INDIANA CRIMINAL BENCHBOOK

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HOW TO USE:

- SEVEN DIGIT NUMBERING SYSTEM
- INDEX AT END OF BENCHBOOK KEYED TO NUMBERING SYSTEM
- MASTER TABLE OF CONTENTS IN FRONT OF BENCHBOOK
- DETAILED TABLE OF CONTENTS FOR EACH TAB TOPIC
- TABLE SHOWING DATE OF MOST RECENT CHAPTER REVISION

Foreword - 2001 Third Edition

The sole responsibility for the content of the Criminal Benchbook is that of the Criminal Benchbook Committee of the Judicial Conference of Indiana, which is pleased to make it available to Indiana's trial judges in its continued effort to improve the administration of justice.

Our purpose in writing this Benchbook has been to provide materials that could be used by trial judges in the courtroom. This meant that we had to limit the size of the book and that the material had to be presented in a way that can comfortably be used in the heat of a trial. Thus, we sought to provide information that trial judges will most likely want available to them on short notice in the most accessible way possible.

Building on the work of the 1984 edition of the Benchbook, seventeen judges somehow found time over the last three years to completely reorganize, update, and rewrite the book. We hope that you find the suggested procedures and practice tips to be pragmatic and helpful. We do not view it as a finished product. Future committees will certainly find ways to make further improvements. We hope you will help by providing suggestions.

The Committee sincerely appreciates the invaluable staff assistance received from Michael J. McMahon, Research Director of the Indiana Judicial Center

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CRIMINAL BENCHBOOK CHAPTERS

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13 Confessions	June 2013 update
16 Extradition and Detainers	2010 update
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22 Bail	April 2015 update
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10.00.000 SEARCH ISSUES.

10.01.000 **WHAT IS A SEARCH:** Government action amounts to a search when it infringes on an expectation of privacy which society is prepared to recognize as reasonable. See *U.S. v. McDonald* 100 F.3d 1320 (7th Cir. 1996); *U.S. v. Myers* 46 F.3d 668 (7th Cir. 1995); *State v. Thomas* 642 N.E.2nd 240 (Ind. Ct. App. 1994).

10.02.000 **SEARCH WARRANTS ARE REQUIRED FOR A SEARCH:** A judicially issued search warrant is a condition precedent to a lawful search, required by both the Fourth Amendment to the United States Constitution and Article I., section 11, of the Indiana Constitution. Searches without judicial process are per se unreasonable, subject to certain well-delineated exceptions. *C.D.T v. State*, 653 N.E.2d 1041, 1044 (Ind. Ct. App. 1995).

10.02.200 **PROBABLE CAUSE FOR A SEARCH WARRANT:** Court may issue a search warrant only on probable cause supported by oath to search any place (including buildings, persons or vehicles) for certain property or persons. Magistrate need only find that there is probable cause to issue a search warrant which is based upon probability of criminal activity, *Baker v. State*, 562 N.E.2d 726 (Ind. 1990) and not necessarily upon a prima facie showing that there is criminal conduct or that contraband will be found. *Everroad v. State*, 442 N.E.2d 994 (Ind. 1982). It is necessary to establish that certain items are probably located at the present time in a certain place. *Tinnin v. State*, 416 N.E.2d, 116 (Ind 1981). Stale information cannot support a finding of probable cause. *Lee v. State*, 545 N.E. 2d 1085 (Ind. 1989).

10.02.400 **NEUTRAL MAGISTRATE:** Determination of probable cause must be made by a neutral and detached magistrate to satisfy constitutional requirements. U.S. Const., Amend. IV; Ind. Const., art. 1, sec. 11; *Kinnaird v. State*, 242 N.E.2d 500 (Ind. 1968).

10.02.500 **AFFIDAVIT FOR SEARCH WARRANT REQUIREMENTS:** I.C 35-33-5-2 requires: (1) Specificity as to place to be searched or thing to be searched for. *Wade v. State*, 490 N.E.2d 1097 (Ind. 1986); *(2)* Allegations as to related offense. See *Wade;* (3) Facts which constitute probable cause. *Blalock v. State*, 483 N.E.2d 439 (Ind. 1985); and (4) If based on hearsay, conclusory statements or assertions are not enough to verify the information. Knowledge of affiant must be corroborated. Affidavit must provide magistrate with substantial basis for determining probable cause. *U.S. v. Leon*, 468 U.S. 897 (1984).

10.02.550 **CORROBORATION EXAMPLE DOG SMELL TEST:** *Neuhoff v. State*, p. 72, 708 E.E. 2d 889 (Ind. Ct. App., 1999). Positive smell test of package by

trained drug-sniffing dog was sufficient to support issuance of search warrant; here, mailed package drug smuggling profile factors corroborated smell test.

10.02.600 **TOTALITY OF CIRCUMSTANCES TEST:** This test requires the issuing magistrate to make a punctual common sense decision, when given all the circumstances set forth in the affidavit including the veracity and the basis of knowledge of persons supplying hearsay information, that there is a fair probability that contraband will be found in a particular place. See 68 Am. Jur. 2d 121; *Beverly v State* 543 N.E. 2d 1111 (Ind. 1989); *Illinois v. Gates*, 462 U.S. 2d 213, 231 (1983); *Bigler v. State*, 602 N.E.2d 509 (Ind. Ct. App. 1992); *May v. State*, 502 N.E.2d 96 (Ind. Ct. App. 1986); *Germaine v. State*, 718 N.E.2d 1125 (Ind. Ct. App. 1999), *trans. denied* 726 N.E.2d 316.

10.03.000 **CREDIBILITY OF INFORMANTS.** Affidavit declaring CI previously supplied information is sufficient to satisfy statutory requirement that credibility of CI be established. *Powers v. State*, 440 N.E.2d 1096 (Ind. 1982).

10.03.500 **CLASS OF INFORMANT:**

10.03.510 **CITIZEN INFORMANT**. Cooperative citizens are presumed reliable unless proven otherwise. *Pawloski v. State*, 380 N.E.2d 1230 (Ind. 1978). An eyewitness or a concerned parent is presumed reliable and does not need credibility affirmed. *Brooks v. State*, 526 N.E.2d 1027 (Ind. Ct. App. 1988).

10.03.520 **PAID INFORMANT:** An informant's reliability may be shown by corroborating facts which provide a substantial basis for crediting the tip. *Seltzer v. State*, 489 N.E.2d 939 (Ind. 1986). Track record helps establish reliability and should include a statement of how many times reliable information has been provided. *Power v. State* 440 N.E.2d 1096 (Ind. 1982).

10.03.530 **ANONYMOUS INFORMANT.** Hearsay information from anonymous sources requires sufficient corroboration to constitute probable cause to justify a search. See *Bradley v. State*, 609 N.E.2d 420 (Ind. 1993); *Alabama v. White*, 496 U.S. 325 (1993), (1982), *Lampkins v. State*, 628 N.E.2d 1268 (Ind. 1997) (anonymous tip was corroborated by other telephone calls received by police and a reliable confidential informant).

GOOD FAITH

10.04.200 **GOOD FAITH DOCTRINE:** Fourth Amendment exclusionary rule will not bar use of evidence obtained by officers acting in reasonable reliance on search warrant issued by magistrate, but later found to be unsupported by probable cause. *United States v. Leon*, 468 US 897 (1984). See also I.C. 35-37-4-5 (statutory good faith provision; includes not only reliance on warrants later found defective but also on statutes later held unconstitutional).

10.04.250 **DEFINITION AND CONDITIONS FOR APPLICATION OF GOOD FAITH DOCTRINE:** *Leon* applies to presumptively invalid warrant (issued on less than probable cause in *Leon* or with insufficient description as in *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S.Ct. 3424, 82 L.Ed.2d 737 (1984)).

10.04.270 **SITUATIONS IN WHICH GOOD FAITH NOT FOUND OR PRESUMED:** This does not apply in cases of police negligence, misconduct, in expired warrants, improper notification and entry, improper detainment, excessive scope of search, etc. *Dolliver v. State*, 598 N.E.2d 525 (Ind. 1992). Police officer is expected to have reasonable knowledge of what the law prohibits. *Woods v. State*, 514 N.E.2d 1277 (Ind. Ct. App. 1987).

10.10.000 **EXCEPTIONS TO WARRANT REQUIREMENT:** "When the prosecution seeks to introduce evidence that was seized during a warrantless search, it bears the burden of showing both the need for an exemption from the warrant requirement and that its conduct fell within the bounds of the exception." *Fair v. State*, 627 N.E.2d 427 (Ind. 1993).

10.10.100 **SEARCH INCIDENT TO LEGAL ARREST:** A search incident to a lawful arrest is an exception to the warrant requirement. The exception permits a search of the arrestee's person and the area within his or her control. *Culpepper v. State*, 662 N.E.2d 670, 675 (Ind. Ct. App. 1996) trans denied.

10.10.105 **WHAT IS AN ARREST:** "It has long been held that an arrest occurs when a police officer interrupts the freedom of the accused and restricts his liberty of movement." *Sears v. State*, 668 N.E.2d 662, 667 (Ind., 1993). Regardless of whether the police officer states the suspect is not under arrest, if she is handcuffed and not free to go, she has been arrested. *Stevens v. State*, 701 N.E. 2d 277, 280-281 (Ind. App. 1998).

10.10.130 **SCOPE OF WARRANT TO SEARCH RESIDENCE -** "[A] warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found." *U.S. v. Ross*, 456 U.S. 798, 821 (1982). "We agree with the courts that conclude the same reasoning applies to the yard

and outbuildings of a single residence". *Sowers v. State*, 724 N.E.2d 588, 590 (Ind. 2000).

10.10.140 **CURTILAGE**. The curtilage of the home, the area immediately surrounding the residence, is in most cases protected by the Fourth Amendment from unreasonable searches and seizures; the curtilage is determined by evaluating four factors: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *U.S. v. Dunn*, 480 U.S. 294, 301 (1987).

10.10.160 **OPEN FIELDS:** Open fields are usually not entitled to Fourth Amendment protection. The term "open fields" for purposes of the Fourth Amendment may include unoccupied or undeveloped, wooded or open, area outside of the curtilage, and need be neither "open" nor a "field", *Oliver v. U.S.*, 466 U.S. 170 (1984).

10.10.170 **AERIAL SURVEILLANCE.** An aerial search of "open fields" reveals things in plain view and may be conducted without a warrant. *Blalock v. State*, 483 N.E.2d 439 (Ind. 1985).

10.10.180 **PLAIN VIEW IN HOME.** Police can obtain probable cause for a search when they espy evidence of criminal activity in plain view when they look into a dwelling, but absent an exigent circumstance a warrant must be obtained to enter the dwelling in order to seize the evidence. *Haley v. State*, 696 N.E.2d 98, 102 (Ind. App. 1998) (equating tent with a residence under proper circumstances). Accord *Middleton v. State*, 714 N.E.2d 1099 (Ind. 1999) (off-duty officer touring a house for sale saw contraband but did not immediately seize it; warrantless police entry later without t proof of exigent circumstances or other exceptions violated Fourth Amendment).

10.10.200 **FLEETING EVIDENCE**. Police can enter home without a warrant when agents believe evidence within can be moved or destroyed before they can get to it. *Hawkins v. State*, 626 N.E.2d 436 (Ind. 1993). The standard is an objective and reasonable fear that the evidence will be destroyed. *Shephard v. State*, 690 N.E.2d 318 (Ind. App. 1997).

10.10.250 **EXIGENT CIRCUMSTANCES.** A situation in which facts of the case warrant quick action before a warrant can be obtained are recognized as exception. E.g., where police possess objective evidence that a violent crime had occurred or was about to occur, *Tata v. State*, 486 N.E.2d 1025 Ind. (1986), or when a burglary may be in process,*B.P.O.E. #576, Elks*

Club v. State, 413 N.E.2d 660(Ind. App. 1980), and *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995).

10.10.300 **AUTOMOBILES -SCOPE OF SEARCH.** There is a much lessened expectation of privacy in any type of motor vehicle. *U.S. v. Griffin*, 729 F.2d 475 (7th Circuit 1984). If probable cause justifies search of a lawfully stopped vehicle, it justifies search of every part of the vehicle that may conceal the object of the search. *Curry v. State*, 643 N.E.2d 963, 1994. Fleeting target exception for warrantless auto searches was established in *Carroll v. U.S.*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543(1925).

10.10.500 **PASSENGER COMPARTMENTS – SEARCH INCIDENT TO ARREST**. "If a defendant is arrested in an automobile, officers are permitted to search the entire passenger compartment of the vehicle, including 'closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like.'" *White v. State*, 772 N.E.2d 408, 411 (Ind. 2002), quoting *New York v. Belton*, 453 U.S. 454, 460 (1980). *Belton* was qualified in *Arizona v. Gant*, 556 U.S. 332 (2009), in which four justices stated "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest"; Justice Scalia concurred, but stated that he would prefer a rule allowing a warrantless vehicle search incident to arrest "only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred." If the warrantless arrest does not permit a *Belton* compartment search under the *Gant* rule, the search must be conducted under a warrant exception other than that for warrantless arrest. *Stark v. State*, 960 N.e.2d 997 (Ind. Ct. App. 2012) (holding officer safety exception permitted search when 3 passengers left in auto and arrested driver's behavior justified suspicion of possible weapon in vehicle).

10.10.700 **CLOSED CONTAINERS – PROBABLE CAUSE FOR EVIDENCE OF CRIME.** Where there is probable cause to believe that a vehicle contains evidence of a crime, a warrantless search of the vehicle does not violate the Fourth Amendment because of the existence of exigent circumstances arising out of the likely disappearance of the vehicle , and a warrantless search of a vehicle may also include a search of a container or package found in the vehicle. *California v. Acevedo*, 500 U.S. 565, 569 (1991). If police officers have probable cause to search a car, they may open and search closed containers of passengers' belongings found in the car that are capable of concealing the object of the search. *Wyoming v. Houghton*, 526 U.S. 295 (1999).

10.11.000 **INVENTORY SEARCH**. State must show inventory search was based on an "established departmental routine or regulation," and an inventory search of car is illegal if made without adherence to an established policy for inventories – conclusory testimony by police is not sufficient. *Wilford v. State*, No. 49S02-1602-CR-110, __ N.E.3d __ (Ind. Feb. 26, 2016). If an inventory is neither necessary nor consistent with policies, indications that the inventory rationale was a pretext can support the conclusion that there was no valid inventory search. *Bartruff v. State*, 706 N.E. 2d 225 (Ind. Ct. App. 1999).

10.11.500 **IMPOUNDMENT OF VEHICLE**. Police may impound a vehicle without a warrant when reasonable to do so as part of the community-caretaking function, to remove vehicles which are abandoned or obstruct traffic, create a nuisance, or invite thieves or vandals. *Wilford v. State*, No. 49S02-1602-CR-110, __ N.E.3d __ (Ind. Feb. 26, 2016). The State must show that impoundment without a warrant was reasonable because (1) the police, consistent with objective standards of sound policing, believed the vehicle posed a threat of harm to the community or was itself imperiled and (2) the decision to impound adhered to established departmental routine or regulation. *Fair v. State*, 627 N.E.2d 427, 433 (Ind. 1993). Community-caretaking impoundment can be reasonable "where the arrest of the driver [leaves] his car unattended on a public highway." *Id*.

10.14.000 **CONSENT**. If a voluntary and intelligent consent is given then a warrantless search of the area covered by the consent can take place. If the consent is revoked, search must stop. *Darnell v. State*, 435 N.E.2d 250 (Ind 1982).

10.14.200 **CONSENT IF IN CUSTODY.** A person asked to give consent to search while in police custody is entitled to the presence and advice of counsel prior to deciding whether to give such consent, *Pirtle v. State*,323 N.E.2d 634 (Ind. 1975); this right to counsel may be waived, but the burden is upon the State to show that a waiver is explicit, and, as in *Miranda,* the State is required to show that the waiver was not occasioned by the defendant's lack of funds. *Cooley v. State*, 682 N.E.2d 1277 (Ind. 1997). *Miranda* warnings to one in custody cannot substitute for *Pritle* right advice. *Sims v. State*, 413 N.E.2d 556 (Ind.1980), overruled on other grounds by *Wright v. State*, 658 N.E.2d 563 (Ind. 1995).. Also see *Jones v. State*, 655 N.E.2d 49 (Ind. 1995).

10.14.400 **VOLUNTARY CONSENT.** Consent must be freely and voluntarily given, not the result of duress or coercion. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) *U.S. v. Taylor*, 31 F.3rd 459 (7th Circ. 1994). To determine voluntariness of consent to search, the totality of circumstances must be

reviewed; factors to consider are (1) whether the defendant was advised of his *Miranda* rights prior to the request to search; (2) the defendant's degree of education and intelligence; (3) whether the defendant was advised of his right not to consent; (4) whether the detainee has previous encounters with law enforcement; (5) whether the officer made any express or implied claims of authority to search without consent; (6) whether the officer was engaged in any illegal action prior to the request; (6) whether the defendant was cooperative previously; and (7) whether the officer was deceptive as to his true identity or the purpose of the search. *Callahan v. State*, 719 N.E.2d 430 (1999).

10.14.500 **CONSENT BY ONE GENERALLY NOT CONSENT FOR SEARCH OF ANOTHER -** A driver's consent to search his vehicle does not constitute valid consent to search personal property of his passenger. *State v. Friedel*, 714 N.E.2d 1231 (Ind. Ct. App. 1999). *See also Krise v. State*, 718 N.E.2d 1136 (Ind. Ct. App. 1999), *transfer granted* (vacated Court of Appeals opinion which held that officers who gained entry to serve a civil body attachment on Ms. Krise invalidly searched her purse, found in her bathroom, when search was based upon consent of individual in her home who appeared to be her cohabitant and consented to a search "of the house").

10.14.600 **STATE HAS BURDEN TO PROVE VOLUNTARY CONSENT.** Government bears burden of proving voluntariness of consent to search and of custodial statement by preponderance of evidence; here, homeowners' acquiescence in search of her bedroom after granting express consent for search of son's room constituted valid consent. *Melton v. State*, 705 N.E.2d 564 (Ind. Ct. App. 1999).

10.14.750 **REQUIRED CONSENTS -** Work release condition requiring search without reasonable suspicion was overly broad. *Green v. State*, 719 N.E.2d 426 (Ind. Ct. App. 1999).

10.20.000 **MISDEMEANORS.** Police officers have right to arrest for misdemeanor when they have probable cause the person is committing a misdemeanor in officer's presence. I.C. 35-33-1-1(a)(4)

10.30.000 **ADMINISTRATIVE SEARCHES**. The Fourth Amendment grants protection against governmental agents other than law enforcement.

10.40.000 **HEALTH, FIRE OR BUILDING INSPECTORS.** Probable cause exists for administrative searches if reasonable administrative standards for inspections are satisfied. *City of Indianapolis v. Wright*, 371 N.E.2d 1298 (Ind. 1978).

10.50.000 **FIREFIGHTERS AND INVESTIGATORS**. "In dealing with fire-damaged premises, a warrant is required in the absence of consent or exigent circumstances, and the type of warrant required is determined by the object of the search. *Michigan v. Clifford*, 464 U.S. 287, 104 S. Ct. 641, 647, 78 L. Ed. 2d 477 (1984), reh'g denied, 465 U.S. 1084. An administrative warrant is sufficient if the object of the search is to determine the cause and origin of the fire; however, a criminal warrant is required if the primary object of the search is to gather evidence in a criminal investigation. *Id*."
Sloane v. State, 686 N.E.2d 1287, 1290-1291 (Ind. Ct. App. 1997)

10.60.000 **PUBLIC SCHOOLS**. "Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985). *See also Linke v. Northwestern School Corp.*, 763 N.E.2d 972 (Ind. 2002) (school's random drug test program for students in extracurricular activities did not, under circumstances, violate Ind. Constitution Art. 1, Section 11).

11.01.000 **ARRESTS**

11.02.000 **TYPES OF POLICE - CITIZEN CONTACT.** 1) Voluntary conversation where there are no 4th amendment implications [*see Overstreet v. State*, 724 N.E.2d 661 (Ind. Ct. App. 2000)]; 2) Investigative detention which involves a limited seizure of person by either physical force or show of authority. Requires a reasonable suspicion standard. [*Kenner v. State*, 703 N.E.2d 1122 (Ind. Ct. App. 1999)(forty-five minjute detention to obtain drug-sniffing dog during stop was permissible)]; 3) An arrest which requires probable cause and requires *Miranda* rights. This is when police take person into custody against one's will for purposes of criminal prosecution or interrogation, *California v. Hodari D.*, 499 U.S. 621 (1991). There is no bright line test for determining when investigatory detention becomes an arrest or custodial interrogation. It involves "an objective test asking whether a reasonable person under the same circumstances would believe that she was under arrest or not free to resist the entreaties of the police." *Florida v. Bostick*, 501 U.S. 429 at 433-34 (1991).

11.02.200 **AUTO STOP IS SEIZURE.** The stopping of an auto is a "seizure" which must be evaluated under the Fourth Amendment. *Johnson v. State*, 659 N.E.2d 116 (Ind 1995).

11.03.000 **SOBRIETY CHECKPOINTS**. Sobriety checkpoints are permissible under the Fourth Amendment and Indiana Constitution, Article 1, Section 11 if properly controlled and conducted. *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990); *State v. Gerschoffer*, 763 N.E.2d 960 (Ind. 2002).

11.03.100 **DRUG CHECKPOINTS** - A highway checkpoint whose primary purpose is the discovery and interdiction of illegal narcotics violates the Fourth Amendment. Unlike sobriety checkpoints, which have a direct relation to promotion of highway safety, narcotics checkpoints serve only the ever-present general purpose of crime control, for which stops can be justified only by some quantum of individualized suspicion. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

11.04.000 **STOPS ON REASONABLE SUSPICION.** Law enforcement officers have a right to make a brief investigatory stop of a person provided they have a reasonable and articulable suspicion that the person has been, is, or is about to be engaged in breaking the law. *Terry v. Ohio*, 392 U.S. 1 (1968). The requirements of the Fourth Amendment are satisfied if the facts known to the officer at the moment of the stop are such that a person "of reasonable caution" would believe that the "action taken was appropriate." *Id*. "The reasonable suspicion requirement is satisfied where the facts known to the officer, together with the reasonable inferences arising from such facts, would cause an ordinarily prudent person to believe that criminal activity has occurred or is about to occur." *Lyons v. State*, 735 N.E.2d 1179, 1184 (Ind. Ct. App. 2000).

11.04.100 **STOPS WITHOUT REASONABLE SUSPICION, WARRANT DISCOVERED –** When a police officer stops an individual without reasonable suspicion or probable cause in violation of the Constitution and:

- there is no flagrant police misconduct involved
- during the stop the officer discovers a valid, pre-existing warrant for the individual's arrest
- the warrant is entirely unconnected with the stop
- the officer makes an arrest based on the warrant

evidence seized pursuant to the arrest on the warrant is admissible, because the discovery of the warrant attenuates the connection between the stop and the evidence. *Utah v. Strieff*, 579 U. S. ___, 136 S. Ct. 2056, 195 L. Ed. 2d 400, 2016 U.S. LEXIS 3926 (2016). Note that it has not been determined whether the same result obtains under the Indiana Constitution.

11.04.200 **POT ODOR ENOUGH FOR PROBABLE CAUSE OR REASONABLE SUSPICION -** The smell of burnt marijuana emanating from a car creates probable cause to search the vehicle. *State v. Hawkins*, 766 N.E.2d 749, 752 (Ind. Ct. App. 2002), *trans. denied*.

11.04.400 **IRREGULAR DRIVING/TRAFFIC VIOLATION BASIS FOR REASONABLE SUSPICION.** Irregular driving pattern in a short distance may justify a stop. *Davis v. State*, 367 N.E.2d 1163 (1977). A traffic stop (pulling over after making a right turn without signaling) can satisfy "reasonable suspicion" standard regardless of police officer's motivation. *State v. Hollins*, 672 N.E.2d 427 (Ind. App. 1996).
Police properly stopped defendant for committing infraction, turning without use of signal under IC 9-21-8-24. *Peck v. State*, 712 N.E.2d 951 (Ind. 1999). But "hunches" are not enough, as when an uncentered flapping license plate did not suffice for reasonable suspicion. *Cash v. Sate*, 593 N.E.2d 1267 (Ind. Ct. App. 1992). An Indiana police officer may not stop a motorist to enforce the seat belt law unless the officer observes circumstances that would cause an ordinary person to agree that the driver or passenger is not wearing a seat belt. *Baldwin v. Reagan*, 715 N.E.2d 332 (Ind. 1999).

11.04.450 **NO FULL SEARCH ALLOWED FOR ROUTINE TRAFFIC STOP.** While concern for officer safety during a routine traffic stop for an infraction may justify the "minimal" additional intrusion of ordering a driver and passengers out of the car, it does not by itself justify the often considerably greater intrusion attending a full field- type search. *Knowles v. Iowa*, 525 U.S. 113 (1998). Circumstances occurring after the stop may create reasonable suspicion ofcriminal activity. *State v. Morris*, 732 N.E.2d 224 (Ind. Ct. App. 2000). Mere nervousness, however, does not alone confer reasonable suspicion. *D.K. v. State*, 736 N.E.2d 758 (Ind. Ct. App. 2000).

11.04.500 **ANONYMOUS TIP AS BASIS FOR REASONABLE SUSPICION.** Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity. An accurate description of a potential accused does not show tipster was accurate about criminal activity; however, there are situations in which an anonymous tip, suitably corroborated, exhibits sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop. *Florida v. J.L.*, 529 U.S. 266 (2000); *Lampkins v. State*, 628 N.E.2d 1268 (Ind. 1997).

11.04.700 **FLIGHT ALONE SOMETIMES SUPPORTS LIMITED INVESTIGATIVE STOP.** The circumstances of a flight from a clearly identified law enforcement

officer may furnish sufficient ground for a limited investigative stop. *Platt v. State* ,589 N.E.2d 222 (Ind. 1992). Compare *Stallings v. State*, 713 N.E.2d 922 (Ind. Ct. App. 1999) (insufficient basis for stop: group in high crime area dispersed and placed hands down front of pants when police approached) and *Webb v. State*, 714 N.E.2d 787 (Ind. Ct. App. 1999)(same) with *Illinois v. Wardlow*, 528 U.S. 119 (headlong flight does not necessarily indicate wrongdoing, but can be sufficient for a stop; holds investigative stop permitted when individual fled headlong from police in narcotics traffic area).

11.07.300 **WEAPONS INQUIRY -** The Fourth Amendment does not prevent police officers from routinely inquiring about the presence of weapons. *Lockett v. State*, 747 N.E.2d 539 (Ind. 2001). Federal Circuit Courts of Appeal have held that office inquiries about weapons are permissible as long as they do not unreasonably extend the duration of a stop. *Delatorre v. State*, 903 N.E.2d 506 (Ind. Ct. App. 2009).

11.07.500 **PAT DOWN SEARCHES**. When conducting pat down search officer need not know individual is armed, but "reasonably prudent person in same circumstance" must believe that officer's safety was in danger. Must be more than hunch, but can be a reasonable inference based on officer's experience. *Terry* search is confined to protective purposes. Must be patdown of outer garments and if something feels like a weapon officer may reach inside clothing. *CDT v. State*, 653 N.E. 2d 1041, 1045 (Ind. App. 1995). *See also Shinault v. State*, 668 N.E.2d 274 (Ind. Ct. App. 1996) (when patdown officer reasonably was not sure a cylindrical bulge he felt was not a weapon, he properly seized it even though he suspected the item could be marijuana), and *Wilson v. State*, 727 N.E.2d 775 (Ind. Ct. App. 2000), *reh. denied*.

11.11.000 **PLAIN FEEL**. An officer performing a proper patdown search for weapons may seize an item on the suspect's person if its identity as contraband is immediately apparent to officer by his sense of touch. *Burkett v. State* 691 N.E. 2d 1241 (Ind. App. 1998). But merely suspecting the nature of an object as contraband is insufficient. *Johnson v. State*, 710 N.E.2d 925, 928-930 (Ind App. 1999) (patdown cocaine had to be suppressed when officer testified he "believed" that the object in subject's watch pocket was "possibly" a narcotic).

11.20.000 **WARRANTLESS ARREST AUTHORITY**.

11.21.000 **FELONIES.** Arrest may occur when officer has probable cause to believe a felony has been or is being committed.

11.22.000 **MISDEMEANORS**. Officer may arrest for misdemeanors committed in his presence and for several statutorily-specified misdemeanors not committed in his presence. I.C. 35-33-1-1.

11.30.000 **WARRANT ARRESTS.** No warrant for arrest of a person may be issued until an indictment has been found charging him with the commission of an offense or a judge has determined that probable cause exists that the person committed a crime and an information has been filed charging him with a crime. I.C. 35-33-2-1.

11.30.100 **ARREST WARRANT FORM CONTENTS.** Pursuant to I.C. 35-33-2-2, the warrant form must specify name, identifiable description, nature of alleged offense, date and county of issuance. It must be signed by clerk or judge, and directed to sheriff with a command to arrest and specification of bail, if any.

11.30.200 **PLACE OF EXECUTION**. Under I.C. 35-33-2-3, any law enforcement officer may serve an arrest warrant at any time at any place, and the officer may break in to execute if not admitted after announcing authority and purpose.

11.30.230 **ARREST IN SUBJECT'S HOUSE**. Police must have an arrest warrant for an individual in order to enter his home to arrest, although in some emergency situations entry of a home for a wanted person may be permissible. *Payton v. New York*, 445 U.S. 573 (1980). Officer who entered residence without a warrant and without exigent circumstances was present illegally and resident could not be convicted of resisting arrest within the home. *Adkisson v. State*, 728 N.E.2d 175, 178 (Ind. Ct. App. 2000). Officers "in hot pursuit"of a suspect who retreats into his home may in some circumstances make a warrantless entry to prevent suspect's escape or the destruction of evidence. *U.S. v. Santana*, 427 U.S. 38 (1976).

11.30.240 **SCOPE OF RESIDENCE SEARCH INCIDENT TO ARREST.** Officers making an arrest in a residence may search the area subject to the arrested person's area of immediate control, and in some instances a "protective sweep" may be allowed. *Marifam v.Buie*, 494 U.S. 325 (1990).

11.30.250 **ARREST IN ANOTHER'S DWELLING.** Police may not execute an arrest warrant in the home of a third party without a judicial authorization to enter that home to make the arrest. *Steagald v. United States*, 451 U.S. 204 (1981).

11.30.400 **LIFE OF ARREST WARRANT**. Warrants for felony and re-arrest for any offense do not expire. Misdemeanor arrest warrants expire 180 days after issued. I.C. 35-33-2-4.

11.30.600 **KNOCK AND ANNOUNCE RULE.** The Fourth Amendment reasonableness inquiry includes the common-law knock and announce principle. *Wilson v. Arkansas*, 514 U.S. 927 (1995). Under I.C. 35-33-5-7(d), police are required to knock and announce their authority and purpose before forcing entry. *Davenport v. State*, 464 N.E.2d 1302 (Ind. 1984). Law enforcement officers may break in to execute a search warrant if not admitted following announcement of their authority and purpose, or if items sought might be destroyed or officers endangered. I.C. 35-33-5-7.

11.30.650 **EXCEPTIONS TO KNOCK AND ANNOUNCE.** To justify a "no-knock" entry, the police must have reasonable suspicion that knocking and announcing would be dangerous or futile or would inhibit effective investigation by, for example, allowing destruction of evidence. *Richards v. Wisconsin*, 520 U.S. 385 (1997).

11.30.700 **NO NEED TO PRESENT WARRANT.** There is no statutory or constitutional requirement that the officer executing a search or arrest warrant present the warrant to the search or arrest subject. *Smith v. State*, 562 N.E.2d 428 (Ind. Ct. App. 1990).

12.05.000 **ANTICIPATORY SEARCH WARRANTS.** An anticipatory warrant is "a warrant based upon an affidavit showing probable cause that at some future time (but not presently)[, and usually after the occurrence of a triggering condition,] certain evidence of crime will be located at a specified place." "[F]or a conditioned anticipatory warrant to comply with the Fourth Amendment's requirement of probable cause, two prerequisites of probability must be satisfied. It must be true not only that *if* the triggering condition occurs 'there is a fair probability that contraband or evidence of a crime will be found in a particular place,' . . . but also that there is probable cause to believe the triggering condition *will occur*." *United States v. Grubbs*, 547 U.S. 90 (2006). *See also Marchetti v. State*, 725 N.E.2d 934 (Ind. Ct. App. 2000).

12.06.000 **CHALLENGES TO WARRANT**. Errors in affidavit must be material to invalidate search warrant. *Murphy v. State*, 453 N.E.2d 219 (Ind. 1983). Search warrant issued on intentionally false statements necessary to finding of probable cause voids a search warrant. *Utley v. State*, 589 N.E.2d 232 (Ind. 1992). Burden is on defendant to show relevant matter in affidavits untrue. *Johnson v. State*, 472 N.E. 2d 892 (Ind. 1984). Suppression is appropriate if magistrate is misled by affiant. *Dolliver v. State*, 598 N.E.2d 525 (Ind. 1992).

12.07.000 **JURAT OR AFFIRMATION**. For probable cause simple affirmation under penalties for perjury satisfies requirement for sworn statement given under oath by notary. I.C. 35-34-1-2.4.

12.08.200 **TELEPHONIC WARRANTS** – I.C. 35-33-5-8(a)(2)

- The judge shall record the conversation on audio tape.
- The applicant shall recite the facts required for an affidavit and verify the facts recited under penalty of perjury.
- The applicant shall read to the judge from a warrant form on which the applicant enters the information read by the applicant to the judge.
- The judge may direct the applicant to modify the warrant. If the judge agrees to issue the warrant, the judge shall direct the applicant to sign the judge's name to the warrant, adding the time of the issuance of the warrant.
- The judge shall order the court reporter to type or transcribe the recording for entry in the record. The judge shall certify the audio tape, the transcription, and the warrant retained by the judge for entry in the record.
- The court reporter shall notify the applicant when the transcription required under this section is entered in the record. The applicant shall sign the transcribed entry upon receiving notice from the court reporter.

12.08.500 **FAX WARRANTS** – I.C. 35-33-5-8(a)(2)

- An applicant shall transmit to the judge an affidavit and a copy of a warrant form completed by the applicant.
- The judge may modify the transmitted warrant.
- If the judge agrees to issue the warrant, the judge shall sign, affix the date and time, and transmit to the applicant a duplicate of the warrant.
- The facsimile copy of the affidavit and warrant sent to the judge shall be retained as if they were the originals.

12.09.000 **E-MAIL WARRANTS** – I.C. 35-33-5-8(a)(4)

- An applicant shall transmit to the judge an affidavit and a copy of a warrant form completed by the applicant.
- The judge may modify the transmitted warrant.
- If the judge agrees to issue the warrant, the judge shall sign, affix the date and time, and transmit to the applicant a duplicate of the warrant.
- The facsimile copy of the affidavit and warrant sent to the judge shall be retained as if they were the originals.

12.09.200 **DENYING TELEPHONIC, FAX, OR E-MAIL WARRANT APPLICATIONS** – A warrant application may be summarily denied, without giving reasons for the denial, but the court in its discretion may make a general reference to the basis for the denial without identifying specific shortcomings. Examples of appropriate references for denial:

- Denied, inadequate description of property to be searched/items seized
- Denied, unclear about the reliability of the hearsay declarant
- Denied, stale information.

12.10.000 **EXECUTION.** I.C. 35-33-5-7.

12.11.000 **TIME PERIOD FOR EXECUTING WARRANT.** A warrant must be executed within 10 days after issuance and returned to court without unnecessary delay after execution and may be executed on any day at any time. I. C. 35-33-5-7(b)(1)

12.12.000 **WHO EXECUTES INDIANA SEARCH WARRANT.** Indiana statutes do not contemplate search warrant execution by persons other than law enforcement officers.

12.13.000 **TERRITORIAL SCOPE OF INDIANA WARRANT AUTHORITY.** A warrant issued by a court of record may be served anywhere in Indiana. A warrant issued a court which is not of record may be executed anywhere in the county of the issuing court. I.C. 35-33-5-7(a).

12.20.000 **WARRANT DOES NOT AUTHORIZE SEARCH OF UNNAMED SUBJECTS..** A warrant does not authorize the search of persons found on premises who are not named in warrant. *Ybarra v. Illinois*, 444 U.S. 85 (1979)

12.22.000 **BODILY INTRUSION SEARCH WARRANT**. In the absence of an emergency, a search warrant is required for an intrusive body search. *Schmerber v. California*, 384 U.S. 757 (1966). Even with implied consent laws, the withdrawal of a blood sample from a driver who does not consent where there is no accident and the driver is not taken to a hospital for treatment is an unreasonable search. *Justice v. State*, 552 N.E.2d 844 (Ind. Ct. App. 1990). I.C. 9-30-6-6 addresses procedures for police to obtain samples or test results from hospitalized motorists. Some intrusions involving examination of a person may require a warrant even though they involve no probing into the body or beneath the body surface. *McClain v. State*, 410 N.E.2d 1297 (Ind. 1980) (warrant required for penis swab).

12.26.000 **WARRANT FOR INVESTIGATORY SEIZURE TO OBTAIN EVIDENCE**. Under limited circumstances, a court may issue a warrant to seize a person for a limited period to obtain fingerprints, based on a showing that there is

strong cause to believe the fingerprints will provide a conventional probable cause basis for charging and arrest. *Baker v. State*, 449 N.E.2d 1085 (Ind. 1983).

12.26.100 **RECORDING SEARCH WARRANTS WHEN NO PROSECUTION PENDING -** Search warrants issued when no prosecution is pending should be assigned a miscellaneous CCS number. A card should be kept listing the CCS warrant numbers assigned and other pertinent identifying notes for such warrants. When a prosecution is filed and linked to a prior search warrant, the prosecution case number and the miscellaneous case number for the warrant should be cross-referenced. Lila Judson, Assistant State Court Administrator (7-16-93).

12.70.100 WARRANT **CONFIDENTIALITY UNTIL RETURN MADE -** A trial court has authority to order that a search warrant and associated materials be kept confidential until "the return of duly executed service". Ind. Administrative Rule 9(G)(2)(j).

12.95.010 AFFIDAVIT – PERSONAL KNOWLEDGE

SEARCH WARRANT AFFIDAVIT
(Personal Knowledge)

_____, of the _____Police/Sheriff's Department, swears that he/she believes and has probable cause to believe that certain property, hereinafter described, is/will be concealed in/upon the following described residence/premises/motor vehicle/person, to wit: _____
_____
_____located at _____, _____County, Indiana.

The property consists of the following: _____
_____
_____ which constitutes unlawfully obtained property/contraband/property used or possessed with the intent to use in the concealment of an offense/evidence of an offense.

In support of your affiant's assertion of Probable Cause, the following facts are within your affiant's personal knowledge, to wit: _____
_____
_____
_____.

Therefore, your affiant respectfully requests the Court to issue a SEARCH WARRANT directing the search for and SEIZURE of the above-described property.

I swear/affirm under penalty of perjury as specified by IC 35-44-2-1 that the foregoing representations are true.

Signed _____
AFFIANT

Subscribed to and sworn before me this _____ day of _____, 20__.

_____
My commission expires: _____ NOTARY PUBLIC

12.95.025 SEARCH WARRANT AFFIDAVIT –INFORMANT

SEARCH WARRANT AFFIDAVIT
(Informant)

_____, of the _____Police/Sheriff's Department, swears that he/she believes and has probable cause to believe that certain property, hereinafter described, is/will be concealed in/upon the following described residence/premises/motor vehicle/person, to wit: _____
_____
located at _____ _____
_____, _____County, Indiana.

The property consists of the following:_____
_____which constitutes unlawfully obtained property/contraband/property used or possessed with the intent to use in the concealment of an offense/evidence of an offense.

In support of your affiant's assertion of Probable Cause, your affiant would show the Court that he/she has received the following information from a reliable and confidential informant which facts the informant state to be within his personal knowledge, to-wit:
_____
_____
_____.

Your affiant believes and has probable cause to believe that the informant's information is reliable, based upon the following facts within your affiant's personal knowledge, to wit: _____
_____
_____.

I swear/affirm under penalty of perjury as specified by IC 35-44-2-1 that the foregoing representations are true.

Signed _____
_____
AFFIANT

Subscribed to and sworn before me this _____ day of _____, 20__.

_____
My commission expires: _____ NOTARY PUBLIC

12.95.050 ORDER FOR SEARCH WARRANT

STATE OF INDIANA) IN THE _____
) COURT OF _____
_____)

ORDER FOR SEARCH WARRANT

_____ appears and files Affidavit for Issuance of a Search Warrant: (H.I.)

The Court finds that the Affidavit particularly describes the place to be searched and the things to be searched for and seized; that it sets forth that such things as are to be searched for are there concealed; that it alleges substantially the offense in relation thereto; that it states that such search is for property which may be lawfully searched for and seized; that probable cause does exist for the issuance of the requested Search Warrant; and that a search should be issued in the following form: (H.I.)

The Officer who executes said Search Warrant shall make a return thereon directed to this Court indicating the date and time served and listing the items seized. Such items seized shall be security held by the law enforcement agency whose officer executed this warrant pursuant to order of the Court trying the cause.

So ORDERED this _____ day of _____, 20__.

_____
Judge

12.95.075 PREMISES SEARCH WARRANT

STATE OF INDIANA)
)
_____)

IN THE _____
COURT OF _____

SEARCH WARRANT

To _____Police/Sheriff's Department

You are hereby AUTHORIZED and ORDERED, in the name of the State of Indiana, with the necessary and proper assistance to enter into and upon the following premises: _____
and there to diligently search for the following described items:
_____

_____.

You are ORDERED to seize such items, or any part thereof, found on such search.

Dated this _____ day of _____, 20__, at _____ o'clock __ M.

_____
Judge, _____ COUNTY
_____ COURT

RETURN

I, the undersigned, executed this WARRANT on the _____ day of _____, 20__, at _____ o'clock ___M.

The following items were seized: _____
_____.

_____
_____ Department

12.95.100 RETURN ON WARRANT

STATE OF INDIANA)
) SS: IN THE _____ COURT
_____)

RETURN ON SEARCH WARRANT

TO: JUDGE OF THE _____ COURT

I, _____, a Law Enforcement Officer with the _____ Police/Sheriff's Department, having affirmed, hereby certify that this Search Warrant was served on the _____ day of _____, 20__, at _____ , ___M., and said place or premises described therein was duly searched and the following items were seized:

I HEREBY AFFIRM, UNDER THE PENALTIES FOR PERJURY, THAT THE FOREGOING REPRESENTATIONS ARE TRUE.

DATED:_____

_____
LAW ENFORCEMENT OFFICER
STATE OF INDIANA

12.95.125 BODY CAVITY SEARCH WARRANT – ORAL APPLICATION

STATE OF INDIANA

IN THE _____ COURT

IN RE THE SEARCH OF
_____ CAUSE NO. _____

ORDER

This matter having come before the Court upon an oral application of the Police/Sheriff's Office, the Court having heard sworn testimony in support thereof on _____, 20__, and the Court being otherwise sufficiently advised.
IT IS HEREBY ORDERED that the Police/Sheriff's Office shall transport _____ to the _____ Hospital for the following procedure and upon its completion shall return _____ to the _____ County Jail.

AND IT IS FURTHER ORDERED that the _____ Hospital and a licensed medical doctor from the Emergency Medicine Physicians Associates shall conduct a body cavity search or/or x-ray or other appropriate procedure upon the body of _____ to search for cocaine or any other controlled substance.

AND IT IS FURTHER ORDERED that any cocaine or controlled substance found during such search shall be securely held by the Police/Sheriff's Office until disposed of according to law.

SO ORDERED THIS _____ DAY OF _____, 20__.

_____
Judge

_____
Court

copies: Defendant
Police/Sheriff's Office _____
_____ Hospital

12.95.150 BODY CAVITY – ORDER TO SEARCH

STATE OF INDIANA)
)
_____)

IN THE _____
COURT OF _____

SEARCH WARRANT

TO ANY OFFICER OF THE _____ POLICE/SHERIFF'S OFFICE

WHEREAS, there has been filed with me an Oral Application For Search Warrant, which is of record, and having been examined by me, and sworn to before me, I now find there exists probable cause for the issuance of this Search Warrant, and you are therefore AUTHORIZED AND ORDERED, in the name of the State of Indiana, with necessary and proper assistance, to enter into or upon the following place or premises:

The body of _____, [insert description] , for a body cavity search and/or x-ray or other similar procedure,

and there diligently search for the following property:

Cocaine.

You are ordered to seize such property, or any part thereof, found on such search holding it security until disposed of according to law, and directing a return on this warrant to me.

Dated:_____, 20__.

_____
JUDGE

_____
COURT

12.95.175 BLOOD DRAW WARRANT

IN THE _____ COURT
COUNTY OF _____
STATE OF INDIANA

SEARCH WARRANT

TO: _____ County Sheriff's Department
_____ City Police Department
Indiana State Police
Indiana Department of Natural Resources
_____

The Court having reviewed the affidavit of _____ and being duly advised in the premises, now finds that probable cause for the issuance of this search warrant has been established.

You are authorized and ordered, in the name of the State of Indiana, with the necessary and proper medical and/or other appropriate health care professional assistance to obtain and remove a blood sample and urine sample from:

NAME: _____

DOB: _____

OLN: _____

and to use reasonable force to obtain such sample. You are ordered to seize the sample obtained on such search and to forward it to an appropriate laboratory facility for chemical analysis.

Dated this _____ day of _____, 20____, at the hour of _____.

_____
, Judge

_____ Court

Executed this _____ day of _____, 20____, at _____.

_____
Officer and Department

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13.00.000 INTERROGATIONS AND CONFESSIONS

13.01.010 **IN GENERAL -** The admissibility of a statement or confession is controlled by determining whether it was made voluntarily and not through inducement, violence, threats, or other improper influences so as to overcome the free will of the accused. *Warner v. State*, 579 N.E.2d 1307, 1309 (Ind. 1991). The question of voluntariness is for the trial court to decide based upon the totality of circumstances. *Id*. See also *Hicks v. State*, 609 N.E.2d 1165 (Ind. Ct. App. 1993).

13.20.100 **MIRANDA -** For a discussion of the validity and admissibility of self-inculpatory statements made by detainees and a general discussion on the *Miranda* exclusionary rule, see *Butler v. State*, 478 N.E.2d 126 (Ind. Ct. App. 1985). Under the *Miranda* doctrine, a statement which is the product of custodial interrogation is inadmissible unless the *Miranda* warnings were given. *Pasco v. State*, 563 N.E.2d 587, 593 (Ind. 1990). Custodial interrogation refers to questioning initiated by law enforcement officials after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id*. *See also Hicks v. State*, 609 N.E.2d 1165 (Ind. Ct. App. 1993).

13.20.150 **CUSTODY -** Custodial means a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Malott v. State*, 485 N.E.2d 875 (Ind. 1985). *Miranda* warnings are based upon the Fifth Amendment Self-Incrimination Clause, and were designed to protect an individual from being compelled to testify against himself. *Curry v. State*, 643 N.E.2d 963, 976 (Ind. Ct. App. 1994), *trans. denied.* However, the procedural safeguards of *Miranda* apply only when an individual is subjected to custodial interrogation. *Id*. Police officers are not required to give a defendant *Miranda* warnings unless the defendant is both in custody and subject to interrogation. *State v. Linck*, 708 N.E.2d 60 (Ind. Ct. App. 1990).

13.20.200 **INTERROGATION:** Interrogation includes both express questioning and words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Curry v. State*, 643 N.E.2d 963, 976 (Ind. Ct. App. 1994), *trans. denied.* However, interrogation must involve a measure of compulsion beyond that inherent in custody itself. *Id.; State v. Linck*, 708 N.E.2d 60 (Ind. Ct. App. 1999).

13.20.300 **INVOCATION OF RIGHT TO COUNSEL -** *Davis v. United States*, 512 U.S. 452 (1994) holds that "invocation of the *Miranda* right to counsel 'requires at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'" *Id*. at 459

(quoting *McNeil v. Wisconsin*, 501 U.S. 171 (1991)). The request for counsel must be made with sufficient clarity such that a "reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.*; see also *Taylor v. State*, 689 N.E.2d 699, 703 (Ind. 1997); *Alford v. State*, 699 N.E.2d 247, 250 (Ind. 1998).

13.20.350 **INVOCATION OF DESIRE NOT TO BE QUESTIONED - IMPEACHMENT -** In *Doyle v. Ohio*, 426 U.S. 610 (1976), the U.S. Supreme Court held that a state violates a criminal defendant's due process rights when it uses the defendant's silence after a *Miranda* warning to impeach him at trial. The Court grounded its opinion on two distinct rationales. First, it stated that a person's decision to remain silent after being advised of his *Miranda* rights is "insolubly ambiguous" evidence. *Id*. at 617. Second, the Court emphasized that the use of such silence for impeachment purposes is fundamentally unfair given that the *Miranda* warnings carry with them an implicit assurance that a person will not be penalized at trial for the exercise of those rights. *Id*. at 618. Subsequent cases have made clear, however, that it is not the ambiguity of the silence but the fundamental unfairness which is of primary importance. *Wainwright v. Greenfield*, 474 U.S. 284 (1986); *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

13.30.000 **VOLUNTARINESS -** The critical inquiry into the voluntariness of statements is whether, looking to all of the circumstances, the defendant's statements were induced by "violence, threats, promises or other improper influence." *Bivins v. State*, 642 N.E.2d 928, 942 (Ind.1994), *cert. denied*, 516 U.S. 1077 (1996); *Rowe v. State*, 444 N.E.2d 303, 304 (Ind.1983).

13.30.100 **COMPULSION -** Not all statements obtained by the police from a person in custody are the product of interrogation. Interrogation occurs when a person in custody is subjected either to express questioning or its functional equivalent, and reflects a measure of compulsion above and beyond that inherent in custody itself. *Staton v. State*, 428 N.E.2d 1203 (Ind. 1981); *Malott v. State*, 485 N.E.2d 875, 882 (Ind. 1985).

13.30.120 **VOLUNTARY STATEMENTS -** Voluntary statements which are not the result of custodial interrogation contemplated by Miranda are properly admitted into evidence. *Malott v. State*, 485 N.E.2d 875, 882 (Ind. 1985).

13.30.150 **ALL OF THE CIRCUMSTANCES TEST -** In order to be in custody for purposes of *Miranda*, one need not be placed under formal arrest. *Thompson v. State*, 692 N.E.2d 474, 476 (Ind. Ct. App. 1998). Rather, the determination is based upon whether the individual's freedom has been deprived in a significant way or if a reasonable person in the accused's circumstances would believe that he is not free to leave. *Id ; Cliver v. State*, 666 N.E.2d 59, 66 (Ind. 1996), *reh'g denied*. The determination

involves an examination of all the objective circumstances surrounding the interrogation. *Loving v. State*, 647 N.E.2d 1123, 1125 (Ind. 1995); *State v. Linck*, 708 N.E.2d 60 (Ind. Ct. App. 1999).

13.30.175 **INTOXICATION AND LACK OF SLEEP -** Intoxication and lack of sleep are merely factors to be considered by the trial court in determining voluntariness. *See Burdine v. State*, 515 N.E.2d 1085, 1092 (Ind. 1987), *reh'g denied*; *Deckard v. State*, 670 N.E.2d 1, 6 (Ind. 1996). In *Dunaway v. State*, 440 N.E.2d 682 (Ind. 1982), Defendant was drinking throughout the day, but three experienced police officers testified that defendant was sober, appeared clean and composed, walked in a normal manner without a stagger, used coherent speech, and did not smell of alcohol. It was uncontested that defendant was properly advised of his Miranda rights and stated that he understood them prior to all questioning. Court found his statement to be a voluntary confession.

13.30.185 **MENTAL ILLNESS -** Although a person's mental condition is relevant to the issue of susceptibility to police coercion, where the person voluntarily makes a confession without police coercion the confession may be considered in spite of the mental condition. *Pettiford v. State*, 619 N.E.2d 925, 928 (Ind. 1993); *Brown v. State*, 698 N.E.2d 1132, 1142 (Ind. 1998).

13.30.200 **FELONIES - RECORDING REQUIRED FOR CUSTODIAL STATEMENTS-** Indiana Evidence Rule 617. Unrecorded statements during custodial interrogation [effective January 1, 2011]:

(a) In a felony criminal prosecution, evidence of a statement made by a person during a Custodial Interrogation in a Place of Detention shall not be admitted against the person unless an Electronic Recording of the statement was made, preserved, and is available at trial, except upon clear and convincing proof of any one of the following:

(a)(1) The statement was part of a routine processing or "booking" of the person; or

(2) Before or during a Custodial Interrogation, the person agreed to respond to questions only if his or her Statements were not Electronically Recorded, provided that such agreement and its surrounding colloquy is Electronically Recorded or documented in writing; or

(3) The law enforcement officers conducting the Custodial Interrogation in good faith failed to make an Electronic Recording because the officers inadvertently failed to operate the recording equipment properly, or without the knowledge of any of said officers the recording equipment malfunctioned or stopped operating; or

(4) The statement was made during a custodial interrogation that both occurred in, and was conducted by officers of, a jurisdiction outside Indiana; or

(5) The law enforcement officers conducting or observing the Custodial Interrogation reasonably believed that the crime for which the person was being investigated was not a felony under Indiana law; or

(6) The statement was spontaneous and not made in response to a question; or

(7) Substantial exigent circumstances existed which prevented the making of, or rendered it not feasible to make, an Electronic Recording of the Custodial Interrogation, or prevent its preservation and availability at trial.

(b) For purposes of this rule, "Electronic Recording" means an audio-video recording that includes at least not only the visible images of the person being interviewed but also the voices of said person and the interrogating officers; "Custodial Interrogation" means an interview conducted by law enforcement during which a reasonable person would consider himself or herself to be in custody; "Place of Detention" means a jail, law enforcement agency station house, or any other stationary or mobile building owned or operated by a law enforcement agency at which persons are detained in connection with criminal investigations.

(c) The Electronic Recording must be a complete, authentic, accurate, unaltered, and continuous record of a Custodial Interrogation.

(d) This Rule is in addition to, and does not diminish, any other requirement of law regarding the admissibility of a person's statements.

13.40.010 **JUVENILE STANDARDS FOR VOLUNTARINESS**

13.40.030 **IN GENERAL -** Juvenile's confession was voluntary where there was no evidence of coercion by police, and officer's misstatement of the law regarding juveniles could not be considered as unfairly teasing juvenile to confess or inducing him to make an unreliable statement. *Carter v. State*, 686 N.E.2d 1254 (Ind. 1997).

13.40.100 **APPLICATION OF *MIRANDA* AND JUVENILE WAIVER STATUTE -** If juvenile is not in custody at the time he confesses, neither *Miranda* warnings nor the juvenile waiver statute applies. *A.A. v. State*, 706 N.E.2d 259, 262 (Ind. Ct. App. 1999).

13.40.120 **CONSTITUTIONAL RIGHTS AND JUVENILE CODE STANDARD -** Juvenile is entitled to the special protection for his constitutional rights to reject interrogation and to have counsel present, afforded by I.C. 31-32-5-1, which requires courts to reject as evidence the confession of a juvenile which is not preceded by a waiver of constitutional rights which is made by the juvenile or his parents after having had meaningful consultation. I.C. 31-32-5-1. In order to be meaningful, a consultation or genuine opportunity therefore must be timely, that is it must occur between the advisement to the two of the existence and nature of constitutional rights, and their choice to give up those rights. *Graham v. State*, 464 N.E.2d 1, 10 (Ind. 1984) (explained in dissent).

13.40.140 **INDIANA JUVENILE STANDARDS APPLY TO CONFESSIONS IN OTHER STATES -** Indiana's law on waiver of juvenile rights applied to a child's confession made in Illinois to Illinois police, and the confession was accordingly inadmissible even though Illinois law did not require any meaningful consultation as required by Indiana statute. *Stidham v. State*, 608 N.E.2d 699 (Ind. 1993) (applying former waiver statute I.C. 31-6-7-3, now codified as I.C. 35-32-5-1).

13.50.010 **STANDARDS FOR SUPPRESSION -** The State has the burden at a suppression hearing of proving that the defendant made a knowing and intelligent waiver of the rights to remain silent and the right to counsel. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mims v. State*, 255 Ind. 37, 262 N.E.2d 638 (1970). When a challenged confession is that of a juvenile, in carrying this burden the State must show that the juvenile and his parents or guardian were informed of the right to remain silent and to have counsel, and that the juvenile then waived these rights after an opportunity was granted the child and his parents, guardian or attorney to consult about the rights and the advisability of waiving them. *Lewis v. State*, 259 Ind. 431, 288 N.E.2d 138 (1972). In Indiana, such a waiver must be shown to have occurred beyond a reasonable doubt. *Burton v. State*, 260 Ind. 94, 292 N.E.2d 790 (1973); *Magley v. State*, 263 Ind. 618, 335 N.E.2d 811 (1975). See *Garrett v. State*, 351 N.E.2d 30, 32 (Ind. 1976). To determine whether the State has met its burden, the Court will consider evidence which supports the decision of the trial court respecting contested evidence and any uncontested evidence presented by appellant. *Garrett v. State*, 265 Ind. 63, 351 N.E.2d 30 (1976); *Douglas v. State*, 481 N.E.2d 107, 111 (Ind. 1985).

13.50.200 **BURDEN OF PROOF -** The State's burden, at the suppression hearing, to prove defendant made a knowing and intelligent waiver of his rights. *Douglas v. State*, 481 N.E.2d 107, 111 (Ind. 1985).

13.50.210 **BURDEN OF DEFENDANT-** Although the State bears the burden to prove the voluntariness of a confession when a hearing is held upon a motion to suppress a confession based upon a claim of involuntariness, the principle is limited by *Wiseheart v. State*, 491 N.E.2d 985 (Ind. 1986) which places a burden upon the

defendant at such a hearing to establish involuntariness due to drugs or intoxication. This principle has been criticized as contrary to the general constitutional principle that the State must establish voluntariness when that issue is raised. See Dissent in *Gibson v. State*, 515 N.E.2d 492 (Ind. 1987).

13.50.300 **UNLAWFULLY TAPE-RECORDED CONVERSATION -** A defendant's Fourth Amendment rights are not violated when the defendant's conversations with an informant are electronically monitored by a government agent with the consent of the informant. *United States v. White*, 401 U.S. 745 (1971), *reh'g denied*; *Lawhorn v. State*, 452 N.E.2d 915, 918-19 (Ind. 1983). The Indiana supreme court observed "the Fourth Amendment provides no protection to the wrongdoer who mistakenly believes that a person to whom he voluntarily confides his wrongdoings will not reveal it." *Snellgrove v. State*, 569 N.E.2d 337, 339-40 (Ind. 1991) *citing Hoffa v. United States*, 385 U.S. 293 (1966), *reh'g denied*. *See also Fozzard v. State*, 518 N.E.2d 789, 791-92 (Ind. 1988); *State v. Farber* 677 N.E.2d 1111 (Ind. Ct. App. 1985).

13.50.325 **CONFESSION AFTER WRONGFUL ARREST -** Where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after a warrantless arrest which violated the Fourth and Fourteenth Amendments of the United States Constitution under *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). See *New York v. Harris*, 495 U.S. 14, 21, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990); and *Cox v. State*, 696 N.E.2d 853, 858 (Ind. 1998).

13.50.330 **FRUIT OF THE POISONOUS TREE -** The "fruit of the poisonous tree" doctrine is one facet of the exclusionary rule of evidence which bars the admissibility in a criminal proceeding of evidence obtained in the course of unlawful searches and seizures. See *C.D.T. v. State*, 653 N.E.2d 1041, 1044-45 (Ind. Ct. App. 1995), *quoting Mapp v. Ohio*, 367 U.S. 643 (1961), *reh'g denied* ; *Mundt v. State*, 612 N.E.2d 566, 567, n.1 (Ind. Ct. App. 1993), *trans. denied*.; State v. Farber, 677 N.E.2d 1111 (Ind. Ct. App. 1997).

13.50.350 **CONSEQUENCES OF FRUIT OF POISONOUS TREE -** When applied, the doctrine operates to bar not only evidence directly obtained, but also evidence derivatively gained as a result of information learned or leads obtained during an unlawful search or seizure. *Wong Sun v. United States*, 371 U.S. 471 (1963); *Jackson v. State*, 669 N.E.2d 744, 750 (Ind. Ct. App. 1996); *Herald v. State*, 511 N.E.2d 5, 8 (Ind. Ct. App. 1987), *trans. denied*. To invoke the doctrine, a defendant must show that challenged evidence was obtained by the State in violation of the defendant's Fourth Amendment rights. *New York v. Harris*, 495 U.S. 14 (1990); J. Strong, *McCormick on Evidence* ' 176 (4th ed. 1992). Stated differently, the defendant must show that the search or seizure was illegal in the first instance.

Where there is no illegal search or seizure, there can be no "fruit of the poisonous tree." *Deckard v. State*, 670 N.E.2d 1, 6 (Ind. 1996); *Troyer v. State*, 605 N.E.2d 1183, 1185 (Ind. Ct. App. 1993), *trans. denied*. See *State v. Farber*, 677 N.E.2d 1111 (Ind. Ct. App. 1997).

13.50.400 **ATTENUATING CIRCUMSTANCES - GOOD FAITH:** The "good-faith exception" enunciated in *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), would permit admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective. This exception to the "exclusionary rule" has no application to warrantless searches. *United States v. Morgan*, 743 F.2d 1158 (6th Cir. 1984). See *Blalock v. State*, 476 N.E.2d 901 (Ind. Ct. App. 1985).

13.50.410 **EXCEPTIONS TO GOOD FAITH:** Suppression is the appropriate remedy where: (1) the judge or magistrate issuing the warrant was misled by information contained in the affidavit which the affiant knew or should have known was false, (2) the issuing magistrate completely abandons his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920(1979), (3) the affidavit is so lacking in indicia of probable cause that no reasonably well trained officer could believe in its existence, and (4) the warrant fails to identify with particularity the place to be searched or the items to be seized. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405 at 3421-22, 82 L. Ed. 2d 677 at 699 (1984). See *Blalock v. State*, 476 N.E.2d 901 (Ind. Ct. App. 1985).

13.60.000 **LINEUPS**

13.60.100 **ONE PERSON SHOW-UPS -** A one-person photographic lineup has been held to be impermissibly suggestive. *Dorsey v. State*, 490 N.E.2d 260 (Ind. 1986). However, whether a one-photographic lineup constitutes reversible error must be determined upon the totality of the circumstances. *Henson v. State*, 467 N.E.2d 750 (Ind. 1984); *Crawford v. State*, 550 N.E.2d 759, 760 (Ind. 1990).

13.60.120 **RIGHT TO COUNSEL -** Once charges are filed against defendant the Sixth Amendment right to counsel attaches to any critical stage in the proceedings, including pretrial identification lineups, in order to preserve defendant's right to a fair trial. *Kirby v. Illinois*, (1972) 406 U.S. 682 (1972); *Little v. State*, 475 N.E.2d 677, 682 (Ind. 1985).

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16.00.000 Extradition and Detainers

16.05.000 **EXTRADITION OVERVIEW**:

Interstate extradition is required by the federal Constitution and must conform to the procedures established by Congress in the Extradition Act of 1793, 18 U.S.C. Sec. 3182. *California v. Superior Court of California, San Bernardino County*, 482 U.S. 400 (1987).

To facilitate extradition with uniform procedures not expressly provided for in the federal statutes, forty-seven states have adopted some version of the Uniform Criminal Extradition Act. The three states which have not adopted this Act are Mississippi, North Dakota, and South Carolina.

The state seeking extradition is the "demanding state." The state from which the extradition is sought is the "asylum state". Extradition requires a demand (a "requisition" in the Uniform Act) from the demanding state's governor. A proper demand requires the asylum state's governor to order the extradition subject's arrest, by a "rendition warrant" (a "governor's warrant" in the Uniform Act), and the subject's delivery to agents of the demanding state. The Uniform Act authorizes the arrest of the subject, in various ways, to hold him until the governor's warrant can be issued. Once the governor's warrant is issued, the subject can make a limited challenge in the asylum state to the extradition, in what is termed a "habeas corpus" proceeding.

16.10.000 **WARRANTLESS ARRESTS:** Indiana authorizes warrantless arrests to hold individuals for extradition only if the subject is charged with a felony in another state. Such an arrest may be made upon "reasonable information" the subject "stands charged" in another state with "a crime punishable by death or imprisonment for a term exceeding one year." I.C. 35-33-10-3(15).

The subject of the warrantless arrest must be taken "before a judge" in Indiana "with all practicable speed" for a judicial determination, "under oath", that there is a felony charged against the subject in another state. I.C. 35-33-10-3(15).

Undue delay between a warrantless prerequisition arrest and the initial appearance before a judge in the asylum state raises due process issues and can be a basis for voiding the proceeding, including the arrest, but whether the delay was reasonable or not must be determined on the facts and circumstances of each case; a delay of four days to allow for the arrival of supporting documents from the demanding state was neither unreasonable nor a violation of the "with all practicable speed" required of the Uniform Act. *State v. Hughes*, 229 N.W.2d 655 (Wis. 1975).

16.10.300 **FUGITIVE ARREST WARRANTS:** Indiana judges are authorized to issue warrants to arrest individuals in order to hold them until an Indiana governor's warrant can be issued for their extradition. Such trial court warrants are commonly referred to as "fugitive warrants" in extradition law.

An Indiana fugitive warrant for a misdemeanor extradition subject may be issued only when the warrant is supported by an in-court sworn statement made before the judge. In

contrast, fugitive warrants may be issued for felony extradition subjects on the basis of either in-court sworn statements or affidavits executed in the demanding state. I.C. 35-33-10-3(14).

The fugitive warrant is to be addressed to the sheriff and orders the sheriff to arrest the subject and bring the subject before the court. A certified copy of the in-court sworn statement or the affidavit is to be attached to the fugitive warrant: I.C. 35-33-10-3(14).

NOTE: The current version of the Act authorizes fugitive warrants for those who have escaped from confinement, or who have violated their bail terms. Indiana has not adopted this version of the Uniform Act. (but see I.C. 35-33-10-3(5) ". . . or that the sentence or some portion of it otherwise remains unexecuted and that the person claimed has not been discharged or otherwise released from the sentence").

16.10.700 **ARREST PURSUANT TO GOVERNOR'S WARRANT:** Under the Uniform Act, a state may request another state's governor to extradite one charged with any crime by sending a formal requisition. The requisition must include a copy of the indictment or of the information accompanied by an affidavit setting forth the facts and circumstances constituting the probable cause, and must also include documents showing that the subject of the requisition is the same person as the subject of the indictment or information. Upon receipt of such a requisition, the governor of the asylum state investigates and, if he/she concludes that extradition is appropriate, issues a governor's extradition warrant. I.C. 35-33-10-3.

A person arrested under a governor's warrant may waive the procedural rights the person has under the Uniform Act. Subsequent to Indiana's adoption of the Act, the National Conference of Commissioners on Uniform State Laws approved the additional to the Act of a provision for the extradition subject's waiver of the rights the Act confers; this provision requires a written waiver executed before the judge of a court of record. The Indiana version is silent on the subject of waiver.

There must not be an unreasonable delay between the extradition subject's expression of intent to contest the legality of the extradition under a governor's warrant and the subject's appearance before a court of record. *Meek v. State*, 321 N.E.2d 205 (Ind. 1975).

The reasonableness of a delay in the appearance before a court of record when the subject wishes to contest extradition depends upon the facts and circumstances of the case. *See Application of Allen*, 357 P.2d 559 (Okla. 1960); *State ex rel. Jones v. Gann*, 584 S.W.2d 235 (Tenn. Cr. App. 1979).

Extradition is not a critical state of a criminal proceeding to which a constitutional right of counsel attaches, and the right to counsel in extradition is thus purely a matter of statute. *Roberts v. Hocker*, 456 P.2d 425 (Nev. 1969); *Wertheimer v. State*, 201 N.W.2d 383 (Minn. 1972).

The right to counsel conferred by the Uniform Act encompasses the habeas corpus proceeding only, and does not apply to the initial appearance before the court after a demand to contest an extradition. *Rutledge v. Preadmore*, 176 N.W.2d 417 (Mich. App. 1970)

If the subject of the governor's warrant is indigent, it is the intention of the Act that counsel be provided at public expense. *Ex parte Turner*, 410 S.W.2d 639 (Tex. Cr. App. 1967); *People v. Braziel*, 169 N.W.2d 513 (Mich. App. 1969).

16.15.000 HABEAS CORPUS PROCEEDING TO CONTEST EXTRADITION

At the habeas corpus proceeding to contest extradition, the sole issues are whether the requisition papers from the demanding state are in order on their face, whether the subject of the papers has been charged with a crime in the demanding state, whether the habeas petitioner in the court is the person named in the request for extradition, and whether the petitioner is a "fugitive from justice." *Decker v. State*, 577 N.E.2d 959 (Ind. 1991).

Under the federal Extradition Act, when the demanding state's extradition documents are in order and on their face charge a crime against the subject, an asylum state may not refuse extradition by making its own evaluation of trial issues (e.g., whether there is a meritorious defense or a basis for a dismissal of the charges). *California v. Superior Court of California, San Bernardino County*, 482 U.S. 400 (1987). *See also, e.g., People v. Superior Court of Los Angeles*, 182 Cal. Rptr. 132 (Cal. App. 1982) (speedy trial right not an issue in extradition hearing); *Sloss v. Sheriff of Leavenworth County*, 648 P.2d 255 (Kan. App. 1982) (credit against sentence in demanding state not an extradition issue).

Cases have considered competence to stand trial to be among the issues outside the scope of the habeas corpus proceeding, but some cases have held that lack of competence to assist counsel at the habeas corpus proceeding itself is a basis for delaying the proceeding. *Compare Kellams v. Buchignani*, 518 S.W.2d 788 (Ky. 1974) (competence to stand trial has no bearing on extradition) with *State ex rel. Jones v. Warmuth*, 272 S.E.2d 466 (W.Va. 1980) (lack of competence at the extradition proceeding requires delay).

A governor's warrant is presumptively valid and the burden is upon the petitioner to rebut the presumption of validity. *In Re Rowe*, 423 N.E.2d 167 (Oh. 1981). See 39 C.J.S. Extradition subsections 13 and 14 (discussion of issues concerning the sufficiency of demanding state's requisition).

A determination of probable cause in the demanding state that the subject committed a crime forecloses inquiry upon the subject in the asylum state. *Michigan v. Doran*, 439 U.S. 282 (1978).

The governor's warrant is prima facie evidence that the accused is a fugitive from justice and the burden is upon the petitioner to prove, beyond a reasonable doubt in most states, that he/she was not physically present within the demanding state at any time when it was possible for him/her to have committed the crime. *State ex rel. Hart v. District Court*, 485 P.2d 698 (Mont. 1971).

Whether the subject of the warrant has been charged with what would be a crime under the laws of the demanding state is a question of law, not an issue of fact. *Smith v. State of Idaho*, 373 F.2d 149 (9th Cir. 1967).

When identity of the petitioner as the person alleged to have committed the crime is put in issue by the petitioner's evidence, the burden is upon the state to prove identity, but if the names of the petitioner and the one accused of the crime are the same there is a rebuttable presumption of identity and the petitioner has the burden to show that he/she is not the person charged. *Notter v. Beasley*, 166 N.E.2d 643 (Ind. 1960).

The formal rules of evidence, except for those as to privilege, do not apply in Indiana extradition proceedings. Ind. Evid. R. 101.

Unsworn statements of absent witnesses may be considered. *Application of Mahon*, 219 N.W.2d 760 (Neb. 1982).

There is no inherent right to confront witnesses in the habeas proceeding to challenge extradition, but since identity is a question of paramount importance, the petitioner must be allowed to broadly cross-examine the identification witnesses against him. *Denbow v. Williams*, 672 P.2d 1011 (Colo. 1983).

16.20.000 EXTRADITION OF JUVENILES

An Indiana court having felony jurisdiction has concurrent original jurisdiction with the Indiana juvenile court if there is probable cause to believe that a child has committed an act that would be murder or a felony if committed by an adult, the child has left Indiana, and the juvenile court cannot obtain jurisdiction over the child in any other lawful way except under the proceedings authorized for the extradition of alleged felons; upon the return of the child under the criminal extradition law, the court having felony jurisdiction must immediately transfer the child to the juvenile court. I.C. 31-6-2-1.5.

16.25.000 EXTRADITION PROCEDURAL CHECKLIST

16.25.010 INITIATION OF PROCEEDINGS

Trial court extradition proceedings are commenced in the asylum state in the following three ways:

1. A request for a fugitive warrant, by either
   a.. in-court sworn testimony by any credible person that the subject committed a crime (felony or misdemeanor) in the demanding state and fled from justice; or
   b. the affidavit of "any credible person" stating that a felony was committed in the demanding state, that the subject has been charged with that felony, and that the subject fled and is believed to be in the asylum state;
2. The arrest of the subject without a warrant upon reasonable information that the accused stands charged in the courts of another state with a felony. The subject should be taken before a judge with all practicable speed and complaint must be made against the subject with the procedures set forth in either paragraphs 1.a. or 1.b. above.
3. The arrest of the subject upon a governor's warrant.

16.25.020 PROCEDURES FOLLOWING WARRANTLESS OR FUGITIVE WARRANT ARREST

The arrested subject is to be brought before a judge who is to determine whether the subject is "the person charged with having committed the crime alleged" and whether the

subject "probably committed" the crime alleged. If the Court so finds, it "shall commit" the person "to jail by a warrant reciting the accusation for such time specified in the warrant as will enable the arrest of the accused under a warrant of the governor." I.C. 35-33-10-3(16).

There is no right to counsel at the initial appearance after a warrantless prerequisition arrest. *See Rutledge v. Preadmore,* 176 N.W.2d 417 (Mich. App. 1970).

Unless charged with a crime punishable by death or life imprisonment, an individual must be admitted to bail during the period between his arrest without a governor's warrant and the time at which the governor's warrant is issued; after that time, the subject has no further entitlement to bail. I.C. 35-33-10-3(17). *State ex rel. Howard v. St. Joseph Superior Court,* 316 N.E.2d 356 (Ind. 1974).

Subsequent to Indiana's adoption of the Uniform Criminal Extradition Act, the National Conference of Commissioners on Uniform State Laws changed the Uniform Extradition Act to require that no more than thirty (30) days be allowed for the demanding state to obtain a governor's warrant to extradite a person seized in a warrantless or fugitive warrant arrest. The Conference also approved a provision for an additional sixty (60) days "recommitment" period, to extend the initial thirty (30) days. The Indiana version of the Act has not been amended to include these presumptively reasonable periods for detention pending issuance of a governor's warrant.

(If the arrest of the subject was without a warrant, the in-court sworn testimony or written complaint as required by 16.20.010, paragraphs 1.a. or 1.b. above, should be received. Thereafter, the procedures to be followed for the arrest of a subject either without a warrant or on a fugitive warrant are identical.)

1. Advise the subject of the allegations that have been made against the subject, using as much detail as the judge possesses.
2. Request the subject to answer the allegations.
3. Sufficient facts must be developed to make findings as to whether:
   a. the person held is the person charged with the alleged crime;
   b. the person Aprobably committed the crime"; and
   c. the person has fled from justice.
4. If the findings in 3. above are made, advise the subject that he or she will be committed to jail for a specified time in order to permit processing of a governor's warrant for extradition. (Thirty days may well be considered a presumptively reasonable period.)
5. Advise the subject that when the governor's warrant is received the subject will have the rights:
   a. to be informed of the demand for the subject's surrender;
   b. to be informed of the crime charged against the subject;
   c. to demand legal counsel and to have counsel appointed at public expense if the subject cannot afford counsel; and
   d. to test the legality of the extradition.
6. Advise the subject that the rights in 5. Above may be waived if the subject chooses and that if the subject does so he or she will be released to the custody of an agent of the demanding state and taken to that state to stand trial on the charges against him or her and that no further court proceedings in this matter will occur in Indiana. If the

subject indicates a desire to waive the rights in 5. above, and the court finds that the subject indicates a desire to waive the rights in 5. above, and the court finds that the waiver is freely and voluntarily given, have the subject execute the waiver form in writing in open court and accept the form in writing. (Use here the form at section 16.90.030). If a waiver is given and accepted, issue an order holding the subject pending release to the custody of an agent of the demanding state. If a waiver is not given and accepted, proceed as follows.

7. Establish bond for the subject's release from custody in an amount which will insure appearance at a time specified in the bond for the subject's surrender on a governor's warrant (unless subject is charged with offense punishable by death or life imprisonment).
8. Execute appropriate orders (e.g., 16.90.040, hereafter).
9. If the governor's warrant has not been received upon the expiration of the dates established either in paragraph 4 (for subject's incarceration) or paragraph 7 (for subject's release on bond), the subject may either be discharged or recommitted for a reasonable additional period.

16.40.030 PROCEDURES FOLLOWING RECEIPT OF GOVERNOR'S WARRANT

Use the following procedure following receipt of a governor's warrant and the subject's reduction to custody, if not already in jail or on bond:

1. Advise the subject that a formal demand for his surrender to the authorities of the demanding state has been made and granted by the governor of Indiana.
2. Advise the subject of the specific crime with which the subject is charged in the demanding state.
3. Advise the subject of the right to contest the extradition and of the right to an attorney in proceedings to contest extradition.
4. Advise the subject that if the subject desires an attorney and is unable to afford one, an attorney will be provided to represent the subject at public expense in these proceedings.
5. Advise the subject that the rights to test the legality of the extradition and to have an attorney to assist in doing so may be waived.
6. Determine whether the subject wishes to contest or to have an attorney represent him or her.
7. If the subject indicates a desire to contest but has no funds to retain counsel, determine indigency and appoint pauper counsel if appropriate.
8. Advise the subject that it is the subject's responsibility to test the legality of the arrest or to contest the validity of extradition by filing a petition for a writ of habeas corpus within a reasonable time.
9. Order a hearing to be held on a specified date if a petition for habeas corpus is not filed.
10. If the subject indicates a desire to waive the rights to test extradition, a waiver may be made in writing; if the trial court finds the waiver to have been freely and voluntarily given, the court may accept the waiver.
11. Issue appropriate orders (e.g., AOrder of Extradition Upon Governor's Warrant, chapter 16.90.050 hereafter).

16.40.040 HABEAS CORPUS PROCEDURES TO CONTEST EXTRADITION

1. Issues are whether:
   Form of extradition papers is proper on their face;
   Matter subject is to be extradited for is a crime under the law of the demanding state;
   Subject is the same person named in the request for extradition; and
   Subject is a fugitive from justice.
2. Governor's warrant is prima facie proof that the subject is a fugitive from justice, and the subject has the burden to rebut this proof by evidence showing beyond a reasonable doubt that subject was not within the demanding state at any time when it was possible for subject to have committed the crime.
3. Burden is upon the petitioner to present evidence disputing identity as the one sought under the governor's warrant, and if the names of the subject and the one named in the warrant are the same a rebuttable presumption of identity arises which petitioner must rebut by proof beyond a reasonable doubt.
4. Extradition papers supporting a governor's warrant are presumptively valid and the burden is upon the petition to prove a defect.
5. Formal rules of evidence do not apply, except to privilege.
6. Petitioner has no constitutional right to confront witnesses and accordingly there is no confrontation issue in the admission of hearsay, but petitioner should be allowed full cross-examination of any witnesses.
7. Exclusionary rules are inapplicable.
8. Determination adverse to the subject is appealable and delivery to the demanding state's agency should be stayed upon prompt avowal of intent to appeal; right to pauper counsel includes appeal and a transcript of the habeas proceeding.

16.50.000 INTERSTATE AGREEMENT ON DETAINERS

16.50.010 Overview

The Interstate Agreement on Detainers (IAD) is codified at I.C. 35-33-10-4, and provides two separate mechanisms for bringing a defendant who is serving a sentence in another state or federal institution within the jurisdiction of an Indiana court. Article 3 of the statute provides a procedure for the defendant to initiate a temporary transfer to Indiana, and Article 4 provides a procedure for the local prosecutor to initiate a temporary transfer.

The federal government, the District of Columbia, Puerto Rico, the Virgin Islands and forty-eight of the fifty states are parties to the agreement. *State v. Thompson*, 687 N.E.2d 225 (Ind. App. 1997) (Mississippi and Louisiana have not adopted the agreement).

"As a congressionally sanctioned interstate compact under the Compact Clause of the United States Constitution, Art. I, § 10, cl. 3, the Interstate Agreement on Detainers is a federal law subject to federal construction." *Alabama v. Bozeman*, 533 U.S. 146, 149 (2001).

16.60.000 PREREQUISITES FOR THE APPLICATION OF THE IAD:

16.60.100 SENDING STATE MUST BE PARTY TO IAD

The "sending state," the state in which the defendant is held**,** must be a party to the IAD. If a defendant incarcerated in Mississippi or Louisiana (i.e. states *not* party to the IAD) requests final disposition of Indiana charges, the prosecution still has an obligation to make every effort to try the defendant in a timely manner. However, the strict time limits of the IAD statute do not apply. *Ballentine v. State*, 480 N.E.2d 957 (Ind. 1985).

16.60.200 DETAINER MUST BE LODGED FOR THE CHARGE

There must be a detainer for the particular charge or charges lodged with the institution in which the defendant is incarcerated.

16.60.300 IAD INAPPLICABLE PENDING TRIAL OR SENTENCE OR FOR COUNTY JAILS

The defendant must be actually serving a term of imprisonment in a state penal or correctional institution in the sending state. The IAD does not apply to prisoners who are awaiting trial or sentencing in the sending state. Nor does the agreement apply to prisoners serving sentences in county jails. *Dorsey v. State*, 490 N.E.2d 260 (Ind. 1986).

16.60.400 IAD INAPPLICABLE TO PAROLE OR PROBATION VIOLATIONS

Because the detainer in Indiana must be based upon an "untried indictment, information or complaint, " the IAD does not apply to probation or parole violators, *State v. Thompson*, 687 N.E.2d 225 (Ind. App. 1997), or to defendants who escape after conviction.

16.65.000 PRISONER-INITIATED TRANSFERS

16.65.050 PROSECUTOR AND COURT MUST RECEIVE NOTICE FROM PRISON AUTHORITIES OF PRISONER'S TRIAL DEMAND -

A prisoner wishing to return to Indiana under the IAD to resolve untried charges for which detainers have been placed must give a written notice and request for disposition of the untried charges to the warden or other official having custody of him. The warden or other official must then forward the notice and

request, together with the warden's certificate of information regarding the prisoner's sentence, by registered or certified mail, return receipt requested, to the Indiana prosecutor and to the trial court. The prisoner's IAD right to trial within 180 days begins to run when the request for final disposition of the charges is delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer. *Fex v. Michigan*, 507 U.S. 43, 52 (1993). Compliance with the IAD notice and request procedures must be shown by a defendant who asserts the 180 days passed without trial. *See Bowling v. State*, 918 N.E.2d 701 (Ind. Ct. App. 2009), *transfer denied* (defendant's motion to dismiss correctly denied, as his evidence that prison authorities had sent his disposition request to the prosecutor did not suffice to prove IAD request had also been sent to the trial court or show the content of what had been sent to the prosecutor); *Greenwood v. State*, 665 N.E.2d 579 (Ind. 1996) (disposition request sent directly by the defendant rather than through the prison authorities does not trigger the IAD deadlines for trial).

The Committee suggests that, when a court receives a prisoner's request under the Interstate Agreement on Detainers for disposition of the charges on which a detainer against the prisoner is based, the best practice is for the Court to:

- make a record in the CCS of the court's receipt of the prisoner's IAD request,
- provide a copy of this record and of the prisoner's request to the prosecutor,
- advise the prosecutor on the CCS that the prosecutor has thirty (30) days to inform the court whether the prosecutor will proceed to trial or dismiss the charges, and
- advise the prosecutor that the Court notes the IAD requires that the prisoner/defendant be tried within one hundred eighty (180) days of the date the prisoner/defendant's request for final disposition of the charges is delivered to the court and the prosecutor.

16.65.070 PRISONER WAIVES EXTRADITION RIGHTS BY SEEKING TRANSFER

When a defendant requests final disposition under the IAD, he thereby waives extradition to the receiving state, as well as back to the sending state.

16.65.100 WARDEN MUST INFORM PRISONER OF IAD RIGHTS AND PROVIDE FORMS

The warden of the penal facility in the sending state has an obligation under the IAD to inform prisoners of their rights under the agreement, to provide the appropriate forms with which to invoke the agreement, and to promptly complete and forward the warden's certificate of inmate's status and offer of temporary custody to the prosecutor and court in the receiving state.

60.65.200 PROSECUTOR MUST FILE ACCEPTANCE FORM AND ARRANGE TRANSPORT

Upon receipt of the documents from the warden in the sending state, the prosecutor in the receiving state must file an "acceptance of temporary custody" form, and makes arrangements to transport the defendant.

16.65.300 PRISONER MUST BE TRIED WITHIN 180 DAYS

The defendant must be tried within 180 days of the date the request for final disposition was received by the court and the prosecutor in the receiving state. Any delays in the case that are attributable to the defendant extend that deadline by the same number of days. Also, failure to object to a trial setting outside of the 180 day deadline constitutes a

waiver of the "speedy trial" rights under the IAD. *Williams v. State*, 533 N.E.2d 1193 (Ind. 1989); *Reid v. State*, 670 N.E.2d 949 (Ind. App. 1996).

16.70.000 PROSECUTOR-INITIATED TRANSFERS

16.70.100 PROSECUTOR'S AUTHORITY TO REQUEST TRANSFER

The local prosecutor may request temporary custody of an out-of-state prisoner for the purposes of trial on pending charges for which detainers have been placed at the sending state institution.

16.70.150 WARDEN'S DUTIES AFTER PROSECUTOR'S REQUEST IS RECEIVED

After prison officials receive the request for temporary custody, they must notify the prisoner of the request, the nature of the pending charges, and of the detainer. The officials then must wait thirty (30) days to allow time for the sending state's governor to intervene under the Act to prevent the prisoner's production.

16.70.200 PRE-TRANSFER PROCEEDING

The prisoner has the right to a pre-transfer proceeding to challenge his production to the demanding state. *Cuyler v. Adams*, 449 U.S. 433 (1980); *Daher v. State*, 572 N.E.2d 1304 (Ind. App. 1991). The challenge proceeding is like the habeas corpus proceeding used to challenge extradition. *Cuyler v. Adams, supra*. There is no established rule as to whether the prisoner must be notified of this pre-transfer hearing right or who is to give such advice. There is some authority establishing that the lack of advice of the pre-transfer challenge procedure is not a basis for undoing an ensuing conviction in the demanding state. *See Shack v. Attorney General of Pennsylvania*, 776 F.2d 1170 (3rd Cir. 1985) (holding no effect on conviction but observing denial of the right to the pre-transfer hearing would afford a basis for a federal civil rights action against officials in the sending state). The Benchbook Committee thinks the better conclusion is that the officials in the sending state's prison should give the prisoner advice of the challenge hearing; the Committee concludes that the judge in the demanding state does not have a responsibility to advise the prisoner about the challenge procedure.

16.70.250 PETITION FOR HABEAS CORPUS

The prisoner commences the pre-transfer procedure by filing a petition for writ of habeas corpus, based upon misidentification, lack of charges in the receiving state, or deficiencies in the demand for production papers.

16.70.500 PRISONER MUST BE TRIED WITHIN 120 DAYS OF ARRIVAL IN RECEIVING STATE

The prisoner must be tried within 120 days of the date of his/her arrival in the receiving state.

16.75.000 TIME LIMITATIONS

16.75.100 180 OR 120 DAY PERIODS EXTENDABLE FOR "GOOD CAUSE"

The IAD time limitations require that the prisoner's trial begin within 180 days of the receipt of the prisoner's request for disposition by the court, or within 120 days of the prisoner's arrival in the receiving state when the transfer is initiated by the prosecutor. Either of those time limits may be extended upon a showing of "good cause", which may

include the unavailability of the trial judge, a congested docket due to a higher priority case, or pre-trial motions filed by the defendant that result in delays.

16.75.500 TIME LIMITS TOLLED WHEN PRISONER IS UNAVAILABLE

Additionally, the time limits may be tolled during any time periods in which the prisoner is unavailable to stand trial. *See Vaden v. State*, 712 N.E.2d 522 (Ind. App. 1999) (defendant requested disposition in two states; time for bringing the defendant to trial in Indiana tolled for the 61 days that he was held in the other "receiving state" because he was "unavailable" during that time.)

16.80.000 "ANTI-SHUFFLING" PROVISIONS OF THE IAD

16.80.100 ALL DETAINERS AGAINST PRISONER MUST BE RESOLVED BEFORE HIS RETURN

A prisoner who initiates transfer under Article III is entitled to disposition of all charges for which detainers have been placed by the receiving state. Any of those charges which remain untried upon the defendant's return to the sending state must be dismissed with prejudice. (IAD, Art. III, ¶ (d).)

When the prosecutor initiates the transfer under Article IV, the prosecutor has an obligation to dispose of all pending charges for which detainers have been placed. Failure to do so prior to the return of the prisoner to the sending state must result in the dismissal of any untried charges. (IAD, Art. IV, ¶ (e).)

16.82.000 RETURN TO THE SENDING STATE

16.82.100 RETURN AT "EARLIEST PRACTICABLE TIME"

The IAD requires that the prisoner be returned to the sending state "at the earliest practicable time". (IAD, Art. V, ¶ (e).) This requires return of the prisoner to the sending state prior to appeal of any conviction(s) obtained in the receiving state, and prior to service of any sentences imposed in the receiving state. After the prisoner has completed service of his/her sentence in the sending state, the prisoner must be extradited back to serve his/her sentence in Indiana.

16.85.000 SANCTIONS FOR VIOLATION OF THE IAD

16.85.100 SANCTION OF DISMISSAL IS LIMITED

Under the IAD, dismissal is called for only when a defendant has not been tried within the requisite time limitations, or when a defendant is returned to the sending state before all pending detainers are resolved in the receiving state. The IAD does not specifically delineate sanctions for other violations of the agreement. The fact that a defendant is illegally transferred from one state to another does not affect the receiving state's jurisdiction over the defendant. *See Brennan v. State*, 639 N.E.2d 649 (Ind. 1994).

16.87.000 CHECKLIST - PROCEDURES TO CONTEST PRODUCTION

Use the following procedure following the filing of a petition for a extradition-type habeas corpus hearing for a prisoner sought to be taken by another state from an Indiana penal facility pursuant to Article 4 of the Interstate Agreement on Detainers:

1. The petition should be filed with the circuit or superior court of the county in which the prisoner is held. If the prisoner is not in the county where the petition was filed, transfer the petition to the correct court.
2. It is customary for the prosecuting attorney to appear on behalf of the demanding state in Interstate Agreement on Detainers hearings.
3. When the petition is filed in the county in which the prisoner is held, issue an order to the penal facility to release the prisoner to the sheriff to be brought to court for an advice of rights hearing, and send notice to the prosecutor.
4. At the advice of rights hearing, advise the subject that a formal demand for his surrender to the authorities of the demanding state has been made.
5. Advise the subject of the specific crime with which the subject is asserted to be charged in the demanding state.
6. Advise the subject of the right to contest [name state]'s request for production and of the right to an attorney in proceedings to contest production.
7. Advise the subject that if the subject desires an attorney and is unable to afford one, an attorney will be provided to represent the subject at public expense in these proceedings.
8. Advise the subject that the rights to test the legality of the request for production and to have an attorney to assist in doing so may be waived.
9. Determine whether the subject wishes to contest or to have an attorney represent him or her.
10. If the subject indicates a desire to contest but has no funds to retain counsel, determine indigency and appoint pauper counsel if appropriate.
11. Advise the subject that it is the subject's responsibility to test the legality of the request by filing a petition for a writ of habeas corpus within a reasonable time.
12. Specify a reasonable date by which a petition for habeas corpus must be filed.
13. If the subject indicates a desire to waive the rights to test the request for production, a waiver may be made in writing; if the trial court finds the waiver to have been freely and voluntarily given, the court may accept the waiver.
14. Issue appropriate orders (e.g., schedule a date for the habeas corpus hearing).

