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ARTICLE

THE GUILTY PLEA PROCESS IN INDIANA: A PROPOSAL TO STRENGTHEN THE DIMINISHING FACTUAL BASIS REQUIREMENT

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INTRODUCTION

Considering the numerous high profile jury trials as well as the fictional yet compelling jury trial scenes from movies and television, it is understandable that Indiana citizens may have an inaccurate perception of the frequency of jury trials in criminal cases. In addition to the media and popular entertainment, however, the public's failure to appreciate that the overwhelming majority of cases in Indiana criminal courts are resolved by way of an uncontested guilty plea is attributable in some measure to the legal system itself. Hailing the jury trial as the scrupulous protector of the rights of the individual and as the cherished means to truth and justice, the legal system often links its legitimacy and credibility to the full fledged adversarial process. The purported sanctity of the jury trial process is further underscored by scholars who rail against the prevalence of plea bargaining and the diminishing numbers of jury trials in the American criminal justice system.[1]

Although the public's misconception about the manner in which Indiana criminal courts go about the business of resolving cases is unfortunate, it is submitted that the legal system's acquiescence in the illusion of the jury trial as the dominant dispositional method in criminal cases is more significant and troubling. It can be argued that in view of the scarcity of jury trials and the frequency of guilty pleas, the legal system has focused disproportionate attention on the former and failed to consistently and legitimately address the latter to the detriment of both the interests of the individual defendants and the proper

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1. *See, e.g.*, Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119 (1992); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984).

administration of justice.

The purpose here is neither to rue the demise of the adversarial process by advocating a prohibition against guilty pleas generally or plea bargaining specifically[2] nor to propose that the American adversarial process should be critically re-evaluated in relation to the inquisitorial approach of the countries of continental Europe.[3] Attention will be directed in this Article to the guilty plea process as it actually functions with particular focus on the guilty plea factual basis requirement. It will be argued that the factual basis requirement is inconsistently implemented in the trial and appellate courts to the point of constituting a threat both to the due process rights of individual defendants and the interests of the fair and efficient administration of justice.

This Article sets forth a proposal to fortify the factual basis requirement by mandating a clear and consistent procedure for Indiana judges in establishing a factual basis for a plea of guilty. As part of the proposal to strengthen the factual basis requirement, an Indiana trial court judge, in limited circumstances, should be authorized to permit a defendant to enter a best interests plea pursuant to the United States Supreme Court case of *North Carolina v. Alford*.[4] The Article will conclude with a delineation of the matters that may be legitimately left to the discretion of the trial court and the matters that should be standardized and required of the trial court judge in establishing a factual basis for a guilty plea or a best interests plea.

I. IMPORTANCE OF THE JURY TRIAL—PREVALENCE OF THE GUILTY PLEA

It has been noted that "[t]he right to jury trial in criminal cases was among the few guarantees of individual rights enumerated in the Constitution of 1789, and it was the only guarantee to appear in both the original document and the Bill of Rights."[5] In addition to the jury trial guarantee in the United States Constitution, the Indiana Constitution of 1851 provides: "In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury . . . ."[6] Indiana has underscored the importance of the right to a jury trial in another constitutional provision: "In all criminal cases whatever, the jury shall

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2. For an excellent review of the "plea bargaining" debate, see Colloquy, *Special Issue on Plea Bargaining*, 13 LAW & SOC'Y REV. 189 (1979). *See also* Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753 (1998).

3. *See* Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539 (1990); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979).

4. 400 U.S. 25 (1970).

5. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994) (citations omitted).

6. IND. CONST. art. 1, § 13(a).

have the right to determine the law and the facts."[7]

The apparent significance of jury trials is further illustrated by a cursory review of the multiple provisions relating to trials contained in the Indiana Code and the various Indiana Supreme Court Rules[8] as well as the reported decisions from the supreme court and court of appeals. Although the disproportionate attention to trial issues in reported decisions by the Indiana appellate courts may be explained in part by the fact that a guilty plea in Indiana constitutes a waiver of the defendant's general right to appeal, the abundant attention to trial procedure in criminal cases is hardly debatable.

The systemic commitment to the jury trial process can be observed in the actions of numerous trial court judges who meticulously manage their jury trial calendar by lamenting the burden of a busy trial docket yet disregarding the fact that so few cases actually proceed to jury trial. Trial court judges make certain the defendant's right to a jury trial is honored by concerning themselves with issues as mundane as jury room facilities and as tedious as jury instructions. The purpose here, however, is not to quarrel with the honored place of the jury trial in the American legal system. From its roots in England, there is little serious doubt about the American criminal jury trial as a fundamental precept of our legal heritage. The right to a jury trial in America pre-dates the Constitution, the Declaration of Independence, and even the first English settlement on this continent.[9] Further, the over-arching public benefit of the jury trial process in affording direct citizen participation as a check against government excess should not be minimized.

The significance and importance of the constitutional guarantee of criminal jury trials must be viewed in the context of the ultimate goal of protecting the rights of the individual and the interests of society as a whole. Whether it be a full-fledged adversarial trial or a quasi-adversarial proceeding in which some or all of the potential issues are uncontested, the legal process must be the means to achieve the ultimate ends of justice. Thus, substance must trump form in order to protect the constitutional rights of the individual, no matter what stage of the process.

Although observers and commentators may posit that justice is best assured through the widespread use of contested proceedings such as jury trials, the reality of the present system demands a more practical approach. Trial court judges faced with limited resources and an ever-increasing caseload would, no doubt, welcome additional funding and staffing, yet these judges know that society cannot provide the resources necessary to ensure trial-type proceedings in all criminal cases. Furthermore, the United States Supreme Court has noted that:

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7. IND. CONST. art. 1, § 19.

8. *See, e.g.*, INDIANA RULES OF EVIDENCE; INDIANA RULES OF CRIMINAL PROCEDURE; INDIANA RULES OF TRIAL PROCEDURE (applicable to all civil actions and to criminal cases unless the supreme court has enacted a conflicting criminal rule) (*see* IND. R. CRIM. P. 21).

9. *See* Alschuler & Deiss, *supra* note 5, at 870.

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.[10]

Considering both the United States Supreme Court imprimatur on the plea bargaining process and the prevalence of guilty pleas with or without plea bargaining, it is disingenuous to argue that the efficacy and legitimacy of the criminal justice system is or should be inextricably intertwined with the complete jury trial. Instead, the criminal justice system should attempt to improve the guilty plea process.

The infrequency of criminal jury trials in Indiana trial courts is proven by the 1998 Indiana Judicial Report compiled and published by the Indiana Supreme Court Division of State Court Administration. The report notes that Indiana criminal courts disposed of 246,142 felonies and misdemeanors in 1998 with 1810 of those dispositions (less than one percent) occurring by way of jury trial, 14,060 (5.7%) by bench trial, 139,516 (fifty-seven percent) by guilty plea, and 80,984 (thirty-three percent) by dismissals.[11] Considering felonies and misdemeanors separately, there were 51,266 felonies disposed of with 1510 (2.9%) dispositions by way of jury trial, 1930 (3.8%) by way of bench trial, 35,867 (seventy percent) by way of guilty plea, and 10,058 (twenty percent) dismissed.[12] There were 194,876 misdemeanors disposed of in 1998 with 300 dispositions (less than one percent) by way of jury trial, 12,130 (6.2%) by bench trials, 103,649 (fifty-three percent) guilty pleas and 70,926 (thirty-six percent) through dismissals.[13]

Statistics from other jurisdictions demonstrate the lack of jury trials throughout the American criminal justice system. For example, in the U.S. district courts there were 59,885 defendants convicted and sentenced in 1998 and 56,256 (approximately ninety-four percent) of the dispositions were by way of a plea of guilty or nolo contendere.[14] Further, for felony convictions in state courts, guilty pleas accounted for approximately ninety-one percent of the dispositions while jury trials accounted for four percent and bench trials

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10. Santobello v. New York, 404 U.S. 257, 260 (1971).

11. *See* INDIANA SUPREME COURT DIVISION OF STATE COURT ADMINISTRATION, 1998 INDIANA JUDICIAL REPORT Vol. 1, at 55, 57-61 (1999) [hereinafter 1998 INDIANA JUDICIAL REPORT].

12. *See id.* at 58-61.

