is the latest pronouncement in the area, and petitioners seeking to obtain relief under the *White* standard are left too little in the way of novel argument, and less in the way of meeting the standard itself. Post-conviction petitioners will likely be able to make gains only in the *Boykin* rights area, such as with *Henderson*, or in the area of pursuing a direct appeal. If this is truly the case, then one must hope that with these limited avenues for relief, the Indiana Supreme Court will, at minimum, leave *White* in place longer than its predecessors so that petitioners may pursue federally based rights without concern for vacillating state standards.

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have pleaded guilty, the court may look objectively at the record. *See* Granger v. State, 499 N.E.2d 743, 745 (Ind. 1986). These two items, when coupled with the post-conviction court's authority for summary disposition of the petitioner under Rule 1, § 4(f) of Indiana Rules of Procedure for Post-Conviction (*Remedies*), may cause an increase in the number of summary dispositions *without* action by the public defender's office because under *White*, the record alone may be a sufficient basis upon which to deny relief. The holdings of the three cases above may be, therefore, subject to new scrutiny and clarification in light of *White*.