16.88.000 CHECKLIST - HABEAS CORPUS HEARING TO CONTEST IAD PRODUCTION

1. Issues are whether:
   Form of paper requesting production is proper on its face;
   Matter subject is to be produced for is a crime under the law of the demanding state;
   Subject is the same person named in the request for production;
   Subject is a fugitive from justice.
2. Fugitivity burden is on prisoner to prove beyond a reasonable doubt that he or she was not in the demanding state at any time when it was possible for him or her to have committed the crime.
3. Burden is upon the petitioner to present evidence disputing identity as the one sought under the request for production, and if the names of the subject and the one named in the request are the same a rebuttable presumption of identity arises which petitioner must rebut by proof beyond a reasonable doubt.
4. Papers requesting production are presumptively valid and the burden is upon the petitioner to prove a defect.
5. Formal rules of evidence do not apply, except as to privilege.
6. Petitioner has no constitutional right to confront witnesses and accordingly there is no confrontation issue in the admission of hearsay, but petitioner should be allowed full cross-examination of any witnesses.
7. Exclusionary rules are inapplicable.
8.. Determination adverse to the subject is appealable and delivery to the demanding state's agent should be stayed upon prompt avowal of intent to appeal; right to pauper counsel includes appeal and a transcript of the habeas proceeding.

16.90.000 EXTRADITION FORMS AND DIALOGUES

16.90.010 AFFIDAVIT OR IN-COURT SWORN STATEMENT FOR ISSUANCE OF FUGITIVE WARRANT

STATE OF INDIANA)
) SS:
COUNTY OF _____)

_____ COURT

CAUSE NO. _____

IN RE: EXTRADITION OF:

_____

AFFIDAVIT OR IN-COURT SWORN STATEMENT FOR ISSUANCE OF FUGITIVE WARRANT

I, _____, having been first duly sworn, do say as follows:

The Respondent named above is believed to be in Indiana.
Said Respondent committed a crime, [name crime], in and under the law of [demanding state].
Said Respondent is charged with this crime in [demanding state].
Said Respondent has fled from justice.

Affiant further sayeth not.

_____

Place notary's certification here or have the form be used in open court for the fugitive warrant application with the following certification:

The undersigned, _____, being the duly appointed Court Reporter for the _____ Court, sitting at _____, Indiana, hereby certifies the foregoing to be a true and correct partial transcript of proceedings held before the Honorable _____, Judge, at a hearing on the above entitled matter on the _____ day of _____, _____.

WITNESS my official hand and seal this ____ day of _____, _____.

_____
Court Reporter

(TO BE ATTACHED TO WARRANT)

16.90.020 DIALOGUE FOR INITIAL APPEARANCE AFTER EXTRADITION ARREST.

This case is entitled In Re the Extradition of _____, Cause Number _____. The Respondent is present in person and the State of Indiana is represented by _____. We are here for purposes of conducting an extradition hearing.

(If the arrest of the Respondent was made without a warrant, in-court sworn testimony stating that the subject committed a crime in another state and that the subject fled from justice should be received, or written complaint by affidavit from another state that a felony has been committed in that state and that the subject has been charged with that felony should be received.)

SWEAR THE DEFENDANT

Would you state your name for the record please?

Mr./Ms. _____, you are being held because it is alleged that you committed a crime in the state of _____. Specifically, you are accused of committing the crime of _____ on the ____ day of _____, _____.

Would you like to answer this allegation made against you?

The Court now finds that the Respondent, _____, is the person charged with having committed the crime alleged in the state of _____, that Respondent probably committed said crime, and that Respondent has fled from justice.

Mr./Ms. _____, you are advised that you will be committed to the _____ County Jail for an initial period of thirty days to await receipt of a governor's warrant for your extradition from the state of Indiana.

You are further advised that when the governor's warrant is received you will also have the rights:

to be informed of the demand for your surrender;
to be informed of the crime with which you have been charged;
to demand legal counsel and to have counsel appointed for you at public expense if you cannot afford to hire counsel at your own expense; and
to contest your extradition to the state of _____.

You may waive and give up these rights if you choose and if you do, you will be released to the custody of the authorities of the state of _____ and be taken there to stand trial on the charges against you and no further court proceedings in the state of Indiana will occur in this matter. Do you wish to waive these rights?

[If Respondent indicates a desire to waive, proceed as follows: (See 16.90.030, Advice and Waiver of Extradition Rights)

Have you received any promises or been given anything of value to induce you to give up these extradition rights?

Has anyone forced or threatened you to induce you to waive these rights?

Do you feel that this waiver is your own free and voluntary act?

You have been given a form entitled “Advice and Waiver of Extradition Rights”. Have you read and do you understand everything that is on that form?

(Respondent signs the form and the Court signs and reads the finding on the bottom of the form into the record.)]

[If Respondent does not waive extradition rights, establish an appropriate bond amount (unless the offense is punishable by death or life imprisonment and hence no bail is allowed) as will insure Respondent’s appearance upon receipt of the governor’s warrant. Specify a time and date certain for respondent’s surrender.]

[CONCLUDE PROCEEDINGS BY ANNOUNCING ORDER OF THE COURT. SEE 16.90.040 HEREAFTER, “ORDER UPON INITIAL EXTRADITION APPEARANCE.”]

16.90.030 ADVICE AND WAIVER OF EXTRADITION RIGHTS

IN RE: THE EXTRADITION OF

_____ CAUSE NO. _____

ADVICE AND WAIVER OF EXTRADITION RIGHTS

The undersigned Respondent, having been arrested [without a warrant] [upon a fugitive warrant] and being held in the _____ County Jail, has been duly advised that when the governor's warrant for Respondent's extradition is received Respondent will have the rights:

to be informed of the demand for Respondent's surrender;
to be informed of the crime with which Respondent is charged;
to demand legal counsel and to have counsel appointed at public expense if Respondent cannot afford to hire counsel at Respondent's own expense; and
to test the legality of extradition.

The undersigned Respondent is further informed that he/she can waive and give up these rights if he/she chooses and that if he/she does so he/she will be released to the custody of an agent of the demanding state and taken there to stand trial on the charges against him/her.

THE UNDERSIGNED NOW WAIVES THE RIGHTS EXPLAINED ABOVE AND CONSENTS TO BE RELEASED TO THE CUSTODY OF AN AGENT OF THE DEMANDING STATE TO BE TAKEN THERE TO STAND TRIAL ON THE CHARGES AGAINST HIM/HER.

Dated this _____ day of _____, _____.

_____
Respondent

Respondent having been brought before the Court and examined under oath, the Court now finds that Respondent voluntarily and upon his/her own free will executed the foregoing Waiver of Extradition Rights.

Dated this _____ day of _____, _____.

_____
Judge, _____ Court

16.90.040 ORDER UPON INITIAL EXTRADITION APPEARANCE

IN RE: THE EXTRADITION OF

_____ CAUSE NO._____

ORDER UPON INITIAL EXTRADITION APPEARANCE

Respondent appears in Court in person and the State of Indiana appears by _____. This matter is now submitted to the Court for initial appearance of Respondent following Respondent's arrest [without warrant] [upon a fugitive warrant] upon the request of the state of _____ that Respondent be returned to said state to stand trial on charges there pending against Respondent. Respondent is advised of the nature of said charges and is given opportunity to answer the charges. Evidence is heard and concluded.

The Court being duly advised finds that Respondent herein is the person charged with having committed the crime alleged and that Respondent has fled from justice. Respondent is advised that Respondent will be committed to the _____ County Jail for an initial period of thirty (30) days to await receipt of a governor's warrant for his/her extradition. Respondent is further advised of the rights that he/she will have when the governor's warrant is received and that Respondent can waive those rights if he/she chooses.

[Respondent now executes written waiver of extradition rights and the Court finds the waiver to be freely and voluntarily given. The Court orders the _____ County Sheriff to hold Respondent for a period not to exceed thirty (30) days and to turn Respondent over to the authorities of the state of _____ upon presentation of proper identification and warrants.]

OR

[Respondent now declines to waive extradition rights. The Court orders that bail herein be set in the amount of $_____, cash or surety, conditioned upon Respondent's surrender herein on _____, _____, at _____ o'clock __.m. on the governor's warrant or for other appropriate proceedings.]

So ORDERED this _____ day of _____, _____.

_____

Judge, _____ Court

16.90.050 ORDER OF EXTRADITION ON GOVERNOR'S WARRANT

IN RE: THE EXTRADITION OF

_____ CAUSE NO. _____

ORDER OF EXTRADITION UPON GOVERNOR'S WARRANT

Respondent now appears in Court in person and the State of Indiana appears by _____. This matter is before the Court for hearing on the demand of the state of _____ for Respondent's surrender to that state's authorities.

The Court advises Respondent:

That a demand has been made for Respondent's surrender to the authorities of the state of _____ and the same has been granted by the governor of Indiana;
That Respondent is charged with the crime of _____- in the demanding state;
That Respondent has the right to test the legality of the extradition and that if Respondent chooses to do so he/she has the right to have an attorney represent him/her in those proceedings; and
That if Respondent desires an attorney and is unable to afford one, an attorney will be appointed to represent him/her at public expense at the contest proceedings.

[Respondent indicates a desire to waive extradition rights and executes written waiver thereof. The Court finds said waiver to be freely and voluntarily given. The Court orders the _____ County Sheriff to hold Respondent without bail for a period not to exceed thirty (30) days and to turn custody of Respondent over to authorities of the state of _____ upon presentation of proper identification and warrants.]

OR

[Respondent indicates a desire to contest extradition and requests appointment of counsel. Evidence heard on the question of Respondent's indigency. The Court appoints the Public Defender to represent Respondent at a hearing on a writ of habeas corpus to be filed within thirty (30) days from the date of this order. The Court set the _____ day of _____, _____, at _____ o'clock ___.m. for further proceedings herein only in the event that application for a writ of habeas corpus has not been filed within said thirty (30) day period. Respondent shall be held without bail pending hearing on said application for writ of habeas corpus.]

So ORDERED this ____ day of _____, _____.

_____

JUDGE, _____ COURT

16.95.000 DETAINERS FORMS

16.95.010 FORM I –NOTICE OF UNTRIED CHARGE AND RIGHT TO REQUEST DISPOSITION

Agreement on Detainers: Form I

In duplicate. One copy of this form, signed by the prisoner and the warden, should be retained by the warden. One copy, signed by the warden, should be retained by the prisoner.

NOTICE OF UNTRIED INDICTMENT, INFORMATION OR COMPLAINT AND OF THE RIGHT TO REQUEST DISPOSITION

Inmate _____ No. _____ Institution _____

Pursuant to the Agreement on Detainers, you are hereby informed that the following are the untried indictments, informations or complaints against you concerning which the undersigned has knowledge and the source and contexts of each.

You are hereby further advised that by the provisions of said Agreement, you have the right to request the appropriate prosecuting officer of the jurisdiction in which any such indictment, information or complaint is pending and the appropriate court that the final disposition be made thereof. You shall then be brought to trial within one-hundred and eighty (180) days, unless extended pursuant to provisions of the Agreement, after you have caused to be delivered to said prosecuting officer and said court, written notice of the place of your imprisonment and your said request, together with a certificate of the custodial authority as more fully set forth in said Agreement. However, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Your request for final disposition will operate as a request for final disposition of all untried indictments, informations and complaints on the basis of which detainers have been lodged against you from the State to whose prosecuting official your request for final disposition is specifically directed. Your request will also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein and a waiver of extradition to the state of trial to served any sentence there imposed upon you, after completion of your term of imprisonment in this state. Your request will also constitute a consent by you to the production of you in any court where your presence may be required in order to effectuate the purposes of the Agreement on Detainers and a further consent voluntarily to be returned to the institution in which you are now confined.

Should you desire such a request for final disposition of any untried indictment, information or complaint, you are to notify _____ of the institution in which you are confined.

You are also advised that under provisions of said Agreement, the prosecuting officer of a jurisdiction in which any such indictment, information or complaint is pending may institute proceedings to obtain a final disposition thereof. In such event, you may oppose the request that you be delivered to such prosecuting officer or court. You may request the Governor of this state to disapprove any such request for your temporary custody but you cannot oppose delivery on the grounds that the Governor has not affirmatively consented to or ordered such delivery.

DATED: _____ BY:_____

WARDEN - SUPERINTENDENT - DIRECTOR

RECEIVED:
DATE: _____

16.95.020 Form II -Inmate's request for disposition

Agreement on Detainers: Form II

Five, signed copies are needed for each jurisdiction within the receiving state that has an indictment, information or complaint pending.: one each to be retained by the prisoner and the warden; one sent to the Agreement Administrator of the state which has the prisoner incarcerated, one sent to the prosecuting official of the jurisdiction which placed the detainer, and one to the clerk of the court which has jurisdiction over the matter. The copies for the prosecuting officials and the court must be transmitted by certified or registered mail return receipt requested.

INMATE'S NOTICE OF PLACE OF IMPRISONMENT AND REQUEST FOR DISPOSITION OF INDICTMENTS, INFORMATIONS OR COMPLAINTS

TO:_____,ProsecutingOfficer_____
__ (jurisdiction)
_____, Court _____
(jurisdiction)

And to all other prosecuting officers and courts of jurisdictions listed below from which indictments, informations or complaints are pending. **YOU ARE HEREBY NOTIFIED THAT THE UNDERSIGNED IS NOW IMPRISONED IN:**

_____at _____
(institution) (town and state)

I hereby request a final disposition of the following indictments, informations or complaints pending against me:
_____

Failure to act in accordance with the Agreement on Detainers, to which your state is committed by law, will invalidate the indictments, informations or complaints. If jurisdiction over this matter is properly in another agency, court or officer, please designate the proper agency, court or officer and return this form to the sender.

I hereby request final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against me from your state. I hereby waive extradition with respect to any charge or proceedings contemplated hereby or included herein, and further waive extradition to your state to serve any sentence therein imposed upon me, after completion of my term of imprisonment in this state. I hereby consent to the production of my body in any court where my presence may be required to effectuate the purposes of the Agreement on Detainers and to voluntarily be returned to the institution in which I am now confined.

The required Certificate of Inmate Status and Offer of Temporary Custody are attached.

DATED: _____ _____
(inmate's name and number)

The inmate must indicate below whether he has counsel or wishes the court in the receiving state to appoint counsel for purposes of any proceedings preliminary to trial which may take place before his delivery to the jurisdiction in which the indictment, information or complaint is pending. Failure to list the name and address of counsel is deemed consent to the appointment of counsel by the appropriate court in the receiving state. Check one option below and supply attorney information if option A is selected.

_____ A My counsel's name and address are: _____
_____B. I request the court to appoint counsel to represent me.

Signed: _____
(inmate's signature)

16.95.030 Form III - Warden's certificate of inmate status

Agreement on Detainers: Form III

In the case of an inmate's request for disposition under Article III, copies of this Form should be attached to all copies of Form II. In the case of a request initiated by a prosecutor under Article IV, a copy of this Form should be sent to the prosecutor upon receipt by the warden of Form V. Copies should be sent to all prosecutors in the same state who have detainers against the inmate. Copy may be given to inmate.

CERTIFICATE OF INMATE STATUS

RE: Inmate _____ No. _____

Institution_____Location_____

The [custodial authority] hereby certifies:

1. The term of commitment under which the prisoner above-named is being held: _____

_____

2. The time already served: _____

3. Time remaining to be served on the sentence: _____

4. The amount of good time earned: _____

5. The date of prisoner's parole eligibility: _____

6. The decisions of the Board of Parole related to the prisoner: (use reverse side if additional space is needed)

_____

7. Maximum expiration date under present sentence: _____

8. Detainers currently on file against this inmate from your state are as follows: _____

_____

Dated:_____ _____

(Custodial Authority)

By: _____

(Warden - Superintendent - Director)

16.95.040 Form IV – Warden's offer of temporary custody

Agreement on Detainers - Form IV

In the case of an inmate's request for disposition under Article III, copies of this Form should be attached to all copies of Form II. In the case of a request initiated by a prosecutor this Form should be completed after the Governor has indicated his approval of the request for temporary custody or after the expiration of the 30 day period. Copies of this Form should then be sent to all officials who previously received copies of Form III. One copy should be given to the prisoner and one copy retained by the warden. Prosecutors' copies by certified or registered mail return receipt requested.

Offer to Deliver Temporary Custody

Date:_____

TO: _____ Prosecuting Officer
(Insert name and title if known)

_____
(Jurisdiction)
and to all prosecutors and courts of jurisdictions listed below from which indictments, informations or complaints are pending.

RE: Inmate_____NO. _____

Dear Sir or Madam,

Pursuant to the provisions of Article V of the Agreement on Detainers between this state and your state, the undersigned hereby offers to deliver temporary custody of the above-named prisoner to the appropriate authority in your state in order that speedy and efficient prosecution may be had of the indictment, information or complaint which is (described) (in the attached inmate's request) (described in your request for custody of ___*date*_____).

(The required Certificate of Inmate Status is enclosed.) (The required Certificate of Inmate Status was sent with our letter of _*date*_____.)

If proceedings under Article IV(d) of the Agreement are indicated, an explanation is attached.

Indictments, informations or complaints charging the following offenses are also pending against the inmate in your state; you are authorized to transfer the inmate to the custody of the appropriate authorities in the jurisdictions to dispose of these matters: If you do not intend to bring the inmate to trial, please inform us as soon as possible.

Offense	County or Other Jurisdiction
_____	_____
_____	_____
_____	_____

Kindly acknowledge._____
(name and title of custodial authority)

By: _____of _____
(Warden - Superintendent - Director) (name and address of institution)

A.My counsel's name and address are: _____

B. I request the court to appoint counsel to represent me. _
Signed: _____*inmate's signature*_____

16.95.050 Form V – Request for temporary custody

Agreement on Detainers: Form V

Five copies. Signed copies must be sent to the prisoner and to the official who has the prisoner in custody. A copy should be sent to the Agreement Administrator of the state in which the prisoner is incarcerated. Copies should be retained by the person filing the request and the judge who signs the request.

REQUEST FOR TEMPORARY CUSTODY

TO:_____of _____
(Warden - Superintendent - Director) (Name and address of institution)

Please be advised that _____, who is presently an inmate of your

institution, is under [indictment], [information], [complaint] in the _____, of
(jurisdiction)
which I am the _____.
(title of prosecuting officer)

Said inmate is therein charged with the [offense] [offenses] enumerated below:

Offense(s)

_____

_____

I propose to bring this person to trial on this [indictment], [information], [complaint] within the time specified in Article IV(c) of the Agreement.

To properly proceed in this matter, I request temporary custody of this person pursuant to Article IV(a) of the Agreement on Detainers.

I agree that immediately after trial is completed in this jurisdiction, I will return the prisoner directly to you (or allow any jurisdiction you have designated to take temporary custody), and I will complete Form IX, the Notice of Disposition of a Detainer.

Signed: _____

Title: _____

I certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV(a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with it's terms and the provisions of the Agreement on Detainers.

DATED: _____ Signed: _____
(Judge)

16.95.055 Form VI – Evidence of authority to act as agent for receiving state

Agreement on Detainers: Form VI

In quadruplicate. All copies, signed by the prosecutor and the agent, should be sent to the Administrator of their own state. After signing all copies, the Administrator should retain one for his/her files, send one to the warden of the institution in which the inmate is located and return two copies to the prosecutor who will give one to the agent for use in establishing his authority and place one in his files.

EVIDENCE OF AGENT'S AUTHORITY TO ACT FOR RECEIVING STATE

TO: _____
(Administrator of the Agreement on Detainers)

_____, is confined in _____
(Inmate) (Name and address of institution)

_____ and will be taken into custody

at the institution on _____ for return to this jurisdiction for trial on or about
(date)
_____. In accordance with Article V(b), I have designated _____
(date) (agent)
_____whose signature appears below as agent to return the prisoner.

_____
(Prosecuting official)

_____
(agent's signature)

TO: Warden,

In accordance with the above representation and the provisions of the Agreement on Detainers,

_____ is designated as agent for this state to return for trial.

Signed:

_____
(Administrator)

16.95.060 Prosecutor's acceptance of custody, prisoner's request for disposition

Agreement on Detainers: Form VII

IMPORTANT: This form should only be used when an offer of temporary custody has been received as the result of a prisoner's request for disposition of a detainer. If the offer has been received because another prosecutor in your state has initiated the request, use Form VIII. Copies of Form VII should be sent to the warden, the prisoner, the other jurisdictions in your state listed in the offer of temporary custody, and the Agreement Administrator of the state which has the prisoner incarcerated. Copies should be retained by the person filing the acceptance and the judge who signs it.

PROSECUTOR'S ACCEPTANCE OF TEMPORARY CUSTODY OFFERED IN CONNECTION WITH A PRISONER'S REQUEST FOR DISPOSITION OF A DETAINER

TO:_____ of _____
(Warden – Superintendent - Director) (Name and address of institution)

_____ In response to your letter of ___(date)_____, and

offer of temporary custody regarding _____, who is presently under
(inmate)
indictment, information or complaint in the _____, of which I am
(jurisdiction)

_____, please be advised I accept temporary custody and that I propose to
(title of prosecuting attorney)

bring this person to trial on the indictment, information or complaint named in the offer within the time

specified in Article III(a) of the Agreement on Detainers.

I agree that immediately after trial is completed in this jurisdiction, I will return the prisoner directly to you (or allow any jurisdiction you have designated to take temporary custody), and I will complete Form IX, the Notice of Disposition of a Detainer.

COMMENTS: [If your jurisdiction is the only one named in the offer to temporary custody, use the space below to indicate when you would like to send your agents to conduct the prisoner to your jurisdiction. If the offer has been sent to other jurisdictions in your state, use the space below to make inquiry as to the order in which you will receive custody, or to indicate any arrangements you have already made with other jurisdictions in your state in this regard.]

Signed: _____

Title: _____

I certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV(a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with it's terms and the provisions of the Agreement on Detainers.

DATED: _____ Signed: _____
(Judge)

16.95.065 Form VIII – Prosecutor's acceptance of custody in connection with another prosecutor's request for disposition

Agreement on Detainers: Form VIII

IMPORTANT: This form should only be used when an offer of temporary custody has been received as the result of another prosecutor's request for disposition of a detainer. If the offer has been received because a prisoner has initiated the request, use Form VII. Copies of Form VIII should be sent to the warden, the prisoner, the other jurisdictions in your state listed in the offer of temporary custody, and the Agreement Administrator of the state which has the prisoner incarcerated. Copies should be retained by the person filing the acceptance and the judge who signs it.

PROSECUTOR'S ACCEPTANCE OF TEMPORARY CUSTODY OFFERED IN CONNECTION WITH ANOTHER PROSECUTOR'S REQUEST FOR DISPOSITION OF A DETAINER

TO:_____of_____
(Warden - Superintendent - Director) (Name and address of institution)

_____ According to your letter of (date)_____,

_____, is being returned to this state at the request of _____
(name of prisoner) (Title of prosecuting

_____of _____.
officer) (jurisdiction)

I accept youroffer of temporary custody of _____,
(name of prisoner)

who also is under indictment, information or complaint in the _____ of

which I am the _____.
(title of prosecuting officer)

I plan to bring this person to trial on said indictment, information or complaint within the time specified in Article IV(c) of the Agreement on Detainers.

I agree that immediately after trial is completed in this jurisdiction, I will return the prisoner directly to you (or allow any jurisdiction you have designated to take temporary custody), and I will complete Form IX, the Notice of Disposition of a Detainer.

COMMENTS: [Use the space below to make inquiry as to order in which your jurisdiction will receive custody or to inform the warden of arrangements you have already made with other jurisdictions in your state in this regard.]

Signed:_____

Title: _____

I certify that the person whose signature appears above is an appropriate officer within the meaning of Article IV(a) and that the facts recited in this request for temporary custody are correct and that having duly recorded said request I hereby transmit it for action in accordance with it's terms and the provisions of the Agreement on Detainers.

DATED:_____ Signed_____
(Judge)

16.95.070 Order on request for hearing to contest production

IN RE: THE PRODUCTION UNDER THE INTERSTATE AGREEMENT ON DETAINERS OF

_____ CAUSE NO. _____

ORDER
ON REQUEST FOR HEARING TO CONTEST PRODUCTION
UNDER INTERSTATE AGREEMENT ON DETAINERS

Respondent now appears in Court in person and the State of Indiana appears by _____. This matter is before the Court for hearing on the demand of the state of _____ for Respondent's surrender to that state's authorities.

The Court advises Respondent:

That a demand has been made for Respondent's surrender to the authorities of the state of _____;
That Respondent is charged with the crime of _____ in the demanding state;
That Respondent has the right to test the legality of the request for his surrender and that if Respondent chooses to do so he/she has the right to have an attorney represent him/her in proceedings to test the request; and
That if Respondent desires an attorney and is unable to afford one, an attorney will be appointed to represent him/her at public expense at the contest proceedings.

[Respondent indicates a desire to waive contest rights and executes written waiver thereof. The Court finds said waiver to be freely and voluntarily given. The Court orders the _____ County Sheriff to return Respondent to the __[name Indiana penal facility] where the officials of that facility will produce him for the agent of the state of _____ upon presentation of proper identification and authority.]

OR

[Respondent indicates a desire to contest the request to produce and requests appointment of counsel. Evidence heard on the question of Respondent's indigency. [The court finds the defendant is not indigent.] [The court finds the defendant to be indigent. The Court appoints the Public Defender to represent Respondent at a hearing on a writ of habeas corpus to be filed within ____-days from the date of this order.] The Court sets the _____ day of _____, _____, at _____ o'clock ___.m. for further proceedings herein only in the event that application for a writ of habeas corpus has not been filed within said period. Respondent shall be returned by the sheriff to [name Indiana penal facility] pending hearing on said application for writ of habeas corpus.]

So ORDERED this ____ day of _____, _____.

_____

JUDGE, _____ COURT

16.95.080 Order to hold prisoner without bail

Date _____ files request for disposition. Trial by: 02-06-06. Defendant ordered held without bail.

STATE OF INDIANA) SUPERIOR COURT OF _____
)ss: COUNTY
) CAUSE _____

STATE OF INDIANA,
)
Plaintiff,)
)
v.)
)
_____)
)
Defendant.)

ORDER

The defendant files a notice of place of imprisonment and request for disposition. The clerk is directed to notify _____ that the defendant is to be brought to trial on or before (date) . The clerk is further directed to notify the Sheriff of _____ County that the defendant is to be held without bail. The clerk is further directed to notify the defendant, _____ County Sheriff's Transportation/Warrant Division and the warden at the (name out-of-state penal institution where defendant is held) in (name city and state).

SO ORDERED: _____
Judge

16.95.082 Order refusing transfer for probation revocation

Date _____ offers pro se disposal form, which Court determines to be an attempt to file a request for **probation revocation** disposition, which is refused for filing because Interstate Agreement on Detainers does not apply to petitions to revoke probation.

STATE OF INDIANA) SUPERIOR COURT OF _____
)ss: COUNTY
) CAUSE _____

STATE OF INDIANA,
)
Plaintiff,)
)
v.)
)
_____)
)
Defendant.)

ORDER

(Date) The defendant offers a *pro se* disposal form, which the Court determines to be an attempt to file a request for **probation revocation** disposition and which is refused for filing for the reason that the Interstate Agreement on Detainers does not apply to petitions to revoke probation. The *pro se* offering indicates that the defendant may now be found at the (name out-of-state penal institution where defendant is held) in (name city and state).
The defendant is expressly informed that his attempted filing of a request for disposition has not triggered any deadlines under the Agreement on Detainers. The clerk is directed to notify the defendant and the warden at the (name out-of-state penal institution where defendant is held) in (name city and state).

SO ORDERED: _____
JUDGE

16.95.085 Order refusing transfer for failure to file request with warden

Date _____ offers motion to quash warrant, dismiss and or request speedy trial, which is refused **on the basis that _____ is being held in a (*name state*) penal institution and his/her motion does not comply with the Interstate Agreement on Detainers**.

STATE OF INDIANA) SUPERIOR COURT OF _____
)ss: COUNTY
) CAUSE _____

STATE OF INDIANA,
)
Plaintiff,)
)
v.)
)
_____)
)
Defendant.)

ORDER

(Date) The defendant offers a *pro se* motion to quash warrant, dismiss and or request speedy trial, which the court redenominates as a request for final disposition, and is refused for filing for the reason that the defendant is not within the jurisdiction of the court and lacks standing to file motions. The *pro se* offering indicates that the defendant may now be found at the (name out-of-state penal institution where defendant is held) in (name city and state).
. In order for a valid request for disposition to be honored by this court, the defendant must first submit his request for disposition to the official having custody of him. That official must forward the request for disposition to the prosecuting attorney and this court together with a certificate as set forth in the Agreement on Detainers. The defendant is expressly informed that his attempted filing of a request for disposition has not triggered any deadlines under the Agreement on Detainers. The clerk is directed to notify the defendant and the warden at the (name out-of-state penal institution where defendant is held) in (name city and state).
.

SO ORDERED: _____
JUDGE

19.00.000 Initial Hearing Contents

19.01.000 U.S. Constitutional Right To Be Informed Of Accusation
19.02.000 Indiana Constitutional Right To Be Informed Of Charge
19.05.000 Statutory Promptness
19.10.000 Initial Hearing To Be Where Arrested Or Where Crime Occurred
19.15.000 Probable Cause For Warrantless Arrest By Initial Hearing
19.15.050 Probable Cause By Affidavit Or Testimony
19.15.100 Custody Or Bail If Probable Cause, Release If None
19.10.100 Fourth Amendment Promptness Requirement Stricter Than Statute
19.10.700 Probable Cause Determination Not Required If Summons Used
19.15.000 Charge To Be Filed At Initial Hearing, 72 Hour Exception
19.20.000 Initial Hearing Advisements, Oral Or In Writing
19.20.100 Prosecutor Must Give Accused Or Counsel A Copy Of Felony Charges
19.25.000 Indigency Determination And Assignment Of Counsel
19.25.200 Counsel Assessment Fee For Indigent Able To Pay
19.30.000 Bail To Be Set Or Reconsidered
19.35.000 Omnibus Date To Be Set At Initial Hearing
19.45.000 Non-U.S. defendant - notice to consulate
19.46.000 Indiana Supreme Court recommends setting trial date at initial hearing

Forms and Dialogues

19.50.000 Initial Hearing Procedural Checklist
19.55.000 Entry For Initial Hearing
19.60.000 Dialogue For Initial Hearing
19.65.000 Notice to sheriff or jail supervisor of Vienna Convention needs

19.00.000 INITIAL HEARING

19.01.000 **U.S. CONSTITUTIONAL RIGHT TO BE INFORMED OF ACCUSATION** - Defendant in a criminal prosecution must be informed of the nature and cause of the accusation. U.S. CONST., AMEND. IV.

19.02.000 **INDIANA CONSTITUTIONAL RIGHT TO BE INFORMED OF CHARGE** - Accused has the right to demand the nature and cause of the accusation against her/him and to have a copy of the accusation. IND. CONST., ART. 1, §13.

19.05.000 **STATUTORY PROMPTNESS REQUIREMENT** - Initial hearing must be held promptly after arrest unless defendant was arrested pursuant to a warrant, in which case the initial hearing must be held within 20 days of the arrest (within 10 days if defendant was arrested for IC 9-30-5 drug or alcohol driving offense). I.C. 35-33-7-1 and -4.

19.10.000 **INITIAL HEARING TO BE WHERE ARRESTED OR WHERE CRIME OCCURRED** - The initial hearing is to take place either in the county where the suspect was arrested or in a county believed to have venue over the offense (e.g., the county or counties where the offense was committed).

19.15.000 **PROBABLE CAUSE FOR WARRANTLESS ARREST BY INITIAL HEARING** -Probable cause determination must be made ex parte no later than initial hearing if not already done and defendant was arrested without a warrant. I.C. 35-33-7-2.

19.15.050 **PROBABLE CAUSE BY AFFIDAVIT OR TESTIMONY** - The facts on which the defendant was arrested are to be presented for probable cause determination to a judicial officer either by affidavit or orally under oath. I.C. 35-33-7-2(a).

19.15.100 **CUSTODY OR BAIL IF PROBABLE CAUSE, RELEASE IF NONE** - If probable cause is found,, "the judicial officer shall order that the arrested person be held to answer in the proper court. If the facts submitted do not establish probable cause or if the prosecuting attorney informs the judicial officer on the record that no charge will be filed against the arrested person, the judicial officer shall order that the arrested person be released immediately." I.C. 35-33-7-2(b).

19.10.100 **FOURTH AMENDMENT PROMPTNESS REQUIREMENT STRICTER THAN STATUTE** - A determination of probable cause made more than 48 hours after a warrantless arrest presumptively violates the Fourth Amendment and will support a civil rights action; a violation will be found unless the government can show a bona fide emergency or other extraordinary circumstance. An intervening weekend or a desire to consolidate pretrial proceedings do <u>not</u> qualify as "extraordinary circumstances." *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

19.10.700 **PROBABLE CAUSE DETERMINATION NOT REQUIRED IF SUMMONS USED** - If a summons to appear is issued to the defendant, the probable cause hearing is to occur at the time listed in the summons. Probable cause need not be determined

at the initial hearing of a person who has been summoned unless the prosecutor requests that the person be held in custody. I.C. 35-33-7-3.5.

19.15.000 **CHARGE TO BE FILED AT INITIAL HEARING, 72 HOUR EXCEPTION** - If the person was arrested before a formal charge was filed, an information or indictment must be filed before or be prepared to be filed at the preliminary hearing. If the prosecutor states that more time is required to determine the charge to file, the court shall recess or continue the initial hearing for up to 72 hours, excluding Saturdays, Sundays, and legal holidays. I.C. 35-33-7-3.

19.20.000 **INITIAL HEARING ADVISEMENTS, ORAL OR IN WRITING** - At the initial hearing of a person, the judicial officer shall inform him orally or in writing:
(1) That he has a right to retain counsel and if he intends to retain counsel he must do so within:
(A) Twenty (20) days if the person is charged with a felony; or
(B) Ten (10) days if the person is charged only with one (1) or more misdemeanors;
after this initial hearing because there are deadlines for filing motions and raising defenses, and if those deadlines are missed, the legal issues and defenses that could have been raised will be waived;
(2) That he has a right to assigned counsel at no expense to him if he is indigent;
(3) That he has a right to a speedy trial;
(4) Of the amount and conditions of bail;
(5) Of his privilege against self-incrimination;
(6) Of the nature of the charge against him; and
(7) That a preliminary plea of not guilty is being entered for him and the preliminary plea of not guilty will become a formal plea of not guilty:
(A) Twenty (20) days after the completion of the initial hearing; or
(B) Ten (10) days after the completion of the initial hearing if the person is charged only with one (1) or more misdemeanors;
unless the defendant enters a different plea.
I.C. 35-33-7-5.

19.20.100 **PROSECUTOR MUST GIVE ACCUSED OR COUNSEL A COPY OF FELONY CHARGES** -At the initial hearing, "the judge shall direct the prosecuting attorney to give the defendant or his attorney a copy of any formal felony charges filed or ready to be filed." I.C. 35-33-7-5.

19.20.200 **ACCUSED MAY REQUEST COPY OF MISDEMEANOR CHARGES - "**The judge shall, upon request of the defendant, direct the prosecuting attorney to give the defendant or his attorney a copy of any formal misdemeanor charges filed or ready to be filed." I.C. 35.33-7-5.

19.25.000 **INDIGENCY DETERMINATION AND ASSIGNMENT OF COUNSEL** - If the defendant requests counsel, the court shall determine whether the defendant is indigent, and if defendant is found indigent the court shall assign counsel to defendant. I.C. 35-33-7-6.

19.25.200 **COUNSEL ASSESSMENT FEE FOR INDIGENT ABLE TO PAY** - If the court finds that the defendant is able to pay part of the expense of assigned counsel, the court shall order the defendant to pay the clerk a fee of $100 for a felony charge or $50 for a misdemeanor charge. I.C. 35-33-7-6. See Indigents Rights, Benchbook Section 37.00.000, for determination of indigency.

19.30.000 **BAIL TO BE SET OR RECONSIDERED** - At the initial hearing the amount and conditions of bail must be determined if not set already. I.C. 35-33-7-5(4) and 35-33-8-3. Previously set bail may be reconsidered at the request of either the state or the defendant. I.C. 35-33-8-5. See Bail, Benchbook Section 22.00.000.

19.35.000 **OMNIBUS DATE TO BE SET AT INITIAL HEARING** - The omnibus date for persons charged with either a felony or a misdemeanor must be set at the initial hearing. I.C. 35-36-8-1(a) and (c). The felony omnibus date must be no earlier than 45 days and no later than 75 days after the initial hearing. I.C. 35-36-8-1. The misdemeanor omnibus date must be no earlier than 30 days and no later than 65 days after the initial hearing and must be the trial date. I.C. 35-36-8-3.

19.45.000 **NON-U.S. DEFENDANT - NOTICE TO CONSULATE** - By treaty, when foreign nationals are arrested or otherwise confined, they are entitled to have notice given, if they desire it, to their country's U.S. consulate:

> If he [the foreign national] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.

Article 36 of the Vienna Convention on Consular Relations Apr. 24, 1963, [1970] 21 U. S. T. 77, 100–101, T. I. A. S. No. 6820.

Under a number of subsidiary treaties, nationals of certain countries <u>must</u> have notice of their arrest or detention sent to the consular officials of their nation. For a list of these countries, see the reverse side of 19.65.000. Up-to-date lists and consulate contact information may be obtained from the U.S. Department of State's webpages on the Vienna Convention:
http://travel.state.gov/consul_notify.html

It remains to be determined what United States legal effect, if any, results from noncompliance with these treaty notice provisions. It has been held that exclusion of evidence is <u>not</u> required for failure to comply with the Vienna Convention. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) ("suppression is not an appropriate remedy for a violation of Article 36"); *Zavala v. State*, 739 N.E.2d 135 (Ind. Ct. App. 2000)(suppression not required as a remedy for violation). In reaching its no-suppression holding, *Sanchez-Llamas* did not decide whether any other rights, including civil causes of action, are available to remedy violations of the Vienna Convention's Article 36. Whether violations have U.S. legal remedies or not, the treaty should be complied with. The Department of State takes the position that "[t]he law enforcement officers who actually make

the arrest or who assume responsibility for the alien's detention ordinarily should make the notification." United States Department of State, *Consular Notification and Access* at p. 18 (available at http://travel.state.gov/consul_notify.html , last consulted June 25, 2009). "Because they do not hold foreign nationals in custody, judicial officials and prosecutors are not responsible for notification. The Department of State nevertheless encourages judicial officials who preside over arraignments or other initial appearances of aliens in court to inquire at that time whether the alien has been provided with consular notification as required by the VCCR and/or any bilateral agreement providing for mandatory notification." *Id.* Queries for judicial officers about notice under the Vienna Convention are contained in the Initial Hearing dialogue, Benchbook 19.60.000 and in the Guilty Plea dialogues If the defendant indicates at the initial hearing that he is a foreign national, a suggested form of notice to jail officials to comply with the Vienna Convention and related treaties is at 19.65.000.

19.46.000 **THE INDIANA SUPREME COURT RECOMMENDS SETTING A TRIAL DATE AT THE INITIAL HEARING:** "To prevent the potential for any subsequent violation of a defendant's constitutional right to a speedy trial due to protracted court congestion, we encourage trial courts to consider setting the defendant's trial date at his or her first initial hearing and to remain diligent in monitoring the age of these cases." *Logan v. State*, 16 N.E.3d 953, 965 (Ind. 2014).

19.50.000 INITIAL HEARING PROCEDURAL CHECKLIST

1. If the person was arrested without a warrant, determine whether probable cause existed (if facts admitted orally, record proceeding). IF PROBABLE CAUSE FOR A WARRANTLESS ARREST IS TO BE DETERMINED AT THE INITIAL HEARING, RATHER THAN EARLIER, REMEMBER THAT THE FOURTH AMENDMENT IS PRESUMPTIVELY VIOLATED IF MORE THAN 48 HOURS PASS BETWEEN ARREST AND PROBABLE CAUSE DETERMINATION, *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Order person's release if no probable cause (do not dismiss the charge). [IC 35-33-7-3]

2. Hearing must be held in the county in which the arrest is made or in any county believed to have venue of the offense. [IC 35-33-7-1]

3. Hearing must be held promptly after arrest, but if the person arrested makes bail or is released in accordance with the terms of the warrant, the hearing must be held within 20 days of the arrest (within 10 days if arrested for an IC 9-30-5 drug or alcohol driving offense).

4. Grant recess for up to 72 hours if prosecuting attorney needs more time. [IC 35-33-7-3]

5. Inform person arrested of the following: [IC 35-33-7-5]

   (a) right to retain counsel and duty to do so within 20 days (10 days for misdemeanors) after initial hearing because of deadlines for filing motions and raising defenses;

   (b) right to assigned counsel either at no expense if indigent, or, if able to pay part of the costs of the representation, with court order to person to pay $100 if charged with felony or $50 if charged with misdemeanor;

   (c) right to speedy trial;

   (d) amount and conditions of bail; and

   (e) privilege against self-incrimination.

6. If formal charge is filed, inform defendant of the following: [IC 35-33-7-5]

   (a) nature of charge; and

   (b) that a preliminary plea of not guilty is being entered and the preliminary plea will become a formal plea of not guilty after 20 days [10 days for misdemeanors] unless defendant enters a different plea.

7. If charges include an alcohol or drug driving offense under IC 9-30-5:

(a) advise defendant that the court will order immediate suspension of defendant's driving privileges to take effect at the close of the hearing;
(b) order the defendant to surrender all driver's licenses, permits, and receipts; and
(c) see that the clerk sends the surrendered licenses or permits and a copy of the order "recommending" immediate suspension to the Bureau of Motor Vehicles.

8. Direct the prosecuting attorney to give the defendant a copy of formal felony charges (if misdemeanors, give defendant a copy of charges upon defendant's request).

9. If defendant requests assigned counsel, determine if he/she is indigent or able to pay part of the costs of representation. If defendant is found to be either indigent or able to pay part of the costs of representation, assign counsel to him/her. For defendant found able to pay part of the costs of representation who accepts assigned counsel, enter order to defendant to pay $100 if charged with a felony and $50 if charged with a misdemeanor. [IC 35-33-7-6]

10. In a misdemeanor case, advice should be given to defendant of the procedures required for demand of a jury trial, as established by Criminal Rule 22.

11. Set felony omnibus date no earlier than 45 days and no later than 75 days after initial hearing (no earlier than 30 days and no later than 65 days for misdemeanors). Schedule pretrial hearing or conference on omnibus date if needed (schedule trial and omnibus date for misdemeanors). [IC 35-36-8-1 and -3.]

12. If defendant apparently is a foreign national, order notice form 19.65.000 sent to [the sheriff] [the jail authorities] that notices required by treaty must be sent to the consular officials of defendant’s nation if they have not already been sent.]

13. If defendant apparently is a foreign national, advise him/her that if he/she is convicted of the charges filed, the conviction may affect his/her ability to remain in the United States and that he/she should discuss the potential for his/her deportation with defense counsel.

14. The Indiana Supreme Court recommends setting a trial date at the initial hearing.

19.55.000 ENTRY FOR INITIAL HEARING

The defendant appears in person [and by counsel] and the Court enters the following summary and Order:

1. The defendant stated the defendant's name is spelled correctly in the (indictment)(information).
2. The true age of the defendant is ____ and the true birth date of the defendant is _____.
3. The defendant was informed of the nature of the charge(s) against him/her, receives a copy of the [information] [indictment], and was informed that a preliminary charge of not guilty would be entered, which would become his/her plea in twenty days unless he/she enters a different plea after consulting with counsel.
4. The defendant is informed:
   - (a) of his/her right to retain counsel and that if he/she intends to retain counsel he/she must do so within twenty days due to deadlines for the filing of motions and defenses, and that if those deadlines are missed, the legal issues and defenses that could have been raised will be waived;
   - (b) of his/her right to assigned counsel at no expense is he/she is indigent;
   - (c) of his/her right to assigned counsel if able to pay part of the costs of representation, and that if counsel is assigned the court will order at once payment of $100 in a felony case or of $50 in a misdemeanor case;
   - (d) of his/her right to a speedy trial;
   - (e) of the amount and conditions of bail, which are:
   - (f) of his/her right to remain silent and his/her privilege against self-incrimination.
   - (g) (misdemeanor case) of his/her rights to trial by jury and of the procedure by which he/she must make written demand for jury trial.
   - (h) [if apparently a foreign national] of his/her right to have the consulate of his country informed of his arrest, and the Court orders [*name employee of court*] to send notice (use notice form 19.65.000) to [the sheriff] [the jail authorities] that defendant has indicated he is a foreign national and that the [sheriff] [jail authorities] must send any notices required by treaty to the consular officials of defendant’s nation if they have not already done so.]
   - (i) [if apparently a foreign national] of the need to consult with counsel about the potential for his/her deportation if convicted.
5. The court finds that the defendant:

   is indigent and entitled to counsel at no expense

   [or]

   is able to pay part of the costs of representation, and accordingly the court orders defendant to pay at once [$100 in this felony case] [$50 in this misdemeanor case] to the clerk as authorized by statute when the court appoints assigned counsel for one partially able to pay.

   The court appoints _____ to serve as defendant's counsel.

6. (a) The defendant requests an early trial date.
   (b) The defendant requests a trial in due course.
7. (a) The defendant's bond remains .
   (b) The defendant's bond is reduced to .

ALL OF WHICH IS ORDERED, ADJUDGED, AND DECREED this day of 20 , in , Indiana.

By
Judge, _____ Court

Trial Date:
Omnibus Date:_____*

*For felonies, not less than 45 days from attorney's appearance nor more than 75 days after initial hearing. For misdemeanors, not less than 30 days nor more than 65 days after initial hearing and is the trial date.

19.60.000

DIALOGUE FOR INITIAL HEARING

I. IDENTIFY THE CASE

(BY THE COURT)

The Court is now proceeding with an initial hearing in Case No.
entitled State of Indiana v. _____.

(COURT ADDRESSES DEFENDANT:)

(Mr./Ms. _____, would you please take the witness stand.

II. IDENTIFY THE DEFENDANT AND ESTABLISH HIS ABILITY TO UNDERSTAND THE PROCEEDINGS

(COURT ADDRESSES DEFENDANT)

Q. Please state your full name.
A. _____ (verify name, including spelling)
Q. Do you read and understand the English language?
A.
Q. What is your age?
A.
Q. What is your date of birth?
A.
Q. What are the last four (4) digits of your social security number?
A.
Q. Where did you live at the time of your arrest?
A.

[NOTE: The United States Department of State suggests the following role for judges to comply with the Vienna Convention on Consular Relations:

> Because they do not hold foreign nationals in custody, judicial officials and prosecutors are not responsible for notification. The Department of State nevertheless encourages judicial officials who preside over arraignments or other initial appearances of aliens in court to inquire at that time whether the alien has been provided with consular notification as required by the VCCR and/or any bilateral agreement providing for mandatory notification. The Department also encourages prosecutors to make similar inquiries. Inquiries such as these will help promote compliance with the consular notification procedures and facilitate the provision of consular assistance by foreign governments to their nationals.

The following suggested question and answers are consistent with this State Department position.]

Q. [To the prosecutor] Does the State have any information indicating that the defendant is a foreign national? If so, which country does that information indicate is defendant's?
A. …….

[If "no," If State has no information indicating foreign national status and defendant volunteers no information, proceed to next item after immigration/deportation advice.]

[If "yes," If State has information indicating foreign national status or defendant volunteers information indicating such status, then order notice (Form 19.65.000 hereafter) to the jail that defendant says he is apparently is a foreign national and that jail authorities should provide the appropriate notices, if they have not done so already, to the consular authorities of defendant's apparent country of citizenship as required by the Vienna Convention on Consular Relations and other treaties. Also, give the following advice:

> If you are not a citizen of the United States, you are entitled to have your country's consular officers here in the United States notified of your situation. You are also entitled to communicate with your consular officers. Depending on the country of which you are a citizen, notice to your consular officers here in the United States may be required, even if you might not want that notice to be given.
>
> If you are not a citizen of the United States, your conviction of the charges filed in this court against you may change your immigration status. You may either be in a less favorable immigration status or you may be subject to being deported from the United States. [(If represented now, or to be later represented, by counsel:) You should ask for and obtain advice from your attorney about immigration and deportation consequences of conviction.] [(If counsel is present) Defense counsel, to effectively represent this client you must ascertain his immigration status and advise him of the immigration and deportation consequences if he is convicted of the charges against him in this cause.]]

A. .....

Q. What was the last year of school you completed?

A.

Q. Are you under the influence of any drug, including alcohol, at this time?

A.

Q. If at any time you do not understand anything I say to you, will you please let me know?

A.

III. <u>ADVISING THE DEFENDANT OF THE CHARGE(S), STATUTES(S) AND PENALTIES</u>

(COURT ADDRESSES DEFENDANT)

(Mr./Ms.) <u>(deft.)</u>, you are now before the Court for an initial hearing;

<u>CHARGES NOT YET FILED</u>

I have been advised of your arrest for the criminal offense(s) of _____. I have also been advised by the prosecutor's office that additional time is needed to review this case to determine what, if any, criminal charges will be filed against you. The prosecutor's office has 72 hours from the time of your arrest to make this determination, excluding weekends and holidays.

Q. When were you arrested on these charges?

A. _____ (verify through prosecutor)

[PROCEED TO PARAGRAPH IV]

<u>CHARGES FILED</u>

You are charged by an (information/indictment) filed in this Court with the criminal offense(s) of _____. Prosecutor, will you give to the defendant a

copy of the (information/indictment) filed in this case, and __(defendant)__ will you read and examine the (information/indictment**)** please.

[IF THE DEFENDANT IS UNABLE TO READ THE CHARGE HAVE THE PROSECUTOR READ IT TO THE DEFENDANT]

Q. __(Defendant)__, have you read the (information/indictment)?

A. _____.

Q. Do you have any questions regarding the (information/indictment)?

A. _____.

Prosecutor, would you read to the defendant the statute(s) under which (this/these) charge(s) (was/were) brought and the penalty provision(s) which apply.

Q. __(Defendant)__, do you have any questions about the statute(s) just read to you or the possible penalties for the charge(s) against you?

A. _____.

Q. Do you understand the nature of the charge(s) filed against you and the penalty(ies) which can be imposed?

A. _____.

OR

(Defendant), the statute under which the charge of _____ was filed reads as follows: _(read statute to defendant)_.

Q. Do you have any questions about the charge filed against you?

A. _____.

Q. Do you now understand the nature of the charge which has been filed against you?

A. _____.

[REPEAT ABOVE FOR EACH CHARGE]

[PENALTY ADVICE FOR FELONIES AND MISDEMEANORS]

(Defendant), under the penal code _(name crime)_ with which you are charged is a Class (felony/misdemeanor). A person who commits a Class __ (felony/misdemeanor) can be sentenced to [see next page for the range of sentences for all crimes] a term of imprisonment from _[minimum]_ to _[maximum]_ years and a fine of up to $_____. **[NOTE - see below for sentencing ranges and enhancements.]**

[Because you are charged with a Class D felony, the Court will have the option of sentencing you for a Class A misdemeanor provided you were not sentenced in that way within three years of the offense now charged. (NOTE-IF OFFENSE CHARGED IS D FELONY DOMESTIC BATTERY OR POSSESSION OF CHILD PORNOGRAPHY, CLASS A MISDEMEANOR SENTENCING IS NOT PERMITTED).]

STANDARD SENTENCING RANGES – CRIME PRIOR TO JULY 1, 2014:

Class	Minimum	Maximum	Advisory	Fines
Murder	45 years	65 years	55 years	$10,000
A	20 years	50 years	30 years	$10,000
B	6 years	20 years	10 years	$10,000
C	2 years	8 years	4 years	$10,000
D	6 months	3 years	1.5 years	$10,000
A misd.	1 yr. max.			$ 5,000
B misd.	180 days max.			$ 1,000
C misd.	60 days max.			$ 500

STANDARD SENTENCING RANGES – CRIME ON OR AFTER JULY 1, 2014:

Level	Minimum	Maximum	Advisory	Fines
Murder	45 years	65 years	55 years	$10,000
1	20 years	50 years	30 years	$10,000
2	10 years	30 years	17.5 years	$10,000
3	3 years	16 years	9 years	$10,000
4	2 years	12 years	6 years	$10,000
5	1 years	6 years	3 years	$10,000
6	6 months	2.5 years	1 year	$10,000
A misd.	1 year max			$ 5,000
B misd.	180 days max			$ 1,000
C misd.	60 days max			$ 500

FELONY SENTENCING ENHANCEMENTS - CRIME PRIOR TO JULY 1, 2014:

Enhancement Type	Minimum Term	Maximum Term
Habitual Criminal – A, B, or C felony	1 x advisory	3x advisory, up to 30 yrs
Use of firearm in : felony against the person (IC 35-42) resulting in death or serious bodily injury; or kidnapping; or Class B felony criminal confinement		5 years
Use of firearm or possession of handgun, sawed-off shotgun, or machine gun in controlled substance offense		5 years
Use of sawed-off shotgun-controlled substance offense		10 years
Use of machine gun or silencer-controlled substance offense		20 years
Habitual controlled substance offender	3 years (1 year if more than 3 years since last prior)	8 years
Murder or felony murder resulting in the termination of a human pregnancy	6 years	20 years
Repeat sexual offender		20 years
Criminal gang		1 x sentence on highest underlying felony

FELONY SENTENCING ENHANCEMENTS- CRIME ON OR AFTER JULY 1, 2014:

Enhancement Type	Minimum Term	Maximum Term
Habitual Criminal – Level 1, 2, 3, or 4	6 years	20 years
Habitual Criminal – Level 5 or 6	2 years	6 years
Use of firearm in : felony against the person (IC 35-42) resulting in death or serious bodily injury; or kidnapping; or level 2 or 3 felony criminal confinement	5 years	20 years
Use of firearm or possession of handgun, sawed-off shotgun, or machine gun in controlled substance offense		5 years
Use of sawed-off shotgun-controlled substance offense		10 years
Use of machine gun or silencer-controlled substance offense		20 years
Habitual vehicular traffic offender (for crimes committed on or after January 1, 2015)	1 year	8 years

Murder or felony murder resulting in the termination of a human pregnancy	6 years	20 years
Repeat sexual offender		20 years
Criminal organization	1 x sentence on underlying felony if sentencing for one felony only	1 x longest sentence imposed for underlying felonies if sentencing for more than one felony

IV. DETERMINE IF THE DEFENDANT IS REPRESENTED BY COUNSEL

(COURT ADDRESSES DEFENDANT)

IF IT IS OBVIOUS THAT DEFENDANT IS REPRESENTED BY COUNSEL, ASK:
Q. (Defendant), do you have an attorney who is representing you in this case?
A. _____.
LET THE RECORD SHOW THAT THE DEFENDANT IS PRESENT IN PERSON AND BY COUNSEL _____, AND THE STATE OF INDIANA IS PRESENT BY
.

[PROCEED TO PARAGRAPH VII]

OR

IF IT IS NOT OBVIOUS THAT DEFENDANT IS REPRESENTED BY COUNSEL, THEN ASK:
Q. (Defendant), do you have an attorney who is present with you at this time?
A. _____.
LET THE RECORD SHOW THAT THE DEFENDANT IS PRESENT IN PERSON AND WITHOUT COUNSEL, AND THE STATE OF INDIANA IS REPRESENTED BY
, _____.

(Defendant), you have a right to retain and be represented by an attorney in this case. You also have the right to proceed without an attorney, if you so desire.
Q. Do you understand that you have those rights?
A. _____.
Q. Do you intend to employ an attorney?
A. _____.

(IF YES, intends to employ attorney:)
Q. Do you understand that you must retain counsel within 20 days (10 days if you are charged with misdemeanors only) because there are deadlines for filing motions and raising defenses and, if those deadlines are missed, the legal issues and defenses that could have been raised will be waived or given up?
A. _____.

[PROCEED TO PARAGRAPH VII]

(IF NO, does not intend to employ attorney:)

(Defendant), if you do not have the money, means or property with which to employ your own attorney the Court will appoint an attorney to represent you in this case.

Q. Do you understand that?
A. _____.
Q. Do you want the Court to appoint an attorney for you?
A. _____.

[IF DEFENDANT WISHES TO PROCEED **WITHOUT COUNSEL**, PROCEED TO PARAGRAPH VI.]

[IF DEFENDANT **WANTS COUNSEL**, CONTINUE WITH PARAGRAPH V ON THE NEXT LINE]

V. DETERMINATION OF ELIGIBILITY FOR COURT-APPOINTED COUNSEL

Q. Are you willing to be placed under oath and to answer questions to determine if you are eligible for court-appointed counsel?
A. _____.

PUT DEFENDANT UNDER OATH AND INQUIRE AS FOLLOWS:

Q. Please again state your name and age.
A. _____.
Q. Where did you live at the time of your arrest?
A. _____.
Q. Whom did you live there with?
A. _____.
Q. Are you married? Presently living with your spouse?
A. _____.
Q. Do you have any children? Are you supporting them?
A. _____.
Q. Do you own any real estate?
A. _____.
Q. Do you have any cash money?
A. _____.
Q. Do you have any savings or checking accounts?
A. _____.
Q. Do you own any motor vehicles, cars, trucks, motorcycles, or other vehicles? What makes, models, payments required (etc.)?
A. _____.
Q. Do you own any furniture or appliances of a value over $ 100?
A. _____.
Q. Do you own any tools or other equipment of a value over $ 100?
A. _____.
Q. Does anyone owe you money?
A. _____.

QQ. Has any member of your family been in touch with you since your arrest on this charge?

A. _____.

Q. (If yes to preceding,) Have they indicated they will get an attorney for your?

A. _____.

Q. Are you presently employed? (Develop further.)

A. _____.

Q. Where were you last employed? (Develop further.)

A. _____.

Q. What is your usual trade or occupation?

A. _____.

Q. Do you have any money, means or property whatsoever which can be used to employ an attorney for you in this case?

A. _____.

(IF INDIGENT) THE COURT FINDS THAT THE DEFENDANT IS INDIGENT AND UNABLE TO PAY ANY PORTION OF THE COSTS OF REPRESENTATION AND APPOINTS _____ TO REPRESENT THE DEFENDANT IN THIS CASE.

[PROCEED TO PARAGRAPH VII]

OR

(IF ABLE TO PAY PART OF REPRESENTATION COSTS) THE COURT FINDS THAT THE DEFENDANT IS ABLE TO PAY PART OF THE COST OF REPRESENTATION BY ASSIGNED COUNSEL AND APPOINTS AS ASSIGNED COUNSEL. THE COURT ORDERS THAT THE DEFENDANT PAY [$100 (FELONY CASE)] [$50 (MISDEMEANOR CASE)] AS REQUIRED BY STATUTE UPON APPOINTMENT OF COUNSEL FOR ONE PARTIALLY ABLE TO PAY REPRESENTATION COSTS.

[PROCEED TO PARAGRAPH VII]

OR

(IF NOT ELIGIBLE FOR COURT-APPOINTED COUNSEL) THE COURT FINDS THAT THE DEFENDANT IS FULLY ABLE TO PAY THE COST OF REPRESENATION BY COUNSEL AND FINDS THAT THE DEFENDANT IS INELIGIBLE FOR ASSIGNED COUNSEL..

Q. _(Defendant)_, do you want further time and opportunity to employ your own attorney or do you want to proceed without an attorney?

A. _____.

(IF DEFENDANT WANTS MORE TIME TO RETAIN COUNSEL:)

Q. Do you understand that you must retain counsel within 20 days (10 days if charged only with misdemeanors) in order to have time to meet deadlines for filing motions and raising defenses?

A. _____.

(IF DEFENDANT DOES NOT WANT TIME TO RETAIN COUNSEL, GO TO PARAGRAPH VI, NEXT)

VI. WAIVER OF RIGHT TO COUNSEL

(IF DEFENDANT WANTS TO PROCEED WITHOUT COUNSEL, HAVE DEFENDANT READ AND COMPLETE FORM 34.20.050.)
Q. _(Defendant)_, I have here a form (show form to Defendant) entitled "WAIVER OF ATTORNEY."
Did you read this form? (A. _____)
Did you understand the advice in the form? (A. _____)
Do you have any questions about your right to a defense attorney? (A. _____)
You understand that a "waiver of defense attorney" means you are giving up your right to a defense attorney? (A. _____)
You understand that by giving up your right to an attorney you will be acting as your own attorney in this case? (A. _____)
And this is your signature on the form, indicating you wish to give up the right to have an attorney to represent you? (A. _____)

And it is your decision, after reading and understanding the advice in the form, to represent yourself, without assistance from an attorney? (A. _____)

VII. ADVISING THE DEFENDANT OF CERTAIN CONSTITUTIONAL RIGHTS

_____, as a defendant charged in a criminal prosecution you have certain legal and constitutional rights guaranteed to you.

(1) You have a right to a speedy, public trial, by jury, in the county in which the offense was allegedly committed.

(2) [**This paragraph for misdemeanor cases only**:] If you wish to exercise your right to trial by jury, you must file a written demand for a jury trial. You must file this written demand no later than ten (10) days before your first scheduled trial date. If you fail to file a written demand, or if you file a written demand but you file it late, you give up your jury trial right, permanently. If you give up your jury trial right, you will have no say about whether it will be a jury or a judge who hears the evidence at your trial and determines whether the State of Indiana proves your guilt beyond a reasonable doubt.

(3) You will be presumed innocent unless and until the State proves you guilty beyond a reasonable doubt.

(4) You have the right to face all witnesses against you and to see, hear, question and cross-examine those witnesses.

(5) You have the right to require witnesses to be present at any hearing to testify in your behalf, and at your request subpoenas will be issued by the Court requiring witnesses to appear in your behalf.

(6) You have the right to remain silent and you cannot be required to give any testimony or make any statement against yourself to anyone.

(7) You have the right to be heard in your own defense at any hearing or trial concerning the charge[s] against you. Anything you say, however, may be used against you.

(8) (By the order of the Court)(Under the bail schedule adopted by this Court), bail in this case has been set in the amount of $____ property, surety, or cash. The conditions of bail are_____.

(9) Do you have any questions concerning any of the rights I have advised you of?

[IF NO CHARGES HAVE BEEN FILED, STOP AT THIS POINT AND PROCEED TO PARAGRAPH VIII - OTHERWISE CONTINUE]

VIII. FINAL HEARING ORDERS

IF INITIAL HEARING IS CONTINUED

The initial hearing is now continued to give the prosecutor's office an opportunity to further review this case and to determine what charges, if any, are to be filed. The initial hearing is now reset for _____, 20_ at __ _:M. The Court order that the defendant be released by the Sheriff of _____ County at __ _:M. unless the Sheriff's office is advised before that time that charges have been filed.

SETTING OMNIBUS DATE AND PRETRIAL CONFERENCE

The omnibus date for this case is now set for __(date)__, on which date a pretrial conference will be held at _(time)_. Final pretrial is now set for _____. Trial is set for _____.

SETTING HEARING TO REVIEW DEFENDANT'S EFFORTS TO RETAIN COUNSEL

This case is now set for hearing on _(date)_ at _(time)_ for the purpose of reviewing defendant's effort to retain counsel. The defendant is ordered to be present at the hearing unless an attorney has entered an appearance in his/her behalf before said date and time.

19.65.000

NOTICE TO (SHERIFF) (JAIL SUPERVISOR):

(NAME DEFENDANT) being held in your (jail) (detention facility),

on charges under Cause No. (insert cause number) pending in this Court,

indicates he/she is not a citizen of the United States. The Court notes that the United States State Department considers you to be responsible for complying with the Vienna Convention on Consular Relations and other related treaties. If you have not done so already, you should:

- determine the country in which Defendant (NAME) is a citizen and
- then determine whether Defendant's country is on the list which requires notice to consular authorities.
- If Defendant's country is on the list, you must send the mandatory notice of Defendant's arrest and/or detention to the consular authorities of that country.
- If Defendant's country is not on the mandatory list, you must advise the Defendant that he has a right to have you notify his country's consular authorities of his arrest and/or detention.
- You must advise the Defendant in any case that he/she has a right to communicate with his country's consular officers.

To assist you, full information on your obligations under the United States treaties, as well as advice forms and consulate contact directories, is available online from the U.S. State Department at the following web address: http://travel.state.gov/consul_notify.html

(Judge's name) , (name court) Court

19.65.000 (Continued – back page of notice to sheriff or jail)
COUNTRIES FOR WHICH NOTICE OF ARREST OF NATIONAL IS MANDATORY BY TREATY

From United States Department of State, *Consular Notification and Access*, "Part 1, Basic Instructions" (available at http://travel.state.gov/consul_notify.html , last consulted June 25, 2009).

Algeria	Malta
Antigua and Barbuda	Mauritius
Armenia	Moldova
Azerbaijan	Mongolia
Bahamas, The	Nigeria
Barbados	Philippines
Belarus	Poland (non-permanent residents only)
Belize	Romania
Brunei	Russia
Bulgaria	Saint Kitts and Nevis
China [1]	Saint Lucia
Costa Rica	Saint Vincent and the Grenadines
Cyprus	Seychelles
Czech Republic	Sierra Leone
Dominica	Singapore
Fiji	Slovakia
Gambia, The	Tajikistan
Georgia	Tanzania
Ghana	Tonga
Grenada	Trinidad and Tobago
Guyana	Tunisia
Hong Kong [2]	Turkmenistan
Hungary	Tuvalu
Jamaica	Ukraine
Kazakhstan	United Kingdom [3]
Kiribati	U.S.S.R. [4]
Kuwait	Uzbekistan
Kyrgyzstan	Zambia
Malaysia	Zimbabwe

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[1] Notification is not mandatory in the case of persons who carry "Republic of China" passports issued by Taiwan. Such persons should be informed without delay that the nearest office of the Taipei Economic and Cultural Representative Office ("TECRO"), the unofficial entity representing Taiwan's interests in the United States, can be notified at their request.

[2] Hong Kong reverted to Chinese sovereignty on July 1, 1997, and is now officially referred to as the Hong Kong Special Administrative Region, or quot;SAR." Under paragraph 3(f)(2) of the March 25, 1997, U.S.-China Agreement on the Maintenance of the U.S. Consulate General in the Hong Kong Special Administrative Region, U.S. officials are

required to notify Chinese officials of the arrest or detention of the bearers of Hong Kong passports in the same manner as is required for bearers of Chinese passports-- *i.e.,* immediately, and in any event within four days of the arrest or detention.

[3] United Kingdom includes England, Scotland, Wales, Northern Ireland and Islands and the British dependencies of Anguilla, British Virgin Islands, Bermuda, Montserrat, and the Turks and Caicos Islands. Their residents carry British passports.

[4] Although the U.S.S.R. no longer exists, some nationals of its successor states may still be traveling on its passports. Mandatory notification should be given to consular officers for all nationals of such states, including those traveling on old U.S.S.R. passports. The successor states are listed separately above.

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22.00.000 Bail

22.01.010 **ALL OFFENSES BAILABLE, EXCEPT MURDER IF PROOF EVIDENT** – "Offenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong." Ind. Const., Art. 1, § 17.

22.01.050 **EXCESSIVE BAIL IS PROHIBITED**- U.S. Const., Amend. VIII;
Ind. Const., Art. 1, § 16.

22.01.100 **DUAL OBJECTS OF BAIL -** A court may admit a defendant to bail and impose conditions specified by statute "to assure the defendant's appearance at any stage of the legal proceedings, or, upon a showing of clear and convincing evidence that the defendant poses a risk of physical danger to another person or the community, to assure the public's physical safety." Ind. Code 35-33-8-3.2(a).

22.02.010 **RIGHT TO BAIL ARISES AT INITIAL HEARING** - Under current statutes, the right to bail does not arise until the initial hearing; admitting a defendant to bail at an earlier time, as at the time of arrest pursuant to a bail schedule, is discretionary: *Schmidt v. State*, 746 N.E.2d 369 (Ind. Ct. App. 2001).

22.02.500 **COOLING OFF PERIOD FOR DOMESTIC BATTERY** - A person arrested for a crime of domestic violence may not be released from custody for the first eight [8] hours following the arrest. Ind. Code 35-33-1-1.7.
[A crime of domestic violence is defined by Ind. Code 35-31.5-2-78 as:

- having as an element either the use of physical force or the threatened use of a deadly weapon, and
- was committed against:
    - Defendant's current or former spouse, Defendant's parent, or Defendant's guardian, or
    - a person with whom Defendant shared a child in common, or
    - a person who was cohabitating with or had cohabitated with Defendant as a spouse, parent, or guardian, or
    - a person who was or had been similarly situated to a spouse, parent, or guardian of the Defendant.]

22.02.550 **NO-CONTACT BAIL ORDER PRIOR TO INITIAL HEARING IF BODILY INJURY** – If a person charged with a felony that resulted in bodily injury or an A misdemeanor that resulted in bodily injury [with eight(8) exceptions listed in IC 5-2-6.1-8] is released on bail without a bail hearing, the court shall include as a condition of bail that the defendant refrain from any direct or indirect contact with the victim for ten (10) days after release or until the initial hearing, whichever occurs first. The court may reinstate or modify the no-contact condition at the initial hearing. Ind. Code 35-33-8-3.6.

22.02.575 **GPS TRACKING DEVICE FOR DOMESTIC VIOLENCE CHARGES –** The court may require a person charged with a crime of domestic violence (as described in IC 35-31.5-2-78) to wear a GPS tracking device as a condition of bail. The court may also order a person required to wear a GPS tracking device as a bail condition to pay any costs associated with the GPS device. Ind. Code 35-33-8-11.

22.02.600 **NO BAIL FOR CERTAIN SEX OFFENDERS WITHOUT A HEARING** – As provided in IC 35-33-8-3.5, a court may not admit the following persons to bail until after the court has conducted a bail hearing in open court:

- A person who is already an IC 35-38-1-7.5 sexually violent predator who has been arrested for or charged with an offense that would classify the person as a sex or violent offender as defined in IC 11-8-8-5 [statutory definition appears below], or
- A person charged with child molesting, or
- A person charged with child solicitation.

The bail hearing must be held within forty-eight (48) hours of arrest unless "exigent circumstances" prevent the hearing within that period. At the conclusion of the hearing the court is to consider whether the factors listed in Ind. Code 35-33-8-4 "warrant the imposition of a bail amount that exceeds court or county guidelines, if applicable."

[Ind. Code 35-33-8-4 provides, in pertinent part,:
Bail may not be set higher than that amount reasonably required to assure the defendant's appearance in court or to assure the physical safety of another person or the community if the court finds by clear and convincing evidence that the defendant poses a risk to the physical safety of another person or the community. In setting and accepting an amount of bail, the judicial officer shall take into account all facts relevant to the risk of nonappearance, including:
(1) the length and character of the defendant's residence in the community;
(2) the defendant's employment status and history and his ability to give bail;
(3) the defendant's family ties and relationships;
(4) the defendant's character, reputation, habits, and mental condition;
(5) the defendant's criminal or juvenile record, insofar as it demonstrates instability and a disdain for the court's authority to bring him to trial;
(6) the defendant's previous record in not responding to court appearances when required or with respect to flight to avoid criminal prosecution;
(7) the nature and gravity of the offense and the potential penalty faced, insofar as these factors are relevant to the risk of nonappearance;
(8) the source of funds or property to be used to post bail or to pay a premium, insofar as it affects the risk of nonappearance;
(9) that the defendant is a foreign national who is unlawfully present in the United States under federal immigration law; and
(10) any other factors, including any evidence of instability and a disdain for authority, which might indicate that the defendant might not recognize and adhere to the authority of the court to bring him to trial.]

[As defined in Ind. Code 11-8-8-5, "sex or violent offender" means a person convicted of any of the following offenses:

(1) Rape
(2) Criminal deviate conduct
(3) Child molesting
(4) Child exploitation
(5) Vicarious sexual gratification (including performing sexual conduct in the presence of a minor)
(6) Child solicitation
(7) Child seduction).
(8) Sexual misconduct with a minor as a Class A, Class B, or Class C felony unless:

(A) the person is convicted of sexual misconduct with a minor as a Class C felony;
(B) the person is not more than:

(i) four (4) years older than the victim if the offense was committed after June 30, 2007; or
(ii) five (5) years older than the victim if the offense was committed before July 1, 2007; and
C) the sentencing court finds that the person should not be required to register as a sex offender.

(9) Incest
(10) Sexual battery
(11) Kidnapping, if the victim is less than eighteen (18) years of age, and the person who kidnapped the victim is not the victim's parent or guardian.
(12) Criminal confinement, if the victim is less than eighteen (18) years of age, and the person who confined or removed the victim is not the victim's parent or guardian.
(13) Possession of child pornography.
(14) Promoting prostitution as a Class B felony.
(15) Promotion of human trafficking if the victim is less than eighteen (18) years of age.
(16) Sexual trafficking of a minor
(17) Human trafficking if the victim is less than eighteen (18) years of age.
(18) Murder
19) Voluntary manslaughter
(20) Sexual misconduct by a service provider with a detained child.
(21) An attempt or conspiracy to commit a crime listed above.
(22) A crime under the laws of another jurisdiction, including a military court, that is substantially equivalent to any of the offenses listed in subdivisions (1) through (21).
(b) The term includes:
(1) a person who is required to register as a sex or violent offender in any jurisdiction; and
(2) a child who has committed a delinquent act and who:

(A) is at least fourteen (14) years of age;
(B) is on probation, is on parole, is discharged from a facility by

the department of correction, is discharged from a secure private facility (as defined in IC 31-9-2-115), or is discharged from a juvenile detention facility as a result of an adjudication as a delinquent child for an act that would be an offense described in subsection (a) if committed by an adult; and
(C) is found by a court by clear and convincing evidence to be likely to repeat an act that would be an offense described in subsection (a) if committed by an adult.]

22.05.005 **BAIL SCHEDULE FOR WARRANTLESS ARRESTS -** Court has implicit authority in bail statutes to employ a bail schedule. *Estate of Payne v. Grant County Court*, 508 N.E.2d 1331 (Ind. Ct. App. 1987).

22.05.010 **COURT TO SET BAIL WHEN CHARGE FILED -** Court shall order amount of bail for persons charged by indictment or information. Ind. Code 35-33-8-4(a).

22.05.050 **BAIL AMOUNT TO APPEAR ON WARRANT -** Arrest warrant shall specify the amount of bail. Ind. Code 35-33-2-2(a)(7) and Ind. Code 35-33-8-4(a).

22.10.100 **Five types of bail undertaking authorized by statute** - The court may admit a defendant to bail by requiring:
(A) the execution of a bail bond with sufficient solvent sureties;
(B) the deposit of cash or securities in an amount equal to the bail;
(C) the execution of a bond secured by real estate in the county, where thirty-three hundredths (0.33) of the true tax value less encumbrances is at least equal to the amount of the bail
[Note – if defendant is a foreign national not lawfully admitted to the U.S., equity in the real estate must be at least twice the bail amount, Ind. Code 35-33-8-4.5; for a method to determine nationality, see 19.60.000, Dialogue for Initial Hearing];
(D) the posting of a real estate bond;
(E) execution by defendant of a bail bond by depositing cash or securities with the clerk of the court in an amount not less than ten percent (10%) of the bail.
[Note – 10% cash bail deposit is not authorized for a foreign national not lawfully admitted to the U.S.. Ind. Code 35-33-8-4.5.; for a method to determine nationality, see 19.60.000, Dialogue for Initial Hearing.]
Ind. Code 35-33-8-3.2.]

22.10.180 **NOTICE BY COURT OR CLERK THAT 10% DEPOSIT MAY BE LOST** - A defendant who deposits 10% of the bail in cash or an individual posting 10% of the bail for the defendant must receive notice from the court, the clerk, or the sheriff that the deposit may be forfeited or retained. Ind. Code 35-33-8-3.2.

22.10.200 **RELEASE ON DEFENDANT'S OWN RECOGNIZANCE** - The court is authorized by statute to release the defendant on personal recognizance unless (A) the state presents evidence relevant to a risk by the defendant (i) of nonappearance, or (ii) to the physical safety of the public; and (B) the court finds by a preponderance of the evidence that the risk exists. Ind. Code 35-33-8-3.2. Note - Release on

personal recognizance is commonly understood as release to be at liberty during the pendency of the criminal proceeding upon no more than defendant's unsecured written promise to appear whenever attendance before the court may be required and to render himself or herself amenable to the orders and processes of the court. BLACK'S LAW DICTIONARY (5TH ED. 1979).

22.10.300 **OTHER RESTRICTIONS OR FORMS OF RELEASE, WITH OR WITHOUT BAIL** - In addition to [or, from statutory language, as alternatives to] imposing bail or personal recognizance as conditions for release pending trial, the court is authorized by statute to:

- Impose reasonable restrictions on the activities, movements, associations, and residence of the defendant during the period of release
- Require the defendant to refrain from any direct or indirect contact with an individual, including any period before the defendant is released from lawful detention;
- Place the defendant under the reasonable supervision of a probation officer or other appropriate public official [defendants supervised in this fashion and determined to have a prior unrelated conviction for any offense may be required to pay, if able, the pretrial services fee authorized effective July 1, 2006 by IC 35-33-8-3.3 – see Procedural Checklist, 22.95.005 hereafter];
- Release the defendant into the care of a qualified person or organization responsible for supervising the defendant and assisting the defendant in appearing in court. The supervisor shall maintain reasonable contact with the defendant in order to assist the defendant in making arrangements to appear in court and, where appropriate, shall accompany the defendant to court. The supervisor need not be financially responsible for the defendant;
- Impose any other reasonable restrictions designed to assure the defendant's presence in court or the physical safety of another person or the community.

Ind. Code 35-33-8-3.2(a).

22.20.100 **FACTORS ESTABLISHED BY STATUTE FOR SETTING DOLLAR LEVEL OF BAIL** - In setting and accepting an amount of bail, the judicial officer shall take into account all facts relevant to the risk of nonappearance, including:
(1) the length and character of the defendant's residence in the community;
(2) the defendant's employment status and history and his ability to give bail;
(3) the defendant's family ties and relationships;
(4) the defendant's character, reputation, habits, and mental condition;
(5) the defendant's criminal or juvenile record, insofar as it demonstrates instability and a disdain for the court's authority to bring him to trial;
(6) the defendant's previous record in not responding to court appearances when required or with respect to flight to avoid criminal prosecution;
(7) the nature and gravity of the offense and the potential penalty faced, insofar as these factors are relevant to the risk of nonappearance;
(8) the source of funds or property to be used to post bail or to pay a premium, insofar as it affects the risk of nonappearance;

(9) that the defendant is a foreign national who is unlawfully present in the United States under federal immigration law; and
(10)any other factors, including any evidence of instability and a disdain for authority, which might indicate that the defendant might not recognize and adhere to the authority of the court to bring him to trial. Ind. Code 35-33-8-4(b).

22.30.100 **MURDER BURDEN ON STATE** – "[W] a criminal defendant is charged with murder or treason, whether by indictment or information, the burden lies with the State to show that 'the proof is evident, or the presumption strong,' if it seeks to deny bail to that defendant." *Fry v. State*, 990 N.E.2d 429, 443-44 (Ind. 2013). To establish "evident proof" or a "strong presumption," the State must show that defendant "more likely than not" committed the murder. *Id.* Defendant must be allowed to present, and the court must consider, evidence of an affirmative defense to rebut the State's strong presumption defendant more likely than not committed the murder. *Satterfield v. State*, No. 49A02-1409-CR-659, __ N.E.3d __ (Ind. Ct. App., Apr. 16, 2015).

22.40.100 **REDUCING BAIL** - The court may reduce bail if defendant "presents additional evidence of substantial mitigating factors, based on the factors set forth in Ind. Code 35-33-8-4" [listed above in Benchbook Section 22.20.100] "which reasonably suggests that the defendant recognizes the court's authority to bring him to trial." But the court may not reduce bail, even if a showing is made as above of substantial mitigating factors, if it is shown as well, by clear and convincing evidence, that an act or threat of physical violence or intimidation was made by defendant or one acting under defendant's direction against the victim or the victim's immediate family. Ind. Code 35-33-8-5(a).

22.40.700 **DENIAL OF BAIL REDUCTION IS APPEALABLE JUDGMENT**- The denial of a motion to reduce bail is a final judgment and within the scope of the defendant's statutory right to appeal "any judgment in a criminal action." *State ex rel. Peak v. Marion Criminal Court, Division One*, 246 Ind. 118, 203 N.E.2d 301 (Ind. 1965).

22.45.000 **INCREASING BAIL -** The court may increase bail based on: additional evidence relevant to a high risk of nonappearance, based on the factors set forth in [Benchbook Section 22.20.100 above], or on clear and convincing evidence that an act or threat of physical violence or intimidation was made by defendant or one acting under defendant's direction against the victim or the victim's immediate family, or that the defendant otherwise poses a risk to the physical safety of another person or the community. Ind. Code 35-33-8-5.

22.50.000 **REVOKING BAIL -** The court may revoke bail or an order for release on personal recognizance upon clear and convincing proof by the state that:
(1) while admitted to bail the defendant:
(A) or his agent threatened or intimidated a victim, prospective witnesses, or jurors concerning the pending criminal proceeding or any other matter;
(B) or his agent attempted to conceal or destroy evidence relating to the pending criminal proceeding;
(C) violated any condition of his current release order;

(D) failed to appear before the court as ordered at any critical stage of the proceedings; or

(E) committed a felony or a Class A misdemeanor that demonstrates instability and a disdain for the court's authority to bring him to trial, or

(2) that an act or threat of physical violence or intimidation was made by defendant or one acting under defendant's direction against the victim or the victim's immediate family, or that the defendant otherwise poses a risk to the physical safety of another person or the community, or

(3) a combination of the factors described in subdivisions (1) and (2) exists.

Ind. Code 35-33-8-5.

22.60.000 **MANDATORY REVOCATION ON CONVICTION OF NONSUSPENDABLE FELONY -**Upon entering a conviction for a nonsuspendable felony, the judge shall order the defendant, if he/she has previously been released on bail or recognizance, to be imprisoned in the county or local penal facility pending sentencing. Ind. Code 35-38-1-2(d).

22.65.000 **EVIDENCE RULES INAPPLICABLE TO BAIL HEARINGS** - Other than with respect to privileges, Indiana Rules of Evidence to not apply to "bail hearings."
Ind. Evidence Rule 101(b)(2).

22.70.100 **TAKING DEPOSITS FOR COSTS, FINES, PUBLIC DEFENDER, RESTITUTION -** Statutes authorize taking of cash bail deposits for payment of fines, costs, restitution, and costs of publicly-provided representation when the 10% cash bail deposit is used. *Obregon v. State*, 703 N.E.2d 695 (Ind. Ct. App. 1998). Bail statutes now allow any portion of a cash deposit of the full amount of bail to be kept by the court for fines, costs, restitution, or costs of publicly paid representation. Compare decisions based on prior versions of the statutes prior to their amendment to allow the full cash deposits to be taken. *See Cody v. State*, 702 N.E.2d 364 (Ind. Ct. App. 1998); *J. J. Richard Farm Corp. v. State,* 642 N.E.2d 1384 (Ind. Ct. App. 1994).

22.70.200 **ATTACHING FORFEITED DEPOSITS FOR VICTIM** - If defendant posts a cash bail deposit, whether 10% or the full amount of bail, and the deposit is subject to forfeiture under the terms of the bond, a court which has received written notice of a pending civil action by the crime victim must order the clerk to retain the deposited funds and may not declare the deposit forfeited; if there is an entry of judgment for the victim in the civil action the court shall order payment of all or part of the deposit to the victim, as necessary to satisfy the judgment, and shall order the balance, if any, forfeited. Ind. Code 35-33-8-7, Ind. Code 35-33-8-8.

22.70.300 **SURETY'S OBLIGATION ON BOND ENDS** - The surety's obligation on a bond extends through the point (1) at which judgment of conviction or acquittal is entered in a misdemeanor case, or (2) in a felony case at which sentence is imposed, acquittal is entered, or defendant is ordered or admitted to a diversion program. Ind. Code 27-10-2-10(c). The surety also may end the obligation by surrendering the defendant at any time; an arrest warrant is not required for the surety to retake the defendant and surrender him at the jail. *Amwest Surety Insurance Co. v. State*, 750 N.E.2d 865 (Ind. Ct. App. 2001).

22.80.100 **SURETY BOND FAILURE TO APPEAR AND LATE SURRENDER AND FORFEITURE** - Failure to appear procedure, late surrender fees, and forfeiture for surety bond. Ind. Code 27-10-2-12.

22.90.100 **ELIGIBILITY FOR BAIL PENDING APPEAL** - By statute, a person convicted of a crime who has appealed or intends to appeal may file a petition for bail pending appeal, and may be admitted to bail at the discretion of the trial court unless he is ineligible for bail pending appeal because he or she was convicted of a Class A felony or a nonsuspendable felony. Ind. Code 35-33-9-1.

FORMS

22.95.005 Procedural Checklist - Setting Bail

1. Preliminary

   a. Advise defendant of nature of hearing and of his **Miranda** rights.
   b. Have defendant provide:
      (1) name;
      (2) age;
      (3) address;
      (4) phone; and
      (5) attorney's name. If defendant is unrepresented by counsel, inform defendant of the right to counsel and appoint counsel if defendant qualifies.

2. Bail inquiry [Ind. Code 35-33-8-4(b)]
   a. Questions to Prosecutor

      (1) Has the defendant failed in the past to appear for a scheduled court hearing?

      (2) Does State have any evidence that there is a likelihood that the defendant will attempt flight to avoid further prosecution?

      (3) Information to be obtained from the prosecutor or arresting officer:

         (a) the nature and circumstances of the offense;
         (b) the maximum penalties applicable to these charges;
      (c) whether a weapon was involved in the offense and a description of the weapon;
      (d) whether personal injuries were inflicted or threatened and a description of the injuries or threats;
      (e) whether property was taken or destroyed, and a description of such property;
      (f) the kinds and quantities of evidence against the defendant (required for murder cases);
      (g) whether any detainers are outstanding against the defendant;
      (h) whether the defendant has made any threats against potential witnesses;
      (i) any grounds to suspect that the defendant is an alcoholic, an addict, or emotionally distraught;
      (j) any information indicating that the defendant may attempt to flee if released;
      (k) the defendant's prior record;
      (l) whether the offense was committed while the defendant was on bail or released on recognizance;
      (m) whether the offense was committed while the defendant was on probation or parole (note court's discretion under Ind. Code 35-33-8-6 to order detention for up to 15 days if defendant on probation or parole).

b. Questions to sworn defendant:

(1) Are you married?
(2) Do you have any children and, if you do, are they presently attending school?
(3) Are you living with your wife (husband) and/or children?
(4) Are you employed?
(5) How long have you been employed with your present employer?
(6) What is your average weekly or monthly take-home pay?
(7) Do you own an automobile?
(8) Do you have a savings account, bonds, stocks, or similar liquid assets?
(9) Do you own or rent your home?
(10) How long have you lived at your present address?
(11) How long have you lived in this city (state) or the surrounding area?
(12) Where did you live before than?
(13) Do you own any other real property?
(14) Are you regularly receiving medical treatment?
(15) Have you ever been treated or hospitalized for mental illness?

3. Set bail [Ind. Code 35-33-8-3.2]

a. State that:

(1) defendant may sign own recognizance bond without sureties; or
(2) bail bond with commercial sureties will be required; or
(3) bail bond secured by real estate in the county with at least 33% of the true tax value less encumbrances equal to bail amount will be required; or
(4) property bond will be required; or
(5) a cash or securities deposit will be required (in either full amount of the bail or ten percent [10%] of the bail), and the deposit:
    (a) must be filed in defendant's name;
    (b) must be considered defendant's money;
    (c) if ten percent [10%] cash bail, the deposit will be used:
        # to pay any costs of a court-appointed attorney who represents the defendant - the deposit will be used for this whether the defendant is acquitted or convicted or charges are dismissed; and
        # if defendant is convicted, to pay fines, costs, fees, and restitution, if ordered by the court;, and
        # whether defendant is convicted or acquitted or charges are dismissed, up to 10% of the deposit or $50.00, whichever is less, will be retained as an administrative fee.

b. State whether:

(1) the defendant is being placed in the custody of a designated person or organization which has agreed to supervise him/her;

(2) any restrictions are imposed on the defendant's activities, movements, associations, and residence;
(3) the defendant is required to return to custody after specified hours;
(4) the defendant is to refrain from any direct or indirect contact with specified individuals;
(5) [for domestic violence offenses] the defendant is required to wear a GPS tracking device (and is required to pay $ _____ for the GPS expenses, and
(6) any other conditions being imposed (deemed reasonably necessary to assure the appearance of the defendant).

c. Explain to the defendant:

(1) when he/she is to appear in court again or how he/she will be advised when next to appear in court;
(2) the consequences and possible penalties if he/she fails to appear or if he/she violates conditions of bail; and
(3) that bail continues until sentencing unless court revokes or alters for cause shown, or court revokes after conviction because felony is nonsuspendible.

22.95.050 Procedural Checklist - Altering Or Revoking Bail

1. **Preliminary**

    a. Defendant or State makes "application" (Ind. Code 35-33-8-5(a)) for alteration or revocation of bail.
    b. Order notice and hearing on "application."
    c. If defendant is to be held in custody pending resolution of an application to increase or revoke bail which is based on a factor other than the commission of a new crime, the Committee recommends that a judicial officer determine there is probable cause or good cause to believe the factor is present or occurred.

2. **Hearing**

    a. Rules of Evidence, except for privilege, do not apply.
    Indiana Rule of Evidence 101(c).

    b. Note Ind. Code 35-33-8-5(a) provides that "credible hearsay" is admissible.

3. **Reduction**

    a. Defendant has burden to present additional evidence of substantial mitigating factors, "based on" the factors listed below in subsection 5, which reasonably suggest that defendant recognizes the court's authority to bring him to trial.
    Ind. Code 35-33-8-5(c).

    b. If court finds defendant has met the burden described above, the court may in its discretion reduce bail, unless court also finds clear and convincing evidence that the defendant poses a risk to the physical safety of another person or the community in which case no reduction of bail may be granted.
    Ind. Code 35-33-8-5.

4. **Increases**

    a. The State has the burden to present additional evidence relevant to a high risk of nonappearance, "based on" the factors listed below in subsection 5.

    b. If court finds the State has met the burden described above, the court may in its discretion increase bail.