13. *See id.*

14. *See* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1998, at 407 (Kathleen Maguire & Ann L. Pastore eds., 1999) [hereinafter SOURCEBOOK].

accounted for five percent.[15]

It should be noted that the Indiana Judicial Report cautions that the report is not designed to be "a complete detailing of every judicial decision."[16] The statistics are derived from the Quarterly Case Status Reports (QCR) completed and submitted by every Indiana trial court, and the dispositional categories listed on the QCR are subject to some question and interpretation.[17] However, as demonstrated by the new dispositional category entitled "Bench Disposition" to be reported in calendar year 2000, most interpretation issues center on dispositions other than jury trials where a jury is seated and evidence is received.[18]

Due to the various Indiana statutes that authorize the court or the prosecuting attorney to dismiss, divert or conditionally defer various types of cases prior to the entry of conviction, a number of "dismissed cases" actually are more akin to guilty plea dispositions. The case is not dismissed until the defendant successfully completes a period of rehabilitation with some degree of supervision. In fact, when a guilty plea at a court appearance precedes the diversion or deferral and ultimate dismissal, the specific dispositional method may be reported differently by individual judges or court administrators. It is also possible that the numerous statutory diversions and deferrals may account for a relatively high dismissal rate of approximately twenty percent for felonies in Indiana courts (the dismissal rate for misdemeanors is even higher at thirty-six percent) as compared to a felony dismissal rate of approximately ten percent for the U.S. district courts.[19] Yet even if the statistics on criminal case dispositions in Indiana are discounted for potential reporting and interpretation errors, it remains beyond dispute that a relatively small number of criminal cases are disposed of through contested jury or bench trials. Conversely, the clear majority of criminal cases are concluded by means of a guilty plea offered by the defendant.

II. AN OVERVIEW OF INDIANA CASES AUTHORIZING A GUILTY PLEA

Considering the frequency of guilty pleas, one might intuitively expect the process to be of such long-standing tradition that little of the procedure would be subject to debate or discretion. Guilty pleas have been recognized for many years as a legitimate part of the American (and Indiana) criminal justice system, yet the process has been neither stagnant nor standardized to the exclusion of discretion or debate. As to the origin of the guilty plea in Anglo-American common law, Professor Alschuler indicates that:

> From the earliest days of the common law, it has been possible for

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15. *See id.* at 432.

16. 1998 INDIANA JUDICIAL REPORT, *supra* note 11, at 1.

17. *See id.*

18. *See id.* at 40.

19. *See* SOURCEBOOK, *supra* note 14, at 407; *see also* 1998 INDIANA JUDICIAL REPORT, *supra* note 11, at 55, 60.

> an accused criminal to convict himself by acknowledging his crime. "Confession" was in fact a possible means of conviction even prior to the Norman conquest. Nevertheless, confessions of guilt apparently were extremely uncommon during the medieval period.[20]

Professor Alschuler also notes that the earliest reported American decision in a guilty plea case was *Commonwealth v. Battis*,[21] an 1804 Massachusetts case, although the 1892 case of *Hallinger v. Davis*[22] was the first United States Supreme Court opinion to uphold a guilty plea conviction entered in a United States district court.[23]

In Indiana, the guilty plea process was sanctioned by the Indiana Supreme Court in various reported cases at least twenty years prior to 1892. For example, in an 1871 case in which the defendant challenged the trial court's denial of the request to withdraw a guilty plea, the supreme court upheld the trial court's denial of the request by noting:

> Upon a plea of guilty, . . . the court has nothing to do but to fix the amount of punishment and render judgment or sentence accordingly. There is nothing for the court to find. The prisoner, by his confession, has made a finding unnecessary. The court may take the prisoner at his word, and proceed accordingly.[24]

In a cautionary note, the supreme court added:

> Mr. Blackstone, in his Commentaries, says: "The other incident to arraignments, exclusive of the plea, is the prisoner's actual confession of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment."[25]

In a case from the November 1882 term, the Indiana Supreme Court overturned a guilty plea to murder entered by a defendant upon advice of counsel because of the danger from a "lynch mob."[26] In overturning the "plea of confession" and ordering the reinstatement of a not guilty plea, the supreme court

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20. Albert W. Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOC'Y REV. 211, 214 (1979) (internal citations omitted).

21. 1 Mass. 95 (1804).

22. 46 U.S. 314 (1892).

23. *See* Alschuler, *supra* note 20, at 214-15.

24. Griffith v. State, 36 Ind. 406, 408 (1871).

25. *Id*. at 408-09 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *329).

26. *See* Sanders v. State, 85 Ind. 318 (1882). Defendant, who reportedly was addicted to alcohol and opium to the extent that he may have become insane, was charged with murder when he could not explain the death of his wife who was killed by a pistol shot while in a room alone with the defendant. *See id.*

found that a guilty plea extorted by duress, as in this case, must be held for naught.[27] In another late nineteenth century case, the Indiana Supreme Court recognized the validity of a guilty plea by noting that a valid guilty plea constituted jeopardy barring the refiling of the criminal charge upon dismissal by the prosecutor after the guilty plea was entered and accepted by the court but prior to sentencing.[28]

In what appears to be one of the first Indiana Supreme Court cases to directly address a guilty plea offered in the context of a "plea bargain," the Indiana Supreme Court found that the trial court judge had abused his discretion in refusing to set aside the guilty plea and reinstate a not guilty plea for a defendant who had pleaded guilty on the day of his arraignment.[29] The defendant, who had been in custody for approximately thirty days prior to the return of the indictment for grand larceny (horse theft), pleaded guilty without consulting an attorney after having discussed the matter with the sheriff who had advised the defendant that the prosecutor agreed that upon a guilty plea, the punishment should not exceed two years.[30] Immediately following the guilty plea the judge sentenced the defendant to a ten-year prison term and the next morning denied the request to set aside the judgment and grant leave to withdraw the guilty plea.[31] The supreme court, in finding that the defendant should have been allowed to withdraw his guilty plea because the defendant was misled by the conversations with the sheriff, found support from other jurisdictions: "Courts have always been accustomed to exercise a great degree of care in receiving pleas of guilty, in felonies, to see that the prisoner has not made his plea by being misled, or under misapprehension, or the like."[32]

In a 1915 case reversing the judgment of the trial court, which had refused to allow the defendant to withdraw his guilty plea (the defendant was a Russian-speaking Austrian who pleaded guilty through an interpreter without an attorney), the Indiana Supreme Court noted: "That a plea of guilty should be entirely voluntary, and made by one competent to know the consequences thereof, and that the trial court should satisfy itself of these facts before receiving it, appears to be well settled."[33] The defendant was neither represented by counsel nor given a full explanation of the consequences of the plea of guilty; thus, the plea would not stand.[34]

An increasing number of guilty plea cases were considered by the Indiana Supreme Court after the turn of the century and most of those cases revolved around the issues of voluntariness and whether the defendant understood the

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27. *See id*. at 320.

28. *See* Boswell v. State, 11 N.E. 788, 789 (Ind. 1887).

29. *See* Myers v. State, 18 N.E. 42 (Ind. 1888).

30. *See id*. at 42-43.

31. *See id*. at 42.

32. *Id.* at 44.

33. Mislik v. State, 110 N.E. 551, 552 (Ind. 1915) (citations omitted).

34. *See id*. at 553 (the interpreter was a police officer who had assisted in the arrest of the defendant).

consequences of his actions, with particular attention to the availability of counsel.[35] In a case decided in 1920, the supreme court made it clear that a defendant could waive the rights guaranteed by the Bill of Rights of the Indiana Constitution[36] even when facing a capital offense of murder in the first degree, so long as the defendant makes the plea with full knowledge of his rights and the consequences of the plea.[37] The guilty plea in this case was set aside, however, because the defendant had not been advised of all the consequences of his guilty plea and he was not given an opportunity to consult with an attorney prior to the plea.[38]

The supreme court issued an extremely significant case in 1953, commenting on the guilty plea process, stating:

> Under our practice an accused may enter a plea of guilty in any case, and thereby waive his constitutional right to trial by jury. But to be valid and binding upon the accused, such a plea must be made by the accused intelligently, advisedly and understandingly, with full knowledge of his rights, and with the considered approval of the judge before whom he stands charged.[39]

However, the court noted that a guilty plea

> should not be accepted from one who does not know, or who, at the time of arraignment, asserts that he does not know, whether or not he has committed the crime charged, for such would be entirely incompatible with the idea of an admission of guilt, and wholly inconsistent with the due administration of justice.[40]

In language foreshadowing the factual basis requirement, which would become part of the required guilty plea process approximately twenty years later, the supreme court opined:

> [A] plea of guilty tendered by one who in the same breath protests his innocence, or declares he actually does not know whether or not he is guilty, is no plea at all. Certainly it is not a sufficient plea upon which to

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35. *See, e.g.*, Ketring v. State, 200 N.E. 212 (Ind. 1936); Rhodes v. State, 156 N.E. 389 (Ind. 1927).

36. *See* IND. CONST. art. I, § 13(a):

> In all criminal prosecutions, the accused shall have the 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.

Id.

37. *See* Batchelor v. State, 125 N.E. 773, 776 (Ind. 1920).