5. **Factors for decreasing or increasing bail**

    (a) Length and character of defendant's residence in the community.
    (b) Defendant's employment status and history and his ability to give bail.
    (c) Defendant's family ties and relationships.
    (d) Defendant's character, reputation, habits, and mental condition.
    (e) Defendant's criminal or juvenile record, insofar as it demonstrates instability and a disdain for the court's authority to bring him to trial.

(f) Defendant's previous record in not responding to court appearances when required or with respect to flight to avoid criminal prosecution.

(g) The nature and gravity of the offense and the potential penalty faced, insofar as those factors are relevant to the risk of nonappearance.

(h) The source of funds or property to be used to post bail or to pay a premium, insofar as it affects the risk of nonappearance.

(i) Any other factors, including any evidence of instability and a disdain for authority, which might indicate that the defendant might not recognize and adhere to the authority of the court to bring him to trial.

6. **Revocation**

(a) Burden is on the State to prove at least one of the following factors by clear and convincing evidence. Ind. Code 35-33-8-5(d).

(b) Factors permitting revocation of bail or recognizance:

(1) Defendant or his agent, while defendant was admitted to bail, threatened or intimidated a victim, prospective witnesses, or jurors concerning the pending criminal proceeding or any other matter.

(2) Defendant or his agent, while defendant was admitted to bail, attempted to conceal or destroy evidence relating to the pending criminal proceeding.

(3) Defendant, while admitted to bail, violated any condition of his current release order.

(4) Defendant, while admitted to bail, failed to appear before the court as ordered at any critical stage of the proceedings.

(5) Defendant, while admitted to bail, committed a felony or Class A misdemeanor that demonstrates instability and a disdain for the court's authority to bring him to trial.

(c) If the State proves one of the factors in subsection (b) above, the court then has discretion as to whether it will revoke bail. Ind. Code 35-33-8-5(d).

22.95.075 Personal Appearance Bond With Ten Percent Cash Deposit

STATE OF INDIANA

_____ COURT

STATE OF INDIANA

v. CAUSE NO.

Personal Appearance Bond
With Ten Percent Cash Deposit
Ind. Code 35-33-8-3.2(a)(2)

I, _____, defendant herein, understand that I have been admitted to bail in the sum of ___ dollars to assure my appearance in _____ Court at __ o'clock, _ M., on _____ , 20__. In lieu of a surety bond, property bond, or full cash bond, I voluntarily accept the option given by the Court to deposit 10% of the amount of the bail in cash with the clerk of the Court as security for the full amount of the bail.

I understand that I am bound to the State of Indiana in the sum of ___ dollars, the amount of the bond. If I appear in Court as directed and comply with all conditions as ordered by the Court until this cause is finally determined, then this bond shall be void; if otherwise, the bond shall remain in full force,

Any proceedings concerning the bond, or its forfeiture, judgment, or execution of judgment, will be held in the Court hereby admitting me to bail.

I understand that an administrative fee of ten percent (10%) of the deposit or $ 50.00, whichever is less, will be retained by the court from the deposit.

If I do not appear at any time fixed by the Court, the Court shall declare this bond to be forfeited and notice of forfeiture shall be mailed to ____(name)___, __(address)__. In addition, unless the Court finds that there was justification for my failure to appear, the Court shall immediately enter judgment, without pleadings and without change of judge or change of venue, against me for the amount of the bail bond.

If the Court receives written notice of a pending civil action or unsatisfied judgment against me arising out of the same transaction or occurrence forming the basis of the criminal case against me, the funds deposited with the clerk of the court may not be declared forfeited by the Court and the Court shall order the deposited funds to be held by the clerk. If there is an entry of final judgment in favor of the plaintiff in the civil action, and if the deposit and the bond are subject to forfeiture, the Court shall order payment of all or any part of the deposit to the plaintiff in the civil action, as is necessary to satisfy the civil judgment. The court shall then order the remainder of the deposit, if any, and the bond forfeited.

If there is no forfeiture but assigned counsel represents me and there are publicly paid costs of representation, or if a judgment of conviction is entered against me and the court orders that I pay fines, costs, or restitution, I understand that the deposit, less fees retained by the clerk, shall be retained by the clerk and I shall receive back only that portion of the deposit, if any, which exceeds the publicly paid costs of representation, fines, costs, and restitution.

*If there is no forfeiture and no publicly paid costs of representation are incurred on my behalf, I understand that upon my request the Court may order whatever amount is refundable from the deposit to be paid to me or to my attorney or to __(name)__, __(address)__.

I understand the terms of this agreement and voluntarily enter into it.

Defendant _____

Date:

I, the undersigned, acknowledge that I have read this agreement and hereby agree to have any funds I provide for the 10% cash bail deposit of Defendant ___[name Defendant] be subject to forfeiture or to being taken to pay a civil judgment against Defendant arising out of the facts relating to Defendant's arrest or to being taken to pay any fines, costs, restitution, or publicly paid costs of representation, as though the funds I provide are the Defendant's.

(Signature[s] of person[s] posting deposit if other than defendant)

Date:

***NOTE** - If the Court wishes to also have the deposit made subject to use for probation user fees or other local matters, provision to that effect should be inserted prior to this paragraph.

22.95.100 Recognizance Or Surety Bond

State of Indiana)
) SS:
County of)

State of Indiana
v.

Recognizance Or Surety Bond
[Ind. Code 27-10-2-10(a),Ind. Code 35-33-8.5-4(b)]

We, (defendant) and (surety), jointly and severally acknowledge ourselves bound to the state of Indiana in ____ dollars. If (the defendant) shall appear on the ____ day of _____, 19__, in the _____ court, to answer a charge of (here state the offense) and from day to day and from term to term thereof, and abide the order of the court until the cause is determined and not depart therefrom without leave, then this recognizance shall be void, else to remain in full force.

If the above named defendant does not appear at any time fixed in this bond, the court shall order (the surety) to produce the defendant. The court shall mail notice of this order to (the surety) at _____ and _____ in _____ county and state of Indiana. If the surety does not produce the defendant, and does not pay all costs and late surrender fees in compliance with Ind. Code 27-10-2-12, the court shall, three hundred sixty-five (365) days after the mailing of the above notice to the surety, declare the bond forfeited, send notice of the declaration of forfeiture to the surety, enter judgment forthwith against the surety no earlier than eleven (11) days after the notice of forfeiture was sent, and certify the judgment to the clerk for record. Such forfeiture shall be without pleadings and without change of judge or change of venue. The obligors on such bond may appeal to the ruling of the court and appeal to the court of appeals as in other civil cases, and on appeal the evidence may be reviewed. Execution shall issue forthwith to the sheriff against the properties of each of us to be levied as other executions are levied.

Witness our hand and seals this ___ day of ____, 20__.
(signature of defendant) (SEAL)
(signature of surety) (SEAL)
taken and approved this ___ day of _____, 20___.

(Officer taking surety)

22.95.125 Commercial Surety Bond - Procedural Checklist - Failure To Appear

1. Defendant fails to appear.

2. Check to see if notice of hearing to enter a plea or of trial was given to bondsman or insurer at least seventy-two (72) hours prior to the time of the scheduled hearing. Notice may be given, pursuant to Trial Rule 5(B), by hand delivery or by mail. **Imperial Insurance Co. and Gudinas v. State**, 346 N.E.2d 612 (Ind. App. 1976). If notice by mail is used, the notice is considered given as of the time of mailing for purposes of the 72 hour requirement. **Allegheny Mutual Casualty Company v. State**, 474 N.E.2d 1051 (Ind. App. 1985). [Note that the 72 hour requirement does not apply if the hearing is to be held within 72 hours of the bond's execution. Ind. Code 27-10-2-8. If such a hearing date was on record prior to the bond's execution, caselaw holds actual notice will not be required, as the court's records reflecting the hearing date will be considered as notice of the hearing. **Lee v. State**, 368 N.E.2d 1172 (Ind. App. 1977). If the hearing to be held within 72 hours of the bond's execution was not reflected in the court's records at the time of the bond's execution, there are no cases as to what would be a reasonable notice period.]

3. If notice was not sent, reschedule hearing or trial and have the clerk send notice of the rescheduling to the bondsman **or** [Ind. Code 27-10-2-8] the insurer.

4. If notice of the hearing or trial had been sent out 72 hours or more in advance, proceed to 5.

5. Issue an arrest warrant for the defendant.

6. Enter an order to the bondsman <u>and</u> the insurer to surrender the defendant; clerk is to mail this order to both bondsman and insurer within 30 days.

7. The bondsman or the insuror complies with the order for surrender above by:
   - (A) producing the defendant (note, statute does not say whether defendant's arrest under the court's warrant by law enforcement personnel is "production" of the defendant by the bondsman or insuror, but arrest probably implicitly is "compliance"), or
   - (B) petitioning for a hearing and proving:
     - (1) that the defendant's failure to appear was prevented by:
       - (a) defendant's illness or death;
       - (b) defendant's being in custody;
       - (c) that the required notice (see step 1) above was not given;or
       - (d) that authorities refused to extradite the defendant (bondsman or insurer to prove by preponderance

     and
     - (2) that the defendant's failure to appear was not with the consent or connivance of the bondsman or the insuror.

8. The time, after mailing of the notice of the order to produce, as in 4 above, within which the bondsman or insuror complies with the order to produce, as in 5 above, determines the amount of the bond which the insuror is liable to pay, as follows:
   - (A) compliance within **120 days or less** - no fees and no forfeiture;
   - (B) compliance within **121 to 180 days** - "late surrender fee" of 20% of bond amount is "assessed";

(C) compliance within **181 to 210 days** - "late surrender fee" of 30% of bond amount is "assessed";
(D) compliance within **211 to 240 days** - "late surrender fee" of 50% of bond amount is "assessed";
(E) compliance within **241 to 365 days** - "late surrender fee" of 80% of bond amount is "assessed";
(F) no compliance until **361 days or more** - assessment of 80% "late surrender fee" on the 360th day plus **declaration and judgment of forfeiture** of 20% of the bond amount.

9. Payment of "late surrender fees" is due on the date of compliance with the order to produce or within 360 days of the mailing of the order. Statute does not specify the time within which the "forfeiture" of 20% of the bond, should one be ordered, is to be paid by the bondsman or insuror, but a judgment is normally payable when entered and perhaps this was the implicit intention in the statute for "forfeiture" payment.

10. Judgment of forfeiture in 8(F), above, is to be entered without pleadings or change of judge or of venue. The judgment of forfeiture is to include "all actual costs resulting from defendant's failure to appear", including jury fees, witness fees, and "any other documented costs incurred by <u>the court</u>."

11. Late surrender fees may be waived or period for payment may be extended by the court in its discretion if the "surety or bondsman" files a written request therefore with the court and the prosecutor and "provides evidence satisfactory to the court that diligent efforts were made to locate the defendant." There is no provision for waiver of a forfeiture once it has been declared (perhaps because the Indiana Constitution give the Governor the power to remit forfeitures).

12. When compliance occurs or a forfeiture is ordered and the "late surrender fees" are not paid at the time of compliance or of the judgment of forfeiture (see 9 above), the clerk shall mail notice to the Department of Insurance, which is to pay the fees and forfeiture and take various other actions under Ind. Code 27-10-2-12.

22.95.150 Failure To Appear On Commercial Surety Bond

Failure To Appear On Commercial Surety Bond When Defendant Fails To Appear

(Date) Comes now the State of Indiana by _____. Counsel for defendant, , appears. Defendant fails to appear after notice. Bondsman fails to produce defendant after notice more than 72 hours prior to hearing/trial pursuant to Ind. Code 27-10-2-8(a). Warrant ordered all as per Order to Produce as below signed and filed.

ORDER TO PRODUCE

TO: (name of surety) and its agent, (bondsman)

RE: (name defendant), Bond #

Whereas the Defendant herein, __(defendant's name)__, is currently on recognizance from this Court upon surety bond in the amount of _____ Dollars through __(name of surety) and its agent, __(name of bondsman)__, and whereas, the Defendant was to appear in this Court on __(date)__ and, whereas, the Defendant failed to appear on the date as ordered:

The Court finds that the bondsman had at least 72 hours notice of the __(date of hearing/trial)__ hearing/trial and failed to produce the Defendant as required under the conditions and terms of the bond. The Court, therefore finds that the Defendant has breached the undertaking as contained in the bond; therefore, pursuant to Ind. Code 27-10-2-12(a) a warrant is ordered issued for the Defendant's arrest and the bondsman is ordered to surrender the Defendant to the Court immediately.

IT IS, THEREFORE, ORDERED, that the bondsman herein, __(name of bondsman)__, surrender the Defendant to the Court immediately and the Court hereby notifies the aforesaid surety and the aforesaid bondsman that upon failure to surrender the Defendant, the Court shall assess a late surrender fee as provided by Ind. Code 27-10-2-12(c) and, if the Defendant is not produced in Court within 365 days of the mailing of this notice by the Clerk of this Court, assess judgment against the surety on the bond in the amount provided by Ind. Code 27-10-2-12(d).

Dated this _____ day of _____, 20___.

22.95.175 Order Assessing Late Surrender Fee

Order Assessing Late Surrender Fee

Whereas, the Defendant herein, _(defendant's name)_, was placed on recognizance with _(surety)_ as surety, and _(name of bondsman)_, as bondsman, under Bond Number __, and, whereas, this Court ordered the bondsman to surrender the Defendant to the Court based upon the Defendant's failure to appear and, whereas, the Clerk of this Court mailed notice of the order to the bondsman and the surety on the bond at the addresses indicated on the bond and, whereas,

(OPTION 1) [_(list number of days)_ days elapsed between the date of the mailing of the notice of the order to produce and the production of the Defendant]:

OR

(OPTION 2) [the bondsman has failed to produce the Defendant as ordered herein and more than three hundred sixty-five (365) days have elapsed since the date of the mailing of the notice]:

The Court, therefore, assesses a late surrender fee in the amount of dollars [$ ___], representing _(insert percentage from Ind. Code 27-10-2-12)_ per cent of the face value of the bond, _(surety)_ to pay the amount forthwith.

Upon receipt of the late surrender fee, the Clerk is directed to forward it to the appropriate authority for deposit in the police pension trust fund established under Ind. Code 36-8-10-12.

The Clerk of this Court is further ordered and directed to mail a copy of this Order to the bondsman dnd the surety and, if the surrender fee is not paid within two [2] days of the date of the mailing of this Order, the Clerk is further ordered and directed to notify the Indiana Commissioner of Insurance pursuant to Ind. Code 27-10-2-12(g) of the failure of the surety to pay the surrender fee as required.

Dated this _____ of _____, 20____.

JUDGMENT OF PARTIAL FORFEITURE

It appearing to the Court that the bonsdman herein has not complied with the terms of Ind. Code 27-10-2-12(b) within three hundred sixty-five days of the mailing of notice of the order to produce the defendant, the Court therefore now declares forfeited the sum of $___, representing an amount equal to 20% of the face value of the bond and eneters Judgment against _(surety)_ on the forfeiture.

Dated this __ day of _____, 20___.

22.95.200 IF MONEY IS NOT RECEIVED FROM SURETY/BONDSMAN

(date) Order of non-compliance with order to pay signed and filed. Notice to the Insurance Commissioner of the State of Indiana pursuant to Ind. Code § 27-10-2-12(g) filed.

ORDER OF NONCOMPLIANCE

It appearing to the Court that the bondsman has failed to pay the late surrender fee assessed by order of this Court dated __,
and it further appearing to the Court that the surety herein has failed to satisfy the judgment rendered by this Court on _(date)_ and it further appearing to this Court that more than two (2) days have elapsed since the Clerk of this Court mailed notice of the late surrender fee assessment [and judgment herein]:

Therefore, pursuant to Ind. Code 27-10-2-12(f), the Clerk of this Court is ordered to mail notice of non-compliance to the Commissioner of Insurance of the State of Indiana and the Clerk is further directed to send a copy of this entry to the bondsman and the surety therein.

Dated this ___ day of _____, 20___.

25.00.000 Grand Jury Contents

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25.00.000 GRAND JURY

25.01.000 **CIRCUIT AND SUPERIOR COURTS MAY IMPANEL** - A circuit or superior court having criminal jurisdiction may impanel a grand jury. Ind. Code 35-34-2-2.

25.01.025 **COURT MAY IMPANEL ON ITS OWN AND MUST AT PROSECUTOR'S REQUEST** - A court may impanel a grand jury without a request from the prosecutor but must impanel a grand jury if the prosecutor requests it. Ind. Code 35-34-2-2.

25.01.100 **GRAND JURORS TO BE DRAWN FROM SAME POOL AS PETIT JURORS** -. Jury "Rules 2 through 10 shall govern grand jury assembly and selection." Jury Rule 1.

25.01.200 **COURT TO DETERMINE QUALIFICATIONS** - The judge is to determine the qualifications of those summoned to serve as grand jurors. Ind. Code 35-34-2-3.

25.01.225 **GROUNDS FOR DISQUALIFICATION** - Ind. Code 35-34-2-3(c) sets out grounds to disqualify persons from service on the grand jury:
Whenever the court finds that a grand juror:
(1) is disqualified from service under law;
(2) is incapable of performing the juror's duties because of bias or prejudice;
(3) is guilty of misconduct in the performance of the juror's duties that might impair the proper functioning of the grand jury;
(4) is under the age of eighteen (18) years;
(5) is not a resident of the county;
(6) is an alien;
(7) is a mentally incompetent person;
(8) is a witness for the prosecution;
(9) has such a state of mind in reference to a target that the juror cannot act impartially and without prejudice to the substantial rights of that person;
(10) holds a juror's place on the grand jury by reason of the corruption of the officer who selected and impaneled the grand jury; or
(11) has requested or otherwise caused any officer or an officer's deputy to place the juror upon the grand jury;
the court shall refuse to swear that grand juror or, if the juror has been sworn, shall discharge that grand juror and swear another grand juror.

25.01.250 **BIAS OR KNOWLEDGE NOT GROUNDS FOR DISMISSING INDICTMENT** -Knowledge of the crime or bias of a grand juror against a target may be a basis for excluding that person from the grand jury during the grand jury selection process [e.g., Ind. Code 35-34-2-3(c)(9)], but it does not make the grand jury defective or serve as a basis for dismissal of an indictment. *Sparks v. State*, 499 N.E.2d 738 (Ind. 1986).

25.01.275 **JURY RULES SELECTION PROCEDURES APPLY.** Jury Rule 1 provides that Jury Rules 4 on the use of questionnaires and 7 on deferral of jury service apply to grand jury proceedings.

25.01.300 **POTENTIAL TARGET MAY HAVE RIGHT TO PARTICIPATE IN SELECTION** - Under former statute, a person aware he or she would be the subject of a grand jury inquiry had the right to attend the grand jury selection and participate in the selection process; failure to do so waived any challenge to the grand jurors. See *Porter v. State*, 271 Ind. 180, 391 N.E.2d 801 (1979). There may be a common law right for a grand jury subject to do this even though statutes no longer expressly provide for it. See William Kerr, INDIANA PRACTICE- CRIMINAL PROCEDURE § 9.4C(4) (West 1998).

25.01.400 **GRAND JURY TO HAVE SIX MEMBERS** - The grand jury consists of six persons and one alternate. Ind. Code 35-34-2-2.

25.01.500 **QUORUM IS FIVE MEMBERS** - A grand jury quorum consists of five members, and if a quorum is present the grand jury may meet and conduct its proceedings, Ind. Code 35-34-2-4, and they may select a member to act as interim foreman or clerk, Ind. Code 35-34-2-3.

25.05.000 **COURT APPOINTS GRAND JURY FOREMAN AND CLERK** - The court appoints one grand juror to serve as foreperson and another to serve as clerk. Ind. Code 35-34-2-3.

25.05.025 **COURT INSTRUCTS GRAND JURY ON DUTIES** - The court is to instruct the grand jury on its duties, and in so doing the court determines what are "necessary" instructions. Ind. Code 35-34-2-3. Erroneous instructions may be a ground for dismissal of the indictment. *Ajabu v. State*, 677 N.E.2d 1035 (Ind. Ct. App. 1997).

25.10.000 **PROSECUTOR AND COURT ARE LEGAL ADVISORS** - The prosecutor and the court are the legal advisors to the grand jury, and the grand jurors may not receive legal advice from any other sources. Ind. Code 35-34-2-4.

25.10.025 **PROSECUTOR'S RIGHT TO BE PRESENT** - The prosecutor, his staff, and any witness he requests to be present may be present at any time during grand jury proceedings. Ind. Code 35-34-2-4.

25.10.050 **PROSECUTOR MAY CALL WITNESSES** - The prosecutor may call any person as a witness whom he believes to have relevant information. Ind. Code 35-34-2-9.

25.15.000 **GRAND JURY AUTHORITY TO INVESTIGATE** - The grand jury is to hear and examine evidence concerning crimes and to "take action with respect to this evidence as provided by law." Ind. Code 35-34-2-2.

25.15.010 **GRAND JUROR AUTHORITY TO REPORT POSSIBLE OFFENSE** – "If a member of the grand jury has reason to believe that an offense has been committed which is triable in the county, he may report this information to his fellow jurors, who may then investigate the alleged offense." Ind. Code 35-34-2-3.

25.15.025 **CLERK TO ISSUE SUBPOENAS FOR GRAND JURY OR PROSECUTOR** - Upon request of either the grand jury or the prosecutor, the clerk is to issue subpoenas to testify or duces tecum. Ind. Code 35-34-2-5.

25.15.050 **GRAND JURORS' AUTHORITY TO POSE THEIR OWN QUESTIONS** - It is implicit in the grand jury statutes that the grand jurors may pose their own questions to witnesses, and a prosecutor may not prevent grand jurors from directly questioning witnesses; the authority of grand jurors to directly question witnesses was violated by the prosecutor's discussion of potential questions with the grand jurors off the record before recalling witnesses to pose questions himself. *Wurster v. State*, 715 N.E.2d 341 (Ind. 1999).

25.20.000 **CLERK OF GRAND JURY IS TO KEEP MINUTES** - The clerk of the grand jury has the duty of keeping "minutes of the grand jury proceedings." Ind. Code 35-34-2-3.

25.20.025 **COURT IS TO PROVIDE MEANS TO RECORD EVIDENCE** - The court is to provide a means of recording the evidence presented to the grand jury and all other proceedings occurring before the grand jury except deliberations, voting, and other discussions when only grand jurors are present in the grand jury room; the recording is to be made in the same manner as evidence and proceedings are recorded in the court's proceedings. Ind. Code 35-34-2-3.

25.20.050 **RECORD REQUIREMENT APPLIES TO PROSECUTOR-GRAND JURY EXCHANGES** -The requirement that a record be kept of grand jury proceedings applies to exchanges between the prosecutor and the grand jurors, and an indicted person who makes a timely objection to the failure to have made such a record need not demonstrate any prejudice from the failure. *Wurster v. State*, 715 N.E.2d 341(Ind. 1999).

25.20.075 **WITNESSES BEFORE GRAND JURY MAY CLAIM SELF-INCRIMINATION** - A witness may claim the privilege against self-incrimination before the grand jury. *State ex rel. Pollard v. Criminal Court*, 263 Ind. 236, 329 N.E.2d 573 (1975).

25.20.100 **WITNESS MUST BE ADVISED OF RIGHT TO CLAIM PRIVILEGE** - Any witness before the grand jury must be advised of that he or she may claim the privilege against self-incrimination, and if the privilege is claimed the court is to resolve the claim in an in camera proceeding and either sustain the claim or order the witness, under pain of contempt, to answer. *State ex rel. Pollard v. Criminal Court*, 263 Ind. 236, 329 N.E.2d 573 (1975).

25.20.150 **PROSECUTOR MAY REQUEST USE IMMUNITY** - If a witness refuses to answer a question by claiming the privilege against self-incrimination, the prosecutor may request that the court grant immunity to the witness. The immunity protects the witness from use and derivative use of any compelled testimony. Ind. Code 35-34-2-7.

25.20.200 **CONSEQUENCES OF USE IMMUNITY** - When a defendant shows he or she testified before a grand jury under compulsion following a grant of use immunity at the

prosecution's request, and that he or she was subsequently indicted by the same grand jury which heard the immunized testimony, the defendant's motion to dismiss requires only a showing that a grant of immunity was issued, and then the State must counter the showing of immunity by presenting evidence that the indictment rests upon evidence independent of the immunized testimony. *State v. Peters*, 637 N.E.2d 145 (Ind. Ct. App. 1994).

25.25.000 **TARGET WITNESS PROCEDURE** - A person charged by information for an offense the grand jury is investigating or a subject of the grand jury investigation is a "target" witness. Ind. Code 35-34-2-1. A target witness has the right to testify before the grand jury provided he or she signs a waiver of immunity. Ind. Code 35-34-2-9. The target may be compelled to appear as a witness with a subpoena which advises the target of the general nature of the investigation, that the target is a subject of the investigation, that the target has the right to consult an attorney and to have the assistance of the attorney during the target's appearance, and that counsel will be appointed for the target if the target is unable to afford counsel. Ind. Code 35-34-2-5. The target may file a motion to quash the subpoena and the motion must be granted unless the prosecutor requests a grant of use immunity for the witness. Ind. Code 35-34-2-5; *State ex rel. Pollard v. Criminal Court*, 263 Ind. 236, 329 N.E.2d 573 (1975). Counsel for the target is to provide legal advice to the target "so long as the conversation is not overheard by any member of the grand jury," but may not participate in any way in the proceeding except as consented to by the prosecutor and the grand jury foreman. Ind. Code 35-34-2-5.5.

25.30.000 **DELIBERATIONS** - After hearing the evidence, the grand jury is to deliberate privately and vote on proposed indictments; no other persons than grand jurors are to be present during the deliberations. Ind. Code 35-34-2-4. At least five members of the grand jury must concur in returning an indictment.

25.35.000 **INDICTMENT ENDORSEMENTS** - The indictment must be endorsed with the phrase "a true bill," signed by the prosecutor, and signed by the foreman or by the other five grand jurors. Ind. Code 35-34-2-12.

25.35.100 **SEALING INDICTMENTS** - Upon motion of the prosecuting attorney, the court may order an indictment sealed, and no person may disclose its existence until the defendant is arrested or otherwise brought within the custody of the court. Ind. Code 35-34-1-1(d). See also Ind. Administrative Rule 9(J)(providing for confidentiality of indictments as ordered by the trial judge prior to return of duly executed service).

25.40.000 **EXTENDING TERM OF GRAND JURY** - The judge of any court having criminal jurisdiction may, upon due cause shown by petition of the prosecuting attorney of the judicial circuit, extend the terms of the members of a grand jury then convened for an additional term of three (3) months or more, as requested by the prosecuting attorney. The terms of the members of any grand jury may be so extended for successive periods of increments of three (3) months or more, to a total length of no more than two (2) years. Ind. Code 35-34-2-13.

25.50.000 **SPECIAL GRAND JURY** - (a) The judge of any court having criminal jurisdiction may, upon due cause shown by petition of the prosecuting attorney of the judicial circuit, order the clerk of the courts, or jury administrator to draw the names of competent persons to be summoned to serve on a special grand jury, which shall serve in addition to the grand jury regularly summoned and convened pursuant to law. (b) A special grand jury has the powers and duties of a grand jury prescribed by law. (c) The members of the special grand jury serve terms of three (3) months or more, as requested by the prosecuting attorney. The terms of members of a special grand jury shall be extended for the same period of time and in the same manner in which the terms of grand jury members may be extended under Ind. Code 35-34-2-13. Ind. Code 35-34-2-14.

25.55.000 **GRAND JURIES NOT AUTHORIZED TO ISSUE NON-INDICTING "REPORTS"** -Grand juries are not empowered to issue reports criticizing the conduct of public officials that does not constitute an indictable offense. *In re Grand Jury*, 497 N.E.2d 1088(Ind. Ct. App. 1986).

FORMS

25.80.000 GRAND JURY PROCEDURAL CHECKLIST

1. Issue order calling grand jury.

2. Convene panel of prospective jurors together with bailiff, court reporter and prosecuting attorney. All proceedings before the judge should be reported.

3. Have bailiff seat panel of prospective jurors in jury box in order drawn.

4. Swear entire panel of prospective jurors for voir dire as follows:
"Do you and each of you solemnly swear or affirm that you will true answers give to the questions about to be given to you by the court, bearing upon your qualifications to serve as grand jurors, and that you will not disclose any evidence given or proceeding had before the grand jury? Those of you who swear, so help you God, and those of you who affirm, do solemnly affirm under the pains and penalties prescribed by law."

5. Have prosecuting attorney explain general nature of cases which may be presented including prospective defendants' and witnesses' names.

6. Court examines panel with respect to qualifications and disqualifications as follows: [Ind. Code 35-34-2-3 and Ind. Code 33-4-5-7]

A. General:
(1) Must be citizen of United States.
(2) Must be resident of county.
(3) Must be able to read, speak, and understand English with proficiency sufficient to satisfactorily fill out juror qualification form.
(4) Must not be under eighteen (18), and over sixty-five (65) may be excused.
(5) Must not be mentally incompetent, incapable of rendering satisfactory jury service due to physical or mental disability, and must not have a guardian appointed due to mental incapacity.
Must not have requested to be on grand jury or be placed on grand jury by reason of corruption of the officer who selected and impaneled the grand jury.
(7) Must not be under sentence imposed for an offense.

B. Specific(1) Must not be a witness for prosecution.
(2) Must not be incapable of performing duties because of bias or prejudice.
(3) Must not have such a state of mind in reference to a target that he or she cannot act impartially and without prejudice to the substantial rights of that person.
(4) Must not be guilty of misconduct in the performance of duties that might impair the proper functioning of the grand jury.

7. Court hears and determines any challenges.
8. Court selects first six jurors who are qualified and excuses rest of the panel.

9. Grand jury sworn as follows:

"You and each of you do solemnly swear or affirm that you will diligently inquire and make true presentment of all offenses committed or triable within this county, of which you shall have or can obtain legal evidence; and that you will present no person through malice, hatred, ill-will, nor leave any unpresented through fear, favor, or affection, or for any reward, or the promise or hope thereof, but in all your indictments you will present the truth, the whole truth, and nothing but the truth; that you will not disclose any evidence given or proceeding had before the grand jury; that you will keep secret whatever you or any other grand juror may have said or in what manner you or any other grand juror may have voted on a matter before the grand jury. Those of you who swear, so help you God, and those of you affirm do solemnly affirm under the pains and penalties prescribed by law." [Ind. Code 35-34-2-3-(e)]

10. Provide printed copy of the provisions of Ind. Code 35-34-2-1 to -15 to the grand jury upon the request of any member. [Ind. Code 35-34-2-3(f)]

11. Give the grand jury instructions relating to the proper performance of their duties (see following section 1.03). [Ind. Code 35-34-2-3(f)]

12. Reporter sworn in as follows:
"I, _____, do solemly swear that I will honestly and faithfully discharge my duties as reporter of the grand jury now in session and that I will in no way reveal any of the proceedings had before such grand jury, except in such manner and under such proceedings as may be authorized by law."

13. Arrange for an interpreter for the grand jury, if prosecutor knows at this point that one will be required for a prospective witness. [Ind. Code 35-34-2-4(f)]

13. Grand jury retires to hear evidence, deliberate, and prepare indictments. Except for the deliberations and voting, minutes shall be kept of the proceedings and all evidence shall be recorded. [Ind. Code 35-34-2-3(d)]

14. Grand jury presents indictments to the Court which are examined, accepted, and ordered filed.

15. Admonish grand jurors as to disclosure of grand jury proceedings.

16. Warrants on indictments ordered issued. [Ind. Code 35-34-1-1]

17. If prosecuting attorney makes a motion to seal indictment, all persons shall be admonished not to disclose the fact that an indictment is in existence until the defendant is arrested or brought into custody. However, any person may make such disclosure necessary to effectuate an arrest. [Ind. Code 35-34-1-1(d)]

25.80.100 Grand Jury Instructions

STATE OF INDIANA

_____ COURT

IN THE MATTER OF THE GRAND JURY
FOR THE _____ COURT.
_____ QUARTER 199_ TERM.

INSTRUCTIONS TO THE GRAND JURY

1. It is the responsibility of the Court to appoint one of the grand jurors as foreman and one as clerk. During any absence of the foreman or clerk, the grand jury shall select one of their numbers to act as foreman or clerk. [Ind. Code 35-34-2-3(d)]

2. The clerk shall keep minutes of the grand jury proceedings and shall record the evidence presented before the grand jury. The Court shall supply a means for recording the proceedings of the grand jury. The person recording the proceedings may be present during the proceedings, but not during the deliberations and voting of the grand jury. [Ind. Code 35-34-2-3(d), Ind. Code 35-34-2-4(e)]

3. The foreman of the grand jury is authorized to administer all oaths to witnesses and the form of such oath to be administered is as follows:

   "Do you solemnly swear or affirm that the testimony you are about to give in the matter now under consideration by the grand jury will be the truth, the whole truth and nothing but the truth, and do you further solemnly swear or affirm that you will not divulge any portion of your testimony before this grand jury except when legally called upon to do so. Those of you who swear, so help you God, and those of you who affirm do solemnly affirm under the pains and penalties prescribed by law." [Ind. Code 35-34-2-4(b)]

4. The prosecuting attorney, the prosecutor's staff, and any witness the prosecuting attorney or the grand jury requests to be present may be present at any time during grand jury proceedings, except that only grand jurors may be present during the deliberations and voting. [Ind. Code 35-34-2-4(c)]

5. No person has a right to appear as a witness before the grand jury or to present any evidence or information to the grand jury, except that a target of a grand jury investigation shall be given the right to testify provided the target signs a waiver of immunity. [Ind. Code 35-34-2-9]

6. A target subpoenaed is entitled to the assistance of an attorney while being questioned in the grand jury room, but the attorney must take an oath of secrecy and must obtain

consent of the prosecutor and foreman in order to address the grand jury or prosecutor, to make objections or arguments, to question any person, or to otherwise participate in the proceeding. The attorney may advise the client so long as the conversation is not heard by the grand jury. [Ind. Code 35-34-2-5.5]

7. Grand jurors have the right to pose their own questions to witnesses. If a witness refuses to answer a question, the grand jury may request that the court determine whether the witness should be compelled to answer. The grand jury shall be the exclusive judge of the facts with respect to any matter before it.

8. Grand jury proceedings shall be secret, and no person present during a grand jury proceeding may, except in the lawful discharge of duties or upon written order of the court impaneling the grand jury or the court trying the case on indictment presented by the grand jury, disclose the nature or substance of any grand jury testimony or any decision, result, or other matter attending the grand jury proceedings. However, any court may require any person present during a proceeding to disclose the testimony of a witness as direct evidence in a prosecution for perjury. [Ind. Code 35-34-2-4(i)]

9. To make a valid indictment, five or more grand jurors must concur in the finding of the indictment, and it must then be: (1) signed by the prosecutor or a deputy prosecutor; (2) endorsed with the phrase "a true bill"; and (3) signed either by the foreman of the grand jury or else by five members of the grand jury. If no more than four grand jurors vote in favor of indicting, there can be no indictment.

25.90.000 INDICTMENT

IN THE _____ COURT OF INDIANA, 19

STATE OF INDIANA CAUSE NUMBER

vs.

INDICTMENT

The Grand Jury of the _____ Court upon their oath or affirmation do present that, on the __ day of _____ in the state of Indiana (HERE SET FORTH THE OFFENSE CHARGED)

Signature of Foreperson (or five members of grand jury)
(must be endorsed "A true bill")

Prosecuting Attorney or Deputy

25.95.000 ORDER CONVENING GRAND JURY

STATE OF INDIANA

_____ COURT

IN THE MATTER OF THE GRAND JURY FOR
THE _____ COURT.

ORDER TO CONVENE GRAND JURY

The Judge of the _____ Court, now finds it necessary that a grand jury be called in _____ County, Indiana.

The clerk of the _____ Court is directed to issue a venire for the grand jurors drawn for service for the _____ term, directed to the sheriff of _____ County, Indiana, returnable at ____ on the ____ day of _____, 20__.

So ORDERED this ____ day of _____, 20__.

Judge

25.95.100 ORDER IMPANELING GRAND JURY

STATE OF INDIANA

_____ COURT

IN THE MATTER OF THE GRAND JURY FOR
THE _____ COURT

ORDER IMPANELING, SWEARING AND INSTRUCTING GRAND JURY

Comes now the panel of prospective grand jurors for service in the _____ Court, 20_. The panel consists of the following persons:

The Court administers the oath to the panel for examination on qualifications.

The Court examines the prospective grand jurors concerning their qualifications to serve on the grand jury.

There being no challenges to the members of the panel of prospective grand jurors, the Court now finds that the grand jury for the Court shall serve for a term of _____ months, not to exceed six (6) months, commencing on the _ day of _____, 20_, and shall consist of the following members:

The Court now excuses the remaining additional members of the panel.

The grand jurors named above are now sworn as the grand jury, and having been duly impaneled and sworn according to law, are now instructed by the Court on their duties as follows:

The Court appoints _____ as foreperson of the grand jury and _____ as clerk of the grand jury.

The grand jury is now directed to hear evidence and to take such further action and proceedings as they deem advisable and to present their Indictment(s) to the Court.

So ORDERED this __ day of _____, 20__.

Judge

25.95.200 ORDER ACCEPTING INDICTMENT AND ISSUING WARRANT

STATE OF INDIANA

_____ COURT

IN THE MATTER OF THE GRAND JURY
FOR THE _____ COURT

ORDER ACCEPTING INDICTMENT(S) AND ISSUING WARRANTS

Comes now the grand jury impaneled on ____ and presents to the Court the following indictments(s) numbered: _(I, e.g.) in __ Counts; _(II., e.g.) in __ Counts; _(III, e.g.) in Counts; etc..

[Upon motion of the Prosecuting Attorney, the Court orders Indictment(s) _(insert numbers) sealed, and no person may disclose the fact that an indictment is in existence, unless necessary to effectuate an arrest.]

The Court examines the Indictment(s) and finds that it/they are in due form and are properly endorsed and signed. The clerk is directed to file the same and to endorse thereon the date of filing as provided by law. The clerk shall record the Indictment(s) in full with their endorsements in the Indictment Record Book. The clerk shall separately docket the Indictments and shall place the original Indictments in the file of each separate cause after arrest of the defendant.

The clerk is directed to issue warrant(s) for the arrest of the defendant(s). Total bail for Indictment No. 1 is set at $__, bail for Indictment No. 2 is set at $__, and bail for Indictment No. 3 is set at $__.

The grand jury is now by the Court admonished as to disclosure of the jury proceedings and declared adjourned.

So ORDERED this ___ day of _____, 20__.

Judge

28.00.000 Indictment And Information Contents

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28.00.000 Indictment And Information

28.01.000 **Constitutional Notice Requirement** - It is well established "that due process requires that a defendant be given notice of the crime or crimes with which he is charged so that he can prepare his defense. Absent sufficient notice that a particular offense is charged, a defendant cannot be convicted of that crime. Ind. Const. art. 1, § 13, *Blackburn v. State*, (1973) 260 Ind. 5, 11, 291 N.E.2d 686, 690." *Elliott v. State*, 450 N.E.2d 1058 (Ind. Ct. App. 1983).

28.01.500 **Double Jeopardy Specificity Requirement** – "The true test of an indictment is whether the material averments thereof are stated with sufficient certainty to apprise the defendant of the nature and character of the charge against him so that he cannot be charged again with the same offense and so that he may plead former jeopardy if he is so charged again." *State v. Schell*, 224 N.E.2d 49 (Ind. 1967).

28.05.000 **Charges by Either Indictment or Information** - A criminal offense may be prosecuted by either a grand jury indictment or a prosecuting attorney information. Ind. Code 35-34-1-1.

28.05.050 **Sealing of Charge Pending Arrest** - Upon motion of the prosecutor the court may order an indictment or information sealed until the defendant has been arrested or otherwise brought within the custody of the court. Ind. Code 35-34-1-1; Administrative Rule 9(G)(1)(b)(x).

28.05.075 **Plain Statement of Charge** "The indictment or information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged. It need not contain a formal commencement, a formal conclusion, or any other matter not necessary to the statement. Presumptions of law and matters of which judicial notice is taken need not be stated." Ind. Code 35-34-1-2.

28.05.100 **Form of Indictment –** The indictment may be substantially in the following form:

IN THE _____ COURT OF INDIANA, 20____

STATE OF INDIANA

vs. CAUSE NUMBER _____

A _____ B _____

The grand jury of the county of _____ upon their oath or affirmation do present that AB, on the _____ day of _____ 20____ at the county of _____ in the state of Indiana (HERE SET FORTH THE OFFENSE CHARGED).

Ind. Code 35-34-1-2(e). The indictment must be signed by the grand jury foreman or the other five grand jurors and by the prosecuting attorney or his deputy. Ind. Code 35-34-1-2.

28.05.125 **Form of Information** – "The information may be substantially in the same form

as the indictment, substituting for the words, "the grand jury of the county of _____, upon their oath or affirmation so present" the following: "CD, being duly sworn on his oath or having affirmed, says." It is not necessary in an information to state the reason why the proceeding is by information rather than indictment."
Ind. Code 35-34-1-2(f). The information must be signed by the prosecuting attorney or his deputy and sworn to or affirmed by the prosecutor or deputy or any other person. Ind. Code 35-34-1-2.

28.05.150 **Contents of Information and Indictment** - The indictment or information shall be in writing and allege the commission of an offense by:
(1) Stating the title of the action and the name of the court in which the indictment or information is filed;
(2) Stating the name of the offense in the words of the statute or any other words conveying the same meaning;
(3) Citing the statutory provision alleged to have been violated, except that any failure to include such a citation or any error in such a citation does not constitute grounds for reversal of a conviction where the defendant was not otherwise misled as to the nature of the charges against him;
(4) Setting forth the nature and elements of the offense charged in plain and concise language without unnecessary repetition;
(5) Stating the date of the offense with sufficient particularity to show that the offense was committed within the period of limitations applicable to that offense;
(6) Stating the time of the offense as definitely as can be done if time is of the essence of the offense;
(7) Stating the place of the offense with sufficient particularity to show that the offense was committed within the jurisdiction of the court where the charge is to be filed;
(8) Stating the place of the offense as definitely as can be done if the place is of the essence of the offense; and
(9) Stating the name of every defendant, if known, and if not known, by designating the defendant by any name or description by which he can be identified with reasonable certainty.
Ind. Code 35-34-1-2(a).

28.05.300 **Requirement That Witnesses Be Listed** - Ind. Code 35-34-1-2 requires that the names of witnesses be stated in an information or an indictment, but the failure to list them does not affect the efficacy of the charge made; the effect of not complying with the statute by listing witnesses is to prevent the state from obtaining a continuance due to the absence of an unlisted witness. *Greer v. State*, 543 N.E.2d 1124 (Ind. 1989).

28.05.400 **Verification - "**If an indictment, information, pleading, motion, petition, probable cause affidavit, or other document is required to be verified or sworn under oath before it is submitted to the court in a criminal action, the document meets the requirements of the law as a sworn document if the following form or a substantially similar form is used: I swear (affirm), under penalty of perjury as specified by Ind. Code 35-44-2-1, that the foregoing (the following) representations are true.

Signed _____" "If a document complies with [the form above], the swearing or affirming need not be done before a notary or other officer empowered to administer oaths."
Ind. Code 35-34-1-2.4.

28.10.000 **Defendant's Motion to Dismiss** - Ind. Code 35-34-1-4 authorizes a defendant's motion to dismiss a charge within the following time frames:
Within 20 days prior to omnibus date in felony case (10 days prior to omnibus date for misdemeanors) for following grounds:

- Information is "defective" as it:
  - fails to substantially conform to all the content provisions listed above in Benchbook Section 28.05.150;
  - the "allegations demonstrate" the court "does not have jurisdiction of the offense; or
  - the statute defining the crime is unconstitutional "or otherwise invalid."
- Misjoinder of parties or offenses, or duplicity
- "Defective" grand jury proceedings
- Failure to state offense with "sufficient" certainty
- Facts stated do not constitute an offense.

Any time before or during trial for:

- Defendant has "immunity with respect to the offense"
- Prosecution barred by reason of a previous prosecution
- Prosecution is untimely brought
- Denial of right to speedy trial
- "Some jurisdictional impediment to conviction" for offense charged
- "Any other ground that is a basis for dismissal as a matter of law."

"At any time" if motion based upon "lack of jurisdiction over the subject matter."
Ind. Code 35-34-1-4.

28.10.100 **Authorized Dispositions of Motion to Dismiss** - If the court grants the motion to dismiss, the defendant must be discharged from custody unless the court determines that the defect in the charge supporting dismissal may be cured by amendment "and the prosecuting attorney has moved for leave to amend," in which case the defendant may be held for up to 72 hours to allow an amended charge to be filed. Ind. Code 35-34-1-4.

28.20.000 **Amendment of Charge at Any Time for "Immaterial Defects"** - A charge may not be dismissed because of an "immaterial defect" and instead may be amended on motion by the prosecuting attorney at any time; "immaterial defects" include:

(1) Any miswriting, misspelling, or grammatical error;
(2) Any misjoinder of parties defendant or offenses charged;
(3) The presence of any unnecessary repugnant allegation;
(4) The failure to negate any exception, excuse, or provision contained in the statute defining the offense;
(5) The use of alternative or disjunctive allegations as to the acts, means, intents, or results charged;

(6) Any mistake in the name of the court or county in the title of the action, or the statutory provision alleged to have been violated;
(7) The failure to state the time or place at which the offense was committed where the time or place is not of the essence of the offense;
(8) The failure to state an amount of value or price of any matter where that value or price is not of the essence of the offense; or
(9) Any other defect, which does not prejudice the substantial rights of the defendant.

Ind. Code 35-34-1-5(a).

28.20.500 **Some Amendments of "Substance" Permitted** - "The indictment or information may be amended in matters of substance, and the names of material witnesses may be added, by the prosecuting attorney, upon giving written notice to the defendant, at any time:

(1) up to
(A) thirty (30) days if the defendant is charged with a felony; or
(B) fifteen (15) days if the defendant is charged only with one (1) or more misdemeanors
before the omnibus date, or
(2) before the commencement of trial;

if the amendment does not prejudice the substantial rights of the defendant. Ind. Code 35-34-1-5(b) (as amended by P.L. 178-2007). (For the law prior to the amendment, see *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007).)

28.20.510 **Amendment Adding Habitual Offender Enhancement** - An amendment of an indictment or information to include a habitual offender charge under IC 35-50-2-8 must be made not later than ten (10) days after the omnibus date. However, upon a showing of good cause, the court may permit the filing of a habitual offender charge at any time before the commencement of the trial. Ind. Code 35-34-1-5(e).

28.50.000 **Prosecutor's Motion to Dismiss** - Upon motion of the prosecuting attorney, the court shall order the dismissal of the indictment or information. The motion may be made at any time before sentencing and may be made on the record or in writing. The motion shall state the reason for dismissal. Ind. Code 35-34-1-13.

28.50.050 **Court Has No Discretion to Deny Prosecutor's Motion** - "This section vests no discretion in the trial court. If the prosecutor moves for dismissal and states his reasons therefore, the trial court must grant the motion. *Swinehart v. State* (1978), 268 Ind. 460, 376 N.E.2d 486. The statute does not provide any standard or authority for assessing the validity of the State's reasons for dismissal. While the prosecutor's stated reason in this case is hardly detailed [the prosecutor explained the dismissal by saying it was "in the best interest of the State"], it was sufficient to trigger operation of the statute and require the trial court to grant the motion to dismiss under Ind. Code 35-34-1-13(a)." *Burdine v. State*, 515 N.E.2d 1085 (Ind. 1987). "We perceive the requirement of a statement of reason to be only for the purpose of insuring some degree of public accountability in an instance of blatant prosecutorial malfeasance. We do not view it as an invitation to the trial court to review the statement of reasons and to substitute its

assessment of the wisdom of prosecution for the discretion of the prosecutor." *Rhoton v. State*, 491 N.E.2d 577 (Ind. Ct. App. 1986).

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31.01.000 JUDGES

31.01.100 **Judges in General**: All defendants in a criminal prosecution have a due process right to trial before an impartial tribunal. See *Harrington v. State*, 584 N.E.2d 558, 561 (Ind. 1992); *Blanche v. State*, 690 N.E.2d 709 (Ind. 1998).

31.01.200 **Change of Judge In Criminal Cases:** Under the current rule, a request for change of judge due to bias or prejudice should be granted if the historical facts recited support a reasonable inference of bias or prejudice. CRIM. R. 12(B). A change of judge is neither "automatic" nor "discretionary." See *Whitehead v. Madison County Circuit Court*, 626 N.E.2d 802, 803 (Ind. 1993) (interpreting identical language governing a change of judge in post-conviction proceedings).

31.01.210 **Rules:** CRIM. R. 12. governs the disposition of motions for change of judge in criminal cases. The time periods and bases upon which such a motion can be granted are set forth in the rule.

31.01.220 **Sufficiency of Allegations of Cause:** A reviewing court may reverse a denial of a change only for an abuse of discretion. *Thakkar v. State*, 644 N.E.2d 609, 611 (Ind. Ct. App. 1994). The law presumes that a judge is unbiased and unprejudiced. *Haynes v. State*, 656 N.E.2d 505, 507 (Ind. Ct. App. 1995).

31.01.230 **Bias:** Actual bias is not the determinative issue; instead, the true question is whether "an objective person, knowledgeable of all of the circumstances, would have a reasonable basis for doubting the judge's impartiality." *Mahrdt v. State*, 629 N.E.2d 244, 248 (Ind. App. 1994) (quoting *Tyson v. State*, 622 N.E.2d 457, 459 (Ind., 1993). The act of rejecting a plea bargain is not sufficient of itself to establish the bias and prejudice of the trial court. *Clemons v. State*, 424 N.E.2d 113 (Ind. 1981). The fact that a defendant has appeared before a certain judge in prior actions does not establish the existence of any bias or prejudice on that judge's part. *Clemons v. State*, 424 N.E.2d 113 (Ind. 1981). A judge is not disqualified to try a case merely because he previously heard the case of a co participant in a separate proceeding. *Carter v. State*, 451 N.E.2d 639 (Ind. 1983). The record must show actual bias and prejudice of the judge against the defendant before a conviction will be reversed on the grounds that the trial judge should have disqualified himself. *Rose v. State*, 488 N.E.2d 1141 (Ind. Ct. App. 1986).

31.01.250 **Hearings:** A presiding judge is not only competent to determine the sufficiency of the affidavits required by the change of judge rule, but also is permitted to hear the motion for change of judge. *Broome v. State*, 687 N.E.2d 590 (Ind. Ct. App. 1997).
A presiding judge against whom a change of judge motion is directed may, but need not, recuse himself when a hearing on the motion is necessary. On appeal, a judge's decision to deny a motion for change of judge will be reversed only if the denial was clearly erroneous. *Sturgeon v. State*, 719 N.E.2d 1173 (Ind. 1999).

31.01.300 **Disqualifications:** A judge has the discretionary power to disqualify himself sua sponte whenever any semblance of judicial bias or impropriety comes to his attention. *Singleton v. State*, 173 Ind. App. 606, 364 N.E.2d 1041 (1977); *State ex rel Mosshammer v. Allen Sup. Ct*., 246 Ind, 366, 206 N.E.2d 139, 142 (1965)*; Stein v. State*, 166 Ind. App. 133, 344 N.E.2d 698 (1975) *(transfer denied)*. Once a judge disqualifies himself he cannot thereafter attempt to rescind such action and reinstate himself unless it affirmatively appears that valid grounds existed for such reinstatement. If no valid reason is shown he may not revoke or set aside his own disqualification. *Wilson v. State*, 521 N.E.2d 363 (Ind. Ct. App. 1986). *Singleton v. State,* 173 Ind. App. 606, 364 N.E.2d 1041 (1977); *State ex rel. Mosshammer v. Allen Sup. Ct.*, 246 Ind, 366, 206 N.E.2d 139, 142 (1965) *(transfer denied)*.

31.01.310 **Grounds:** A trial judge has the discretionary power to disqualify himself *sua sponte* whenever the existence of any semblance of judicial bias or impropriety in a proceeding in his court comes to his attention. *Stein v. State*, 166 Ind. App. 133, 344 N.E.2d 698 (1975) (*transfer denied*). See: *State ex rel. Mosshammer v. Allen Sup. Ct.*, 246 Ind. 366, 206 N.E.2d 139 (1965); *Joyce et al. v. Whitney et al*., 57 Ind. 550 (1877). Additionally, where a judge has an actual prejudice in reference to a cause, or is interested in the litigation or related to a party, justice requires that he refuse to hear such cause. *State ex rel. Mosshammer v. Allen Sup. Ct., supra; Tokash v. State*, 232 Ind. 668, 115 N.E.2d 745 (1953); *State ex rel. Purcell v. Circuit Court*, 228 Ind. 410, 92 N.E.2d 843 (1950); *State ex rel. Parker v. Vosloh, Judge*, 222 Ind. 518, 54 N.E.2d 650 (1944); *Joyce et al. v. Whitney et al., supra; Folger v. Barnard*, 73 Ind. App. 523, 125 N.E. 460 (1919) *(transfer denied)*.

31.01.340 **Waiver:** Disqualification of the judge may be waived by the consent of the parties and the judge. Thus, the judgment was not void per se, but simply voidable. *Wilson v. State*, 521 N.E.2d 363 (Ind. Ct. App. 1986), citing *Singleton v. State,* 173 Ind.App. 606, 364 N.E.2d 1041 (1977).

31.01.400 **Selection of Special Judge:** *Wilson v. State*, 521 N.E.2d 363 (Ind. Ct. App. 1986): selection of a special judge is governed by CRIM. R. 13. Subparagraph (C) of the Rule provides that in counties with four or fewer judges, the selection method shall be determined by local rule adopted pursuant to CRIM. R. 2.2. In counties with more than four judges, upon the granting of a change of judge, a successor judge shall be assigned in the same manner as the initial judge.

31.01.410 **Rules:** CRIM. R. 2.2 requires that courts of record in each county shall adopt for approval by the Indiana Supreme Court a local rule by which all felony and misdemeanor cases shall be assigned to each court in the county at the time of filing. Should a county fail to adopt such plan, the Supreme Court shall prescribe a plan for use by the county. The local rule shall include (1) provisions for non-discretionary assignment of all felony and misdemeanor cases filed in the county to one or more of the courts and judges with such jurisdiction; (2) to the extent practical under this mandate for non-discretionary assignment in criminal cases, consideration of the workload of each court in other areas; (3) provision for the

continued assignment of a judge in the event of dismissal; and (4) pursuant to Ind. Crim. Rule 13(C), provision for the reassignment of the case in the event a change of judge is granted under Ind. Crim. Rule 12 or an order of disqualification or recusal is entered in the case.

31.01.460 **Qualification Requirements:** A judge assigned under the provision of Crim. Rule 13 shall accept jurisdiction unless disqualified under the Code of Judicial Conduct or excused from service by the Indiana Supreme Court. An oath or special order accepting jurisdiction is not required.

31.01.500 **Magistrate may sentence guilty plea** - In 2015, I.C. 33-23-5-8-9(b) was amended to provide that a magistrate who presides at a criminal trial or a guilty plea hearing may enter a final order and sentence.

31.02.00 Prosecutors

31.02.010 **Presence Required:** Except for the initial hearing where evidence is not presented, the Prosecuting Attorney or a deputy prosecuting attorney shall be present at all felony or misdemeanor proceedings, including the presentation of evidence, sentencing or other final disposition of the case. Crim. Rule 10.1.

31.02.020 **Disqualification:** A conflict of interest of a deputy prosecutor will not necessarily disqualify the entire prosecutor's office. However, a conflict of interest on part of county prosecutor will disqualify entire prosecutor's office, despite general rule that conflict of interest of deputy prosecutor will not necessarily disqualify entire prosecutor's office; county prosecutor speaks and acts through deputies, and integrity of process of criminal justice compels that elected prosecutor's personal disqualification requires recusal of prosecutor's deputies. *Johnson v. State*, 675 N.E.2d 678, 681 n. 2 (Ind.1996).

31.02.030 **Prosecutor as a Witness:** *State ex rel. Goldsmith v. Superior Court of Hancock County*, 270 Ind. 487, 386 N.E.2d 942, 495 (1979), held that "if the elected prosecutor himself becomes a witness in a case or otherwise is disqualified by reason of having an interest in the outcome, his entire staff of deputies must be recused in order to maintain the integrity of the process of criminal justice."

31.02.040 **Deputy Prosecutor as a Witness:** Disqualification of an individual deputy prosecutor does not mandate the disqualification of the prosecutor or the rest of the prosecutor's office (or, in that case, a successor prosecutor and the successor prosecutor's office). *State ex rel. Goldsmith v. Superior Court of Hancock County*, 270 Ind. 487, 386 N.E.2d 942 (1979) cannot be fairly read to hold that the facts, which would disqualify a prosecutor from participating in a particular case, disqualify a successor prosecutor as well. *Johnson v. State*, 675 N.E.2d 678, 681 n. 2 (Ind.1996).

31.02.050 **Voluntary Disqualification:** If elected prosecutor opposes appointment of special prosecutor, judicial determination of factual basis for elected prosecutor's

disqualification must be made prior to special prosecutor's appointment. *State ex rel. Goldsmith v. Superior Court of Hancock County*, 270 Ind. 487, 386 N.E.2d 942 (1979); *State ex rel. Spencer v. Criminal Court of Marion County*, 214 Ind. 551, 15 N.E.2d 1020, 16 N.E.2d 888 (1938); State ex rel. *Purcell v. Circuit Court of Sullivan County*, 228 Ind. 410, 92 N.E.2d 843 (1950); *State ex rel. Latham v. Spencer Circuit Court*, 244 Ind. 552, 194 N.E.2d 606 (1963). However, if the prosecutor voluntarily disqualifies himself, no such determination need be made. *King v. State*, 397 N.E.2d 1260 (Ind. Ct. App. 1979).

31.02.060 **Involuntary Disqualification:** This situation of voluntary disqualification by the prosecutor differs from one in which the elected prosecutor *opposes* appointment of a special prosecutor. In the latter situation, judicial determination of the factual basis for disqualification must be made prior to the special prosecutor's appointment. This prevents the arbitrary judicial usurpation of the powers of a constitutional office like that of prosecutor. The prosecuting attorney is a constitutional officer, State ex rel. Spencer v. Criminal Court of Marion County, supra; State ex rel. Latham v. Spencer Circuit Court, supra, and is not subject to an arbitrary order of disqualification at the whim of a trial judge. *State ex rel. Purcell v. Circuit Court of Sullivan County*, 228 Ind. 410, 92 N.E.2d 843 (1950); *State ex rel. Williams v. Ellis*, 184 Ind. 307, 112 N.E. 98 (1915) (discusses this limitation).

31.02.080 **Selection of Special Prosecutor – Recommendation by Regular Prosecutor:** ~~The statute governing the appointment of special prosecutors is Ind. Code 33-14-1-6.~~ It is not impermissible for the regular prosecutor to recommend a special prosecutor to the Court, but that recommendation is not binding. *Terry v. State*, 602 N.E.2d 535 (Ind. Ct. App. 1992).

31.02.090 **Scope of Authority:** Ind. Code 33-14-1-6(d) provides "(d) A person appointed to serve as a special prosecutor has the same powers as the prosecuting attorney of the county. However, the scope of the special prosecutor's duties shall be limited by the appointing judge to include only the investigation or prosecution of a particular case or particular grand jury investigation."

31.02.100 **~~Acts Of~~ De Facto Special Prosecutor ~~That Go Beyond Authority~~:** The acts of a de facto public official [such as a Special Prosecutor] may not be collaterally attacked. The validity of the acts of a public official may only be challenged by a direct challenge against the individual who purports to hold the office. This rule applies to prosecutors as well as other public officials. *State ex rel, Crowmer v. Superior Court of Marion County* (1957), 237 Ind. 633, 146 N.E.2d 88. The public is not to suffer because those discharging the functions of an officer may have a defective title, or no title at all. *Parker v. State ex rel. Powell* (1892), 133 Ind. 178, 200, 32 N.E. 836, 843; *Bagnell v. State* (Ind. App. 1980), 413 N.E.2d 1072; *King v. State* (1979), Ind. App., 397 N.E.2d 1260.

31.02.110 **Defendant's Burden - Sufficiency of Showing:** A defendant is only entitled to a special prosecutor if the trial court finds, by clear and convincing evidence, that a special prosecutor is necessary to avoid a conflict of interest or that the prosecutor has committed a crime. *Jorgensen v. State*, 567 N.E.2d 113 (Ind. Ct.

App.), *aff'd* in part and *vacated* in part on other grounds, 574 N.E.2d 915 (Ind. 1991). A prosecutor's apparent prejudice against a defendant does not satisfy the requirements for appointment of a special prosecutor. *Kindred v. State*, 521 N.E.2d 320 (Ind. 1988); *Aschliman v. State*, 578 N.E.2d 759 (Ind. Ct. App. 1991), *vacated on other grounds*, 589 N.E.2d 1160 (Ind. 1992).

31.03.000 Venue

31.03.010 **Change of County:** Criminal Rule 12 governs change of venue from the county in criminal cases.

31.03.020 **Mechanics of Perfecting Motion:** A motion for change of venue from the county shall be verified or accompanied by an affidavit signed by the criminal defendant or the prosecuting attorney setting forth facts in support of the constitutional or statutory basis or bases for the change. Any opposing party shall have the right to file counter-affidavits within ten (10) days, and after a hearing on the motion, the ruling of the court may be reviewed only for abuse of discretion.

31.03.030 **Burden on the Motion:** A change of venue is generally warranted only when the trial court determines in its sound discretion that, due to the existence of community bias or prejudice, the defendant could not otherwise obtain a fair trial. The mere possibility of prejudice or bias is not sufficient to entitle a defendant to a change of venue. In order for a defendant to establish good cause for a discretionary change of venue, he must produce evidence of community bias or prejudice sufficient to convince the trial court that he cannot obtain a fair trial in that county. *Trevino v. State*, 428 N.E.2d 263 (Ind. Ct. App. 1981); *Slone v. State*, 496 N.E.2d 401 (Ind. 1986).

31.03.040 **Adverse Publicity Alone Insufficient Basis:** The fact that potential jurors have heard information about the defendant does not require a change of venue. The question is not whether potential jurors had heard of the crime or Appellant's identification with it, but whether those potential jurors had a preconceived notion of a defendant's guilt and whether they were able to set aside that notion and render a verdict based upon the evidence. *Slone v. State*, 496 N.E.2d 401 (Ind. 1986)

31.03.100 **Eliminating a County From List of Counties for Striking:** Indiana Criminal Rule 12 permits the trial judge before whom an application for a change of venue from the county is pending to eliminate a county from the list of the adjoining counties to be submitted for striking if it appears that the grounds for a change of venue also exist in one or more of the adjoining counties. The decision as to whether to add non-adjoining counties to the panel of receiving counties is within the discretion of the trial court, and will be reversed only for an abuse of that discretion. *McDaniel v. State*, 268 Ind. 380, 382, 375 N.E.2d 228, 230 (1978); *James v. State*, 613 N.E.2d 15 (Ind. 1993).

31.03.120 **Belated Motions:** Criminal Rule 12(D) requires a belated motion for change of venue to set forth "when the cause was first discovered . . . the facts showing the

cause for a change, and why such cause could not have been discovered before by the exercise of due diligence."

31.03.130 **Adverse Publicity.** The burden on a motion for change of venue rests with the moving party to establish adverse publicity and that the jurors were unable to set aside their preconceived notions of guilt and render a verdict based upon evidence introduced at trial. *Yeagley v. State*, 467 N.E.2d 730 (Ind. 1984); *Washington v. State*, 496 N.E.2d 392 (Ind. 1986); *Neal v. State*, 506 N.E.2d 1116 (Ind. Ct. App. 1987).

31.03 .140 **Change Beyond Contiguous Counties.** Whether a change of venue should be granted beyond the contiguous counties lies within the discretion of the trial court and will not be reversed unless an abuse of discretion is shown. Where court submitted a list of contiguous counties failure of defendant to strike from such list waived his right to a change of venue. *McDaniel v. State*, 268 Ind. 380, 375 N.E.2d 228 (1978).

31.03.150 **Duty of Court to Balance Factors.** In determining the right to change of venue the trial court has the duty to balance the rights of the news media, the defendant and the citizens. *Mendez v. State*, 267 Ind. 309, 370 N.E.2d 323 (1977)**.**

31.03.170 **Exhaustion of Peremptory Jury Challenges.** In order to prove error in the denial of a motion for change of venue from the county, the defendant must show that he exhausted his peremptory challenges in an effort to secure juror impartiality. *Neal v. State*, 506 N.E.2d 1116 (Ind. Ct. App. 1987).

31.03.200 **Jurors From Another County** - Ind. Code 35-36-6-11 provides that if defendant is charged with murder or a Class A felony to be tried by a jury and moves for a change of county, the court may recognize but decline to grant the motion, and order that the jury be drawn from the residents of a county other than the county in which the court is located.

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34.00.000 Defense Counsel

34.00.100 In General

Both the sixth amendment to the Constitution of the United States and art. 1, sec. 13 of the Indiana Constitution guarantee an indigent defendant the right to counsel. *Jackson v. State*, 441 N.E.2d 29 (Ind. 1982). This right applies to misdemeanor as well as felony offenses. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Moore v. State*, 273 Ind. 3, 401 N.E.2d 676 (1980). A failure to permit any defendant to have counsel constitutes a deprivation of that defendant's constitutional right to due process of law. *Spinks v. State*, 437 N.E.2d 963 (Ind. 1982). The purpose of the guarantee of the right to counsel is to protect a defendant from being convicted because of his own ignorance of his legal and constitutional rights and to assure him of the guidance of counsel throughout the proceeding. *Koehler v. State*, 499 N.E.2d 196. (Ind. 1986).

34.00.400 Misdemeanors

The Sixth Amendment prohibits imprisonment of a person convicted of a misdemeanor after having been denied the assistance of counsel. *Argersinger v. Hamilton*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). Article I, Section 13 of the Indiana Constitution, however, requires assistance of counsel in all misdemeanor prosecutions to the same extent and under the same rules as it does in felony cases. *Bolkovac v. State*, 229 Ind. 294, 98 N.E.2d 250 (1951).

34.00.500 Right to Counsel – Probation Revocation, Post-Conviction Relief

Indiana Code 35-38-2-3(e) provides that a person is entitled to representation by counsel at a hearing on an alleged violation of probation. Post Conviction Rule PC 1, Section 9 provides for representation by the Indiana State Public Defender if certain conditions are met. Failure of the trial court to refer a petition for post-conviction relief to the Public Defender's office upon the proper proof of indigence warrants reversal and remand. *Sanders v. State*, 401 N.E.2d 694, 696 (Ind. 1980).

34.00.600 Critical Stages Of Proceeding At Which Right Attaches

"[T]he guarantees of an accused's right to counsel [under] the Sixth Amendment . . . apply at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Jones v. State*, 655 N.E.2d 49, 54 (Ind. 1995). The Indiana initial hearing is not a critical stage of the prosecution at which the right to counsel applies, *Benner v. State*, 580 N.E.2d 210 (Ind. 1991), although it has been suggested that there may be a right to assistance of counsel for determination of bail, W. Kerr, Indiana Practice - Criminal Procedure § 10.6a(4) (1998). The right to counsel also does not apply to "perfunctory, administrative procedures such as the taking of fingerprints and handwriting exemplars." *Gillie v. State*, 465 N.E.2d 1380, 1386 (Ind. 1984); *Frances v. State*, 316 N.E.2d 364, 366 (Ind. 1974); *White v. State*, 699 N.E.2d 630 (Ind. 1998).

34.00.700 Effective Assistance Of Counsel Guaranteed

The Sixth Amendment provides a right not just to the assistance of counsel but to the effective assistance of counsel "because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). "Absent some effect of [the] challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Id.* Thus, any violation of the Sixth Amendment must be reviewed in the context of the whole trial process. *Platt v. State*, 664 N.E.2d 357 (Ind. Ct. App. 1996).

34.10.010 Public Defenders - No Specific Request Is Required

An explicit request for the assistance of counsel is not necessary to qualify for appointment of a public defender as long as there is clear proof of indigence. *Sanders v. State,* 401 N.E.2d 694 (Ind. 1980).

34.10.100 Right to Appointed Counsel If Indigent

The right to counsel is one of the most fundamental of our constitutional guarantees. A defendant charged with a crime is guaranteed the right to be represented by counsel and this right includes the right for an indigent defendant to have counsel provided for him at state expense. Since we are dealing with such a fundamental right, the record must show that careful consideration commensurate with the right at stake has been given to the defendant. The Indiana Supreme Court has recognized that it is not possible to set specific monetary guidelines to determine indigency. *Moore v. State*, 401 N.E.2d 676, 678 (Ind. 1980

34.10.110 Determining Indigence a Judicial Function

It is a judicial function to determine whether counsel shall be appointed at public expense, and this determination is within the sound discretion of the trial judge. *Moore v. State*, 401 N.E.2d 676 (Ind. 1980).

34.10.120 General Indigence Definition

If defendant legitimately lacks the financial resources to employ an attorney, without imposing substantial hardship on himself or his family, the court must appoint counsel to defend him. The defendant does not have to be totally without means to be entitled to counsel. *Moore v. State*, 401 N.E.2d 676 (Ind. 1980).

34.10.130 Total Financial Picture Is Object

The determination as to the defendant's indigency is not to be made on a superficial examination of income and ownership of property but must be based on as thorough an examination of the defendant's total financial picture as is practical. *Moore v. State*, 401 N.E.2d 676 (Ind. 1980)

34.10.140 Income To Be Balanced Against Liabilities

The record must show that the determination of ability to pay includes a balancing of assets against liabilities and a consideration of the amount of the defendant's disposable income or other resources reasonably available to him after the payment of his fixed or certain obligations. *Moore v. State*, 401 N.E.2d 676 (Ind. 1980).

34.10.145 Factors To Consider

While it is not possible to set specific monetary guidelines which would determine a defendant's indigency, there are several factors which must be considered:
Ability to post bond is one factor only. The fact that the defendant posted a bond does not determine that he is not indigent but is only a factor to be considered.
Employment
Property ownership and equity
Amount of income (gross, net and ultimately, disposable) [Caution: use of prior year's taxable income figure may be misleading. The most recent income information should be used. *Shively v State*, 912 N.E.2d 427 (Ind. Ct. App. 2009)
Amount of other obligations
Expense for defense counsel
Hardship on family
Number of dependents
Dependents' incomes
Other kinds of hardship other than reduction of income.
Child support obligations
Insurance payments for self and dependents
Attendance at school on borrowed money
Cash savings
Debt payments
Poverty guidelines(see http://aspe.hhs.gov/poverty/10poverty.shtml) (Poverty guidelines a factor but not dispositive: *Hall v. State*, 826 N.E.2d 99 (Ind. Ct. App. 2005))

For a dialogue to be used in examining a defendant about specific income, assets, resources, debts and liabilities encompassing the above considerations, see Section 19.60.000, part V.

For an affidavit of indigency to be filled out by defendant, see Section 34.90.500.

34.10.150 Statutory Considerations

Indiana Code section 33-40-3-7 provides for payment of costs of representation where the court has already determined to provide publicly paid representation. Since this decision hinges on an indigency determination, the following factors listed by the statute may also be relevant to the determination of whether to appoint counsel: (1) the person's independently held assets and assets available to the spouse of the person or the person's parent if the person is unemancipated; (2) the person's income; (3) the person's liabilities; and, (4) the extent of the burden that payment of costs of representation would impose on the person and the dependents of the person.

34.10.160 Indigency Determined By Factors at Time of Request

A determination of indigency must be made upon the defendant's request for counsel based upon the defendant's financial condition at that time. The court's duty to appoint competent counsel arises at any stage of the proceedings when the defendant's indigency causes him to be without the assistance of counsel. Therefore, the fact that the Defendant was able to hire private counsel for his

appeal is irrelevant to the issue of his indigency prior to trial. *Moore v. State*,401 N.E.2d 676 (Ind. 1980).

34.10.180 Application - Case 1 - Inadequate Inquiry Into Indigence

Defendant's private attorney withdrew for non-payment because the defendant had used up all his money posting bond and paying counsel for unrelated charges. Defendant requested appointment of counsel.

The court asked defendant if he had a job or any assets. Defendant testified that his father owned a well drilling business and he worked with his father in this business. He stated that he did not receive a regular paycheck but that he, his father and brother would periodically split whatever was earned from drilling wells. Defendant stated that he had just paid tuition for a course at a technical school to become a certified welder, that he and his wife owned a car and had been buying a house through FHA financing for six and one-half years. There was no inquiry as to the Defendant's actual income, any equity in the home, any monetary interest in his father's business, the current value of the car, the amount of any indebtedness on the car, or the amount of any other liabilities defendant might have had. The court denied defendant's request to have court-appointed counsel.

Defendant made a second request and a second hearing was held. Defendant stated that he had changed jobs and was now a salesman; that he had only received one paycheck; that he hadn't been able to pay his father back for the money he borrowed before to pay his other attorneys; and that he couldn't get a second mortgage on his home because the FHA did not give second mortgages. The court denied his request because the defendant did have some equity in real estate and allegedly in some ~~the~~ equipment. However, the record did not support this latter or reflect the actual amount of equity defendant had in the home. "There is nothing in the record to show a balancing of defendant's assets against his liabilities and a consideration of the amount of [his] disposable income or other resources reasonably available to him."

Moore v. State, 401 N.E.2d 676 (Ind. 1980).

34.10.181 Application - Case 2 - Adequate Inquiry Into Indigence

The trial court denied Joe's pauper petition without a hearing based upon his affidavit where he averred that his and his wife's combined weekly gross income was $ 390. After expending $ 90 for child care and transportation expenses and $ 80 for child support, he alleged that the remaining $ 220 weekly income was depleted on rent, utilities, car insurance, and other necessities to maintain his household of six. It appears that Joe's fixed debts were approximately half of his $ 1,560 gross monthly income. Thus, he had over $ 850 remaining each month to support his family. Although we acknowledge that this amount must be wisely managed to provide for a family of six, he has not shown that he and his family will suffer substantial hardship if he is held responsible for the costs of his appeal. *Elliott v. Elliott*, 634 N.E.2d 1345 (Ind. Ct. App. 1994).

34.10.182 Application - Case 3 - Inadequate Inquiry Into Indigence - During the ten-month period before Redmond's trial, his biweekly earnings decreased from $ 450 to $ 300-$ 340. Redmond was the sole supporter for his wife and two children and paid $ 200 per month rent. Redmond did not own a car or real

property. The trial court refused to appoint pauper counsel. Our supreme court reversed, finding that Redmond was indigent and should have had the benefit of appointed counsel. *Redmond v. State*, 518 N.E.2d 1095 (Ind. 1988).

34.10.183 Application - Case 4 - Inadequate Inquiry Into Indigence
Graves was an unemployed student attending school on borrowed money and his cousin posted his bail. The trial court did not make a thorough inquiry into Grave's financial situation that perhaps would have contradicted these facts, and supported its denial of appointed counsel. *Graves v. State*, 503 N.E.2d 1258 (Ind. Ct. App. 1987).

34.10.190 Indigent Has No Right To Choice Of Counsel - Although a defendant has an absolute right to be represented by counsel, an indigent defendant does not have an absolute right to counsel of his own choosing. *Luck v. State* (Ind., 1984), 466 N.E.2d 450 (Ind. 1984); *Alexander v. State*, 449 N.E.2d 1068, 1071 (1983).

34.20.000 Compensation Of Public Defender - The trial court has the inherent Authority to set attorney's fees. *Knox County Council v. State ex rel McCormick,* 217 Ind. 493, 29 N.E.2d 405 (1940). A member of the Bar appointed to perform such services is not required to serve without compensation and it is the duty of the trial judge to see that he is adequately paid. In *State ex rel. White v. Hilgemann*, 34 N.E.2d 129 (Ind. 1941), the Indiana Supreme Court stated: "We have held that attorneys appointed by the court to defend poor persons in criminal actions cannot be required to serve without compensation; that the Constitution requires that such persons shall have counsel; and that courts have inherent power to incur the expense and order compensation for counsel paid out of county funds."

34.20.100 Court's Authority to Order Payment for Court Appointed Counsel and Timing of Order –A court may order the payment of court-appointed attorney fees at different times during a case. However, a trial court should reassess the defendant's indigency at each time the court orders reimbursement.

- BEST PRACTICE: Conduct a hearing and make findings regarding indigency, defendant's ability to pay, and the reasonableness of the attorney's fees. In most of the sections below, the indigency hearing is held at the time of the court's order of reimbursement of defense costs; however, Section (4) notes that an indigency hearing should be held at the time of collection of the defense costs if the defendant is first serving an executed sentence followed by probation.

1) **At the initial hearing** – Indiana Code 35-33-7-6 provides that the court shall determine whether a person who requests assigned counsel is indigent prior to the completion of the initial hearing. This section further provides that if a court finds that the person is able to pay part of the costs, the court shall order payment in the amount of
    a. $100 for a felony; or

b. $50 for a misdemeanor.

However, this finding may be reviewed at any time during the proceedings.

2) **At any time during the case** - Ind. Code 33-40-3-6(a) provides that if a court makes a finding of ability to pay, a court shall require payment by a person of costs, including reasonable attorney's fees of appointed counsel and costs incurred by the county due to court appointed legal services. This finding may be made at any time of the prosecution for a felony or a misdemeanor. The factors to be considered are set out in Indiana Code 33-40-3-7 and are as follows:
    a. The person's assets and assets of spouse;
    b. The person's income;
    c. The person's liabilities; and
    d. The extent of the burden on the person and dependents.
3) **At sentencing -** Indiana Code 33-37-2-3(a) and (e) require the Court to hold an indigency hearing to impose payment of court costs and costs of representation at the time of sentencing. If the Court makes a determination that the defendant is not indigent and is able to pay part of the costs of representation, then the Court shall order the defendant to pay an amount for defense services.
4) **At the time of collection if defendant is placed on probation after an executed sentence –** The Court in *Rich v. State*, 890 N.E.2d 44 (Ind. Ct. App. 2008), upheld the trial court's order that the defendant pay $200 as a condition of probation for reimbursement for public defender services without first holding an indigency hearing because the defendant was to serve an executed sentence before being placed on probation. Similarly, *Kimbrough v. State,* 911 N.E.2d 621 (Ind. Ct. App. 2009), explained that the indigency hearing could be held when the defense fees become due as opposed to when the fees are ordered. See also *Owens v. State,* 947 N.E.2d 482 (Ind. Ct. App. 2011), where the Court held that the trial court was under no obligation to make a determination of the defendant's ability to pay defense fees at the time of initial sentencing when the defendant was ordered to serve an executed sentence followed by home detention and probation; such determination is more appropriately made after incarceration.
5) **On direct appeal –** Indiana Code 33-40-3-6(a) seems to allow for the payment of attorney's fees "at any stage of a prosecution . . ." if the court makes a finding of ability to pay. See *Lamonte v. State*, 839 N.E.2d 172 (Ind. Ct. App. 2005), where the Court applied Indiana Code 33-40-3-6 to a trial court's order of a $400 payment for costs of appointed appellate counsel and reversed the order finding that the defendant was indigent based on the circumstances involved.
6) **Petitions to revoke** – While there is no express statute regarding the repayment of defense fees for representation on a petition to revoke, the general provision of Indiana Code 33-40-3-6 would seem to allow a judge to exercise discretion when making this decision. A judge would still need to make a proper record regarding ability to pay as required by Indiana Code 33-40-3-6.
7) **On post-conviction relief -** Indiana Rules of Procedure for Post Conviction Remedies, Rule 1, Section 9 provides that the court is not required to appoint counsel other than the state Public Defender for a petitioner. . The court in

Medlock v. State, 547 N.E.2d 884 (Ind. Ct. App. 1989), went further and held that Post-Conviction Rule 1, Section 9, and I.C. 33-1-7-2 (since repealed) prohibited a judge from appointing counsel outside the office of the public defender. Therefore, the Benchbook Committee expects there would be little appellate support for the imposition of attorney fees in a PCR proceeding.

34.20.500 Means of Collecting Payment

1) **Order Payment to Clerk** – As noted above, I.C. 35-33-7-6, I.C. 33-40-3-6, and I.C. 33-37-2-3 indicate that the Court can order payment by the defendant. The language of these statutes indicates that the payment would be made to the Clerk.
2) **Taxing Public Defender's Fee Against Defendant - Cash Bond** – Ind. Code 35-33-8-3.2(a)(1) provides that the court may require the defendant and each person who posts bail to execute an agreement allowing the court to retain all or a part of the cash to pay publicly paid costs of representation (along with other fees) if the defendant is convicted. Ind. Code 35-33-8-3.2(a)(2) provides that the clerk shall retain the amount deposited (bond) for publicly paid costs of representation (and other fees). The person posting the bond must be notified that the bond may be retained for this purpose. Ind. Code 35-33-8-3.2(a)(1) states that a cash bond in the full amount of the bail may be posted. Ind. Code 35-33-8-3.2(a)(2) gives another alternative: more than 10% of the bail may be posted. Previously, bond could only be retained for publicly provided representation when the defendant had posted a ten-percent bond. *Cody v. State*, 702 N.E.2d 364 (Ind. Ct. App. 1998); *Traylor v. State*, 817 N.E.2d 611 (Ind. Ct. App. 2004). However, these two cases were decided prior to an amendment to I.C. 35-33-8-3.2 (P.L. 97-2006, effective July 1, 2006). This amendment added a provision in the subsection regarding full cash bond which allows the court to require the defendant or persons posting bond to execute an agreement for the retention of cash to pay publicly paid costs of representation. It could now be argued that bond posted over 10% may be used for costs of representation if the person posting the bond signs an agreement indicating that the bond will be used for such purposes. However, at the time of the preparation of this material, there had not yet been a case interpreting the effect of the amendment on the holdings of *Cody* and *Traylor.*

34.20.550 Limitations on Collecting Payments for Defense Costs

1) Amounts collected cannot exceed the actual costs of defense services. See I.C. 33-40-3-6(d) and I.C. 33-37-2-3(e).
2) Fees are to be deposited in the supplemental public defender services fund. See I.C. 33-40-3-6(b), I.C. 33-37-2-3(e), I.C. 35-33-7-6(c), and 35-33-8-3.2(b).
3) Defendant must have “ability to pay” or be “not indigent.” In *Turner v. State*, 755 N.E.2d 194 (Ind. Ct. App. 2001), the Court held that the imposition of a $1,000 public defender reimbursement fee was inappropriate where the defendant had never posted a bond and where the trial court had not found that the defendant had the “ability to pay” under I.C. 33-9-11.5-6 (now I.C. 33-40-3-6) or that the defendant was “not indigent” under I.C. 33-19-2-3 (now I.C. 33-37-2-3). In this case, the trial court was limited to the $100 cap for costs of representation set out in I.C. 35-33-7-6(c)(1).

4) Probation may not be revoked for failure to pay defense fees – Indiana Code 35-38-2-3(m) is specific and indicates that failure to pay fees or costs assessed against a person under I.C. 33-40-3-6 (counsel fees at any time during the case as discussed in 34.15.610(2)), I.C. 33-37-2-3 (counsel fees at sentencing as discussed in 34.15.610(3)) or I.C. 35-33-7-6 (counsel fees at the initial hearing as discussed in 34.15.610(1)) is not grounds for revocation.

34.20.700 Compensation of Public Defender And Inadequate Representation

The importance of adequate compensation for counsel and investigation support in capital cases has been recognized in Indiana, see Ind. Crim. Rule 24(C). The fact that attorneys believe they could have done more had they been more highly compensated does not compel a conclusion that their performance was deficient. Irrespective of whether there are problems with a public defender system, in order to claim ineffective assistance of counsel, a defendant must show that his trial counsel provided deficient performance and that it was prejudicial. See *Platt v. State*, 664 N.E.2d 357, 362-63 (Ind. Ct. App. 1996) (where defendant unsuccessfully argued that public defender lacked sufficient funds to permit performance of adequate pretrial investigation and preparation by appointed counsel), *trans. denied, cert. denied* 117 S. Ct. 1470, 137 L. Ed. 2d 683 (1997). See also *Sublett v. State*, 665 N.E.2d 621, 623 (Ind. Ct. App. 1996) ("there is no constitutional violation unless the defendant can prove he was prejudiced at trial by the deficient performance"), *trans. denied*. If a defendant fails to demonstrate either deficient performance or prejudice his or her claim of ineffective assistance of counsel fails also. *See, e.g.*, *Games v. State*, 684 N.E.2d 466, 481 (Ind. 1997) ("the defendant does not assert and establish that individualized errors due to systemic problems undermined the reliability of his convictions").

34.30.000 Ancillary Defense Services

Litigation assistance, whether represented by counsel or *pro se*

experts, preparatory or as witnesses

investigators

other evidence - e.g., tests

Counsel for direct appeal, *Blinn v. State*, 441 N.E.2d 49(Ind. 1982) (the indigent defendant's right to counsel at public expense extends to the right to be represented by counsel at public expense to prosecute an appeal).

Trial transcript for direct appeal, Ind. Code 33-1-4-1. See also *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1955) (as a matter of equal protection an indigent defendant is entitled to a transcript at public expense to directly appeal a conviction).

Post-conviction relief:

Public defender's assistance, including funds for experts, etc. - Upon receiving a copy of the petition, including an affidavit of indigency, from the clerk of the court, the Public Defender may represent any petitioner committed to the Indiana Department of Correction in all proceedings under this Rule, including appeal, if the Public Defender determines the proceedings are meritorious and in the interests of justice. The Public Defender may refuse representation in any case where the conviction or sentence being challenged has no present penal consequences. Petitioner retains the right to employ his own counsel or to proceed pro

se, but the court is not required to appoint counsel for a petitioner other than the Public Defender. Post-Conviction Rule 1, § 9.
Pro se defendant -Transcript of guilty plea and sentencing hearing. Post-Conviction Rule 1, § 9.
Other matters - experts, tests, etc? See *Scott v. State*, 593 N.E.2d 198 (Ind. 1992).
Transcript of post-conviction hearing. Post-Conviction Rule 1, § 9.

34.30.100 Indiana Provision for "Basic Tools of an Adequate Defense
Principles of fundamental fairness entitle an indigent defendant to an adequate opportunity to present his claims fairly within the adversary system. The "basic tools of an adequate defense or appeal" must be provided to defendants who cannot afford to pay for them. [*Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087 (1985)] (quoting *Britt v. North Carolina*, 404 U.S. 226, 227, 30 L. Ed. 2d 400, 92 S. Ct. 431 (1971)). The question is what constitutes the basic tools of an adequate defense. *Scott v. State*, 593 N.E.2d 198 (Ind. 1992)

34.30.110 Judge's Discretion to Decide What Tools Are "Basic" to Defense
Indiana practice assigns the decisions about expert services for indigent defendants to the trial judge's sound discretion, and these decisions are not overturned absent an abuse of discretion. It is within the trial court's discretion to determine whether the requested service would be needless, wasteful, or extravagant. The trial court is not required to appoint at public expense any expert the defendant believes may be helpful. The defendant requesting the appointment of an expert bears the burden of demonstrating the need for the appointment. *Scott v. State*, 593 N.E.2d 198 (Ind. 1992)(citations omitted).

34.30.120 Determination Is Case-Specific
It is not possible to set forth with specificity when a trial court should provide expert services to an indigent defendant. The determination is to be made in the context of each individual case. Mindful of this difficulty, we attempt today to enumerate those factors which trial courts should consider in making these decisions. *Scott v. State*, 593 N.E.2d 198 (Ind. 1992).

34.30.200 "Central inquiries" –"Necessary" and Specifically Beneficial
The central inquiries in deciding this issue are whether the services are necessary to assure an adequate defense, and whether the defendant specifies precisely how he would benefit from the requested expert services. A defendant cannot simply make a blanket statement that he needs an expert without some specific showing of what that expert would provide for the defendant. *Scott v. State*, 593 N.E.2d 198 (Ind. 1992)(citations omitted).

34.30.300 "Necessary" Expert Assistance - Factors to Consider - In attempting to decide what is necessary, a trial court should determine whether the proposed expert's services would bear on an issue which is generally regarded to be within the common experience of the average person, or on one for which expert opinion would be necessary.

1) If the requested services could be performed by counsel, an expert need not be provided.

2) An expert need not be appointed if it is improbable that the proposed expert could demonstrate that which the defendant desires.
3) The appointing of an expert is not necessary when the purpose of the expert appears to be exploratory only.
4) Another consideration for the trial court is whether the expert services will go toward answering a substantial question or simply an ancillary one. For example, if the State's principal evidence linking the defendant to the crime is sufficiently technical that it is commonly the subject of expert testimony, the trial court should strongly consider providing an expert.
5) The more serious the charge facing the defendant and the greater the severity of the possible penalty, the more reasonable it is to appoint assistants.
6) The more complex the case, the more justifiable assistance by experts would be.
7) If the State is relying upon an expert and expending substantial resources on the case and defendants with monetary resources probably would choose to hire an expert, the trial court should strongly consider such an appointment to assist defense counsel in investigating the same matters, cross-examining the State's expert, or providing testimony.
8) The cost of the expert services should be evaluated; a trial court need not authorize services bearing exorbitant fees.
9) A court need not appoint an expert if the defendant's request is untimely or not made in good faith.
10) A request for an expert whose testimony would not likely be admissible at trial should be viewed with disfavor.
(11) If there is cumulative evidence of a defendant's guilt, the need to attack one aspect of that evidence with an expert's services is diminished.

Scott v. State, 593 N.E.2d 198 (Ind. 1992)(citations omitted)(emphasis added).

34.30.350 Expert generally not required to rebut precise measurements

Where the testimony of the experts involves precise, physical measurements and chemical testing, and there is no showing that the experts were less than precise or able in their testing and observations, that the truth or accuracy of their testimony is questionable by some new evidence, or that there is evidence available or likely from other experts which would indicate they were wrong, the trial court does not abuse its discretion in denying a motion for appointment of an expert. *Schultz v. State*, 497 N.E.2d 531 (Ind. 1986).

34.30.400 Ex parte hearing on defense request for defense services

"Counsel appointed at an hourly rate in a capital case shall be provided, <u>upon an *ex parte* showing to the trial court of reasonableness and necessity</u>, with adequate funds for investigative, expert, and other services necessary to prepare and present an adequate defense at every stage of the proceeding . . .." Indiana Criminal Rule 24(C)(2) (emphasis added).

See also *Stevens v. State*, 770 N.E.2d 739, 759 (Ind. 2002) (addressing issue in a capital case tried six years before the C.R. 24(C)(2) amendment quoted above and stating "[w]hile we recognize that strategic considerations will often lead defense counsel to prefer secrecy as to their funding requests, we find no automatic constitutional entitlement to such ex parte proceedings," but "[a] trial

court may, however, upon a showing of good cause, permit an ex parte request for funds for assistance" and "[t]he denial of such a request is reviewable for abuse of discretion").

BUT SEE:

"Newhart challenges the trial court's failure to approve his lawyer's request for the appointment of experts to aid the defense. As we have indicated above, there is no indication that this was error under *Scott*, 593 N.E.2d 198. In particular, he challenges the trial court's refusal to grant him an ex parte hearing on his request. Our ethical rules counsel against such ex parte communications. Ind. Judicial Conduct Canon 3(B)(8). Newhart has not persuaded us that the trial court erred in this regard." *Newhart v. State*, 669 N.E.2d 953 (Ind. 1996) (noncapital murder case).