38. *See id.*

39. Harshman v. State, 115 N.E.2d 501, 502 (Ind. 1953).

40. *Id.*

> base a judgment of conviction. No plea of guilty should be accepted when it appears to be doubtful whether it is being intelligently and understandingly made, or when it appears that, for any reason, the plea is wholly inconsistent with the realities of the situation.[41]

In 1972, the Indiana Supreme Court handed down *Brimhall v. State*,[42] another extremely significant guilty plea case in which the court quoted with approval from the U.S. Supreme Court case of *Brady v. United States*:[43]

> That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the fifth amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.[44]

The Supreme Court also noted with approval the draft of the American Bar Association Project on Minimum Standards for Criminal Justice, Pleas of Guilty, that specifically set forth the matters about which a defendant should be advised by the court upon a plea of guilty and addressed the factual basis as follows: "Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as may satisfy it that there is a factual basis for the plea."[45] The Indiana Supreme Court also discussed the U.S. Supreme Court case of *McCarthy v. United States*[46] which reversed a conviction because the trial court failed to comply with Rule 11 of the Federal Rules of Criminal Procedure to make certain the plea was voluntary and the defendant understood the nature of the charge and the consequences of pleading guilty.[47]

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41. *Id.*

42. 279 N.E.2d 557 (Ind. 1972).

43. 397 U.S. 742 (1970).

44. *Brimhall*, 279 N.E.2d at 563 (quoting *Brady*, 397 U.S. at 742).

45. *Id*. at 563 n.1 (quoting Minimum Standard 1.6).

46. 394 U.S. 459 (1969).

47. *See Brimhall*, 279 N.E.2d at 564. A factual basis became mandatory for a plea of guilty or nolo contendere in federal courts in 1966 through an amendment to Rule 11 of the Federal Rules of Criminal Procedure. *See also* John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88, 111 (1977).

In 1973, the year following the *Brimhall* decision, the Indiana General Assembly enacted a provision requiring not only a determination by the judge that a guilty plea was entered voluntarily and with an understanding of the consequences of the action but also a determination that there was a sufficient factual basis for the plea of guilty.[48] Although there have been some changes since the 1973 enactment, the present statutory guilty plea process[49] remains essentially the same in that a plea of guilty must be voluntary, the defendant must understand and appreciate the consequences of his guilty plea[50] and there must be a factual basis for the plea of guilty.[51] It is the factual basis requirement which will be the focus of the remainder of this Article.

Since the enactment of the detailed statutory procedure regarding guilty pleas in 1973, the Indiana Supreme Court and the Indiana Court of Appeals have rendered several decisions regarding the guilty plea factual basis requirement. Although some of the decisions are confusing, if not inconsistent, a few general propositions have developed and can be stated with some degree of certainty.

Although the Indiana Code provides that the court may be satisfied that there is a sufficient factual basis for the guilty plea from either the court's examination of the defendant or the evidence presented,[52] it has been left to the appellate courts to determine the legitimacy of the variations on the two general approaches. For example, the judge may question the defendant regarding the offense or ask the defendant for a narrative regarding the charge, read the information and ask the defendant to admit to the charge or ask the defendant if he understands that a guilty plea is an admission to the truthfulness of the charges.[53] The judge may also allow the prosecutor as well as the defense lawyer to participate in the factual basis inquiry.[54] The supreme court has held:

> Evidence used to illustrate factual basis may come from a variety of sources and is not limited to sworn testimony. The court may base its decision on its inquiry alone, so long as the questions presented are sufficiently detailed to show guilt. Questions requiring only a yes or no answer may be found insufficient. The court may also find factual basis from the State's detailed recitation of evidence on the elements of the crime and the defendant's admission thereto. Moreover, it may be shown through the testimony of witnesses who have personal knowledge of the defendant's conduct or admissions, . . . or the defendant's own

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48. *See* WILLIAM ANDREW KERR, INDIANA CRIMINAL PROCEDURE—TRIAL, PART I, 16A WEST INDIANA PRACTICE 209-10 (1998).

49. *See* IND. CODE §§ 35-35-1-2 to -4 (1998).

50. The record must demonstrate that the judge properly advised the defendant of various rights and options. *See id.* § 35-35-1-2.

51. *See id.* § 35-35-1-3.

52. *See* KERR, *supra* note 48, at 222.

53. *See id.*

54. *See id.*

sworn testimony.[55]

Other than affirming that Indiana law generally requires a factual basis for a valid guilty plea and sanctioning numerous methods by which the factual basis may be established, the Indiana Supreme Court and the Indiana Court of Appeals have not regularly and consistently addressed other substantive and procedural issues relating to the guilty plea factual basis requirement. The appellate courts have left the factual basis process to the wide ranging discretion of the trial court judge with appellate review on an ad hoc basis most often in the context of a Petition for Post Conviction Relief.

III. A SAMPLING OF CURRENT GUILTY PLEA FACTUAL BASIS PROCEDURES

Recognizing the wide variety of authorized factual basis procedures coupled with the reality that many trial court procedures are never specifically addressed by an appellate court, several trial court judges were contacted by questionnaire regarding the method employed in establishing a factual basis.[56] The questionnaire was not designed as a scientific survey to yield data for statistical analysis but was an effort to obtain an informal sampling of present procedures and perceived problems. After the questionnaire was initially developed and submitted to the thesis committee members for comment and suggestions, two sitting judges were asked to review the questionnaire for comments and questions prior to distribution.

After some minor modifications based upon suggestions received, the questionnaire was distributed to approximately fifty judges (roughly fifteen percent of trial judges with criminal jurisdiction). In addition to every judge in Administrative District 13 (consisting of eleven counties in the southwest corner of the state), questionnaires were forwarded to judges in various parts of Indiana. Although distribution was not based on specific demographic factors because the purpose of the survey was merely to obtain an informal sampling, a point was made to distribute questionnaires to judges from most geographic regions of the state including judges serving in urban areas (more likely to be high volume courts) as well as rural jurisdictions.

Part I of the questionnaire was designed to obtain information about the methods by which the factual basis is established. Part II was designed to elicit comments regarding factual basis issues or problems which may arise during the guilty plea process. It was candidly recognized that in addition to the restricted distribution of a relatively short survey, the amount of information might be further limited by a lack of enthusiasm (based on anecdotal evidence) that trial judges have for surveys. More significantly, it was recognized that limited responses and information might also result from a lack of interest in the subject underscored by the general failure of trial court judges to appreciate the significance of the issue.

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55. Butler v. State, 658 N.E.2d 72, 77 n.14 (Ind. 1995) (internal citations omitted).

56. A copy of the questionnaire and the accompanying cover letter in addition to the responses are on file with the author.

IV. RESULTS FROM PART I OF THE QUESTIONNAIRE

A total of thirty-six questionnaires were returned and the responses indicate that there are, indeed, a variety of factual basis procedures employed by Indiana trial court judges. Seven judges indicated that the factual basis process is conducted primarily by the judge, fourteen respondents indicated that the factual basis procedure is conducted primarily by the prosecutor, seven judges reported that the factual basis is primarily established by the defense attorney, and eight respondents advised that the factual basis resulted primarily from the combined efforts of the judge and the prosecutor.

Of the seven judges who responded that the factual basis process is conducted primarily by the judge, four indicated that the charging information is read to the defendant, who is asked to specifically admit the allegations with no other statement elicited from the defendant. One of the seven indicated that by pleading guilty the defendant is advised that he is admitting to the allegations of the offense, but the defendant is not required to specifically admit the allegations. Another judge indicated that the defendant is advised that the guilty plea is an admission to the allegations and the defendant is also required to specifically admit the allegations. Finally, one of the seven indicated that after the judge advises the defendant that by pleading guilty the defendant is admitting to the allegations, the defense attorney then asks questions of the defendant regarding the allegations.

Although a majority of the judges responding to the questionnaire indicated the factual basis process is conducted primarily by the prosecutor, there was considerable variation in the specific approaches. Five of the respondents indicated that in establishing the factual basis, the prosecutor reads the information to the defendant who is asked to admit to the allegations. However, only two of these respondents indicated that the process consists solely of reading the information to the defendant. One of the five indicated that in addition to reading the information, the prosecutor also outlines the evidence which would be presented at trial. The fourth respondent in this group reported that the prosecutor reads the information and also asks specific questions of the defendant regarding the allegations. The fifth judge in this group indicated that the prosecutor reads the information, outlines the evidence which would be presented at trial and asks specific questions regarding the allegations.

Five of the judges who responded that the factual basis process is conducted primarily by the prosecutor indicated that the prosecutor does not read the information to the defendant. Instead, the prosecutor outlines the evidence which would be presented at trial and then asks the defendant, under oath, to admit to the truth of the allegations. Two other judges, responding that the prosecutor outlines the evidence which would be presented at trial instead of reading the charging information, indicated that the prosecutor also asks specific questions of the defendant. Finally, two judges indicated that the prosecutor establishes the factual basis only by asking specific questions of the defendant.

Of the seven judges who reported that the factual basis is primarily established by the defense attorney asking questions of the defendant, two made

no mention of additional questioning by the prosecutor or the judge. The other five noted supplemental participation by the prosecutor and the judge. Eight judges indicated that the factual basis is primarily established by the combined efforts of the judge and prosecutor although none of the eight proceed in identical fashion. Seven of the respondents indicated that the judge reads the charging information, and one indicated that the information was read by the prosecutor. Of the seven judges who read the information to the defendant, two direct the prosecutor to ask questions of the defendant regarding the allegations. The other five judges direct the prosecutor to outline the evidence which would be presented at trial with the defendant then asked to confirm the accuracy of the allegations. Two of the judges also allow specific questioning of the defendant by the prosecutor and the defense attorney.

Indiana trial court judges use a variety of methods in addressing the statutorily required guilty plea factual basis. However, variation alone does not necessarily pose due process issues or systemic injustices in view of the wide discretion appellate courts grant to trial court judges. Part II of the questionnaire, however, is designed to address some of the potential problems in relation to the factual basis requirement.

V. PART II OF THE QUESTIONNAIRE

Question One of Part II[57] prompted a variety of responses from "no" (three respondents) to "often" to "ten to twenty percent, higher in misdemeanors." However, the clear majority of respondents indicated that confronting a defendant who refuses to establish a factual basis occurs on a relatively infrequent basis.

The responses to Question Two of Part II[58] indicated that trial court judges generally are willing to change the method of establishing the factual basis in order to accept a guilty plea, although it does not happen often. In fact, the frequency listed in answering Question Two mirrored the frequency listed in responding to Question One in almost fifty percent of the questionnaires. For example, the respondent who indicated that it was rare to be confronted with a defendant who wishes to plead guilty but is unwilling to establish a factual basis also responded that it was rare for the judge to change the method of establishing a factual basis. Although it cannot be known for certain, the similar frequency in responses to questions one and two may suggest that the judge changed the factual basis process whenever the judge was confronted with a defendant unwilling or unable to establish a factual basis.

Judges who noted they had never been confronted with a defendant unwilling to establish a factual basis indicated that they had, at least on occasion, changed the method of establishing a factual basis in order to accept a guilty plea.

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57. "Have you ever been confronted with a defendant who wishes to plead guilty but refuses to establish a factual basis?"

58. "Have you ever changed the method of establishing a factual basis in order to accept a guilty plea?"

Moreover, there were judges who indicated they had changed the method of establishing a factual basis more frequently than they had been confronted with a defendant unwilling to establish a factual basis. Apparently, these judges have learned of a potential problem with establishing a factual basis prior to or during a guilty plea hearing because there seems to be no other reason for a judge to modify procedure to accept a plea if the defendant was willing to establish the factual basis in the normal manner.

There were also some judges who indicated that they had been confronted with defendants unwilling to establish a factual basis, but these judges had never changed the method of establishing a factual basis. A few judges indicated that they had been more frequently confronted with defendants unwilling to establish a factual basis than occasions in which they had changed the method.

There does not seem to be a significant relationship (at least with the small sample obtained) between the manner in which the factual basis procedure is conducted and the likelihood or frequency of a defendant refusing to establish a factual basis or the likelihood or frequency of a judge changing the method of establishing the factual basis to accept a guilty plea. Although the factual basis process is primarily conducted by the judge, prosecutor, defense attorney, or a combination of the judge and prosecutor, this does not appear to impact the likelihood or frequency of a judge having confronted a defendant unwilling to establish a factual basis.

The responses to Question Three of Part II[59] provide the most surprising answers of the entire survey. Out of the thirty-six responses, only seven respondents indicated that they had accepted a guilty plea from a defendant suspected by the judge to be innocent of the charge. Of the positive responses, frequency estimates ranged from two out of hundreds, one a year, one to two a year, two to three a year, several a year and monthly.

The fact that a majority of responding judges do not suspect that innocent defendants will plead guilty is understandable to the extent that a conscientious judge concerned for the best interests of a defendant may not allow an innocent defendant to plead guilty. The U.S. Supreme Court has indicated that a criminal defendant does not have a constitutional right to plead guilty,[60] and perhaps the responding judges always exercise discretion in rejecting a guilty plea from a defendant suspected to be innocent. However, the responses may also imply that judges do not regularly suspect innocence in cases where a defendant is willing to admit to a crime. Finally, the numerous negative responses to Question Three are surprising in view of the answers to Question Five which, in some ways, address the same issue of guilty pleas by innocent defendants. Apparently, judges believe that although *they* do not do so, other judges accept guilty pleas from innocent defendants.

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59. "Regardless of the method employed in establishing a factual basis, have you accepted a guilty plea when you suspected a defendant was not guilty of the crime to which the defendant was pleading guilty?"

60. *See* Lynch v. Overholser, 369 U.S. 705 (1962).

Responses to Question Four[61] were quite consistent in that a majority of judges indicated they had never or only very infrequently rejected a guilty plea in spite of a sufficient factual basis when it was suspected that the defendant was innocent.[62] Other than one respondent who indicated that a guilty plea with a sufficient factual basis was rejected two to three times a month, other affirmative responses were coupled with frequency estimates ranging from very infrequently, very rare, rare, seldom, not often, one to two in career, one in three-and-a-half years, one in six years and two in six years. The infrequent rejection of a guilty plea because of suspected innocence would not be surprising if the occasion rarely arises.

As noted above, both Question Three and Question Five[63] were designed to address the issue of guilty pleas by innocent defendants. Apparently, some judges interpreted Question Five to relate only to cases before them, and others interpreted Question Five as a more general inquiry because some judges answered "no" to Question Three but "yes" to Question Five. Of course, interpretation may also explain why one judge responded "no" to Question Five indicating that the judge did not believe there were cases in which an innocent defendant pleads guilty, but then responded to Question Six by ranking in order of importance the various reasons innocent defendants plead guilty.[64]

Approximately one-third of the respondents indicated that they did not believe that there are cases in which an innocent defendant pleads guilty. However, the number of negative responses to Question Five was considerably smaller than the number of negative responses to Question Three. As previously noted, some judges apparently interpreted Question Five more generally than Question Three. It could be argued, however, that the opposite interpretation would be expected because Question Three left open the possibility that the defendant was only suspected not guilty, or was innocent of the charged crime but guilty of another crime, but Question Five referenced the innocent defendant. In any event, twenty-four judges indicated that innocent defendants do

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61. "Have you ever rejected a guilty plea in spite of a sufficient factual basis when you suspected a defendant to be not guilty of the crime to which the defendant sought to plead guilty?"

62. Incidentally, the infrequency of rejecting guilty pleas tends to diminish the efficacy of the potential explanation in question three as to why most judges indicated they had never accepted a guilty plea from a defendant suspected of innocence.

63. "Do you believe there are cases in which an innocent defendant pleads guilty?"

64. The five reasons offered as to why an innocent defendant may plead guilty were:

A. defendant desires to obtain the benefit of an attractive agreement with the prosecutor (dismissal of other charges or reduction of recommended sentence); B. defendant does not have an agreement with the prosecutor but expects or desires to obtain a reduced sentence from the judge; C. defendant desires to avoid the time, expense and uncertainty of fighting the charge (punishment on conviction is considered less burdensome than contesting the charge); D. defendant does not properly understand or appreciate the significance of pleading guilty; E. defendant is not guilty of the crime to which the defendant is pleading guilty but the defendant is guilty of some criminal conduct and seeks to avoid further attention or investigation from law enforcement.

occasionally plead guilty although almost none of the judges thought it was a frequent occurrence. Responses included: very rare, infrequent, rare, less than five, less than five percent, two a year, several a year and weekly but guilty of something.

As to ranking the reasons an innocent defendant pleads guilty, more than half of the respondents indicated that the most important reason for the occurrence is that the defendant desires to obtain the benefit of an attractive agreement with the prosecutor. On the other hand, one judge placed the desire to obtain the benefit of a bargain with the prosecutor as the least important factor, and two others ranked it as the second least important factor. The other respondents ranked the "prosecutor-plea agreement" factor as the most important or in the top three. Interestingly, four of the five factors were listed as the most important by at least one judge and every factor was listed as the least important factor by no less than one judge. The responses are varied to the point that other than the "prosecutor-plea agreement" factor being the most important, the desire to receive a reduced sentence from the judge, and the defendant not properly understanding or appreciating the significance of pleading guilty being approximately equal as the least important factors, few other generalizations are appropriate with the relatively small sample.

VI. The Significance of the Questionnaire Responses

The responses are not offered as a scientific opinion poll or as necessarily reflective of the entire Indiana trial court bench. The questionnaire was designed to obtain a sampling of the variety, if any, of current procedures and opinions of Indiana trial court judges. Even a cursory review of the responses makes it apparent that there are a number of current approaches to the guilty plea factual basis requirement in Indiana. Although the divergent methods are not necessarily troubling in view of the great deal of discretion vested in the trial judge, the responses in Part II of the questionnaire cast a discomforting shadow and raise potentially troubling issues regarding the lack of uniformity.