COMPARE:

34.30.500 *Ake v. Oklahoma* rule for mental expert on insanity

"When a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, due process requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one" provided defendant's sanity is "seriously in question"; assistance required is limited to "a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense"; defendant does not have the right to choose the psychiatrist or to receive funds to hire his own. *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). *Ake* did not address expressly whether a "disinterested qualified expert" who reports to the court and is available to assist the defendant and the state suffices. *Palmer v. State*, 486 N.E.2d 477 (Ind. 1985) suggested that a neutral expert appointed by the court pursuant to the Indiana insanity statute may suffice for the *Ake* requirement if the expert is instructed to be "available for consultation" with defense.

34.40.000 Counsel From Another State - Discretion to Allow

34.40.200 Counsel Not Licensed To Practice Law

It is of no consequence that an attorney is licensed to practice law in another state. If neither licensed to practice in Indiana nor authorized to appear in a particular case, that attorney is per se incapable of providing an Indiana criminal defendant with his constitutional right to the effective assistance of counsel. Moreover, in failing to comply with Admission and Discipline Rule 3, such an attorney would be engaging in the unauthorized practice of law in this state and would be subject to the disciplinary jurisdiction of our supreme court. *Butler v. State*, 668 N.E.2d 266 (Ind. Ct. App. 1996); *Matter of Fletcher*, 655 N.E.2d 58, 61 (Ind. 1995). In a footnote to the opinion in *Butler* the court noted that a different case would be presented if there was evidence of collusion between the defendant and his counsel in which the defendant was aware of his counsel's unauthorized status and yet proceeded to trial with that knowledge. Such action would be invited error and would, in effect, result in the waiver of a claim of ineffective assistance on those grounds.

34.40.600 Discretion To Allow Out-Of State Counsel

Indiana Admission and Discipline Rule 3 confers discretion on the trial court to permit an attorney not licensed in Indiana to appear in a particular proceeding for a temporary period, provided the attorney complies with all the requirements specified in Admission and Discipline Rule 3. The Rule requires that the member of the Indiana bar serving, as required by the Rule, as co-counsel "shall sign all briefs, papers and pleadings in such cause and shall be jointly responsible therefore."

34.50.000 Removal of Appointed Counsel

A trial court may, in the exercise of its sound discretion, deny a defendant's request for a new court appointed attorney. Such ruling is reviewable only for an abuse of discretion. *Houze v. State*, 441 N.E.2d 1369 (Ind. 1982). If a defendant refuses to be represented by his court appointed counsel, he must "find some method to employ his own counsel or proceed in propria persona. The defendant may not arbitrarily compel a trial court to discharge competent appointed counsel." *State v. Irvin*, 259 Ind. 610, 616, 291 N.E.2d 70 (Ind. 1973); *Luck v. State*, 466 N.E.2d 450 (Ind. 1984).

34.50.100 Representing More Than One Defendant

The possibility of prejudice which rises when there is multiple representation does not require an inflexible rule that presumes resulting prejudice. *Burger v. Kemp*, 483 U.S. 776 , 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638, 650 (1987). Prejudice will be presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance. Id. For standards to assess validity of a waiver of conflict-free representation, see *Latta v. State*, 743 N.E.2d 1121 (Ind. 2001).

34.50.600 Defense Counsel Motion to Withdraw

An accused is not entitled to a “meaningful” relationship” with his defense lawyer; nor is the accused entitled to “an unqualified right to the appointment of counsel of his own choosing.” See *Morris v. Slappy*, 461 U.S. 1, 14 (1983). However, the accused does have the right to effective assistance of counsel to ensure a fair trial. *Strickland v. Washington,* 466 U.S. 668, 686 (1984). Effective assistance of counsel requires more than the lawyer’s mere presence in the courtroom. Exactly how much more involvement by the lawyer that is required by the Sixth Amendment is often addressed by the trial court in a defense counsel’s motion to withdraw or to substitute counsel.

Some common scenarios for a defense motion to withdraw may include a disciplinary complaint filed against the attorney by the defendant (*Blackman v. State,* No. 34A04-0810-PC-626 (Ind. Ct. App. June 24, 2009) (unpublished memorandum decision); defendant being uncooperative (*Sharpe v. State,* 369 N.E.2d 683 (Ind. Ct. App. 1977); *Bailey v. State,* 397 N.E.2d 1024 (Ind. Ct. App. 1979)); belligerent, or threatening; attorney not paid in full or at all (*Mitchell v. State,* 417 N.E.2d 364 (Ind. Ct. App. 1981)); lack of time to prepare for a hearing (*Hartman v. State,* 292 N.E.2d 293 (Ind. Ct. App. 1973)); lawyer knows defendant

or witness intends to testify untruthfully (*Huffman v. State,* 543 N.E.2d 360 (Ind. 1989)).

The trial court judge retains broad discretion whether to permit counsel to withdraw. Indiana case law does not address this issue in much detail. Other jurisdictions have held that the consideration of the defendant's Sixth Amendment rights must control the judge's decision. Some factors that judges may consider during a defense counsel's motion to withdraw are:

1. The timeliness of the motion;

2. The adequacy of the court's inquiry into the matter (the inquiry may include the legal competence of the defense lawyer and also the quality of the interaction between the lawyer and defendant *to determine if prejudice exists*);

3. The extent of the conflict between the attorney and client and whether it was so great that it resulted in a total lack of communication preventing an adequate defense; and

4. The balancing of these factors with the public's interest in the prompt and efficient administration of justice. (Not all circuits have applied this fourth factor.)

See United States v. Mack, 258 F. 3d 548 (6th Cir. Ohio 2001); *United States v. Myers,* 294 F. 3d 203 (1st Cir. 2002); *United States v. Barrow,* 287 F.3d 733, 738 (8th Cir. 2002). *Also see* 73 Fordham L. Rev. 2665 (May 2005), for a detailed discussion of this topic.
Note: Indiana Rule of Professional Conduct 1.16 establishes ethical requirements for a motion to withdraw.

34.60.000 Right To Waive Counsel

Correlative to the right to counsel is the right of a criminal defendant to waive counsel and represent himself. *Faretta v. California,* 422 U.S. 806 (1975); *Jackson v. State*, 441 N.E.2d 29 (Ind. 1992). Waiver of counsel will not be inferred from an unclear record. The waiver must be unequivocal, as well as knowing, voluntary, and intelligent. *Eaton v. State* 894 N.E.2d 213 (Ind. Ct. App. 2008)

34.60.050 Cannot Reserve Public Defender To Proceed Pro Se

A person cannot reserve the right to seek a public defender while choosing to proceed pro se. *Howard v. State*, 576 N.E.2d 1253 (Ind. 1991).

34.60.100 No Denial If Knowing and Voluntary Waiver

A person cannot claim he was denied right to assistance of counsel when he knowingly and voluntarily decided to represent himself. *Carter v. State*, 512 N.E.2d 158 (Ind. 1987) (defendant who took control of his defense with public defender as standby counsel waived his right to assert ineffective assistance of counsel under the Sixth Amendment).

34.60.150 Trial Court Determination of Valid Waiver

It is the trial court's duty to determine if the waiver of counsel is knowing and voluntary. The trial judge must establish a record showing that the defendant is was made aware of the nature, extent, and importance of the right and the consequences of waiving his or her right to counsel. Merely making the defendant aware of his or her constitutional right to counsel is an insufficient record. *Phillips v. State*, 433 N.E.2d 800 (Ind. Ct. App. 1982); *Mitchell v. State*, 417 N.E.2d 364 (Ind. Ct. App. 1981); *Wallace v. State*, 172 Ind. App. 535, 361 N.E.2d 159 (1977); *Jackson v. State*, 441 N.E.2d 29 (Ind. Ct. App. 1988) *transfer denied*; *Kindred v. State*, 521 N.E.2d 320 (Ind. 1988)

Following *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), our courts have required that where a defendant requests to proceed without counsel, he must be fully advised regarding the dangers and disadvantages of self-representation. *Kindred v. State*, 524 N.E.2d 279 (Ind. 1988); *Nation v. State*, 445 N.E.2d 565 (Ind. 1983); *McKeown v. State*, 556 N.E.2d 3 (Ind. Ct. App. 1990), *trans. denied*.

The record needs to contain more than just a mere advisement of rights. *Sedberry v. State,* 610 N.E. 2d 284, (Ind. Ct. App. 1993) and needs to be sufficient to show that the defendant is making a decision that is of his own choice and is made with his eyes wide open. *Ellerman v. State*, 786 N.E.2d 788 (Ind. App. 2003); *Sherwood v. State*, 717 N.E.2d 131 (Ind. 1999). Furthermore, when making its determination, the trial court should be mindful that "the law indulges every reasonable presumption against a waiver of this fundamental right." *Poynter v. State*, 749 N.E.2d 1122 (Ind. 2001).

While our Supreme Court has stated that trial courts should use the Dowell factors [see sections below] in order to establish a knowing, intelligent and voluntary waiver of a defendant's right to counsel, it has also said that those factors are just guidelines for the court to consider and should not constitute a rigid mandate setting forth specific inquiries the trial court is required to make before determining whether a defendant's waiver of right to counsel is knowing, intelligent and voluntary. *Leonard v. State*, 579 N.E.2d 1294 (Ind. 1991).

Even where the trial court has not made the necessary advisements, waiver may be found if the record demonstrates that the defendant's background, experience, and conduct enable him to competently forego the right to counsel. See *Kindred v. State*, 521 N.E.2d 320 (Ind. 1988); *Jackson v. State*, 441 N.E.2d 29 (Ind. Ct. App. 1988).

- Best practice: It is recommended for a case that demands a thorough advisement that a dialogue should be used that encompasses all the advice/inquiries set forth 34.60.350 through 34.60.500 below. An example of such a dialogue may be found at 34.90.000.

34.60.200 Mental Competence of Defendant to Waive Right to Counsel

A defendant may be mentally competent to stand trial, but not mentally competent to represent himself at trial. The Indiana Supreme Court, on remand from the U.S. Supreme Court, held in *Edwards v. State*, 902 N.E.2d 821 (Ind. 2009), that a trial court may deny a defendant's request to act *pro se* when the defendant is mentally competent to stand trial but suffers from severe mental illness to the point where he is not competent to conduct trial proceedings by himself. The Indiana Constitution's guarantee of a defendant's right to be heard by himself does not afford mentally impaired persons a broader right to self-representation than does the federal constitution. Thus, both the U.S. and Indiana Constitutions permit a mental illness related limitation on the scope of the right of self-representation. *See Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379 (2008). The *Edwards* holding specifically rejects the invitation to find that the Indiana Constitution permits trial courts to refuse a criminal defendant the right of self-representation merely where the defendant cannot communicate coherently with the court or jury. Rather, trial courts should continue to make mental competency determinations following evidentiary hearings. *See* Ind. Code § 35-36-3-1.

- **Best Practice:** In *Edwards*, each Supreme Court found it helpful that the trial judge outlined, on the record, the prior medical reports and testimony which supported the determination that, while the Defendant was competent to stand trial, the competence determination pre-supposed the assistance of counsel.

34.60.300 Necessity of Hearing

When the right of self-representation is properly asserted by a clear and unequivocal request made within a reasonable time prior to trial, the trial court must conduct a hearing to determine the defendant's competency to represent himself and also to establish a record of the waiver. *Dowell v. State*, 557 N.E.2d 1063 (Ind. Ct. App. 1990), *trans. denied, cert. denied*, 502 U.S. 861, 116 L. Ed. 2d 143, 112 S. Ct. 181 (1991).

34.60.350 Hearing-Advice of Advantages of Counsel

Defendants should be specifically instructed as to the following legal skills and expertise that an attorney would afford them through representation (Dowell v State, 557 N.E.2d 1063(Ind. App.1990); *Callahan v. State* 719 N.E.2d 430 (Ind.App., 1999):

(1) investigating and interrogating witnesses;
(2) gathering appropriate documentary evidence;
(3) obtaining favorable defense witnesses;
(4) preparing and filing pre-trial motions;
(5) preparing appropriate written instructions of the jury;
(6) presenting favorable opening and closing statements;
(7) examining and cross-examining witnesses at trial; and 5
(8) recognizing objectionable, prejudicial evidence and testimony and making proper objections thereto.

34.60.400 Hearing – Disadvantages of Proceeding Without Counsel

Defendants should be made aware that self-representation is almost always unwise, that the defendant may conduct a defense which is to his own detriment, that the defendant will receive no special indulgence from the court and will have to abide by the same standards as an attorney as to the law and procedures, and that the State will be represented by an experienced attorney. Further, defendants should be advised that if they choose to represent themselves they cannot later claim inadequate representation. *Dowell v State*, 557 N.E.2d 1063 at 1067(Ind. App. 1990).

34.60.500 Hearing – Other Inquiries and Advisements

The defendant should know the nature of the charges, the possibility of lesser included offenses and the possibility of defenses and mitigating circumstances surrounding the charge. The Court should inquire into the educational background of the defendant, the familiarity of the defendant with legal procedures and rules of evidence and the defendant's mental state [if at issue – see 34.20.75 above] *Dowell v State,* 557 N.E.2d 1063 at 1067(Ind. App. 1990).

34.60.600 Review on Appeal Sufficiency of Record

The trial court's conclusion of whether the defendant knowingly and voluntarily waived the right to counsel is reviewed de novo, *Miller v. State*, 789 N.E.2d 32, 37 (Ind. Ct. App. 2003) but the Supreme Court has acknowledged that the trial court is in the best position to assess whether the defendant has made a knowing and intelligent waiver, and the trial court's finding will most likely be upheld "where the judge has made the proper inquiries and conveyed the proper information, and reaches a reasoned conclusion about the defendant's understanding of his rights and voluntariness of his decision." *Poynter v. State*, 749 N.E.2d 1122, 1126 (Ind. 2001).

Even where the trial court has not made the necessary advisements, waiver may be found if the record demonstrates that the defendant's background, experience, and conduct enable him to competently forego the right to counsel. See *Kindred v. State*, 521 N.E.2d 320 (Ind. 1988); *Jackson v. State*, 441 N.E.2d 29 (Ind. Ct. App. 1988).

In *Poynter,* our supreme court adopted four factors to consider on appeal when determining whether a waiver is knowing and intelligent: (1) the extent of the court's inquiry into the defendant's decision; (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation; (3) the background and experience of the defendant; and (4) the context of the defendant's decision to proceed pro se.

> **Best practice:** It is recommended that, for a case that demands a thorough advisement, that a dialogue should be used that encompasses all the advice/inquiries set forth in 34.60.350 through 34.60.500 above. An example of such a dialogue may be found at 34.90.000.

34.60.700 Examples of Adequate Advisement

Jones v. State 783 N.E.2d 1132 (Ind. 2003); The defendant was questioned several times regarding his intention to proceed without benefit of counsel. The Indiana Supreme Court held that the dialogue conducted by the trial court was sufficient to establish that the defendant made a knowing, intelligent, and voluntary waiver of his right to counsel after having been adequately advised of the disadvantages of dangers of proceeding without counsel. In *Kroegher v. State* , 774 N.E.2d 1029 (In. Ct. App. 2002) Defendant's refusal to hire counsel after the Court had advised defendant of the dangers and disadvantages of proceeding without counsel, was held to be a valid waiver. Defendant had been given ample opportunity to hire counsel and never said that he was without means to hire an attorney.

34.60.750 Example of inadequate advisement

In *Drake v. State* 895 N.E.2d 389, (Ind. Ct. App. 2008) the trial court failed to advise a defendant of the advantages of counsel and the disadvantages of self-representation, did not make specific inquiry into the defendant's background, education or abilities, and did not explore the issue of competency that had been previously raised. Although the defendant was able to present a "coherent defense" the Court determined that there had not been a knowing and intelligent waiver.

34.60.770 Caution

In *Jones v. State* 783 N.E.2d 1132 (Ind. 2003) the Court of Appeals recognized that trial judges must be cautious that, during the course of advising the defendant of dangers and disadvantages, that the court does not try to coerce him into changing his mind about *pro se* representation. The defendant's constitutional right to proceed *pro se* needs to be respected and honored even though the decision may be made to the defendant's detriment. *Jones v. State* 783 N.E.2d 1132 (Ind. 2003) , *Sherwood v. State*, 717 N.E. 2d 131 (Ind. 1999), *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)

34.60.800 Advice on Attorney Assistance in Bargaining

Hopper v. State, 957 N.E.2d 613 (Ind. 2011) determined on rehearing not to require the following advice, but a judge may wish to include it in advising of the dangers and disadvantages of self-representation: An attorney can also evaluate the strengths or weaknesses of the case against you and give you expert advice on whether you should attempt to seek a plea agreement with the State of Indiana which may result in the dismissal of some of the charges and a recommendation for a favorable sentence in return for your plea of guilty.

34.60.900 No Mandated Dialogue and Waiver Form

After the *Leonard* decision, 579 N.E.2d 1294, (Ind. 1991) there appears to be no prescribed form of dialogue that the Court must engage in order to satisfy the requirements for a waiver of counsel. The sufficiency of a Court's determination is made on a case by case basis based upon the totality of the circumstances. Examples of a useful dialogue and a waiver form are found at 34.90.000.

34.70.000 Standby Counsel

There is no constitutional right to standby counsel after a defendant has elected to proceed pro se and a trial court may, in its discretion, deny a motion requesting creation of such a scheme. *Averhart v. State*, 470 N.E.2d 666, 689 (Ind. 1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2051, 85 L.Ed.2d 323. 8 Generally, a defendant has no right to hybrid representation. *Sherwood v. State*, 717 N.E.2d 131, 135 (Ind. 1999). As a result, the trial court is vested with the discretion to deny such a request. *Averhart v. State*, 470 N.E.2d 666, 689 (Ind. 1984).

The Benchbook Committee does note the following practical considerations: 1) the potential that the defendant may change his mind in the middle of trial 2) the length and complexity of the trial, 3) the background and experience of the defendant, including his familiarity with legal procedures and rules of evidence and his mental state.

34.70.400 Appropriate Role of Standby Counsel

This state has traditionally limited standby counsel to a strictly advisory role. *See. e.g.*, *Averhart v. State*, 470 N.E.2d 666, (Ind. 1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2051, 85 L.Ed.2d 323. However, the determination of standby counsel's responsibilities is within the discretion of the trial court in Indiana. Several states applying the same standard have allowed standby counsel to take a much more active role. See, e.g., *Parker v. State*, 455 So.2d 130 (Ala.1984); *Houston v. State*, 246 N.W.2d 908 (Iowa 1976).

34.70.800 Request for counsel after waiver

Our Supreme Court applied the “abuse of discretion” standard to review a trial court’s decision on such a request in Koehler v State, 499 N.E.2d 196 (Ind. 1986). It held that a court should consider the following factors in deciding whether to grant or deny a request to change from pro se representation to representation by counsel, when stand by counsel has been assigned: 1. Defendant’s prior criminal history in the substitution of counsel and in the desire to change from self-representation to counsel representation; 2. The reasons set forth for the request; 3. the length and stage of the trial proceeding; 4. Disruption or delay which reasonably might be expected to ensue from the granting of such motion; 5. the likelihood of defendant’s effectiveness in defending against the charges if required.

34.80.000 Waiver of Counsel by Conduct

In addition to cases where a defendant has made an express request to waive counsel and proceed self-represented, caselaw also addresses whether a defendant can impliedly waive counsel by his own action or inaction. Generally the defendant’s conduct in these cases involves a failure to retain counsel when financially able (see *Poynter v. State*, 749 N.E.2d 1122 (Ind. 2001), *Fitzgerald v State*, 257 N.E.2d 305 (Ind. 1970), *Seniors v State*, 634 N.E.2d 803 (Ind. App. 1994) or undermining existing representation by counsel (see *Houston v State*, 553 N.E.2d 117 (Ind. 1990), *Gilmore v State*, No. 40A01-1011-CR-553, ___ N.E.2d ___ (Ind. Ct. App., Aug. 24, 2011). Taken together, these cases establish that a defendant's actions that delay or obstruct the judicial process, even if intentional are not <u>alone</u> a sufficient basis to support a waiver of counsel. (but see *Houston* above). Instead our Supreme Court in *Poynter* adopted an analysis

that focused on the following 4 factors: (1) the extent of the court's inquiry into the defendant's decision; (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation; (3) the background and experience of the defendant; and (4) the context of the defendant's decision to proceed pro se.

- **Practice pointer**: To have any chance of successfully withstanding an appeal the trial judge must warn the defendant that the consequences of his continued conduct will be the waiver of his right to counsel. In addition, these cases also demand a thorough advisement and therefore a dialogue should be used that encompasses all the advice/inquiries set forth in 34.60.350 through 34.60.500 above. An example of such a dialogue may be found at 34.90.000.

34.90.000 Dialogue and Waiver Form

ADVICE FOR SELF-REPRESENTED DEFENDANTS

Set the record (case title, cause number)

(Defendant's name), are you now under the influence of any alcohol, drugs, or medications that could affect your ability to understand what we are doing today or to understand your rights? (*Answer*)

Your trial is set for _____and you have indicated you want to represent yourself at that trial. You have the right to represent yourself at trial just as you have the right to have counsel represent you and to have court appointed counsel for trial if you can't afford an attorney. Before you make that decision final, I want you to understand what you will be giving up.

You may have any number of defenses which apply to your case and which an attorney is trained to know.

Should you be convicted of the offense, you are facing a penalty of _____. There are factors which the Court can consider in increasing your sentence within that range or in decreasing your sentence within that range. These are factors which an attorney would know about.

An attorney has developed certain skills to assist you in presenting a defense to the charge against you. These include:

(1) Investigating your case, interrogating witnesses against you, and finding favorable witnesses and obtaining their testimony;
(2) Explaining charges and any lesser-included offenses;
(3) Gathering documents and other kinds of written evidence;
(4) Preparing and filing motions before trial such as motions for speedy trial, motions for discovery, or motions to keep unfavorable information from being received as evidence;
(5 Examining and cross-examining witnesses at trial;
(6) Recognizing objectionable and unfavorable evidence and promptly objecting to its use;
(7) Presenting favorable sentencing information and attacking unfavorable sentencing information;
(8) In jury trials, presenting favorable opening and closing statements, preparing appropriate written jury instructions, and selecting a jury; and
(9) Training, knowledge, and skill at properly preserving the record of the case for purposes of an appeal.
[(10) (Note-*Hopper v.* State, 957 N.E.2d 613 (Ind. 2011) determined on rehearing not to require the following paragraph; the Benchbook Committee has placed it here as an option:) An attorney can also evaluate the strengths or weaknesses of the case against you and give you expert advice on whether you should attempt to seek a plea agreement with the State of Indiana which may result in the dismissal of some of the charges and a recommendation for a favorable sentence in return for your plea of guilty.]

You must understand that if you decide not to have an attorney, you will not receive any special treatment with your defense. You will have to follow all the same rules and procedures in your case as an attorney would have to. The State will be represented by an attorney and will have the advantage that an attorney presents. If you decide to represent yourself and the result turns out badly, you need to know that you will not be able to complain that you were not an effective attorney in your own defense.

As I have told you, you have a right to decide against having an attorney, but you must be aware that deciding not to have an attorney can turn out to be a very bad decision. Experienced lawyers almost always decide to be represented by another lawyer in a criminal case.
There are some of the things that you should consider before you appear at trial without an attorney, and I want to ask you about them now: *(Place defendant under oath)*

(1) What skills or knowledge do you have that would be helpful to you if you represent yourself? *(Answer)*
(2) Have you ever studied criminal law? *(Answer)*
(3) Have you had previous experience with the criminal justice system? *(Answer)*
(4) Have you ever participated in a (jury) trial before? *(Answer)*
(5) How much education have you had? *(Answer)*
(6) Are you able to read and write well? *(Answer)*
(7) Are you a good speaker? *(Answer)* and,
(8) Can you quickly become familiar with large numbers of special rules and procedures and use them the right way in a pressure situation such as your own trial? *(Answer)*

Have there been any promises or suggestions from anyone that you will receive special treatment or a milder sentence if you do not have an attorney? *(Answer)*

Have there been any threats to you that you or another will be harmed or disadvantaged in any way if you do have an attorney? *(Answer)*

Do you have any questions?

Do you still wish to proceed without counsel?

[(Option for Judges who would use as written advisement)

I have read this advisement and by my signature waive my right to counsel.

_____ _____ **]**
Defendant **Date**

34.90.500. Affidavit of Financial Status.

STATE OF INDIANA) IN THE _____ COURT
) SS:
COUNTY OF) OF _____ COUNTY

STATE OF INDIANA CAUSE NO. -_____

v.
_____
Defendant

REQUEST FOR APPOINTMENT OF COUNSEL
AND AFFIDAVIT OF FINANCIAL STATUS

I hereby affirm under the pains and penalties for perjury that I cannot afford to hire my own attorney in this case and request that the Court appoint counsel for me. In support of this request, I affirm that the following information is true and correct.

Name: _____ DOB: _____

Telephone: (___)_____ E-mail address_____

Street address: _____

City: _____ State: _____ Zip code:_____

Usual occupation: _____ Currently employed: Yes No

Employer: _____ Physical health: _____
BRING HOME pay in each of last six months: (list most recent first)
$_____ $_____ $_____ $_____ $_____ $_____
If unemployed, how long: _____ Why: _____

Checking account balance: $_____ Savings account balance: _____
Cash you have: $_____ Money owed to you: _____
Tax refund due: Yes No
When: _____ Amount: $_____

Other income (check all appropriate): ____Unemployment ____Disability ____Child support ____Worker's compensation ____Student loans
How much (other income): $_____ How often: _____
Do you own real estate: Yes No Value: $_____
Mortgage(s) balance: $_____

List all motor vehicles by year, make, model, value, and amount owed: _____
_____

List all personal property such as tools, electronics, appliances, furniture, etc., over $250:
_____

Number of dependents: _____ Ages: _____ Do they live with you: Yes No

If no, do you pay support: Yes No Monthly amount: $_____
Arrearage: $_____

If yes, how do you pay: ____ Withhold from check by employer
____ Paid after receiving paycheck
List monthly expenses and amounts <u>you</u> pay: _____
_____
_____

Does anyone contribute to the payment of these expenses: Yes No
List other adults that live with you by name, relation, and monthly bring-home pay:
_____

List any debts over $250 by who you owe and how much: _____
_____

If you have posted bond in the last year, list the amount, the name of the person who paid the premium, and that person's relationship to you:
_____

If any of the above are cash bonds (where you did not pay a fee to a bondsman), mark with "$".

* *

I understand that the information given above will be used to determine whether or not I am able to pay any part of the cost of a Public Defender appointed by the Court.

Under the pains and penalties for perjury, I hereby solemnly swear, or affirm, that the information above is true and correct to the best of my knowledge.

Date: _____

_____
Signature

<u>NOTICE</u>

If the Court finds that you are able to pay part of the cost of an appointed attorney, you will be ordered to pay an initial fee of $100 in a felony case, and $50 in a misdemeanor case. You may

also be required to repay the value of your appointed attorney's services if you are found to be able to pay at any time in the future.

Complete this form and return to the Court at the address on the front of this form.

35.00.000 Interpreters

35.01.100 Interpreters-- right to an interpreter
35.10.100 Types of interpreters
35.20.100 Methods of court interpretation
35.22.100 Accurate interpretation required
35.25.100 Duty to appoint when the Court is put on notice
35.30.100 For court-appointed defense interpreter indigence required
35.35.100 Disabilities interpreters at public expense
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35.45.100 Not decided: one person as proceedings and defense interpreter
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35.55.100 Trial Rule 43
35.60.100 Qualifying interpreters – Evidence Rule 604
35.60.200 Qualifications must be established
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35.80.100 Locating certified court interpreters
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35.00.000 Interpreters

35.01.100 Interpreters-- right to an interpreter -

Martinez Chavez v. State, 534 N.E.2d 731, 737 (Ind. 1989) (cited with approval in *Arrieta v. State,* 878 N.E.2d 1238, 1243-44 (Ind. 2008)) , establishes that, for a limited-English-proficient (LEP) defendant, an interpreter is necessary to implement fundamental notions of due process, including the right to be present at trial, the right to confront one's accusers, and the right to counsel.

The Americans with Disabilities Act may require appointment of an interpreter for a hearing-impaired, speech-impaired, or visually impaired person as a reasonable accommodation under the Act.

35.10.100 Types of interpreters - For appointment decisions, all interpreters fall into two categories: proceedings interpreters and defense interpreters. A proceedings interpreter serves the judge, counsel, parties, and juries by interpreting during various events in a case in which communication with or before the court is necessary, e.g. interpreting a non-English-speaking defendant's responses during a bond proceeding or interpreting a non-English-speaking witness' testimony at trial. *See Arrieta v. State*, 878 N.E.2d 1238, 1243 (Ind. 2008). A defense interpreter primarily serves the defendant by simultaneously interpreting the English proceedings to the defendant and by assisting with attorney-client communications. *Id.* at 1242-45. This distinction is important to determine who must bear the cost of the interpreter's service. For this latter purpose, the distinction between foreign language interpreters and interpreters required to be appointed under the Americans with Disabilities Act also is important.

35.20.100 Methods of court interpretation -

- Sight translation - reading of written text of one language translated orally into another language. Commonly performed for exhibits, plea agreements, and court documents.
- Consecutive interpretation - rendering of an interpretation after the speaker has stopped speaking, usually in short utterances. Commonly performed for witness testimony during a hearing or trial.
- Simultaneous interpretation - rendering of an interpretation for a party at the same time someone else is speaking (usually heard only by the person receiving the interpretation) so that non-English speaker may understand the English proceedings. Commonly performed for LEP defendant for events in the court proceedings that do not call for a response from the defendant, e.g. opening statement, witness testimony, closing argument, and jury instructions.

35.22.100 Accurate interpretation required - In *Diaz v State*, 934 N.E.2d 1089 (Ind. 2010) the Indiana Supreme Court endorsed as "important best practices" that an interpreter "must give . . . the precise form and tenor of each question propounded, and . . . in like manner translate the precise expressions . . ." while

stating that “occasional lapses in translation will not render a proceeding fundamentally unfair.”

35.25.100 Duty to appoint a proceedings interpreter exists when the Court is put on notice - The Court is put on notice of the need to appoint an interpreter when a defendant “manifests a significant language difficulty, or when an interpreter is specifically requested”. The Court’s decision should be based on such factors as the defendant’s understanding of spoken and written English, the complexity of the proceedings, issues, and testimony, and whether, considering those factors, the defendant will be able to participate effectively in his defense. *Nur v. State, 869 N.E.2d 472 (Ind. Ct. App. 2007).*

35.30.100 For court-appointed defense interpreter indigence required - For the appointment of a defense interpreter, there also must be a showing of indigency. *Arrieta v. State*, 878 N.E.2d 1238, 1245 (Ind. 2008).

35.35.100 Disabilities interpreters at public expense -As an Americans With Disabilities Act reasonable accommodation, an interpreter must be provided at public expense, for a vision-impaired or hearing-impaired defendant, whether indigent or not, and the interpreter expenses may not be assigned to the defendant at any time. 28 C.F.R. § 35.130(f) (Department of Justice regulation implementing Act). See also 56 Fed. Reg. 35694 (July 26, 1991) (Department of Justice promulgation of ADA regulations, in Summary, opining that under 28 C.F.R. § 35.130(f) "recouping the costs of interpreter services by assessing them as part of court costs would also be prohibited"). The Title II access to public facilities portion of the ADA, which the Department of Justice regulations implement, applies to state courts. *Tennessee v. Lane*, 541 U.S. 509 (2004).

35.40.100 No duty to *sua sponte* appoint interpreter - Without a request for an interpreter or an indication of a defendant's language difficulty, a trial court is under no obligation to inquire into a defendant’s need for an interpreter. *Nur v. State, 869 N.E.2d 472* (Ind. Ct. App. 2007). Defendant, who was convicted of dealing in cocaine, was not denied his right to counsel by trial court's failure to provide sua sponte a competent interpreter of the Spanish language prior to trial, particularly in light of evidence that defendant spoke and understood English well enough to have conversantly discussed the drug trade in English with police officer and to have orchestrated the events which supported his conviction and that defendant had no difficulty answering questions while testifying at the sentencing hearing. *Martinez v. State*, 451 N.E.2d 39, 41 (Ind. 1983).

35.45.100 Not decided if one person can serve as both proceedings and defense interpreter - "The present case does not require deciding whether one interpreter can serve as both a defense interpreter and a witness interpreter in the same proceeding, or whether more than one may sometimes be necessary. We have laid out these distinct roles to alert trial courts of the need to ensure that they are both filled, to protect the rights of the parties and the integrity of the fact-finding process." *Arrieta v. State*, 878 N.E.2d 1238, 1244 (Ind. 2008).

35.50.100 No Duty to Accept at Face Value Defendant's Professed Language

Skills - In *Gado v. State*, 882 N.E.2d 827, 830-31 (Ind. Ct. App. 2008), the Indiana Court of Appeals held that a trial court did not have to accept at value the defendant's professed lack of understanding of English. Defendant, who was charged with attempted murder, sought a defense interpreter who spoke the African dialect of Djerma. The appellate court determined that he was not entitled to the interpreter, as there was considerable evidence that defendant, who was offered a French interpreter, spoke and understood English and French. The appellate court pointed to the following factors in reaching this conclusion: the trial court's interactions with the defendant, defendant's familiarity with English slang terms, and a witness' testimony about her frequent, lengthy conversations with defendant in English that covered a range of topics, including crimes the defendant had committed. The appellate court determined that the trial court did not abuse its discretion when it determined that the defendant "intentionally was attempting to frustrate his prosecution by faking inability to communicate in any language other than Djerma, a rare language for which it is very difficult to find interpreters . . . [t]he trial court was in the best position to judge witness credibility firsthand and decide whether Gado required an interpreter."

35.55.100 Trial Rule 43 - Trial Rule 43 states that the compensation for an interpreter shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court. Application of this rule shall be in compliance with the Americans with Disabilities Act." Ind. Trial Rule 43 (F). The Benchbook Committee believes that *Arrieta v. State*, 878 N.E.2d 1238, 1244 (Ind. 2008) controls the discretion of the court in assessing the costs of an interpreter in a criminal case, and therefore cites Trial Rule 43 here only as a caution to judges who may read it without considering Arrieta.

35.60.100 Qualifying interpreters - Evidence Rule 604: "An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation." Ind. Evidence Rule 604.

35.60.200 Qualifications must be established - Due to the importance of an interpreter's function in interpreting court proceedings to a party, establishment of interpreter's qualifications and administration of an oath or affirmation is necessary. *Mariscal v. State*, 687 N.E.2d 378, 383 (Ind. App. 1997).

35.60.300 Suggested qualifying questions for interpreter: "We suggest that trial courts ask the following questions to potential interpreters to evaluate an interpreter's qualifications:

(1) Do you have any particular training or credentials as an interpreter?
(2) What is your native language?
(3) How did you learn English?
(4) How did you learn [the foreign language]?
(5) What was the highest grade you completed in school?
(6) Have you spent any time in the foreign country?
(7) Did you formally study either language in school? To what extent?

(8) How many times have you interpreted in court?
(9) Have you interpreted for this type of hearing or trial before? To what extent?

Although not an exhaustive list, after considering these types of questions, a trial court will be better able to determine whether or not an interpreter is properly qualified to translate." *Cruz Angeles v. State*, No. 751 N.E.2d 790 (Ind. Ct. App. 2001), transfer denied.

NOTE-As an alternative to asking the questions above in every case or proceeding, the court may wish to consider use of the affidavit, Benchbook form 35.25.500, kept on file in the court's records and noted in each case or proceeding as establishing the interpreter's qualifications.

35.60.500 Interpreter conflicts inquiry – The questions below addressing possible interpreter conflicts were suggested by *Cruz Angeles v. State*, 751 N.E.2d 790 (Ind. Ct. App. 2001), transfer denied. [If the interpreter is sworn to "abide by the Indiana Interpreter Code of Conduct and Proceedings" (see "proceedings interpreter oath" section 59.24.140 post) which in turn requires that an interpreter not have any conflict of interest (see Interpreter Code of Conduct and Proceedings Section III, paragraph 16), these questions now may only be necessary if there is a specific concern about a potential conflict.]

(1) Are you a potential witness in this case?
(2) Do you know or work for any of the parties?
(3) Do you have any other potential conflicts of interest?

35.60.600 Interpreter's ability to speak to defendant or witness – The questions below addressing the interpreter's having checked to assure ability to communicate with the non-English speaking defendant or witness were suggested by *Cruz Angeles v. State*, No. 751 N.E.2d 790 (Ind. Ct. App. 2001), transfer denied. [If the interpreter is sworn to "abide by the Indiana Interpreter Code of Conduct and Proceedings" (see "proceedings interpreter oath" section 59.24.140 post) which in turn requires that an interpreter inform the court whenever there is "a word, phrase or concept" that the interpreter does not understand (see Interpreter Code of Conduct and Proceedings Section III, paragraph 11(a), these questions now may only be necessary if there is a specific concern about understanding.]

(1) Have you had an opportunity to speak with the non-English speaking person informally? Were there any particular communication problems?
(2) Are you familiar with the dialect or idiomatic peculiarities of the witnesses?

35.60.700 Objections to interpreter qualifications

35.60.750 Interpreter bias -
Trujillo v. State, 806 N.E.2d 317 (Ind. Ct. App. 2004) - Defendant's unsupported speculation that CPS caseworker who interpreted four-year-old molestation victim's interview was biased simply due to her employment and because she was asked to interpret by law enforcement was insufficient to warrant

suppression of videotape of interview when defense counsel was able to cross-examine the interpreter and failed to present any evidence, argument, or suggestion that interpretation was inaccurate.
Ozuna v. State, 703 N.E.2d 1093 (Ind. Ct. App. 1998) - Defendant's absence from a pretrial meeting of the prosecutor, state's witness, and interpreter, the purpose of which was to determine if the interpreter was able to understand the witness' dialect, did not violate defendant's federal or state constitutional right to be present, when defendant had opportunity to confront and cross-examine witness at trial, defendant did not demonstrate the witness' trial testimony was subject to more than one interpretation or that the interpretation at trial was inaccurate, and defense counsel cross-examined interpreter about alleged discrepancies in interpretation.
Jennings v. State, 297 N.E.2d 909 (Ind. App. 1973) - Without a demonstration that defendant was prejudiced by use of an interpreter friendly to the prosecution's witness, defendant could not obtain post-conviction relief on ground the court erred in utilizing friend of complaining witness as a Spanish interpreter.

35.60.800 Failure to object to qualifications - Defendant's failure to object to appointment of interpreter and attorney's affirmative consent to appointment of interpreter waived issue of suitability of appointment of interpreter, even though trial court failed to inquire into interpreter's qualifications. *Mariscal v. State*, 687 N.E.2d 378, 383 (Ind. App. 1997).

35.65.100 Interpreter oath

Statutory oath for single non-English speaking witness:

Do you solemnly swear (or affirm) that you will justly, truly, and impartially interpret to _____ the oath about to be administered to him (her), and the questions which may be asked him (her), and the answers that he (she) shall give to such questions, relative to the cause now under consideration before this court so help you God (or under the pains and penalties of perjury)? Ind. Code 34-45-1-5.

Proceedings interpreter oath:

(The Committee notes that paragraph 8 of the Indiana Supreme Court's Interpreter Code of Conduct and Proceedings requires that the statutory oath printed immediately above be used by the courts. The Committee observes that the statutory oath appears to be for a witness's testimony. The Committee considered ways in which the oath might be adapted to retain the essential aspects of the language in the statutory oath and yet be broadened to encompass an entire proceeding. The Committee drafted the following suggested proceedings interpreter oath):

Do you solemnly swear or affirm under the penalties for perjury that you will justly, truly, and impartially interpret all proceedings had in open court relative to the case under consideration, including any oaths administered, or questions and answers, or statements made (so help you God)?

35.70.100 Objections to interpreter's accuracy

35.70.200 Sufficiency of interpretation on record - Despite fact that transcript of guilty plea proceedings did not show places in which trial judge stopped to allow partial interpretation of trial judge's questions, record of guilty plea proceedings was "complete" . . . when it was apparently impossible for court reporter to take down any Spanish words, when record was complete as to all English words that were spoken and showed complete record of advisement of rights and factual basis of plea, and when trial judge also asked second interpreter to discuss proceedings with petitioner and ascertain whether he understood everything. *Garcia v. State*, 391 N.E.2d 604, 607 (Ind. 1979).

35.70.300 Defendant's Due Process rights violated when accuracy of interpretation is subject to "grave doubt" - "A criminal defendant is denied due process when the accuracy and scope of a translation at a hearing or trial is subject to grave doubt." *Martinez Chavez v. State*, 534 N.E.2d 731, 737 (Ind. 1989). However, the Indiana Supreme Court determined that appellant presented no evidence to suggest that the interpreter violated his oath to interpret truly: "[a]lthough an independent interpreter did not corroborate Gomez's translation, as the priest did in *Garcia*, there is no indication that the interpretation is subject to grave doubt."

35.70.700 Procedure for attacking accuracy of interpretation post verdict - In *Cruz Angeles v. State*, 751 N.E.2d 790, 796 (Ind. Ct. App. 2001), the defendant asserted on appeal that the interpreter incorrectly interpreted several pieces of testimony at trial, thereby denying him a fair trial. As part of his appeal, he included a revised version of the trial transcript prepared by another interpreter. The State moved to strike the Record of Proceedings because the revised translations had not been certified as part of the record by the trial court. The appellate court granted the motion, and the trial court certified both versions of the trial transcript. The appellate court ruled that in such cases, "when an appeal requires factual determinations based upon evidence not in the record, the proper procedure is to ask that the appeal be suspended or terminated in order that a more thorough record may be developed through post-conviction proceedings under the *Davis/Hatton* procedure." (*Hatton v. State*, 626 N.E.2d 442, 442 (Ind. 1993); *Davis v. State*, 368 N.E.2d 1149, 1151 (1977).

35.70.710 Procedure after successful attack on accuracy of interpretation - In *Diaz v State*, 934 N.E.2d 1089 (Ind. 2010), the Indiana Supreme Court remanded a post conviction relief case to the trial court to commission its own independent interpretation of the court's audio record where there was credible evidence that the interpretation of a guilty plea may have been inaccurate.

35.80.100 Locating certified court interpreters - The Benchbook Committee recommends that courts use certified interpreters, particularly for trials and other potentially dispositive hearings. A list of certified court interpreters around the state is listed by region at:

ww.in.gov/judiciary/interpreter/registry

For additional assistance locating an available certified court interpreter, go to: http://www.in.gov/judiciary/interpreter/about.html or contact the Division of State Court Administration at 317.232.2542.

35.90.100. Interpreter's affidavit – The following affidavit is recommended for use for interpreters who regularly appear in the court. The affidavit should be filled out by the interpreter and kept on file with the court. (Multiple courts may want to consider establishing a central repository for the affidavits.) In each case or proceeding in which the interpreter serves, the court can note that the interpreter's qualifications are established by the affidavit on file. This procedure will avoid having to ask the interpreter the same qualifying questions in every case or proceeding. It is recommended that a new affidavit be completed periodically and filed to replace the old one. Caveat – the Benchbook Committee recommends use of this form as directed above but notes that the practice suggested has not been approved or endorsed by either the Indiana Supreme Court or the Indiana Court of Appeals.

STATE OF INDIANA)
) SS:
COUNTY OF _____)

IN THE _____ COURT
OF _____ COUNTY

INTERPRETER'S AFFIDAVIT

Comes now _____, and being duly advised of the pains and penalties for perjury, now affirms as follows:

1. My name is _____.
2. I am qualified to interpret for persons who:
   (a) Have _____ as their primary language(s);
   (b) Are hearing impaired/deaf;
   (c) Other _____.
3. My native language is _____. (If your native language is not English, please complete the next portion of this paragraph.) I learned to speak English as follows:_____.
4. I am fluent in the following languages: English, _____

(For each language you desire to interpret for the Court, please complete paragraphs 5 though 10. If you qualify in more than one language, please use a separate sheet of paper to provide this information.)

5. My qualifications to interpret _____ include the following formal education:

___High school (_____ semesters);

___College (_____ semesters); degree_____;

___Post graduate; degree _____;

___Other: _____;

6. To become fluent in _____, I have spent the following time in these countries:

Country: _____ Time spent in country: _____

Country: _____ Time spent in country: _____

Country: _____ Time spent in country: _____

7. I have had the following experience interpreting for others:

___ Informal (for social, recreational reasons, etc.) _____

_____

___ Formal (for employment, business, governmental reasons, etc.) _____

_____

8. I have interpreted for individuals in court before approximately _____ times; I have interpreted in:

(a) State and/or federal courts; (Circle which apply)

(b) Criminal and/or civil cases; (Circle which apply)

(c) For witnesses and/or for parties; (Circle which apply)

(d) I have interpreted at the follow types of hearings:

___ (1) Pre-trial hearings not involved in the presentation of evidence;

___ (2) Pre-trial hearings involved in the presentation of evidence;

___ (3) Bench trials;

___ (4) Jury trials;

___ (5) Post-trial proceedings.

9. I belong to the following professional organizations for interpreters: _____

_____

10. I am certified to serve as an interpreter for _____ by _____. The requirements to obtain this certification were as follows: _____

_____

11. I understand that I must have no interest in the outcome of any case, financial, emotional, or otherwise, and that I must be impartial to all parties. I will disclose any matter to the Court that any party or attorney for any party might reasonably perceive as a potential bias or conflict of interest.

12. Upon discovering any difficulty whatsoever that I am experiencing in understanding any person for whom I'm assigned to interpret, due to any dialect, idiomatic peculiarities of speech, or for any other reason, I will disclose this to the Court immediately.

13. I have read, and agree to be bound by, and will follow the Indiana Supreme Court Interpreter Code of Conduct and Procedure in effect at the time I perform my duties.

14. I understand that I must protect and uphold the confidentiality of all communication that is not an interpretation required by a proceeding in open court in the presence of a judicial officer in the course of my sworn duties. It is especially important when I serve as an interpreter between the defendant and defense counsel that I uphold the attorney-client privilege as to any communications I am a part of between attorney and client. This rule also applies to other types of privileged communications, and if I ever have a question about what may be confidential, I will seek guidance from an appropriate authority within the judiciary who is not involved in the proceeding before making any disclosure to anyone.

In the event I become aware during the course of the proceedings of information that suggests imminent harm to someone or relates to a crime being committed, I will immediately disclose that information to an appropriate authority within the judiciary who is not involved in the proceeding and seek advice in regard to whether such information should be disclosed, and to whom.

15. I understand that a copy of this Affidavit will be kept by the Court and will be noted in the case file of each case to which I am assigned as on file with the Court. To the extent that additional training, education, and/or experience enhance my qualifications and potential range of duties to which I may be appointed, I agree to update this Affidavit on a yearly basis.

I hereby affirm under the pains and penalties for perjury that the foregoing information is true to the best of my knowledge and belief.

_____
(Printed)

_____
(Signature)

35.90.200 Language Identification Guide - When court and clerk staff members encounter someone with whom they are unable to effectively communicate, they can simply show the person an “I Speak” Language Identification Guide. The guide contains the phrase “I speak [name of language]” in 80 different languages from around the world, plus 10 indigenous dialects from Central America. The Guide may be downloaded and printed from the following link:

http://www.in.gov/judiciary/interpreter/3390.htm

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39.00.000 JURY RIGHT AND DEMAND

39.10.000 Jury Right In General

39.10.100 Constitutional Right: The Indiana Constitution guarantees the right to a jury trial with no distinction between felonies and misdemeanors or between degrees of misdemeanors. *Stevens v. State*, 689 N.E.2d 487, 489 (Ind. App.1997).

39.10.200 Criminal Rule Distinction: A defendant charged with a felony has an automatic right to a jury trial under the Indiana Constitution unless he or she affirmatively waives the right, but misdemeanor charges are tried to the bench unless the defendant demands a jury trial in a timely manner as prescribed in Criminal Rule 22. *Stevens v. State*, 689 N.E.2d 487, 489 (Ind. Ct. App. 1997).

39.20.000 Misdemeanor Juries

39.20.100 Size Of Misdemeanor Jury: A person charged with a misdemeanor must be tried to a jury consisting of six persons. Ind. Code 35-37-1-1(b)(2).

39.20.200 Demanding Misdemeanor Jury Trial: A defendant charged with a misdemeanor may demand trial by jury by filing a written demand therefor not later than ten (10) days before his first scheduled trial date. IND. CRIM. RULE 22.

39.20.300 Waiver Of Right To Misdemeanor Jury Trial If No Demand: The failure of a defendant to demand a trial by jury as required by this rule shall constitute a waiver by him of trial by jury unless the defendant has not had at least fifteen (15) days advance notice of his scheduled trial date and of the consequences of his failure to demand a trial by jury. The trial court shall not grant a demand for a trial by jury filed after the time fixed has elapsed except upon the written agreement of the state and defendant, which agreement shall be filed with the court and made a part of the record. If such agreement is filed, then the trial court may, in its discretion, grant a trial by jury. IND. CRIM. RULE 22.

39.20.400 Sufficiency Of Waiver: "A record in a misdemeanor charge is sufficient to establish a defendant's personal, voluntary, knowing, and intelligent waiver of the right to trial by jury if: (1) it does not contain a request for a trial by jury; (2) it evidences that the defendant was fully advised of the right to a trial by jury and of the consequences for failing to timely request the right; and (3) it reflects that the defendant was able to understand the advice." *Eldridge v. State*, 627 N.E.2d 844, 848 (Ind. Ct. App. 1994).

39.20.500 Written Advisement Sufficient: Although defendant charged with a misdemeanor must be advised of the constitutional right to jury trial, written advisement of his rights and consequences of failure to make timely demand is sufficient. *Jackson v. State*, 644 N.E.2d 595, 596 (Ind. Ct. App. 1994).

39.20.600 Waiver Effective Without Advice Of Counsel: By reading, initialing and signing acknowledgement of rights form containing written advisement that misdemeanor defendant had right to jury trial and by failing to demand jury trial, defendant effectively waived right to jury trial, even though he was not

represented by counsel at time of waiver. *Belazi v. State*, 525 N.E.2d 351, 352 (Ind. Ct. App. 1988).

39.20.700 **No Duty To Inquire As To Reasons For Waiver:** Neither the United States Constitution nor the Indiana Constitution imposes a duty on the trial court to inquire of a misdemeanant about his reason for failing to request jury trial. *Hadley v. State*, 636 N.E.2d 173, 175 (Ind. Ct. App. 1994).

39.20.800 **Ineffective Assistance Of Counsel:** Failure of defense counsel to file necessary jury trial request after defendant voiced desire for jury trial on misdemeanor charges constituted ineffective assistance; defendant was prejudiced, regardless of whether correct result may have been reached in bench trial, because of denial of constitutional right to jury trial. *Stevens v. State*, 689 N.E.2d 487 (Ind. Ct. App. 1997).

39.30.000 **Felony Jury**

39.30.100 **Size Of Jury:** A person charged with murder, a Class A felony, a Class B felony, or a Class C felony, must be tried to a jury consisting of twelve persons. A person charged with a Class D felony must be tried to a jury consisting of six persons. Ind. Code 35-37-1-1(b).

39.30.200 **Automatic Right To Jury:** A person charged with a felony has an automatic right to a jury trial unless he or she waives it. *Hutchins v. State*, 493 N.E.2d 444, 445 (Ind. 1986).

39.30.300 **No Right To Non-Jury Felony Trial**

39.30.310 **Parties May Waive Jury If Court Agrees**: "The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court. All other trials must be by jury." Ind. Code 35-37-1-2.

39.30.320 **Defendant Has No Right To Non-Jury Felony Trial**: Defendant has no constitutional or statutory right in Indiana to demand and insist upon a trial without a jury over the objections of the state. *Alldredge v. State*, 156 N.E.2d 888, 890-91 (Ind. 1959).

39.30.330 **Court May Deny Parties' Waiver Of Jury Trial:** Trial court did not err in denying defendant's oral waiver of jury trial, even though State did not object to waiver, where jury had already been called and was waiting for voir dire to begin at time waiver was made. *Arnold v. State*, 1984, 460 N.E.2d 494 (Ind. 1984).

39.30.400 **Waiver Of Right To Felony Jury Trial**

39.30.410 **Written Waiver Sufficient:** Written waiver executed by the defendant is adequate to waive right to jury trial; there is no requirement that a trial court orally advise a defendant of his right to a jury trial and the consequences of waiving that right. *Coleman v. State*, 694 N.E.2d 269, 272 (Ind. 1998).

39.30.420 **Colloquy With Defendant Not Required:** While it is advantageous for trial judge to engage defendant in colloquy concerning consequences of waiving trial by

jury, such exchange is not required by either federal or state constitutions, or by statute. *Poore v. State*, 1997, 681 N.E.2d 20, 208 (Ind. 1997).

39.30.430 **Record Must Show Personal Waiver**: Docket entry, which indicated that defendant appeared in person and with counsel and waived trial by jury, did not reflect a knowing, intelligent, and voluntary waiver of right to trial by jury; defendant's assent must be personal, reflected in the record before the trial begins either in writing or in open court; the record reflection must be direct and not merely implied; therefore, defendant, who had been tried by the court, was entitled to a new trial. *Doughty v. State*, 470 N.E.2d 69, 70 (Ind. 1984).

39.30.440 **Withdrawal Of Waiver:** Denial of defendant's motion, filed on day of trial, to withdraw written jury waiver was not abuse of discretion, where defendant signed waiver after he had been allowed to consult with attorney and failed to show that waiver was other than knowing, voluntary and intelligent. *Jones v. State*, 518 N.E.2d 479 (Ind. 1988).

39.30.450 **Waiver Not Ineffective Assistance Of Counsel:** Trial counsel's decision to encourage defendant to sign jury waiver, reflecting choice of strategy which is often followed by trial counsel, did not show pattern of ineffective counsel. *Clay v. State*, 1983, 457 N.E.2d 177, 179 (Ind. 1983).

39.30.460 **No Waiver Of Jury By Failing To Appear**: Although the defendant's failure to appear for trial may waive his or her right to be present, it does not waive the rights of jury trial and of counsel; therefore, it is reversible error to try a defendant *in absentia* without a jury or defense counsel absent a sufficient independent waiver of those rights. *Carr v. State*, 591 N.E.2d 640, 641-42 (Ind. App. 1992).

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40.00.00 Discovery

40.01.000 Introduction

40.01.010 Court's Involvement In Discovery - An amendment of Criminal Rule 21 may make it unnecessary for the Court to implement discovery between the State and Defendant only by entering a discovery order. Since CRIMINAL RULE 21 now provides that the TRIAL RULES apply so long as they are not in conflict with any rule specifically adopted for criminal cases, then discovery ought to be available to the parties subject to the TRIAL RULES.

40.01.015 Local Rule For Discovery - Some courts have a standard Order for discovery or impose standard discovery obligations by a local rule. Such courts might consider leaving discovery up to the parties for several reasons: less Court time; fewer papers filed; fewer CCS entries; less paper copied; etc. If the parties disagree on what is discoverable, the Court will learn soon enough after a party files a **Motion To Compel Discovery.**

40.01.050 Leave Discovery To The Parties - In some instances the law requires a party, State or Defendant, to take affirmative steps to obtain information through discovery. For instance, under RULE 404 OF INDIANA EVIDENCE, the accused must first request through discovery, whether the State intends to offer evidence of other crimes, wrongs, or acts. If the accused does not ask, he/she may first learn about it at trial.

40.02.000 Prosecutor's Pre-Charge Subpoena Authority

40.02.010 Court Ordering Third Party Discovery - Before there is an underlying cause of action, a court has the authority to issue subpoena duces tecum at the request of the prosecutor, directing a third party to reveal to the prosecutor records and other information where the information is needed by the prosecutor to carry out his duty to prosecute felons. *Indiana Bell Telephone Company, Incorporated v. State of Indiana*, 409 N.E.2d 1089 (Ind. 1980).

40.02.020 Prosecutor's Subpoena Authority - Ind. Code 33-14-1-3 authorizes a prosecutor to seek subpoenas from the court in criminal investigations prior to filing a charging information. Once charges have been filed, Criminal Rule 21 and the civil rules of discovery should be followed, requiring notice of depositions, etc. *Rita v. State*, 674 N.E.2d 968 (Ind. 1996).

40.02.030 Prosecutor To Get Court Approval For Third Party Order – "A prosecutor acting without a grand jury must first seek leave of court before

issuing a subpoena *duces tecum* to a third party for the production of documentary evidence." *Oman v. State*, 737 N.E.2d 1131 (Ind. 2000).

40.03.000 Applying Trial Rules In Criminal Cases

40.03.001 Trial Rules Apply To The Discovery Process In Criminal Cases - Crim. R. 21 was amended effective March 1, 1997 to provide that the TRIAL RULES are generally applicable to all criminal proceedings, rather than merely to criminal appeals as the prior version provided. ". . . To the extent . . . cases suggest that the TRIAL RULES are per se inapplicable to criminal proceedings, they are superseded by the recent amendment." *WTHR-TV v. Cline,* 693 N.E.2d 1(Ind. 1998).

40.03.010 Some Trial Rules Still Do Not Apply In Criminal Cases - Some TRIAL RULES, like T.R. 56, by their language are not applicable to criminal cases. Others such as T.R. 36 and 33 are presumably inapplicable to criminal proceedings. In "the context of a defendant's discovery request in a criminal case . . . (1) there must be a sufficient designation of the items sought to be discovered (particularity); (2) the items requested must be material to the defense (relevant); and (3) if the particularity and materiality requirements are met, the trial court must grant the request unless there is a showing of >paramount interest' in non-disclosure." WTHR-*TV v. Cline*, 693 N.E.2d 1, 5-6 (Ind. 1998).

40.03.020 Interrogatories Not Proper In Criminal Case - Interrogatories are never proper in a criminal case when their function can be served by another, previously recognized discovery technique. *State ex re. Grammer v. Tippecanoe Circuit Court,* 377 N.E.2d 1359 (Ind. 1978).

40.04.000 Exculpatory Evidence

40.04.010 Prosecutor's Obligation to Disclose Exculpatory Evidence - Case law has established a group of due process privileges for delivery by the state of exculpatory evidence into the hands of the accused. *California v. Trombetta*, 467 U.S. 479 (1984).

40.04.015 Failure To Disclose Exculpatory Info May Violate Due Process - Suppression of requested evidence favorable to an accused violates due process when the evidence is material either to guilt or punishment, irrespective of good or bad faith of the prosecution. *Brady v. Maryland,* 373 U.S. 83 (1963).

40.04.016 Materiality Test - Prosecutorial suppression of exculpatory evidence is a constitutional violation requiring reversal only if the evidence is material in the sense that there is a reasonable probability that the result would have been different had the evidence been disclosed; for purposes of this rule there is no distinction between impeachment evidence and other kinds of evidence. *United States v. Bagley*, 473 U.S. 667 (1985); *Gibson v. State*, 514 N.E.2d 318 (Ind. App. 2nd Dist. 1987).

40.04.020 **Defendant Must Show That Exculpatory Evidence Exists - To** succeed on a claim of denial of access to exculpatory evidence, a criminal defendant must first demonstrate that exculpatory evidence existed. The defendant must show that undisclosed favorable evidence could reasonably have put the whole case in such a different light as to undermine confidence in the verdict. *Johnson v. State*, 693 N.E.2d 941 (Ind. 1998).

40.04.030 **Discretion On Remedies For Suppressing Exculpatory Evidence -** Possible remedies for a due process violation of the duty to disclose exculpatory evidence, besides mistrial, may be a continuance or allowing a witness to be re-called. The appropriate remedy depends on the severity of non-compliance with discovery, how deliberate and flagrant it was, and whether or not a fair trial can be achieved short of a mistrial. *Braswell v. State*, 550 N.E.2d 1280 (Ind. 1990).

40.05.000 **Use Of Perjured Testimony**

40.05.010 **Perjured Or Inconsistent Testimony** - The State violates a defendant's rights to due process of law when it uses perjured testimony in order to procure a conviction. *Wallace v. State*, (1985), Ind. 474 N.E.2d 1006, 1008. However, mere inconsistencies in the testimony of a witness do not lead to the conclusion that the witness committed perjury. Id. The jury is given the responsibility of resolving any inconsistencies, which might exist. *Klagiss v. State*, 585 N.E.2d 674 (Ind. Ct. App. 1992).

40.05.020 **State Cannot Knowingly Use False Testimony – "If** the prosecution has knowingly used perjured testimony, whether the perjury relates to the defendant's guilt or to the credibility of a State's witness, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Carey v. State*, 416 N.E.2d 1252 (Ind. 1981).

40.08.000 **Lost Or Destroyed Physical Evidence**

40.08.010 **Evidence Favorable To Accused Must Not Be Destroyed-** The Constitution prohibits state destruction of evidence, which has apparent exculpatory value, and for which a defendant has no substitute of comparable value he can obtain by other reasonable available mean. *California v. Trombetta*, 467 U.S. 479 (1984).

40.08.020 **Accused Has a Duty To Review Evidence When Made Available - The** state's failure to preserve test samples may not violate due process if the state makes test results available at once and the defense delays in moving to obtain samples for its own tests. *Nettles v. State*, 565 N.E.2d 1064 (Ind. 1991).

40.08.030 **State Must Show Destroyed Evidence Did Not Prejudice Defendant -** When the prosecution determines evidence is nonmaterial and destroys it without notification to the defense, the prosecution has the burden to show that

destruction of the evidence did not prejudice the defendant: *Birkla v. State*, 323 N.E.2d 645 (Ind. 1975).

40.08.040 **Defendant Must Show Evidence Loss Or Withholding Prejudicial- When** the state negligently looses or withholds evidence, the defendant must establish the materiality of the evidence as a condition precedent to claiming a denial of due process, except where the materiality is self-evident or a showing of materiality is prevented by the destruction of the evidence. *Myers v. State*, 510 N.E.2d 1360 (Ind. 1987).

40.08.060 **Bad Faith In Destruction Of Evidence Is Important Element** - Absent a showing of bad faith on the part of the police, the failure to preserve evidence does not constitute a denial of due process. *Rita v. State*, 663 N.E.2d 1201 (Ind. Ct. App. 1992).

40.09.000 **Disclosure Of Inducement For Testimony**

40.09.001 **Inducements Or Rewards Should Be Provided To Trier Of Fact -** The trier of fact should have before it all the relevant circumstances that caused or induced such witness to testify, including the rewards for such testimony. *Newman v. State,* Ind., 334 N.E.2d 684 (1975).

40.09.002 **Hope For Leniency Not An Agreement For Testimony - "**An express agreement requiring disclosure does not exist if a witness testifies favorably in the hope of leniency, and the State neither confirms nor denies that hope to the witness." *Lopez v. State*, 527 N.E.2d at 1129; *Aubrey v. State*, 478 N.E.2d at 74. Similarly, hopes and expectations of a state witness coupled with evidence that a prosecutor-accomplice witness deal may have been consummated after the in-court testimony is insufficient to bring a case within the disclosure rule. *Wright v. State*, 690 N.E.2d 1098 (Ind. 1997).

40.10.000 **Work Product Privilege**

40.10.001 **Statements Of Witnesses Taken By The Defendant** - Statements of witnesses taken by the defendant, his attorney, or his agents in anticipation of litigation are not subject to pretrial discovery by the prosecutor over a timely work product objection. *Spears v. State,* Ind., 403 N.E.2d 828 (1980); *George v. State*, 397 N.E.2d 1027 (Ind. Ct. App. 1979). [Note: the State did not make any showing in these cases that it could not obtain a statement by other means, so that these cases do not resolve whether the State could obtain statements of defense witnesses by making the showing in Trial Rule 26.]

40. 10.004 **State Not Required To Disclose Expected Testimony -** The trial Court may not require prosecutor to disclose each witness's expected

testimony on the elements of charged offenses. *State ex rel. Myers v. Tippecanoe Superior Court*, 438 N.E.2d 989 (Ind. 1982).

40.10.006 **Work Product Claim Generally Protects Police Reports** -Work product protection invoked by prosecution cloaks police reports generally, and the work product protection is not waived when the prosecutor complies with his duty to disclose exculpatory evidence by permitting defense counsel to examine such reports; after defense's examination prosecutor could still invoke work product protection to court-ordered discovery of police reports. *State ex rel. Keeton v. Rush Circuit Court*, 475 N.E.2d 1146 (Ind. 1985).

40.10.008 **Substantially Verbatim Witness Statements Not Protected From Discovery - Substantially** verbatim witness statements contained in police reports have no work product shield against discovery, but police impressions of what a witness said are work product. *Robinson v. State*, 693 N.E.2d 548 (Ind. 1998).

40.10.010 **Attorney Work Product Privilege Is Waivable – "**The work product privilege is a qualified one and can be waived. We have held that even where documents, e.g., police reports, are produced in a criminal trial context, this does not render them admissible if there is not an explicit or implicit waiver of the privilege." *Jenkins v. State,* 627 N.E.2d 789 (Ind. 1993).

40.10.016 **State Must Produce Substantially Verbatim Pre-Trial Statements - Defendant** has a right to production of the pretrial statement of a witness if the witness has testified, a substantially verbatim transcription of the statement is within the prosecution's control, and the statement relates to matters covered in the testimony of a witness at trial. *Antrobus v. State*, 254 N.E.2d 873 (Ind. 1970). Defendant may obtain substantially verbatim witness statements within the prosecution's control in advance of trial upon the laying of an "Antrobus-type foundation"; this foundation may be presumed if the witness is on the list of anticipated witnesses in the state's written discovery answer; "substantially verbatim witness statements" are "those statements which purport to be the actual words of the witness, reduced to writing as the witness spoke or shortly thereafter or transcribed from a tape recording." *State ex re. Crawford v. Superior Court of Lake County, Criminal Division, Room II*, 549 N.E.2d 374 (Ind. 1990).

40.10.020 **In Camera Inspection May Be Needed** - "Substantially verbatim witness statements," generally discoverable, are those statements which purport to be the actual words of the witness, reduced to writing as the witness spoke or shortly thereafter or transcribed from a tape recording. Documents fitting this definition would typically contain little but the words of the witness and would normally be written in the first person. >Police reports, ' protected under Keaton, are the officer's record of his investigation. These are commonly typed from notes or tape-recorded dictation of the officer. Documents fitting this definition would typically be written from the officer's perspective. "Where an officer's opinions, impressions, and theories are interspersed with verbatim statements by

a witness, in-camera inspection by the trial court should permit the court to determine whether a document is essentially a verbatim statement and therefore discoverable or essentially a police report containing occasional quotations and thus privileged. 549 N.E.2d 374, *State ex rel. Crawford v. Superior Court of Lake County, Criminal Div., Room II*, (Ind. 1990).

40.10.030 **Applying Trial Rules To Work Product Objection - Criminal** Rule 21 states that the trial rules apply if not in conflict with criminal rules. T.R. 26 (B)(3) provides that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

40.11.000 **Grand Jury - Witness Statements/Transcripts**- Defendant has a right to witness statements to a grand jury upon the laying of a proper foundation, but there is no right to a transcript of the grand jury proceedings. *Morris v. State,* 332 N.E.2d 90 (Ind. 1975). Ind. Code 35-34-2-10(b)(1988). The proper foundation consists of eliciting from a witness who has testified an admission that he or she testified before the grand jury and that consequently the State probably has a substantially verbatim transcription of the witness's testimony. *Antrobus v. State*, 254 N.E.2d 873 (Ind. 1970). It would appear that there is no reason not to provide a defendant who requests it with the transcription prior to trial provided the defendant makes an *Antrobus*-type showing that the individual is listed as a State's trial witness and testified before the grand jury. *See State ex re. Crawford v. Superior Court of Lake County, Criminal Division, Room II*, 549 N.E.2d 374 (Ind. 1990).

40.12.000 **Statements By Defendant**

40.12.001 **Defendant Is Generally Entitled To His Own Statements -** Defendant is entitled to an order requiring the state to disclose any confessions or statements made by the defendant absent a showing by the prosecution of a paramount interest in nondisclosure. *Lagenour v. State,* 376 N.E.2d 475 (Ind. 1978). Defendant should be permitted to obtain prior to trial copies of written statements to the police; if a statement by defendant was never reduced to writing, the defendant may have to resort to the deposition process. *Sexton v. State*, 276 N.E.2d 836 (Ind. 1972).

40.15.000 **Notice Of Defenses**

40.15.002 **Defendant Must Disclose Defenses, Witnesses, And Exhibits - A** discovery order requiring defendant to inform the state of any defenses which he had intended to make at a hearing or trial and to furnish the state with names and last known addresses of persons he intended to call as witnesses and with any books, papers, documents, photographs or tangible objects he intended to use as evidence or for impeachment at hearing or trial, did not eliminate proof beyond a reasonable doubt standard nor did it shift burden of proof and was not violative

of defendant's right against self-incrimination. *State ex rel. Keller v. Criminal Court of Marion County, Division IV*, 262 Ind. 420, 317 N.E.2d 433 (1974).

40.15.004 **Statute Requiring Advance Alibi Notice Is Upheld - Statutes** which require a defendant to disclose prior to trial that he intends to rely on an alibi as a defense and to list the names of witnesses he intends to call at trial to prove the alibi do not violate the Fifth Amendment, provided they assign reciprocal responsibilities to the state. *Williams v. Florida (*1970), 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446.

40.15.006 **Defendant May Always Give His Own Alibi Testimony -** Even if the defendant fails to properly notify the state of an alibi defense, "the exclusion of a defendant's own testimony of alibi under the alibi statute, Ind. Code Sec. 35-36-4-1, is an impermissible infringement upon the right of the accused to testify guaranteed by Article I, Sec. 13 of the Indiana Constitution." *Campbell v. State*, 622 N.E. 494 (Ind. 1993).

40.15.008 **Insanity Defense Notice**

40.15.010 **Statute Requires Insanity Defense Notice From Defendant -** A defendant who wishes to raise the insanity defense must file notice of his intent to do so. Ind. Code 35-36-2-1.

40.15.012 **Automatism And Sleep Deprivation Not Insanity -** Evidence of automatism bears on the voluntariness of conduct and is not a subclass of the insanity defense. *McClain v. State*, 678 N.E.2d 104 (Ind. 1997).

40.15.018 **Notice Not Required If Defense Is Not Mental Disease Or Defect –** A defendant contending her medical condition of TIA caused her to commit the offense was not required to give the State notice under the insanity statute. In Indiana a defendant is not permitted to offer evidence of diminished capacity, a mental abnormality which does not rise to the level of insanity, but which affects the defendant's capacity to form criminal intent. See *Holmes v. State*, 671 N.E.2d 841, 857-58 (Ind.1996). Although the defendant may have unartfully phrased her argument by contending that she did not have the ability to knowingly commit theft, she was merely attempting to show that she did not voluntarily commit theft. *Reed v. State*, 693 N.E.2d 988 (Ind. Ct. App. 1998).

40.16.000 Depositions And Right Of Confrontation

40.16.002 **Defendant Has Right To Depose State's Witnesses -** Absent a showing of no legitimate defense interest or of a paramount state interest, a defendant has a right to depose those persons listed on the states witness list. *Finnin v. State*, 416 N.E.2d 116 (Ind. 1981); *Murphy v. State*, 352 N.E.2d 479 (Ind. 1976).

40.16.004 **Use Of Deposition Against Defendant, At Trial. "**While courts have held that before a deposition can be used against a defendant at trial, **confrontation**

requires the defendant to have been present at the deposition," *Gallagher v. State* (1984), Ind.App. 466 N.E.2d 1382, 1385, citing *United States v. Benfield* (8th Cir.1979), 593 F.2d 815; *Collins v. State* (1971), . . . where the deposition was not taken at the request of the prosecution or to preserve testimony for trial, the **defendant's presence during the taking of the deposition** is not necessary. *Gallagher*, 466 N.E.2d at 1385, 1386. In the present case the deposition was taken at Johnston's request, and the State never questioned Woodbury during this time. This indicates, as stated in Gallagher, the State expected Woodbury to appear at trial. There is no indication the State intended to preserve testimony for trial through the deposition. 517 N.E.2d 397, *Johnston v. State*, (Ind. 1988)

"This rule is not without exception however. For example, admission at trial of a **deposition** which defendant was not permitted to attend, taken by the State and given by a **witness unavailable for trial**, results in the defendant never having the opportunity to confront that witness. Such a procedure may violate the defendant's right to confrontation." See e.g., Miller, 517 N.E.2d 64 (videotaped statement of child victim taken without notice to defendant); Gallagher *v. St*ate (1984), Ind.App. 466 N.E.2d 1382, 1385. 622 N.E.2d 948, *State v. Owings***,** (Ind. 1993).

40.16.006 **Defendant Has No Constitutional Right To Attend Deposition. "**Criminal defendants generally have no constitutional right to attend depositions." *Jones v. State* (1983), Ind., 445 N.E.2d 98, 99. This is so because the constitutional right of confrontation applies only to "those criminal proceedings in which the accused may be condemned to suffer grievous loss of either his liberty or his property," and a deposition taken for purposes of discovering information is not such a proceeding. *Bowen v. State* (1975), 263 Ind. 558, 564, 334 N.E.2d 691, 695. Application of this rule is obviously appropriate when the **deponent gives live testimony at trial** because the defendant will be allowed full exercise of the right to confrontation in front of the trier of fact. 622 N.E.2d 948, **State v. Owings,** (Ind. 1993).

40.17.000 **Orders For Exemplars**

40.17.001 **Taking Blood Sample Permissible - Taking** a defendant's blood sample to test for alcohol content does not violate his Fifth Amendment privilege against self-incrimination, but the taking is a search which must be conducted under sanitary conditions as authorized by a warrant. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

40.17.004 **Defendant Can Be Compelled To Give Physical Tests - "**We held in *Allen v. State* (1981), Ind., 428 N.E.2d 1237 that compelling the defendant to repeat the words about which the witness had testified was not a violation of his constitutional right to remain silent. The privilege against compulsory self-incrimination does not shield a defendant against a court-ordered submission to

a "purely physical" test such as body measurements, handwriting, fingerprinting, and voice exemplars. Appellant's compulsory utterance was for the sole purpose of examining the physical characteristics of his mouth as he spoke. His statement was not testimonial in nature. We find no trial court error." Cornett *v. State*, 536 N.E.2d 501 (Ind. 1989).

40.17.006 **No Right To Counsel For Fingerprints or Handwriting Samples –"**We have held many times that the right to counsel attaches at the critical stages of criminal proceedings and that legal counsel is not required for perfunctory, administrative procedures such as the taking of fingerprints and handwriting exemplars. *Frances v. State,* 262 Ind. 353, 357, 316 N.E.2d 364, 366 (1974)." Gillie *v. State***,** 465 N.E.2d 1380 (Ind. 1984).

40.17.008 **Compelling Testimony Is Not the Same As Physical Tests -** "Both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Smith v. State***,** 496 N.E.2d 778 (Ind. Ct. App. 1986). "The privilege does not extend to the compulsory submission to purely physical tests, such as blood samples, fingerprinting, and voice exemplars, *Allen v. State*, (1981) Ind., 428 N.E.2d 1237; *Frances v. State*, (1974) 262 Ind. 353, 316 N.E.2d 364." Clark *v. State*, 436 N.E.2d 779 (Ind. 1982).

40.17.010 **Impression Of Defendant's Teeth Is Not Compelled Testimony** – "The oral examination and impressions made of Defendant's teeth, produced an incriminating product of compulsion, but were neither Appellant's testimony nor evidence relating to some communicative act or writing by Appellant and thus were not inadmissible on privilege grounds." 490 N.E.2d 1097, *Wade v. State***,** (Ind. 1986).

40.17.012 **Neurological Examination Is Not Compelled Testimony - "**Defendant filed what was captioned a motion in limine, but what was in substance a motion to suppress, aimed at precluding the State from presenting any evidence based on a neurological examination conducted by Dr. Romain. . . . The trial court ruled that the evidence was admissible. Dr. Romain then testified that the EEG revealed that the defendant did not suffer from psychomotor epilepsy. . . there is no merit to the claim that the use of evidence gathered from the use of nasopharyngeal electrodes constituted use of "testimonial" or "communicative" evidence in violation of the privilege against self-incrimination." Clark *v. State*, 436 N.E.2d 779 (Ind. 1982).

40.17.015 **Compelling Defendant To Wear Garment –"**We conclude the defendant's privilege against self-incrimination was not violated when, at trial, he was

compelled to don the corduroy coat worn by the perpetrator. By his action, he communicated no information; rather, he merely constituted physical evidence." 433 N.E.2d 387**,** *Bivins v. State*, (Ind. 1982).

40.17.017 **Defendant Compelled to Make Voice Recording – "In** *United States v. Dionisio*, (1973) 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67, it was argued that a grand jury directive to make a voice recording was an infringement of rights under the Fourth Amendment. The court rejected this argument reasoning that the voice like facial characteristics and handwriting is constantly exposed to the public." McClain *v. State***,** 274 Ind. 250, 410 N.E.2d 1297 (Ind. 1980).

40.17.020 **Fingernail Scrapings Properly Compelled – "In** Cupp v. Murphy, (1973) 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900, the United States Supreme Court considered whether the Fourth Amendment provides protection where scraping the fingernails for evidence of crime was involved. The cutting and cleaning of fingernails involves very minor discomfort. . . . In spite of the minor nature of the procedure, the court held that it, like the blood test and pat down by officers, went beyond the region defined by voice exemplars, handwriting and fingerprinting, and is subject to constitutional scrutiny." 410 N.E.2d 1297, 274 Ind. 250, *McClain v. State,* (Ind. 1980)

40.17.022 **More Intrusive Physical Tests Scrutinized More Closely –** "The swab emission test does not involve the insertion of an instrument into body, but the body fluid is forced from it by the application of pressure. . .the conclusion we reach is that the intrusion involved in the swab emission examination is sufficient in magnitude to require constitutional justification. In this case the State relies upon a search warrant for this purpose, and we now turn to consider its validity." McClain *v. State*, 274 Ind. 250, 410 N.E.2d 1297 (Ind. 1980). "In *McClain v. State*, (1980) Ind. 410 N.E.2d 1297, we analyzed the validity of a warrant to examine appellant's person for gonorrhea. Needless to say, this Court has recognized warrants for a search of the person for evidence. *Baker v. State*, 449 N.E.2d 1085,1091 (Ind. 1983).

40.17.026 **Multiple Handwriting Samples Can Be Ordered – "**Appellant also contends that it was error to order him to give the handwriting exemplar because the trial court already had a sample of his handwriting in State's Exhibit Six. It is within the trial court's discretion to order a handwriting exemplar whenever it determines that it will aid the handwriting expert in testifying. This is so even where there may be other samples of a defendant's handwriting available to the trial court." Hutchinson *v. State*, 477 N.E.2d 850 (Ind. 1985).

40.17.028 **Exemplars: Pre-Charge vs. Post-Charge Requests** - If the State files a request for an exemplar such as hair, scrapings, blood, handwritings, etc. after charges have been filed**,** the safest procedure would be to provide notice to the defendant, or to his attorney if one has appeared or been appointed, and set the matter for hearing or at least set a date by the which the other side must file an objection. It would seem that the State and Defendant would make their

requests for Discovery to each other and not with the Court. There should be no reason to seek Court Ordered discovery unless an objection is being made to the requested discovery; one side requests that the time for discovery be shortened or lengthened; or when filing a motion to compel discovery.)

40.18.000 Witness List

40.18.005 Defendant Has Right To Witness List - Defendant has a right to pretrial discovery of names of witnesses who will be used to support the prosecution's case: *Ortez v. State*, 374 N.E.2d 504 (Ind. 1978).

40.18.010 Right To Known and Anticipated Witnesses – "Known and anticipated witnesses, even if presented in rebuttal, must be identified pursuant to a court order, such as a pre-trial order, or to a proper discovery request." *McCullough v. Archbold Ladder Co.,* 605 N.E.2d 175 (Ind. 1993), *applied to criminal cases in Palmer v. State,* 640 N.E.2d 415 (Ind. App. 1994).

40.20.000 Violations Of Discovery - Sanctions

40.20.005 Exclusion Of Evidence - Exclusion of evidence as a discovery abuse sanction is proper only where there is a showing that the State engaged in deliberate or other reprehensible conduct that prevents the defendant from receiving a fair trial. *Taylor v. State*, 676 N.E.2d 1044 (Ind. 1997).

40.20.010 Exclusion Of Evidence vs. Continuance - Where the state seeks to introduce discoverable evidence at the time that the evidence is revealed to the defendant, defendant may seek either a continuance or exclusion of that evidence. A continuance is usually the appropriate remedy. However, exclusion of evidence is proper where the state engaged in deliberate conduct or bad faith or where introduction of the evidence would result in substantial prejudice to defendant's rights. The trial court's decision will not be overturned absent clear error. *Cook v. State*, 675 N.E.2d 687 (Ind. 1996).

40.20.012 Trial Court Has Wide Discretion In Selecting Remedy - The trial court has wide discretion in ruling on violations of a discovery order, and it will be reversed only for an abuse of discretion. Exclusion of evidence as a discovery abuse sanction is proper only where there is a showing that the State engaged in deliberate or other reprehensible conduct, which prohibits the defendant from receiving a fair trial. *Jenkins v. State*, 627 N.E.2d 789 (Ind. 1993).

40.20.015 Sanctioning Defendant's Discovery Violation - Analysis - When a criminal defendant seeks to introduce testimony in violation of a pretrial discovery order, the trial court must conduct a hearing to consider the surrounding circumstances of the defendant's breach. A defendant's violation of a pretrial discovery order does not *ipso facto* constitute grounds for the exclusion of testimony. The most extreme sanction of witness exclusion should not be employed unless the defendant's breach has been purposeful or intentional or unless substantial and

irreparable prejudice would result to the State. In order to reach a just decision which fully assesses the right of both parties to a fair trial and the criminal defendant's Sixth Amendment right to present witnesses on his behalf, the following kinds of questions should be asked: **(1)** Whether the nature of defendant's violation was **trivial or substantial**. The trial court should consider when the witness first became known to defense counsel. **(2) How vital** the potential witness' testimony is to the defendant's case. The trial court should determine the significance of the proffered testimony to the defense. Is the testimony relevant and material to the defense or merely cumulative? **(3**) The **nature of the prejudice to the State**. Does the violation have a deleterious impact on the case prepared by the State? **(4)** Whether **less stringent sanctions** are appropriate and effective to protect the interest of both the defendant and the State. **(5)** Whether the State will be **unduly surprised and prejudiced** by the inclusion of the witness' testimony despite the available and reasonable alternative sanctions (e.g., a recess or a continuance) which can mitigate prejudice to the State by permitting the State to interview the witnesses and conduct further investigation, if necessary. *Wiseheart v. State***,** 491 N.E.2d 985 (Ind. 1986).

40.20.017 **Right To Present Witnesses vs. Exclusion Of Evidence -** The Sixth Amendment provides a defendant with a fundamental right to present witnesses in defense, and a discovery sanction excluding testimony of a material witness can in some instances violate this right; the right is not absolute, however, and it does not absolutely bar exclusion of defense evidence for discovery order violations; when defense discovery violations are willful and motivated by a desire to obtain tactical advantage or to conceal a plan to present fabricated testimony, exclusion of a witness's testimony can be appropriate regardless of whether a less drastic sanction might be available, adequate, or merited: *Taylor v. Illinois***,** 484 U.S. 400 (1988).

43.00.000 Speedy Trial Contents

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43.10.300 Indiana Criminal Rule 4(B) 70 day speedy trial – 43.40.000
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43.20.000 CRIMINAL RULE 4(A) 180 DAY RULE

43.20.100 Failure to object to trial date outside period does not waive right
In contrast to subsections (B) and (C) of C.R. 4, subsection (A)'s right to recognizance if not tried within 180 days is not waived by failure to promptly object to a trial date outside the 180 day period. *State ex rel. Bramley v. Tipton Circuit Court*, 835 N.E.2d 479 (Ind. 2005).

43.20.800 Remedy if not released after 180 days
If a defendant is not released on recognizance after the 180 day period in C.R. 4(A), his remedy is to file an interlocutory appeal or an original action for a writ of mandate; if he is tried within the one year period of C.R. 4(C) and is convicted, the defendant cannot appeal the violation of the 180 day C.R. 4(A) rule, even if he made a timely demand for release after 180 days but was erroneously not released. *Collins v. State*, 364 N.E.2d 750 (Ind. 1977).

43.30.000 CRIMINAL RULE 4 (C) ONE YEAR RULE

43.30.100 Beginning of the period:

One year begins with later of fiing of formal charge or arrest on formal charge. *State ex rel. Penn v. Criminal Court of Marion County*, 389 N.E.2d 21 (Ind. 1979).

When defendant is arrested, is then formally charged, and is never rearrested on the formal charge, the one year period begins on the date the formal charge is filed. *Caldwell v. State*, 922 N.E.2d 1286 (Ind. Ct. App. 2010), *transfer denied*.

When multiple charges are filed in a cause, the one year for a charge begins to run when it is filed, without regard to the dates the other charges were filed. *Coates v. State*, 534 N.E.2d 1087 (Ind. 1989).

When defendant is held in another county on unrelated charges when charges are filed, C.R. 4(C) "arrest" occurs when the defendant's return from the other county is ordered. *State v. Helton*, 625 N.E.2d 1277 (Ind. Ct. App. 1993). But when defendant's prosecution has already begun in the county and he is thereafter held in another county on unrelated charges, his case is "midstream" and the C.R. 4(C) period begins to run when the defendant sends the "midstream" court a written "notice of surrender" advising of his incarceration in the other county. *Werner v. State*, 818 N.E.2d 26 (Ind. Ct. App. 2004).

43.30.300 Waiver rules

Defendant's failure to move for discharge when the one year C.R. 4(C) period ends waives the violation of the Rule. *McIntyre v. State*, 460 N.E.2d 162 (Ind. Ct. App. 1984).

A premature motion for discharge is properly denied. *State ex rel. Sheppard v. Circuit Court of Clark County*, 413 N.E.2d 258 (Ind. 1980).

A defendant who fails to promptly object to a trial date set outside the C.R. 4(C) one year period is considered as having acquiesced to the date and waived his right to discharge when the one year period elapses. *Little v. State*, 415 N.E.2d 44 (Ind. 1981).

43.30.500 Dismissal and refiling

"Dismissing and refilling charges does not reset the speedy trial clock – it merely tolls it for the actual days between dismissal and refilling." *Sweeney v. State*, 704 N.E.2d 86 (Ind. 1998) (applying refiling rule to C.R. 4(C) one year analysis).

When a charge is dismissed, the running of the one year period is considered to be tolled and will start running again where it left off if the charge is refilled. *Bentley v. State*, 462 N.E.2d 58 (Ind. 1984).

43.30.700 Retrial following mistrial or appeal

C.R. 4 "does not anticipate mistrials" or retrials after remand, and "speaks in terms of the time allowed the state to bring a defendant to trial-not to convict him," so when initially "the defendant was brought to trial within the prescribed period of time under the rule" "the rule does not specify how much time is reasonable following a mistrial by reason of a hung jury" or remand after appeal; "[u]ntil such a rule is adopted, the only

limitation is a 'reasonable time.'" *Driver v. State*, 594 N.E.2d 488, 492 (Ind. Ct. App. 1992).

43.30.800 Remedy if no trial within one year

If the defendant is not tried within the one year period required by Criminal Rule 4(C) and he makes a timely motion for discharge, the charges must be dismissed. C.R. 4(C).

43.40.000 CRIMINAL RULE 4(B) 70 DAY EARLY TRIAL RULE

43.40.200 Motion by represented defendant:

A defendant who is represented by counsel is not entitled to move for a trial within 70 days unless he waives the right to counsel and elects to be unrepresented or the court grants permission for hybrid representation. *Jenkins v. State*, 809 N.E.2d 361 (Ind. Ct. App. 2005).

43.40.300 Waiver rules

Defendant's failure to move for discharge when the 70 day early trial period ends waives the right to discharge. *Roseborough v. State*, 625 N.E.2d 1223 (Ind. 1993).

A defendant who has made a 70 day early trial motion and who fails to object at the earliest opportunity if the court sets a trial date outside the 70 day trial period is deemed to have acquiesced to the date and to have waived the violation of the 70 day trial requirement. *Lloyd v. State*, 448 N.E.2d 1062 (Ind. 1983).

43.40.400 Release from jail:

Subsection (B) is satisfied if a defendant held in jail who requested an early trial is released from jail on the last day of the 70 day period. *Williams v. State*, 631 N.E.2d 485 (Ind. 1994).

The rule in *Williams* above applies when the defendant is released on the charge for which he made the Subsection (B) motion but remains in jail on an unrelated charge. *Mork v. State*, 912 N.E.2d 408 (Ind. Ct. App. 2009).

43.40.500 Dismissal and refiling:

The 70 day clock is stopped if charges are dismissed but resumes running where it stopped if and when charges are refilled. *Goudy v. State*, 689 N.E.2d 686 (Ind. 1997).

43.40.700 When motion is complied with and a new motion required

"[W]hen a motion has been made under CR. 4(B), and the trial court has acted on that motion by setting a trial date, the motion will be deemed to have served its purpose." *Cody v. State*, 290 N.E.2d 38 at 41 (Ind. 1972). When trial court had acted on the C.R. 4(B) motion by setting a trial date within the period, the original motion had "served its purpose," so that after a mistrial defendant was required to make a new C.R. 4(B) motion to

avail himself of the 70 day rule on retrial. *Johnson v. State*, 355 N.E.2d 240 (Ind. 1976).

43.40.800 Remedy if no trial within 70 days

When the defendant has moved for early trial and is not tried within the 70 day period required by Criminal Rule 4(B), if he makes a timely motion for discharge the charges must be dismissed. C.R. 4(B); *Crosby v. State*, 597 N.E.2d 984 (Ind. Ct. App. 1992).

43.50.000 EXTENDING C.R.4(B) 70 DAYS, C.R. 4(A) 180 DAYS, OR C.R. 4(C) ONE YEAR

43.50.010 **Continuance or other defense delay**: Criminal Rule 4(F): "When a continuance is had on motion of the defendant, or delay in trial is caused by his act, any time limitation contained in this rule shall be extended by the amount of the resulting period of such delay caused thereby. However, if the defendant causes any such delay during the last thirty [30] days of any period of time set by operation of this rule, the state may petition the trial court for an extension of such period for an additional thirty [30] days."

43.50.100 **Defense continuance suspends running of C.R. 4 period**:

Defense motion for indefinite continuance charged to defendant until defense asks for trial date. *Eguia v. State*, 468 N.E.2d 559 (Ind. Ct. App. 1984)

Defense agreement to a State's continuance is charged to defendant. *State ex rel. O'Donnell v. Cass Superior Court*, 468 N.E.2d 209 (Ind. 1984).

Exception for defense agreement to indefinite continuance – defense has right to expect court will set a date within the period. *State ex rel. O'Donnell v. Cass Superior Court*, 468 N.E.2d 209 (Ind. 1984).

Exception for defense to file a continuance when an untimely habitual offender allegation is filed – the continuance delays the habitual trial but does not affect defendant's right to be tried on the primary charge within the C.R. 4 time period. *Kidd v. State*, 738 N.E.2d 1039 (Ind. 2000).

43.50.200 **Defense motions which have effect of delay in the particular case** suspend running of period:

43.50.210 **Change of venue**. *Lyons v. State*, 431 N.E.2d 78 (Ind. 1982).