The lack of a mandatory and consistent guilty plea factual basis process allows trial judges to abdicate, consciously or otherwise, their responsibility to ensure that a plea of guilty is voluntarily made with full appreciation of the consequences of the action. Moreover, the wide discretion in establishing a factual basis also easily allows the trial judge to compromise, again, consciously or otherwise, the judge's role as a neutral voice within the criminal justice system interested in protecting both the rights of the individual defendant as well as the interests of society. Considering that there is legitimate accuracy inquiry required for a guilty plea and the prevalence of plea bargaining in the guilty plea process, the judge may serve as little more than an administrator supporting the systemic goal of the efficient processing of guilty defendants. A contested jury trial may be an infrequent interruption caused by the occasional defendant unwilling to plead guilty.

When a judge is advised that the prosecutor and defense attorney have reached an agreement on sentencing, the judge is presented with a clear opportunity to efficiently dispose of the matter through a resolution that avoids

the costly and time-consuming jury trial procedure. Promoting efficiency by deleting the determination of guilt from the process is particularly palatable if there is an assumption of guilt. If the trial judge even subconsciously assumes guilt, it is evident that the accuracy inquiry for a guilty plea becomes much easier to minimize, ignore or haphazardly address as a mere legal technicality.

When determining whether to accept a guilty plea, there are other significant considerations facing the trial judge, such as the overcrowded trial docket and the "speedy trial" problems resulting from the defendant's inability to post bond. To reject a plea agreement means that witnesses and victims will not be spared the burdens of trial, reluctant jurors will be required to report, and the overworked public defender will be responsible for trying the matter. These pressures, coupled with the defendant's apparent guilt, create little doubt that the trial judge may allow an expedited guilty plea process which has insufficient regard for the purported factual basis requirement.

The purpose here is not to cast undue criticism on the efforts of trial judges based on the relatively small sampling obtained from the narrowly focused questionnaire. Instead, it is submitted that the survey results simply point to a divergence in opinion and approach at the trial court level regarding the factual basis requirement, which underscores the contention that there has been a lack of meaningful and consistent guidance from the Indiana Supreme Court and the Indiana Court of Appeals on the matter since the factual basis requirement became part of Indiana law by legislative enactment in 1973.[65]

For example, a few years prior to the legislative enactment in which the factual basis requirement was inserted into the Indiana guilty plea process, the U.S. Supreme Court had held there is no constitutional requirement for a defendant to expressly admit guilt to be subjected to criminal punishment, specifically noting: "An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."[66] In 1973,[67] the Indiana Supreme Court in *Boles v. State*[68] appeared to sanction an "Alford-type best interests plea" when it held:

> [W]here a guilty plea is accompanied with a protestation of innocence and unaccompanied by evidence showing a factual basis for guilt, the trial court should never accept it. But where, as in the case at bar, the plea is accompanied with overwhelming evidence of the defendant's guilt, the defendant is judicially advised of all the rights he is waiving, and the plea is voluntarily, freely, and knowingly given, then the

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65. *See* KERR, *supra* note 48, at 209.

66. North Carolina v. Alford, 400 U.S. 25, 37 (1970).

67. Although the factual basis requirement was not a statutory requirement until 1973, in 1972 the Indiana Supreme Court handed down the case of *Brimhall v. State*, which generally set forth the factual basis requirement provisions codified by the Indiana General Assembly. *See supra* notes 42-47 and accompanying text.

68. 303 N.E.2d 645 (Ind. 1973).

> subjective motivation behind such plea shall not render it defective. Subsequent contentions of innocence arising during post-conviction relief proceedings are not sufficient, nothing more appearing, to attack a previously entered plea of guilty.[69]

Relying on *Boles*, the Indiana Supreme Court and the Indiana Court of Appeals upheld an "Alford-type plea" in several cases.[70]

Although the U.S. Supreme Court authorized so called "best interests pleas" in *Alford*, the Court stated that: "[T]he States may bar their courts from accepting guilty pleas from any defendants who assert their innocence."[71] After approximately ten years of allowing "Alford-type best interests pleas" as set forth in *Boles*, the Indiana Supreme Court in *Ross v. State*[72] revisited the issue and repudiated *Boles* to the extent that it had been interpreted to allow a guilty plea from a defendant who simultaneously asserts innocence.[73] *Boles* was also repudiated to the extent that it had been interpreted to overrule the 1953 *Harshman* case.[74] In a laudable effort to clearly state the law in Indiana regarding the factual basis requirement, the Indiana Supreme Court held in *Ross* that "as a matter of law, . . . a judge may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time. To accept such a plea constitutes reversible error."[75]

One might expect that such a direct and specific pronouncement of the law would effectively eliminate any confusion on the issue of the guilty plea factual basis, at least to the extent of best interests pleas. Furthermore, the supreme court seemed intent upon reviving the rationale of the *Harshman* case, which unmistakably provided that guilty pleas should be cautiously received and "a plea of guilty tendered by one who in the same breath protests his innocence, or declares he actually does not know whether or not he is guilty, is no plea at all."[76] Therefore, in specifically rejecting the "Alford best interests plea" of *Boles*, it would appear that the court expected the factual basis procedure, at a minimum, to ensure that defendants did not plead guilty without admitting to the charge. As later stated by the Indiana Supreme Court in *Butler v. State*,[77] the factual basis is designed to "ensure[] that a person who pleads guilty truly is guilty."[78]

The clarity and specificity of the law resulting from *Ross* did not last. In fact,

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69. *Id.* at 654.

70. *See, e.g.*, Campbell v. State, 321 N.E.2d 560 (Ind. 1975); Hitlaw v. State, 381 N.E.2d 527 (Ind. App. 1978); Likens v. State, 378 N.E.2d 24 (Ind. App. 1978); Brown v. State, 322 N.E.2d 98 (Ind. App. 1975).

71. *Alford*, 400 U.S. at 38 n.11.

72. 456 N.E.2d 420 (Ind. 1983).

73. *See id.* at 423.

74. Harshman v. State, 115 N.E.2d 501 (Ind. 1953).

75. *Ross*, 456 N.E.2d at 423.

76. *Harshman*, 115 N.E.2d at 502.

77. 658 N.E.2d 72 (Ind. 1995).

78. *Id.* at 76.

the attack on the rationale of *Ross* and *Harshman* occurred on two fronts—not only did subsequent cases limit *Ross* to the relatively narrow circumstance of a defendant pleading guilty and *simultaneously* protesting innocence, but subsequent cases found the factual basis to be a matter of discretion for trial judges to the extent that the requirement often became illusory. Its mandates were considered satisfied through a variety of discretionary procedures.

The Indiana Supreme Court has found that a guilty plea is not invalid under *Ross* simply because the defendant states that he is unable to remember the circumstances of the crime because a lack of memory is not a protestation of innocence.[79] Also, to render a guilty plea invalid under *Ross*, there must be protestations of innocence rather than an unwillingness or failure to admit to the offense[80] and the protestations must occur at the time of the entry of the plea of guilty. For example, a protestation of innocence offered at a hearing on a motion to withdraw guilty plea held after entry of the guilty plea, but before sentencing, did not automatically invalidate the plea, leaving the trial judge with discretion to deny the motion.[81] Likewise, a protestation of innocence outside the courtroom, such as to a probation officer preparing a pre-sentence report, does not render a plea invalid, even if the claim of innocence makes its way into the record of the case.[82] Further, a plea of guilty is not necessarily invalid under *Ross*, according to the Indiana Court of Appeals, even when there is a protestation of innocence "to a degree" in the courtroom at sentencing *and* a claim of innocence to the probation officer during the pre-sentence interview.[83]

Interestingly, in *Brooks v. State*,[84] the court of appeals invalidated a guilty plea pursuant to *Ross* in view of the defendant's protestation of innocence during the pre-sentence interview with the probation officer and during the sentencing hearing.[85] The court acknowledged that out-of-court protestations of innocence had been held to be inconsequential by the supreme court in *Moredock*,[86] but the supreme court had "yet to modify *Ross* to the extent a protestation of innocence made prior to the acceptance of a guilty plea is similarly inconsequential even with a sufficient factual basis for the plea."[87] In an apparent effort to ensure that trial judges have virtually unfettered discretion in accepting a guilty plea from a willing defendant, the *Brooks* decision was repudiated by the court of appeals in *Carter v. State*.[88] In *Carter*, the court of appeals rejected *Brooks* not only "as an

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79. *See* Gibson v. State, 490 N.E.2d 297 (Ind. 1986).

80. *See* Bates v. State, 517 N.E.2d 379 (Ind. 1988).

81. *See* Bewley v. State, 572 N.E.2d 541 (Ind. Ct. App. 1991).

82. *See* Moredock v. State, 540 N.E.2d 1230, 1231 (Ind. 1989). The supreme court did, however, acknowledge that the trial judge should question the defendant regarding the protestations of innocence prior to sentencing the defendant. *See id.*

83. *See* Harris v. State, 671 N.E.2d 864 (Ind. Ct. App. 1996).

84. 577 N.E.2d 980 (Ind. Ct. App. 1991).

85. *See id.*

86. *See Moredock*, 540 N.E.2d at 1230.

87. *Brooks*, 577 N.E.2d at 981.

88. 724 N.E.2d 281 (Ind. Ct. App. 2000), *aff'd*, 739 N.E.2d 126 (Ind. 2000).

unnecessary extension of the law of *Ross"* but also "destructive to the intent of the plea statutes."[89] The court of appeals attempted to shift the focus away from the inquiry of whether the court has formally accepted the guilty plea and set the matter for sentencing or has taken the tendered guilty plea under advisement pending sentencing.[90] As long as the trial judge properly conducts the plea hearing, the majority in *Carter* holds that a guilty plea may be accepted even if there are later protestations of innocence, including those proffered at the sentencing hearing.[91]

In a dissenting opinion, Judge Sullivan argued that based on *Brooks*, when the defendant protested his innocence at the sentencing hearing prior to the trial court accepting the guilty plea, the court was required to set aside the guilty plea.[92] In a footnote, Judge Sullivan indicated that a defendant may enter a best interests plea pursuant to *Alford.*[93] After granting transfer, the supreme court summarily affirmed the majority opinion of the court of appeals and specifically disapproved of *Brooks.*[94] The supreme court noted that *Harshman* and *Ross* established that an Indiana trial court may not accept a guilty plea that is accompanied by a denial of guilt, but the *Harshman-Ross* rule is applicable only when the protestation of innocence occurs at the same time the defendant attempts to plead guilty.[95] In specifically rejecting *Brooks*, the supreme court cited as controlling authority its decision in *Owens v. State*.[96] With deference to the supreme court and its reliance on a cased decided two years prior to *Ross*, the present state of the law regarding the factual basis requirement and best interests please remains rather muddled in spite of the apparent certainty of *Carter*, *Ross* and *Harshman*.

To underscore the murkiness and confusion regarding *Ross* and its progeny, the Indiana Supreme Court has carved out an exception to the general rule that protestations of innocence must occur in the courtroom simultaneously with the plea of guilty in murder cases in which the death penalty may be imposed.[97] In what is surely an appropriate concession to the admonition that great caution be exercised by trial court judges in accepting a plea of guilty, our supreme court noted: "In Indiana we will not execute people who plead guilty and then protest innocence at their sentencing hearing."[98] However, even this singular exception to the general rule was tempered by the supreme court when it held that a defendant in a capital murder case does not have the unfettered right to plead guilty and later withdraw it or have it invalidated due to a subsequent protestation

89. *Id*. at 285.
90. *See id*. at 284-85 (both procedures are permissible under the guilty plea statutory scheme).
91. *See id*. at 284.
92. *See id.* at 286 (Sullivan, J., dissenting).
93. *See id.* at 286 n.4.
94. *See* Carter v. State, 739 N.E.2d 126 (Ind. 2000).
95. *Id.* at 129.
96. 426 N.E.2d 372 (Ind. 1981).
97. *See* Patton v. State, 517 N.E.2d 374 (Ind. 1987).
98. *Id*. at 376.

of innocence:

> The most important consideration in applying the Ross rule to capital cases is the need for heightened reliability of the guilty determination. There can be no per se rule, however, to evaluate the reliability of these determinations. It is a decision that must be made upon the facts of each case. It almost goes without saying that a plea in a capital case must be more carefully and fully explored on the record with the defendant than a plea which subjects the defendant only to a term of years. A later request to withdraw such a plea calls for examining whether the plea was given truthfully and intelligently and whether the request to withdraw arises out of genuine misapprehension or out of a desire to manipulate.[99]

Although the cases cited make it apparent that the rationale of *Ross* and *Harshman* has been narrowed by the appellate courts, the rationale of *Ross*, and indeed, the entire concept of requiring a factual basis for a plea of guilty, is imperiled when trial courts conduct factual basis inquiries with few parameters and restrictions to ensure a legitimate and meaningful inquiry. Simply stated, the factual basis requirement is no longer a barrier to any guilty plea the judge desires to accept. In fact, the Indiana Supreme Court has recently determined that the failure of a trial court to establish a factual basis for a guilty plea is not grounds for granting a petition for post-conviction relief unless the petitioner/defendant demonstrates prejudice by the omission.[100] The Indiana Supreme Court quotes from a previous decision in which it held that failure to comply with a statutory advisement of rights (except the rights required by *Boykin v. Alabama*[101]) was not grounds for granting post-conviction relief unless the petitioner/defendant proved that the failure affected the decision to plead guilty:

> Routine reversal of convictions on technical grounds imposes substantial costs on society. . . . [J]urors, 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 re-live frequently painful experiences 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 punishment, and hamper the rehabilitation of wrongdoers.[102]

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99. Trueblood v. State, 587 N.E.2d 105, 108 (Ind. 1992).

100. *See* State v. Eiland, 723 N.E.2d 863 (Ind. 2000).

101. 395 U.S. 238 (1969). The *Boykin* rights include the right to a trial by jury, the right of confrontation, and the right against self-incrimination. *See id.*

102. *Eiland*, 723 N.E.2d at 865 (quoting White v. State, 497 N.E.2d 893, 905 (Ind. 1986)).

Although the reversal of convictions on technical grounds is abhorrent, the costs of repeating a trial are non-existent in most guilty plea scenarios and rewarding "an admitted perpetrator"[103] with the constitutional right of trial when there was no legitimate admission in the first instance seems reasonable. Society's interest in punishing the guilty should not convert the accuracy inquiry for a plea of guilty into a mere technicality that constitutes a bothersome snare for the unsuspecting trial judge dedicated to the prompt and efficient administration of justice. As the Indiana Supreme Court held:

> A requirement that a guilty plea manifest an unqualified admission of guilt does not exalt form over substance. It implements fundamental notions of due process essential to the fair and just administration of criminal law. It protects a defendant's right to require proof of his guilt before a jury. It also obviates a collateral attack on a judgment by a later claim the plea was too equivocal to bind the pleader and permit entry of judgment. For these reasons, we prohibit trial courts from accepting guilty pleas from people who maintain their innocence.[104]

The present Indiana approach to the factual basis requirement does not require an unqualified admission of guilt. Indeed, no admission of guilt is necessary in view of the factual basis procedures authorized by the appellate courts. For example in the cases of *Lee v. State*,[105] and *Zavesky v. State*,[106] the court of appeals held that a colloquy between a defendant and a judge over specific allegations is not a necessity for a factual basis, as the court may rely on statements other than sworn testimony of the defendant for an adequate factual basis.

Although it is clear from the legislative scheme that a court may be satisfied with a factual basis for the guilty plea either from its examination of the defendant *or* from the evidence presented, a factual basis determination is not required until there is a knowing and voluntary guilty plea from the defendant.[107] Specifically, from the totality of the circumstances, the trial judge must determine that there is a voluntary and knowing plea of guilty (proper admonishments are required) and that there is a sufficient factual basis for the plea. Additionally, although one determination may assist the court in making the other, there is a clear distinction between the two.[108] A trial judge has discretion regarding the method to be utilized in establishing a factual basis, but a sufficient factual basis is necessary only if there is a voluntary and knowing guilty plea. Directly stated, until a defendant clearly indicates a knowing and voluntary desire to plead guilty, the trial judge is not required to conduct an

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103. *Id.*

104. Patton v. State, 517 N.E.2d 374, 376 (Ind. 1987).

105. 538 N.E.2d 983 (Ind. Ct. App. 1989).

106. 514 N.E.2d 658 (Ind. Ct. App. 1987).

107. *See* IND. CODE § 35-35-1-3 (2000).

108. *See* KERR, *supra* note 48, at 210.

accuracy inquiry.

Commenting on trial court discretion in establishing a factual basis, the Indiana Supreme Court has held "a finding of factual basis is a subjective determination that permits a court wide discretion—discretion that is essential due to the varying degrees and kinds of inquiries required by different circumstances."[109] To a disturbing degree, the need for trial court discretion has been caused by the Indiana Supreme Court's failure to focus regular and consistent attention on the issue. If the Indiana Supreme Court provided specific parameters and guidelines on the issues surrounding the factual basis requirement, there would be fewer circumstances in which trial court discretion would be exercised (and ultimately authorized on a piecemeal basis by the appellate courts). While reasonable discretion must remain with the trial court in that there are "varying degrees and kinds of inquiries required by different circumstances,"[110] certain matters should be consistent in every criminal court in Indiana. Just as a guilty plea cannot be considered knowing, voluntary and intelligent unless the record discloses that the defendant knowingly waived his or her *Boykin* rights,[111] it is time for our supreme court to specifically delineate the substance and procedure of the guilty plea factual basis requirement in Indiana criminal courts.