43.50.220 **Change of judge**. *Bradberry v. State*, 364 N.E.2d 1183 (Ind. 1977).

43.50.230 **Withdrawal of case from judge** due to unreasonable delay in ruling,

including period required for supreme court to appoint a special judge (in this case 119 days). *Wood v. State*, 999 N.E.2d 1054 (Ind. Ct. App. 2013).

43.50.250 Motion to suppress. *Curtis v. State*, 948 N.E.2d 1143 (Ind. 2011).

43.50.260 Motion in limine. *State ex rel. Cox v. Superior Court of Madison County*, N.E.2d 1367 (Ind. 1983).

43.50.300 **Interlocutory appeal**, including an appeal by the State, of a defense motion ruling suspends running of period. *Pelley v. State*, 901 N.E.2d 494 (Ind. 2009).

43.50.400 **Other delays**

43.50.450 Competency evaluation, even if court orders *sua sponte*, and time required to become competent, suspends running of period. *Baldwin v. State*, 411 N.E.2d 605 (Ind. 1980).

43.40.500 Insanity defense mental examination suspends running of period. *Graham v. State*, 464 N.E.2d 1 (Ind. 1984).

43.50.600 Plea negotiations which delay suspend running of period count against running of C.R. 4 period:

Time between tender of plea and the withdrawal of plea before its acceptance. *Burdine v. State*, 515 N.E.2d 1085 (Ind. 1987).
Ttime between tender of plea and the court's decision to reject plea agreement. *Wilson v. State*, 606 N.E.2d 1314 (Ind. Ct. App. 1993).

43.50.700 Obtaining defense counsel can suspend running of period:

Time to conduct indigency hearing and appoint counsel. *Poe v. State*, 445 N.E.2d 94 (Ind. 1983).

Change of appointed counsel. *Thomas v. State*, 491 N.E.2d 529 (Ind. 1986).

Change from appointed to retained counsel. *Little v. State*, 415 N.E.2d 44 (Ind. 1981).

Change from retained counsel to appointed counsel. *State ex rel. Shepphard v. Circuit Court of Clark County*, 413 N.D.2d 258 (Ind. 1980).

Causing counsel's withdrawal and the ensuing delay. *Sharpe v. State*, 369 N.E.2d 683 (Ind. Ct. App. 1977).

Counsel's unavailability on date of trial. *Sharpe v. State*, 369 N.E.2d 683 (Ind. Ct. App. 1977) (another trial); *Epps v. State*, 192 N.E.2d 4594 (Ind. 1963) (vacation).

43.50.800 **Unavailable evidence:** Criminal Rule 4(D) "If when application is made for discharge of a defendant under this rule, the court be satisfied that there is evidence for the state, which cannot then be had, that reasonable effort has been made to procure the same and there is just ground to believe that such evidence can be had within ninety [90] days, the cause may be continued, and the prisoner remanded or admitted to bail; and if he be not brought to trial by the state within such additional ninety [90] days, he shall then be discharged."

Examples of permissible unavailable evidence continuances:

- Expected testimony of unavailable State's witness qualifies for 90 day delay. *Sims v. State*, 368 N.E.2d 1352 (Ind. 1977).
- Expert witness unavailable. *Smith v. State*, 502 N.E.2d 485 (Ind. 1987) (State's psychiatrist).
- Rule's language on "reasonable effort" to procure is considered to mean "lack of fault" for witness's absence. *Wiseman v. State*, 600 N.E.2d 1375 (Ind. Ct. App. 1992); *Griffin v. State*, 695 N.E.2d 1010 (Ind. App. 2006).

43.50.900 **Congestion of court calendar or exigent circumstances**: Criminal Rule 4 (A), (B), and (C) each contain a provision allowing for an extension of the pertinent period under the subsection when, in the words of subsection (A), "where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall make such statement in a motion for continuance not later than ten (10) days prior to the date set for trial, or if such motion is filed less than ten (10) days prior to the trial, the prosecuting attorney shall show additionally that the delay in filing the motion was not the fault of the prosecutor. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time."

43.50.920 **Congestion can include absence of essential persons** *Sholar v. State*, 626 N.E.2d 547 (Ind. Ct. App. 1993)(judge had to attend Judicial Conference annual meeting); *Loyd v. State*, 398 N.E.2d 1260 (Ind. 1980)(prosecutor absent because family member ill); *Lowrimore v. State*, 728 N.E.2d 860 (Ind. 2000)(filing of death penalty enhancement shortly before trial necessitating appointment of capital-qualified attorneys warranted extension under congestion or emergency exceptions).

43.50.930 **Prosecutor must comply with the requirement in Rule for a formal motion** to

continue within time period, and court must comply with requirement of written order which reschedules trial within a reasonable period. *Young v. State*, 765 N.E.2d 673 (Ind. Ct. App. 2002).

43.50.940 **Determination of congestion** and continuance must occur prior to expiration of the time period. *Huffman v. State*, 502 N.E.2d 906 (Ind. 1987).

43.50.950 **Challenging court's congestion finding**:
Trial court's finding of congestion is presumed valid.
Defendant may challenge court's finding of congestion with a prima facie showing the finding was factually or legally incorrect.
If prima facie showing of inaccuracy is made, "absent further trial court findings explaining the congestion and justifying the continuance" discharge is required. *Clark v. State*, 659 N.E.2d 548 (Ind. 1995).

- **PRIMA FACIE SHOWING** can be that **no trial was scheduled on last day of speedy period**, or that no trials were scheduled on a number of dates within the period. *Austin v. State*, 997 N.E.2d 1027 (Ind. 2013); *James v. State*, 716 N.E.2d 935 (Ind. 1999).
- **PRIMA FACIE SHOWING CAN BE OVERCOME** by findings that **trial was not possible** on the date in question. *Austin v. State*, 997 N.E.2d 1027 (Ind. 2013) (court could probably not have summoned a jury in time for that date, that a courtroom was not available, and that it was likely witnesses would be unavailable).
- **PRIMA FACIE SHOWING CAN ALSO BE OVERCOME** by congestion findings based on **trial court scheduling policies** applied to case. *James v. State*, 716 N.E.2d 935 (Ind. 1999) (court's expressed policy "that a speedy trial is set on the first day available when there is no other speedy trial set," defendant's trial was set on the first available speedy trial date, and earlier dates which opened up after the setting on the first available speedy date could not have been anticipated).
- **PRIMA FACIE SHOWING CAN BE OVERCOME** by showing that **another speedy case was set** to be tried on the date at issue; in such situations, the Court of Appeals will not demand that the trial court "assess and determine its calendar to make sure that when a speedy trial defendant's speedy trial is continued, that defendant has priority over another speedy trial whose trial had been previously scheduled on that date." *Wilkins v. State*, 901 N.E.2d 535 (Ind. Ct. App. 2009).
- **NORMALLY A DEFENDANT'S SHOWING OF OTHER CASES SET OR NOT SET** to be tried on the same date does not affect the accuracy of the trial court's finding of congestion, but **when the trial court's congestion findings were made on the same dates** as the defendant's scheduled trials, and it was shown that the calendar was in fact open on those dates and trial could have in fact been scheduled on them, the defendant successfully proved the congestion finding was inaccurate. *Dean v. State*, 901 N.E.2d 648 (Ind. Ct. App. 2009).

43.60.000 Priority treatment for speedy trial cases:

"Upon an incarcerated defendant's request for a speedy trial, Criminal Rule 4(B) requires particularized priority treatment. The rule is not satisfied merely by scheduling such a case for trial at the next date available for criminal cases or for cases generally. Rather, it must be assigned a meaningful trial date within the time prescribed by the rule, if necessary superseding trial dates previously designated for civil cases and even criminal cases in which Criminal Rule 4 deadlines are not imminent. We recognize, however, that emergencies in either criminal or civil matters may occasionally interfere with this scheme. Similarly, there may be major, complex trials that have long been scheduled or that pose significant extenuating circumstances to litigants and witnesses, which will, on rare occasions, justify application of the court congestion or exigent circumstances exceptions." *Clark v. State*, 659 N.E.2d 548 (Ind. 1995).

43.60.100 Prioritization factors:

43.60.120 Speedy trial case generally has priority over non-speedy criminal cases and civil ases. *Clark v. State*, 659 N.E.2d 548 (Ind. 1995).

Exceptions:

43.60.130 When continuing civil case will not allow sufficient time to prepare for and accommodate the criminal trial. *Austin v. State*, 997 N.E.2d 1027 (Ind. 2013).

43.60.140 Emergencies in either criminal or civil matters. *Clark v. State*, 659 N.E.2d 548 (Ind. 1995).

43.60.150 On rare occasions, major, complex civil trials which have long been scheduled or that pose significant extenuating circumstances to litigants and witnesses. *Clark v. State*, 659 N.E.2d 548 (Ind. 1995).

43.60.180 Longer-incarcerated defendant's speedy trial request should generally take priority over a more-recently charged speedy trial movant. *Austin v. State*, 997 N.E.2d 1027 (Ind. 2013). Where calendar allows both Rule 4 deadlines, longer-incarcerated defendant's trial need not go first. *Austin*, *supra*.

43.70.000 Federal Constitution speedy trial requirements

The Sixth Amendment speedy trial right attaches when a person becomes an "accused," either by the filing of a formal charge or by an arrest for an offense, whichever occurs first. *United States v. Marion*, 404 U.S. 307 (1971).

43.70.200 To determine a violation of the Sixth Amendment right, no specific time period is used; instead, a balancing test applies utilizing at least the following four factors:

length of the delay
reason for the delay
defendant's assertion of right to a speedy trial
prejudice to the defendant
Barker v. Wingo, 407 U.S. 514 (1972)

No particular factor is dispositive. *Barker*; *supra*; *Moore v. Arizona*, 414 U.S. 25 (1973)(showing of prejudice is not necessarily required).
Delay of one year until trial is generally sufficient to require *Barker* analysis, but fourteen month delay is generally not sufficient to raise a presumption of prejudice (which the State would have the burden to disprove). *Davis v. State*, 819 N.E.2d 91 (Ind. Ct. App. 2004).

43.80.000 Indiana Constitution speedy trial requirements:

Indiana has adopted the federal Sixth Amendment *Barker v. Wingo* balancing test for determining violations of the Indiana Constitution Art. 1, § 12 speedy trial guarantee. *Fortson v. State*, 379 N.E.2d 147 (Ind. 1978).

43.90.010 Calculation Sheet

Criminal Rule 4 Delay Calculation Sheet

Begin by determining base period for variety of Criminal Rule 4 period at issue – 180 day release on recognizance motion, one year motion for discharge, or 70 day early trial motion

Start (earlier of arrest or charge, or date of 70 day motion:_____
End not counting any delays (180 days, one year, 70 days) _____

Type of Defense Delay	Delay Start Date	Delay End Date	Days of Delay
Continued for evidence			
Continued for discovery			
Continued for new counsel			
Continued for appointed counsel			
Motion to suppress			
Motion in limine			
Interlocutory appeal			
Competency -evaluate, restore			
Insanity defense exams			
Plea negotiations			
Change of county			
Change of judge			
Trial Rule 53.1 or 53.2 process			
Judge, Pros'r, counsel absent			
Congestion of calendar			
Weather emergency			
Act of God			
TOTAL DAYS OF DELAY	----------	----------	

Total days of delay chargeable to defense to expand period _____

Expanded period's last day (add total delays to "End not counting any delays" date) _____

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47.00.000 Competence To Stand Trial

47.01.020 Competence To Stand Trial, Generally - A criminal defendant must be competent in order to stand trial. If the mental state of the defendant is in doubt and there are reasonable grounds for believing that the defendant is incompetent under the statute, the court shall order a hearing at which evidence, including testimony by court-appointed doctors who have examined the defendant, may be introduced as to the mental capacity of the defendant. At which time, the court may, in its discretion, find the defendant competent to stand trial or incompetent and commit the defendant to an appropriate institution, under the statute. Ind. Code 35-36-3-1.

47.01.050 Due Process Requires Defendant Be Competent To Stand Trial - The trial and conviction of a defendant who lacks competency is a denial of federal due process and a denial of state statutory right as well. *Culpepper v. State*, 662 N.E.2d 670 (Ind. Ct. App. 1996); *Brewer v. State*, 646 N.E.2d 1382 (Ind. 1995). *See also Bramley v. State*, 543 N.E.2d 629 (Ind. 1989) (a trial court may not properly permit an incompetent defendant to damage himself before the jury by waiving his rights when it is clear that the waivers are due to his incompetency).

47.01.075 Competence To Stand Trial Is Distinct From Sanity At Time Of Crime - Defendant's competency at the date of trial and defendant's sanity at the date of the crime are two separate issues. Ind. Code 35-36-2-1 to 5 and Ind. Code 35-36-3-1. *Gibbs v. State*, 610 N.E.2d 875, 877 (Ind. Ct. App. 1993).

47.05.000 Definition Of Competence To Stand Trial - A defendant is competent to stand trial if the court finds that he or she has the present ability to consult rationally with defense counsel to assist in the preparation of his or her defense and has factual understanding of the proceedings against him or her. Ind. Code 35-36-3-1; Wisehart *v. State*, 693 N.E.2d 23, 44 (Ind. 1998); *Mato v. State*, 429 N.E. 2d 945 (Ind. 1982).

47.10.000 Trial Judge Determines Competence - The court determines competency by hearing, when reasonable grounds exist for believing that the defendant is unable to understand the proceedings and is unable to assist in his or her defense. Ind. Code 35-36-3-1.

47.10.100 Need For Competence Evaluation Within Courts Discretion - Whether reasonable grounds exist to order an evaluation of competency is a decision assigned to the sound discretion of the trial court, reviewable only for abuse of discretion. *Brown v. State*, 516 N.E.2d 29 (Ind. 1987). A competency hearing is required by Ind. Code 35-36-3-1 only where the trial court is confronted with evidence that creates a reasonable bona fide doubt as to the competency of the accused. *Brewer v. State*, 646 N.E.2d 1382 (Ind. 1995).

47.10.125 **Without Petition, Hearing Within Courts Discretion** -If no petition for a competency hearing is filed, the decision whether to hold a hearing lies in the province of the trial judge. *Goodman v. State*, 453 N.E.2d 984 (Ind. 1983).

47.10.150 **Hearing Required If Reasonable Grounds To Believe Not Competent** - A competency hearing is required if, at any time before final submission of any criminal case to the court or to the jury trying the case, the court has reasonable grounds for believing that the defendant lacks the ability to understand the proceedings and assist in the preparation of his or her defense. Ind. Code 35-36-3-1.

47.15.000 **No Burden On Either Party To Establish Competence Or Incompetence** - The burden of proving whether defendant is competent to stand trial does not need to be assigned to one party or the other in order to comport with due process, as it is sufficient under the due process clause to afford a criminal defendant a reasonable opportunity to demonstrate to the court that he is incompetent to stand trial. *Montano v. State*, 649 N.E. 2d 1053 (Ind. Ct. App. 1995).

47.15.050 **Court Or Either Side May Raise The Issue Of Competency** - The need for a hearing to determine competency to stand trial may be raised at any time by the court on its own motion or by any other person. *Fine v. State*, 490 N.E.2d 6 (Ind. 1987).

47.15.100 **Competency Be Raised At Any Time** - The issue of defendants competency to stand trial may be raised at any time, including long after trial, conviction and sentencing have occurred. *Smith v. State*, 443 N.E. 2d 1187 (Ind. 1983). *See, e.g.,* Mato *v. State*, 429 N.E. 2d 945 (Ind. 1982) (competency hearing held six months after trial does not violate due process); Schmidt *v. State*, 307 N.E.2d 464 (Ind. Ct. App. 1974) (testimony of psychiatrists, appointed in connection with defendants post-trial motion for examination as to whether he was a criminal sexual deviate, which indicated that defendant may not have been competent at the time of trial constituted reasonable grounds to order a separate, independent and objective determination of the defendants competence to stand trial).

47.15.150 **No Presumption Of Waiver Of Hearing** - There is no presumption of a waiver of the issue of competency. *Richardson v. State*, 351 N.E.2d 904 (Ind. Ct. App. 1976); *Evans v. State*, 300 N.E.2d 882 (Ind. 1973) (defendant who is incompetent to stand trial cannot be held to have knowingly and intelligently waived his right to a competency hearing by his failure to assert it at trial.

47.20.000 **Competency Exam Procedure By Statute** - Procedures for an examination to determine competency are established by Ind. Code 35-36-3-1.

47.20.020 **Appointment Of Mental Health Experts To Examine Defendant** - If the court determines that a competency hearing is necessary, it shall then appoint two or three disinterested

(1) psychiatrists, or
(2) psychologists endorsed by the Indiana state board of examiners in psychology as health service providers in psychology, or
(3) physicians,

who have expertise in determining competency. **At least one of the individuals appointed must be a psychiatrist <u>or</u> psychologist.** The individuals who are appointed shall examine the defendant and testify at the hearing as to whether the defendant can understand the proceedings and assist in the preparation of the defense. Ind. Code 35-36-3-1.

47.20.030 **Experts Assist Court Not Parties** - Competency experts are appointed by the court in order to determine whether the defendant is competent to stand trial and not as an aid for the defendant in preparing a defense or jury selection. *Hough v. State*, 560 N.E.2d 511 (Ind. 1990).

47.20.040 **Competency Experts' Exam Records To Be Available For Defendant** - Records of examinations of defendant shall not be withheld from the defendant but must be available through defendant's exercise of due diligence. *Conner v. State*, 711 N.E.2d 1238 (Ind. 1999); *Cook v. State*, 284 N.E.2d 81 (Ind. 1972) (no error was shown with respect to alleged fact that reports of psychiatrists as to defendants competency to stand trial were not furnished to him, where there was nothing in the record to indicate that defendant requested a copy or was refused one or that he was harmed in any way if he in fact failed to obtain a copy).

47.30.000 **Competency Hearing To Be Held Promptly** - A hearing must be held immediately when the court determines that reasonable grounds exist for the court to believe that the defendant lacks the ability to understand the proceedings and is unable to assist in his or her defense. Ind. Code 35-36-3-1 (West 1998); *Culpepper v. State*, 662 N.E.2d 670 (Ind. Ct. App. 1996).

47.30.025 **No Absolute Right To A Competency Hearing** - The right to a competency hearing is not absolute but is dependent upon the existence of reasonable grounds to believe that the defendant is incompetent to stand trial. *Carter v. State*, 422 N.E. 2d 742 (Ind. 1981).

47.30.050 **Competency Hearing Required Only If Bona Fide Doubt** - A competency hearing is only required by state statute and due process when there is evidence (or "indicators") before the trial court that creates a reasonable or bona fide doubt as to the defendants competency. *Corder v. State*, 467 N.E.2d 409 (Ind. 1984); *Feggins v. State*, 400 N.E.2d 164 (Ind. 1980).

47.30.075 **Defendant Has Burden To Establish Grounds For Competency Hearing** - The defendant has the burden of establishing that reasonable grounds for a competency hearing exist. *Hurley v. State*, 446 N.E.2d 1326 (Ind. 1983).

47.30.100 **Competence Depends On Facts Of Each Case** - Whether the evidence is sufficient to require a hearing is determined by the facts of the case. *Goodman v. State*, 453 N.E.2d 984 (Ind. 1983); Feggins *v. State*, 400 N.E.2d 164 (Ind. 1980) (citing *Malo v. State*, 361 N.E.2d 1201 (Ind. 1977)).

47.30.125 **Appellate Standard Looks For Clear Error** - The decision as to whether a competency hearing should be held lies in the province of the trial court and will be disturbed on appeal only where clear error is shown. *Stolarz v. State*, 445 N.E.2d 114 (Ind. Ct. App. 1983).

47.35.000 **Prior Mental Commitment Does Not Mandate Competency Hearing** - Prior commitment for mental illness does not automatically mandate a competency hearing. *Harshman v. State*, 451 N.E.2d 46 (Ind. 1983).

47.35.050 **Confusion Over Defense Strategy Does Not Mandate Competency Hearing -** Defendant's confusion over the best way to conduct his or her defense does not entitle the defendant to a psychiatric examination when the defendant has a rational understanding of the proceedings and is able to assist counsel in his or her defense. *Brown v. State*, 516 N.E.2d 29 (Ind. 1987).

47.35.075 **Stress From Trial Not Grounds For Competency Inquiry** - Predictable stress from ones own felony trial does not warrant a competency hearing. *Collins v. State*, 543 N.E.2d 375 (Ind. Ct. App. 1994).

47.35.100 **Delay Due To Psychiatric Examinations-** A delay that is directly attributable to efforts to explore defendants legal sanity can be enough to put the trial court on notice that it is presented with a situation involving the defendants mental condition; here, without insanity evaluations, which might have removed doubts about competence, the trial court erred in accepting a guilty plea. *Schuman v. State*, 357 N.E.2d 895 (Ind. 1976).

47.35.125 **Court May Properly Consider Demeanor Of Defendant** - The trial court may consider the defendants demeanor at both prior proceedings and at the competency hearing itself in its decision as to whether reasonable grounds exists for ordering a competency hearing. *Manuel v. State*, 535 N.E.2d 1159 (Ind. 1989); *Timmons v. State*, 500 N.E.2d 1212 (Ind. 1986).

47.35.135 **Cumulative Effect Of Evidence May Suffice** - Not every occurrence outside the norm is necessarily a compelling indicator that a competency hearing should be held, but such occurrences may have a cumulative effect. *Mato v. State*, 468 N.E.2d 1042 (Ind. 1984). *See also Haviland v. State*, 677 N.E.2d 509 (Ind. 1997) (after three competency hearings had resulted in competence conclusions, testimony of a doctor who had spoken to the defendant for twenty-five minutes and found him incompetent did not oblige the trial court to start anew the process of assessing the defendant's competency).

47.35.200 **Expert Opinions** - Expert testimony that the defendant did not meet the criteria for insanity and that the defendant was sane at the time of the crime supported the determination that the defendant was competent to stand trial, notwithstanding the defendant's claim that amnesia prevented presenting a realistic defense and that since the amnesia goes away fairly rapidly the State would not have been prejudiced by a trial delay. *Darby v. State*, 514 N.E.2d 1049 (Ind. 1987).

Failure to conduct a competency hearing after defense counsel filed a motion to determine competency was not abuse of discretion where the judge had received written opinions from two court-appointed psychiatrists that defendant was competent. *Hadley v. State*, 496 N.E.2d 67 (Ind. 1986).

Testimony by the examining expert that defendant "had complete ability to differentiate between right and wrong, and I'm sure has the intelligence to aid his attorney in his own defense" was sufficient to sustain the trial judges decision not to order a competency hearing. *Brown v. State*, 346 N.E.2d 559 (Ind. 1976)

47.35.250 **Discord With Attorney Not Sure Indication Of Incompetence** - Defendants unwillingness to aid his or her counsel does not necessarily mean that he or she is incompetent to stand trial. *Ferry v. State*, 453 N.E.2d 207 (Ind. 1983).

47.35.300 **Civil Guardianship May Warrant Competence Inquiry** - The judgment of a probate court appointing a guardian for the defendant by reason of his inability to manage his affairs because of mental illness may cast sufficient reasonable doubt on competency at the time of trial to warrant an evidentiary hearing. *Tinsley v. State*, 298 N.E.2d 429 (Ind. 1973).

47.40.000 **Competence To Plead Guilty** - Guilty Plea: Defendant cannot voluntarily and intelligently waive his constitutional rights if he is not sufficiently rational to do so. *Suldon v. State***,** 580 N.E.2d 718 (Ind. Ct. App. 1991).

47.40.050 **Guilty Plea, Right And Competency To Plead**: Evidence supported the conclusion that a rape and robbery defendant was competent to plead guilty, when the court-appointed psychiatrist reported that in addition to being able to understand the nature of the proceedings against him and assist in his defense, the defendant's thought processes were orderly and rational and that, although mentally retarded, he was capable of comprehending various options available to him. *Suldon v. State***,** 580 N.E.2d 718 (Ind. Ct. App. 1991).

47.45.000 **Handicap Not A Basis Alone For Competence Inquiry**: Defendants handicap or unusual behavior does not alone establish a reasonable basis for a competency hearing. *Manuel v. State*, 535 N.E.2d 1159 (Ind. 1989); *McDowell v. State*, 456 N.E.2d 713 (Ind. 1983).

47.45.050 **Communication Impediment Does Not Compel Competence Inquiry** - Trial court did not have to order a competency hearing sua sponte, notwithstanding

defendants communication impediment and handicap and defendants unusual behavior at trial, where the record did not demonstrate that either counsel or any one else believed the defendant to be incompetent. *Manuel v. State*, 535 N.E.2d 1159 (Ind. 1989). *See also McDowell v. State*, 456 N.E.2d 713 (Ind. 1983) (in a prosecution involving a 16-year-old being tried as an adult, the trial court did not abuse its discretion in finding the defendant competent to stand trial despite the defendants contention of incompetency due to her deafness, lack of education, low level of intelligence and general inability to communicate).

47.50.000 **Insanity Plea Does Not Require Competency Inquiry**: A plea of insanity is not sufficient in itself to present a reasonable basis for believing that a defendant is incompetent to stand trial. *Like v. State*, 426 N.E.2d 1355 (Ind. Ct. App. 1981); *Dragon v. State*, 383 N.E.2d 1046 (Ind. 1979); Perry *v. State*, 471 N.E.2d 270 (Ind. 1984). *See also Galloway v. State*, 529 N.E.2d 325 (Ind. 1988) (trial court was not required to hold a competency hearing after defendant filed a suggestion of insanity in rape prosecution, where two court-appointed psychiatrists found defendant competent).

47.55.000 **Intoxication Does Not Require Competency Hearing** - Intoxication: Testimony or evidence that the defendant was intoxicated at the time of the crime or prior to trial or even at trial does not automatically entitle the defendant to a competency hearing. *Underwood v. State*, 535 N.E.2d 507 (Ind. 1989).

47.55.025 **Substance Abuse Alone Does Not Require Competency Evaluation** - Defendant was not entitled to a competency hearing or to psychiatric examination, notwithstanding testimony during the hearing on a motion for psychiatric examination that he abused alcohol and drugs, was at times confused and had difficulty understanding events occurring around him and was on prescribed antidepressants; because other statements made by defendant during hearing supported the trial courts conclusion that he understood the proceedings and was able to assist his counsel in preparation of his defense. *Underwood v. State*, 535 N.E.2d 507 (Ind. 1989).

47.55.050 **Medication Without Impairment Does Not Require Evaluation** - While defendant was taking a tranquilizer by prescription, he was still found competent to stand trial based on his clear and intelligent answers to questions by the trial judge and based on the fact that neither the defendant nor anyone else raised the issue of competency to the court. *Hill v. State*, 451 N.E.2d 683 (Ind. 1983).

47.55.100 **Possibility Of Incompetence Without Medicine Not Sufficient** - Trial court did not abuse its discretion in failing to conduct a second competency hearing prior to the trial of defendant for attempted murder, where a report submitted at the initial competency hearing indicated that the defendant, whose mental illness had been in remission, might become incompetent by the time of trial if his regular medication was not resumed in jail. *Denes v. State*, 508 N.E.2d 305 (Ind. 1987).

47.55.125 **Forcibly Administered Medication Does Not Waive Competence Issue -** If medication is administered by coercion, there is no waiver of appeal of the issue of competency. *State v. Van Orden*, 647 N.E.2d 641 (Ind. Ct. App. 1995).

47.55.150 **Confinement Alone Does Not Show Medication Was Forced** - Mere physical confinement of a defendant while medicated, absent other evidence of force, does not prove that the medication was administered forcibly, or by coercion. *State v. Van Orden*, 647 N.E.2d 641 (Ind. Ct. App. 1995).

47.60.000 **Memory Loss Alone Does Not Require Competency Hearing** - Memory loss by the defendant does not alone establish a reasonable basis for a competency hearing. *Evans v. State*, 489 N.E.2d 942 (Ind. 1984). *Evans v. State*, 489 N.E.2d 942 (Ind. 1984) (trial court did not abuse its discretion in refusing to set aside the jury's verdict even though the defendant testified at the sentencing hearing that she was not competent to stand trial because she now recalled things that could have helped her at trial, where the trial court conversed with defendant at the sentencing hearing to determine why she felt that she had not been competent to stand trial).

47.65.000 **Mental Illness May Not Affect Competence** - Determination that rape defendant was competent to stand trial was not abuse of discretion, though court-appointed psychiatrists both testified that defendant was schizophrenic, where psychiatrists also testified that defendant was aware of charges against him and was able to assist his attorney, and where defendant demonstrated at the competency hearing that he was aware of the victims name and denied raping anyone. *Hansley v. State*, 575 N.E.2d 1053 (Ind. Ct. App. 1991).

47.70.000 **Repeated Discharge Of Defense Counsel Not Evidence Of Incompetence** - The appearance of multiple attorneys from the time of defendant's arraignment to the date of trial is not sufficient to show that the defendant lacks competency. *Perry v. State*, 471 N.E.2d 270 (Ind. 1984). *See also Culpepper v. State*, 662 N.E.2d 670 (Ind. Ct. App. 1996) (behavior of defendant in a drug case in requesting a speedy trial and then refusing to be present at that trial because things did not go his way, in that he did not like his appointed attorneys and wanted to hire his own, did not create a bona fide question as to his competency to stand trial).

47.75.000 **Feelings Of Racial Persecution Not Evidence Of Incompetence** - Defendants deep-seated feeling or delusions of racial persecution do not afford reasonable grounds for believing defendant to be insane. *Sims v. Lane*, 411 F.2d 661 (7th Cir. 1969). *See also Feggins v. State*, 400 N.E.2d 164 (Ind. 1980) (trial courts appointment of a psychiatrist to examine the defendant and the courts reliance on the psychiatrist's medical opinion to deny a motion for a competency hearing was not sufficient "state action to render the alleged racially discriminatory treatment of the defendant violative of the Fourteenth Amendment.)

47.80.000 **Request For Hearing Or Examination Not Evidence Of Incompetence** - A request for psychiatric examination is not evidence of incompetency. *Cook v. State*, 284 N.E.2d 81 (Ind. 1972). Defendant must claim more than he is incompetent to stand trial and incapable of assisting in his defense to establish reasonable grounds for a hearing. *Culpepper v. State*, 662 N.E.2d 670 (Ind. Ct. App. 1996); *Green v. State*, 421 N.E.2d 635 (Ind. 1981). Defendants "suggestion of incompetency," which contained only the naked assertion that he was incompetent to stand trial and incapable of assisting in his defense, was insufficient to warrant the appointment of two psychiatrists to examine the defendant. *Green v. State*, 421 N.E.2d 635 (Ind. 1981).

47.85.000 **Multiple Charges, Consolidated Cases** - Trial court properly conducted a single hearing concerning defendant's competency to stand trial in consolidated murder cases. *Walker v. State*, 621 N.E.2d 627 (Ind. 1993).

47.85.000 **No Judicial Notice Of Competency Evidence In Companion Case** - The court cannot take judicial notice of the testimony or determination of the competency hearing in a companion case. *Smith v. State*, 443 N.E.2d 1187 (Ind. 1983).

47.85.300 **Wait To Accept Companion Guilty Plea Pending Competency Outcome** - Where two separate informations have been filed against a defendant and a motion for psychiatric examination in one cause of action has been granted by the court based on reasonable grounds and doctors have been appointed to examine the defendant, the trial court must defer accepting defendants guilty plea in the companion case until the court-appointed physicians determine the defendants competency. *Miller v. State*, 348 N.E.2d 14 (Ind. 1976).

47.90.000 **Second Examinations Or Hearings Require New Event Or Occurrence**- When there has been a determination of competency to stand trial and there is no event or occurrence subsequent to that determination to indicate a change in defendants mental condition, an additional hearing on competency is not required. *Montano v. State*, 468 N.E.2d 1042 (Ind. 1984); *Buhring v. State*, 453 N.E.2d 228 (Ind. 1983).

47.92.000 **Withdrawal Of Request For Hearing Or Examination** - Where counsel withdrew both the notice of incompetency to stand trial and the psychiatric evaluation which had been granted and there was no evidence tending to give the trial court reason to suspect that the defendant was mentally retarded, the trial court was not obliged to order sua sponte a psychiatric evaluation. *Allen v. State*, 686 N.E.2d 760 (Ind. 1997).

47.95.000 **Ineffectiveness Claim For Failure To Request Hearing** - When making an ineffectiveness claim based upon an attorney's failure to request a competency hearing, appellate or post-conviction, petitioner must clear both the performance and prejudice hurdles of the *Strickland* standard for ineffective assistance claims, under which a defendant must show: 1) that his attorney's performance fell below an objective standard of reasonableness and 2) that this substandard

performance deprived him of a fair trial, as determined by whether there is a reasonable probability that the result of the proceedings would have been different but for the defense counsel's inadequate representation. *Matheney v. State*, 688 N.E.2d 883 (Ind. 1997).

47.97.000 **Attempted Waiver Of Hearing** - An attempted waiver or specific withdrawal of the competency issue is a circumstance bearing on the trial courts decision whether or not to hold a competency hearing. *Dragon v. State*, 383 N.E.2d 1046 (Ind. 1979).

47.98.010 Order for Examination on Comprehension to Stand Trial

STATE OF INDIANA

_____ COURT

STATE OF INDIANA
v. CAUSE NO. _____

_____

ORDER FOR EXAMINATION
ON COMPREHENSION TO STAND TRIAL

The State of Indiana / TheDefendant / The Court sua sponte having raised the issue of the Defendant's comprehension to stand trial, the Court now finds that it has reasonable grounds to believe that the defendant lacks the ability to understand the proceedings and to assist in the preparation of a defense, and pursuant to IC 35-36-3-1 appoints _____ and _____, to examine the defendant, file a written report with the court, and to testify at the hearing set below as to whether the defendant does lack the ability to understand the present proceedings and to assist counsel in the preparation of a defense to the charges herein.

An evidentiary hearing on defendant's present comprehension to stand trial is set for _____, 20__, at ____M.

The Sheriff of _____ County, Indiana is ordered to deliver the defendant to the office of _____ at____M., on _____, 20___, at ____M. for said examination, provide adequate security during the examination, and return the defendant to the _____ County Jail after each examination.

The Sheriff of _____ County, Indiana is ordered to deliver the defendant to the office of _____ at____M., on _____, 20___, at ____M. for said examination, provide adequate security during the examination, and return the defendant to the _____ County Jail after each examination.

So ORDERED this _____ day of _____, 20__.

_____
Judge

47.98.100 Order Determining Comprehension to Stand Trial

STATE OF INDIANA
_____ COURT

STATE OF INDIANA
v. CAUSE NO. _____

_____

ORDER DETERMINING COMPREHENSION TO STAND TRIAL

The State of Indiana appears by _____, Deputy/Prosecuting Attorney, and the defendant appears in person and by counsel _____ for hearing pursuant to IC 35-36-3-1 on the issue of the defendant's present comprehension to stand trial. Evidence and argument are received, and the Court, being duly advised, now finds:

That the defendant presently is mentally competent and does have comprehension sufficient to understand the proceedings and to assist counsel in the preparation of a defense, and that further proceedings in this cause shall not be delayed or continued on the ground of the alleged lack of comprehension of the defendant.

So ORDERED this _____ day of _____, 20__.

_____
Judge

47.98.200 Order Determining Lack of Comprehension to Stand Trial

STATE OF INDIANA

_____COURT

STATE OF INDIANA
v.
_____ Cause No. _____

ORDER DETERMINING LACK OF COMPREHENSION TO STAND TRIAL

The State of Indiana appears by _____, Deputy/Prosecuting Attorney, and the defendant appears in person and by counsel, _____ for hearing pursuant to IC 35-36-3-1 on the issue of the defendant's present comprehension to stand trial. Evidence and argument are received and the Court now finds that the defendant presently lacks the ability to understand the proceedings and to assist in the preparation of a defense. Accordingly, it is now ordered that:

1. Proceedings in this case shall be delayed and continued and the defendant is hereby committed to the Division of Mental Health and Addiction.

2. The Division of Mental Health and Addiction shall provide competency restoration services consistent with Indiana Code 35-36-3-1(b).

3. Whenever the defendant attains the ability to understand the proceedings and to assist in the preparation of a defense, such shall be certified to this Court and this Court will then enter an order to the Sheriff of this county to return the Defendant for trial.

4. Within ninety (90) days after a defendant's admission to a state institution or the initiation of competency restoration services to a defendant by a third party contractor, the superintendent of the state institution, or the director/medical director of the third party contractor providing competency restoration services, shall certify to this court whether the defendant has a substantial probability of attaining the ability to understand the proceedings and assist in the preparation of the defendant's defense within the foreseeable future.

5. If a substantial probability does not exist, the state institution or the third party contractor shall initiate regular commitment proceedings. If a substantial probability does exist, the state institution or third party contractor shall retain the defendant until the defendant attains the ability to understand the proceedings and assist in the preparation of the defendant's defense and is returned to the proper court for trial, or for six (6) months from the date of either the defendant's admission to a state institution or the initiation of competency restoration services by a third party contractor, whichever occurs first.

6. If the defendant is found to have a substantial probability of attaining the ability to understand the proceedings and assist in the preparation of a defense, and has not attained that ability within six (6) months after the date of the defendant's admission to a state institution or the

initiation of competency restoration services by a third party contractor, then the state institution or the third party contractor shall institute regular commitment proceedings.

The Clerk of this Court is ordered to send a copy of this order, together with copies of the charge against the defendant and of reports and testimony of the mental health experts appointed by the court to evaluate defendant, to:

MS 27
Office of General Counsel
Division of Mental Health
402 W. Washington Street, Room W451
Indianapolis, IN 46204

in order that the Division of Mental Health may determine to which facility defendant shall be taken.

The Sheriff of _____ County, Indiana, upon oral notification of the Court, shall comply with and perform all things appropriate to implement this order, including delivering the defendant to the facility designated by the Division of Mental Health.

So ORDERED this _____ day of _____, 20__.

_____
Judge

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50.00.000 GUILTY Pleas

50.01.005 **Record -** The court shall record the entire guilty plea proceedings and the recording shall be either transcribed or preserved by the court. If not transcribed, the electronic record shall be kept for fifty-five (55) years in felony cases or ten (10) years in misdemeanor cases. Ind. Criminal Rule 10.

50.05.005 **Defendant's competence to plead guilty** - The standard of competence for pleading guilty is, for federal due process purposes, the same as the standard required for standing trial - whether defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "has a rational as well as factual understanding of the proceedings against him." *Godinez v. Moran*, 509 U.S.389 (1993). *Accord, Schuman v. State*, 357 N.E.2d 895 (Ind. 1976). Indiana caselaw has not clearly resolved whether a different standard for competence to plead guilty is required. *See Suldon v. State*, 580 N.E.2d 718 (Ind. Ct. App. 1991), *transfer denied.*

50.10.000 **Admission of guilt required**

50.10.005 **Types of pleas**- Not guilty, guilty, and guilty but mentally ill at the time of the crime are the three authorized pleas in criminal proceedings. Ind. Code 35-35-2-1.

50.10.010 **Assertion of innocence at time of plea precludes acceptance** - It is reversible error to accept a guilty plea from a defendant who maintains he/she is not guilty, even when defendant says the plea is tendered to obtain plea bargain benefits. *Ross v. State*, 456 N.E.2d 420 (Ind. 1983). *See also Brooks v. State*, 577 N.E.2d 980 (Ind. Ct. App. 1991) (trial court may not accept a tendered guilty plea after defendant has made in-court avowals of innocence and has not recanted those avowals).

50.10.015 **Inability to recall specific details not assertion of innocence** - The *Ross* rule does not prohibit a guilty plea from a defendant who asserts he cannot remember "specific details" but wants to plead guilty, as the failure "to recall details" is not "a protestation of innocence," provide there is an adequate factual basis - consisting in this case of transcripts of a co-defendants testimony at his trial of defendants role in the crime, along with the prosecutors recitation of the facts about the crime and defendants answer he had no reason to believe that the facts were untrue. *Gibson v. State*, 490 N.E.2d 297 (Ind. 1986).

50.10.025 **Assertion of innocence after plea offered does not preclude acceptance** - Out-of-court avowals of innocence made after a guilty plea has been tendered but before it has been accepted (e.g., to probation officer preparing presentence report) will not prevent acceptance of the plea. *Mayberry v. State*, 542 N.E.2d 1359 (Ind. App. 1989). *See also Smith v. State*, 596 N.E.2d 257 (Ind. Ct. App. 1992)(protestation of innocence at sentencing will not require withdrawal of guilty plea in a noncapital case [but will in capital case]).

50.15.000 Counsel for guilty plea

50.15.005 Guilty plea by unrepresented person requires waiver of counsel - A plea of guilty, or guilty but mentally ill, shall not be accepted from an unrepresented defendant who has not freely and knowingly waived the right to counsel. Ind. Code 35-35-1-1.

50.15.010 Misdemeanor guilty plea requires assistance of counsel - The Indiana Constitution confers a right to assistance of counsel when a guilty plea is entered for a misdemeanor. *Brunson v. State*, 394 N.E.2d 229 (Ind. Ct. App. 1979).

50.15.020 Defendant must enter guilty plea - A plea of guilty must be personally entered by the defendant. *State v. Richardson*, 63 N.E.2d 195 (Ind. 1945).

50.15.025 Counsel may tender guilty plea if defendant present - A judge may accept a plea of guilty entered by the defendant's attorney provided the defendant is present in court and affirms that the plea proffered is his/her personal plea. *Grantz v. State*, 230 N.E.2d 756 (Ind. 1967).

50.15.050 Effective assistance of counsel – Defendants have a Sixth Amendment right to counsel, a right that extends to the plea bargaining process. Defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. When defense counsel allows a plea offer to expire without advising the defendant or allowing him to consider it, defense counsel does not render the effective assistance the Constitution requires. *Missouri v. Frye,* No. 10-444, __ U.S. __, 132 S. Ct. 1399 (2012).

Where ineffective assistance of counsel results in a rejection of a plea offer and the defendant is convicted at trial, *Strickland* requires the defendant to demonstrate that "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.*, 132 S.Ct. at 1385.

Defense counsel's erroneous advice to defendant of "an incorrect legal rule" resulting in defendant being prejudiced by having "lost out on an opportunity to plead guilty and receive a substantially lower sentence that was offered to him amounts to ineffective assistance of counsel and defendant is entitled to "specific performance of the original plea agreement . . . ." *Lafler v. Cooper,* No. 10-209, __ U.S. __, 132 S. Ct. 1376 (2012).

50.20.000 Guilty Plea Advisements

50.20.005 Rights advisements required by statute - A court shall not accept a plea of guilty or guilty but mentally ill without first determining that the defendant has been advised: (1) of the nature of the charges; (2) that by pleading guilty the defendant waives the rights to public and speedy trial by jury, to confront and cross-examine witnesses, to have compulsory process, to have proof by the state of guilt beyond a reasonable doubt, and to not be compelled to testify against himself/herself; (3) of the maximum and minimum possible sentences for the crimes charged, of any possible increased sentence by reason of prior convictions, and of any possibility of consecutive sentences; and (4) that if there is an Ind. Code 35-35-3-1 plea agreement the court must accept the agreement before it will be bound by it. Ind. Code 35-35-1-2(a).

50.20.010 Failure to advise not reversible unless prejudice shown; *boykin* exception The Ind. Code 35-35-1-2(a) information requirements are intended to assure that a guilty plea represents the voluntary and intelligent choice among alternatives required by federal constitutional standards for review of guilty pleas. Following Ind. Code 35-35-1-2(a) is the best way to assure that a defendant's plea is made voluntarily and intelligently, but failure to follow the statute will not require vacation of the conviction entered on a guilty plea unless the defendant shows that the omission of any advice mandated by the statute prejudiced him/her. A defendant would make this factual showing of prejudice from omitted advice by proving, for example, that he/she would not have tendered the guilty plea had the omitted advice been given; this general rule requiring the defendant to show prejudice from omitted advice has a major exception in the requirements of the *Boykin v. Alabama* case, described below. Under *Boykin*, unless the guilty plea record reveals that the defendant knew or was advised at the time of the plea of the three *Boykin* rights' waiver, the conviction must be vacated. *White v. State*, 497 N.E.2d 893 (Ind. 1986).

50.20.025 *Boykin* rights advisement required - *Boykin v. Alabama* requires that the defendant pleading guilty have been advised of three basic rights. A guilty plea will not be presumed voluntary and intelligent without a showing that when the defendant entered it he/she knew that by doing so three basic rights were being waived - the right to trial by jury, the right to confront one's accusers, and the right against self-incrimination. *Boykin v. Alabama*, 395 U.S. 238 (1969).

50.20.030 Boykin rule applies to misdemeanors - The *Boykin v. Alabama* rule applies to misdemeanor guilty pleas. *Hunt v. State*, 487 N.E.2d 1331 (Ind. Ct. App. 1986).

50.20.035 *Boykin* knowledge shown by plea record or P-C. R. 1 evidence- The knowledge of waiver of jury, confrontation, and self-incrimination rights required by *Boykin v. Alabama* for a valid guilty plea may be shown either by the record of the proceeding in which the guilty plea was tendered or by the State's later affirmative evidence which "rehabilitates" "a defective guilty plea transcript" by proving to a post-conviction relief judge's satisfaction that the defendant in fact

had the required knowledge at the time of the plea. \ Indiana's guilty plea statutes "do not create a substantive 'right to be advised in open court,' the violation of which is itself grounds for . . . relief," but there must be evidence which shows that at some point, in or out of court, defendant was in fact advised of (e.g., by defense counsel) and understood the *Boykin* rights and their waiver. *Youngblood v. State*, 542 N.E.2d 188 (Ind. 1989).

50.20.050 **Deportation advice by counsel** – When accepting a guilty plea, the court is not required to advise a defendant who is a foreign national that conviction may lead to deportation. *Williams v. State*, 641 N.E.2d 44 (Ind. Ct. App. 1994). But the failure of defense counsel " to advise of the consequence of deportation can, under some circumstances, constitute deficient performance. . . . Whether it is deficient in a given case is fact sensitive and turns on a number of factors. These presumably include the knowledge of the lawyer of the client's status as an alien, the client's familiarity with the consequences of conviction, the severity of criminal penal consequences, and the likely subsequent effects of deportation. Other factors undoubtedly will be relevant in given circumstances." *Segura v. State*, 749 N.E.2d 496, 500 (Ind. 2001). See also *Sial v. State*, 862 N.E.2d 702 (Ind. Ct. App. 2007)(fact defendant would have to leave family behind or uproot them if he were deported, when he had lived in the U.S. for twenty years, supported conclusion he would not have pled guilty if counsel had advised about deportation). The U.S. Supreme Court has held specifically in *Padilla v Kentucky*, 559 U.S. 356 (2010) that where the relevant immigration statute is "succinct, clear and explicit in defining removal consequences," such as the removal required "for all controlled substances convictions except for the most trivial marijuana possession offenses" [see 8 U.S.C. section 1227(a)(2)(B)(i)], that counsel's performance is deficient if he or she does not include an advisal of the consequence of removal upon conviction.

The Benchbook Committee recommends that the court's guilty plea dialogue include a query to the defendant as to whether defense counsel has advised about the effect of the plea on the defendant's immigration status and possible deportation. The Committee notes that the analysis of possible deportation must take into account a number of factors under federal immigration law. Accordingly the Committee recommends that the judge not give any specific advice to the defendant about his immigration situation. A brief synopsis of the law involved is available at the "Resources" tab on the following website:
http://www.immigrantdefenseproject.org .

50.25.000 **Written advisements for misdemeanor guilty pleas**

50.25.005 **Statute authorizes written waiver of advice for misdemeanors** - In misdemeanor cases, statute provides that a defendant "may waive" all the matters Ind. Code 35-35-1-2(a) requires the court to advise of "by signing a written waiver." Ind. Code 35-35-1-2(b).

50.25.010 **Caselaw ratification of misdemeanor written waiver** - A misdemeanor defendant's signature on a waiver form, as allowed by Ind. Code 35-35-1-2, can adequately demonstrate his awareness of, and thus his voluntary and intelligent waiver of, his *Boykin* and statutory rights. While further inquiry by the trial court is advantageous, *see Poore v. State*, 681 N.E.2d 204, 208 (Ind. 1997), *Boykin* does not require a court to engage a misdemeanor defendant in an oral colloquy to make sure he understands what he is signing, or a record to disclose a misdemeanant's ability to read and understand the waiver form he signs. To overcome the inference of valid waiver from the signed form, the burden is on the challenger of the conviction to show that he could not read the advisements contained on the form, for example, or that his signature was produced by coercion or misapprehension. *Maloney v. State*, 684 N.E.2d 488 (Ind. 1997).

50.30.000 **"Mass" advisements to group of defendants** - A trial court's "mass" simultaneous advisement of a dozen defendants of their rights sufficed under the statutes, when the record also showed the judge "polled [each defendant] on his plea and questioned on whether he understood his rights." *James v. State*, 454 N.E.2d 1225 (Ind. Ct. App.1983). *Compare Snowe v. State*, 533 N.E.2d 613 (Ind. App. 1989)(while a videotaped advisement of rights "may serve a preliminary purpose," the judge must determine that each individual defendant understands the rights, their waiver by guilty plea, the nature of the charged crime, and the sentencing possibilities).

50.40.000 **Factual basis**

50.40.005 **Statutory requirement of factual basis for guilty plea** - The court shall not enter judgment upon a plea of guilty or guilty but mentally ill unless satisfied from its examination of defendant or the evidence presented that there is a factual basis for the plea. Ind. Code 35-35-1-3(b).

50.40.010 **Factual basis test to be applied by trial judge**- "The test necessary to prove a sufficient factual basis to support a guilty plea is not the same as that required to support a conviction. A trial court may find a sufficient factual basis to support a guilty plea when there is evidence about the elements of the crime from which a court could reasonably conclude that the defendant is guilty," while "in contrast, a trial court may not enter a judgment for conviction unless the evidence shows guilt beyond a reasonable doubt." "Relatively minimal evidence has sometimes been held adequate [to show sufficient factual basis]," and "determinations of sufficient factual bases need not turn into "veritable bench trials." *Rhoades v. State*, 675 N.E.2d 698 (Ind.1997).

50.40.015 **Factual basis methods – summary** – "Despite the wealth of writing on the benefits of the factual basis requirement, court decisions and statutes specifying the "precise quantum of evidence" constituting "factual basis" are non-existent. . . . This is because 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." *Butler v. State*, 658 N.E.2d 72, 76 (Ind. 1995). "Evidence used to illustrate factual basis may come from a variety of sources and is not limited to sworn testimony. [Citations omitted.] 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. [Citations omitted.] 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. [Citation omitted.] Moreover, it may be shown through the testimony of witnesses who have personal knowledge of the defendant's conduct or admissions, [citation omitted], or the defendant's own sworn testimony, [citation omitted. In practice, factual basis is commonly established through a combination of such evidence." *Id.* at 77 n. 14

50.40.020 **Factual basis by defendants admission of facts in information** - A proper factual basis may be established when the court asks the prosecutor to state the facts and the prosecutor reads the factual allegations in the information, the judge asks the defendant whether defendant admits the alleged acts, and the defendant admits the truth of the information. *Silvers v. State*, 499 N.E.2d 249 (Ind. 1986). *See also Lloyd v. State*, 383 N.E.2d 1048 (Ind.1979) *(*"At the guilty plea hearing, the petitioner stated that he understood the elements of the crime with which he was charged and that he understood that by entering his plea he was admitting the truth of the matters contained within the criminal information filed against him"- "such admissions are sufficient to establish a factual basis for the plea"); *Toan v. State*, 691 N.E.2d 477 (Ind. Ct. App. 1998) (affirms based on defendants admission he had been driving while intoxicated).

50.40.025 **Factual basis from defendant's admissions in presentence** - Statements contained in the presentence report which contained defendant's admissions, facts supporting the elements of the charged crime, and the probable cause affidavit coupled with defendant's acknowledgment he had read the report and understood the charged crime provided a factual basis. *Lee v. State*, 538 N.E.2d 983 (Ind. Ct. App. 1989).

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50.40.035 **Uncertainty regarding admissions of status or scientific facts**- There is a dispute in decisions of the Court of Appeals as to whether the general rule that a factual basis is established by defendant's admission of the charged facts can apply when criminal liability depends upon (1) a prior adjudication or administrative status (e.g., Habitual Traffic Offender status), or (2) upon facts which cannot be ascertained without resort to scientific or chemical tests (e.g., blood-alcohol content): *Compare Jones v. State*, 603 N.E.2d 888 (Ind. Ct. App. 1992)(factual basis for HTO driving crime must have HTO status document, not mere admission of HTO status by defendant) and *Gumm v. State*, 655 N.E.2d 610 (Ind. Ct. App. 1995)(expressly disagrees with *Melton v. State*, described hereafter) *with Melton v. State*, 611 N.E.2d 666 (Ind. Ct. App.1993), transfer denied (holding factual basis for .10% blood alcohol driving crime was established by defendant's admission of driving after drinking and of BAC %;

expressly rejects *Jones* and defense argument BAC test evidence was required). The significance of the dispute is perhaps reduced by the Indiana Supreme Court holding that a defendant who admits recidivist status, without any documentary evidence to show the nature of the priors, as a "factual basis" for an habitual offender or habitual substance offender enhancement cannot obtain relief from the enhancement simply by arguing there was an insufficient factual basis; instead, in his post-conviction relief proceeding he must show prejudice from the lack of such evidence by proving that he was in fact not a recidivist as alleged and admitted. *Butler v. State*, 658 N.E.2d 72 (Ind.1995).

50.40.050 **Burden to challenge inadequate factual basis -** Proving an inadequate factual basis does not establish that a guilty plea must be vacated. The onus is on the defendant to prove he/she was prejudiced by the lack of a factual basis. *State v. Eiland*, 723 N.E.2d 863 (Ind. 2000), *adopting by incorporation opinion at* 707 N.E.2d 314 (Ind. Ct. App.1999).

50.45.000 **Voluntariness of plea**

50.45.005 **Determination of voluntariness required** - The court shall not accept a guilty plea, without first determining that the plea is voluntary, and determining whether any promises, force, or threats were used to obtain the plea. Ind. Code 35-35-1-3(a).

50.45.010 **Intoxication may render plea involuntary** - Guilty pleas from significantly intoxicated defendants may be involuntary on that basis. *Vonderschmidt v. State*, 81 N.E.2d 782 (Ind. 1948)(drunken defendant); *Lobaugh v. State*, 82 N.E.2d 247 (Ind. 1948)(significantly impaired by drug ingestion).

50.45.015 **Plea to avoid prosecution of relatives may be involuntary** - Guilty pleas to avoid prosecution of relatives or other persons are not involuntary on that basis. *Rogers v. State*, 437 N.E.2d 957 (Ind. 1982).

50.45.020 **No involuntariness from threat of more serious prosecution** - Guilty pleas solely to avoid prosecution for more serious crimes or more severe penalties are not involuntary. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (threat of habitual offender sentencing if no guilty plea is made does not make plea involuntary). *See also Lombardo v. State*, 429 N.E.2d 243 (1981)(death penalty threat); *Lockert v. State*, 391 N.E.2d 1979)(threat other charges will be brought).

50.45.025 **Plea conditioned on no advice of counsel is involuntary**- A guilty plea for a lesser sanction made on basis of prosecutor's insistence that defendant plead immediately without advice of counsel is involuntary per se. *Hood. v. State*, 546 N.E.2d 847 (Ind. Ct. App. 1989). *See also Majors v. State*, 568 N.E.2d 1065 (Ind. Ct. App. 1991)(bargain calling for defendant's waiver of post-conviction remedies was unenforceable).

50.50.000 **Plea bargaining**

50.50.005 **Plea agreement unenforceable until defendant performs** - A plea bargain is merely an "executory agreement" until the defendant performs part of his or her end of the bargain, and the prosecutor is free to withdraw from the bargain before defendant performs. *Mabry v. Johnson*, 467 U.S. 504 (1984).

50.50.010 **Bargain not enforceable if not in prosecutors power** - Specific performance by the State of bargains will be required only when performance of the bargain is within the State's power (i.e., dismiss a charge, as opposed to having a specific sentence imposed). *See Martin v. State*, 537 N.E.2d 491 (Ind. 1989) (bargain enforceable if made with prosecutor or police who have authority to make the bargain). *See also Payne v. State*, 531 N.E.2d 216 (Ind. Ct. App. 1988)(prosecutor's agreement to have arrest record expunged could not be specifically enforced, as police agencies not prosecutor had control of decision to expunge and prosecutor could not bind them by his plea agreement).

50.50.015 **Defendants breach of agreement makes it unenforceable** - Breach of plea agreement conditions by the defendant makes the bargain unenforceable and State is no longer bound by it; allowing defendant to enter a bargain binding on the court and then to violate the agreement operates as a fraud upon the court. *Spivey v. State*, 553 N.E.2d 508 (Ind. App. 1990). *See also Menifee v. State*, 605 N.E.2d 1207 (Ind. Ct. App. 1993)(bargain to alter original bargain breached, so reinstatement of sentences under original bargain warranted).

50.50.025 **Judge should not participate in bargaining** - The judge should not participate in plea bargaining negotiations. *Anderson v. State*, 335 N.E.2d 225 (Ind. 1975). The court should not pressure the defendant to enter, or even consider entering a guilty plea. But when a court exercises its discretion to reject a plea agreement, it is in both parties' interests that the court explain its reasons. A court may offer guidance as to what sentence it might find marginally acceptable, taking into account a presentence report prepared by the probation department. Such facilitation of the bargaining process is not improper judicial involvement in the plea process. *Ellis v. State*, 744 N.E.2d 425 (Ind. 2001).

50.50.050 **Bargain may be negotiated after trial starts** - A plea bargain may be negotiated after the trial has begun. *Powell v. State*, 463 N.E.2d 529 (Ind. Ct. App. 1984).

50.50.075 **Five-Step statutory plea bargain procedure** - The statutory plea bargaining framework provides, directly or implicitly, for five stages - (1) prosecutor and defendant reach agreement, (2) prosecutor files written agreement with court, (3) court accepts or rejects agreement, (4) actual entry of plea by defendant, and (5) sentencing. *Badger v. State*, 637 N.E.2d 800 (Ind. Ct. App. 1994).

50.50.080 **Written agreement required for felony but not misdemeanor** - A plea agreement for a felony must be reduced to written form and submitted to the trial

court before the defendant pleads guilty; a "plea agreement" for a misdemeanor may be submitted orally to the court. Ind. Code 35-35-3-3.

50.50.085 **Victim must be informed of bargain** - Prosecutor must inform the victim of negotiations and the terms of any bargain, and the judge may not consider a prosecutor's recommendation of sentence under the statutes if this requirement is not complied with. Ind. Code 35-35-3-2. At the hearing on the agreement, the court must advise any victim present of the right to make a statement concerning the crime and the defendant. Ind. Code 35-35-3-5.

50.50.090 **Felony agreement requires presentence report** - A presentence report is to be ordered when felony plea agreement is tendered. Ind. Code 35-35-3-3.

50.50.100 **Withdrawal of plea agreement** - The prosecutor or the defendant may move, orally or in writing, to withdraw a plea agreement tendered to the court at any point prior to the court's acceptance of the agreement; in exercising its discretion to grant motions to withdraw, the trial judge should consider whether the moving party has materially benefited from the agreement and whether the non-moving party has relied upon the agreement to his substantial detriment. *Badger v. State*, 637 N.E.2d 800 (Ind. 1994). See also *Carter v. State*, 739 N.E.2d 136 (Ind. 2000)("court permission is required to withdraw a guilty plea, even when the plea has not been accepted and the withdrawal request is based upon a protestation of innocence").

50.50.110 **Acceptance binds court** - Once the court accepts the agreement, the court is bound by its terms. Ind. Code 35-35-3-3(e).

50.50.120 **Acceptance unaffected by failure to have presentence report** - While statute requires that judge is to order a presentence report and to consider it prior to accepting any proposed plea bargain on a felony charge, failure to comply with this requirement does not affect the judge's authority to accept an agreement; once the agreement has been accepted, the judge's acceptance may not be revoked even if the presentence report eventually prepared suggests substantial reasons why the agreement should not be accepted. *Reffett v. State*, 571 N.E.2d 1227 (Ind. 1991).

50.50.125 **Accepting plea subject to its withdrawal if bargain rejected** – Ind. Code 35-35-3-3(b) provides, in pertinent part, that "if the plea agreement is not accepted, the court shall reject it before the case may be disposed of by trial or by guilty plea." This language suggests that a plea should not be accepted before the court decides to accept or reject the agreement. Caselaw suggesting the contrary may have been eclipsed by the statutory language here. *Compare Spencer v. State*, 634 N.E.2d 72 (Ind. App. 1994)(trial court accepted guilty plea and entered judgment of conviction at guilty plea hearing while advising defendant court was not bound by the agreement and would allow defendant to withdraw the plea if the court rejected the agreement; held, bargain was not thereby accepted), *transfer denied,* 653 N.E.2d 476 (DeBruler, J., dissenting)

with Steele v. State, 638 N.E.2d 1338 (Ind. App. 1994)(acceptance of guilty plea and entry of judgment of conviction at guilty plea hearing was an acceptance of the plea agreement; if trial judge did not wish to accept the agreement, his options were either to reject the plea when it was tendered or to take the plea under advisement; unlike the record in *Spencer*, the judge made no statements about withdrawal of the plea if bargain was rejected).

50.50.135 **Court should give reasons for rejecting agreement** - The court may reject the bargain without providing reasons for its rejection; "when a trial court, after complying with the guilty plea statute and taking evidence on the factual basis for the plea, rejects a plea bargain, the appellate courts presume that the court has properly evaluated the propriety of accepting it." *Meadows v. State*, 428 N.E.2d 1232 (Ind. 1981). "But when a court exercises its discretion to reject a plea agreement, it is in both parties' interests that the court explain its reasons. A court may offer guidance as to what sentence it might find marginally acceptable, taking into account a presentence report prepared by the probation department. Such facilitation of the bargaining process is not improper judicial involvement in the plea process." *Ellis v. State*, 744 N.E.2d 425 (Ind. 2001).

50.50.140 **Repetition of advisements may be required at acceptance**- If the court gives the defendant the full guilty plea advice of rights and liabilities when the plea and the plea bargain are tendered, it may be necessary to repeat that guilty plea advisement if an "unreasonable" period of time passes between tendering of the bargain and plea and the court's acceptance of the bargain and entry of the plea. *George v. State*, 403 N.E.2d 339 (Ind. 1980)(if a guilty plea is tendered by the defendant at one time and accepted by the court at a later time, as when the court does not accept the guilty plea and bargain until it has had an opportunity to review a presentence report concerning the defendant, the court may advise the defendant of his rights at the time that the plea is tendered, and the advice of rights does not have to be repeated at the time that the plea is finally accepted if there is not an unreasonable delay between the giving of the advice and the acceptance of the plea; in this case, a delay of fifteen days was a reasonable one). *See also Fraley v. State*, 323 N.E.2d 239 (Ind. App. 1975)(delay of twenty-four days did not require repetition of advice). *But see Helton v. State*, 443 N.E.2d 1201 (Ind. App.1982)(delay of fifty-nine days required repetition of advice).

50.50.500 **Magistrate may sentence guilty plea** - In 2015, I.C. 33-23-5-8-9(b) was amended to provide that a magistrate who presides at a criminal trial <u>or a guilty plea hearing</u> may enter a final order and sentence.

50.60.000 **Withdrawal of guilty plea**

50.60.005 **Withdrawal prior to sentencing** - A guilty plea has been entered but sentencing has not yet been imposed, the plea may be sought to withdrawn by the filing of a written, verified petition; the court <u>may</u> allow the defendant to withdraw the plea for "any fair and just reason unless the state has been substantially prejudiced by

reliance upon the defendant's plea," but the court "shall allow" the withdrawal whenever the defendant proves it is "necessary to correct a manifest injustice"; the burden is on the moving party to establish by a preponderance the alleged grounds for relief. Ind. Code 35-35-1-4(b), (e).). When a guilty plea is tendered to the court and taken under advisement, pending preparation of a presentence report and a sentencing hearing, the plea is considered “entered” under Ind. Code 35-35-1-4 so that it may not be withdrawn except as permitted by the court, pursuant to the statute. *Peel v. State*, 951 N.E.2d 269 (Ind. Ct. App. 2011).

50.60.010 **Presentence withdrawal hearing not required** - A hearing on a motion to withdraw a guilty plea is not required. Ind. Code 35-35-1-4, by requiring a motion to withdraw a guilty plea to be verified and to contain facts in support of the relief demanded, and by expressly permitting the State to file counter-affidavits in opposition, "contemplates a summary proceeding," so that convening a hearing on the motion to withdraw is "merely a discretionary option of the trial court.” *Fletcher v. State*, 649 N.E.2d 1022 (Ind. 1995).

50.60.020 **Post-Sentence withdrawal to be by P-C. R. 1** - After sentencing, a defendant may seek to withdraw a guilty plea by using the Post-Conviction Rule 1 procedure. Ind. Code 35-35-1-4(c).

50.70.000 Suggested procedures

A. WHEN THERE IS NO PLEA AGREEMENT: If there is **no plea agreement**, the Court may use **Dialogue at section 50.70.400** to accept the guilty plea when it is tendered by defendant in open court .

B. WHEN THERE IS A PLEA AGREEMENT: If there is a **plea agreement**, the Benchbook affords two options in **section 50.70.300 and 50.70.350** for use when the agreement is tendered to the court. **Both dialogues are not acceptances of either the agreement or the tendered guilty plea and both so state expressly:**

C. ADVISEMENTS AND ANALYSIS

1. Sentencing Parameters and Suspendibility Advisement: **section 50.70.100** on Sentencing Parameters and **section 50.70.250 (crimes committed before July 1, 2014) or section 50.70.251 (crimes committed after June 30, 2014)** on Suspendibility are for use in determining what specific advice to insert in the various dialogues about the sentence the Defendant could receive.

2. Simple Advisement: **section 50.70.300** is a simple advisement of the procedural situation without any guilty plea advice of rights - e.g., that the plea and bargain are considered as offered but not accepted, that a presentence report will be written and victim's rights procedures followed before the court makes any decision on the plea or the agreement, and that acceptance of the plea and bargain will only occur at a later hearing. **HOWEVER, a court utilizing section 50.70.300 should use 50.70.400, the full guilty plea advisement, when subsequently ACCEPTING the plea**.

3. Full Advisement: **section 50.70.350** is a full statement of guilty plea advisements which clearly states it is **not an acceptance** of the plea or the agreement. Courts which prefer a full advice of rights when a plea is tendered should use this dialogue. Such courts should **note** that the **passage of time may require** that a **full advice of rights will have to be repeated** at the time the court decides to accept the bargain and the plea. **Compare** *George v. State*, 403 N.E.2d 339 (Ind. 1980)(delay of fifteen days between tendering of guilty plea and acceptance was reasonable and readvisement not required) and *Fraley v. State*, 323 N.E.2d 239 (Ind. App. 1975)(delay of twenty-four days did not require repetition of advice) *with Helton v. State*, 443 N.E.2d 1201 (Ind. App.1982)(delay of fifty-nine days required repetition of advice). **A court utilizing section 50.70.350 should use the dialogue in section 50.70.400 when accepting or rejecting the bargain subsequently.**

4. Written Advisement Procedures: In accepting guilty pleas of Class D felonies or for Misdemeanors written advisements are often utilized:

a. **Misdemeanor written advisements: section 50.70.475** is a proposed form of written advisement. **Suggested dialogue:** An oral advisement may be given with the written misdemeanor advisement. See **50.70.500.**

b. Class D or Level 6 felony written advisements: CAVEAT: Note that the use of a written advice of rights form for a D or Level 6 felony has not been approved in Indiana, so the form in **50.70.450** for D or Level 6 felonies may be disapproved by appellate decision. Indiana Code 35-35-1-2's express provision that a defendant may waive rights when pleading guilty to a misdemeanor "by signing a written waiver" could be held in a felony case as intended to prohibit felony advice of rights by written advisement followed by use of the dialogue in **50.70.500** with its in-court colloquy as to defendant's understanding of the advisement - a procedure like that upheld for a misdemeanor in *Spencer v. State*, 634 N.E.2d 500 (Ind. Ct. App. 1993). A proposed D or Level 6 felony written advisement is provided as **50.70.450.**

c. **Suggested dialogue:** An oral advisement may be given with the written misdemeanor or D or Level 6 felony advisement. See **50.70.500.**

50.70.100 FELONY SENTENCING PARAMETERS

STANDARD SENTENCING RANGES – CRIME PRIOR TO JULY 1, 2014:

Class	Minimum	Maximum	Advisory	Fines
Murder	45 years	65 years	55 years	$10,000
A	20 years	50 years	30 years	$10,000
B	6 years	20 years	10 years	$10,000
C	2 years	8 years	4 years	$10,000
D	6 months	3 years	1.5 years	$10,000
A misd.	1 yr. max.			$ 5,000
B misd.	180 days max.			$ 1,000
C misd.	60 days max.			$ 500

STANDARD SENTENCING RANGES – CRIME ON OR AFTER JULY 1, 2014:

Level	Minimum	Maximum	Advisory	Fines
Murder	45 years	65 years	55 years	$10,000
1	20 years	50 years	30 years	$10,000
2	10 years	30 years	17.5 years	$10,000
3	3 years	16 years	9 years	$10,000
4	2 years	12 years	6 years	$10,000
5	1 years	6 years	3 years	$10,000
6	6 months	2.5 years	1 year	$10,000
A misd.	1 year max			$ 5,000
B misd.	180 days max			$ 1,000
C misd.	60 days max			$ 500

50.70.150 FELONY SENTENCING ENHANCEMENTS:

FELONY SENTENCING ENHANCEMENTS - CRIME PRIOR TO JULY 1, 2014:

Enhancement Type	Minimum Term	Maximum Term
Habitual Criminal – A, B, or C felony	1 x advisory	3x advisory, up to 30 yrs
Use of firearm in : felony against the person (IC 35-42) resulting in death or serious bodily injury; or kidnapping; or Class B felony criminal confinement		5 years
Use of firearm or possession of handgun, sawed-off shotgun, or machine gun in controlled substance offense		5 years
Use of sawed-off shotgun-controlled substance offense		10 years
Use of machine gun or silencer-controlled substance offense		20 years
Habitual controlled substance offender	3 years (1 year if more than 3 years since last prior)	8 years
Murder or felony murder resulting in the termination of a human pregnancy	6 years	20 years
Repeat sexual offender		20 years
Criminal gang		1 x sentence on highest underlying felony

FELONY SENTENCING ENHANCEMENTS- CRIME ON OR AFTER JULY 1, 2014:

Enhancement Type	Minimum Term	Maximum Term
Habitual Criminal – Level 1, 2, 3, or 4 - IC 35-50-2-8	6 years	20 years
Habitual Criminal – Level 5 or 6 - IC 35-50-2-8	2 years	6 years
Used a firearm in : felony against the person (IC 35-42) resulting in death or serious bodily injury; or kidnapping; or level 2 or 3 felony criminal confinement - IC 35-50-2-11	5 years	20 years
Pointing or discharging a firearm at law enforcement officer in any misdemeanor or felony other than those listed in row above - crimes on or after July 1, 2015 - IC 35-50-2-11	5 years	20 years

Use of firearm - controlled substance dealing offense - IC 35-50-2-13		5 years
Use of or possession in violation of federal law of a sawed-off shotgun-controlled substance dealing offense - IC 35-50-2-13		10 years
Use of machine gun or silencer-controlled substance dealing offense - IC 35-50-2-13		20 years
Habitual vehicular traffic offender (for crimes committed on or after January 1, 2015) - IC 9-30-15.5-2	1 year	8 years
Murder or felony murder resulting in the termination of a human pregnancy - IC 35-50-2-16	6 years	20 years
Repeat sexual offender - IC 35-50-2-14		1x advisory (10 yr. cap)
Criminal organization - IC 35-50-2-15	1 x sentence on underlying felony if sentencing for one felony only	1 x longest sentence imposed for underlying felonies if sentencing for more than one felony

50.70.200 CALCULATION -MAXIMUM AND MINIMUM FELONY SENTENCE, CRIME PRIOR TO JULY 1, 2014:

Total basic sentence	Min.	Max.
Habitual Criminal – A, B, or C felony	1 x advisory	3x advisory, up to 30 yrs
Use of firearm in: felony against the person (IC 35-42) resulting in death or serious bodily injury; or kidnapping; or Class B felony criminal confinement		Up to 5 years
Use of firearm or possession of handgun, sawed-off shotgun, or machine gun -controlled substance offense		Up to 5 years
Use of sawed-off shotgun-controlled substance offense		Up to10 years
Use of machine gun or silencer-controlled substance offense		Up to 20 years
Habitual controlled substance offender	3 yrs., or 1 yr. if 3+ since last prior	8 yrs.
Repeat sexual offender		1x advisory, 10 year maximum
Murder or felony murder resulting in the termination of a human pregnancy	6 years	20 years
Criminal gang		1 x sentence on highest underlying felony
TOTAL MINIMUM AND MAXIMUM	TOTAL MIN.	TOTAL MAX.

50.70.201 CALCULATION -MAXIMUM AND MINIMUM FELONY SENTENCE, CRIME ON OR AFTER JULY 1, 2014:

Total basic sentence	Min.	Max.
Habitual Criminal – Level 1, 2, 3, or 4	6 years	20 years
Habitual Criminal – Level 5 or 6	2 years	6 years
Use of firearm in: felony against the person (IC 35-42) resulting in death or serious bodily injury; or kidnapping; or Level 2 or 3 felony criminal confinement	5 years	20 years
Pointing or discharging a firearm at law enforcement officer in any misdemeanor or felony other than those listed in row above - crimes on or after July 1, 2015 - IC 35-50-2-11	5 years	20 years
Use of firearm controlled substance dealing offense		5 years
Use of or possession in violation of federal law of a sawed-off shotgun-controlled substance dealing offense - IC 35-50-2-13		10 years
Use of machine gun or silencer-controlled substance offense		20 years
Habitual vehicular traffic offender (for crimes committed on or after January 1, 2015)	1 year	8 years
Murder or felony murder resulting in the termination of a human pregnancy	6 years	20 years
Repeat sexual offender		1x advisory, 10 year maximum
Criminal gang	1 x sentence on underlying felony if sentencing for one felony only	1 x longest sentence imposed for underlying felonies if sentencing for more than one felony
TOTAL MINIMUM AND MAXIMUM	TOTAL MIN.	TOTAL MAX.

50.70.250. Determining suspendibility of felony sentence – Crime committed before July 1, 2014

SUSPENDIBILITY OF FELONY SENTENCE CRIME BEFORE JULY 1, 2014

INSTRUCTIONS:

To determine eligibility for suspended sentence and probation, use the following seven step form. **Step one** simply eliminates the obvious death penalty or "life without parole" situations in which probation is absolutely foreclosed. **Step two** determines whether the juvenile record requires service of the "minimum sentence" (defined below in this box). **Step three** determines if "minimum sentence" probation is not available at all due to the kind of crime committed. **Step four** determines whether the adult criminal record makes the "minimum sentence" either nonsuspendable or suspendable only under limited conditions. A defendant free of restrictions in all four steps may have the entire sentence suspended without any limits on the types of probation conditions. **Step five** determines whether the defendant's maximum period of probation is subject to the 10 year cap for child victim sex offense cases. **Step 6** determines whether the defendant's maximum period of probation is subject to the thirty year cap for child molesting of a victim under 12 with defendant 21 or older. **Step 7** determines whether the sentence is one of the few which miscellaneous provisions make entirely nonsuspendible.

"Minimum sentence" [Ind. Code 35-50-2-1(c)] is:

murder 45 years + enhancements*
A felony 20 years + enhancements*
B felony 6 years + enhancements*
C felony 2 years + enhancements*
D felony 1/2 year + enhancements*

*Note that the habitual criminal offender and habitual controlled substance offender penalty enhancements are not suspendable when the "minimum sentence" for the underlying felony is not suspendable. See *Stanek v. State*, 603 N.E.2d 152 (Ind. 1992), adopting part 3 of Court of Appeals opinion found at 587 N.E.2d 736 (Ind. Ct. App. 1992); *Collins v. State*, 583 N.E.2d 761 (Ind. Ct. App. 1991). The enhancements for use of a firearm, Ind. Code 35-50-2-11, or for controlled substance offenses with use of a firearm or possession of a handgun, sawed-off shotgun, machine gun, or silencer, Ind. Code 35-50-2-13, are probably not suspendable under the same rationale.

STEP 1. DEATH OR LIFE WITHOUT PAROLE SENTENCES PRECLUDE ALL PROBATION

If defendant is charged with murder for which death or life imprisonment without parole penalties are sought and such penalties are imposed, obviously there is no probation. The same is true when

defendant is charged with being an habitual violent offender for whom the penalty is to be life imprisonment without parole.

STEP 2. DOES JUVENILE RECORD PRECLUDE OR LIMIT PROBATION?

A defendant's sentence is subject to the "minimum sentence" limits of Ind. Code 35-50-2-2(a)(as held in *Saintignon v. State*, 749 N.E.2d 1134 (Ind. 2001), if pursuant to Ind. Code 35-50-2-2.1 factors (1) and (2) below apply and the court does not make any of the findings in the box below listed under (3):

(1) Crime committed is a felony;

(2) Defendant has a juvenile record of delinquent acts which if he/she were an adult would have been:

(a) A Class A or B felony committed less than three years before the instant felony,
(b) Two Class C or D felonies each committed less than three years before the instant felony, or
(c) One Class C and one Class D felony each committed less than three years before instant felony

(3) But court may suspend entire sentence notwithstanding (2) above if

Instant felony was result of circumstances unlikely to recur, or

Instant felony victim induced or facilitated the offense, or

Substantial grounds tend to excuse or justify the instant felony, though they are not a defense, or

The felonies in the juvenile record are Class C or D, not A or B, and home detention will be used for the "minimum sentence" for instant felony

STEP 3. DOES SPECIFIC CRIME MANDATE EXECUTED "MINIMUM" SENTENCE?

If defendant is charged with any offense on the following list, the defendant cannot have the "minimum sentence" [see INTRODUCTION box above] for the offense suspended:

murder
battery with deadly weapon or battery causing death
sexual battery with deadly weapon
kidnapping
confinement with deadly weapon
rape as Class A felony
criminal deviate conduct as Class A felony
child molesting as Class A or B felony [except B felony, victim over 12, defendant not more than 4 years older than victim (or 5 years if in dating relationship), defendant not position of authority or influence, defendant had no prior sex offenses or sex delinquencies]
robbery with serious bodily injury or deadly weapon
arson for hire or with serious bodily injury

burglary with serious bodily injury or deadly weapon
resisting law enforcement with deadly weapon
escape with deadly weapon
rioting with deadly weapon
dealing in cocaine, narcotic drug, or methamphetamine, I, II or III Controlled Substance if with a firearm or with intent to deliver to a minor (at least three years younger) and was on a bus or within 1000 feet of school property, public park, family housing complex, or youth program center
"an offense under Ind. Code 9-30-5 (operating a vehicle while intoxicated)" if the offender "has accumulated at least two (2) prior unrelated convictions under Ind. Code 9-30-5"“an offense under IC 9-30-5-5(b) (operating a vehicle while intoxicated causing death)”
aggravated battery
disarming a law enforcement officer

STEP 4. DOES ADULT CRIMINAL RECORD REQUIRE EXECUTED "MINIMUM SENTENCE" OR "MINIMUM SENTENCE" IN COMMUNITY CORRECTIONS?

If defendant's crime is **not on list 3 above** and **any of the following categories under this number apply**, defendant either cannot have any probation for the "minimum sentence" or, unless prohibited by Ind. Code 35-38-2.6-1(b)(see list below in brackets), can have probation for the "minimum sentence" only in a "community corrections" residential/work release or electronic monitoring program [or, for D felonies only, in "home detention" probation]. [Ind. Code 35-38-2.6-1, -3; Ind. Code 35-50-2-2(b)(3)(D felony "home detention")]:

Crime committed is an A or B felony (other than an Ind. Code 35-42 sex offense or incest)* and defendant has a prior, unrelated felony conviction,

OR

Crime committed is a C felony (other than an Ind. Code 35-42 sex offense or incest)* and less than 7 years have passed since discharge from probation, parole, or prison for prior unrelated felony

OR

Crime committed is a D felony (other than an Ind. Code 35-42 sex offense or incest)* and less than 3years have passed since discharge from probation, parole, or prison for prior unrelated felony.

*[Ind. Code 35-38-2.6-1 prohibits "direct commitment to community corrections" for sex offenses under Ind. Code 35-42-4 or 35-46-1-3, for 9-30-5-4.offense (Causing serious bodily injury when operating motor vehicle while intoxicated, or for 9-30-5-5.offense (Causing death of another person when operating motor vehicle) and offenses listed under Step 3. Thus for any of these crimes, when the "minimum sentence" is nonsuspendible the Ind. Code 35-38-2.6 "direct commitment to community corrections" for the "minimum sentence" is not an option and the minimum sentence must be served.]

STEP 5. DO SEX OR VIOLENT OFFENSE LAWS LIMIT THE MAXIMUM PERIOD OF PROBATION FOR THE CRIME?

Sex and violent offenders as defined under Ind. Code 11-8-8-5 are subject to a special ten year limit on probation for their crimes. It appears that Ind. Code 35-50-2-2 as amended in 1994 limits the probation sentence to ten years for these crimes even though the defendants could be given "suspended" sentences of more than 10 years.

The offenses subject to the sex offender 10 year cap on probation are:

rape,
criminal deviate conduct,
child molesting,
child exploitation,
vicarious sexual gratification,
child solicitation,
child seduction,
sexual misconduct with a minor Class A .B, or C felony unless (A) the person is convicted of sexual misconduct with a minor as a Class C felony; (B) the person is not more than: **(i)** four (4) years older than the victim if the offense was committed after June 30, 2007; or **(ii)** five (5) years older than the victim if the offense was committed before July 1, 2007; and **(C)** the sentencing court finds that the person should not be required to register as a sex offender.
incest,
sexual battery,
kidnapping of a victim less than 18 by a non-parent/non-guardian,
criminal confinement of a person less than 18 by a non-parent/non-guardian,
possession of child pornography (IC 35-42-4-4(c)),
promoting prostitution as A Class B felony,
promotion of human trafficking if the victim is less than eighteen (18) years of age,
sexual trafficking of a minor,
human trafficking if the victim is less than eighteen (18) years of age,
murder (IC 35-42-1-1),
voluntary manslaughter,
sexual misconduct by a service provider with a detained child (IC 35-44-1-5(c)).
an attempt or conspiracy to commit a crime listed above, or
an offense in another state substantially equivalent to those above.

STEP 6. DOES CLASS A FELONY CHILD MOLESTING CAP APPLY?

A Class A felony child molester of a child under 12 when the molester was 21 or older can have only that part of the sentence in excess of 30 years suspended. Note that in *Miller v. State*, 943 N.E.2d 348, 349 (Ind. 2011) the Court held that a sentence of less than thirty years could have been imposed because section 2(i) does not set a minimum sentence.

STEP 7. DO MISCELLANEOUS CAPS PREVENT ALL SUSPENSION?

The sentences for a small number of particular offenses, or for particular enhancements, are entirely nonsuspendible:

voluntary manslaughter if committed by means of a deadly weapon
the 5 year enhancement for all IC 35-42 offenses that resulted in death or serious bodily injury
kidnapping, and criminal confinement when they are committed with a firearm
the entire sentence for provision of a firearm to a child if commission of offense was knowing or intentional
the entire sentence for dangerous control of a child if commission of offense was knowing or intentional
the entire sentence for C felony possession of a narcotic drug if defendant was in possession of a firearm
the entire sentence for C felony possession of methamphetamine if defendant was in possession of a firearm

50.70.251 Determining suspendibility of felony sentence – Crime committed on or after July 1, 2014

SUSPENDIBILITY OF FELONY SENTENCE CRIME ON OR AFTER JULY 1, 2014

INSTRUCTIONS:

To determine eligibility for suspended sentence and probation, use the following three step form. **Step one** determines whether the offense is in a category for which the "minimum sentence" is nonsuspendible. **Step two** determines whether the juvenile record requires service of the "minimum sentence" (defined below in this box. **Step three** determines whether the adult criminal record makes the "minimum sentence" nonsuspendable. A defendant free of restrictions in these three steps may have the entire sentence suspended without any limits on the types of probation conditions.

"Minimum sentence" [Ind. Code 35-50-2-1(c)] is:
for murder, forty-five (45) years;
for a Level 1 felony, for a crime committed after June 30, 2014, twenty (20) years;
for a Level 2 felony, for a crime committed after June 30, 2014, ten (10) years;
for a Level 3 felony, for a crime committed after June 30, 2014, three (3) years;
for a Level 4 felony, for a crime committed after June 30, 2014, two (2) years;
for a Level 5 felony, for a crime committed after June 30, 2014, one (1) year; and
for a Level 6 felony, for a crime committed after June 30, 2014, one-half (1/2) year.
*The habitual criminal offender enhancement is not suspendable. I.C. 35-50-2-8(i). [The I.C. 9-30-15.5 habitual vehicular substance offender enhancement (effective Jan. 1. 2015) is silent on any suspendibility limit.] Enhancements for use of a firearm, Ind. Code 35-50-2-11, or for controlled substance offenses with use of a firearm or possession of a handgun, sawed-off shotgun, machine gun, or silencer, Ind. Code 35-50-2-13, are silent on any suspendibility limit.

STEP 1. IS THE FELONY EITHER MURDER OR LEVEL 1?

"Minimum sentences" for murder and Level 1 felonies cannot be suspended.

STEP 2. DOES JUVENILE RECORD PRECLUDE OR LIMIT PROBATION?

A defendant's sentence is subject to the "minimum sentence" limits of Ind. Code 35-50-2-2(a)(as held in *Saintignon v. State*, 749 N.E.2d 1134 (Ind. 2001), if pursuant to Ind. Code 35-50-2-2.1 factors (1) and (2) below apply and the court does not make any of the findings in the box below listed under (3):

(1) Crime committed is a felony;

(2) Defendant has a juvenile record of delinquent acts which if he/she were an adult would have been:

(a) A Class A or B felony committed less than three years before the instant felony, or
(b) Two Class C or D felonies each committed less than three years before the instant felony, or
(c) One Class C and one Class D felony each committed less than three years before instant felony, or
(d) A Level 1, Level 2, Level 3, or Level 4 felony committed less than three years before the instant felony, or
(e) Two Level 5 or Level 6 felonies each committed less than three years before the instant felony, or
(f) One Level 5 and one Level 6 felony each committed less than three years before the instant felony.

(3) But court may suspend entire sentence notwithstanding (2) above if

Instant felony was result of circumstances unlikely to recur, or

Instant felony victim induced or facilitated the offense, or

Substantial grounds tend to excuse or justify the instant felony, though they are not a defense, or

The felonies in the juvenile record are Class C or D or Level 5 or Level 6, not A or B or Level 1 or Level 2 or Level 3 or Level 4 felonies, and home detention will be used for the "minimum sentence" for instant felony.

STEP 3. IS THE FELONY LEVEL 2 OR LEVEL 3 AND NOT "CONCERNING" CONTROLLED SUBSTANCE, AND OFFENDER HAS ANY PRIOR UNRELATED FELONY CONVICTION?

If the instant felony is a Level 2 or Level 3 felony and the offender has any prior unrelated felony conviction, the "minimum sentence" for the instant felony is not suspendible unless the instant felony is one "concerning a controlled substance under IC 35-48-4," but effective July 1, 2016 there is an exception making methamphetamine or heroin Level 2 offense minimum sentences nonsusendible if the offender has a prior felony conviction for dealing in a controlled substance other than marijuana, hasish, hash oil, salvia divinorum, or a synthetic drug.

50.70.300 SIMPLE ADVISEMENT
DIALOGUE FOR RECEIVING PLEA AGREEMENT
NO ADVICE OF RIGHTS

I have before me a proposed plea agreement.

(a) Did you sign this agreement? (Show defendant the agreement.)
(b) Did you read the agreement before you signed it?
(c) Did you discuss the agreement with your attorney before you signed it?
(d) Leaving out the formal parts, the agreement reads as follows:
_____.
(e) Is that what you understand the agreement to be?
(f) Do you understand that the Court is not bound by this agreement yet?
(g) Do you understand that today you and the State are merely offering this plea agreement and the guilty plea it calls for in order for the Court to decide whether to agree to it or not?
(h) Do you understand that the Court will order a presentence investigation report to be prepared on you and the charged crime and that only after receiving and reviewing that report will the Court decide whether to accept the plea agreement you and the State are offering now?
(I) Do you understand that if the Court decides not to accept the agreement you will be allowed to withdraw the plea of guilty you are offering today and to reinstate your original plea of not guilty?
(j) (Check with prosecutor as to whether the victim has been given notice of the proposed agreement.)
(k) Do you understand that if the court accepts the agreement, the court will be bound to sentence you as the agreement provides for? (Do you understand that the agreement does not allow the court to make any change in your sentence unless the State agrees to it first, so that if the court accepts the agreement and you are sentenced on it the court will not be able after sentencing to consider changing the sentence in your favor unless the prosecutor agrees to it?)
[(l) [At the initial hearing, you indicated that you are not a citizen of the United States.] [Are you a citizen of the United States? (*If "no," give following advice)*] Has your attorney advised you about the effect of a guilty plea on your immigration status? (Defendant's answer) .] Do you understand that pleading guilty can sometimes lead to being deported? Have you discussed the possibility of deportation with your attorney? (Defendant's answer) .] (*If the answers to these queries indicate that the defendant has not received advice about the consequences of the guilty plea on his immigration status and deportation, the Committee recommends that the judge continue the hearing to allow defense counsel to advise the defendant. The duration of the continuance should be sufficient to permit counsel to consult immigration laws and/or authorities so as to be able to competently advise the defendant.*)]

The Court now orders a Presentence Investigation by the _____ Probation Department and sets this matter for hearing and sentencing on _____.

50.70.350

FULL ADVISEMENT
DIALOGUE FOR RECEIVING PLEA AGREEMENT AND GUILTY PLEA WITH PLEA ADVISEMENTS BUT NO ACCEPTANCE OF PLEA OR BARGAIN

NOTE: Prior to using this dialogue, the Judge should see 50.70.100 "Sentencing Parameters" and 50.70.250 "Suspendibility" and mark the appropriate spaces on the following Dialogue's paragraphs 14, 15, and 17 to show the Defendant's potential criminal liability.

The State has filed a plea agreement reached with the Defendant, (name Defendant). To go with this agreement the Defendant has submitted a guilty plea which is to be entered only if the Court decides to accept the plea agreement and to be bound by it.

The agreement provides that [recite a brief summary of the filed recommendation] .

By law, the State's plea recommendation must include a certification by the Prosecuting Attorney of, first, an offer to show the recommendation to the victim[s] of the alleged offense[s] charged against the Defendant and, second, an offer by the Prosecutor to the victim[s] of an opportunity to present their opinion of the recommendation to the Prosecutor and to the Court.

If present, the victims of the offense(s) for which the Defendant and the prosecuting attorney have submitted a plea agreement have the right to make a statement to the court now. The victim[s] [is] [are] by no means required to make any statement, but if they would care to would they please stand now, identify themselves, and address their remarks to the Court? (Have statements recorded, if any.)

Defendant, please state your name and age:_____.

(Defendant) , before this Court can accept a guilty plea from you, I must be satisfied that you fully understand your constitutional rights, that your plea of guilty is made freely and voluntarily, and that you in fact committed the crime. Therefore it is necessary that I ask you certain questions and hear some evidence. If you do not understand the questions or the words that I use, please let me know and I will explain them to you. You may also speak with your attorney at any time.

1. Have you ever been treated for any mental illness? (Defendant's answer). To your knowledge do you now suffer from any mental or emotional disability? (Defendant's answer).

2. Are you now under the influence of alcohol or any drugs? (Defendant's answer) .

3. Is it your intention to (withdraw your earlier plea of not guilty and) enter a plea of guilty? (Defendant's answer) .

4. (Defendant), I advise you that:

(a) You have the right to a public and speedy trial by jury. Do you understand this? (Defendant's answer)

(b) You have the right to face all witnesses against you and to see, hear, question and cross-examine these witnesses. Do you understand this? (Defendant's answer).

(c) You have the right to require witnesses to be present at any hearing or trial and to testify in your behalf, and the court will assist you in this right by issuing subpoenas for such witnesses. Do you understand this? (Defendant's answer).

(d) The State of Indiana must prove beyond a reasonable doubt that you committed the offense charged before you can be found guilty. Do you understand this? (Defendant's answer).

(e) You cannot be forced to make any statement or to testify against yourself at any hearing or trial. You have the right to remain silent. Do you understand this? (Defendant's answer).

5. Do you understand that by pleading guilty you give up all of the rights I just explained? (Defendant's answer).

6. Do you understand that if you were to have a trial and you were found guilty, that you would have the right to appeal your conviction to the Supreme Court or the Court of Appeals? (Defendant's answer).

7. Do you understand that by pleading guilty you give up that appeal right? (Defendant's answer).

8. Do you understand that you have the right to be represented by an attorney at all times, including during a trial or for an appeal, and that if you cannot afford to pay an attorney now the court will appoint an attorney for you? (Defendant's answer).

9. Do you understand that the charge to which you are now pleading guilty is _____? (Defendant's answer). Do you understand that this crime of _____ is defined as (give elements of the charged crime in terms of facts alleged in charge, e.g., "knowingly or intentionally killing John Doe")? (Defendant's answer). Do you understand that in order to prove you guilty in a trial the State must prove each part of the definition I just read beyond a reasonable doubt? (Defendant's answer).

10. Do you understand that by pleading guilty you are admitting that you committed the crime you are charged with? (Defendant's answer).

11. Do you understand that by pleading guilty you will be judged guilty and sentenced without any trial? (Defendant's answer).

12. Do you understand that the crime to which you are pleading guilty is [Murder] [a Class felony] [a Class _ misdemeanor]? _(Defendant's answer)_.

13. [Do you understand that the State has alleged you are an habitual criminal offender subject to a greater sentence? _(Defendant's answer)_.]

[Do you understand that the State has alleged you are a violent habitual criminal offender subject to life imprisonment for the charged crime? _(Defendant's answer)_.]

[Do you understand that the State has alleged you have a prior conviction of the crime with which you are charged and that you are subject to a greater sentence for that reason? _(Defendant's answer)_.]

[Do you understand that the State has alleged that you committed the charged crime [while possessing a firearm] [by using (a firearm) (a sawed-off shotgun) (a machine gun) (a firearm equipped with a muffler or silencer)] and that you are subject to a greater sentence for that reason? _(Defendant's answer)_.]

[Do you understand that the State has alleged that you are (an habitual controlled substance offender) (a habitual vehicular traffic offender) subject to a greater sentence? _(Defendant's answer)_.]

[Do you understand that, if the offense to which you are pleading guilty involves the operation of a motor vehicle, notice of your conviction will be sent to the Bureau of Motor Vehicles and will count toward you being a Habitual Traffic Violator? _Defendant's answer_.] [Note – this advice should suffice to comply with the I.C. 35-38-1-32 requirement for advice that conviction of certain offenses can qualify defendant for habitual violator status.]

STANDARD SENTENCING RANGES – CRIME PRIOR TO JULY 1, 2014:

Class	**Minimum**	**Maximum**	**Advisory**	**Fines**
Murder	45 years	65 years	55 years	$10,000
A	20 years	50 years	30 years	$10,000
B	6 years	20 years	10 years	$10,000
C	2 years	8 years	4 years	$10,000
D	6 months	3 years	1.5 years	$10,000
A misd.	1 yr. max.			$ 5,000
B misd.	180 days max.			$ 1,000

C misd.	60 days max.			$ 500

STANDARD SENTENCING RANGES – CRIME ON OR AFTER JULY 1, 2014:

Level	**Minimum**	**Maximum**	**Advisory**	**Fines**
Murder	45 years	65 years	55 years	$10,000
1	20 years	50 years	30 years	$10,000
2	10 years	30 years	17.5 years	$10,000
3	3 years	16 years	9 years	$10,000
4	2 years	12 years	6 years	$10,000
5	1 years	6 years	3 years	$10,000
6	6 months	2.5 years	1 year	$10,000
A misd.	1 year max			$ 5,000
B misd.	180 days max			$ 1,000
C misd.	60 days max			$ 500

14. Do you understand that the basic sentence for the crime you are charged with [see chart above] is a minimum of (minimum) years, up to a maximum sentence of (maximum) years? [Do you understand that the State has alleged special sentence increasing factors and that if the State proves those factors you can receive a sentence as great as (add maximum from Sentence Calculation, reproduced below?] (Defendant's answer) .

SENTENCE CALCULATION WITH ENHANCEMENTS – CRIME COMMITTED BEFORE JULY 1, 2O14:

Total basic sentence	Min.	Max.
Habitual Criminal – A, B, or C felony	1 x advisory	3x advisory, up to 30 yrs
Use of firearm in: felony against the person (IC 35-42) resulting in death or serious bodily injury; or kidnapping; or Class B felony criminal confinement		Up to 5 years
Use of firearm or possession of handgun, sawed-off shotgun, or		Up to 5 years

machine gun -controlled substance offense		
Use of sawed-off shotgun-controlled substance offense		Up to10 years
Use of machine gun or silencer-controlled substance offense		Up to 20 years
Habitual controlled substance offender	3 yrs., or 1 yr. if 3+ since last prior	8 yrs.
Repeat sexual offender		1X advisory, 10 year maximum
Murder or felony murder resulting in the termination of a human pregnancy	6 years	20 years
Criminal gang		1 x sentence on highest underlying felony
TOTAL MINIMUM AND MAXIMUM	TOTAL MIN.	TOTAL MAX.

SENTENCE CALCULATION WITH ENHANCEMENTS – CRIME COMMITTED ON OR AFTER JULY 1, 2014:

Total basic sentence	Min.	Max.
Habitual Criminal – A, B, or C felony	1 x advisory	3x advisory, up to 30 yrs
Habitual Criminal – Level 1, 2, 3, or 4	6 years	20 years
Habitual Criminal – Level 5 or 6	2 years	6 years
Use of firearm in: felony against the person (IC 35-42) resulting in death or serious bodily injury; or kidnaping; or Level 2 or 3 felony criminal confinement	5 years	20 years
Use of firearm or possession of handgun, sawed-off shotgun, or machine gun -controlled substance offense		5 years
Use of sawed-off shotgun-controlled substance offense		Up to10 years
		Up to 20 years

Use of machine gun or silencer-controlled substance offense		
Habitual vehicular traffic offender (for crimes committed on or after January 1, 2015)	1 year	8 years
Repeat sexual offender		1X advisory, 10 year maximum
Murder or felony murder resulting in the termination of a human pregnancy	6 years	20 years
Criminal organization	1 x sentence on underlying felony if sentencing for one felony only	1 x longest sentence imposed for underlying felonies if sentencing for more than one felony
TOTAL MINIMUM AND MAXIMUM	TOTAL MIN.	TOTAL MAX.

15. Do you understand that the Court can also impose a fine of up to $___ as part of the sentence, added on to any imprisonment you receive? _(Defendant's answer)_.

16. Do you understand that if you have any prior criminal convictions or prior juvenile delinquency adjudications, the Court may increase your sentence? _(Defendant's answer)_.

17. Do you understand that [you will be eligible for probation] [you will not be eligible for probation] [you will not be eligible for probation until you have served ___ years of the possible maximum sentence]?

18. [Advice of consecutivity:] Do you understand that [you will begin to serve] [the court will decide whether you will serve] the sentence(s) for the crime(s) in this case only after you have finished serving [the sentence(s)] [___ years of the sentence(s)] for the crime(s) of (charged against you in _____ Court) (for which you were sentenced by the Court)?

    Do you understand that the court [may, because it is discretionary under this agreement and the statutes,] [will, because it is mandatory under this agreement and/or the statutes,] order the sentences for the crimes charged in this case served one at a time, what the law calls"consecutively," so that the time you spend imprisoned on the sentence for [here name crime in Count 1] will not count as time served on the sentence for [here name crime in Count 2]?

19. Are you now on parole, probation, or a suspended sentence? If so, do you understand that pleading guilty to the charge(s) in this Court could lead to your having your parole, probation, or suspended sentence revoked?

20. Are you now out on bond on another charge? Do you understand that pleading guilty to the charge(s) in this case could result in your bond's being revoked or increased for that other charge?

21. Are you a drug abuser or an alcoholic? _(Defendant's answer). (If yes, Defendant may request treatment instead of imprisonment for certain offenses as provided in Ind. Code 12-23-6, 23-12-7, or 12-23-8.)

[22. {Use when the crime charged is "of domestic violence" as defined in IC 35-31.5-2-78: has as an element either the use of physical force or threatened use of a deadly weapon and was committed against:

(a) a current or former spouse, a parent, or guardian of defendant, or
(b) a person with whom defendant shared a child in common, or
(c) a person who was cohabitating with or had cohabitated with the defendant as a spouse, parent, or guardian, or
(d) a person who was or had been similarly situated to a spouse, parent, or guardian of the defendant).}

Defendant, do you understand that if you are convicted of the crime of (*name crime*) charged against you that you will lose the right to possess a firearm?]

[23. [At the initial hearing, you indicated that you are not a citizen of the United States.] [Are you a citizen of the United States? (*If "no," give following advice)*] Has your attorney advised you about the effect of a guilty plea on your immigration status? (Defendant's answer) .] Do you understand that pleading guilty can sometimes lead to being deported? Have you discussed the possibility of deportation with your attorney? (Defendant's answer) .] (*If the answers to these queries indicate that the defendant has not received advice about the consequences of the guilty plea on his immigration status and deportation, the Committee recommends that the judge continue the hearing to allow defense counsel to advise the defendant. The duration of the continuance should be sufficient to permit counsel to consult immigration laws and/or authorities so as to be able to competently advise the defendant.*)]

24. _(Defendant)_, have you or anyone else received any promises [besides the plea agreement you have filed] or been given anything of value to get you to enter the plea of guilty you are making today?

25. Has anyone forced or threatened or put you or anyone else in fear to get you to plead guilty to the charge(s) in this case?

26. Do you feel that the plea of guilty you are offering now is your own free choice and decision?

27. Is it still your intention to plead guilty?

28. _(Prosecutor)_(Defense Counsel)_, would you please present the factual basis for the charges to which the Defendant has offered a guilty plea? [Factual basis now presented. Note: basis for recidivist status must be shown by documentary evidence of court records of prior convictions.]

29. _(Defendant)_, do you agree that you acted as described in the information presented by
(Prosecutor)(Defense Counsel)_?

30. The Court now finds that _____, Defendant, is ___ years of age, that he/she understands the nature of the charge(s) to which he/she has moved to plead guilty, that he/she understands the possible sentence(s) for the crime(s), that his/her offer to plead guilty is freely and voluntarily made, and that there is a factual basis for the plea.

31. The Court does now take the plea agreement and the plea of guilty under advisement for the purposes of determining whether the Court will accept them. The Court does not decide now whether to reject or accept either the plea agreement or the guilty plea.

The Court now orders the _____ Probation Department to prepare the presentence report required by statute and to serve copies of that report upon the Defendant and the State prior to the hearing on plea acceptance, which the Court now sets down for hearing on _____ . At the conclusion of that hearing the Court will decide whether to accept or reject the plea agreement. If the Court decides to accept the agreement and the plea, the sentencing hearing for the Defendant will follow immediately, on _[same date as hearing on acceptance]_.

50.70.400 FULL GUILTY PLEA DIALOGUE FOR ACCEPTANCE AND ENTRY OF GUILTY PLEA

Defendant, please state your name and age:_____.

__(Defendant)__, before this Court can accept a guilty plea from you, I must be satisfied that you fully understand your constitutional rights, that your plea of guilty is made freely and voluntarily, and that you in fact committed the crime. Therefore it is necessary that I ask you certain questions and hear some evidence. If you do not understand the questions or the words that I use, please let me know and I will explain them to you. You may also speak with your attorney at any time.

1. Have you ever been treated for any mental illness? __(Defendant's answer). To your knowledge do you now suffer from any mental or emotional disability? __(Defendant's answer).

2. Are you now under the influence of alcohol or any drugs? __(Defendant's answer)__.

3. Do you want to (withdraw your earlier plea of not guilty and) enter a plea of guilty? (Defendant's answer)__.

4. __(Defendant)__, I advise you that:

   (a) You have the rights to have a trial, and to have that trial be public, speedy, and by jury. Do you understand you have these rights? __(Defendant's answer)__.

   (b) You have the right to face all witnesses against you and to see, hear, question and cross-examine these witnesses. Do you understand this? __(Defendant's answer)__.

   (c) You have the right to require witnesses to be present at any hearing or trial and to testify in your behalf, and the court will help you by issuing orders to such witnesses to come to court and testify. Do you understand this? __(Defendant's answer).

   (d) The State of Indiana must prove beyond a reasonable doubt that you committed the offense charged against you before you can be found guilty. Do you understand this? __(Defendant's answer)__.

   (e) You cannot be forced to make any statement or to testify against yourself at any

   hearing or trial. You have the right to remain silent. Do you understand this? (Defendant's answer)__.

5. Do you understand that by pleading guilty you give up all of the rights I just explained? (Defendant's answer)__.

6. Do you understand that if you were to have a trial and you were found guilty, that you would have the right to appeal your conviction to the Supreme Court or the Court of Appeals? _(Defendant's answer)_ .

7. Do you understand that by pleading guilty you give up that appeal right? (Defendant's answer).

8. Do you understand that you have the right to be represented by an attorney at all times, including during a trial or for an appeal, and that if you cannot afford to pay an attorney now the court will appoint an attorney for you? _(Defendant's answer)_ .

9. Do you understand that the charge to which you are now pleading guilty is _____? (Defendant's answer) . Do you understand that this crime of _____ is defined as _(give elements of the charged crime in terms of facts alleged in charge, e.g., "knowingly or intentionally killing John Doe")_ ? _(Defendant's answer)_ . Do you understand that in order to prove you guilty the State must prove each part of the definition I just read beyond a reasonable doubt? _(Defendant's answer)_ .

10. Do you understand that by pleading guilty you are admitting that you committed the crime of _[name crime]_ you are charged with? _(Defendant's answer)_ .

11. Do you understand that by pleading guilty you will be judged guilty and sentenced without any trial? _(Defendant's answer)_ .

12. Do you understand that the crime to which you are pleading guilty is [Murder] [a Class ___ felony] [a Class _ misdemeanor]? _(Defendant's answer)_.

13. [Do you understand that the State has alleged you are an habitual criminal offender subject to a greater sentence? _(Defendant's answer)_ .]

    [Do you understand that the State has alleged you are a violent habitual criminal offender subject to life imprisonment for the charged crime? _(Defendant's answer)_ .]

    [Do you understand that the State has alleged you have a prior conviction of the crime with which you are charged and that you are subject to a greater sentence for that reason? _(Defendant's answer)_ .]

    [Do you understand that the State has alleged that you committed the charged crime[while possessing a firearm] [by using (a firearm) (a sawed-off shotgun) (a machine gun) (a firearm equipped with a muffler or silencer)] and that you are subject to a greater sentence for that reason? _(Defendant's answer)_ .]

    [Do you understand that the State has alleged that you are (an habitual controlled substance offender) (a habitual vehicular traffic offender) subject to a greater sentence? (Defendant's answer) .]

    [Do you understand that, if the offense to which you are pleading guilty involves the operation of a motor vehicle, notice of your conviction will be sent to the Bureau of Motor Vehicles and will count toward you being a Habitual Traffic Violator? Defendant's

answer.] [Note – this advice should suffice to comply with the I.C. 35-38-1-32 requirement for advice that conviction of certain offenses can qualify defendant for habitual violator status.]

STANDARD SENTENCING RANGES – CRIME PRIOR TO JULY 1, 2014:

Class	Minimum	Maximum	Advisory	Fines
Murder	45 years	65 years	55 years	$10,000
A	20 years	50 years	30 years	$10,000
B	6 years	20 years	10 years	$10,000
C	2 years	8 years	4 years	$10,000
D	6 months	3 years	1.5 years	$10,000
A misd.	1 yr. max.			$ 5,000
B misd.	180 days max.			$ 1,000
C misd.	60 days max.			$ 500

STANDARD SENTENCING RANGES – CRIME ON OR AFTER JULY 1, 2014:

Level	Minimum	Maximum	Advisory	Fines
Murder	45 years	65 years	55 years	$10,000
1	20 years	50 years	30 years	$10,000
2	10 years	30 years	17.5 years	$10,000
3	3 years	16 years	9 years	$10,000
4	2 years	12 years	6 years	$10,000
5	1 years	6 years	3 years	$10,000
6	6 months	2.5 years	1 year	$10,000
A misd.	1 year max			$ 5,000
B misd.	180 days max			$ 1,000
C misd.	60 days max			$ 500

14. Do you understand that the basic sentence for the crime you are charged with [see chart above] is a minimum of _(minimum)_ years, up to a maximum sentence of _(maximum)_

years? [Do you understand that the State has alleged special sentence increasing factors and that if the State proves those factors you can receive a sentence as great as (add maximum from Sentence Calculation, reproduced below?] (Defendant's answer) .

SENTENCE CALCULATION WITH ENHANCEMENTS – CRIME COMMITTED BEFORE JULY 1, 2O14:

Total basic sentence	Min.	Max.
Habitual Criminal – A, B, or C felony	1 x advisory	3x advisory, up to 30 yrs
Use of firearm in: felony against the person (IC 35-42) resulting in death or serious bodily injury; or kidnapping; or Class B felony criminal confinement		Up to 5 years
Use of firearm or possession of handgun, sawed-off shotgun, or machine gun -controlled substance offense		Up to 5 years
Use of sawed-off shotgun-controlled substance offense		Up to10 years
Use of machine gun or silencer-controlled substance offense		Up to 20 years
Habitual controlled substance offender	3 yrs., or 1 yr. if 3+ since last prior	8 yrs.
Repeat sexual offender		1X advisory, 10 year maximum
Murder or felony murder resulting in the termination of a human pregnancy	6 years	20 years
Criminal gang		1 x sentence on highest underlying felony
TOTAL MINIMUM AND MAXIMUM	TOTAL MIN.	TOTAL MAX.

SENTENCE CALCULATION WITH ENHANCEMENTS – CRIME COMMITTED ON OR AFTER JULY 1, 2014:

Total basic sentence	Min.	Max.

Habitual Criminal – A, B, or C felony	1 x advisory	3x advisory, up to 30 yrs
Habitual Criminal – Level 1, 2, 3, or 4	6 years	20 years
Habitual Criminal – Level 5 or 6	2 years	6 years
Use of firearm in: felony against the person (IC 35-42) resulting in death or serious bodily injury; or kidnaping; or Level 2 or 3 felony criminal confinement	5 years	20 years
Use of firearm or possession of handgun, sawed-off shotgun, or machine gun -controlled substance offense		5 years
Use of sawed-off shotgun-controlled substance offense		Up to10 years
Use of machine gun or silencer-controlled substance offense		Up to 20 years
Habitual vehicular traffic offender (for crimes committed on or after January 1, 2015)	1 year	8 years
Repeat sexual offender		1X advisory, 10 year maximum
Murder or felony murder resulting in the termination of a human pregnancy	6 years	20 years
Criminal organization	1 x sentence on underlying felony if sentencing for one felony only	1 x longest sentence imposed for underlying felonies if sentencing for more than one felony
TOTAL MINIMUM AND MAXIMUM	TOTAL MIN.	TOTAL MAX.

15. Do you understand that the Court can also impose a fine of up to $___ as part of the sentence, added on to any imprisonment you receive? _(Defendant's answer)_.

16. Do you understand that if you have any prior criminal convictions or prior juvenile delinquency adjudications, the Court may increase your sentence? _(Defendant's answer)_.

17. [From 50.70.250 or 50.70.251: advice of "nonsuspendible" sentence] Do you understand that**:** [the sentence for the crime of [name "nonsuspendible" crime here] to which you are pleading guilty now is "nonsuspendible," so that you cannot receive any probation for the first [insert "minimum sentence" term] years of the sentence you will receive?]
[If you have prior felony convictions, your record may make the sentence for the crime[s] to which you are pleading guilty now "nonsuspendible," so that you will not receive any probation for the first __ years of the sentence you will receive?] Has your lawyer discussed this possible effect of prior convictions on your eligibility for probation?]

18. [Advice of consecutivity to sentences in other prosecutions:] Do you understand that [you will begin to serve] [the court will decide whether you will serve] the sentence(s) for the crime(s) in this case only after you have finished serving [the sentence(s)] [___ years of the sentence(s)] for the crime(s) of _____ (charged against you in _____ Court) (for which you were sentenced by the _____ Court)?

19. [Advice of consecutivity for sentences in this prosecution:] Do you understand that the court may order the sentences for the crimes charged in this case served one at a time, what the law calls"consecutively," so that the time you spend imprisoned on the sentence for [here name crime in Count 1] will not count as time served on the sentence for [here name crime in Count 2]?

20. Are you now on parole, probation, or a suspended sentence? If so, do you understand that pleading guilty to the charge(s) in this Court could lead to your having your parole, probation, or suspended sentence revoked?

21. Are you now out on bond on another charge? Do you understand that pleading guilty to the charge(s) in this case could result in your bond's being revoked or increased for that other charge?

22. Are you a drug abuser or an alcoholic? _(Defendant's answer). (If yes, Defendant may request treatment instead of imprisonment for certain offenses as provided in Ind. Code 12-23-6, 23-12-7, or 12-23-8).

[23. {Use when the crime charged is "of domestic violence" as defined in IC 35-31.5-2-78: has as an element either the use of physical force or threatened use of a deadly weapon and was committed against:

(a) a current or former spouse, a parent, or guardian of defendant, or
(b) a person with whom defendant shared a child in common, or
(c) a person who was cohabitating with or had cohabitated with the defendant as a spouse, parent, or guardian, or
(d) a person who was or had been similarly situated to a spouse, parent, or guardian of the defendant).}

Defendant, do you understand that if you are convicted of the crime of (*name crime*) charged against you that you will lose the right to possess a firearm?]

24. [At the initial hearing, you indicated that you are not a citizen of the United States.] [Are you a citizen of the United States? (*If "no," give following advice)*] Has your attorney

advised you about the effect of a guilty plea on your immigration status? (Defendant's answer) .] Do you understand that pleading guilty can sometimes lead to being deported? Have you discussed the possibility of deportation with your attorney? (Defendant's answer) .] (*If the answers to these queries indicate that the defendant has not received advice about the consequences of the guilty plea on his immigration status and deportation, the Committee recommends that the judge continue the hearing to allow defense counsel to advise the defendant. The duration of the continuance should be sufficient to permit counsel to consult immigration laws and/or authorities so as to be able to competently advise the defendant.*)

25. [Only when there is a rejected plea agreement:] I have informed you that I will not accept the plea agreement which you and the State offered this Court. Do you understand that the Court is not bound by that agreement and that by pleading guilty now the sentence you will receive from the Court will not be limited by any bargain or agreement?

26. (Defendant) , have you or anyone else received any promises [besides the plea agreement you have filed] or been given anything of value to get you to enter the plea of guilty you are making today?

27. Has anyone forced or threatened or put you or anyone else in fear to get you to plead guilty to the charge(s) in this case?

28. Do you feel that the plea of guilty you are offering now is your own free choice and decision?

29. Do you still want to plead guilty?

30. (Prosecutor) (Defense Counsel) , would you please present the factual basis for the charges to which the Defendant has offered a guilty plea? [Factual basis now presented. Note: basis for recidivist status must be shown by documentary evidence of court records of prior convictions.]

31. (Defendant) , do you agree that you acted as described by (Prosecutor) (Defense Counsel) ?

32. (Defense Counsel), do you have a motion to withdraw the former plea of not guilty and to enter a plea of guilty?

33. (Defendant) , do you join in (Defense Counsel's) motion to enter a plea of guilty to the charge~~s~~ of (NAME CRIME IN CT. 1) ? (Defendant) , do you join in (Defense Counsel's) motion to enter a plea of guilty to the charge of (NAME CRIME IN CT. 2) ?

34. Use appropriate option below:

The Court now grants the defense motion to enter a plea of guilty to the charges of . The Court now finds that the Defendant is ___ years of age, that he/she understands the nature of the charge(s) against him/her to which he/she is pleading guilty, that he/she

understands the possible sentences for the crime(s), that his/her plea was freely and voluntarily made, and that there is a factual basis for the plea. The Court accepts the plea of guilty and finds _(Defendant)_ guilty of _(offense(s) charged)_.

It is now ordered and adjudged by the Court that the Defendant, _(Defendant's name)_, a male/female __ years of age, is guilty of the crimes of _(state crimes and grade and class of offense)_ as charged by the information (indictment).

The Court now orders a Presentence Investigation by the _____ Probation Department and sets this matter for hearing and sentencing on _____.

50.70.450 - CLASS D FELONY WRITTEN ADVISEMENT AND WAIVER OF RIGHTS

CAVEAT: Note that the use of a written advice of rights form for a D felony has not been approved in Indiana, so this form for D felonies may be disapproved by appellate decision. Indiana Code 35-35-1-2's express provision that a defendant may waive rights when pleading guilty to a misdemeanor "by signing a written waiver" could be held in a felony case as intended to prohibit advice of rights by written advisement. If this Class D felony written advisement is used, it should be followed with the 50.70.500 in-court colloquy as to defendant's understanding of the advisement. Such a procedure was upheld for a misdemeanor in Spencer v. State, 634 N.E.2d 500 (Ind. Ct. App. 1993).

NOTE: Some judges who employ a written advice of rights form always advise the defendant orally in open court of the waiver of the rights listed in paragraph 8 below. Judges who wish to use this procedure will find the paragraph 8 rights and an oral waiver advisement shown as an option in the following 50.70.500, the suggested in-court colloquy for use with a written advisement.

Before the Court may accept a guilty plea, you must be informed of certain facts and certain rights that you have. You must read this document carefully.

1. You have been charged with a Class D felony.

2. The maximum penalty for a Class D felony is 3.0 years imprisonment at the Department of Corrections and the minimum penalty is 6 months imprisonment at the Department of Corrections. The Court may suspend all or any part of the penalty, unless you have a juvenile record of the following kinds of delinquent acts which, if committed by an adult, would have been:
   one (1) Class A or Class B felony, or
   two (2) Class C or Class D felonies, and
   less than three (3) years have elapsed between the prior delinquent act(s) and the commission of the present alleged Class D felony,
   but even if you do have prior delinquent act(s) as listed above and they were committed within three (3) years of the commission of the alleged Class D felony in this case, the Court may still suspend all or part of the penalty for the Class D felony if it makes certain findings.

   Additionally, the Court may impose a fine of not more than $10,000.00 and the Court must impose court costs. If the Court suspends any part of your sentence, the Court must put you on probation.

3. The Court has the discretionary authority to sentence you as a Class A Misdemeanant instead of a Class D felon, unless you have received such treatment on a prior, unrelated Class D felony and that prior felony was committed within 3 years of the commission of this offense. The maximum penalty for a Class A misdemeanor is 365 days in jail. Additionally, the Court may impose a fine of not more than $5,000.00. The

Court may suspend any part of the sentence or fine. The Court may also put you on probation. The minimum penalty for a Class A Misdemeanor is no days in jail and no fine; however, court costs must be paid.

4. If you are pleading guilty to more than one offense, the Court may impose the penalties concurrently, i.e., together, or consecutively, i.e., one after the other.

5. If you were on probation or parole or were incarcerated at the time you committed this offense, your plea of guilty may have an adverse effect upon your probation, parole, or incarceration status, and any sentence that you may receive for this offense must be consecutive to any sentence that you may be on probation or parole, or imprisoned for.

6. If you have a prior history of juvenile or criminal offenses, that fact alone may cause you to receive a harsher penalty than you would otherwise receive.

7. You have the right to be represented by an attorney. If you cannot afford an attorney, the Court will appoint an attorney for you. You have the right to a continuance in which to hire an attorney and to have you attorney prepare you case and subpoena witnesses. If you choose to proceed without an attorney, you will be giving up these rights.

8. You have the right to a public and speedy trial by jury; the right to confront and cross-examine witnesses against you; the right to subpoena witnesses at no cost; the right to require that the State prove you guilty beyond a reasonable doubt at a trial at which you do not have to testify, but in which you may testify if you wish; and the right to appeal any decision made by the judge. By pleading guilty you will give up and waive each and every one of these rights.

9. Your guilty plea has been made knowingly and voluntarily and no promises, threats or force have been used to make you plead guilty.

10. [If the offense to which you are pleading guilty involves the operation of a motor vehicle, notice of your conviction will be sent to the Bureau of Motor Vehicles and will count toward you being a Habitual Traffic Violator.]

11. [If you are pleading guilty to D felony (dealing in a Schedule V controlled substance, Ind. Code 35-48-4-4)(dealing in a counterfeit substance, Ind. Code 35-48-4-5) (possession of a narcotic drug, Ind. Code 35-48-4-6) (possession of a controlled substance, Ind. Code 35-48-4-7) (dealing in marijuana, hash oil, or hashish, Ind. Code 35-48-4-10) (possession of marijuana, hash oil, or hashish, Ind. Code 35-48-4-11) and you made more than an incidental use of a motor vehicle in committing the offense [see *Adams v. State*, 960 N.E.2d 793 (Ind. 2014)]: (a) your license to operate a motor vehicle must be suspended for a period from six months to two years, to be determined by the court; (b) your motor vehicle registrations must be suspended for a period from six months to two years, to be determined by the court; and your ability to register motor vehicles will be suspended for a period from six months to two years, to be determined by the court.

12. [If you are pleading guilty to a Class D felony that involves the use, abuse, delivery, transportation, possession or manufacture of alcohol or drugs as material elements of

the offense, then your conviction will count toward you being a Habitual Substance Offender.]

13. [If you are pleading guilty to a crime “of domestic violence,” which involved either the use of physical force or a threat to use of deadly weapon and was committed against:

(a) your current or former spouse, your parent, or your guardian, or
(b) a person with whom you share a child in common, or
(c) a person who was cohabitating with or had cohabitated with you as a spouse, parent, or guardian, or
(d) a person who was or had been similarly situated to a spouse, parent, or guardian of yours),

then do you understand that you will lose the right to possess a firearm?]

14. If you and the State have entered into a plea agreement on your case, and the Judge accepts your guilty plea, the Judge must follow the plea agreement.

15. You have been given the opportunity to read the probable cause affidavit filed in this case and you agree that the facts contained in the affidavit are true and constitute a factual basis for your plea.

I hereby certify that I have read the above statements, understand each paragraph, and wish to waive and hereby do waive each and every right enumerated.

Dated:_____ _____

Defendant’s Signature

50.70.460 – LEVEL 6 FELONY WRITTEN ADVISEMENT AND WAIVER OF RIGHTS

CAVEAT: Note that the use of a written advice of rights form for a Level 6 felony has not been approved in Indiana, so this form for Level 6 felonies may be disapproved by appellate decision. Indiana Code 35-35-1-2's express provision that a defendant may waive rights when pleading guilty to a misdemeanor "by signing a written waiver" could be held in a felony case as intended to prohibit advice of rights by written advisement. If this Level 6 felony written advisement is used, it should be followed with the 50.70.500 in-court colloquy as to defendant's understanding of the advisement. Such a procedure was upheld for a misdemeanor in Spencer v. State, 634 N.E.2d 500 (Ind. Ct. App. 1993).

NOTE: Some judges who employ a written advice of rights form always advise the defendant orally in open court of the waiver of the rights listed in paragraph 8 below. Judges who wish to use this procedure will find the paragraph 8 rights and an oral waiver advisement shown as an option in the following 50.70.500, the suggested in-court colloquy for use with a written advisement.

Before the Court may accept a guilty plea, you must be informed of certain facts and certain rights that you have. You must read this document carefully.

1. You have been charged with a Level 6 felony.

2. The maximum penalty for a Level 6 felony is 2.5 years imprisonment at the Department of Corrections and the minimum penalty is 6 months imprisonment at the Department of Corrections. The Court may suspend all or any part of the penalty, unless you have a juvenile record of the following kinds of delinquent acts which, if committed by an adult, would have been:
   one (1) Class A or Class B felony, or
   two (2) Class C or Class D felonies, or
   one (1) Level 1, Level 2, Level 3, or Level 4 felony, or
   two (2) Level 5 or Level 6 felonies or
   one (1) Level 5 and one (1) Level 6 felonies, and
   less than three (3) years have elapsed between the prior delinquent act(s) and the commission of the present alleged Level 6 felony,
   but even if you do have prior delinquent act(s) as listed above and they were committed within three (3) years of the commission of the alleged Level 6 felony in this case, the Court may still suspend all or part of the penalty for the Level 6 felony if it makes certain findings.
   Additionally, the Court may impose a fine of not more than $10,000.00 and the Court must impose court costs. If the Court suspends any part of your sentence, the Court must put you on probation.

3. The Court has the discretionary authority to sentence you as a Class A Misdemeanant instead of a Level 6 felon, unless (1) you have received such Class A misdemeanor treatment on a prior, unrelated Class D or Level 6 Felony and that prior felony was

committed within 3 years of the commission of this new Level 6 offense, or (2) this new Level 6 felony charge is for domestic battery, or (3) this new Level 6 felony charge is for possession of child pornography. The maximum penalty for a Class A misdemeanor is 365 days in jail. Additionally, the Court may impose a fine of not more than $5,000.00. The Court may suspend any part of the sentence or fine. The Court may also put you on probation. The minimum penalty for a Class A Misdemeanor is no days in jail and no fine; however, court costs must be paid.

4. If you are pleading guilty to more than one offense, the Court may impose the penalties concurrently, i.e., together, or consecutively, i.e., one after the other.

5. If you were on probation or parole or were incarcerated at the time you committed this offense, your plea of guilty may have an adverse effect upon your probation, parole, or incarceration status, and any sentence that you may receive for this offense must be consecutive to any sentence that you may be on probation or parole, or imprisoned for.

6. If you have a prior history of juvenile or criminal offenses, that fact alone may cause you to receive a harsher penalty than you would otherwise receive.

7. You have the right to be represented by an attorney. If you cannot afford an attorney, the Court will appoint an attorney for you. You have the right to a continuance in which to hire an attorney and to have you attorney prepare you case and subpoena witnesses. If you choose to proceed without an attorney, you will be giving up these rights.

8. You have the right to a public and speedy trial by jury; the right to confront and cross-examine witnesses against you; the right to subpoena witnesses at no cost; the right to require that the State prove you guilty beyond a reasonable doubt at a trial at which you do not have to testify, but in which you may testify if you wish; and the right to appeal any decision made by the judge. By pleading guilty you will give up and waive each and every one of these rights.

9. Your guilty plea has been made knowingly and voluntarily and no promises, threats or force have been used to make you plead guilty.

10. [If the offense to which you are pleading guilty involves the operation of a motor vehicle, notice of your conviction will be sent to the Bureau of Motor Vehicles and will count toward you being a Habitual Traffic Violator.]

11. [**(offense committed before January 1, 2015)** If you are pleading guilty to D felony (dealing in a Schedule V controlled substance, Ind. Code 35-48-4-4)(dealing in a counterfeit substance, Ind. Code 35-48-4-5) (possession of a narcotic drug, Ind. Code 35-48-4-6) (possession of a controlled substance, Ind. Code 35-48-4-7) (dealing in marijuana, hash oil, or hashish, Ind. Code 35-48-4-10) (possession of marijuana, hash oil, or hashish, Ind. Code 35-48-4-11) and you made more than an incidental use of a motor vehicle in committing the offense [see *Adams v. State*, 960 N.E.2d 793 (Ind. 2014)]: (a) your license to operate a motor vehicle must be suspended for a period from six months to two years, to be determined by the court; (b) your motor vehicle registrations must be suspended for a period from six months to two years, to be

determined by the court; and your ability to register motor vehicles will be suspended for a period from six months to two years, to be determined by the court.]

[**(offense committed on or after January 1, 2015)** If you are pleading guilty to Level 6 felony (dealing in a Schedule V controlled substance, Ind. Code 35-48-4-4)(dealing in a Schedule IV controlled substance, Ind. Code 35-48-4-3) (dealing in marijuana, hash oil, or hashish, Ind. Code 35-48-4-10), and you made more than an incidental use of a motor vehicle in committing the offense [see *Adams v. State*, 960 N.E.2d 793 (Ind. 2014)], the court has the authority to order your driving privileges suspended for a period of up to two years.]

12. [**(offense committed on or after January 1, 2015)** If you are pleading guilty to a Level 6 felony in which (operation of a motor vehicle while intoxicated) (operation of a motor vehicle in excess of the statutory limit for alcohol) (operation of a motor vehicle with a controlled substance or its metabolite in your body) is a material element, your conviction of the felony will count in the future toward your being a habitual vehicular substance offender.]

13. [If you are pleading guilty to a crime "of domestic violence," which involved either the use of physical force or a threat to use of deadly weapon and was committed against:
    (a) your current or former spouse, your parent, or your guardian, or
    (b) a person with whom you share a child in common, or
    (c) a person who was cohabitating with or had cohabitated with you as a spouse, parent, or guardian, or
    (d) a person who was or had been similarly situated to a spouse, parent, or guardian of yours),
    then do you understand that you will lose the right to possess a firearm?]

14. If you and the State have entered into a plea agreement on your case, and the Judge accepts your guilty plea, the Judge must follow the plea agreement.

15. You have been given the opportunity to read the probable cause affidavit filed in this case and you agree that the facts contained in the affidavit are true and constitute a factual basis for your plea.

I hereby certify that I have read the above statements, understand each paragraph, and wish to waive and hereby do waive each and every right enumerated.

Dated:_____ _____
Defendant's Signature

50.70.475 MISDEMEANOR ADVISEMENT AND WAIVER OF RIGHTS

STATE OF INDIANA	)	IN THE _____ COURT
	)	
COUNTY OF ___	)	
STATE OF INDIANA	)	
vs.	)	CAUSE NO.:
_____	)	

MISDEMEANOR
WRITTEN ADVISEMENT AND WAIVER OF RIGHTS

Before the Court may accept a guilty plea, you must be informed of certain facts and certain rights that you have. You must read this document carefully.

1. You have been charged with a **Misdemeanor**. The Class of Misdemeanor determines the maximum and minimum penalty.

2. The maximum penalty for a Class C Misdemeanor is 60 days in jail and/or a fine of $500.00.

3. The maximum penalty for a Class B Misdemeanor is 180 days in jail and/or a fine of $1000.00.

4. The maximum penalty for a Class A Misdemeanor is 365 days in jail and/or a fine of $5000.00.

5. The minimum penalty for any Misdemeanor is 0 days in jail and $0.00 fine; however, court costs must be paid. Additionally, you may be placed on probation for up to one year.

6. If you pleading guilty to more than one Misdemeanor, the Court may impose the penalties concurrently, i.e., together, or consecutively, i.e., one after the other.

7. If you were on probation or parole or were incarcerated at the time you committed this offense, your plea of guilty may have an adverse effect upon your probation, parole, or incarceration status, and any sentence that you may receive for this offense must be consecutive to any sentence that you may be on probation or parole, or imprisoned for.

8. If you have a prior history of juvenile or criminal offenses, that fact alone may cause you to receive a harsher penalty than you would otherwise receive.

9. You have the right to be represented by an attorney. If you cannot afford an attorney, the Court will appoint an attorney for you. You have the right to a continuance in which to hire an attorney and to have you attorney prepare you case and subpoena witnesses. If you choose to proceed without an attorney, you will be giving up these rights.

10. You have the right to a public and speedy trial by jury; the right to confront and cross-examine witnesses against you; the right to subpoena witnesses at no cost; the right to require that the State prove you guilty beyond a reasonable doubt at a trial at which you do not have to testify, but in which you may testify if you wish; and the right to appeal any decision made by the judge. By pleading guilty you will give up and waive each and every one of these rights.

11. Your guilty plea has been made knowingly and voluntarily and no promises, threats or force have been used to make you plead guilty.

12. [If the misdemeanor to which you are pleading guilty is Ind. Code 35-48-4-10, [dealing in marijuana under 30 grams] [dealing in hash oil, hashish, or salvia less than 5 grams], the court the court has the authority to order your driving privileges suspended for a period of up to two years.]

13. [If the misdemeanor to which you are pleading guilty involves the operation of a motor vehicle, notice of your conviction will be sent to the Bureau of Motor Vehicles and will count toward you being a Habitual Traffic Violator.] [Note – this advice should suffice to comply with the I.C. 35-38-1-2 requirement for advice that conviction of certain offenses can qualify defendant for habitual violator status.]

14. [**(offense committed prior to July 1, 2014)** If you are pleading guilty to a Class A Misdemeanor that involves the use, abuse, delivery, transportation, possession or manufacture of alcohol or drugs as material elements of the offense, then your conviction will count toward you being a Habitual Substance Offender.]
[**(offense committed on or after January 1, 2015)** If you are pleading guilty to misdemeanor in which (operation of a motor vehicle while intoxicated) (operation of a motor vehicle in excess of the statutory limit for alcohol) (operation of a motor vehicle with a controlled substance or its metabolite in your body) is a material element, your conviction of the misdemeanor will count in the future toward your being a habitual vehicular substance offender.]

15. [If you are pleading guilty to a misdemeanor which involved either the use of physical force or a threat to use a deadly weapon and was committed against:
    (a) your current or former spouse, your parent, or your guardian, or
    (b) a person with whom you share a child in common, or
    (c) a person who was cohabitating with or had cohabitated with you as a spouse, parent, or guardian, or
    (d) a person who was or had been similarly situated to a spouse, parent, or guardian of yours),
then do you understand that you will lose the right to possess a firearm?]

16. If you and the State have entered into a plea agreement on your case, and the Judge accepts your guilty plea, the Judge must follow the plea agreement.

17. You have been given the opportunity to read the probable cause affidavit filed in this case and the facts contained in it are true and constitute a factual basis for your plea.

I hereby certify that I have read the above statements, understand each paragraph, and wish to waive and hereby do waive each and every right enumerated.

Dated:_____ _____

Defendant's Signature

50.70.500 - Dialogue for Use With Written Misdemeanor or D or Level 6 Felony Advice of Rights

CAVEAT: Note that the use of a written advice of rights form for a D or Level 6 felony has not been approved in Indiana, so the form 50-70-450 for D or Level 6 felonies may be disapproved by appellate decision. Indiana Code 35-35-1-2's express provision that a defendant may waive rights when pleading guilty to a misdemeanor "by signing a written waiver" could be held in a felony case as intended to prohibit advice of rights by written advisement followed by the form in-court colloquy as to defendant's understanding of the advisement - a procedure like that upheld for a misdemeanor in Spencer v. State, 634 N.E.2d 500 (Ind. Ct. App. 1993).

Note the optional oral advisement of the waiver of critical rights, which is listed in the box in the oral colloquy below as an option. Some judges prefer to give the defendant advice of the waiver of these rights orally rather than to rely solely on the advice in the written waiver form.

1. (Defendant) , is this your signature? [Show Defendant the advice of rights form, (50.70.450 (D felony)) (50.70.460 (Level 6 felony)) (50.70.475 (Misdemeanor)).]
2. How far did you go in school?
3. Did you read this Written Advisement and Waiver of Rights form, which you signed?
4. Did you understand the form when you read it?
5. [If not pro se:] Did your attorney explain the form to you?
6. Do you wish to change your plea to guilty?
7. Do you understand that when you plead guilty you give up your right to a trial?
8. Do you understand that when you plead guilty you give up each of the other rights this Advisement form tells you about?

> **Optional oral advice:** Do you understand that you have the right to a public and speedy trial by jury; the right to confront and cross-examine witnesses against you; the right to subpoena witnesses at no cost; the right to require that the State prove you guilty beyond a reasonable doubt at a trial at which you do not have to testify, but in which you may testify if you wish; and the right to appeal any decision made by the judge? Do you understand that by pleading guilty you will give up and waive each and every one of these rights?

9. Have you had any alcoholic beverages today?
10. Are you taking any medication?
11. Do you feel like you are thinking clearly today and understand this proceeding?
12. Have you been forced or threatened into pleading guilty?
13. Is the guilty plea you are making a free and voluntary act of your own choice?
14. [**Misdemeanors:**
    a. Have you made an agreement with the prosecutor about the sentence you are to receive on your plea of guilty?
    b. What is that agreement? (Have agreement explained by defendant, defense counsel, or prosecutor, and restate the agreement here for the record.)

c. Do you understand this agreement?
d. Have any promises been offered to you for your guilty plea other than what is in this agreement?
e. Do you understand that if the Court accepts the agreement now that the Court will sentence you as called for by the agreement?
f. [If "yes"] The Court accepts the agreement and will sentence defendant as called for by the agreement. The Court accepts defendant's plea of guilty and orders that a judgment of conviction be entered against defendant for [specify crime(s)].] (Proceed to sentencing.)]

[**D or Level 6 Felonies:**
a. I understand that you are changing your plea to guilty to have your sentence be as set out in this agreement you have made with the State. Is this the agreement you made? [Show defendant the agreement.]
b. What is the sentence you and the State have agreed on?
c. Do you understand that the Court has not yet agreed to that sentence?
d. Do you understand that if the Court decides to refuse the agreement you can take back your plea of guilty and plead not guilty again?
e. Have any promises been offered to you for your guilty plea other than what is in this agreement?
f. Let the record show that defendant's guilty plea and a written plea agreement between defendant and the State are now received by the Court without the Court's having accepted either the plea or the agreement. The Court orders a presentence report prepared, for the Court's review. The Court will not decide whether to accept the guilty plea and the agreement until the presentence report has been prepared and reviewed by the Court.]

53.00.000 Motions To Suppress And In Limine Contents

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53.00.000 Motions To Suppress And In Limine

53.05.000 Pretrial Motion To Suppress - In addition to challenging the admission of evidence a trial, a defendant may test its admissibility by means of a motion to suppress filed and heard prior to trial.

53.05.100 Court Not Obliged To Dispose Of Motion Prior To Trial - The filing of a motion to suppress evidence does not obligate the trial court to dispose of the issues raised by that motion prior to trial. Stated differently, it is within the trial court's discretion to hear and determine a motion to suppress prir to trial. The trial judge may properly defer resolution of those issues until the evidence in question is offered at trial. *Candler v. State*, 363 N.E.2d 1233, 1240 (Ind. 1977); *Magley v. State*, 335 N.E.2d 811, 821 (Ind. 1975), *overruled on other grounds*, *Smith v. State*, 689 N.E.2d 1238, 1246 (Ind. 1997).

53.05.300 Pretrial Ruling On Motion To Suppress Is Interlocutory - A pretrial ruling on a motion to suppress is interlocutory in nature. *Gasaway v. State*, 231 N.E.2d 513, 514-15 (Ind. 1967); *Wesley v. State*, 696 N.E.2d 882, 882-3 (Ind. Ct. App. 1998). The effect of this status is to limit the right of appeal to those situations in which the trial court is willing to certify an adverse ruling for appeal and the Court of Appeals is willing to accept jurisdiction. It also vests the trial court with the ability to reconsider its ruling at the time of trial. *Joyner v. State*, 678 N.E.2d 386, 393 (Ind. 1997).

53.10.000 Hearing Outside Presence Of Jury - Admissibility of evidence which is challenged as illegally obtained must be determined by the trial judge following a hearing which is conducted outside the presence of the jury. *Grimm v. State*, 556 N.E.2d 1327, 1300 (Ind. 1990); *Guajardo v. State*, 496 N.E.2d 1300, 1303 (Ind. 1986); *Bruce v. State*, 375 N.E.2d 1042, 1050 (Ind. 1978).

53.10.100 Judge Resolves All Issues Of Fact - The trial judge resolves all issues of fact necessary to a determination of admissibility. *Brock v. State*, 540 N.E.2d 1236, 1239 (Ind. 1989); *State v. Hunter*, 581 N.E.2d 992, 995 (Ind. Ct. App. 1991).

53.10.200 Rules Of Evidence Do Not Apply - In determining admissibility, the trial judge should not strictly apply rules of evidence. The one exception to this general principle requires the application of those rules, which pertain to the existence, and effect of recognized privileges. This approach is codified in Rule 104(a) of the Indiana Rules of Evidence.

53.15.000 Burdens Of Production And Persuasion - When a defendant challenges the admissibility of evidence, claiming it was illegally obtained, he has the burden of going forward with evidence in support of that challenge. Failure to do so should result in the rejection of the challenge. *Timberlake v. State*, 690 N.E.2d 243, 257 (Ind. 1997); *Simpson v. State*, 506 N.E.2d 473, 474 (Ind. 1987). Assuming that a defendant produces sufficient evidence to support his or her challenge, the burden shifts to the prosecution to produce evidence tending to show that the subject evidence was properly obtained. *See, e.g., Murrell v. State*, 421 N.E.2d 638 (Ind. 1981)(when defendant showed police had no search warrant, burden

fell on prosecutor to show police action was within an exception to the warrant requirement). When the issue is properly joined, the prosecution bears the ultimate burden of proof regarding admissibility.

53.15.100 **State Burden Of Persuasion - FOURTH AMENDMENT PREPONDERANCE** - Challenged evidence taken in a law enforcement search is admissible if the prosecution proves by a preponderance of the evidence that it was not obtained in violation of the Fourth Amendment. *Triplett v. State*, 437 N.E.2d 468, 468-69 (Ind. 1982).

53.15.200 **State Burden Of Persuasion - Confession** - In *Magley v. State*, 335 N.E.2d 811, 821 (Ind. 1975), *overruled on other grounds*, *Smith v. State*, 689 N.E.2d 1238, 1246 (Ind. 1997), the Indiana Supreme Court held that the prosecution must overcome a voluntariness challenge under the Indiana Constitution to a defendant's inculpatory statement by proof beyond a reasonable doubt. This principle, as enunciated in *Magley*, was explained by the holding in *Smith v. State*, 689N.E.2d 1238, 1246 (Ind. 1997). The *Smith* case appears to stand for the proposition that an Indiana court, when ruling on a challenge to the admissibility of such a statement which is grounded in the United States Constitution, should apply the proof by a preponderance of the evidence standards employed by the federal courts. This holding further appears to leave intact the *Magley* test of proof beyond a reasonable doubt in cases in which a defendant challenges admissibility under rights guaranteed by the Indiana Constitution, Art. 1, 11 and 14.

53.15.450 **State Burden Of Persuasion - Custodial Interrogation Waiver** - The prosecution's proof of a valid waiver of rights to counsel and to remain silent in the face of custodial police interrogation must be sustained beyond a reasonable doubt if the defendant asserts those rights as guaranteed by the Indiana Constitution. *Wilcoxen v. State*, 619 N.E.2d 574, 577 (Ind. 1993); *S.A. v. State*, 654 N.E.2d 791, 796 (Ind. Ct. App. 1995).

53.15.500 **State Burden Of Persuasion - Lineup - Clear And Convincing** - The Indiana Supreme Court held in the case of *Young v. State*, 700 N.E.2d 1143, 1146 (Ind. 1998), that a defendant's assertion that identification testimony was tainted by an impermissibly suggestive pre-trial lineup must be overcome by clear and convincing evidence.

53.15.800 **Beyond A Reasonable Doubt Recommended When No Precedent** - It is suggested that, unless the trial judge is able to locate a case which is clearly analogous to the facts before the court, it is safest to apply a proof beyond a reasonable doubt standard to the prosecution's efforts in opposition to a defendant's motion to suppress.

53.20.000 **Trial Objection After Unsuccessful Motion To Suppress** - Under most circumstances, a defendant will object at trial to the admission of evidence, which has been the subject of an unsuccessful motion to suppress. This may be done solely to create a record for appeal. Assuming that the objection at trial is based upon the same grounds as those asserted in the motion to suppress, the ruling

will almost certainly be the same. Occasionally, however, a defendant may raise new factual or legal issues, which bear on the admissibility of the subject evidence. In such circumstances, a trial judge should require that defense counsel provide an accurate summary of the new issue. Thereafter the judge should undertake a two-state analysis. If the judge determines that the new issue, even if resolved in the defendant's favor, would not render the subject evidence inadmissible, the objection may be summarily overruled. If, on the other hand, the trial judge deems the new matter to be of sufficient substance, he or she may defer ruling until another hearing regarding admissibility has been held. Such a hearing should be limited in scope to the newly raised issue and should be conducted outside the presence of the jury. *Magley v. State*, 335 N.E.2d 811 (Ind. 1975), *overruled on other grounds*, *Smith v. State*, 689 N.E.2d 1238, 1246 (Ind. 1997).

53.20.200 **Further State Evidence If Motion To Suppress Denied** - Once given evidence is determined to be admissible, as a general rule the prosecution need not present any additional proof at trial regarding admissibility. *Nash v. State*, 433 N.E.2d 807, 810 (Ind. Ct. App. 1982). An exception to this rule arises when the evidence in question was obtained pursuant to a search warrant. In such circumstances, the prosecution is obligated to offer the warrant as evidence, but this procedure occurs outside the presence of the jury and the warrant should not be submitted to the jury. *Guajardo v. State*, 496 N.E.2d 1300, 1303 (Ind. 1986).

56.00.000 Jury Lists And Panels Contents

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FORMS

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56.00.000 Jury Lists And Panels

56.01.000 **JURY POOL** - These rules shall govern petit jury assembly, selection, and management in all courtsof the State of Indiana. Rules 2 through 10 shall govern grand jury assembly and selection. Ind. Jury Rule 1.

The judges of the trial courts shall administer the jury assembly process. The judges may appoint clerical personnel to aid in the administration of the jury system. Any person appointed to administer the jury assembly process is a jury administrator. The jury administrator shall compile the jury pool annually The jury administrator shall compile the jury pool annually by selecting names from lists approved by the Supreme Court**.** Ind. Jury Rule 2 (as amended effective Jan. 1, 2006).

The jury administrator shall randomly draw names from the jury pool as needed to establish jury panels for jury selection. Prospective jurors shall not be drawn from bystanders or any source except the jury pool. Ind. Jury Rule 3.

56.10.025 **SUBSTANTIAL COMPLIANCE IF SELECTION IMPARTIAL AND RANDOM** – "A completely random selection of jurors is not required so long as the system used is impartial and not arbitrary. Complete impartiality in the selection system should be sought and the more random the process, the less will be the appearance of arbitrariness. The major requirement should be that the system of selection is not arbitrary. Jury commissioners are vested with a certain amount of discretion, however, and a substantial following of the statutory requirements will suffice." *Wireman v. State*, 432 N.E.2d 1343 (Ind. 1982). Substantial compliance with statutory requirements for jury selection is sufficient so long as selection system used is impartial and not arbitrary; and minor irregularities in compliance with jury selection statutes do not constitute reversible error. *Smith v. State*, 658 N.E.2d 910 (Ind. Ct. App. 1995).

56.10.075 **IRREGULARITIES WAIVED IF NOT PROMPTLY RAISED** - Defendant could not complain on appeal in regard to improprieties in jury selection process in criminal proceeding where defense counsel, who could have discovered the improprieties before trial, did not make a timely objection. *Swinehart v. State*, 372 N.E.2d 1244 (Ind. Ct. App. 1978).

56.10.100 **COMPLETE FAILURE TO COMPLY IS SUBSTANTIAL DEFECT** - Where grand jurors were not chosen at random from voter registration list, but instead jury commissioners chose from telephone directory those whom they believed to be of good repute for intelligence and honesty, commissioners ignored requirement that each county commissioner's district be represented on jury list in proportion to its population, and commissioners ignored requirement that they place names in jury selection box on slips of paper of uniform color, there was no random and impartial selection of jurors and indictments returned by grand jury composed of jurors drawn from that list were void. *State ex rel. Burns v. Sharp*, 393 N.E.2d 127 (1979).

56.10.125 **IRREGULARITIES COMPROMISING RANDOM SELECTION ARE SUBSTANTIAL** -Jury selection procedure whereby jury commissioners selected every tenth name from voter registration records in county clerk's office and placed names on a list in the same order in which they were drawn from alphabetized precinct voter registration lists did not substantially comply with requirements of IC 1971, 33-4-5-2 for jury selection. *Cross v. State*, 397 N.E.2d 265 (1979).

56.10.150 **IF RANDOM SELECTION NOT COMPROMISED, COMPLIANCE IS SUBSTANTIAL** - For example:
•Although box for grand jury selection was not purged from time to time and therefore the same name might appear in the box twice and although commissioners did not always select names in presence of each other, where selection was made in proper and random manner, jury commissioners did substantially comply with statutory requirements [Ind. Code " 33-4-5-1 et seq.] in selection of grand jury. *Wireman v. State*, 432 N.E.2d 1343 (Ind. 1982).
•Clerk's error, which was not shown by defendant to have resulted in purposeful discrimination prejudicing defendant's right to fair and impartial trial by jury, in failing to certify list of jurors as drawn for service was harmless. *Lockridge v. State*, 359 N.E.2d 589 (App. 1 Dist. 1977).
•Use of voter registration figures rather than census figures to establish jury selections proportional to population of each jury commissioner's district constitutes substantial compliance with statutory requirement that selections be proportioned to population of each commissioner's district. *Moore v. State*, 427 N.E.2d 1135 (App. 3 Dist. 1981).

56.20.000 **SIXTH AMENDMENT REQUIRES JURY SELECTED FROM FAIR CROSS SECTION** - The Sixth Amendment jury trial right requires that the jury be selected using procedures which, by avoiding practices which would permit systematic exclusion of a particular racial or other distinctive group, provide for the selection of a petit jury from a representative cross section of the community. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

56.20.025 **DEFENDANT'S SIXTH AMENDMENT BURDEN** – "[T]o establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process." *Duren v. Missouri*, 439 U.S. 357, 368 (1979).

56.20.100 **EQUAL PROTECTION BANS DISCRIMINATION AGAINST IDENTIFIABLE GROUPS** - The federal Constitution's Fourteenth Amendment Equal Protection Clause prohibits purposeful or "invidious" discrimination which excludes particular racial or other identifiable groups from the jury selection process. *Swain v. Alabama*, 380 U.S. 202 (1965). It has also been noted that the Indiana Constitution prohibits such discrimination. *See Swain v. State*, 215 Ind. 259, 18 N.E.2d 921 (1939).

56.20.125 **DEFENDANT'S EQUAL PROTECTION SHOWING** - A defendant may establish an inference of purposeful or deliberate discrimination by showing a "significant

disparity" is present between the percentage of the members of a race or other particular group selected for jury service and the percentage of that race or group in the community; after defendant establishes a "prima facie" case of invidious discrimination and exclusion, the state has the burden of overcoming the inference of discrimination. *Sanders v. State*, 259 Ind. 43, 284 N.E.2d 751 (Ind. 1972). *See Tewell v. State*, 339 N.E.2d 792 (Ind. 1976) (defendant's assertion that only one black was called to serve as juror and statement of trial counsel in pretrial motion that his observation of prospective jurors of another trial revealed only two jurors out of the 50 were black failed to sustain burden cast on defendant to show an Equal Protection violation in the purposeful exclusion of blacks from jury).

56.20.150 **CONSTITUTIONS DO NOT REQUIRE ANY PARTICULAR GROUP ON JURY** – "[I]n holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition . . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975), *quoted in Phillips v. State*, 376 N.E.2d 1143 (Ind. 1978).

56.20.175 **POLICY OF NO SERVICE FOR A YEAR NO CROSS SECTION VIOLATION** - Defendant's right to trial by jury before a jury selected from a fair cross section of the community was not violated by exclusion of persons who had served as jurors within the preceding year in that the standards and probable purposes for the disqualification were reasonable. *Woods v. State*, 547 N.E.2d 772 (Ind. 1989).

56.20.200 **SYSTEM CANNOT EXCLUDE PERSONS WHO DO NOT OWN REAL PROPERTY** - Jury selection system which excludes from jury service all persons who do not own real property is, prima facie, systematic discrimination and unconstitutional. *Wooten v. State*, 418 N.E.2d 538 (Ind. Ct. App. 1981).

56.20.225 **SYSTEM USING BOTH PERSONAL AND REAL PROPERTY OWNERS SUFFICES** -System by which jury is selected from assessment rolls of owners of real and personal property is not unconstitutional per se. *Wooten v. State*, 418 N.E.2d 538 (Ind. Ct. App.1981). *See also Thomas v. State*, 443 N.E.2d 1197 (Ind. 1983) (The use of real property tax rolls in the selection process of a jury panel does not deny the defendant the right to a jury drawn from a source fairly representative of the community, even though that source may exclude 18 to 24-year-old persons).

56.20.250 **VOTER LIST SUFFICES FOR FAIR CROSS SECTION** - Selection of a jury panel from a list of registered voters is permissible, even if the county contains a large number of residents of a particular religion who do not vote and are thus excluded from jury service. *Lamar v. State*, 366 N.E.2d 652 (Ind. 1977).

56.25.000 **Notice of selection for jury pool and summons for jury service -**
Not later than seven (7) days after the date of the drawing of names from the jury pool, the jury administrator shall mail to each person whose name is drawn a

juror qualification form, and notice of the period during which any service may be performed. The judges of the courts of record in the county shall select, by local rule, on of the following procedures for summoning jurors:

(a) Single tier notice and summons. The jury administrator may send a summons at the same time the jury qualification form and notice is mailed. If so, the jury administrator shall send the jury qualification form and summons to prospective jurors at least six (6) weeks before jury service.

(b) Two tier notice and summons. The jury administrator may send summons at a later time. If the jury administrator sends the jury qualification form and notice first, the jury administrator shall summon prospective jurors at least one (1) week before service.

The summons shall include the following information: directions to court, parking, public transportation, compensation, attire, meals, and how to obtain auxiliary aids and services required by the Americans with Disabilities Act. The judge may direct the jury administrator to include a questionnaire to be completed by each prospective juror.

A judge may order prospective jurors to appear upon less notice when, in the course of jury selection, it becomes apparent that additional prospective jurors are required in order to complete jury selection.

A judge may authorize the jury administrator to use technological programs for receiving responses to juror qualification forms or to supplement information provided to jurors in the notice of selection and summons. The judge may authorize automated telephone services or web-based programs which include appropriate verification, such as juror identification numbers, PIN numbers, and passwords. The judge must ensure that jurors who are unable or unwilling to use these technological programs are able to complete the proper forms and receive the above-required information by contacting the jury administrator.

Ind. Jury Rule 4 (as amended effective Jan. 1, 2006).

56.25.050 Questionnaires are confidential by supreme court rule - Personal information relating to a juror or prospective juror not disclosed in open court is confidential, other than for the use of the parties and counsel. The court shall maintain that confidentiality to an extent consistent with the constitutional and statutory rights of the parties. Ind. Jury Rule 9(L).

56.40.025 **OBJECTIONS TO QUALIFICATION OF A JUROR WAIVED IF NOT TIMELY MADE** - Objections to competency of juror are waived by neglecting to use due diligence in urging them as well as by failure of party, afterwards complaining, to avail himself of such objections at proper time after they have come to his knowledge, especially where qualifications are questioned because proposed juror is not a freeholder or householder or voter of county. *Maddox v. State*, 102 N.E.2d 225 (1951).

56.40.050 **JUROR QUALIFICATIONS** - The court shall determine if the prospective jurors are qualified to serve, or, if disabled but otherwise qualified, could serve with reasonable accommodation. In order to serve as a juror, a person shall state under oath or affirmation that he or she is:

(a) a citizen of the United States;

(b) at least eighteen (18) years of age;

(c) a resident of the summoning county;
(d) able to read, speak, and understand, the English language;
(e) not suffering from a physical or mental disability that prevents him or her from rendering satisfactory jury service;
(f) not under a guardianship appointment because of mental incapacity;
(g) not a person who has had rights to vote revoked by reason of a felony conviction and whose rights to vote have not been restored; and
(h) not a law enforcement officer, if the trial is for a criminal case.
Persons who are not eligible for jury service shall not serve.
Ind. Jury Rule 5.

56.40.200 **EXEMPTIONS** – Effective July 1, 2006, P.L. 4-2006 repeals all jury exemptions.

56.40.500 **DEFERRAL** - The judge or judge's designee may authorize a deferral of jury service for up to one (1) year upon a showing of undue hardship, extreme inconvenience, or public necessity.

56.40.700 **DOCUMENT DISQUALIFICATIONS, EXEMPTIONS, AND DEFERRALS** - The facts supporting juror disqualifications, exemptions, and deferrals shall be recorded under oath or affirmation. No disqualification, exemption, or deferral shall be authorized unless the facts support it. These records shall be kept for a minimum of two (2) years. Ind. Jury Rule 8.

56.60.000 **NUMBER OF PETIT JURORS** - I.C. 35-37-1-1, as amended effective July 1, 2014, provides:
If a defendant is charged with:
(1) murder or a Level 1, Level 2, Level 3, Level 4, or Level 5 felony,the jury shall consist of twelve (12) qualified jurors unless the defendant and prosecuting attorney agree to a lesser number; or

(2) any other crime, the jury shall consist of six (6) qualified jurors.

As of August 1, 2014, a proposed amendment of Jury Rule 16 was before the Supreme Court to add the new Levels 1 through 6 felonies to the Rule as provided for in I.C. 35-37-1-1 above. Until an amendment is adopted and becomes effective, the Rule continues to refer only to jurors in Class D felony through Class A felonies, as follows:

> In all criminal cases, if the defendant is charged with: murder, a Class A, B, or C felony, including any enhancement(s), the jury shall consist of twelve (12) persons, unless the parties and the court agree to a lesser number of jurors. If the defendant is charged with any other crime, the jury shall consist of six (6) persons. The court shall determine the number of alternate jurors to be seated. The verdict shall be unanimous. Ind. Jury Rule 16.

56.60.025 **FEDERAL CONSTITUTION MANDATES ONLY 6 PERSON JURY** - Criminal defendant's right to trial by jury does not include the right to be tried by a 12-person jury, but Sixth Amendment requires a minimim number of six. *Williams v. Florida,* 399

U.S. 78 (1970) (twelve not required); *Ballew v. Georgia*, 435 U.S. 223 (1978) (six is minimum).

56.60.035 **INDIANA CONSTITUTION PERMITS 6 PERSON JURY** - "While a felony defendant has a constitutional right to a jury trial, nothing in the federal or Indiana constitutions guarantees him a specific number of jurors. There is, in effect, no constitutional difference between a six-member jury and a twelve-member jury so long as each provides the requisite safeguard against over-zealous prosecutors and eccentric judges." *O'Brien v. State*, 422 N.E.2d 1266 (Ind. App. 1981). The right to a twelve-member jury is a purely statutory matter of trial procedure; it is not a fundamental right. *Croney v. State*, 710 N.E.2d 212 (Ind. Ct. App. 1999).

56.60.050 **NUMBER OF JURORS DETERMINED BY CLASS OF OFFENSE CHARGED** - Defendant who was charged with carrying a handgun without a license, which was made Class C felony by virtue of defendant's prior felony conviction, was entitled to be tried by 12-person jury, even though crime would only have been a misdemeanor without the prior conviction, and six-person jury would have been appropriate, without prior felony conviction. *Henderson v. State*, 690 N.E.2d 706 (Ind. 1998).

56.60.075 **ENHANCEMENTS NOT CHANGING CRIME CLASS DO NOT CHANGE NUMBER** -Defendant who was charged with theft, a class D felony, and with being an habitual offender, was entitled only to a six-person jury at both guilt and habitual offender phases of the trial, notwithstanding claim that habitual offender sentencing required a 12-person jury. *Dyer v. State*, 460 N.E.2d 511 (Ind. 1984). Defendant's right to fundamental due process was not violated by allowing six-person jury which had convicted him of attempted escape and felony conspiracy to commit escape to reconvene and adjudge defendant to be habitual offender, even though penalty involved on habitual offender finding was equivalent to presumptive penalty for class A felony conviction, for which 12-person jury was required. *Newland v. State*, 459 N.E.2d 384 (Ind. 1984).

56.60.100 **CONSENT TO BE TRIED BY LESS THAN TWELVE** - Defendant entitled to jury of 12 may agree to be tried by lesser number at any time prior to verdict. *Taylor v. State*, 687 N.E.2d 606 (Ind. Ct. App. 1997). Defendant's attorney could consent, on behalf of defendant, to trial by less than a twelve-person jury, even though statute requires defendant's consent, since the consent did not involve a fundamental right but merely a matter of trial procedure; defense counsel's consent to a six-person jury, rather than a twelve-person jury, did not constitute ineffective assistance of counsel. *Judy v. State*, 470 N.E.2d 380 (Ind. Ct. App. 1984).

56.60.150 **FAILURE TO OBJECT WAIVES ERROR IN NUMBER OF JURORS** - Because the right to be tried by a jury of twelve members is not a constitutional right, a defendant's failure to make an express objection to the trial court either personally or through his counsel constitutes a valid waiver of the right. *Croney v. State*, 710 N.E.2d 212 (Ind. Ct. App. 1999).

56.65.000 **ALTERNATES SELECTED THE SAME AS REGULAR JURORS** - Alternate jurors are selected in same manner as regular jurors, have the same qualifications, are subject to the same examination and challenges and take the same oath and are prepared at all times to replace a regular juror. *Landers v. State*, 331 N.E.2d 770 (Ind. Ct. App. 1975). See also Indiana Rules of Trial Procedure, Rule 47.

56.70.000 **PLACING JUROR OUT OF DRAWING ORDER NOT REVERSIBLE** - Trial court's placement of juror on venire out of order from which names were drawn did not prejudice defendant who exercised peremptory challenge against that juror and did not exercise all of his challenges. *Justice v. State*, 552 N.E.2d 844 (App. 1 Dist. 1990).

56.75.000 **TERM OF SERVICE** - (a) A person who appears for service as a petit juror serves until the conclusion of the first trial in which the juror is sworn, regardless of the length of the trial or the manner in which the trial is disposed. A person who appears for service but is not selected and sworn as a juror completes the person's service when jury selection is completed; provided, however, jurors who are called for jury service are eligible to serve in any court in that county on the day summoned.
(b) A person who:
(1) serves as a juror; or
(2) serves until jury selection is completed, but is not chosen to serve as a juror;
may not be selected for another jury panel until all nonexempt persons in the jury pool for that year have been called for jury duty. Ind. Jury Rule 9.

56.90.025 MODEL JUROR QUESTIONNAIRE

COMMENTS:

Purpose:

Early identification of jurors who are not legally qualified to serve. Basic screening information for the Court and attorneys.

Format:

(a) General information; (b) questions pertaining to legal qualifications and bases for excuse; (c) background questions to identify those jurors who might be unsuitable for a particular trial.

Use:

The questionnaire may be mailed to prospective jurors (a) to be completed and brought with them when they appear for duty; (b) to be mailed back and used for initial screening; or (c) completed upon arrival at the courthouse. And accompanying explanation (written if mailed, verbal if at the courthouse) should, at the minimum, state:

1. The obligation of every American citizen to serve.
2. The major reasons a prospective juror might not be qualified.
3. The importance of truthful and complete answers on the form, not only for administrative efficiency, but also for the integrity of the judicial/jury system.

MODEL JUROR QUESTIONNAIRE

STATE OF INDIANA

_____ COURT

MODEL JUROR QUESTIONNAIRE

Note: This paragraph should be modified to reflect the local use of questionnaires.

TO THE JUROR:

Your name has been selected for potential service as a juror. In order to determine your qualifications to sit as a juror, you are asked to complete and return this personal questionnaire. The questions asked in this questionnaire could be asked of you in open court. You are required to answer the questions truthfully. The information is NOT for the public. Only the judge and the attorneys who will be involved in jury cases during your term will see your answers. Jury service is an obligation of every

American citizen, and this duty should not be taken lightly. Trial by juries is the keystone of our system of justice. Its successful operation requires the intelligent and unbiased judgment of qualified jurors.

1. Name _____ Age ____
   (first) (middle) (last)

2. Home address _____

3. Current marital status: (Check one) Married _____ Divorced _____
   Single _____ Widow _____
   Separated ____ Widower _____

4. Number of children (total) : _____ Children at home: _____

5. List all members of your family residing in your home (omit names):

   Relationship Age Occupation Employer_____
   _____
   _____
   _____
   _____

6. Home phone number: _____

7. Place of birth: _____

8. Employer (if retired, give last employer): _____

9. Business address: _____

10. Business phone number: _____

11. Education: _____

12. (a) Your present occupation : _____
    (b) Years employed by present employer : _____
    (c) Prior occupations and employers (past five years): _____
    _____
    _____
    _____

13. Spouse's present occupation and employer: _____
    _____

    If spouse retired or deceased, give last occupation and employer: _____
    _____

15. Years of residence: Present address _____ years.

State of Indiana _____ years.
_____ County _____ years.

16. Have you ever served as a juror? Yes ____ No ____

17. How many miles is it from your house to the courthouse? _____

18. Are you presently serving with either the state or national guard?
Yes ____ No ____

19. Are you a citizen of the United States?Yes ____ No ____

20. Can you read, write, speak, and understand the English language?
Yes ____ No ____

21. Do you have any physical or mental infirmity impairing your capacity to serve as a juror?
Yes ____ No ____

22. Were you ever convicted of a state or federal crime punishable by imprisonment for more than one year? Yes ____ No ____

23. If yes, were your civil rights restored by pardon or amnesty?
Yes ____ No ____

24. Are any charges pending against you?
Yes ____ No ____

25. Have you or any member of your immediate family been in Court for any reason (other than a traffic ticket)? Yes ____ No ____

26. Have you or any member of your family been involved in a lawsuit (even as a witness)?
Yes ____ No ____

27. Have you are any member of your immediate family been a victim of a crime?
Yes ____ No ____

28. Are you related to or close friends with any law enforcement officers?
Yes ____ No ____

29. Do you have religious convictions or conscientious scruples which would prevent your sitting in judgment of another person? Yes ____ No ____

30. Is there any financial burden imposed upon you by jury service which would interfere with your sitting as a member of the jury?
Yes ____ No ____

31. Are you or any member of your immediate family employed by or have any interest in or own any stock of an insurance company?
Yes ____ No ____

32. Do you know of any other valid and legal reason for your disqualification from jury service or why you could not serve as a fair and impartial juror?

Yes ____ No ____

If yes, please EXPLAIN FULLY: _____
_____
_____
_____
_____

I affirm, under penalties for perjury, that the foregoing is true to the best of my information and belief.

_____

_

Signature

Date: _____

57.00.000 Voir Dire Contents

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57.02.000 Oath to venire
57.03.000 Scope of voir dire questions
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57.90.100 Challenges for cause, jury rule 17
57.92.000 Checklist—objection that state or defense peremptory challenges are racially or gender discriminatory

57.00.000 Voir Dire

57.01.000 **Calling in order drawn.** The sheriff or bailiff shall call the jurors to the jury box in the same order that their names were drawn. Ind. Code 33-28-4-9. *Phillips v. State*, 376 N.E.2d 1143 (Ind. 1978)**.**

57.02.000 **Oath to venire.** The jury panel consists of those prospective jurors who answered their summons by reporting for jury service. The judge shall administer the following to the prospective jurors of the jury panel: "Do you swear or affirm that you will honestly answer any question asked of you during jury selection?" Jury Rule 11. [Note that this oath is included in Form 57.90.010, "Introduction to the Case," which appears at the end of this chapter.]

57.03.000 **Scope of voir dire questions.** Examination of jurors shall be pursuant to Trial Rule 47. Jury Rule 15. Purpose of questions are to search for and eliminate bias, but not to condition prospective jurors to be receptive to examiners evidence. *Winningham v. State*, 432 N.E.2d 24 (Ind. 1982). The extent of examination is not governed by fixed rules. *Sasraceno v. State*, 177 N.E. 436 (Ind. 1931). The boundary line is good faith and is largely in the discretion of the trial court. *Martin v. Lily*, 121 N.E. 443 (Ind. 1919). Any question pertinent to the issue and tending to elicit information upon which to base a challenge either peremptory or for cause is proper. *Baker v. State*, 129 N.E. 468 (Ind. 1921).

57.03.100 **Questions concerning race.** When the race of defendant and victim differs, there is no right per se to have voir dire specifically on racial prejudice; on the other hand, there is a right when "under all of the circumstances there is "a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be indifferent as (they stand) unsworn"; while there is not a right just because defendant and victim are of different races, there is a right to voir dire on racial prejudice when the races of defendant and victim are different and the death penalty is sought. *Turner v. Murray*, 476 U.S. 28 (1985).

57.03.300 **Questions about penalties.** In a murder case the court may tell prospective jurors that the death penalty will not be at issue in order to avoid concern about an attempted disqualification due to having to recommend for or against capital punishment. *Burgess v. State*, 444 N.E.2d 1193 (Ind. 1983).

57.03.325 **Questions by defendant.** Trial court has discretion to prohibit a defendant from posing questions to voir dire. *Lock v. State*, 403 N.E.2d 1360 (Ind. 1980).

57.04.000 **Time restrictions on voir dire.** The court may place reasonable advance time limitation of voir dire by the parties. Ind. Tr. 47(d).

57.04.500 **Defendants right to interpreter.** A criminal defendant who cannot speak English is entitled to an interpreter during the jury selection process. *Martinez v. State*, 449 N.E.2d 307 (Ind. App. 3rd Dist. 1983).

57.05.000 **Juror misconduct.** Juror's failure to state her relationship to the victim was misconduct and was prejudicial to the defendant because it deprived him of the right to challenge. *Johnston v. State*, 155 N.E.2d 129 (Ind. 1959). If answer of juror was inaccurate concerning juror's relationship to prosecution, it was misconduct and prevented defendant from investigating a possible source of future bias. *Barnes v. State*, 330 N.E. 2d 743 (Ind. 1975). The fact that a witness or party was on a juror's "expansive list" of Facebook "friends" does not, standing alone, establish a prejudicial relationship or misconduct, if the juror was not asked about Facebook "friendships." *Slaybaugh v. State*, 47 N.E. 3d 607 (Ind. 2016), adopting Court of Appeals opinion found at 44 N.E.2d 111.

57.06.000 **Court's role.** The court shall permit the parties or their attorneys to conduct the examination of prospective jurors or the court may conduct the examination. If the court conducts the examination, the parties or their attorneys may supplement the examination by further inquiry. Ind. Tr. 47(a). Trial courts should assume an active role in voir dire and exercise broad discretion to restrict interrogation to what is pertinent to testing the capacity and competence of jurors; examination to condition jurors to be receptive to a party's case is improper. *Robinson v. State*, 297 N.E.2d 409 (Ind. 1973).

57.07.000 **Counsel's role.** Trial Rule 47(d) does not demand that the court allow the attorneys to speak directly to the prospective jurors. *White V. State*, 330 N.E. 2d 84 (Ind.1975)

57.08.000 **Number of jurors to be selected – murder, Level 1 to 5 or A, B, and C felony.** The jury shall consist of twelve (12) qualified jurors in a murder, Level 1, Level 2, Level 3, Level 4, Level 5, or Class A, B, or C felony, unless the defendant and prosecuting attorney agree to a lesser number. . Jury Rule 16(a); Ind. Code 35-37-1-1.

57.08.400 **Number of jurors in Level 1 or D felony and misdemeanors -** If a defendant is charged with a D felony or a misdemeanor, the jury shall consist of six (6) qualified jurors. Jury Rule 16(a); Ind. Code 35-37-1-1.

57.10.000 **Challenges for cause, in general.** Challenges for cause other than those enumerated in the statute may be made to the competency of a person called to be a juror. *Klinck v. State*, 179 N.E. 549 (Ind. 1932). The constitutional standard of fairness requires that a defendant have a panel of impartial jurors, but absent a showing of hostility during voir dire, no presumption of partiality may be made. *Murphy v. Florida*, 421 U.S. 793 (1975). Challenges for cause must be specific, and it is within the power of the party raising the challenge to make clear on the record any inconsistent or incoherent answers of the juror. *Shield v. State*, 49 N.E. 351 (Ind. 1888). Despite individual jurors statements that opinions can be set aside, where the current community pattern of prejudice is clear, jurors should be excused for cause or a change of venue granted. *Irvin v. Dodd*, 366 U.S. 717 (1961). See 57.91.000 Re Ind. Code 35-37-1-5.

57.10.100 **Challenges for cause, Jury Rule 17 –** The list of challenges for cause in Jury Rule 17 appears at the end of this chapter, as Form 57.90.100.

57.10.200 **Exhaustion rule for for-cause challenges.** "[P]arties may seek appellate review of for-cause challenges to prospective jurors only if they have exhausted their peremptory challenges." "[P]arties satisfy the exhaustion rule the moment they use their final peremptory challenge—regardless of whom they strike. We also hold that if parties fully comply with the exhaustion rule and demonstrate they were unable to remove any prospective juror for lack of peremptories, appellate courts may review denial of any motion to strike for cause, regardless of whether a challenged juror actually served on the jury." *Oswalt v. State*, 19 N.E.3d 241 (Ind. 2014).

57.20.000 **Right to peremptory challenges.** There is no **constitutional** right to peremptory challenges and defendants acquire no more rights to such challenges than statutes confer. *Lund v. State*, 345 N.E.2d 826 (1976).

57.22.000 **Numbers of peremptory challenges by type of case.** In a capital case, there are 20; in class A, B, or C felony cases, there are 10; in all other cases 5. Jury Rule 18. The prosecuting attorney and defendant have the same number of challenges. *Id*.; Ind. Code 35-37-1-3 & 4. While it is error to grant double the number of peremptory challenges, the error may be harmless if both the state and the defendants are allowed the same excessive number. *Swininger v. State*, 352 N.E.2d 245 (Ind. 1976).

57.22.100 **Peremptories for alternates**. One peremptory challenge is authorized for each side for every two alternate jurors to be selected. Peremptories for alternates may not be used to select regular jurors, and peremptories for regular jurors may not be used for alternates. Jury Rule 18.

57.24.000 **Co-Defendants must strike together.** When several defendants are tried together, they must join in their challenges. Jury Rule 18; Ind. Code 35-37-1-3. *Tewell v. State*, 339 N.E.2d 792 (Ind. 1976).

57.25.000 **Timing of peremptories.** Trial court may require party to exercise peremptory challenges after completion of voir dire examination by both parties, *Marsh v. State*, 396 N.E.2d 883 (Ind. 1979). Peremptories may not be exercised after the jury is sworn. *Stevens v. State*, 357 N.E.2d 245 (Ind. 1976).

57.30.000 **Racially based peremptory challenges.** The fifth amendment equal protection clause forbids the use of peremptory challenges by prosecutor for sole purpose of removing jurors of the defendants racial group.

57.30.100 **Procedure to contest peremptory challenge.** The defendant must establish a prima facie case of improper discrimination by showing that the prosecutor has used peremptory challenges to remove jurors of a cognizable racial group or a gender, and that the facts and circumstances raise an inference that the challenges were based solely on race or gender. The burden then shifts to the state to make a racially neutral explanation for its challenges. If the state meets this burden, then the judge must decide whether the defendant's prima facie case has been rebutted. *Batson v. Kentucky*, 476 U.S. 79 (1986).

57.30.300 **Defendant need not be member of group or gender.** A *Batson* challenge may be made by any defendant, whether he is of the same race as the challenged jurors or not. The equal protection clause prohibits a prosecutor from using the states peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, and the defendant, no matter what his race, has standing to raise the equal protection issue on behalf of the excluded jurors. *Powers v. Ohio*, 499 U.S. 400 (1991).

57.30.500 **State may object to defendant's challenge.** The constitution prohibits a criminal from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges, and *Batson* procedures apply to allow the state to make a prima facie case of racial discrimination in defense peremptories and to thereby require the defendant to articulate a racially neutral explanation for peremptory challenges. *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348 (1992).

57.35.000 **Gender based challenges.** The federal equal protection clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no other reason other than the fact that the person happens to be a woman or a man. Strikes based on characteristics that are disproportionately associated with one gender may be appropriate, absent a showing of pretext (for example, challenging all persons with military experience would disproportionately affect men at this time or challenging all persons employed as nurses would disproportionately affect women at this time would not be unconstitutional, since they are not gender or race-based. *J.E.B. v. Alabama*, 511 U.S. 127, 114 S. Ct. 1419 (1994). Trial court in rape prosecution properly refused to allow peremptory challenges on basis they were gender biased when defense peremptorily challenged six of eight female venire persons and after objection to strikes against last two, defense explanation was that one female juror challenged had never had children and second challenged female was young, attractive, may have been attracted to prosecutor, was younger than defense counsel, and had visited female doctor after leaving male physician. *Koo v. State*, 640 N.E. 2d 95 (Ind. App. 1994).

57.42.000 **Oath on impaneling petit jurors and alternates**

After the jury has been selected, have the panel stand, raise their right hands and be sworn:

"Do each of you swear or affirm that you will well and truly try the matter in issue between the parties, and give a true verdict according to the law and evidence?"

57.45.000 **Juror compensation.** Ind. Code 33-37-10-1 provides:

(A) Jurors of circuit, superior, county, probate, and municipal courts and members of a grand jury are entitled to fees equal to:

(1) The mileage rate paid to state officers for each mile necessarily traveled to and from the court; and,

(2) Payment at the rate of:

(A) Fifteen dollars ($15) for each day the juror is in actual attendance in court until the jury is impaneled; and,

(B) Forty dollars ($40) for each day the juror is in actual attendance after impaneling and until the jury is discharged.

(B) A county fiscal body may adopt an ordinance to pay from county funds a supplemental fee in addition to the fees prescribed by subsection (a)(2).

(C) Jurors of city and town courts are entitled to:

(1) Fifteen dollars (15) per day while in actual attendance; and

(2) Receive a sum for mileage equal to that sum per mile paid to state officers and employees for each mile necessarily traveled to and from the court.

(D) A city or town fiscal body may adopt an ordinance to pay from city or town funds a supplemental fee in addition to the fee prescribed by subsection (c)(1).

(E) A prospective juror who is summoned for jury duty and who reports to the summoning court on the day specified in the summons is in actual attendance on that day for the purposes of this section.

57.48.000 **Waiver of errors and appeal of jury selection process.** In order for challenges to be reviewed on appeal, a party must preserve them fully in the record. *Click v. State*, 94 N.E.2d 919 (Ind. 1950). Denial of a timely request to record voir dire proceedings may deprive a defendant of appellate review on issues of juror bias and may be a reversible abuse of discretion. *Emmons v. State*, 492 N.E. 2d 303 (Ind. 1986). When a party has grounds to challenge a juror and does not do so, he waives the disqualification. *Nix v. State*, 166 N.E. 2d 326 (Ind. 1960). When a challenge for cause is overruled, the fact that a peremptory challenge prevented the juror from serving did not make the error harmless. *Fletcher v. Crist*, 38 N.E.2d 472 (Ind. 1894). Counsels failure to exhaust his peremptory challenges constituted a waiver of any error occasioned by trial courts refusal to excuse a juror for cause. *Foresta v. State*, 413 N.E. 2d 889 (Ind. 1980).

FORMS

57.90.010 INTRODUCTION TO THE CASEAND VOIR DIRE DIALOGUE

Good morning, ladies and gentlemen. I am Judge _____ of the _____ Court and I will preside during this trial.

CRIMINAL

This is a *criminal* case in which the Defendant, __(*name defendant*)_____, who is seated _____, is charged with the crime of _____. He/she is represented by _____, who is seated to his/her _____. These charges are brought by the State of Indiana. In this case the State of Indiana is represented by _____, who is seated at _____. In a criminal case the Defendant is presumed to be innocent of the charges brought against him or her and the State of Indiana has the burden of overcoming this presumption of innocence and proving the Defendant guilty of this crime beyond a reasonable doubt. I will discuss these concepts with you at greater length later in the proceedings.

CIVIL

This is a *civil* case in which the Plaintiff(s) _____, has/have made a claim for damages against the Defendant(s). This claim arises from _____. In order to prevail the Plaintiff(s) must prove, by a preponderance of the evidence that the Defendant(s) _____ . The Plaintiff(s) must also prove by a preponderance of the evidence, that _____ suffered monetary damages as a consequence of this wrong. Proof by a preponderance of the evidence means proof that a given proposition is more likely true than not true. In this case the Plaintiff(s) are represented by _____ and the Defendant(s) are represented by _____.

You have been chosen randomly according to law to serve as a juror from certain lists of county residents. This call for jury service may require some sacrifice of a personal or business nature; however, it does not come to you frequently. Jury service represents one of the most important duties that citizens are asked to perform, and the jury system couldnot function without the assistance of capable citizens who are willing to accept this responsibility. Your service as a juror is an assurance to every citizen of his or her right to make a defense to a crminal charge, or to contest a civil dispute, in open court and to have the facts regarding such matters considered and determined by a jury of his or her peers. While some of you may have had previous experience as a juror, I know that jury service may seem strange to most of you. As a consequence, I would like to make a few preliminary remarks which may be helpful to you.

A short explanation of the procedure used in selecting a jury is in order since the first step in any trial by jury in either a criminal or civil case is the selection of an impartial jury. All of those who participate in a trial must do so according to established rules, and this is equally true of jurors. All of the parties are entitled to a jury made up of people who will approach the case with open minds, and who will agree to keep their minds open until a verdict is reached. Jurors must

be as free as humanly possible from bias, prejudice, or sympathy, and must not be influenced by preconceived ideas as to either the facts or the law.

During the first step of selecting the jury, the Court and counsel will ask you questions concerning your competency and qualifications to serve as a juror in this case. This is called voir dire examination of prospective jurors. "Voir Dire" is a French phrase which means "to speak the truth." These questions must be answered fully, frankly, and accurately. If a prospective juror thinks that he or she may be disqualified for any reason not brought out by our questions, he or she should tell the Court about it. Under the law, lawyers are within their rights in asking questions to test a juror's state of mind and qualifications. The questions asked each of you are no intended to satisfy idle curiosity, or to embarrass you in any way.

In the process of jury selection, some jurors may be excused for cause. Such challenges will be made individually as we proceed, and there is no numeric limit to the number of challenges for cause which a lawyer may make. I will rule on each challenge for cause individually. In addition, the law permits counsel to excuse a certain number of jurors without giving any reason. In this case that number is ____. No juror who is excused should feel that counsel or the Court is, in any way, critical of that juror. The selection of a jury is an art rather than a science, and lawyers often accept or reject potential jurors purely on instinct.

Occasionally, during the course of a trial, a juror or prospective juror may have concerns or questions which he or she wishes to raise with me without stating them aloud in open court. These questions or concerns may be brought to my attention in a note which should be given to the bailiff at the earliest opportunity. The bailiff will convey that note to me. Please understand that I must share this note with the lawyers and the parties. After this is accomplished I will address the issue raised by the juror. In doing so, I will attempt to accommodate both the juror's desire for privacy and the rights of the parties.