VII. SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

As the American system of justice has evolved from one in which its courts were very reluctant to receive and record guilty pleas[112] to one in which the highest court of the land notes that "disposition of criminal charges by agreement between the prosecutor and the accused, . . . is an essential component of the administration of justice,"[113] it is indisputable that the guilty plea is the predominant dispositional method in American criminal courts. Likewise, the process and substance of pleading guilty has evolved in the various jurisdictions through legislative enactments, appellate court decisions and customs and practices of trial court judges. The present guilty plea process in Indiana consists of certain elements that have been recognized as essential components of the process, while other requirements have been added as deemed necessary to ensure the continued legitimacy and integrity of the criminal justice system.

Unlike the inherent requirement of voluntariness, the factual basis component of a guilty plea was mandated in Indiana by legislative enactment in 1973, although it had been employed by individual trial court judges and addressed by the Indiana Supreme Court prior to that time.[114] Because the legislative provision set forth the factual basis requirement in general terms,

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109. Butler v. State, 658 N.E.2d 72, 76-77 (Ind. 1995).

110. *Id.* at 77.

111. Griffin v. State, 617 N.E.2d 550 (Ind. Ct. App. 1993).

112. *See* Griffith v. State, 36 Ind. 406 (1871).

113. Santobello v. New York, 404 U.S. 257, 260 (1971).

114. *See supra* notes 41-48 and accompanying text.

meeting the requirement was left to the discretion of the trial courts subject to judicial review by the Indiana Court of Appeals and the Indiana Supreme Court. Unfortunately, because of the divergent and haphazard manner in which it has been implemented in the trial courts and the lack of consistent, legitimate review and consequent guidance from the Indiana Court of Appeals and the Indiana Supreme Court, the factual basis requirement is imperiled to the point of constituting a threat not only to the due process interests of individual defendants but also to the efficient administration of justice.

A. A Modest Proposal to Strengthen the Factual Basis

The emasculation of the factual basis requirement merits immediate attention. Although the issues could be addressed by the Indiana General Assembly, much of what ails the guilty plea factual basis procedure should be remedied by the Indiana Court of Appeals and the Indiana Supreme Court. In fact, the factual basis requirement may be resuscitated by the Indiana Supreme Court without complete abandonment of *Ross*[115] and *Harshman*,[116] so long as the court is willing to mandate compliance with the rationale set forth in those cases while also redirecting the attention of the trial courts to the statutory guilty plea procedure.[117]

To reinvigorate the factual basis requirement while upholding the *Ross* rule, the Indiana Supreme Court must require a record from the trial court that demonstrates a voluntary, knowing and intelligent guilty plea *and* an unqualified admission of guilt from the defendant. Although a simple, "Did you do it?" may be a bit unrefined, a straightforward inquiry and an unqualified affirmative response must be part of the record. In what would constitute more than a semantic adjustment, the *Ross* rule should be modified to replace the protestation of innocence standard with a requirement of unqualified admission. The accuracy of a guilty plea should be determined by the certainty of the admission, not the degree to which the defendant protests his innocence. If a defendant does not provide an unqualified admission, the guilty plea would be invalid regardless of whether the defendant's actions may be characterized as protestations of innocence. Further, a silent record on the issue of an unqualified admission would invalidate a guilty plea even in the absence of protestations of innocence.

Moreover, as *Harshman* clearly provides, "a plea of guilty tendered by one who in the same breath protests his innocence, *or declares he actually does not know whether or not he is guilty*, is no plea at all."[118] Therefore, it should be an unquestioned principle of Indiana law that a defendant who equivocates because he believes himself innocent or because he does not know whether he is guilty, must not be allowed to plead guilty. The unqualified admission standard would

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115. Ross v. State, 456 N.E.2d 420 (Ind. 1983).

116. Harshman v. State, 115 N.E.2d 501 (Ind. 1953).

117. *See* IND. CODE §§ 35-35-1-2 to -3 (stating when guilty plea may be accepted), and § 35-35-1-4 (stating when guilty plea may be withdrawn) (2000).

118. *Harshman*, 115 N.E.2d at 502 (emphasis added).

underscore not only the *Ross* prohibition against "best interests pleas" but also the more expansive guilty plea prohibitions of *Harshman*.

Upon the voluntary, knowing and intelligent guilty plea from the defendant and the unqualified admission of guilt, the record must also reflect the evidence considered by the judge to constitute a sufficient factual basis for the plea of guilty. As provided by statute, the trial judge may accomplish this task through examination of the defendant or other evidence presented.[119] Whether the factual basis is established through sworn testimony from the defendant or other evidence presented, if the defendant denies guilt during the factual basis process, the guilty plea must be rejected even if the defendant seeks to plead guilty in spite of the denial. If there is a voluntary, knowing and intelligent guilty plea accompanied by an admission of guilt and a sufficient factual basis, the plea shall be considered accepted regardless of whether the plea is taken under advisement until sentencing or judgment of conviction is entered with sentencing set at a later date.[120] Upon acceptance of the guilty plea, later protestations of innocence, whether outside the courtroom to a probation officer or inside the courtroom to the judge at a subsequent hearing, will not invalidate a guilty plea except as the trial judge determines appropriate under a motion to withdraw the plea filed pursuant to statute.[121]

With renewed commitment to the principles of *Ross* and *Harshman* and the statutory provisions regarding guilty pleas, there will be renewed commitment to the proposition that because an admission of guilt deprives the defendant of the right to a jury trial, a guilty plea should be cautiously received.[122] Indeed, a renewed commitment to *Ross* and *Harshman* will enable the criminal justice system to ensure that a person who pleads guilty truly is guilty.[123]

B. An Alternative and Radical Proposal

The Indiana Supreme Court should initiate a more efficient approach to the factual basis requirement by specifically repudiating the remaining vestiges of *Ross* and *Harshman* while simultaneously strengthening and standardizing the factual basis inquiry process. With the protestation of innocence standard of *Ross* and *Harshman* properly put to rest, the more pragmatic issues of the guilty plea process, including the troublesome matter of a defendant who wishes to plead guilty but does not wish to admit to the allegations, can be addressed with due regard for the rights of the defendant and the interests of society.

To argue that *Ross* should be overruled is not to suggest that the factual basis requirement should or will be weakened. On the contrary, the *Ross* rule that a guilty plea is invalidated only if the defendant protests his innocence while simultaneously pleading guilty is a weak and ineffectual standard which can be

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119. *See* IND. CODE § 35-35-1-3(b) (2000).

120. *See* Carter v. State, 739 N.E.2d 126 (Ind. 2000).

121. *See* IND. CODE § 35-35-1-4 (2000).

122. *See* Patton v. State, 517 N.E.2d 374, 375 (Ind. 1987).

123. *See* Butler v. State, 658 N.E.2d 72, 76 (Ind. 1995).

easily met or manipulated, particularly with the wide discretion granted the trial judge in establishing a factual basis. Likewise, to allow the trial court the discretion to accept a plea from someone unable or unwilling to admit to the allegations does not mean that there will be no factual basis for the plea. The factual basis for such a plea would require heightened judicial scrutiny because the judge could not simply rely on the uncorroborated representations of the defendant.

In proposing the sanctioning of a guilty plea by one who is unwilling to admit the commission of the crime but nevertheless believes it in his best interests to plead guilty, attention is redirected to the language of *North Carolina v. Alford*:[124]

> Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.
>
> Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.[125]

Although it is clear that today Indiana courts may deny defendants the opportunity to enter a "best interests plea" or an "*Alford* plea,"[126] it should be remembered that for approximately ten years following *Boles*[127] and prior to *Ross*,[128] defendants were permitted to enter best interests pleas. In view of the present state of Indiana law regarding guilty pleas and the factual basis requirement, best interests pleas should be reinstated. The present state of the law and procedure regarding guilty pleas raises certain policy concerns against the present approach. For example, in view of the *Ross* rule, some judges may refrain from meaningful inquiries into the circumstances of the offense to avoid any equivocation by the defendant which later could be raised as a protestation of innocence. In fact, one judge responded to the questionnaire that the factual basis procedure should be conducted by the defense attorney because only he or she knew what the defendant would admit to. Reticence on the part of a cautious judge to engage in meaningful dialogue with the defendant in order to maintain the validity of the process limits the judge's ability to determine voluntariness and the existence of a factual basis and may deprive the court of other potentially

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124. 400 U.S. 25 (1970).

125. *Id.* at 37.

126. *See id*. at 38 n.11.