The jury, when selected, will consider of regular members, and one or most alternate jurors who will serve in the event that a regular member is excused for illness, or some other reason, during the trial.

After a jury is selected and sworn, the Court will read preliminary instructions on the law as it applies to this case.

(A) <u>CRIMINAL CASE</u>

The Prosecutor will then give an outline of the State's case in what is called an "opening statement." The Defendant will then have an opportunity to give an opening statement, but is not required to do so. The opening statements are not evidence. They are merely a preview of the case and are designed to help you follow the evidence as it is presented.

(B) <u>CIVIL CASE</u>

The parties will then have an opportunity to give an opening statement, but are not required to do so. The opening statements are not evidence. They are merely a preview of the case, and are designed to help you follow the evidence as it is presented.

After this phase of the trial, the State of Indiana (Plaintiff) will present evidence. The Defendant follows with the presentation of such evidence as he or she desires. The Defendant is under no obligation to present any evidence whatever.

The lawyers are required to present evidence according to rules of law. I enforce these rules and determine what evidence may be admitted. There may be objections to an exhibit offered into evidence or to a question asked. Under the rules, a lawyer has the duty, and is within his or her rights, to object to the attempted introduction of any evidence which he or she believes is not proper. If I agree, the objection will be sustained and this keeps the evidence out of the case. If I think that the lawyer is mistaken, I will overrule the objection and this ruling permits that evidence to become a part of the case. Objections by the lawyers, and rulings by the Court with regard to those objections, should not cause the jurors to take sides.

There may be times during the trial when the jury is excused and retires to the jury room so that the Court may hear the arguments of the lawyers on a point of law. The lawyers may also approach the bench and have a conference with the Court. The purpose of these procedures is to secure a ruling from the Court as to some matter relating to the trial, which, under the rules, may not be discussed in the presence of the jury.

The trial concludes with arguments of counsel and final instructions of law by the Court. Thereafter, the jury retires to the jury room to deliberated upon a verdict which must be concurred in by all of the jurors. The jury shall not be permitted to separate during deliberation in a criminal case unless the parties consent to the separation.

You are all prospective jurors in this case. You are prohibited from discussing this case with anyone prior to the commencement of the evidentiary portion of the trial. To do so may result in a mistrial. After the presentation of evidence has begun, jurors may discuss the evidence presented among themselves in the jury room during recesses. All regular jurors and alternates must be present during such discussion, and you must reserve judgment concerning the outcome of the case until jury deliberations begin. You may not discuss the facts of this case with me, or with the lawyers, or with any of the witnesses. You may not investigate the case yourselves, or attempt to obtain information outside the courtroom. It is highly improper for you to do so. You are also prohibited from reading any newspaper accounts of this case, and from listening to, or watching, any radio or television reports relating to this trial. You are to consider and decide this case only upon the evidence received during the course of the trial in the courtroom.

Our schedule for trial is generally as follows: We try to begin at ____ A.M., which means that you need to be here by ___ A.M. We try to break for lunch at approximately 12:00 noon, and resume the trial at approximately ___ P.M. We try to break for the evening at approximately ___ P.M.

Those of you who are called as jurors, but do not serve, will be paid a per diem and mileage for travel expenses. For those of you who are called as jurors, and do serve, you receive a higher per diem and also receive a mileage allowance. At the conclusions of the trial, a list will be prepared and submitted to the County Auditor. You will receive a check from the Auditor thereafter. If you need statements verifying your service as a juror for your employer, you should make that fact known to the Bailiff or to me. Such statement will be provided to you. …… When we have a recess, or adjourn for lunch or overnight, those of you who are in the jury box, please remember your seating arrangements in the box and take the same chair each time that you return. Once the jury has been selected, during recesses or retiring for

lunch, please go to the jury room at the start of the recess and remain in that room unless you leave for lunch or are excused by the Court. The Bailiff will conduct you into the courtroom at the appropriate time.

The law requires that prosepective jurors be sworn before any questinos are asked. Please rise, hold up your right hand, and face me. I will administer the oath to you.

OATH TO PROSPECTIVE JURORS

Do you swear or affirm that you will honestly answer any question asked of you during jury selection?

AFTER OATH

Certain persons are not eligible for jury service. To serve as a juror a person must be:

a) a citizen of the United States;
b) at least eighteen (18) years of age;
c) a resident of this county;
d) able to read, speak, and understand the English language;
e) not be suffering from a physical or mental disability that prevents him or her from rendering satisfactory jury service;
f) not under a guardianship appointment because of mental incapacity;
g) not a person who has had rights to vote revoked by reason of a felony conviction and whose rights have not been restored; and
h) not a law enforcement officer, if the trial is for a criminal case.

A person may claim exemption from jury service if he or she has completed a term of jury service in the preceding two (2) years.

Do any of you state that you are disqualified?

I am going to begin the voir dire by asking some initial questions that I will direct to all of you, including those in the audience. If you find that you would answer “yes” to any of these questions, please raise your hand. When I call upon you, I will first need to know your name for the record, and then I will ask you about your answers.

BASIC CAUSE QUESTIONS

1. Do any of you know or are you related to any of the attorneys?

2. Have any of the lawyers represented you , your family or your friends?

3. Do any of you know or are you related to the Defendant _____? His family?

4. Do any of you know the alleged victim in this case _____?
5. The witnesses in this case include the following people: (LIST) Do you know or are you related to any of them?

6. Do any of you have any personal knowledge of the facts of this case?

7. Have any of you read or heard anything about the case?

8. Without saying what is your personal knowledge/what you have read or heard, has it caused you to form an opinion about the innocence or guilt of the Defendant?

9. Without stating what that opinion is, if I instruct you that it is your duty to put it out of your mind and to make your decision in this case only on the basis of the evidence presented and the law as provided, can you follow that instruction?

10. Does anyone have problems with their vision such that it would be difficult to view exhibits or observe witnesses as they testify?

11. Please stand. If you have been able to hear me without any problem so far, please sit down. Does anyone have any hearing impairment?

12. Is anyone unable to read, write and speak the English language fluently?

13. Is anyone here a law enforcement officer?

14. Is anyone here currently a Defendant in a pending criminal case?

OATH OF PETIT JURORS SELECTED TO TRY THE CASE

Do you, and each of you, swear or affirm that you will well and truly try the matter in issue between the parties and give a true verdict according to the law and evidence?

ADVICE TO ALTERNATE JURORS

Those of you who are alternate jurors will serve in the event that a regular member is excused for illness, or some other reason, during the trial. As alternate jurors, you will be in the jury room during deliberations but you may not participate in the deliberations or participate in the vote unless I first direct you to replace one of the regular jurors.

OATH OF JURY BAILIFF

Do you solemnly swear to keep the jury together in the jury room in this courthouse, to permit no person to speak or communicate with them, to speak or communicate with them yourself only by order of the Court or to ask them whether they have agreed upon a verdict, and to return them into Court when ordered by the Court?

Do you further solemnly swear that you will not communicate to any person the state of the deliberations of the jury, so help you God?

ADMONISHMENT OF JURY

(1) You are all jurors in this case and I must tell you now, and I will repeat this again each time you are permitted to separate:

(2)Generally you must not discuss this case among yourselves or with anyone else before it is submitted to the jury for deliberation; however,

(3) You are permitted to discuss the evidence presented in this case among yourselves in the jury room during recesses from trial. All jurors and alternates must be present during these discussions, and you must reserve judgment about the outcome of the case until your deliberations begin.

(4) You are admonished that you may not discuss the facts of the case with anyone other than your fellow jurors.

(5) You may not discuss this case with me, or with the lawyers, parties, or with any of the witnesses.

(6) You should not listen to or read any outside or media accounts of the trial You may not investigate the case or attempt to obtain information outside the courtroom, and it is highly improper for you to do so. You are to consider and decide this case only upon the evidence received during the course of the trial in the courtroom.

_____
Judge
_____Court

Instruction Number _____

57.90.100 Challenges for Cause, Jury Rule 17

A. In both civil and criminal cases the parties shall make all challenges for cause before the jury is sworn to try the case, or upon a showing of good cause for the delay, before the jury retires to deliberate. The court shall sustain a challenge for cause if the prospective juror:

1. is disqualified under rule 5:
    a. not a citizen of the United States;
    b. not at least eighteen (18) years of age;
    c. not a resident of the summoning county;
    d. not able to read, speak, and understand, the English language;
    e. suffering from a physical or mental disability that prevents him or her from rendering satisfactory jury service;
    ~~f.~~ under a guardianship appointment because of mental incapacity;
    g. a person who has had rights to vote revoked by reason of a felony conviction and whose rights to vote have not been restored; and
    h. a law enforcement officer, if the trial is for a criminal case.
2. served as a juror in that same county within the previous three hundred sixty-five (365) days in a case that resulted in a verdict;
3. will be unable to comprehend the evidence and the instructions of the court due to any reason including defective sight or hearing, or inadequate English language communication skills;
4. has formed or expressed an opinion about the outcome of the case, and is unable to set that opinion aside and render an impartial verdict based upon the law and the evidence;
5. was a member of a jury that previously considered the same dispute involving one or more of the same parties;
6. is related within the fifth degree to the parties, their attorneys, or any witness subpoenaed in the case;
7. has a personal interest in the result of the trial;
8. is biased or prejudiced for or against a party to the case; or
9. is a person who has been subpoenaed in good faith as a witness in the case.

B. In criminal cases the court shall sustain a challenge for cause if the prospective juror:

1. was a member of the grand jury that issued the indictment;
2. is a defendant in a pending criminal case;
3. in a case in which the death penalty is sought, is not qualified to serve in a death penalty case under law; or
4. has formed or expressed an opinion about the outcome of the case which appears to be founded upon
    a. a conversation with a witness to the transaction;
    b. reading or hearing witness testimony or a report of witness testimony.

57.92.000 Checklist—Objection That State or Defense Peremptory Challenges Are Racially or Gender Discriminatory:

1. Timely objection.
2. Resolve objection on the record outside jurys hearing.
3. Required prime facie showing:
    a. Other side has peremptorily challenged members of a “cognizable racial group” or a gender;
    b. Defendant does not have to be a member of the “cognizable racial group” or gender;
    c. Circumstances raise an inference the peremptories were based on impermissibly discriminatory racial or gender considerations; factors raising such an inference may include (but are not limited to):
        i. challenged jurors share only race or gender in common and are otherwise heterogeneous.
        ii. a pattern of strikes against the racial or gender group in the case being tried.
        iii. in past cases counsel has used peremptories to strike all members of the racial or gender group.
        iv. type and manner of questions on voir dire were generally desultory.
        v. type and manner of questions to challenged jurors were desultory (e.g., lack of questions or meaningless questions).
        vi. disparate treatment of venire persons with the same characteristics or who answer questions in the same or similar manner.
        vii. disparate examination (e.g., questions likely to provide disqualifying answers posed only to “cognizable racial group” or one gender of jurors;
        viii. all or most of the peremptories were used and were used against the racial or gender group.
        ix. party did not use all peremptories but those used eliminated members of the racial or gender group.
4. Other side rebuts the objectors *prima facie* case:
    a. mere denials or assertions of good faith are insufficient.
    b. assumptions of intuitions shared race or gender would make challenged jurors sympathetic to objector are insufficient;
    c. clear and plausible nondiscriminatory explanations, based on specific observable characteristics of challenged jurors, can suffice to rebut.
5. Allow the objector an opportunity to present evidence that the other sides rebuttal is merely a sham or a pretext.
6. If court finds objector made *prima facie* showing which was not properly rebutted choice of remedies is:
    a. discharge venire and have a new jury selected from a new venire; or
    b. disallow the discriminatory peremptories and resume selection.

58.00.000 MISTRIALS CONTENTS

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58.00.000 MISTRIALS

58.05.000 ADDRESSING A MOTION FOR MISTRIAL

How a judge deals with a mistrial motion will vary depending upon what prompted the motion, the severity of the case, the investment of time, effort and expense already made in the case, and many other case specific facts. What follows is not the Committee's recommended procedure for every instance, but is an attempt to provide a basic approach with options that may be available in more serious situations.

1. The immediate goal when an attorney moves for a mistrial is to avoid inflaming the situation before you have a chance to rule. Because the moving attorney's objection may only serve to point out or emphasize the prejudicial information in the jurors' minds, the attorneys should be asked to come to the bench to state their respective motion and response at the earliest possible sign that an attorney is moving for a mistrial.

2. If the Court finds no basis for the motion, it may be denied and the trial will proceed. If the motion was made in the jury's hearing the Court's ruling should be made in the jury's hearing also with any explanation the court chooses to give.

3. If the Court needs to consider the motion further, the jury should be excused from the courtroom with a generic explanation such as "Ladies and gentlemen, from time to time matters come up that need to be addressed outside of your presence. This is one of those times, so we are going to take a brief recess."

4. In addition, if the jury is excused from the courtroom, then the standard admonishment should be read to them before they are taken out. Depending upon what the jury has heard, the Committee suggests adding to the admonishment: "Further, until we have resolved this matter and you are returned to the courtroom, you shall not discuss counsel's motion/objection and shall not speculate on the reasons for it."

5. Listen to the arguments of counsel outside the jury's presence.

6. Although not recommended in every instance, an option open to the court at this point is to individually *voir dire* the jurors to determine exactly what they saw and/or heard. It may be that what appears to be very prejudicial on its face was not even heard or perceived by the jurors.

7. If after evaluating the mistrial motion the court decides not to grant a mistrial, the court must decide whether an admonishment should be given. As noted in section 58.20.000, the moving party may object to an admonishment. This objection will need to be evaluated in accordance with section 58.20.000.

8. If the court decides to give an admonishment, the court must compose that admonishment (a suggested basic form is in the following paragraph). A decision must be made as to how briefly or fully to describe the behavior that jurors are being admonished to ignore. A balance must be reached between identifying the offending behavior adequately for the admonition to effectively address it, but not so completely that it is reinforced in the jury's mind. In composing the admonition, the Court should involve the attorneys and attempt to obtain their agreement on the record to the wording.

Model admonition:

> Ladies and Gentlemen of the jury:
> Thank you for your patience. When you were last in the courtroom there was an objection made on which I needed to rule. It was necessary that I discuss that objection with the attorneys outside of your presence. I have now sustained that objection and ruled as a matter of Indiana law that the [behavior/statement/ testimony**/**comment of counsel/_____] that prompted the objection was improperly placed before you. Therefore you are now ordered and admonished to disregard entirely such behavior/statement/testimony/comment of counsel/_____]. It is not to be mentioned or considered by you in any way during the course of this trial, and particularly shall not be mentioned or considered in your deliberations, or in any discussions in or outside of the jury room. You are each charged to bring any violation of this order to the Court's attention through the Bailiff.

9. If you conducted individual *voir dire* and determined only certain jurors perceived the prejudicial information, you can return just those jurors to the courtroom, either individually or together, and read the admonishment to them. This gives you an opportunity to *voir dire* them again on their willingness to follow the admonishment. ('Do you understand what I have just read to you? Can you assure the court unequivocally that you will obey this admonishment?")

10. Return the entire jury to the courtroom and read the admonishment to them. If you determine that the situation demands, you can *voir dire* the jury as a whole or individually to obtain a commitment on record that each understands and will obey the admonishment.

58.10.100 AUTHORITY TO GRANT MISTRIAL - Indiana trial courts are authorized by statute to grant mistrials. I.C. 34-36-1-7. Furthermore, a trial court has authority to declare a mistrial on its own motion in any trial in which there is a "manifest necessity". *Patterson v. State*, 495 N.E.2d 714 (Ind. 1986).

58.10.200 AUTHORITY TO SANCTION CAUSING MISTRIAL - Indiana courts possess the inherent power to sanction parties and their attorneys for causing mistrials. To do so the Court must find that the attorney or party engaged in egregious misconduct that causes a mistrial. Egregious misconduct consists of intentional, reckless, or negligent conduct by the party or attorney. Before a court may impose such sanctions the party or attorney is entitled to due process which includes notice and the opportunity to be heard. The sanctions must be compensatory in nature,

and therefore a full scale evidentiary hearing is not required for their imposition. Exercise of the sanctioning power is reviewable only for an abuse of discretion. *Allied Property and Casualty Ins. Co. v. Good*, 919 N.E.2d 144 (Ind. App. 2009), *transfer denied*, 929 N.E.2d 789.

58.10.500 STANDARDS FOR GRANTING MISTRIALS

DEFENSE MISTRIAL MOTION - A trial court is required to grant a defendant's motion for mistrial in any case in which the defendant is placed in a position of "grave peril" to which he should not have been subjected. *Kelley v. State*, 555 N.E.2d 140 (Ind. 1990); *Wright v. State*, 593 N.E.2d 1192 (Ind. 1992).

PROSECUTOR MISTRIAL MOTION – A trial court is required to grant a prosecutor's motion for mistrial in any trial where a "manifest necessity" for it exists. *Wright v. State*, 593 N.E.2d 1192 (Ind. 1982).

58.20.000 CONSIDERATIONS IN GRANTING OR DENYING A MISTRIAL

MISTRIAL IN COURT'S DISCRETION - The decision to declare a mistrial is within the trial court's discretion and will be revised only for an abuse of discretion. *Schlomer v. State*, 580 N.E.2d 950 (Ind. 1991).

MISTRIAL AN EXTREME REMEDY - A mistrial is an extreme remedy which should be declared only when nothing else can remedy the situation. *Szpyrka v. State*, 550 N.E.2d 316 (Ind.1990); *Wallace v. State*, 486 N.E.2d 445 (Ind.1985).

ADMONISHMENT USUALLY AVOIDS MISTRIAL – A prompt admonishment to the jury is usually enough to avoid a mistrial. *Underwood v. State*, 535 N.E.2d 507 (Ind. 1989); *Scott v. State*, 510 N.E.2d 170 (Ind. 1987); *Van Orden v. State,* N.E.2d 1153 (Ind. 1984).

ADMONISHMENT DOES NOT AVOID MISTRIAL IN SOME CASES – In some cases an admonition is simply inadequate to cure an error, and a mistrial is the only proper remedy. *Myers v. State*, 887 N.E.2d 170 (Ind. Ct. App. 2008).

WHEN COUNSEL MOVES FOR MISTRIAL AND OBJECTS TO ADMONITION - An important unresolved issue concerning mistrials arises when the trial court determines that a mistrial need not be granted because an admonition to the jury would cure any prejudice, but counsel for the party adversely affected requests that no admonition be given. Benchbook Committee members differ as to whether the court should give the admonition over counsel's request it not be given. All Committee members agree that the mistrial and admonition issues should be resolved outside the presence of the jury. Some members think that, if the trial court believes there is a serious mistrial issue raised, the court should (1) make a record of advice to the defense that the situation is one in which an admonition should be given, (2) advise the affected party that an objection to the admonition may well amount to invited error such that the mistrial issue would be waived, and (3) give the admonition over objection if it appears to the court that an admonition would suffice to cure the mistrial problem. Other members conclude

that usually it is experienced counsel who request that an admonition not be given and that the court should accede to a timely request that the admonition be dispensed with. A record should be made of counsel's request that no admonition be given.

58.20.100 MISTRIAL ANALYSIS FACTORS – The Indiana Supreme Court has devised the following list of factors that have been considered in determining whether to grant a mistrial.

(1) The effect of the Constitutional provision statute or rule relating to harmless error;
(2) The degree of materiality of the proffered testimony;
(3) Other evidence of guilt;
(4) Other evidence tending to prove the same facts;
(5) Other evidence that may cure the improper testimony;
(6) Possible waiver by the injured party;
(7) Whether an offending statement was volunteered or part of a deliberate action by the defending party;
(8) The penalty assessed;
(9) Whether the offending statement was brought out by the injured party;
(10) The existence of other errors;
(11) Whether the question of guilt is close or clear and compelling;
(12) Standing in experience of the witness giving the objectionable testimony ; and
(13) Whether the offending testimony or misconduct was repeated.

White v. State, 272 N.E.2d 312 (1971).

58.30.100 STAGE OF TRIAL – VOIR DIRE

PARTIES' COMMENTS –

Mistrial was warranted by prosecutor's improper comments during voir dire telling prospective jurors that defense counsel's role is to mislead the jury. *Bardonner v. State*, 587 N.E.2d 1353 (Ind. Ct. App.1992).

PROSPECTIVE JUROR'S FALSE STATEMENTS -

Juror's untruthful answers on jury questionnaire and during voir dire warranted mistrial. *Ried v. State*, 610 N.E.2d 275 (Ind. Ct. App.1973).

58.30.200 STAGE OF TRIAL - OPENING STATEMENTS AND MISTRIALS

STANDARD: In exercising its discretion concerning alleged misconduct during opening statements, the trial court must determine

(1) whether the party engaged in misconduct, and
(2) whether the misconduct viewed from a totality of the circumstances placed the offended party in a position of grave peril. In determining grave peril the trial court must look to the probable

persuasive effect of misconduct on the jury's decision. *McGowan v. State*, 599 N.E.2d 589 (Ind. 1992).

APPLICATION: PROSECUTOR'S OPENING STATEMENTS

Prosecutor's comments during opening statement as to his personal dealings with witnesses and referring to them as burglars and thieves and courtroom regulars was improper and together with the other improper statements made later in the trial by the prosecutor were grounds for mistrial. *Hossman v. State*, 473 N.E.2d 1059 (Ind. Ct. App. 1985).

Prosecutor's improper reference in opening statement to the Department of Corrections being unable to locate the defendant's fingerprints, though improper, was cured by the trial court's admonishment. *Schlomer v. Stat,* 580 N.E.2d 950 (Ind. 1991).

Although improper for the prosecutor to allude in opening statement to evidence the admissibility of which was still under advisement, misconduct did not warrant mistrial. *Chatman v. State*, 334 N.E.2d 673 (Ind. 1975).

Prosecutor's misstatement of the evidence where victim's credit card was recovered did not require a mistrial. *Draper v. State*, 556 N.E.2d 1380 (Ind. Ct. App. 1990).

APPLICATION: DEFENSE COUNSEL'S OPENING STATEMENTS

Defense counsel's opening statement which referred to the co-defendant as being "bought and paid for" and claiming witness must testify "in a manner to please the prosecutor" warranted mistrial. *Pavey v. State,*764 N.E.2d 692 (Ind. Ct. App. 2002).

Defense counsel's statement during opening that states witnesses had "failed polygraph examinations" warranted mistrial. *Wright v. State*, 593 N.E.2d 1192 (Ind. 1992).

58.40.000 STAGE OF TRIAL - PRESENTATION OF EVIDENCE — MISCONDUCT

58.40.100 PRIOR CRIMINAL RECORD OR PRIOR BAD ACTS

Prosecutor's repeated attempts to introduce evidence regarding prior conviction for entering to commit a felony warranted mistrial. *Garcia v. State*, 509 N.E.2d 888 (Ind. Ct. App. 1987).

Police officer's testimony that he did not personally arrest the defendant on the warrant because he was in custody in another county was improper but did not warrant mistrial. *Schmitt v. State*, 310 N.E.2d 73 (Ind. Ct. App. 1974).

Lay witnesses testimony that defendant was on “probation or parole” did not warrant mistrial. *Evans v. State*, 855 N.E.2d 378 (Ind. Ct. App. 2006).

Prosecutor’s statement in court in front of the jury implying that the defendant was involved in drug activity did not warrant mistrial. *Stephenson v. State*, 742 N.E.2d 463 (Ind. 2001).

Testimony from lay witness that defendant had been “selling cocaine and marijuana” did not warrant mistrial. *Hutcherson v. State*, 507 N.E.2d 969 (Ind. 1987).

Testimony from lay witness that defendant had been involved in unrelated burglaries and had been in the penitentiary before did not warrant mistrial. *Wallace v. State*, 486 N.E.2d 445 (Ind. 1985).

Playing redacted video tape which included twelve references to the defendant’s prior criminal history without limiting admonishment required mistrial. *Mote v. State*, 775 N.E.2d 687 (Ind. Ct. App. 2002).

Prosecutor calling police officer to testify about unrelated criminal offense committed by the defendant warranted mistrial. *Smith v. State*, 471 N.E.2d 733 (Ind. Ct. App. 1984).

Prosecution witness who testified about receiving threats and offer of bribe without any connecting evidence to the defendant warranted mistrial. *Keyser v. State*, 312 N.E.2d 922 (Ind. Ct. App. 1974).

58.40.200 MUG SHOTS -

Mug shots are admissible if (1) not unduly prejudicial, (2) have substantial probative value, and (3) proponent makes an effort to disguise the nature of the photograph.
Farris v. State, 818 N.E.2d 63 (Ind. Ct. App. 2004).

Officer’s testimony that he made arrangements with witness to view mug shots despite the trial court’s order in limine barring the use of the term mug shot did not warrant mistrial. *Sutherlin v. State*, 784 N.E.2d 971 (Ind. Ct. App. 2003).

Verbal reference by lay witness to exhibit as a mug shot did not warrant a mistrial. *Vanzandt v. State*, 731 N.E.2d 450 (Ind. Ct. App. 2000).

58.40.300 POLYGRAPH -

Though improper admission of polygraph evidence does not always require a mistrial, investigating officers twice injecting references to defendant’s polygraph during their testimony warranted mistrial. *Sandifur v. State*, 815 N.E.2d 1042 (Ind. Ct. App. 2004).

Where witnessed testified about taking polygraph, mistrial was warranted. *Couch v. State*, 527 N.E.2d 183 (Ind. 1988); *Smith v. State*, 537 N.E.2d 496 (Ind. 1989); *Glenn v. State*, 796 N.E.2d 322 (Ind. Ct. App. 2003).

Where defendant stated in direct examination that he passed a polygraph, prosecutor's motion for mistrial was properly granted. *Bridwell v. State*, 507 N.E.2d 644 (Ind. Ct. App. 1987).

When the prosecuting attorney's witness referred to the defendant's polygraph, a motion for mistrial was properly granated. *Patterson v. State*, 495 N.E.2d 714 (Ind. 1986).

58.40.400. **PROCEDURAL CALAMITY -**

It was not error for the trial court to refuse to grant a mistrial after the defendant picked up a pitcher of water and threw it at the witness as she was leaving the witness stand. *Gordon v. State*, 609 N.E.2d 1085 (Ind. 1993).

When the coroner refused to testify and the Court found him in contempt mistrial was appropriate. *White v. State*, 460 N.E.2d 132 (Ind. 1984).

Trial court did not abuse its discretion in *sua sponte* declaring a mistrial where the State discovered following commencement of the trial that it had failed to turn over written statements of witnesses pursuant to discovery order and defense counsel declined to accept offer of a continuance but instead insisted on either dismissal or suppression of the statements. *Jester v. State,* 551 N.E.2d 840 (Ind. 1990).

58.50.000 **FINAL ARGUMENT - MISCONDUCT**

58.50.100 **COMMENT ON DEFENDANT'S SILENCE -**

Prosecutor violated defendant's right to silence by playing a video tape showing the defendant's interrogation and the defendant invoking his right to remain silent. The trial court's failure to grant defendant's motion for mistrial or give curative instruction to the jury was erroneous. *Kubsch v. State*, 784 N.E.2d 905 (Ind. 2003).

Prosecutor's comments regarding defendant's post arrest silence were reversible error. *White v. State*, 647 N.E.2d 684 (Ind. Ct. App. 1995).

58.50.200 **COMMENT ON COUNSEL'S CHARACTER -**

Trial court erred in failing to grant defendant's motion for mistrial based on prosecutorial misconduct, when, in closing argument, prosecutor stated that the defense attorney's job was to get his client off. *Johnson v. State*, 453 N.E.2d 365 (Ind. 1983).

58.50.300 APPEAL TO SYMPATHY OR PREJUDICE -

Argument of prosecutor that the defendant, charged with second degree murder, if convicted instead of manslaughter might be out in two years was improper and prejudicial. When trial court merely overruled objections to remarks and made no attempt to admonish jury, a new trial was required. *Rowe v. State*, 237 N.E.2d 576 (Ind. 1968).

58.50.600 STAGE OF TRIAL - DELIBERATIONS

Declaration of mistrial after seven hours of deliberation when jurors indicated they did not believe a unanimous opinion could be reached was proper. *Menifee v. State,* 512 N.E.2d 142 (Ind. 1987).

58.60.000 JURY/JUROR ISSUES

58.60.100 PROCEDURE FOR HANDLING JUROR MISCONDUCT:

- During trial, trial courts must immediately investigate suspected jury taint by thoroughly interviewing jurors collectively and individually, if necessary.
- If any of the jurors have been exposed, he must be individually interrogated by the court outside the presence of the other jurors, to determine the degree of exposure and the likely effect thereof.
- After each juror is so interrogated, he should be individually admonished.
- After all exposed jurors have been interrogated and admonished, the jury should be assembled and collectively admonished, as in the case of a finding of "no exposure."
- If the imperiled party deems such action insufficient to remove the peril, he should move for a mistrial.
- Defendants seeking a mistrial for suspected jury taint are entitled to the presumption of prejudice only after making two showings, by a preponderance of the evidence:
    - (1) extra-judicial contact or communications between jurors and unauthorized persons occurred, and
    - (2) the contact or communications pertained to the matter before the jury.
- The burden then shifts to the State to rebut this presumption of prejudice by showing that any contact or communications were harmless.
- If the State does not rebut the presumption, the trial court must grant a new trial.
- On the other hand, if a defendant fails to make the initial two-part showing, the presumption does not apply. Instead, the trial court must apply the probable harm standard for juror misconduct, granting a new trial only if the misconduct is "gross and probably harmed" the defendant.
- In egregious cases where juror conduct fundamentally compromises the appearance of juror neutrality, trial courts should skip the two-part inquiry, find irrebuttable prejudice, and immediately declare a mistrial.

- At all times, trial courts have discretion to decide whether a defendant has satisfied the initial two-part showing necessary to obtain the presumption of prejudice or a finding of irrebuttable prejudice.

Ramirez v. State, 7 N.E.3d 933 (Ind. 2014).

Note: the two following points on juror taint concern procedures after the jury has been discharged, when a mistrial can no longer be granted.)

- If possible jury taint is raised after the jury has been discharged, the two showings rule in *Ramirez* still applies. *Wahl v. State*, 51 N.E.3d 113 (Ind. 2016)(juror's e-mail alleging alternate's participation in deliberations was sent to judge prior to sentencing with a mistrial motion, which was denied; following sentencing, a sworn affidavit from the juror about the alternate's conduct was filed with a motion to correct error, which was denied).
- Majority *Wahl* opinion does not address how exposure of discharged jurors is to be shown or how State is to meet its burden. Dissent in *Wahl* observes that "while the majority does not state it expressly, the only possible way for the State to meet that burden would be to subpoena and/or obtain affidavits from the entire jury, individually confirming that they remained impartial during deliberations despite the misconduct." Note: *Wahl* held that an alternate is not a member of the jury, so that an alternate's misconduct in the jury room during deliberations is an improper "outside influence" about which Evidence Rule 606(b) permits evidence to be admitted.

58.60.300 PRIOR KNOWLEDGE OR RELATIONSHIP WITH A PARTY -

Mistrial was warranted where trial court learned that two jurors knew the victim in rape prosecution. *Mooberry v. State*, 300 N.E.2d 125 (Ind. Ct. App.1973).

Trial court erred when it refused to grant mistrial after discovering a juror was married to a lawyer who had accepted employment with prosecuting attorney's office. *Haak v. State* , 417 N.E.2d 321 (Ind. 1981).

58.60.400 IMPROPER CONTACT WITH THE JURY -

Mistrial was required where prosecuting witness had lunch with three of the six jurors during the trial. *Kelley v. State*, 555 N.E.2d 140 (Ind. 1990).

58.60.500 JUROR CALAMITY

Mistrial was warranted when a juror's mother died during the trial. *Greenwalt v. State*, 209 N.E.2d 254 (Ind. 1965).

58.60.600 UNAUTHORIZED VIEW OR INSPECTION

It was not error to refuse a mistrial after a juror made an unauthorized inspection of the crime scene, when the juror was removed and the other jurors stated they had prevented any description of the visit to the scene

and affirmed they could remain impartial. *Pierce v. State*, 761 N.E.2d 821 (Ind. 2002).

58.70.100 EFFECT OF MISTRIAL ON RETRIAL –

If a defendant moves for a mistrial, the defendant forfeits the right to raise a double jeopardy claim in subsequent proceedings, unless the motion for mistrial was necessitated by governmental conduct "intended to goad the defendant into moving for a mistrial." *Willoughby v. State*, 660 N.E.2d 570, 576 (Ind. 1996) (quoting *Oregon v. Kennedy*, 456 U.S. 667, 676, 72 L. Ed. 2d 416, 102 S. Ct. 2083 (1982)). . . . [T]he key inquiry on appeal concerns the subjective intent of the prosecuting authority. *. . .* In *Willoughby* we stated, "To determine whether a second trial is barred after a defendant's motion for a mistrial, we must examine whether the prosecutor brought about the mistrial with the intent to cause termination of the trial. If the State acted with intent to force the defendant into moving for a mistrial, the prohibition against double jeopardy bars a second prosecution." 660 N.E.2d 570, 576.
Wilson v. State, 697 N.E.2d 466, 472 (Ind. 1998).

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59.00.000 Trials

59.10.000 Presence Of Defendant At Trial:

59.10.100 **Right To Be Present:** A criminal defendant has a constitutional right to be present during all stages of trial. U.S. Const. amend. VI; Ind. Const. Art. I, § 13.

59.10.200 **Trial In Absentia:**

59.10.210 **When Trial In Absentia Is Permitted**: A defendant waives his right to be present and may be tried *in absentia* by failing to appear for trial, but the trial court must determine that the defendant knowingly and voluntarily waived that right. The best evidence that the defendant knowingly and voluntarily waived his right to be present is the fact that the defendant was present when the court set the trial date. *Lampkins v. State*, 682 N.E.2d 1268, 1272 (Ind. 1997); *Fennell v. State*, 492 N.E.2d 297, 299 (Ind. 1986).

59.10.220 **Knowledge Of Trial Date**: If there is no direct evidence of the defendant's knowledge of the trial date, circumstantial evidence may be sufficient. It is not necessary to find that the defendant knew of the exact trial date if there is evidence showing that the defendant departed the jurisdiction for the purpose of avoiding trial. *Fennell v. State*, 492 N.E.2d 297, 299 (Ind. 1986).

59.10.230 **Opportunity To Explain Absence**: A defendant who has been tried *in absentia* must be given the opportunity to explain his absence, with his or her attorney present, which may rebut the initial presumption of waiver. *Ellis v. State,* 525 N.E.2d 610, 612 (Ind. App. 1987); see also, *Miller v. State*, 593 N.E.2d 1247, 1250-51 (Ind. App. 1992).

59.10.240 **No Waiver Of Jury Or Counsel**: Although the defendants failure to appear for trial may waive his or her right to be present, it does not waive the rights of jury trial and of counsel; therefore, it is reversible error to try a defendant *in absentia* without a jury or defense counsel absent a sufficient independent waiver of those rights. *Carr v. State*, 591 N.E.2d 640, 641-42 (Ind. App. 1992).

59.10.300 **Appearance In Jail Clothes Before A Jury:**

59.10.310 **Right Not To Appear In Jail Clothes**: A defendant cannot be compelled to stand trial before a jury while dressed in identifiable jail or prison clothes. *Estelle v. Williams*, 425 U.S. 501 (1976); *Bledsoe v. State*, 410 N.E.2d 1310, 1314-15 (Ind. 1980).

59.10.320 **Waiver Of Right Not To Appear In Jail Clothes**: A defendant waives his right to be tried in civilian clothes before a jury by failing to object to being tried in jail clothes. The court has no obligation ask a defendant represented by counsel whether he or she intends to proceed with jury trial while dressed in such clothes. *Estelle v. Williams*, 425 U.S. 501 (1976); *Bledsoe v. State*, 410 N.E.2d 1310, 1314-15 (Ind. 1980).

59.10.400 Restraint Or Removal Of Defendant:

59.10.410 Right Not To Appear In Restraints: A criminal defendant has a constitutional right to appear before a jury free of physical restraints. *Coates v. State*, 487 N.E.2d 167, 168 (Ind. App. 1985).

59.10.420 When Restraint Necessary: The right to appear at trial unrestrained is not absolute and can be denied if necessary to prevent the escape of the defendant, maintain courtroom decorum, or ensure the safety of persons present in the courtroom. The courts specific facts and reasoning for ordering restraints must be placed on the record. *Coates v. State*, 487 N.E.2d 167, 169 (Ind. App. 1985).

59.10.430 Removal Of Defendant: A criminal defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. *Illinois v. Allen*, 397 U.S. 337 (1970).

59.10.440 Remedies For Disruptive Defendant: Constitutionally permissible ways for a judge to handle a disruptive defendant are to: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; or (3) remove him from the courtroom until he promises to conduct himself properly. *Illinois v. Allen*, 397 U.S. 337 (1970).

59.15.000 Preliminary Jury Instructions:

59.15.100 Procedure For Selecting Preliminary Instructions:

59.15.110 Selection Must Be Outside Presence Of Jury: "Each party shall have reasonable opportunity to examine such instructions and state his specific objections thereto out of the presence of the jury and before any party has stated his case." Ind. Criminal Rule 8(F).

59.15.120 Objections To Preliminary Instructions: "The manner of objecting to such instructions, of saving questions thereon, and making the same a part of the record shall be the same as in Rule 51 of the Rules of Trial Procedure." Ind. Criminal Rule 8(H).

59.15.200 Mandatory Preliminary Instructions:

59.15.210 Mandatory Admonition: "The court shall admonish the jurors in the preliminary instruction, before separating for meals, and at the end of the day, that it is their duty not to converse among themselves or permit others to converse with them on any subject connected with the trial, or to form or express any opinion about the case until the cause is finally submitted to them." Ind. Code. 35-37-2-4(a). (See Ind. Pattern Jury Instructions - Criminal - 1.0100).

59.15.220 **Mandatory Instructions**: "When the jury has been sworn the court shall instruct in writing as to the issues for trial, the burden of proof, the credibility of witnesses, and the manner of weighing the testimony to be received." Ind. Criminal Rule 8(F). "The court shall instruct the jurors that if a juror realizes that he or she has personal knowledge of any fact material to the case, the juror shall inform the bailiff at the next recess or upon adjournment, whichever is sooner." Ind. Code. ' 35-37-2-3(a).

59.15.300 **Discretionary Preliminary Instructions:**

59.15.310 **Circumstantial Evidence Instruction**: Preliminary instruction on circumstantial evidence *could* be given in criminal prosecution, though necessarily no evidence had yet been presented. *Thakkar v. State*, 613 N.E.2d 453, 460 (Ind. 1993).

59.15.320 **Defense Instructions**: Specific defenses should not be anticipated by court, but trial court must have considerable latitude in area and if evidence adduced makes it appear that omitted preliminary instruction would have been appropriate, matter can be rectified by final instruction. It would be appropriate to give a preliminary instruction upon a theory of defense, if requested and if the defendant has committed himself to such defense by pleading or pre-trial order. *Everly v. State*, 395 N.E.2d 254, 257 (Ind. 1979).

59.15.400 **Lesser Included Offense Improper Preliminary Instruction**: Potential lesser included offenses are not appropriate for preliminary instruction; trial court cannot determine whether instruction on lesser included offense is proper prior to hearing evidence. *Greene v. State*, 515 N.E.2d 1376, 1382 (Ind. 1987)

59.20.000 **Separation Of Witnesses:**

59.20.100 **In General:**

59.20.110 **Separation Mandatory If Requested**: "At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses, and it may make the order on its own motion. This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause." Ind. Evidence Rule 615.

59.20.120 **Timing Of Motion**: Rule 615 does not specify the timing of the order. A motion made after testimony has begun may be permissible as long as basic notions of fundamental fairness are not offended. *Anderson v. State*, 743 N.E.2d 1273 (Ind. Ct. App. 2001).

59.20.130 **Scope Of Separation**: Rule 615 does not specify whether witnesses who have completed their testimony may remain in the courtroom and discuss the testimony with other witnesses whose testimony has been completed, whether separation orders apply to rebuttal witnesses, and whether the separation order

should apply to opening statements or closing arguments. Courts may wish to consider preparation of standard orders for use when a Rule 615 motion is made, or counsel may wish to submit specific forms of order. 13 R. Miller, Indiana Evidence § 615.102 (3rd ed. 2007).

59.20.140 **Investigating Officer Exempted:** The investigating police officer may remain at the prosecution's table as its designated representative under the second exemption to Indiana Evidence Rule 615. *Fourthman v. State*, 658 N.E.2d 88, 91 (Ind. App. 1995).

59.20.200 **Remedies For Violation Of Witness Separation Order:**

59.20.210 **Discretion Of Court**: Rule 615 does not specify the remedies if a witness violates a separation order. The remedy for violation of a separation order lies within the trial court's discretion. *Gibbs v. State*, 538 N.E.2d 937, 942 (Ind.1989). The court should consider the order's purpose of discouraging and exposing fabrication, inaccuracy, and collusion. 13 R. Miller, Indiana Evidence § 615.104 (3rd Ed. 2007). The trial court's actions upon a violation are reviewable only for abuse of that discretion, and the party seeking review must show harm resulting from the trial court's actions. *Bell v. State*, 610 N.E.2d 229, 234 (Ind.1993); *Wardlaw v. State*, 483 N.E.2d 454, 456 (Ind. 1985).

59.20.220 **Remedies For Violation**: Three remedies used by the courts are: (1) citing the witness for contempt; (2) permitting comment on the witness' noncompliance in order to reflect on his credibility; and (3) refusing to let the witness testify or striking his testimony. 3 Weinstein Section 615[03], at 615-22 (1987).

59.20.230 **Refusal To Permit Witness To Testify**: The trial court has discretion to refuse to permit the offending witness to testify. *State v. Kinder*, 286 N.E.2d 826, 827-828 (Ind. 1972).

59.20.240 **Abuse Of Discretion**: It has been held that when a party is without fault or knowledge of the violation by a witness the party seeks to call, it is an abuse of discretion to refuse to permit, or to limit, the testimony of the witness. *Brannum v. State*, 366 N.E.2d 1180, 1183-1184 (Ind. 1977).

59.30.000 **Opening Statements:**

59.30.100 **Opening Statement By Prosecutor Required In Jury Trials**: "After the jury is impaneled and sworn, the prosecuting attorney shall state the case of the prosecution and briefly state the evidence by which he expects to support it, and the defendant may then state his defense and briefly state the evidence he expects to offer in support of his defense." Ind. Code 35-37-2-2(1).

59.30.200 **Failure Of Prosecutor To Give Opening Statement**: Since it is mandatory for a prosecutor to state the case of the prosecution and briefly state the evidence by which he expects to support it, a trial court may require the prosecutor, on its own or on defendant's motion, to show that the state will present a prima facie case; if any sanction as drastic as a judgment of acquittal is to be the penalty for the

prosecutor's failure to make such a showing, it should not be imposed until he has been made aware of the defect, has been given an opportunity to correct it, and has failed to do so. *Chatman v. State*, 326 N.E.2d 839, 842-43 (Ind. App. 1975).

59.30.300 **Opening Statement By Prosecutor Not Required In Non-Jury Trials**: Statute requiring prosecutor to make opening statement applies only to cases tried by jury. *Shaw v. State*, 355 N.E.2d 879, 880 (Ind. App. 1976).

59.30.400 **Misconduct In Opening Statements**: A ruling on opening statements is largely a matter for the discretion of the trial court. In exercising its discretion concerning alleged misconduct on opening statements, the trial court must determine whether the party making the statement in fact did engage in misconduct and whether such conduct viewed from the totality of the circumstances of the case placed the defendant in a position of grave peril. In determining grave peril, the court must look to the probable persuasive effect of the misconduct on the jury's decision. *McGowan v. State*, 599 N.E.2d 589, 593-94 (Ind. 1992)

59.35.000 **Order of Proof:**

59.35.100 **In General:**

59.35.110 **Statutory Authority**: "The prosecuting attorney shall then offer the evidence in support of the prosecution, and the defendant shall then offer the evidence in support of his defense. The parties may then respectively offer rebutting evidence only, unless the court, for good reason and in furtherance of justice, permits them to offer evidence upon their original case." Ind. Code. 35-37-2-2(2), -2(3).

59.35.120 **Discretion Of Court**: The order of proof is within sound discretion of trial judge, and there is no abuse of discretion where the nature of the case, the evidence, or convenience requires a deviation from the usual order. *Thomas v. State*, 321 N.E.2d 194, 195 (Ind. 1975).

59.35.130 **Affirmative Defenses**: Fact that defendant had burden of establishing affirmative defense of insanity did not entitle her to present initial opening statement, present her case first, and have opening and closing arguments. *Green v. State*, 469 N.E.2d 1169, 1172 (Ind. 1984).

59.35.140 **Corpus Delicti**: It is desirable to first establish corpus delicti before showing confession or statements against interest by defendant, but such is not necessary; matter of order of proof is within sound discretion of trial court. *Garr v. State*, 312 N.E.2d 70, 71-72 (Ind. 1974).

59.35.200 **Rebuttal Evidence:**

59.35.210 **Rebuttal - In General**: Rebuttal evidence is limited to that which tends to explain, contradict, or disprove evidence offered by adverse party. *Schwestak v. State*, 674 N.E.2d 962, 964 (Ind. 1996).

59.35.220 **Defendants Right To Rebuttal**: When defendant complains of improper rebuttal, his remedy is to present his own rebuttal. *Williams v. State*, 408 N.E.2d 123, 127 (Ind. App. 1980).

59.35.230 **Discretion Of Court**: It is within sound discretion of trial court to permit a witness to testify during rebuttal regarding a matter which is not in rebuttal but is related to state's case in chief, and irregularity in so doing will not be treated as reversible error unless the defendant was prevented from presenting rebuttal evidence thereto. *Trinkle v. State*, 288 N.E.2d 165, 168 (Ind. 1972).

59.35.240 **Disclosure Of Rebuttal Witnesses**: Trial judge may permit a rebuttal witness to testify even though witness' name does not appear on State's witness list, as it is impossible to anticipate calling of such a witness. *Tanner v. State*, 471 N.E.2d 665, 667 (Ind. 1984).

59.40.000 Witnesses:

59.40.100 Witnesses-In General:

59.40.110 **Oath**: "Before testifying, every witness shall be sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath must be the most consistent with and binding upon the conscience of the person to whom the oath may be administered." Ind. Evidence Rule 603; Ind. Code. 34-45-1-2.

59.40.120 **Proof Of Service**: "When a subpoena is served by the sheriff or his deputy, his return shall be proof of service. When served by any other person, the service must be shown by affidavit. No fees or costs for the service of a subpoena shall be collected or charged as costs except when service is made by the sheriff or his deputy." Ind. Code. 35-37-5-2(e).

59.40.130 **No Witness Fees Required**: "Fees need not be first paid or tendered in order to compel the attendance of witnesses in a criminal proceeding." Ind. Code. 35-37-5-2(f).

59.40.140 **Compelling Attendance**: "Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of: (1) the court from which the subpoena is issued; or (2) the court of the county where the witness was required to appear or act. When duly subpoenaed, the attendance of all witnesses may be enforced by attachment." Ind. Code. 35-37-5-2(g).

59.40.200 **Admitting Deposition In Lieu Of Testimony:**

59.40.210 **Evidence Rule 804:** "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil

action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Ind. Evidence Rule 804(b)(1).

59.40.220 **Trial Rule 32**: Trial Rule 32(A)(3) provides that a nonparty witness's deposition may be used at trial if the moving party is unable to procure the witness's attendance by subpoena or if the witness is outside the state, unless the absence was procured by the proponent of the evidence. *Hunter v. State*, 578 N.E.2d 353, 356 (Ind.1991); *Freeman v. State*, 541 N.E.2d 533, 537-538 (Ind. 1989); *Moore v. State*, 569 N.E.2d 695, 699-700 (Ind. App. 1991).

59.40.230 **Evidence Rule 804 Does Not Affect Trial Rule 32**: Rule 804 creates exceptions to the hearsay rule contained in Rule 802, but Rule 802 only makes hearsay inadmissible "except as provided by law". Accordingly, Rule 802 does not exclude, and the hearsay exception in Rule 804(b)(1) does not affect admissibility of deposition testimony made admissible by Trial Rule 32(A). 13 R. Miller, Indiana Evidence § 804.201 (3rd Ed. 2007).

59.40.235 **Confrontation right and deposition admission:** A defendant's rights of confrontation under both the federal and state constitutions are not violated by admission of deposition testimony if the defense had an opportunity for a full and vigorous examination during the deposition; the fact that a deposition is "for discovery" instead of "for testimony" does not preclude the deposition's admission as evidence over a confrontation objection as long as the defense was not prevented from making a full and vigorous examination of the deponent. *Thomas v. State*, 966 N.E.2d 1267 (Ind. Ct. App. 2012), *transfer denied*; *Berkman v. State*, 976 N.E.2d 68 (Ind. Ct. App. 2012), *transfer denied*.

59.40.300 **Privilege Against Self-incrimination**:

59.40.310 **Constitutional Authority**: The Fifth Amendment to the United States Constitution states that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. Amend V.

59.40.320 **Standard For Incrimination**: It has long been held that the privilege against self-incrimination "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Allen v. Illinois*, 478 U.S. 364 (1986).

59.40.330 **Testimony At Preliminary Hearing Does Not Waive Privilege**: Evidence Rule 104(d) provides that an accused who testifies on a preliminary matter is not subject to cross-examination as to other issues in the case. When the accused testifies in support of a motion to suppress evidence on federal constitutional grounds, the testimony may not be admitted over objection as substantive evidence against him at trial, although it may be admissible for impeachment purposes if he testifies at trial. 12 R. Miller, Indiana Evidence § 104.401 (3rd ed. 2007)

59.40.340 **Scope of Cross-Examination of Defendant**: Evidence Rule 611(b) establishes no special rule for cross-examination of an accused who testifies at trial. Under the federal and state constitutions, however, a defendant in a criminal case has the right to refrain from self-incrimination, and also has the right to confront and cross examine the witnesses against him. A criminal defendant is subject to the same scope of cross examination as is any other witness, and the accused hence waives his constitutional right against self-incrimination to that extent by taking the stand in his own behalf. 13 Miller, 13 R. Miller, Indiana Evidence § 611.208 (3rd Ed. 2007).

59.40.400 **Special Procedure For Child Witness In Child Molestation Case**: The Legislature has created an exception to Rule 802 (hearsay) in specified criminal cases for oral or videotaped out-of-court statements by children under fourteen years of age at the time of trial or by certain mentally deficient persons. Ind. Code. 35-37-4-6.

59.40.500 **Cross-examination Of Witness:**

59.40.510 **Right To Cross-examine Not Absolute**: Although defendant has the right to cross-examine, when the defendant fails to show relevance of proposed cross-examination, he fails to show violation of confrontation rights. *Ingram v. State*, 547 N.E.2d 823, 827-828 (Ind. 1989)

59.40.520 **Standard Of Review**: Only a total denial of cross-examination on an area concerning a witness's credibility will amount to a constitutional denial of the right to cross-examination. *Komyatti v. State*, 490 N.E.2d 279, 283 (Ind. 1986).

59.40.530 **Witnesses Name and Address**: A criminal defendant has a right to ask the witness's address, unless the prosecutor shows *in camera* the existence of an actual threat against, or danger to, the witness, or unless the question would reveal that the witness is incarcerated. *Pigg v. State*, 603 N.E.2d 154,157 (Ind. 1992); *Pierce v. State*, 640 N.E.2d 730, 732-33 (Ind. App. 1994).

59.45.000 **Jury View:**

59.45.100 **Procedure for Jury View**: "When the court determines it is proper, the court may order the jury to view: the real or personal property which is the subject of the case; or the place in which a material fact occurred. The place shall be shown to the jury by a person appointed by the court for that purpose. While the jury is absent for the view, no person, other than the person appointed to show the place to the jury, shall speak to the jury on any subject connected with the trial. Counsel for the parties shall have the right to accompany the jury but shall not speak to the jury. Indiana Jury Rule 25.

59.45.200 **Instruction to Jury Prior to View**: (See Indiana Pattern Jury Instructions No. 12.45).

59.45.300 Recommended Oath To Bailiff For Jury View: "Do you solemnly swear to keep this jury together, to conduct the jury to the (property) (scene) involved in this case, and there permit the jury to examine said (property) (scene); that you will not permit the jury to discuss any matter relative to this case during its absence from the courtroom; that you will not permit any other person to speak or communicate with the jury during its absence on any matter relative to this case; that you will promptly return the jury to the courtroom after they have viewed said (property) (scene), so help you God?"

59.50.000 Juror Misconduct:

59.50.100 Procedure For Handling Juror Misconduct:

- During trial, trial courts must immediately investigate suspected jury taint by thoroughly interviewing jurors collectively and individually, if necessary.
- If any of the jurors have been exposed, he must be individually interrogated by the court outside the presence of the other jurors, to determine the degree of exposure and the likely effect thereof.
- After each juror is so interrogated, he should be individually admonished.
- After all exposed jurors have been interrogated and admonished, the jury should be assembled and collectively admonished, as in the case of a finding of "no exposure."
- If the imperiled party deems such action insufficient to remove the peril, he should move for a mistrial.
- Defendants seeking a mistrial for suspected jury taint are entitled to the presumption of prejudice only after making two showings, by a preponderance of the evidence:
    - (1) extra-judicial contact or communications between jurors and unauthorized persons occurred, and
    - (2) the contact or communications pertained to the matter before the jury.
- The burden then shifts to the State to rebut this presumption of prejudice by showing that any contact or communications were harmless.
- If the State does not rebut the presumption, the trial court must grant a new trial.
- On the other hand, if a defendant fails to make the initial two-part showing, the presumption does not apply. Instead, the trial court must apply the probable harm standard for juror misconduct, granting a new trial only if the misconduct is "gross and probably harmed" the defendant.
- In egregious cases where juror conduct fundamentally compromises the appearance of juror neutrality, trial courts should skip the two-part inquiry, find irrebuttable prejudice, and immediately declare a mistrial.
- At all times, trial courts have discretion to decide whether a defendant has satisfied the initial two-part showing necessary to obtain the presumption of prejudice or a finding of irrebuttable prejudice.

Ramirez v. State, 7 N.E.3d 933 (Ind. 2014).

- If possible jury taint is raised after the jury has been discharged, the two showings rule in *Ramirez* still applies. *Wahl v. State*, 51 N.E.3d 113 (Ind.

2016)(juror's e-mail alleging alternate's participation in deliberations was sent to judge prior to sentencing with a mistrial motion, which was denied; following sentencing, a sworn affidavit from the juror about the alternate's conduct was filed with a motion to correct error, which was denied).

- Majority *Wahl* opinion does not address how exposure of discharged jurors is to be shown or how State is to meet its burden. Dissent in *Wahl* observes that "while the majority does not state it expressly, the only possible way for the State to meet that burden would be to subpoena and/or obtain affidavits from the entire jury, individually confirming that they remained impartial during deliberations despite the misconduct." Note: *Wahl* held that an alternate is not a member of the jury, so that an alternate's misconduct in the jury room during deliberations is an improper "outside influence" about which Evidence Rule 606(b) permits evidence to be admitted.

59.50.140 ***Lindsey* Procedure Not Required Prior to Selection:** The *Lindsey* requirements for questioning jurors concerning potential misconduct, apply only to misconduct discovered after jury has been selected and trial is in progress, and not during voir dire; the parties had the opportunity to question the prospective jurors during voir dire. *Seeley v. State*, 544 N.E.2d 153, 155-56 (Ind. 1989).

59.50.200 **Types of Juror Misconduct:**

59.50.210 **False Statements During Voir Dire**: A juror who makes false statements during voir dire is guilty of misconduct. *McDaniel v. State*, 375 N.E.2d 228, 232 (Ind. 1978); *Barnes v. State*, 330 N.E.2d 743, 747 (Ind. 1975). "To obtain a new trial based on a claim of juror misconduct, the defendant must demonstrate that the misconduct was gross and likely harmed the defendant." *Stephenson v. State*, 864 N.E.2d 1022, 1055 (Ind. 2007). "See also *Ramirez v. State*, 7 N.E.3d 933, 938, 939 (Ind. 2014) (referring to the standard of review for juror misconduct as the 'probable harm standard' and explaining that a defendant must show that the misconduct was '"gross and probably harmed" the defendant') (quoting *Henri v. Curto*, 908 N.E.2d 196, 202 (Ind. 2009)." *Slaybaugh v. State*, No. 79S02-1601-CR-28, __ N.E.3d __ (Ind., January 20, 2016), adopting Court of Appeals opinion found at 44 N.E.3d 111.

59.50.220 **Incorrect Information On Application**: In criminal proceeding, claim of juror misconduct with respect to juror who stated, in juror application form, that he had never been involved in a lawsuit though he had been involved in child support proceedings, was without basis, in view of indication that juror had misunderstood the term "lawsuit." *Solomon v. State*, 439 N.E.2d 570, 577 (Ind. 1982).

59.50.230 **Prior Knowledge of Defendant**: Defendant was not entitled to hearing on claim of juror misconduct, as there was no showing of impact on verdict by asserted misconduct; defendant presented evidence that juror knew defendant prior to trial, discussed case with other jurors prior to deliberation, read newspaper articles about case during trial, and was told by husband that he thought defendant was guilty, but witness stated that shortly before deliberations juror did

not know how she was going to vote. *Lopez v. State,* 527 N.E.2d 1119, 1130 (Ind. 1988).

59.50.240 **Discussion of Case:** Although juror technically violated court's instruction not to discuss the case with other jurors by discussing the selection of foreman, juror's conduct was not such as to necessitate removal. *Sylvester v. State*, 549 N.E.2d 37, 40-41 (Ind. 1990).

59.50.250 **Sleeping Juror - In General**: The mere falling asleep for a short time, by a juror, during the argument of counsel for defendant in a criminal cause, does not of itself constitute a sufficient cause for a new trial; prejudice must be shown. *Whiting v. State*, 516 N.E.2d 1067, 1067-68 (Ind. 1987).

59.50.260 **Sleeping Juror - Timeliness**: When both defendant and his attorney were aware of the sleeping juror and concerned about it, and neither brought it the attention of the court, the trial court was not in a position to make any factual determination on the record concerning it and had no chance to take any appropriate corrective action. *Whiting v. State*, 516 N.E.2d 1067, 1068-69 (Ind. 1987).

59.50.270 **Sleeping Juror - Factors:** Length of time juror was asleep and importance of evidence may be taken into account when considering prejudice to defendant. *Lenover v. State*, 550 N.E.2d 1328, 1332 (Ind. App. 1990).

59.50.280 **Sleeping Juror- Prejudice Not Shown**: Defendant was not prejudiced by two jurors sleeping 10 to 15 minutes of three-day trial, during testimony of one witness who had been testifying as to layout of defendant's garage, where drug transaction took place, and who was drawing diagram on chalkboard when jurors were dozing; defendant did not demonstrate importance of diagram and accompanying testimony to his defense. *Lenover v. State*, 550 N.E.2d 1328, 1332 (Ind. App. 1990).

59.55.000 **Replacing Jurors With Alternates:**

59.55.100 **In General:**

59.55.110 **Discretion Of Court**: Trial courts have significant leeway in determining whether to replace juror with alternate and will be reversed only if there was abuse of discretion. *Jervis v. State*, 679 N.E.2d 875, 881-82 (Ind. 1997)

59.55.120 **Alternates May Be Present But Cannot Deliberate:** "An alternate juror who does not replace a regular juror shall be discharged after the jury brings in its verdict. If alternate jurors are permitted to attend deliberations, they shall be instructed not to participate." Ind. Trial Rule 47(B).

59.55.130 **Hearing Not Required:** Trial Rule 47(B) does not require trial judge to conduct hearing to determine incompetency or determine probable length of absence of juror in question, and it is sufficient when situation arises for the trial judge to immediately replace the questioned juror with an alternate juror if one has been provided. *Blevins v. State*, 291 N.E.2d 84, 87 (Ind. 1973).

59.55.200 Grounds For Removal:

59.55.210 Biased Juror: A biased juror must be removed because the Indiana Constitution guarantees an impartial jury; such bias may be actual, or implied, that is, presumed from juror's relationship with one of the parties. *Threats v. State,* 582 N.E.2d 396, 398-99 (Ind. 1991).

59.55.220 Juror Must Not Be Biased for Either Side: Removal of a biased juror is proper regardless of which way the bias cuts. *Threats v. State,* 582 N.E.2d 396, 399 (Ind. 1991).

59.55.230 Other Reasons For Disqualification: Substitution of alternate juror for a regular juror is warranted where regular juror has personal knowledge of a material fact, or otherwise becomes or is found to be unable or disqualified to perform the duties. *Burtley v. State,* 476 N.E.2d 835, 836 (Ind. 1985).

59.55.300 If No Alternate Available:

59.55.310 Discharge Or Trial By Lesser Number: "If the court finds that the juror has personal knowledge of a material fact, the juror shall be excused and the court shall replace that juror with an alternate. If there is no alternate juror, then the court shall discharge the jury without prejudice, unless the parties agree to submit the cause to the remaining jurors." Ind. Code. 35-37-2-3.

59.55.320 Trial By Lesser Number: Defendant entitled to jury of twelve may agree to be tried by lesser number at any time prior to verdict. *Taylor v. State*, 687 N.E.2d 606, 610 (Ind. App. 1997).

59.60.000 Judgment on the Evidence (Directed Verdict) in Jury Trial

59.60.100 When Entered: "Where all or some of the issues in a case tried before a jury . . . are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict." Ind. Trial Rule 50(A).

59.60.200 When Raised: "A party may move for such judgment on the evidence (1) after another party carrying the burden of proof . . . has completed presentation of his evidence thereon; or (2) after all the parties have completed presentation of the evidence upon any one or more issues; or (3) after all the evidence in the case has been presented and before judgment . . ." Ind. Trial Rule 50(A).

59.60.300 No Evidence Or Inference: Trial court may enter judgment on the evidence only if there is no substantial evidence or reasonable inference to be adduced there from to support an essential element of the claim, i.e., the evidence must point unerringly to a conclusion not reached by the jury. *State v. Lewis*, 429 N.E.2d 1110, 1114 (Ind. 1981).

59.60.400 **Total Lack Of Evidence**: In order for trial court to grant motion for directed verdict, there must be total lack of evidence on essential element of crime or evidence must be without conflict and susceptible only to inference in favor of defendant's innocence. *Hart v. State*, 671 N.E.2d 420, 426 (Ind. App. 1996).

59.60.500 **Prima Facie Case Sufficient To Avoid Judgment**: In order to avoid judgment on the evidence, state need only establish prima facie case; it need not show that every reasonable doubt has been overcome. *Dunville v. State*, 393 N.E.2d 143, 147 (Ind. 1979).

59.60.600 **Waiver**: Where defendant introduced evidence after his motion for a directed verdict was denied, defendant waived any error in the court's ruling on his motion. *Love v. State*, 400 N.E.2d 1371, 1374 (Ind. 1980).

59.65.000 **Final Arguments**:

59.65.100 **Final Arguments - In General**:

59.65.110 **Jury Rule Final Arguments:** "When the evidence is concluded, the parties may, by agreement in open court, submit the case without argument to the court or jury trying the case.

If the parties argue the case to the jury, the party with the burden of going forward shall open and close the argument. The party which opens the argument must disclose in the opening all the points relied on in the case. If, in the closing, the party which closes refers to any new point or fact not disclosed in the opening, the adverse party has the right to reply to the new point or fact. The adverse party's reply then closes the argument in the case.

If the party with the burden of going forward declines to open the argument, the adverse party may then argue its case. In criminal cases, if the defense declines to argue its case after the prosecution has made opening argument, then that shall be the only argument allowed in the case.

In criminal cases, the party with the burden of going forward is the prosecution. In civil cases, the party with the burden of going forward is the plaintiff.." Indiana Jury Rule 27.

59.65.120 **Discretion Of Court**: Control of final argument is assigned to discretion of trial judge; unless there is clear abuse of this discretion, clearly prejudicial to rights of accused, ruling of trial court will not be disturbed. *Rouster v. State*, 600 N.E.2d 1342, 1347 (Ind. 1992).

59.65.130 **Personal Statement By Defendant**: Defendant represented by counsel has no right to personally make final argument to jury. *Adams v. State*, 314 N.E.2d 53, 59 (Ind. 1974).

59.65.200 **Procedure For Improper Final Argument Before Jury:**

59.65.210 **Admonishment Or Mistrial:** Defendant waives possible error concerning the prosecutor's closing argument when he fails to object to argument at trial; correct procedure to be employed when improper argument is alleged is to request admonishment and if further relief is desired to move for mistrial, and failure to request admonishment or move for mistrial results in waiver of non-fundamental error. *Isaacs v. State*, 673 N.E.2d 757, 764 (Ind. 1996).

59.65.220 **Admonishment Generally Suffices:** Supreme Court seldom finds reversible error when trial court admonishes jury to disregard statement made during proceedings. *Davidson v. State*, 580 N.E.2d 238, 241 (Ind. 1991).

59.65.300 **Comment On Defendants Right Not To Testify Before Jury:**

59.65.310 **Improper Comment**: Prosecutor's remark during his final argument that defendant had chosen to exercise his Fifth Amendment rights was direct reference to defendant's exercise of his constitutional right to refuse to testify, so that defendant was entitled to reversal of his conviction. (Note that the trial court gave no admonishment). *Brooks v. State*, 598 N.E.2d 519, 520 (Ind. 1992).

59.65.320 **Waiver Of Error:** Prosecutor clearly erred in commenting on defendant's failure to testify, but defendant voluntarily waived his right to silence concerning his refusal to testify by failing to timely object to prosecutor's improper comment and by sua sponte discussing his failure to testify during his final argument. *Mitchell v. State*, 455 N.E.2d 1131, 1134 (Ind. 1983).

59.65.330 **Failure To Admonish Is Error:** Prosecutor's statement that jury could not draw any inference from fact that defendant did not testify but could infer something from fact that no one else told jurors where defendant was on the night in question was improper comment on defendant's decision not to testify, and although the trial court properly sustained defendant's objection, failure to promptly admonish the jury constituted reversible error. *Dooley v. State*, 393 N.E.2d 154, 156 (Ind. 1979).

59.65.400 **Comment On Defendants Lack Of Evidence Before Jury**:

59.65.410 **When Comment Proper**: Remarks on lack of explanation by defense concerning otherwise incriminating evidence against accused is proper so long as state comments or focuses on the absence of evidence to contradict state's evidence and not on accused's failure to testify. *Didio v. State*, 471 N.E.2d 1117, 1123 (Ind. 1984).

59.65.420 **When Comment Not Proper:** Trial court properly sustained objection to prosecutor's comment related to defendant's failure to call certain witnesses, and correctly instructed jury to disregard improper suggestion. *Mitchell v. State*, 455 N.E.2d 1131, 1133 (Ind. 1983).

59.65.500 **Other Comments During Final Argument:**

59.65.510 **Comment on Defendants Post-arrest Silence**: It is plainly improper for prosecutor to comment on defendant's post-arrest silence. *Taylor v. State*, 689 N.E.2d 699, 705 (Ind. 1997).

59.65.520 **Comment Based On Attorneys Personal Knowledge**: Mere use of phrases "I believe" or "I think" does not constitute improper argument by prosecutor where prosecutor is commenting on credibility of evidence; prosecutor may not imply, however, that he has access to special information outside evidence presented to jury and that such outside information convinced prosecutor of defendant's guilt. *Miller v. State*, 623 N.E.2d 403, 407 (Ind. 1993).

59.65.530 **Comment On Defendants Character**: Prosecutor's characterization of defendant during closing argument, as a "mean s.o.b." was acceptable comment on fact that evidence showed defendant to have been an aggressive, sadistic individual. *Miller v. State*, 623 N.E.2d 403, 408 (Ind. 1993).

59.65.540 **Comment On Defendants Guilt**: Prosecutor may express belief in guilt of accused during final argument, if it is clearly stated or implied that basis for belief is evidence presented at trial. *Clark v. State*, 597 N.E.2d 4, 9 (Ind. App. 1992)

59.65.550 **Comment On Credibility Of Witnesses**: In closing argument, prosecutor may comment upon credibility of witnesses as long as assertions are based upon reasons, which arise from evidence. *Beard v. State*, 428 N.E.2d 772, 775 (Ind. 1981).

59.65.560 **Comment On Role Of Defense Counsel**: Prosecutor's closing argument statement that prosecutor had obligation to ascertain true facts surrounding commission of crime, while defense attorney had no comparable obligation to ascertain or present truth, and that defense counsel was trying to confuse jury was not fundamental error. *Roller v. State,* 602 N.E.2d 165, 169 (Ind. App. 1992). [Note, the Indiana Supreme Court has disapproved of a prosecutor reciting the dissent in *United States v. Wade,* 87 S. Ct. 1926, 1947 (1967), in which Justice White stated that defense counsel have no obligation to ascertain or present the truth. *Miller v. State*, 623 N.E.2d 403, 408 (Ind. 1993).]

59.65.600 **Use Of Verdict Forms, Instructions, And Visual Aids:**

59.65.610 **Verdict Forms**: Prosecutor could discuss in final argument verdict forms that would be presented to jury. *Whittle v. State*, 542 N.E.2d 981, 994 (Ind. 1989), overruled on other grounds by *Scisney v. State*, 701 N.E.2d 847 (Ind. 1998).

59.65.620 **Instructions:** It is not error for a party to read a court instruction during final argument. *Perdue v. State*, 398 N.E.2d 1290, 1297 (Ind. App. 1979).

59.65.630 **Visual Aids:** Any exhibit properly admitted during the trial may be used during closing. Also, use of charts was not abuse of discretion, even though chart had not been admitted into evidence, where all facts on chart had been properly admitted during trial and format was chosen as aid to jury. *Andrews v. State*, 532 N.E.2d 1159, 1165 (Ind. 1989).

59.65.700 Prosecutors Rebuttal Final Argument:

59.65.710 Opening Door To Inadmissible Evidence: Prosecutors are entitled to respond to allegations and inferences raised by defense even if prosecutor's response would otherwise be objectionable. *Swartz v. State,* 597 N.E.2d 977, 981 (Ind. App. 1992).

59.65.720 Opening Door To Prior Convictions: Defense counsel opened door to prosecutor's rebuttal argument that defendant had three prior misdemeanor convictions, where defense counsel argued in closing argument that defendant was "clean" of misdemeanor or felony convictions. *Trice v. State*, 519 N.E.2d 535, 538 (Ind. 1988).

59.65.800 Defendants Rebuttal Argument: Defendant was not entitled to second closing argument, despite contention that State referred to both new facts and new points in closing final argument that were not mentioned in opening final argument; alleged new facts and points were referred to in opening final argument and were referred to in closing final as response to portions of defendant's final argument. *Hughes v. State*, 508 N.E.2d 1289, 1299 (Ind. App. 1987).

59.65.900 Time Limitations -Discretion of Court: The time allotted by the trial court for final argument is within the sound discretion of the trial judge. Trial court, in prosecution for assault with intent to commit a felony, inflicting injury during course of robbery, and aggravated assault and battery, did not abuse discretion in restricting State and defendant to 30 minutes for final argument. *Barnes v. State*, 378 N.E.2d 839, 844 (Ind. 1978).

59.70.000 Final Jury Instructions:

59.70.100 Procedure For Selecting Final Jury Instructions:

59.70.110 Limit Of Tendered Instructions: "In addition to instructions given by the Court on its own motion, a party in any cause tried by a jury, before argument, shall be entitled to tender in writing not to exceed ten (10) proposed instructions to be given to the jury. However, the trial court, in its discretion, may fix a greater number in a particular case, which number shall be stated of record by an order book entry made by the court . . .. No party shall be entitled to predicate error upon the refusal of a trial court to give any tendered instruction in excess of the number fixed by the court order, whichever is greater. Each tendered instruction shall be confined to one (1) relevant legal principle." Ind. Criminal Rule 8(A).

59.70.120 Tendering Pattern Jury Instructions: "Any party requesting a trial court to give any instruction from the Indiana Pattern Jury Instructions . . . may make such request in writing without copying the instruction verbatim, by merely designating the number thereof in the publication." Ind. Trial Rule 51(E).

59.70.130 Re-tendering Preliminary Instructions: "The court may of its own motion and shall, if requested by either party, reread to the jury the instructions given

pursuant to subdivision (F) of this rule along with the other instructions given to the jury at the close of the case." Ind. Criminal Rule 8(G).

59.70.140 **Tendering Instructions**: "Requested instructions must be reduced to writing (identified as to the party making submission), separately numbered, and accompanied by a cover sheet signed by the party, or his attorney . . ." Ind. Criminal Rule 8(D).

59.70.150 **Selecting Instructions**: "The court shall indicate on all instructions, in advance of the argument, those that are to be given and those refused. After the court has indicated the instructions to be given, each party shall have a reasonable opportunity to examine such instructions and to state his specific objection to each, out of the presence of the jury and before argument, or specific written objections to each instruction may be submitted to the court before argument." Ind. Criminal Rule 8(B).

59.70.160 **Manner Of Objecting To Instructions:** "The manner of objecting to such instructions, of saving questions thereon, and making the same a part of the record shall be the same as in Rule 51(C) of the Rules of Trial Procedure." Ind. Criminal Rule 8(H).

59.70.170 **Failure To State Grounds**: Bare objection to instructions, with no statement of grounds thereof, was insufficient to preserve claimed error for review. Trial Rule 51 requires a distinct statement of grounds of the objection. *Lund v. State*, 345 N.E.2d 826, 830 (Ind. 1976).

59.70.180 **Standard Of Review**: Trial court commits no error when it refuses to give a tendered instruction, which incorrectly states law or which is adequately covered by other instructions given by the court. *Johnson v. State*, 387 N.E.2d 1328, 1329 (Ind. 1979).

59.70.190 **Court Has No Duty To Modify**: Where portion of tendered instruction is an incorrect statement of the law, the trial court is not required to modify it but may reject it in its entirety or accept that part which it deems appropriate. *Jones v. State*, 445 N.E.2d 92, 93 (Ind. 1983).

59.70.195 **Court's Discretion to Instruct Before Arguments**: "The court may, in its discretion, give some or all final instructions before final arguments, and some or all final instructions after final arguments." Indiana Jury Rule 26.

59.70.200 **Sending Instructions To The Jury Room:** "The court shall read appropriate final instructions, providing each juror with written instructions before the court reads them. Jurors shall retain the written instructions during deliberations." Jury Rule 26.

59.70.300 **Lesser Included Offense Instruction**:

59.70.310 **Court May Give Its Own Motion**: A trial court may give an instruction on its own motion concerning the elements of an offense which is included within an alleged

offense if the court considers the instruction to be appropriate and necessary. A trial court may give an appropriate instruction concerning a lesser included offense even over the defendant's objection. *Aikins v. State*, 271 N.E.2d 418, 420 (Ind. 1971).

59.70.320 **Defendant Entitled To Instruction**: A defendant is generally entitled to an instruction concerning any offense that is included in the alleged offense. *Hash v. State*, 284 N.E.2d 770, 772-73 (Ind. 1972). [Note, the defendant should tender a proposed written instruction pursuant to Ind. Criminal Rule 8(A).

59.70.330 **Analysis For Giving Instruction:** The proper analysis to determine when a trial court should, upon request, instruct the jury on a lesser included offense of the crime charged contains three steps: (1) a determination of whether the lesser included offense is inherently included in the crime charged; if not, (2) a determination of whether the lesser included offense is factually included in the crime charged; and, if either, (3) a determination of whether a serious evidentiary dispute existed whereby the jury could conclude the lesser offense was committed but not the greater. If the third step is reached and answered in the affirmative, the requested instruction should be given. *Powers v. State*, 696 N.E.2d 865, 867 (Ind. 1998); *Wright v. State*, 658 N.E.2d 563, 566-67 (Ind.1995).

59.70.340 **Trial Courts Finding**: In deference to trial courts' proximity to the evidence, the Indiana Supreme Court will review the decision whether to instruct the jury on lesser included offenses for an abuse of discretion if the court makes a finding as to the existence or lack of a "serious evidentiary dispute" on the element in question. *McEwen v. State*, 695 N.E.2d 79, 84 (Ind. 1998).

59.70.350 **Inherently Included**: Lesser offense is inherently included in greater offense, so that instruction on lesser offense may be warranted in prosecution for greater offense, if lesser offense can be established by proof of same material elements or less than all of material elements of charged offense, or if distinguishing feature between two offenses is lesser culpability required to prove lesser offense. *Sledge v. State*, 677 N.E.2d 82, 85 (Ind. App. 1997).

59.70.360 **Voluntary Manslaughter**: Voluntary manslaughter is an inherently lesser included offense of murder. *Horan v. State*, 682 N.E.2d 502, 506 (Ind. 1997).

59.70.370 **Drug Possession**: Possession of a narcotic is an inherently lesser included offense of dealing in the narcotic. *Abron v. State*, 591 N.E.2d 634, 636 (Ind. App. 1992).

59.70.400 **Legal Defense Instruction:**

59.70.410 **In General**: Defendant is entitled to instruction on any defense, which has some foundation in evidence, even when that evidence is weak or inconsistent. *Harvey v. State*, 652 N.E.2d 876 (Ind. App. 1995).

59.70.420 **Defendant Must Request Instruction**: Burden to request instruction on self-defense is clearly upon the defendant. *Harris v. State*, 377 N.E.2d 632, 633 (Ind. 1978).

59.70.430 **Intoxication**: In deciding whether an instruction on intoxication should be given, trial court must determine whether there exists an adequate evidentiary basis for defense. *Dalton v. State*, 418 N.E.2d 544, 545 (Ind. App. 1981).

59.70.500 **Circumstantial Evidence Instruction**: Defendant was not entitled to instruction on quantity of circumstantial evidence necessary for conviction where evidence against him was not wholly circumstantial. *Murray v. State,* 479 N.E.2d 1283, 1287 (Ind. 1985).

59.70.600 **Flight Instruction is error**: It is error for a trial court to give an instruction that flight may be considered as "consciousness of guilt." *Dill v. State*, 741 N.E.2d 1230 (Ind. 2001).

59.70.700 **Judicially Noticed Fact Instruction**: In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. Ind. Evidence Rule 201(g).

59.70.800 **Supplementing Instructions After Jury Begins Deliberations:** (See below, 59.75.600 JURY REQUEST FOR ADDITIONAL INSTRUCTIONS.)

59.75.000 **Jury Deliberations:**

59.75.100 **Sequestration of Jurors**:

59.75.110 **Sequestration During Deliberations**: "The court shall not permit the jury to separate during deliberation in criminal cases unless all parties consent to the separation and the instructions found in section "a" of this rule are given." [Section "a" instructions: "[B]efore the jurors are permitted to separate, the court shall instruct them that while they are separated, they shall:
(1) not discuss the case among themselves or with anyone else;
(2) not talk to the attorneys, parties, or witnesses;
(3) not express any opinion about the case; and
(4) not listen to or read any outside or media accounts of the trial.]
Jury Rule 29.

59.75.120 **Sequestration May Be Required Prior to Deliberations**: The trial court may sequester a jury prior to deliberations if necessary to give the defendant a fair trial. *Clemens v. State*, 610 N.E.2d 236, 240-41 (Ind. 1993).

59.75.130 **Separation is Error Unless Exigent Circumstances**: Separation of a jury does not necessarily render a verdict invalid. A verdict may be sustained despite a separation of the jury if exigent circumstances justify the separation, the state can prove that the defendant was not prejudiced by the separation, and the evidence clearly supports the verdict. *Follrad v. State*, 428 N.E.2d 1201, 1202-1203

(Ind.1981); *Walker v. State*, 410 N.E.2d 1190, 1192-93 (Ind. 1980) (separating for holiday weekend was not an exigent circumstance).

59.75.200 Sending Exhibits to the Jury Room at Beginning of Deliberations:

59.75.210 Guidelines for Sending Exhibits to the Jury Room: Generally, trial courts may send tangible exhibits and documents to the jury room when the jury first retires, but the Indiana Supreme Court has adopted the following standards of the American Bar Association as guidelines for the trial courts in exercising their discretion:

"5.1 Material to the jury room.

(a) The court in its discretion may permit the jury, upon retiring for deliberation, to take to the jury room a copy of the charges against the defendant and exhibits and writings which have been received in evidence, except depositions.
(b) among the considerations which are appropriate in the exercise of this discretion are:
  (1) whether the material will aid the jury in a proper consideration of the case;
  (2) whether any party will be unduly prejudiced by submission of the material; and
  (3) whether the material may be subjected to improper use by the jury."

Thomas v. State, 289 N.E.2d 508, 509 (Ind. 1972)

59.75.220 Prior Statements of Witnesses Not Permitted to be sent to Jury Room: Although the ABA standards permit writings other than depositions to be sent to the jury room, the Indiana Supreme Court has held that prior statements of witnesses may not be sent to the jury room over objection of a party because such statements are similar to depositions and fail to meet the considerations in ABA Standard 5.1(b) as stated above, especially if the prior statements are inconsistent. *Thomas v. State*, 289 N.E.2d 508, 509-10 (Ind. 1972).

59.75.300 Alternate Jurors in Jury Deliberations: If alternate jurors are permitted to attend deliberations, they shall be instructed not to participate. Ind. Trial Rule 47(B).

59.75.400 Swearing Bailiff Before Deliberations:

59.75.410 Bailiff Must Be Sworn: After hearing the charge, the jury shall retire to the jury room for deliberation. They shall retire under the charge of an officer, who shall be sworn by the court. Ind. Code 35-37-2-6(a).

59.75.420 Recommended Bailiff Oath: “Do you solemnly swear to keep the jury in this case together in the jury room in this courthouse, to furnish them with food as directed by the Court, to permit no person to speak or communicate with them, to speak or communicate with them only by order of the Court or to ask them

whether they have agreed upon a verdict, an to return them into Court when so agreed or when so ordered by the Court? Do you further solemnly swear that you will not communicate to any person the state of the deliberations of the jury, so help you God?"

59.75.500 Jury Requests to Rehear or Examine Evidence:

59.75.510 Statutory Procedure: If, after the jury retires for deliberation, there is a disagreement among the jurors as to any part of the testimony; the jury may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or the attorneys representing the parties. Ind. Code 34-36-1-6.

59.75.520 When Statutory Procedure is Applicable: Indiana Code 34-36-1-6 is triggered where the jurors explicitly indicate a disagreement as to any part of the testimony. If there is no disagreement, then the statute does not apply, but the court must comply with the common law procedure (see below, 59.75.540 Common Law Procedure). *Bouye v. State*, 699 N.E.2d 620, 627-28 (Ind. 1998).

59.75.530 When Statutory Procedure is Not Applicable: When the jury simply requests to see certain exhibits and does not indicate a disagreement as to the evidence, the statutory procedure is not applicable and sending the exhibits admitted at trial to the jury without consulting the parties was not error. *Gibson v. State*, 702 N.E.2d 707, 709 (Ind. 1998).

59.75.540 Common Law Procedure: If the statute is inapplicable, the trial court should consider three factors in deciding whether to permit the jury to take a copy of the exhibits into the jury room.

(1) whether the material will aid the jury in a proper consideration of the case;
(2) whether any party will be unduly prejudiced by submission of the material; and
(3) whether the material may be subjected to improper use by the jury.

The same factors govern a trial court's decision to send exhibits to the jury before or during deliberations. *Thacker v. State*, 709 N.E.2d 3, 6 (Ind. 1999) [Citing *Robinson v. State*, 699 N.E.2d 1146, 1150 (Ind. 1998)].

59.75.600 Jury Requests for Additional Instructions:

59.75.610 Statutory Procedure: After the jury retires for deliberations, it may ask the court to inform as to any point of law arising in the case. The Court shall give the information in the presence of, or after notice to, the parties or the attorneys representing the parties. Ind. Code 34-36-1-6.

59.75.620 When Statutory Procedure is Applicable: Indiana Code 34-36-1-6 is triggered when the jurors ask the court to be informed as to any point of law. If they do not ask about a point of law, then the statute does not apply, but the court must

comply with the common law procedure (see 59.75.640 Common Law Procedure). *Bouye v. State*, 699 N.E.2d 620, 627-28 (Ind.1998).

59.75.630 **Statutory Procedure Not Violated**: Trial court *did not* violate the statutory procedure by referring the jury to the final instructions after the jury requested additional guidance without first notifying the parties. The statute does not require the presence of or notice to the parties whenever the court responds to a jury request; rather, notice or presence is required when "information" is given. The courts response of merely referring the jury to the instructions was not the giving of information. *Pendergrass v. State*, 702 N.E.2d 716, 719-20 (Ind. 1998).

59.75.640 **Common Law Procedure**: Whenever jurors request any type of additional guidance from the court, the proper procedure is for the judge to notify the parties so that they may be present in court and informed of the courts proposed response before the judge ever communicates with the jury. *Pendergrass v. State*, 702 N.E.2d 716, 719-20 (Ind. 1998); *Bouye v. State*, 699 N.E.2d 620, 628 (Ind. 1998).

59.75.650 **Common Law Procedure Violated**: Trial court *did* violate the constitutional procedure by referring the jury to the final instructions after the jury requested additional guidance without first notifying the parties. The trial courts response of merely referring the jury to the instructions, however, was in substance a denial of the request and was harmless error. *Pendergrass v. State*, 702 N.E.2d 716, 720 (Ind. 1998).

59.75.660 **Standard for Supplementing Instructions**: The Supreme Court has stated that the trial court should give an additional instruction only under "the most extreme circumstances," such as when the jurys question indicates that there is "an error or legal lacuna" in the final instructions. Normally, the trial court should re-read or direct the jury to the final instructions. *Jenkins v. State*, 424 N.E.2d 1002, 1003 (Ind. 1981); *Cameron v. State*, 383 N.E.2d 1039, 1041 (Ind. 1979); *Brannum v. State*, 366 N.E.2d 1180, 1184 (Ind. 1977).

59.75.670 **Supplemental Instruction Permitted**: Principle that additional instructions or explanations cannot be given to jury without re-reading whole charge did not apply where jury was not deadlocked but simply did not understand their task. *Taylor v. State*, 677 N.E.2d 56, 62 (Ind. App. 1997).

59.75.680 **Supplemental Instruction Permitted**: When there was a variance between the dates in the information and the evidence at trial, and when the jury asked the trial judge whether the State had to prove the act occurred within the dates alleged in the information, trial court properly supplemented its instructions because the instruction covered a legal lacuna and was necessary to the proper deliberation of the jury. *Downs v. State*, 656 N.E.2d 849, 853 (Ind. App. 1995).

59.75.700 **Length of Deliberations:**

59.75.710 **Discretion of Court**: The trial court has the discretion to determine the length of time during which a jury should be required to deliberate, and also has the

discretion to determine whether a jury should be required to continue with its deliberations or whether a mistrial should be declared because of the jury's inability to reach a verdict. *Hinton v. State*, 397 N.E.2d 282, 284 (Ind. 1979).

59.75.720 **Jury Must Not be Coerced**: In reviewing the length of deliberations, one of the factors considered is whether the jury was coerced into reaching a verdict. *Ayad v. State*, 261 N.E.2d 68, 69 (Ind. 1970).

59.75.730 **Abuse of Discretion**: It was abuse of discretion for trial court to continue deliberations for approximately 30 hours without allowing jurors to sleep, especially when prosecutor joined in defense request that jurors be allowed to rest. *Farrell v. State*, 622 N.E.2d 488, 492 (Ind. 1993).

59.75.800 **Assisting Jurors at an Impasse** – "If the jury advises the court that it has reached an impasse in its deliberations, the court may, but only in the presence of counsel, and, in a criminal case the parties, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the court, after consultation with counsel, may direct that further proceedings occur as appropriate." Indiana Jury Rule 28.

59.75.900 **Jury Exposure to Extraneous Information:**

59.75.910 **Jury Exposure Discovered During Trial:** If the possible exposure is discovered during trial, the trial court should follow the procedures set forth above in 59.50.100 Procedure for Handling Juror Misconduct.

59.75.920 **Jury Exposure Discovered After Jury has Been Discharged:** If the possible exposure is discovered after the jury has been discharged, the Jury Rule 24 or *Lindsey* procedures (as set forth in 59.50.125 and 59.50.130 above) are not appropriate. An inquiry of the type required by *Lindsey* would permit jurors to testify as to the influence the extraneous material had upon their deliberations and, therefore, to impeach their own verdict, which is not permitted. The Defendant must first make a prima facie showing of actual exposure before the trial may consider any remedy. Although a juror may not impeach his verdict, he may give testimony as to what transpired during the trial, including the deliberations. If a defendant has a bona fide claim of jury taint, the defendant must first allege that exposure did occur and support the claim with evidence, by affidavit or testimony, at the discretion of the trial judge. "If, and only if, a claimant establishes, by a preponderance of the evidence, that the jury saw or heard the material complained of, should the judge be put to the task of determining the likelihood of the verdict having, thereby been polluted." *Fox v. State*, 457 N.E.2d 1088, 1092-94 (Ind. 1984)

59.75.930 **Testimony by Jurors About Deliberations**: "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental

processes in connection therewith, except that a juror may testify (1) to drug or alcohol use by any juror, (2) on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or (3) whether any outside influence was improperly brought to bear upon any juror. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received for these purposes." Ind. Evidence Rule 606.

59.80.000 Jury Verdicts:

59.80.100 Return of Jury Verdict:

59.80.110 Verdict Must Be Rendered in Open Court: "When the jury has agreed upon its verdict, the officer having the jurors in his charge shall conduct them into court. If all jurors appear, their verdict must be rendered in open court. If all do not appear, the court shall discharge the jury without prejudice." Ind. Code 35-37-2-7.

59.80.120 Right to Poll Jury: The trial court may poll the jurors to determine whether the verdict is unanimous. If the trial court does not do so, the prosecuting attorney and the defendant have the right to request the trial court to poll the jury. Ind. Code 35-37-2-7.

59.80.130 Proper Procedure for Return of Verdict: "The practice in this state has been for the trial judge to ask the jury if it has agreed upon its verdict. If the foreman of the jury answers in the affirmative, the verdict is ordered delivered to the bailiff, who in turn delivers it to the clerk, if present, or to the judge, and then the verdict is read. The judge then asks the jury if this is its unanimous verdict. If this is answered in the affirmative the defendant has the right to poll the jury. If it still appears to be the unanimous verdict of the jury, it is received and filed and the jury discharged." *Gilmore v. State*, 98 N.E.2d 677, 680 (Ind. 1951).

59.80.200 Defective Jury Verdict:

59.80.210 Defective Verdict May Be Corrected: A verdict is not final until it is returned in open court, accepted by the judge, and the jury is discharged. Prior to its discharge, a jury may be allowed to correct a verdict. *Gilmore v. State*, 98 N.E.2d 677, 680 (Ind. 1951).

59.80.220 Verdict Must Be Corrected Before Jury Discharged: Once a trial court discharges the jury, the court may not reconvene the jury to correct a defective verdict. *West v. State*, 92 N.E.2d 852, 855 (Ind. 1950).

59.80.230 Trial Court Has Duty to Correct Defective Verdict: When a trial court reviews a verdict form and finds that the verdict is defective, it has the duty to set aside the erroneous verdict and to furnish the jury with a proper verdict form and return them for deliberation. *McFarland v. State*, 579 N.E.2d 610, 612 (Ind. 1991).