127. Boles v. State, 303 N.E.2d 645 (Ind. 1973).

128. Ross v. State, 456 N.E.2d 420 (Ind. 1983).

relevant information. The present approach focuses inordinate attention on what the defendant will or will not say in court as opposed to what the defendant did or did not do in relation to the charges.

Another matter which may be better addressed by utilization of a best interests plea is the dilemma for the innocent defendant who must choose between facing the uncertainties of trial in spite of an attractive plea agreement or committing perjury in order to obtain the benefit of the bargain. In *Scheckel v. State*,[129] the Indiana Supreme Court noted that by pleading guilty the defendant had saved court time and resources and spared the victim's family from enduring the difficulties of trial, and "a defendant who willingly enters a plea of guilty has extended a substantial benefit to the state and deserves to have a substantial benefit extended to him in return."[130] It is ironic that the present guilty plea system openly extends a benefit to the guilty defendant as well as a defendant willing to admit to a crime not committed, but withholds that same benefit from the defendant unwilling to admit to false allegations. This unintended result may necessitate wide discretion for trial court judges in establishing a factual basis under the mandates of *Ross*.

Another troublesome aspect of Indiana's present approach to guilty pleas is that it occasionally exposes a defense attorney to the untenable position of being unable to counsel acceptance of a course of conduct that is clearly in the client's best interests. The defense attorney must tell the client that the plea agreement offered is conditioned upon a guilty plea and a guilty plea is conditioned upon an admission of guilt. The defense lawyer also must remind the client that perjury is a serious matter and that the decision to plead guilty ultimately rests with the defendant. A pragmatic defendant may simply seek counsel's well timed prompting of when to say "guilty" or "yes, Judge" during the courtroom ritual of pleading guilty. Just as some defendants willingly but dishonestly indicate an understanding of "beyond a reasonable doubt" and the "right against self-incrimination," some defendants may be willing to admit guilt regardless of the truth of the assertion if the admission is necessary to obtain a perceived advantage.

Other defendants steadfastly refuse to admit to the crime even though conviction at trial may result in a harsher sentence. To salvage the advantages and efficiency of a guilty plea resolution, the defense attorney must encourage the criminal justice system to modify or ignore the factual basis requirement. For example, there is the occasional defendant who voluntarily pleads guilty but, when asked about the allegations, relates a version which constitutes a denial of the offense. After a quick "off the record" conference with the defense attorney, the defendant restates the narrative and admits participation in the crime. Of course, the judge may reject the admission as an unacceptable sham. However, under present case law, the judge has discretion to proceed and the defendant's initial denial will not be considered a protestation of innocence sufficient to support a later challenge of the plea.

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129. 655 N.E.2d 506 (Ind. 1995).

130. *Id.* at 511 (quoting Williams v. State, 430 N.E.2d 759, 764 (Ind. 1982)).

While it is true that a guilty plea may be accepted under the present approach without the defendant's sworn admission, this is a rather disinegnuous procedure when contrasted with the best interests plea process. By sanctioning the divergent approaches to the factual basis process to circumvent the unwieldy *Ross* rule without specifically overruling it, the Indiana appellate courts are undermining the legitimacy of the entire guilty plea process. For example, in *Corbin v. State*[131] the court of appeals upheld a conviction following a bench trial during which all the State's evidence was entered by stipulation from the defense, which also agreed not to offer any evidence contesting the charge.[132] Although Judge Staton concurred in the denial of Corbin's claim that the procedure was defective because it was an impermissible nolo contendere plea (a plea in which the defendant neither admits nor denies guilt), he specifically cautioned against the procedure because it could be used to skirt the Indiana Supreme Court's *Ross* rule.[133] Concurring in the validity of the procedure despite his concerns and reservations, Judge Staton provided a clear example of the ineffectual nature of the present protestation of innocence standard of *Ross*:

> In this case, Corbin essentially pleaded guilty, but he did so without having to enter a formal plea of guilty or admit his guilt. Our supreme court has stated that "[a]n Indiana defendant must admit the offense to which he is pleading guilty." The record in this case does not reveal that Corbin ever proclaimed his innocence, or even that he was unwilling to admit his guilt. Thus, Corbin is not entitled to reversal on this ground. Nevertheless, I can envision circumstances where criminal defendants might enter into agreements with the State, similar to the one entered into by Corbin, in an effort to avoid the requirement that they not plead guilty and proclaim their innocence at the same time.[134]

Submitting a case on the record or by stipulated evidence as in *Corbin* is clearly and unmistakably an effort to circumvent the *Ross* rule and because the record does not demonstrate protestations of innocence, the hybrid "no trial—no guilty plea" procedure is sanctioned.

Although there are defensible policy reasons for the end result of a conviction without a trial or an admission of guilt from the defendant, there is no justification for the continued reliance on the illusory proposition that a guilty plea must be accompanied by an admission of guilt. If a fully informed defendant wishes to voluntarily plead guilty without admitting guilt because the plea is deemed to be in the defendant's best interests, the trial judge should be given the discretion to allow the defendant to proceed in that manner without subterfuge. Simply stated, *Ross* should be overruled. To repudiate *Ross* and sanction the best interests plea is not enough to ensure the viability of the factual basis requirement. The Indiana Supreme Court must also make certain that the

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131. 713 N.E.2d 906 (Ind. Ct. App.), *trans. denied*, 726 N.E.2d 303 (Ind. 1999).

132. *See id.* at 907.

133. *See id.* at 909 (Staton, J., concurring).

134. *Id*. (internal citation omitted).

factual basis requirement is an essential and fundamental part of the trial court plea process whether the defendant unequivocally pleads guilty or seeks to enter a best interests plea pursuant to *Alford.* The supreme court may do so only by imbuing the basic factual basis procedure with constitutional import.

Specifically, and as set forth above in the more modest proposal to resuscitate and modify the *Ross* rule, when a defendant tenders a plea of guilty, the record must reflect both a knowing, intelligent, voluntary plea of guilty and an unequivocal admission of guilt by the defendant. The focus for the trial court judge must be on the unqualified desire to plead guilty and the unequivocal admission of guilt and not on whether the record reflects any protestations of innocence. If the record does not demonstrate a knowing, intelligent and voluntary guilty plea and an unqualified admission, acceptance of a guilty plea would be reversible error.

Further, upon a knowing, voluntary and intelligent guilty plea and an admission of guilt, the record must reflect the evidence relied upon by the trial judge to establish a factual basis for the guilty plea. Pursuant to current law, that evidence may consist of the sworn testimony of the defendant or other evidence presented. Upon a finding that the plea was voluntary, knowing, intelligent, and supported by a sufficient factual basis, the plea would be accepted and would not be invalidated by protestations of innocence or withdrawn by the defendant except as allowed by statute.[135]

Alternatively, a defendant who wishes to plead guilty but is unwilling or unable to admit to the allegations, would be allowed to enter a best interests plea. While any equivocation on the part of the defendant about proceeding would invalidate the request to enter the best interests plea, the trial judge would have the discretion of entering conviction if the defendant's actions were found to be knowing, intelligent, voluntary and there was a sufficient factual basis supporting the guilty plea. The judge would be required to designate the evidence relied upon to establish a factual basis for the plea. The prosecutor, victim or other interested party would have the right to be heard on whether the best interests plea should be permitted by the court; however, acceptance of the plea and entry of conviction would be left to the sound discretion of the trial court.

Likewise, the method by which a factual basis was established and the evidence to be relied upon in establishing the factual basis would be left to the discretion of the trial judge, subject to review by the appellate courts for abuse of discretion. In determining the existence of an adequate factual basis, the trial court must be satisfied that there is sufficient evidence of probative value to demonstrate that the defendant is guilty of the crime to which the defendant is pleading. After a plea has been accepted, it could not be withdrawn by the defendant except as allowed by statute.

Recognizing and sanctioning a best interests plea while simultaneously mandating a legitimate factual basis procedure would properly acknowledge the fact that:

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135. *See* IND. CODE § 35-35-1-4 (2000).

> A person charged with a crime may wish to plead guilty to the charge for one of several reasons. He may wish to avoid the time and trouble, or he may hope to spare his family the anguish and embarrassment occasioned by criminal proceedings or he may hope that his cooperation will be reflected by lesser punishment. But despite these rational and simple reasons for a plea of guilty, there are procedures and safeguards the judicial system must impose on the entertaining of guilty pleas.[136]

The trial court judge should necessarily retain broad discretion in conducting the guilty plea procedure so long as that discretion does not relegate the accuracy inquiry embodied in the factual basis requirement to the status of a mere legal technicality. In a system dependent upon the guilty plea as the predominant method by which cases are resolved, the due process rights of the individual defendant as well as society's interest in the fair and proper administration of justice demand nothing less.

136. IND. CODE OF CRIM. PRO., cmts. at 177 (Proposed Final Draft 1972).