59.80.300 Jury Verdict of Guilty:

59.80.310 **Entry of Judgment of Conviction**: After a verdict of guilty, the court shall enter a judgment of conviction. Ind. Code. 35-38-1-1.

59.80.320 **Set Sentencing Date**: "Upon entering a conviction, the court shall set a date for sentencing within thirty (30) days, unless for good cause shown an extension is granted. If a presentence report is not required, the court may sentence the defendant at the time the judgment of conviction is entered. However, the court may not pronounce sentence at that time without:

(1) inquiring as to whether an adjournment is desired by the defendant; and
(2) informing the victim, if present, of a victim's right to make a statement concerning the crime and the sentence.

When an adjournment is requested, the defendant shall state its purpose and the court may allow a reasonable time for adjournment." Ind. Code 35-38-1-2(b).

59.80.330 **Order Defendant Imprisoned Pending Sentencing**: "If the felony is nonsuspendable under Indiana Code 35-50-2-2, the judge shall order the defendant, if the defendant has previously been released on bail or recognizance, to be imprisoned in the county or local penal facility pending sentencing." Ind. Code 35-38-1-2(d).

59.80.400 **Jury Verdict of Not Guilty**: After a verdict of not guilty, the court shall enter a judgment of acquittal and release the surety bond or bail deposit.

59.85.000 **Non-jury Trials:**

59.85.100 **General Procedure for Non-jury Trial**: "A non-jury or bench trial is conducted under essentially the same procedures as a jury trial, but there are certain basic differences in the procedures primarily because of the absence of a jury. For example, the defendant has no right to examine the trial court on voir dire, no right to have the trial court sequestered to avoid being influenced by prejudicial publicity, no right to appear before the trial court free of physical restraints, and no right to have instructions at the conclusion of the trial. In addition, the prosecuting attorney is not required to make an opening statement, the trial court is not required to consider a motion in limine, and the trial court is not required to conduct a preliminary hearing on the admissibility of evidence." 16B Kerr, Indiana Practice Section 22.14 (1998).

59.85.200 **Involuntary Dismissal in Non-jury Trial:**

59.85.210 **Trial Rule 50 Does Not Apply:** When the court sits as the trier of fact, without a jury, Trial Rule 50 for Judgment on the Evidence (Directed Verdict) does not apply; Rule 41(B) for Involuntary Dismissal applies. *State v. Vowels*, 535 N.E.2d 146, 147 (Ind.App. 1989); Ind. Trial Rule 41(B), 50(A).

59.85.220 **Trial Court May Weigh Evidence: "**The distinction between the Trial Rule 50 standard and the Trial Rule 41(B) standard is that the trial court judges the credibility of the State's witnesses and weighs the evidence in ruling on a Trial

Rule 41(B) motion, while, in ruling on a Trial Rule 50 motion, the trial court determines only whether the State has presented evidence on each element of the offense." *Kimbrough v. State*, 622 N.E.2d 230, 232 (Ind. App. 1993).

59.85.230 **Standard for Granting Involuntary Dismissal:** "The establishment by the State of a prima facie case does not save it from a Rule 41(B) motion. The trial court is permitted to make an ultimate conclusion in the case based solely upon the evidence presented by the State . . .. Accordingly, a defendant's motion for involuntary dismissal should be granted if the trial court concludes that, after the State presents its evidence, the State has failed to prove the essential elements of the offense beyond a reasonable doubt--except where . . . the State's required burden is less, such as by the preponderance of the evidence." *State v. Vowels*, 535 N.E.2d 146, 147-48 (Ind. App. 1989).

59.85.300 **Waiver of Jury Trial:**

59.85.310 **Consent of Prosecutor and Court Required**: A defendant does not have a right to a non-jury or bench trial in a felony case, or in a misdemeanor case after a timely jury demand has been made. A defendant may waive his or her right to a jury trial only with the consent of the prosecuting attorney and the trial court. Ind. Code 35-37-1-2. See also, 39.30.300 Waiver of Jury Trial.

59.85.320 **Misdemeanor Trials**: A defendant charged with a misdemeanor may demand a jury trial by filing a written demand no later than ten days before his or her first scheduled trial date. Failure to do so waives the defendants right to a jury trial. Thereafter, the trial court has discretion to grant a demand for jury trial only with the written consent of both the State and the defendant. Ind. Criminal Rule 22. See also, 39.20.200 Demanding Misdemeanor Jury Trial.

59.90.000 **Jury Trial Checklist and Sample Jury Dialogue**:

59.90.100 **Preliminary Matters:**

59.90.110 **Selection of Preliminary Instructions**: *(The Court should decide preliminary instructions prior to voir dire whenever possible. The Court delivers to the attorney for each of the parties the Courts proposed preliminary instructions for examination and objection, if any. The Court invites counsel to submit any proposed instructions. The Court should specifically state for the record the instructions it will give and those it will refuse and invite counsel to file written objections or to dictate to the Court Reporter any objections to any instructions indicated to be given.)*

59.90.120 **Motions in Limine**: *(The Court should rule upon motions in limine prior to voir dire whenever possible.)*

59.90.130 **Other Preliminary Matters:** *(The Court should discuss and decide any other preliminary matters, such as time limits and procedures for voir dire, time limits for opening statements, and number of alternates jurors to be selected.)*

59.90.200 Voir Dire Dialogue:

59.90.210 Preliminary Remarks to the Jury Venire:
Ladies and Gentlemen, thank you for appearing today for jury selection. Your pay will be $_____ for appearing. If you are actually selected to be on the jury, you pay will be $_____. All of you will also receive your travel expenses at the rate of $_____ per mile. At the conclusion of the trial, your claims will be submitted to the county auditor. You should receive your check soon after the trial is ended. If any of you need statements verifying your service for your employer, forms will be furnished to you by the _____. The bailiff has furnished me a list of the persons who should have appeared for service, and I must verify the list for the record. Therefore, I will call the names, which appear on the list, and when your name is called, answer "Present." *(After reading all names)* Are there any prospective jurors present whose names were not called? If so, raise you hands. *(If hands are raised, identify the persons.)*

59.90.220 Oath to Jury Venire:
All of you will be asked to take an oath, or affirmation, to tell the truth. Will all of you stand, raise your right hands to be sworn or affirmed, and reply, "I do" after I read your oath:

Do you solemnly swear (or affirm under penalties for perjury) that you will give true answers to all questions put to you concerning your qualifications to sit as jurors in this case at issue and which now is the subject for trial, so help you God? *(After response)* Please be seated.

59.90.230 Voir Dire of the Jury Venire:
This case is a criminal case entitled State of Indiana v. _____, and it was started by an Information (Indictment) alleging, in substance, that _____ committed the criminal offense(s) of _____ in violation of the laws of the State of Indiana. The attorneys involved in the trial of this case are *(here identify attorneys, starting with the State and then the Defendant.)* I will ask a number of questions addressed to all of you as a group. If your answer any of these questions is "yes," you should raise your hand immediately. When I have finished, the attorneys will ask you questions. These questions are not intended to be offensive or personal, but may be necessary to insure that the right jury is selected for this type of case. You should not be offended if you are excused for no apparent reason. If your answer to any of the following questions is "yes," please raise your hand after the question is asked:

(The Court and attorneys voir dire the venire. See above, 57.90.200 Court's Voir Dire on qualifications. After jury is selected, thank and release balance of Venire.)

59.90.300 Swearing and Admonishing Jury

59.90.310 Oath to Jury After Selection: *(The Court swears the jury as follows:)*

Do you, and each of you, solemnly swear (or affirm under penalties of perjury) that you will and truly try and determine this case at issue and now on trial, and return a true verdict, according to the law and evidence as it is presented to you during this trial, so help you God?

59.90.320 **Admonishment of Jury Before Separation**: *(After the Court swears the jury, the Court must admonish the jury each time it leaves the courtroom. The first time the jury separates; the Court reads the following admonishment, which is also a preliminary jury instruction:)*

During the progress of the trial there will be times when you will be outside the courtroom for rest periods and other times when you will be allowed to separate for lunch and overnight. During all of those times that you are outside the courtroom, you must not talk about this case among yourselves or with anyone. You are permitted to discuss the evidence among yourselves in the jury room during recesses from trial but only when all jurors and alternates are present. Do not talk to any of the parties, the attorneys or the witnesses. Should anyone attempt to talk to you about the trial you should refuse, and should report the attempt to me at your first opportunity. There may be publicity in newspapers, on radio or on television concerning this trial. You should not read or listen to those accounts but should confine your attention to the Court proceedings; listen attentively to the evidence as it comes from the witnesses, and reach a verdict solely upon what you hear and see in this Court. You should keep an open mind. You should not form or express an opinion during the trial and should reach no conclusion about the case until it is submitted to you for deliberation. Under these instructions, you will be permitted to separate. *(The Court directs the bailiff to take the jury to the jury room until the trial is ready to begin.)*

59.90.330 **Admonishment of Jury at Recess or Adjournment**: *(The Court may give the following short-form admonishment at subsequent recesses and adjournments instead on the above long-form:)* You are admonished that it is your duty not to discuss this case among yourselves or with anyone else nor form or express any opinion on the guilt or innocence of the defendant(s) until the case is finally submitted to you. Under these instructions, you will be permitted to separate for recess (or for adjournment).

59.90.400 **Trial Checklist:**

59.90.410 **Reading of Preliminary Instructions**: *(The Court reads the preliminary instructions to the jury.)*

59.90.420 **Opening Statements**: *(The Court invites attorneys for the State and the defendant to make their opening statements to the jury.)*

59.90.430 **Introduction of Evidence**: *(The State proceeds with the presentation of evidence, then the defendant proceeds, then the State for rebuttal, and, if required, the defendant for rebuttal.*

59.90.440 **Admonishment of Jury***: At recess or adjournment, the Court must admonish the jury. See above, 59.90.330 Admonishment of Jury at Recess or Adjournment (short-form).*

59.90.450 **Motion for judgment on the evidence***: A motion for judgment on the evidence (directed verdict) at the close of the States case in chief must be heard and determined out of the presence of the jury.)*

59.90.460 **Retirement of Jury Prior to Final Instructions**: *(At the close of the evidence, the Court explains to the jury the purpose of the recess and then recesses and directs the bailiff to return the jury to the jury room to await recall, with admonishment.)*

59.90.470 **Settlement of Final Instructions**: *(The Court gives counsel copies of its own proposed instructions and invites the tender of proposed instructions by the parties. The Court must rule and indicate which of the tendered instructions the Court will give and which it will refuse, noting its action thereon, and advise the parties to make a record by filing written objections to the final instructions or dictating their objections to the final instructions to the Court Reporter.)*

59.90.480 **Final Arguments**: (*the orders of final arguments are: first by the State; then by the defendant; and then closing by the State. If the State in closing refers to any new point of fact no disclosed in the opening, the defendant may reply to that point of fact*.)

59.90.490 **Final Instructions**: *(The Court then reads its final instructions to the jury.)*

59.90.500 **Initiating Jury Deliberations:**

59.90.510 **Oath to Bailiff**: *(Swear Bailiff in presence of the jury.)*
Mr(s). _____, as bailiff of this Court, the Court now places the jury in your charge. Please raise your right hand. Do you solemnly swear (or affirm under penalties for perjury) to keep the jury in this case together in the jury room in this courthouse, to furnish them with food as directed by the Court, and to permit no person to speak or communicate with them, to speak or communicate with them yourself only by order of the Court or to ask them whether they have agreed upon a verdict, and to return them into court when so agreed or when so ordered by the Court?

Do you further solemnly swear (or affirm under penalties for perjury) that you will not communicate to any person the state of the deliberations of the jury, so help you God?

59.90.520 **Communications With Jury During Deliberations**: *(The Court should instruct the bailiff to abstain from any discussions of the case with the jury. Very specifically, the bailiff should not attempt to answer any questions that might be posed by the jury during its deliberations. If the jury signals the bailiff that it has a request or questions, the bailiff shall report this fact to the Court.)*

59.90.530 **Request or Questions By The Jury:** *(If the jury has a request or questions, the Court notifies all attorneys and defendant, and the court reporter. The judge shall reconvene Court, ensure the presence of all parties and take such action as is necessary.)*

59.90.600 **Receiving the Jury Verdict:**

59.90.610 **Return of Jury**: *(When the jury indicates either that it has reached a verdict or is unable to reach a verdict, the bailiff notifies the Court and assembles the attorneys and the defendant. Then the Court requests the bailiff to return jury to the jury box. After the bailiff returns the jury to the courtroom, the Court determine if all are present and then addresses the jury as follows:)*

Ladies and Gentlemen of the Jury: Have you reached your verdict(s)? (*If yes*) Will the Foreman rise, state his/her name, and hand the verdict(s) to the bailiff, who will bring it to me for reading in open Court. *(After the Bailiff hands the verdict to the Court)* Will the Defendant please stand? *(The Court then reads the verdict aloud; attorneys may request the Court to poll the jury.)*

(If no) Will the foreman rise, state his/her name and respond to these questions: Without revealing any numbers, do you think the jury is close to reaching a verdict? Do you think that with further deliberations a verdict is reasonably possible? Is it your opinion the jury cannot reach a verdict in this case? (*To the Jury)* You have heard the opinion of the Foreman. Do each of you agree?

59.90.620 **Entering Judgment for Felony**: *(If the defendant is guilty of a felony, the Court enters a judgment of conviction and announces to the defendant the date of sentencing (not more than thirty (30) days after the verdict). The Court orders a presentence investigation. Then the Court continues bail, alters or revokes bail pursuant to Ind. Code 35-33-8-5, admits the defendant to bail pending appeal pursuant to Ind. Code 35-33-9-1, or orders the defendant imprisoned if the felony is nonsuspendable under Ind. Code 35-50-2-2. The Court remands the defendant to the custody of sheriff if there is no bail.)*

59.90.630 **Entering Judgment for Misdemeanor**: *(If the defendant is guilty of a misdemeanor, the Court enters a judgment of conviction and inquires the defendant as to whether he/she desires an adjournment or postponement before the Court imposes its sentence. (The ruling by the Court is discretionary.) If adjournment is not requested or refused, the Court invites the defendant and his attorney to speak on the subject.)*

59.90.640 **Entering Judgment of Acquittal**: *(If the defendant is not guilty, the Court enters judgment of acquittal and announces that it discharges the defendant in respect to the crimes charged in this case and that the defendant shall be released from custody by the sheriff unless there is another warrant requiring him to retain custody of the defendant.)*

59.90.650 **Discharge of the Jury**: *(The Court compliments and thanks the members of the jury, the attorneys, and discharges the jury.)*

59.95.000 SAMPLE JURY TRIAL CHRONOLOGICAL CASE SUMMARY ENTRIES

[Note, these are possible, but not required, entries for the Chronological Case Summary (CCS) to reflect the major judicial events as suggested by Trial Rule 77(B). Also, most CCS entries do not need to be entered on the Records of Judgments and Orders (RJO), but judgments of conviction or acquittal, and any order to hold the defendant without bond should entered on the RJO.]

- ❑ The Court calls this matter for Jury Trial.
- ❑ Defendant appears in person and by counsel _____.
- ❑ State of Indiana appears by Deputy Prosecutor _____.
- ❑ State moves for Motion in Limine.
- ❑ Defendant moves for Motion in Limine.
- ❑ Court grants Motion in Limine.
- ❑ Court denies Motion in Limine.
- ❑ Venire sworn and examined. Jury selected and accepted by State and Defendant.
- ❑ The following are sworn as Jurors:

1. _____ 7. _____
2. _____ 8. _____
3. _____ 9. _____
4. _____ 10._____
5. _____ 11. _____
6. _____ 12. _____

- ❑ The following are sworn as alternate jurors:

1. _____ 3. _____
2. _____ 4. _____

- ❑ State submits proposed preliminary instructions numbered _____.
- ❑ Defendant submits proposed preliminary instructions numbered _____.
- ❑ Preliminary instructions settled.
- ❑ State moves for separation of witnesses.
- ❑ Defendant moves for separation of witnesses.
- ❑ Court grants motion, admonishes witnesses and attorneys, and separates witnesses.
- ❑ Court reads preliminary instructions.
- ❑ State makes opening statement.
- ❑ Defendant makes opening statement.
- ❑ Defendant waives opening statement.
- ❑ State submits evidence.
- ❑ State rests.

- ❑ Defendant moves for Judgment on Evidence (Directed Verdict), Court grants motion.
- ❑ Defendant moves for Judgment on Evidence (Directed Verdict), Court denies motion.

- ❑ Court adjourns for the day, trial to resume on _____, 200__, at ____:____ __.m.

- ❑ The Court resumes this matter for Jury Trial after overnight adjournment.

- ❑ Defendant submits evidence.
- ❑ Defendant rests.
- ❑ State submits rebuttal evidence and rests.
- ❑ Defendant submits surrebuttal evidence and rests.

- ❑ Defendant moves for Judgment on Evidence (Directed Verdict), Court grants motion.
- ❑ Defendant moves for Judgment on Evidence (Directed Verdict), Court denies motion.

- ❑ State submits proposed final instructions numbered _____.
- ❑ Defendant submits proposed final instructions numbered _____.
- ❑ Final instructions settled.
- ❑ Parties waive rereading of preliminary instructions.

- ❑ State makes closing argument.
- ❑ Defendant makes closing argument.
- ❑ State responds to Defendant's closing argument.

- ❑ Court reads final instructions and swears Bailiff.
- ❑ Jury retires to deliberate.

- ❑ Court receives Jury question. Court conducts hearing outside presence of jury.
- ❑ Court responds to Jury question in writing.
- ❑ Courts responds to Jury question in open Court, Court orders Jury to resume deliberations.

- ❑ Jury returns and announces it is unable to reach a verdict.
- ❑ Court orders Jury to resume deliberations.
- ❑ Court declares mistrial because Jury is unable to reach a verdict.

- ❑ Jury returns verdict(s). Court examines verdict forms and reads verdict(s):

Count ____: _____	Count ____: _____
Count ____: _____	Count ____: _____
Count ____: _____	Count ____: _____
Count ____: _____	Count ____: _____
Count ____: _____	Count ____: _____

- ❑ Court polls Jury at request of _____.

- ❑ Judgment of acquittal entered on Count(s) _____.
- ❑ Judgment of conviction entered on Count(s)_____.
- ❑ Judgment of conviction entered as a Class A misdemeanor on Count(s) _____.
- ❑ Judgment of conviction entered for _____, as included in Count _____.

- ❑ Defendant waives right to be sentenced within thirty days.
- ❑ Court orders the probation department to prepare a presentence investigation report and sets this cause for a sentencing hearing on _____, 200_ at ___: ___ __ _.m.

- ❑ Court orders the Sheriff to hold Defendant without bond pending sentencing.
- ❑ Defendant having been found not guilty on all Counts, Court orders Defendant released as to this cause only.
- ❑ Defendant having been found not guilty on all Counts, Court orders Surety released as to this cause only.

- ❑ Motion made of mistrial by _____, Court grants motion.
- ❑ Motion made of mistrial by_____, Court denies motion.

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62.00.000 Penalty Enhancements

62.01.000 General characteristics

62.01.010 Three types of recidivist penalty enhancements:
(1) General habitual offender statute, I.C. 35-50-2-8, provides that a person convicted of three or four felonies of any kind is subject to an additional term of years beyond that imposed for the underlying felony;
(2) "Specialized habitual offender statutes" apply where the predicate underlying offenses are of a common type (*e.g.*, "repeat sexual offender," I.C. 35-50-2-14; "habitual vehicular substance offender," I.C. 9-30-15.5-2);
(3) "Progressive penalty statutes" apply if the defendant has previously been convicted of a particular offense (e.g., operating while intoxicated, I.C. 9-30-5-3, as a level 6 felony with a prior OWI conviction).
Beldon v. State, 926 N.E.2d 480, 482-83 (Ind. 2010).

62.02.000 Multiple enhancements

62.02.200 General rule on multiple enhancements - "absent explicit legislative direction, a sentence imposed following conviction under a progressive penalty statute may not be increased further under either the general habitual offender statute or a specialized habitual offender statute." *State v. Downey*, 770 N.E.2d 794, 796 (Ind. 2002).

62.02.300 "Explicit legislative direction" for multiple enhancements - an example of the "explicit legislative direction" needed for multiple enhancements was the express inclusion of drug misdemeanors and felonies in the definition of "substance offense" for which the former habitual substance offender enhancement could be imposed. *State v. Downey*, 770 N.E.2d 794 (Ind. 2002).

62.04.000 Pretrial

62.04.010 Separate pleading - the enhancement is to be alleged on a paper separate from the rest of the charging instrument. This provision is required by statute (*e.g.*, I.C. 35-50-2-8(a) (habitual criminal offender); I.C. 35-34-1-2.5 (prior conviction of the offense, for a "progressive penalty")).

62.04.100 Time of filing - the habitual offender statute, I.C. 35-34-1-5(e), provides that an amendment to add an habitual criminal offender charge must be made at least thirty days before commencement of trial, but the thirty day period may be dispensed with and an amendment at any time before the commencement of trial may be made if it does not prejudice the defendant's substantial rights. If an amendment is allowed within the thirty day period prior to trial, the defendant is entitled to a continuance "for any reason; the state may obtain a continuance "for good cause shown." Statutes are silent on the time of filing for specialized habitual offender enhancements and progressive penalty enhancements; see generally I.C. 35-34-1-5, on amendments to charges.

62.04.400 Initial hearing - an initial hearing is required on an habitual offender count, but failure to hold an initial hearing is not reversible error unless it results in prejudice. *Shelton v. State*, 490 N.E.2d 738, 744 (Ind. 1986) (prejudice did not result where State filed habitual offender count three days before trial and defendant had notice before trial of habitual offender charge); *Lampkins v. State*, 682 N.E.2d 1268, 1273-1274 (Ind. 1997) (counsel knew of habitual addition at least four days prior to trial and represented defendant's interest in the habitual phase).

62.05.000 Trial

62.05.100 Jury

62.05.110 Jury right - If the trial of the underlying offense is to a jury, the enhancement is also to be tried to the jury, as indicated in all the enhancement statutes' provision that the jury "shall reconvene" for "the sentencing hearing." The jury right may be knowingly and intentionally waived. *Gonzalez v. State*, 757 N.E.2d 202 (Ind. Ct. App. 2001).

62.05.120 Jury size by grade of offense - When the State charges a felony enhanced due to prior conviction to a Level 5 or higher, a twelve-person jury is required. *Henderson v. State*, 690 N.E.2d 706 (Ind. 1998) (holding that a defendant charged with a Class D felony enhanced to a Class C felony due to a prior unrelated conviction was entitled to the twelve person jury required by I.C. 35-37-1-1 for Class C felonies).

62.05.150 No voir dire - "The state or the defendant may not conduct any additional interrogation or questioning of the jury during the habitual offender portion of the trial." I.C. 35-50-2-8(h). Other recidivist enhancement statutes do not contain equivalent language.

62.05.170 Re-swearing of same jury not required - Re- swearing of the jury when it reconvenes for an enhancement proceeding is not required (result might be different if a new jury were impaneled to try the habitual issue). *Wine v. State,*539 N.E.2d 932 (Ind. 1989).

62.05.200 Bifurcation - when the trial of the underlying offense is to a jury, after the finding of guilt on the underlying charge the jury reconvenes for the enhancement phase of the proceeding to hear and deliberate on the evidence of the alleged prior offenses. This procedure ensures that the defendant receives a fair trial on the underlying offense by a jury which has not been exposed to the evidence of the alleged unrelated prior convictions. *Lawrence v. State*, 259 Ind. 56, 286 N.E.2d 830 (1972).

62.05.270 "Trifurcation" not required - "Holding the charge enhancement and habitual offender determinations in the same phase of a trial does not offend any interest of the defendant in a fair trial" - "trifurcated proceedings do not provide defendants any additional protections beyond those which bifurcated proceedings afford." *Shelton v. State*, 602 N.E.2d 1017, 1020 (Ind. 1992).

62.05.300 Preliminary instructions:

- **General recidivist enhancement preliminary -** see Indiana Pattern Jury Instructions (Criminal) No. 15.1000.
- **Finder of law and fact –** "when a defendant requests the trial court to instruct the jury on its role as finders of law and fact during the habitual offender phase of a trial, it is reversible error for the trial court to refuse the request." *Warren v. State*, 725 N.E.2d 828 (Ind. 2000). The Committee recommends that a preliminary and final instruction on the jury's role as finder of law and fact be given, if requested.

62.05.400 Evidence issues

62.05.410 Evidence rules - "evidentiary protections apply to the extent they are implicated in a habitual offender proceeding," although Indiana Rule of Evidence 101(c)(2) explicitly excludes sentencing hearings from the scope of the Rules of Evidence. *Poore v. State*, 685 N.E.2d 36, 39 (Ind. 1997).

62.05.420 Evidence from first phase –the "usual and better procedure is for the State to move for admission of all evidence from the guilt phase of the trial into the sentencing phase," but if the State omits this motion and the sentencing jury is the jury which heard the guilt phase the jury may properly consider evidence admitted in the guilt phase of the trial. *State v. Brooke*, 565 N.E.2d 754 (Ind. 1991) (holding that jury could consider guilt phase evidence of date of principal offense's commission in habitual offender phase even though State had not moved for admission of guilt phase evidence).

62.05.430 Certified and authenticated conviction records required:

- State must introduce into evidence proper certified and authenticated records of the defendant's prior felony convictions in order to prove beyond a reasonable doubt the existence of those prior convictions.
- In the absence of a showing by the State that such records are unavailable, parol evidence alone is not sufficient to prove the fact of prior convictions.
- Even though additional supporting evidence is required to prove the identity of the defendant and may be required to prove the proper sequence of the felony convictions, proper certified and authenticated documentary evidence is required to establish that the prior convictions in fact occurred.
- A judgment must be signed by the trial judge to constitute substantial evidence of probative value sufficient to sustain a habitual-offender enhancement.

Dexter v. State, 959 N.E.2d 235, 238-239 (Ind. 2012).

62.05.440 Certified records not required to prove date of offense - "the date of an offense's commission is not part of the fact of a prior conviction and may be proven with such evidence as charging documents, testimony at trial, or jury instructions. *Beavers v. State*, 566 N.E.2d 533 (Ind. 1991).

62.05.450 State must prove identity of defendant as one convicted:

- The State must prove that the defendant is the person who was convicted of the prior felonies alleged, and must present evidence linking the defendant with the evidence of the prior convictions.
- A sufficient connection between the prior conviction evidence and the defendant is made if the evidence yields logical and reasonable inferences from which the trier of fact may determine it was indeed the defendant who was convicted of the felonies alleged.
- To make the proper showing, the State must produce certified copies of records showing convictions of the prior unrelated felonies and supporting evidence to identify the defendant as the same person who was convicted of those crimes.

62.05.455 Types of identity evidence:

- **Identical names insufficient to prove identity -** certified copies of judgments or commitments containing the same name as defendant's may be entered to prove the commission of felonies, but to support an habitual offender finding there must be other supporting evidence to identify the defendant as the one named in the documents. *Baxter v. State*, 522 N.E.2d 362 (Ind. 1988).
- **Commitment papers with photographs and descriptions** of defendant may suffice for the jury to identify defendant as the person committed. *Meredith v. State*, 503 N.E.2d 880 (Ind. 1988).
- **Fingerprint evidence** - to provide the link between documents evidencing prior convictions and defendant, the State may use the testimony of a fingerprint technician to match defendant's fingerprints with those in the prior felony arrest records. *Palmer v. State*, 679 N.E.2d 887 (Ind. 1998).
- **Identification testimony** - Evidence that man with defendant's name had been convicted of two prior unrelated felonies and testimony of two police officers identifying defendant as that same person was sufficient proof of two prior unrelated felony convictions in habitual criminal proceeding. *Collins v. State*, 415 N.E.2d 46 (Ind. 1981). *See also Spurlock v. State*, 675 N.E.2d 313 (Ind. 1996) (certified copies of information and docket sheet, and officer's testimony identifying defendant and stating that he had been convicted of theft, was sufficient evidence of prior theft conviction to support habitual offender determination).

62.05.500 Same priors may be used for different enhancements - the same felonies may be alleged and used for multiple habitual offender sentencing enhancements for unrelated felonies tried separately; because the habitual offender statute does not create new or separate offenses and the habitual offender proceeding does not deal with the underlying facts on the substantive charge, the use of prior convictions at more than one habitual offender proceeding does not constitute double jeopardy or violate the principles of collateral estoppel. *Baker v. State,* 425 N.E.2d 98 (Ind. 1981), *habeas corpus denied sub nom*. *Baker v. Duckworth*, 752 N.E.2d 302 (7th Cir. 1985), *cert. denied*, 472 U.S. 1019 (affirms habitual offender finding based on evidence of the same two priors on which defendant had been

found not to be a habitual offender in an unrelated felony trial); *Mers v. State*, 496 N.E.2d 75 (Ind. 1986) (defendant is not acquitted of alleged prior felonies when the jury does not make an habitual offender finding in one case, so that the same felonies may be alleged and used as the basis for an habitual offender enhancement in a later case).

62.05.550 **Pending appeal of priors does not bar use for enhancement** – fact that prior felonies alleged as basis for an enhancement are being appealed has no effect on their use for recidivist penalty. *Maisonet v. State,* 448 N.E.2d 1052 (Ind. 1983).

62.05.600 **Collateral attack on priors:**

- **Facial invalidity of prior conviction record -** Collateral attack doctrine permitting defendant to exclude evidence of prior guilty plea convictions relied upon for recidivist sentence enhancement permits attack only for facial invalidities relating to the admission of guilt or the denial of the right to counsel. *Edwards v. State,* 479 N.E.2d 541 (Ind. 1986).
- **Presumption of constitutional infirmity -** in order to sustain a collateral attack on an underlying felony in an habitual offender proceeding, the defendant must demonstrate that documents used in his trial to prove the prior conviction on their face raise a presumption that the conviction was constitutionally infirm. *Spurlock v. State*, 675 N.E.2d 312 (Ind. 1996).
- **Guilty plea invalidity must relate to admission of guilt -** where the prior conviction is based upon a guilty plea, the facial infirmity must affect that part of the plea that constitutes the admission of guilt. *Spurlock v. State*, 675 N.E.2d 312 (Ind. 1996). Defects in the waiver of rights advisements for the prior guilty plea cannot be a basis for collateral attack. *Edwards v. State,* 479 N.E.2d 541 (Ind. 1986) (*Boykin v. Alabama* violations cannot be basis for collateral attack on prior felonies in habitual proceeding); *Baird v. State*, 479 N.E.2d 538 (Ind. 1986) (no collateral attack for failure to advise of minimum sentence at guilty plea hearing).

62.05.700 **Misdemeanor convictions as enhancers** - if an uncounseled misdemeanor conviction results in a prison sentence, that conviction cannot be used for enhancement purposes; such a conviction is constitutionally invalid when (1) the court records reflecting the proceedings which led to the prior conviction, on their face, raise a presumption that the conviction is constitutionally infirm, and (2) the apparent constitutional infirmity is of the type which undermines both the integrity and reliability of the determination of guilt; defendant may raise as a defense the asserted invalidity of a prior conviction if he can show that he was not adequately represented by counsel or that he did not knowingly and intelligently waive such representation at the time of the conviction; defendant has the burden of producing evidence in support of his defense that his prior misdemeanor conviction is invalid. *Brown v. State*, 683 N.E.2d 600 (Ind. Ct. App. 1997).

62.06.000 Final instructions:

- **General recidivist enhancement final -** see Indiana Pattern Jury Instructions (Criminal) No. 15.1000.
- **Finder of law and fact –** "when a defendant requests the trial court to instruct the jury on its role as finders of law and fact during the habitual offender phase of a trial, it is reversible error for the trial court to refuse the request." *Warren v. State*, 725 N.E.2d 828 (Ind. 2000). The Committee recommends that a preliminary and final instruction on the jury's role as finder of law and fact be given, if requested.
- **Law and fact right of jury –** the jury's right to determine the law as well as the facts means that the jury may find the alleged prior conviction(s) proven beyond a reasonable doubt but not find the status required for the alleged enhancement. *Parker v. State*, 698 N.E.2d 737 (Ind. 1998) (instruction jury "should" find habitual offender status if State proved predicate felonies, without accompanying instruction on right to determine "law and facts," was reversible error); *Seay v. State*, 698 N.E.2d 732 (Ind. 1998) (reversible error to instruct jury it was judge only of the facts and not of the law).
- **Whether prior is a felony an issue for the court** – the court should determine whether the predicate offenses alleged are felonies and so instruct the jury, as "whether an offense is a felony is not a question of fact for the jury, but a matter of law, predetermined by the legislature and applied by the judiciary." *McCollum v. State*, 582 N.E.2d 804, 815 (Ind. 1991).

62.07.000 Verdict forms:

- **Habitual verdict form should have finding on each prior** - an habitual offender verdict form which sets out each felony conviction alleged and requires the jury to find whether it has been proven by the State, as well as whether the jury finds defendant has accumulated two prior convictions and is an habitual offender, does not violate the rule against special verdicts and jury interrogatories; such a form facilitates the jury's findings and is preferable to a general verdict. *Wolfe v. State*,562 N.E.2d 414 (Ind. 1990).
- **Court should not use a general habitual verdict form -** when more than the minimum required prior felony convictions are alleged for an enhancement and one conviction is affected by a defect (*e.g.*, when one is in fact a misdemeanor), the use of a general verdict form which makes it impossible to determine whether the jury relied on the defective prior requires vacation and retrial. *Waye v. State*, 583 N.E.2d 733 (Ind. 1991).

62.08.000 Sentencing

62.08.100 Enhancement not a separate crime - appellate courts will find error and remand for correction if a separate sentence is imposed for an enhancement. *E.g.*, *Dimmitt v. State*, 25 N.E.3d 203 (Ind. Ct. App. 2015). *See also* I.C. 35-50-2-8(j) (habitual criminal offender enhancement "is a status that results in an enhanced sentence" and "is not a separate crime and does not result in a consecutive sentence"). The habitual criminal offender procedure does not violate the double jeopardy prohibition of multiple punishment for the same crime because it merely provides a more severe penalty for the crime

charged, rather than impose punishment for a separate crime. *Dullen v. State,* 496 N.E.2d 381 (Ind. 1986).

62.08.200 Habitual enhancement must attach to highest sentence – the 2014 amendment of the habitual offender statute added a provision in subpart (j) that the trial court "shall attach the habitual offender enhancement to the felony conviction with the highest sentence imposed and specify which felony count is being enhanced." There is no equivalent provision for other enhancements.

62.09.000 Retrial

62.09.020 Retrial to a new jury following mistrial - defendant may be retried on an habitual offender count in front of a new jury impaneled for that purpose following a declaration of a mistrial during the first habitual offender proceeding. *Funk v. State*, 427 N.E.2d 1081 (Ind. 1981); *State v. McMillan*, 409 N.E.2d 612 (Ind. 1980); *Turpin v. State,* 435 N.E.2d 1 (Ind. 1982).

62.09.040 Retrial after reversal for insufficient evidence – double jeopardy does not prohibit retrial on an enhancement allegation following reversal on appeal of an enhancement judgment for insufficient evidence. *Jaramillo v. State*, 823 N.E.2d 1187 (Ind. 2005); *Dexter v. State*, 959 N.E.2d 235 (Ind. 2012).

62.09.100 Criminal Rule 4(B) 70 day speedy trial rule applies to retrial - a habitual offender determination is a "trial" within the meaning of Criminal Rule 4(B). *Poore v. State*, 685 N.E.2d 36 (Ind. 1997).

62.09.500 Preliminary instruction for habitual retrial - On [date], a jury returned a guilty verdict against the defendant, [name], for [a felony] [*specify type of offense*]; that conviction stands and you are not to speculate about it, except that you are instructed that it is a [felony] [*specify type of offense*] conviction. You are further instructed that you are not to speculate as to why you are now being asked to determine whether the Defendant, [name] is an [habitual offender] [*specify type of offender*]. (This instruction is derived from *Denton v. State*, 496 N.E.2d 576 (Ind. 1986)). *See also Beavers v. State*, 506 N.E.2d 1085 (Ind. 1987) (trial court's instruction to new jury for habitual offender retrial that defendant had previously been convicted of burglary was appropriate, as "[i]t would have been totally confusing to that jury to hear nothing other than an habitual criminal allegation").

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68.00.000 Sentencing

68.01.010 **Presentence Report and Related Information - when required -** A defendant cannot be sentenced for murder or a Class A, B, or C or Level 1, 2, 3, 4, or 5 felony before a written presentence report is prepared by a probation officer and considered by the court. If the defendant is committed to the department of correction or a community corrections program for a misdemeanor or a Class D or Level 6 felony the probation department must prepare a postsentence report if there was no presentence report. Ind. Code 35-38-1-8 [the requirement of a presentence report].

68.01.015 **Imprisonment after conviction of non-suspendable offense -** Ind. Code 35-38-1-2(d) requires that if the defendant is convicted of a felony committed prior to July 1, 2014 that is non-suspendable under Ind. Code 35-50-2-2 or committed after June 30, 2014 that is non-suspendable under Ind. Code 35-50-2-2.2 and the defendant had been released on bond or on recognizance, the defendant is to be imprisoned pending sentencing. Ind. Code 35-38-1-2(d).

68.01.020 **When victim representative required -** If a victim is deceased, incapacitated, or less than eighteen (18) years of age, the court shall designate a victim representative prior to sentencing. Ind. Code 35-38-1-2(e) [court to designate victim representative if the victim is deceased, incapacitated, or under 18 years old].

68.01.025 **Presentence contents established by statute -** Ind. Code 35-38-1-9 sets forth the statutorily required elements of the presentence report. The Indiana Judicial Conference has developed minimum standards for presentence reports. Ind. Code 35-38-1-9 [the required contents of a presentence report]; Ind. Code 35-38-1-8.5 [the required notifications to victims and contents of the presentence report concerning victims]. I.C. 35-38-1-9(f) requires that the probation officer preparing the presentence investigation is to consult with the community corrections program, if there is one in the county, regarding services and programs available to the defendant.

68.01.030 **Presentence information and report are confidential -**The presentence report, memoranda, and any report of physical or mental examination are confidential and may only be disclosed to the defendant, defense counsel, the prosecuting attorney, probation department, a community corrections program into which the defendant is placed, or the Indiana Criminal Justice Institute. Ind. Code 35-38-1-9.5 [confidential information regarding HIV testing]; Ind. Code 35-38-1-13 [the confidentiality of the presentence report].

68.01.035 **Failure to prepare presentence report is error** - Failure to prepare a presentence report when required is reversible error. *Hinton v. State*, 397 N.E.2d 282 (Ind. 1980).

68.01.040 **Must include basic information on defendant -** Presentence report that did not fully address the defendant's social history, employment history, family situation, economic status, and personal habits was deficient; however, reversal was not required because defendant failed to show how he was prejudiced by the

omissions. *Woodcox v. State*, 591 N.E.2d 1019 (Ind. 1992) (overruled on other grounds by *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999)).

68.01.045 **Court has discretion as to presentence contents -** The statute grants broad discretion as to what may be included in the presentence report. *Smith v. State*, 432 N.E.2d 1363 (Ind. 1982).

68.01.050 **May include any relevant matters -** The presentence report may contain any matter deemed relevant by the probation officer. *Lottie v. State*, 406 N.E.2d 632 (Ind. 1980) (overruled on other grounds by *Ludy v. State*, 784 N.E.2d 459 (Ind. 2003)).

68.01.055 **May include juvenile offenses and acquittals -** The presentence report may include, and the court may consider, juvenile offenses and offenses that were dismissed or resulted in acquittals. *Lottie v. State*, 406 N.E.2d 632 (Ind. 1980).

68.01.060 **Report presumed true -** Statements in the presentence report are presumptively true unless challenged by the defendant or the state. *Shuttleworth v. State*, 469 N.E.2d 1210 (Ind. Ct. App. 1984).

68.01.065 **Defendant's version may be used unless not free and voluntary -** In the absence of *Miranda* warnings the defendant's statement of the version of the offense may be used unless it is shown that the defendant's statements were not free and voluntary. *Burch v. State,* 450 N.E.2d 528 (Ind. 1983).

68.01.070 **Sentencing worksheets problematic -** The attachment of a sentencing worksheet in which the probation officer set forth aggravating and mitigating factors and recommended a sentence was improper where the worksheet was outdated and improperly prepared. *Wooley v. State*, 716 N.E.2d 919 (Ind. 1999).

68.01.075 **No orders for police reports after plea agreement accepted -** After the court accepted a plea agreement, it did not have the authority to order the prosecutor to produce police reports for inclusion in the presentence report since the court was then bound to accept the plea agreement. *State v. Barkdull*, 708 N.E.2d 58 (Ind. Ct. App. 1999).

68.01.080 **New presentence report not required for resentencing** - The original presentence report may be used for resentencing provided defendant can present evidence about events subsequent to the preparation of the original report. *Jackson v. State*, 625 N.E.2d 1219 (Ind. 1993).

68.01.085 **Presentence report prepared by venue county -** The presentence report requirement was met by a report filed by the probation department of the county where charges were venued. *Wagner v. State*, 474 N.E.2d 476 (Ind. 1985).

68.01.095 **Notice to victim of presentence investigation -**The probation officer preparing the presentence report shall send notification to each victim or each victim representative. Ind. Code 35-38-1-8.5 sets forth the contents and timing of the notice. The statute includes the contents of the victim impact statement that is required to be included in the presentence report. Ind. Code 35-38-1-8.5 [the required notifications to victims and contents of the presentence report].

68.01.100 **Victim notice non-compliance does not invalidate report -** Failure to include a written statement by the victim or failure to state that the probation officer attempted to contact the victim does not render the presentence report defective. *Schwass v. State*, 554 N.E.2d 1127 (Ind. 1990).

68.01.105 **Victim impact statement to be included -** Indiana statute provides for the inclusion and requirements of a victim impact statement in the presentence report. Ind. Code 35-38-1-8.5.

68.01.110 **Mental or Physical Examination** - In connection with a presentence investigation the court may order a person to undergo a physical or mental examination in a designated facility. The person may be ordered to remain in the facility for not more than 90 days. Ind. Code 35-38-1-10.

68.01.115 **Evaluation by Department of Correction** -A court may order a person awaiting sentence and subject to commitment to the department of correction to be temporarily committed to the department for not more than thirty days for evaluation, classification, and determination of proposed assignment. For adult males, the evaluation is conducted at the Reception-Diagnostic Center and for adult females, the evaluation is conducted at the Indiana Women's' Prison. Ind. Code 11-10-1-4.

68.01.120 **Within court's discretion -** Whether to order a physical or mental examination is within the discretion of the trial court. *Wray v. State*, 547 N.E.2d 1062 (Ind. 1989).

68.01.125 **Not error to deny late examination request -** The court is not required to grant the defendant's oral request for a court ordered physical and mental examination made on the date of sentencing. *King v. State*, 531 N.E.2d 1154 (Ind. 1988).

68.01.130 **Memorandum Filed by Defendant** - Prior to sentencing, the defendant may file a written memorandum with the court containing information considered pertinent to the sentence. Statements of others may be attached. Ind. Code 35-38-1-11.

68.01.135 **State may file sentencing memorandum -** The State may file a sentencing memorandum to convey information to the court regarding sentencing. *Laird v. State*, 483 N.E.2d 68 (Ind. 1985).

68.01.140 **Defendant's and State's right to be advised of presentence contents** - The court must either advise the defendant or defense counsel and the state of the contents of the presentence investigation or provide a copy of the presentence report to the defendant or defense counsel and the state. This must be done sufficiently in advance of sentencing so that the defendant has a fair opportunity to controvert the material in the report. Ind. Code 35-38-1-12.

68.01.145 **Continuance to review report may not be necessary -** The defendant must show prejudice from the denial of a continuance of a sentencing hearing to review the presentence report. *Goudy v. State*, 689 N.E.2d 686 (Ind. 1997); Where the defendant and counsel were given a copy of the presentence report several hours prior to sentencing, review the report, did not dispute the factual

content, and presented evidence at sentencing, the defendant was presented with a fair opportunity to refute any inaccurate or improper information in the presentence report. *Lang v. State*, 461 N.E.2d 1110 (Ind. 1984).

68.01.150 **Continuance not required if disputed information disregarded -** The court was not required to continue the sentencing hearing where the court declared that it would ignore disputed information contained in the pre-sentence report. *Lucas v. State*, 499 N.E.2d 1090 (Ind. 1986).

68.01.155 **Confidential information's sources protected** - Sources of confidential information need not be disclosed. Ind. Code 35-38-1-12(b) [need not disclose sources of confidential information]; Ind. Code 35-38-1-13 [confidentiality of the presentence report].

68.01.160 **Sentencing within 30 days -** Sentencing is required to be within thirty (30) days after entering a conviction unless good cause is shown. Ind. Code 35-38-1-2(b); Ind.Crim.Rule 11. The language of the statute appears to not apply if a guilty plea is taken under advisement and a conviction is not entered.

68.01.165 **Discharge is not remedy for 30 day sentence rule -** When a court fails to sentence within 30 days, the proper remedy is the imposition of the sentence and not discharge. *Carter v. State*, 382 N.E.2d 986 (1978).

68.01.170 **Waived right cannot be subsequently asserted -** The defendant's objection to a continuance of the sentencing hearing does not constitute an assertion of the previously waived right to be sentenced within 30 days. *Crawley v. State*, 677 N.E.2d 520 (Ind. 1997).

68.01.175 **Good cause presumed for delay beyond 30 days if no objection -** That good cause exists to justify holding the sentencing hearing beyond 30 days is presumed from a silent record when the defendant does not object. *McElroy v. State*, 553 N.E.2d 835 (Ind. 1990); *Williams v. State*, 489 N.E.2d 53 (Ind. 1986).

68.01.180 **Good cause shown -** The court's desire to facilitate pending divorce proceedings was good cause to delay the husband's sentencing for battery on his wife. *Vandergriff v. State*, 653 N.E.2d 1053 (Ind. Ct. App. 1995).

68.01.185 **No right to change of judge** - There is no right to a change of judge for sentencing. *Johnson v. State*, 472 N.E.2d 892 (Ind. 1985).

68.01.190 **Successor judge may sentence -** Where a case was remanded for resentencing and the judge who imposed a sentence had retired, the successor judge could impose the sentence. *Richardson v. State*, 447 N.E.2d 574 (Ind. 1983).

68.01.500 **Magistrate may sentence guilty plea** - In 2015, I.C. 33-23-5-8-9(b) was amended to provide that a magistrate who presides at a criminal trial or a guilty plea hearing may enter a final order and sentence.

68.02.000 Sentencing Hearing

68.02.010 **Required adjournment advice - length discretionary** - The court must inquire whether the defendant requests adjournment prior to sentencing. If such a request is made, the defendant must state the purpose for the request. The court has discretion to allow a reasonable time for adjournment. The court must also advise the victim that the victim may make a sentencing statement. Ind. Code 35-38-1-2(b).

68.02.015 **Defendant and prosecution must be present** for sentencing. Ind. Crim. Rule 10.1 [prosecutor must be present].

68.02.020 **The court must make a record** of all misdemeanor and felony sentencing hearings. Ind. Crim. Rule 10 [court must make record].

68.02.025 **Sentencing hearing continuance in trial court's discretion -** Whether to grant a continuance of the sentencing hearing is within the court's discretion and will be reviewed by an abuse of discretion standard. *Goudy v. State*, 689 N.E.2d 686 (Ind. 1997).

68.02.030 **Sentencing is usually under statute in effect at time of crime -** Generally the defendant is sentenced pursuant to the statute that was in effect at the time the crime was committed. *Payne v. State*, 688 N.E.2d 164 (Ind. 1997).

68.02.035 **Amelioration doctrine may make current statute apply -** Unless the legislature includes a specific savings clause, a sentencing statute amendment which reduces the maximum sentence for a crime applies to all individuals sentenced for that crime after the amendments effective date regardless of the date of the crimes commission. *Payne v. State*, 688 N.E.2d 164 (Ind. 1997).

68.02.036 **Amelioration doctrine does not apply to 2014 penal code** - Ind. Code 1-1-5.5-21 provides that penalties incurred, crimes committed, and proceedings begun before the July 1, 2014 effective date of the 2014 penal code are to be enforced under prior law as if the 2014 penal code revision had not been enacted. Ind. Code 1-1-5.5-21 also expressly provides that "[t]he general assembly does not intend the doctrine of amelioration (see Vicory v. State, 400 N.E.2d 1380 (Ind. 1980)) to apply to any SECTION of P.L. 158-2013 or HEA 1006-2014," the legislation enacting the 2014 penal code.

68.02.085 **Defendant's right of allocution** - If the defendant was convicted at trial, the court must inquire whether the defendant wishes to speak. Ind. Code 35-38-1-5 [the defendant and counsel have the right to make a statement at sentencing and the court must inform the defendant of that right].

68.02.090 **Failure to timely demand allocution or object to denial waives right -** While statute puts the trial court under an affirmative duty to give defendant an opportunity to be heard at sentencing, defendant's failure to object when the court fails to permit the defendant to speak on his own behalf waives the right to speak. *Angleton v. State*, 714 N.E.2d 156 (Ind. 1999). *But see Fields v. State*, 676 N.E.2d 27 (Ind. Ct. App. 1997) (resentencing required when trial court did not advise of right to speak or inquire whether defendant appearing without counsel wished to speak).

68.02.095 **Right to statement after guilty plea if specific request by defendant -** Because a guilty plea is not based on "the verdict of the jury or the finding of the court" the trial judge is not required to ask the defendant whether the defendant wants to make a statement as provided by Indiana Code section 35-38-1-5 after a guilty plea. But when a defendant specifically makes a request of the court for the opportunity to give a statement, then the request should be granted. *Biddinger v. State*, 868 N.E.2d 407, 412 (Ind. 2007).

68.02.100 **Sentencing without defendant present - right to be present -** The defendant is to be present at sentencing. A corporate defendant may be sentenced in absence of counsel if counsel fails to appear after reasonable notice. Ind. Code 35-38-1-4.

68.02.105 **Waiver of right -** The defendant waives the right to be present at sentencing if the absence is knowing and voluntary. *Gillespie v. State*, 634 N.E.2d 862 (Ind. Ct. App.1994).

68.02.110 **Presence not required for imposition of license suspension -** Where the defendant was afforded a full sentencing hearing, the court could recommend the imposition of a license suspension without the defendant present and after the conviction. *Dixon v. State*, 685 N.E.2d 715 (Ind. Ct. App.1997).

68.02.115 **Sentencing record** - In felony cases the court record of the sentencing hearing must include an electronic recording of the hearing, a transcript of the hearing, and a copy of the presentence report. The court may also make a shorthand or stenographic record, but Criminal Rule 10 provides that this is in addition to, and not in place of an electronic recording. In misdemeanor sentencings the court must make an electronic recording of the hearing. Ind. Code 35-38-1-3 [sentencing felony cases]; Ind. Crim Rule 10 [Court must make record with an electronic recording device].

68.02.120 **Victim's right to make statement if present** - The court shall inform the victim, if present, of the victim's right to make a statement concerning the crime and the sentence. Ind. Code 35-38-1-2(b).

68.02.125 **Victim's rights constitutional provision** - The Indiana Constitution provides the victims of crime with the rights, to the extent that the rights of the accused are not infringed, to be treated with fairness, dignity, and respect throughout the criminal justice process, and to be informed of and to be present at public hearings and to confer with the prosecution. Indiana Constitution, Art. 1, Sec. 13(b).

68.02.130 **Notice and opportunity to be heard** - An individual defendant has the right to be present when sentence is pronounced. That right may be waived by knowingly or intentionally failing to appear. A corporate defendant may be

sentenced in the absence of counsel if counsel fails to appear for sentencing after reasonable notice. Ind. Code 35-38-1-4.

68.02.135 **Waiver of defendant's right to be present -** When the defendant has knowingly and voluntarily waived the right to be present at trial, the defendant's continued absence may be considered a waiver of the right to be present at sentencing. *Gillespie v. State*, 634 N.E.2d 862 (Ind. 1994).

68.02.140 **Defendant's right to refute information -** The defendant has the right to refute inaccurate or improper information presented at sentencing. *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App.1999).

68.02.143 **Right to counsel at sentencing** - The right to have counsel present at all critical stages of a criminal proceeding includes presence at sentencing. The presence of an unsupervised third year law student does not suffice. *Adams v. State*, 693 N.E.2d 107 (Ind. Ct. App.1998).

68.02.150 **Evidence at sentencing - Summary** - Communications of plea negotiations or evidence adduced in connection with a rejected guilty plea are not admissible pursuant to Ind. Code 35-35-3-4. [Note the same policy is set forth in Evidence Rule 410, but this Rule does not apply at sentencing, as provided in Evidence Rule 101.] Caselaw also has held that a defendant's statements made in connection with plea bargaining may not be used for sentencing. *Hensley v. State*, 573 N.E.2d 913, 917 (Ind. Ct. App. 1991), *trans. denied*.

68.02.155 **Rules of Evidence do not apply except for privilege** - Indiana Evidence Rule 101(c)(2).

68.02.160 **Rejected plea inadmissible** - Rejected guilty or guilty but mentally ill plea is inadmissible. Ind. Code 35-35-1-4(d). "A plea agreement, or a verbal or written communication concerning the plea agreement, may not be admitted into evidence at the trial of the case, should the plea agreement not culminate in approval by the court." Ind. Code 35-35-3-4.

68.02.165 **"Clean up" statements in unsuccessful negotiations are inadmissible -** "Clean up" statements made by the defendant in unsuccessful plea negotiations may not be considered at sentencing. *Hensley v. State*, 573 N.E.2d 913 (Ind. Ct. App.1991).

68.02.170 **Court not limited to evidence admissible at trial -** The sentencing court is not confined to evidence that would be admissible at trial. *State v. Barkdull*, 708 N.E.2d 58 (Ind. Ct. App. 1999). See also Evidence Rule 101 (Evidence Rules do not apply at sentencing).

68.02.175 **Hearsay evidence admissible-** Hearsay evidence is admissible to determine the amount of restitution at a sentencing hearing. *Kotsopoulos v. State*, 654 N.E.2d 44 (Ind. Ct. App. 1995).

68.02.180 **Court may review evidence in camera -** When a timely objection is made to evidence at sentencing, the court may review questionable evidence in camera. *State v. Barkdull*, 708 N.E.2d 58 (Ind. Ct. App. 1999).

68.02.185 **Police report cannot be ordered after agreement accepted -** After the court accepted a plea agreement, it did not have the authority to order the prosecutor to produce police reports to review at sentencing since the court was then bound to accept the plea agreement. *State v. Barkdull*, 708 N.E.2d 58 (Ind. Ct. App.1999).

68.02.190 **Statement of absent declarant may be admissible -** Absent declarant's pretrial statement to police was properly admitted when it had some indicia of reliability (was sworn and corroborated by other evidence) and when defendant had opportunity to inform the court of any asserted inaccuracies. *Powell v. State*, 644 N.E.2d 82 (Ind. 1994).

68.02.195 **Statements to support guilty plea later withdrawn inadmissible -** Ind. Code 35-35-1-4(d) [rejected guilty or guilty but mentally ill plea is inadmissible]; Ind. Code 35-35-3-4 [plea agreement or communication concerning a plea agreement is inadmissible].

68.02.200 **Judge must sentence -** The sentence must be imposed by an elected or appointed judge, special judge, or judge pro tempore. A sentence imposed by anyone else is a nullity. A validly appointed judge pro tempore who conducted a trial may enter the sentence after the term of appointment has expired. *Floyd v. State*, 650 N.E.2d 28 (Ind. 1994)**.**

68.03.000 **Felony sentencing statement** - "[U]nder the new [2005 sentencing] statutory regime Indiana trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. . . . [T]he statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating." *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007) (modified on other grounds by *Anglemyer v. State,* 875 N.E.2d 218 (Ind. 2007)).
Note that, **for crimes committed on or after July 1, 2014**, Ind. Code 35-38-1-1.3 provides that a sentencing statement is required whenever a court imposes a sentence based on aggravating or mitigating factors **"unless the court imposes the advisory sentence for the felony."** It is an issue for decision whether this statutory change will be considered in caselaw to modify the requirement in *Anglemyer*, above. [Note also that although Ind. Code 35-38-1-1.3 removed the requirement of a sentencing statement if the advisory sentence is imposed for a crime committed after June 30, 2014, Ind. Code 35-38-1-3 was not amended to be consistent with 35-38-1-1.3 and still requires a sentencing statement without exceptions.]

68.03.020 **Sentence explanation not required if plea agreement sets sentence above the advisory sentence for the offense** - Under the sentencing statutes in effect before April 25, 2005, the court was not required to state the reasons for imposing the sentence when it accepted and became bound by a plea agreement which expressly dictated the sentence to be imposed. *Silvers v. State*, 499 N.E.2d 249 (Ind. 1986). A trial court is not required to provide specific reasons for imposing a sentence pursuant to a plea agreement. *Hall v. State*, 826 N.E.2d 99, 103 (Ind. Ct. App. 2005).

68.03.030 **Resentencing limit after post-conviction relief** - Sentencing after the granting of post-conviction relief may not be more severe than the original sentence unless the court articulates reasons for the harsher penalty, which were not before the court when defendant was initially sentenced. *Ault v. State*, 705 N.E.2d 1078 (Ind. Ct. App. 1999).

68.03.110 **Recommendations of victim or family may be considered -**Victim or victim's family recommendations for leniency or severity are not mitigating or aggravating circumstances as those terms are used in the sentencing statute, but they may properly assist a court in "determining what sentence to impose for a crime." Ind. Code Ann. 35-38-1-7.1(a). *Edgecomb v. State*, 673 N.E.2d 1185 (Ind. 1996).

68.03.200 **Non-statutory aggravating and mitigating factors authorized -** "[T]he amended statute now includes a non-exhaustive list of aggravating and mitigating circumstances trial court 'may consider,' I.C. 35-38-1-7.1 (a)-(b)." *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007) (modified on other grounds by *Anglemyer v. State,* 875 N.E.2d 218 (Ind. 2007)). See also Ind. Code 35-38-1 - 7.1 (c) ("The criteria listed in subsections (a) and (b) do not limit the matters that the court may consider in determining the sentence").

68.03.215 **Same factor may support enhancement and consecutivity -** The same aggravating factor used to enhance the sentence may also support imposition of consecutive sentences. *Miller v. State*, 716 N.E.2d 367 (Ind. Ct. App. 1999).

68.03.225 **Nonstatutory "less than enhanced would depreciate" o.k.** - While not enumerated in the sentencing statute, a finding that "a sentence less than an enhanced term sought by the prosecution would depreciate the seriousness of the crime" is a permissible basis for an increased sentence. *Ector v. State*, 639 N.E.2d 1014 (Ind. 1994).

68.03.240 **Impact on others beyond normal and forseeable -** The impact of the crime on others may be considered as an aggravating factor only if the impact was beyond that normally associated with the offense and that impact was foreseeable to the defendant. *Bacher v. State*, 686 N.E.2d 791 (Ind. 1997), *after resentencing* 722 N.E.2d 799 (Ind. 2000).

68.03.250 **Record of arrest is not considered criminal history** - A record of arrests does not establish the historical fact of prior criminal behavior, but it does suggest that subsequent antisocial behavior on the part of the defendant has not been

deterred even after having been subject to the police authority of the State, and is thus relevant to the court's assessment of the defendant's character and the risk that he will commit another crime and is therefore properly considered by a court in determining sentence. *Tunstill v. State*, 568 N.E.2d 539 (Ind. 1991).

68.03.255 **Pending charge may be considered aggravator-** The court may consider a pending criminal charge as an aggravating factor. *Dillon v. State*, 492 N.E.2d 661 (Ind. 1984).

68.03.260 **Pending delinquency allegations not waived can be aggravator -** In sentencing a waived juvenile the court may consider as aggravating factors contemporaneous juvenile offenses that were not waived. *Carter v. State*, 711 N.E.2d 835 (Ind. 1999).

68.03.261 **Juvenile record may be aggravator if specific on criminal activity -** A trial court may treat a defendant's juvenile record as an aggravating circumstance if the presentence investigation report contains specifics as to juvenile criminal activity and those specifics support evidence of a history of criminal activity.

68.03.265 **Finding of probation violation not required prior to sentencing** - A finding of the violation of probation need not be found by the probation court before the probation violation can be found as an aggravating factor. *Beason v. State*, 690 N.E.2d 277 (Ind. 1998).

68.03.267 **Victim's disability** - The facts that the victim of the offense had a disability, as defined in Ind. Code 27-7-6-12, and that the defendant knew or should have known that the victim was a person with a disability, may be considered as an aggravating factor. Ind. Code 35-38-1-7.1.

68.03.270 **Lack of remorse may be considered -** The defendant’s lack of remorse may be considered as an aggravating factor. *Angleton v. State*, 686 N.E.2d 803 (Ind. 1997); *Bacher v. State*, 686 N.E.2d 791 (Ind. 1997).

68.03.275 **Circumstances when lack of remorse may not be considered -** The only circumstance under which lack of remorse might be inappropriate is when the defendant maintains innocence and the only evidence is the victim's uncorroborated testimony. *Dinger v. State*, 540 N.E.2d 39 (Ind. 1989); *Dockery v. State*, 504 N.E.2d 291 (Ind. Ct. App. 1987).

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68.03.280 **May not consider elements of greater offense -** When the defendant pleads guilty to a lesser included offense, the court may not use the elements that distinguish it from the greater offense as aggravating factors. *Carlson v. State*, 716 N.E.2d 469 (Ind. Ct. App. 1999).

68.03.285 **Material element of offense cannot be an aggravator** - A material element of an offense may not serve as an aggravating factor, but the circumstances relating to that element may be an aggravating factor. *Widener v. State*, 659

N.E.2d 529 (Ind. 1995); *Holmes v. State*, 642 N.E.2d 970 (Ind. 1994); *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999).

68.03.290 **May not consider seriousness of crime that was reversed** - The court may not consider the seriousness of a crime that was reversed on appeal. *White v. State*, 647 N.E.2d 684 (Ind. Ct. App. 1995).

68.03.295 **Desire to make a statement is impermissible basis to enhance -** The judge's desire to make a political statement or to send a personal message is not a reason to aggravate a sentence. *Gregory-Bey v. State*, 669 N.E.2d 154 (Ind. 1996).

68.03.500 **"Weighing" factors no longer subject to challenge -** "Because the trial court no longer has any obligation to 'weigh' aggravating and mitigating factors against each other when imposing a sentence, unlike the pre-*Blakely* statutory regime, a trial court cannot now be said to have abused its discretion in failing to 'properly weigh' such factors." *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007) (modified on other grounds by *Anglemyer v. State,* 875 N.E.2d 218 (Ind. 2007)).

68.03.535 **Post-incident reform is not a mandatory mitigating factor -** The court is not required to consider the defendant's post-incident reform as a mitigating factor. *State v. Lopez*, 676 N.E.2d 1063 (Ind. Ct. App. 1997).

68.03.540 **Remorse need not be considered -** The court need not consider the defendant's alleged remorse. *Manns v. State*, 637 N.E.2d 842 (Ind. Ct. App. 1994).

68.03.600 **Good behavior during pretrial incarceration does not compel a mitigating factor -** The fact that the defendant engaged in good behavior while incarcerated prior to sentencing does not require the court to find a mitigating factor. *Trueblood v. State*, 587 N.E.2d 105 (Ind. 1992).

68.03.605 **Troubled childhood does not require finding of mitigating factor -** Evidence that the defendant had an unhappy childhood does not require the court to find a mitigating factor. *Blanche v. State*, 690 N.E.2d 709 (Ind. 1998).

68.03.610 **Confession can be entitled to weight as mitigator -** The defendant's confession six hours after the crime was entitled to be considered as a mitigating factor, but the court could weigh the factor differently than the defendant. *Beason v. State*, 690 N.E.2d 277 (Ind. 1998).

68.03.615 **Mental illness may properly be considered a mitigating factor -** Well-documented mental illness should be considered a mitigating factor. A court is not required to reduce an enhanced sentence because of it and could properly consider the defendant's ability to control himself in the courtroom. *Archer v. State*, 689 N.E.2d 678 (Ind. 1997); Mayberry v. State, 670 N.E.2d 1262 (Ind. 1996).

68.03.620 **Seizure disorder unconnected to offense not a mitigating factor -** The fact that the defendant suffered from a disorder that caused seizures was not a mitigating factor without some connection between the disorder and the crime that affected the criminal behavior or reduced responsibility for the crime. *Wooley v. State*, 716 N.E.2d 919 (Ind. 1999).

68.03.630 **History of non-violent crimes not required to be found as mitigator -** The fact that the defendant's criminal history is nonviolent need not necessarily be considered mitigating. *Mayo v. State*, 681 N.E.2d 689 (Ind. 1997).

68.03.640 **Court not required to apply mitigators in same manner as defendant –** The court is not required to explain why it did not find a fact to be a significant mitigating factor and is not required to apply the same weight or significance to a mitigating factor as that applied by the defendant. See *Birdsong v. State*, 685 N.E.2d 42 (Ind. 1997).

68.03.800 **Appealable abuses of sentencing discretion -** "So long as the sentence is within the statutory range, it is subject to review only for abuse of discretion. . . . One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. Other examples include entering a sentencing statement that explains reasons for imposing a sentence -- including a finding of aggravating and mitigating factors if any -- but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law." *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007) (modified on other grounds by *Anglemyer v. State,* 875 N.E.2d 218 (Ind. 2007)).

68.03.850 **"Inappropriate" sentence as basis for appeal -** "Appellate Rule 7(B) . . . provides that the '[appellate] Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.' It is on this basis alone that a criminal defendant may now challenge his or her sentence where the trial court has entered a sentencing statement that includes a reasonably detailed recitation of its reasons for imposing a particular sentence that is supported by the record, and the reasons are not improper as a matter of law." *Anglemyer v. State*, 868 N.E.2d 482 (Ind. 2007) (modified on other grounds by *Anglemyer v. State*, 875 N.E.2d 218 (Ind. 2007)).

68.04.000 **Court bound by plea agreement -** Once the court accepts a plea agreement it must be strictly adhered to and the court is precluded from imposing any sentence other than that required by the agreement. *Sinn v. State*, 693 N.E.2d 78 (Ind. Ct. App.1998).

68.04.100 **Agreement that contains illegal sentence can be binding -** A defendant "may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence." *Lee v. State*,

816 N.E.2d 35, 40 (Ind. 2004), *citing Collins v. State*, 509 N.E.2d 827, 833 (Ind. 1987).

68.04.200 **Punitive obligations not in agreement may not be imposed -** When restitution was not included in the plea agreement, the court could not impose it as a condition of probation. *Disney v. State*, 441 N.E.2d 489 (Ind. Ct. App. 1982). *See also Gipperich v. State*, 658 N.E.2d 946 (Ind. Ct. App.1995) *(*agreement which provided for payment of the victim's counseling fees and costs but did not mention fines did not permit the trial court to impose $10,000 fines on each of four counts and provide that the defendant was to be incarcerated until the fines were paid in full*). But see Fisher v. State*, 52 N.E.3d 871 (Ind. Ct. App. 2016) (I.C. 35-48-4-17 mandates court shall order restitution for costs of an environmental cleanup incurred as a result of a methamphetamine manufacturing offense, and this mandate is implicitly incorporated in a meth manufacturing plea agreement).

68.04.210 **Administrative terms not expressly in bargain are permissible** - In addition to the express terms of a plea agreement the trial court may add administrative or ministerial conditions, but may not add terms that materially add to the punitive obligation. Court erred in imposing home detention and community service requirements that were not included in the plea agreement. *Freije v. State*, 709 N.E.2d 323 (Ind. 1999).

68.04.220 **Bargain giving court probation discretion permitted home detention -** When a plea agreement capped the executed sentence to be imposed but gave the court discretion in imposing probation terms, home detention during the period of probation was not imprisonment subject to the cap and was within the court's discretion to impose under the agreement. *Antcliff v. State*, 688 N.E.2d 166 (Ind. Ct. App.1997).

68.04.225 **Discretion to impose probation may be implicit** - An agreement providing for attendance of classes to obtain a GED implied a probation sentence, and imposition of a two-year term of probation did not violate the agreement. *Minor v. State*, 641 N.E.2d 85 (Ind. Ct. App.1994).

68.10.000 **Sentencing credits for pretrial incarceration** - I.C. 35-50-6-0.5 effective July 1, 2015 provides for the following sentence credit terminology:

- "Credit time" means "the sum of a person's accrued time, good time credit, and educational credit."
- "Accrued time" "means the amount of time that a person is imprisoned or confined."
- "Educational credit" is a reduction in imprisonment or confinement awarded for participation "in an educational, vocational, rehabilitative, or other program."

- "Good time credit" "means a reduction in a person's term of imprisonment or confinement awarded for the person's good behavior while imprisoned or confined."

A defendant is entitled to accrued time for time served incarcerated prior to sentencing when the incarceration is attributable to the crime being sentenced. Pre-trial incarceration is punishment for which credit for time served must be given against a sentence later imposed for the charge. *Brown v. State*, 322 N.E.2d 708 (Ind. 1975).

68.10.005 **Crimes before 7-01-16: Credit for presentence time served in home detention discretionary** - "Although not directly before us today, we . . . conclude that a trial court is within its discretion to deny a defendant credit toward sentence for pre-trial time served on home detention," and absent legislative direction, we believe that a defendant is only entitled to credit toward sentence for pre-trial time served in a prison, jail or other facility which imposes substantially similar restrictions upon personal liberty. *Purcell v. State*, 721 N.E.2d 220, 224, n. 6 (Ind. 1999). When a defendant has not yet been convicted and has been serving pretrial home detention, there is no statute that mandates an award of credit for time served toward his sentence. Whether to award credit for such time is a matter of trial court discretion. *Lewis v. State*, 898 N.E.2d 1286, 1290 (Ind. Ct. App. 2009).

68.10.006 **Crimes on or after 7-01-16: Credit time for presentence home detention –** a person placed on pretrial home detention is assigned to Class P and thereby earns one day of good time credit for every four (4) days the person serves "on pretrial home detention awaiting trial." I.C. 35-50-6-4 and I.C. 35-50-6-3.1.

68.10.010 **Credit for time served in secure facility prior to waiver** - Indiana has not decided whether a juvenile waived to adult court is entitled to credit for time the juvenile was held in a secure facility prior to waiver and no statutory guidance exists. Other states have decided that a waived juvenile is entitled to such credit. *State v. DaFonseca*, 286 A.2d 592 (R.I. 1972); *People v. Thomas*, 226 N.W.2d 734 (Mich. 1975); *Ex Parte Green*, 688 S.W.2d 555 (Tex.Cr.App. 1985).

68.10.015 **Defendant entitled to credit for time held subsequent to bond revocation -** Absent a hearing for reassignment to a different credit class, a defendant is entitled to good time credit for the period spent incarcerated subsequent to revocation of bond. The behavior that violates the terms of release may not be used to deprive accrued time. *Tumbleson v. State*, \706 N.E.2d 217 (Ind. Ct. App. 1999).

68.10.020 **Entitled to credit for confinement pending appeal -** The defendant is entitled to credit for time incarcerated pending appeal. *Kindred v. State*, 172 Ind. 645, 362 N.E.2d 168 (Ind. 1977).

68.10.025 **Not entitled to credit when jailed on another charge -** The defendant is not entitled to credit for time confined prior to trial when the confinement is attributable to another sentence, which is to be served consecutively. *Corn v.*

State, 659 N.E.2d 554 (Ind. 1995); *Diedrich v. State*, 744 N.E.2d 1004 (Ind. Ct. App. 2001).

68.10.030 **Credit only against aggregate of consecutive sentences -** When consecutive sentences are imposed, pretrial confinement credit is applied against the aggregate period of the sentences, and not against each individual sentence. *Shane v. State*, 716 N.E.2d 391 (Ind. 1999).

68.10.035 **Credit when one consecutive sentence reversed -** When the defendant was incarcerated for two consecutive sentences and one sentence is reversed on appeal the defendant is entitled to application of the credit for time incarcerated to the remaining sentence. *Jenkins v. State*, 492 N.E.2d 666 (Ind. 1986)

68.10.040 **Credit for confinement in psychiatric hospital -** The defendant was entitled to credit for time spent in a psychiatric hospital if the stay was ordered by the court and was another form of imprisonment. The defendant was not free to leave and was to be returned to jail if released from the hospital. *Wilson v. State*, 679 N.E.2d 1333 (Ind. Ct. App. 1997).

68.10.045 **Confinement must be for instant charge -** The defendant is not entitled to credit for time spent simultaneously for pretrial incarceration and for a hold for a warrant for a probation violation. Even if the arrest warrant had been served, the defendant must show that incarceration was the result of that warrant or hold. *Bischoff v. State*, 704 N.E.2d 129 (Ind. Ct. App. 1998).

68.10.050 **Not entitled to credit if held on other charges -** A defendant incarcerated on unrelated charges is not entitled to credit because there was a detainer or hold for the unrelated charges. *Sweeney v. State*, 704 N.E.2d 86 (Ind. 1998).

68.10.055 **No credit for confinement in another state on other charges -** A defendant is not entitled to credit for time spent incarcerated on other charges in another state. *Penick v. State*, 659 N.E.2d 484 (Ind. 1995).

68.10.060 **Credit for confinement in another state on Indiana charges -** To obtain credit for time incarcerated in another state, defendant must show that Indiana had placed a "hold" on him with the other state, which would have caused that state to retain custody over the defendant even were there no charges pending in that other state. Cf. *Nutt v. State,* 451 N.E.2d 342, 345 (Ind. Ct. App. 1983) (defendant held in Texas on both Texas and Indiana charges entitled to Indiana credit where Texas clearly incarcerated him on basis of Indiana hold). *Cohen v. State*, 560 N.E.2d 1246 (Ind. 1990); *Nutt v. State*, 451 N.E.2d 342 (Ind. 1983).

68.10.065 **Credit time good time credit – crime committed before July 1, 2014** - A person assigned to Class I earns one (1) day “credit time” [current term is “good time credit”] for each day imprisoned and a person assigned to Class II earns one (1) day credit time [current term is “good time credit”] for each two (2) days imprisoned. A person assigned to Class III does not earn credit time [current

term is “good time credit”]. A person assigned to Class IV earns one (1) day of credit time [current term is “good time credit”] for every six (6) days the person is imprisoned for a crime or confined awaiting trial or sentencing. Ind. Code 35-50-6-3.

68.10.066 **Good time credit – crime committed on or after July 1, 2014** – A person assigned to Class A earns one (1) day of good time credit for each day the person is imprisoned for a crime or confined awaiting trial or sentencing. A person assigned to Class B earns one (1) day of good time credit for every three (3) days the person is imprisoned for a crime or confined awaiting trial or sentencing. A person assigned to Class C earns one (1) day of good time credit for every six (6) days the person is imprisoned for a crime or confined awaiting trial or sentencing. A person assigned to Class D earns no of good time credit.

A person who is not a credit restricted felon and is imprisoned for a Level 6 felony or a misdemeanor or imprisoned awaiting trial for a Level 6 felony or a misdemeanor is initially assigned to Class A.
A person who is not a credit restricted felon and is imprisoned for a felony other than a Level 6 felony or imprisoned awaiting trial for a felony other than a Level 6 felony is initially assigned to Class B.
A person who is a credit restricted felon and is imprisoned for a crime or is imprisoned while awaiting trial or sentencing is initially assigned to Class C, and may not be assigned to Class A or Class B.
A person who is not a credit restricted felon may be reassigned to Class C or Class D if the person violate any of the following: (1) a rule of the department of correction; (2) a rule of the penal facility in which the person is imprisoned; or (3) a rule or condition of a community transition program.

68.10.070 **Felony credit time determines eligibility for parole -** Ind. Code 35-50-6-1 provides that credit time awarded to a person convicted of a felony is applied to determine when the person is eligible for release on parole or probation.

68.10.075 **Misdemeanor good time credit determines time of discharge -** Ind. Code 35-50-6-2 provides that of good time credit awarded to a person convicted of a misdemeanor is applied to determine when the person is to be discharged, with no mention of release on probation.

68.10.080 **No good time earned on probation or parole** - A person does not earn good time credit while on probation or parole, Ind. Code 35-50-6-6, except as authorized for home detention as a condition of probation as provided in Ind. Code 35-38-2.5-5.

68.10.085 **Good time and accrued time for probation home detention –** For a crime committed prior to July 1, 2014, a person confined on home detention as a condition of probation earns credit for time served, Ind. Code 35-38-2.5-5, and also for credit time. *Peterink v. State,* 982 N.E.2d 1009 (Ind. 2013) (summarily affirming on transfer the Court of Appeals decision, found at 971 N.E.2d 735 (Ind. Ct. App. 2012), that a probationer is entitled under ambiguous statutes to receive credit time for home detention as condition of probation).

For a crime committed on or after July 1, 2014, Ind. Code 35-38-2.5-5 expressly provides that a person on home detention as a condition of probation earns both credit for time served and credit time.

68.10.087 **Credit time and credit for time served for home detention in community corrections –** For a crime committed prior to July 1, 2014, a person placed in community corrections earns credit time [current term is "good time credit"], including for home detention, *Arthur v. State,* 950 N.E.2d 343 (Ind. Ct. App. 2011) (holding 35-38-2.6 applies to require credit time [current term is "accrued time"] for all community corrections home detentions), *transfer denied*, and also earns credit for time served [current term is "good time credit"], *Purcell v. State*, 721 N.E.2d 220 (Ind. 1999).

For a crime committed on or after July 1, 2014, statute expressly provides that a person placed in community corrections program, including home detention, earns accrued time and good time credit. Ind. Code 35-38-2.6-6.

68.10.095 **Court may not deny or revoke good time credit for incarcerated persons-** The penal facility pursuant to rules adopted under Ind. Code 4-22-2, and not the court, may revoke good time or reduce good time earning class. *Campbell v. State*, 716 N.E.2d 577 (Ind. Ct. App.1999). In the event of any pre-sentence deprivation of good time, the trial court must report it in the sentencing judgment. *Robinson v. State*, 805 N.E.2d 783 (Ind. 2004).

68.10.200 **Consecutive sentences - Summary -** Under Ind. Code 35-50-1-2, the judge is required in some circumstances and given discretion in others to order sentences for one or more crimes to be served consecutively rather than concurrently.

Consecutive sentences must be imposed for a crime committed after the defendant's arrest for another crime and before the person is discharged from parole, probation, or imprisonment for the first crime or while the defendant is released on own recognizance or while on bond.

Consecutive sentences may be imposed even if the sentences are not imposed at the same time subject to the following limits:

For crimes which:

(a) arise out of a single "episode of criminal conduct" and

(b) are not "crimes of violence" (murder, voluntary manslaughter, involuntary manslaughter, reckless homicide, aggravated battery, kidnapping, rape, criminal deviate conduct, child molesting, Level 1 or 2 or Class A or B felony sexual misconduct with a minor, Level 2 or 3 or Class A or B felony robbery, Level 1, 2, 3, or 4 or Class A or B felony burglary, causing death while operating a motor vehicle while intoxicated, operating while intoxicated causing serious bodily injury, and felony resisting law enforcement) the court may order consecutive service only of that portion of the sentence which does not exceed the advisory sentence for the next higher class of felony.

The Courts have found error where the trial court imposed consecutive habitual offender sentences at a single criminal trial. See *McCotry v. State*, 722 N.E.2d 1265, 1268 (Ind. Ct. App. 2000). The Court has also found error where the defendant's consecutive habitual offender sentences did not arise from a single

criminal trial, but they did arise from a single sentencing proceeding. See, *Ingram v. State,* 761 N.E.2d 883, 885-886 (Ind. Ct. App. 2002)

68.10.205 **Statutory cap on consecutivity -** Ind. Code 35-50-1-2 limits the length of the total terms of consecutive sentences arising from a single episode of criminal conduct to not more than the advisory sentence for the next higher class of felony. That limitation does not apply if a conviction being sentenced was a "crime of violence" (murder, voluntary manslaughter, involuntary manslaughter, reckless homicide, aggravated battery, kidnapping, rape, criminal deviate conduct, child molesting, Level 1 or 2 or Class A or B felony sexual misconduct with a minor, Level 2 or 3 or Class A or B felony robbery, Level 1, 2, 3, or 4 or Class A or B felony burglary, causing death while operating a motor vehicle while intoxicated, operating while intoxicated causing serious bodily injury, and felony resisting law enforcement).

68.10.210 **Consecutive sentence required for crime committed after defendant absconded -** Statute required consecutive sentences for a crime committed after the defendant absconded and had bond revoked for another crime. *Douglas v. State*, 632 N.E.2d 1150 (Ind. Ct. App. 1994).

68.10.215 **Habitual offender and habitual substance abuse offender enhancements may not be consecutive -** When crimes are being ordered served consecutively and one or both has an habitual offender or a habitual substance abuse offender enhancement, the court's authority to order consecutivity applies only to the regular sentences, not the habitual enhancements. *Breaston v. State*, 907 N.E.2d 992 (Ind. 2009) (the rule against consecutivity of enhancements applies even when the sentences for the underlying offenses have to be served consecutively pursuant to the mandatory consecutivity provision in I.C. 35-50-1-2(d)).

68.10.220 **Finding of at least one aggravating factor may be required -** Under the sentencing law in effect prior to April 25, 2005, in order to impose consecutive sentences for separate counts when consecutivity is discretionary rather than mandatory, the court was required to find at least one aggravating factor. *Hampton v. State*, 719 N.E.2d 803 (Ind. 1999). The Indiana Court of Appeals has determined more recently that a single aggravating circumstance may support the imposition of consecutive sentences. *Vermillion v. State,* 978 N.E.2d 459, 466 (Ind. Ct. App. 2012).

68.10.225 **Same aggravating factor may support sentence enhancement and consecutive sentences -** The court may use the same aggravating factor to justify enhancing a sentence and imposing consecutive sentences. *Williams v. State*, 690 N.E.2d 162 (Ind. 1997).

68.10.230 **Reasons for consecutive sentence must be set forth -** When consecutive sentences are imposed, the court must include in the sentencing statement the

reasons for the consecutivity, regardless of whether the consecutivity is mandatory or discretionary. *Willoughby v. State*, 660 N.E.2d 570 (Ind. 1996).

68.10.235 **Statutory authority does not require contemporaneity -** The amended Ind. Code 35-50-1-2(c) "essentially overturned the requirement" of previous cases, so that now a court has authority to impose its sentence consecutive to the sentence in another case even though the two sentences were not contemporaneously imposed. *Berry v. State*, 689 N.E.2d 444 (Ind. 1997).

68.10.245 **No authority for concurrency with another jursidiction's sentence, but consecutivity is authorized -** The court cannot impose a sentence that is concurrent with an unrelated federal sentence or sentence in another state. *Morrow v. State*, 690 N.E.2d 183 (Ind. 1997); *Ridley v. State*, 690 N.E.2d 177 (Ind. 1997); *Carrion v. State*, 619 N.E.2d 972 (Ind. Ct. App. 1993). The court may, however, order its Indiana sentence served consecutively to that of another jurisdiction. *Ridley v. State,* 690 N.E.2d 177 (Ind. 1997); *Penick* v. State, 659 N.E.2d 484, 489 (Ind. 1995).

68.11.000 **Double jeopardy and Merger**

68.11.005 **Statutory limit on sentencing only for greater and not lesser -** The court may not enter judgment on a lesser, included offense when defendant is convicted and sentenced for greater offense. Ind. Code 35-38-1-6.

68.11.010 **Indiana Double Jeopardy -** Two or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense; defendant meets the actual evidence test if he "demonstrates a reasonable possibility that the evidentiary facts used by the fact-finder to establish elements of one offense may also have been used to establish the essential elements of a second challenged offense." *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999).

68.11.015 **Merge, do not vacate verdict –** Merging a lesser count and entering a judgment of conviction only on the greater count, not vacating the verdict on the lesser, is the appropriate method for sentencing when double jeopardy prohibits conviction on both counts. *Laux v. State*, 821 N.E.2d 816 (Ind. 2005). "[A] merged offense for which a defendant is found guilty, but on which there is neither judgment nor a sentence, is 'unproblematic' as far as double jeopardy is concerned." *Green v. State,* 856 N.E.2d 703 (Ind. 2006). If a trial court does not formally enter a judgment of conviction on a jury verdict of guilty, then there is no requirement that the trial court vacate the "conviction," and merger is appropriate. However, if the trial court does enter judgment of conviction on a jury's guilty verdict, then simply merging the offenses is insufficient and vacation of the judgment is required.
Kovats v. State, 982 N.E.2d 409, 414-415 (Ind. Ct. App. 2013).

68.12.000 Costs and Fines

68.12.005 **Alternative fine calculated by defendant's wrongful gain -** Instead of the maximum fines set forth elsewhere in the Ind. Code, the court may impose a fine in a sum equal to twice the defendant's pecuniary gain or twice the pecuniary loss sustained by the victims of the offense. Ind. Code 35-50-5-2.

68.12.010 **Costs suspendable -**A court may impose costs and suspend payment of all or part of the costs until the convicted person has completed all or part of the sentence. If the court suspends payment of the costs, the court shall conduct a hearing at the time the costs are due to determine whether the convicted person is indigent. If the convicted person is not indigent, the court shall order the convicted person to pay the costs at the time the costs are due, or the entire amount of the costs at some later date, or specified parts of the costs at designated intervals. Ind. Code 33-37-2-3.

68.12.015 **May not assess jury costs -** Without statutory authority a defendant cannot be assessed jury costs. *Cranor v. State*, 699 N.E.2d 284 (Ind. Ct. App.1998).

68.12.020 **May order charitable contribution in lieu of fine -** The court may order the defendant to make a charitable contribution in lieu of a fine. *Ratliff v. State,* 596 N.E.2d 241 (Ind. Ct. App. 1992).

68.12.025 **Charitable contributions disfavored by Qualifications Commission -** The ordering of or conditioning of payment of a charitable contribution is like a "pay-off" in order to receive a favorable sentence and is therefore disfavored. Advisory Opinion of the Indiana Judicial Qualifications Commission, dated December 16, 1986.

68.12.050 **Hearing and determination of ability to pay fines** - Ind. Code 35-38-1-18 requires that the court conduct an indigency hearing prior to sentencing defendant to pay a fine. *Meeker v. State*, 395 N.E.2d 301 (Ind. Ct. App. 1979).

68.12.055 **Hearing and determination of ability to pay costs** Ind. Code 33-37-2-3 requires the court to conduct a hearing to determine indigency before imposing costs. *Everroad v. State*, 730 N.E.2d 222 (Ind. Ct. App. 2000).

68.12.060 **Indigent defendant may be sentenced for fine but payment cannot be enforced -** If the defendant is found indigent, a fine may be imposed but its payment may not be enforced. *Marshall v. State*, 505 N.E.2d 853 (Ind. Ct. App. 1987).

68.12.065 **Required advisement of no imprisonment for fines and costs if indigent -** If the court finds defendant to be indigent, should the court impose a fine the court must advise the defendant on the record that he cannot be imprisoned for failure to pay the fine and the record must show that defendant is not to be imprisoned for such failure. *Ridley v. State*, 690 N.E.2d 177 (Ind. 1997). If the court finds the defendant indigent he must likewise be advised on the record that he cannot be imprisoned for failure to pay costs. *Id.* (so stating even though statute cited as basis for holding applies only to "fines":). *See also Robles v. State*, 705 N.E.2d 183 (Ind. Ct. App. 1998) (not required to advise or note record that there could be

no imprisonment for failure to pay costs when defendant was found only *partially* indigent).

68.12.070 **Payment of costs for non-indigent defendant -** If the defendant is not found indigent at sentencing, the court shall determine whether the costs ordered should be paid when the sentence is pronounced, at a later date, or at designated intervals. Ind. Code 33-37-2-3.

68.12.080 **Requesting jail in lieu of fine -** If the defendant so requests, the defendant can be committed to the county jail for a set period of time in lieu of a fine. Ind. Code 35-38-1-18.

68.12.085 **Jail upon default in payment of fines and costs -** Upon default and if the defendant is not indigent the court may order that the defendant be committed to the county jail with the defendant credited $20.00 for each 24 hour period served. Ind. Code 33-37-2-3.

68.12.090 **Order to pay county jail healthcare expenses** – As a term of a sentence, the court may order a defendant to reimburse the county for all or a portion of the expense for medical, dental, eye, and any other healthcare-related services provided for the defendant while an inmate in the county jail. In making the determination of the amount of reimbursement to order, the court shall consider the defendant's ability to pay. Ind. Code 11-12-5-7.

68.13.000 **Indigency determination for counsel not sufficient for indigency for fines and costs -** Finding the defendant indigent for the purpose of appointing counsel is not conclusive on the issue of whether the defendant is indigent regarding the ability to pay fines and costs. *Meeker v. State*, 395 N.E.2d 301 (1979).

68.13.005 **Reimbursement for publicly-paid costs of defense, means of collection and limitations on collection –** See Benchbook sections 34.20.100, 34.20.500, and 34.20.550.

68.14.000 **Restitution - Summary -** A court may sentence any person convicted of a felony or misdemeanor to pay restitution to the victim of the crime, either as a condition of probation or without the imposition of probation. Restitution must be based upon property damages (actual repair costs or replacement if repair is "inappropriate"), medical costs incurred by the victim up to the date of sentencing, and lost earnings up to the date of sentencing, and funeral, burial, or cremation costs incurred by the victim's family or estate. Restitution can be ordered to reimburse the victim service division of the Indiana Criminal Justice Institute. In entering an order of restitution, the court shall send a certified copy of the order, which must include the name and address of the person that is to receive the restitution and the amount of restitution, to the circuit court clerk of the county in which the charges were filed. The clerk then enters the order in the judgment docket and provides notice to the department of insurance. A restitution order is a judgment lien and can be perfected and enforced. Ind. Code 35-50-5-3. When restitution or reparation is a condition of probation, the court shall fix the amount, which may not exceed an amount the person can or will be able to pay, and shall fix the manner of performance. Ind. Code 35-38-2-2.3.

68.14.005 **Expenses must be incurred because of criminal act -** Defendant convicted of failure to stop at the scene of an accident but acquitted of reckless homicide could not be ordered to pay restitution for burial expenses since the deceased did not die as the result of a crime. Funeral costs did not result from the failure to stop. *Utley v. State*, 699 N.E.2d 723 (Ind. Ct. App. 1998).

68.14.010 **May be ordered without placement on probation -** Restitution may be ordered in addition to any sentence, regardless of whether the defendant was placed on probation. *Utley v. State*, 699 N.E.2d 723 (Ind. Ct. App. 1998).

68.14.015 **Must fix manner of payment -** A probation condition that the defendant make a good faith effort to pay restitution as determined by the probation department was unenforceable as unreasonably vague. The probation order must fix the manner of payment. *Savage v. State*, 655 N.E.2d 1223 (Ind. 1995); *Garrett v. State*, 680 N.E.2d 1 (Ind. Ct. App. 1997)

68.14.020 **Entitlement to hearing -** The defendant was entitled to a hearing on the amount of restitution owed. *Sales v. State*, 464 N.E.2d 1336 (Ind. Ct. App. 1984).

68.14.025 **May exceed current assets and earning ability -** Restitution order as a condition of probation in excess of the defendant's current assets and lifetime discretionary income based upon the income level prior to incarceration was not manifestly unreasonable. *Savage v. State*, 655 N.E.2d 1223 (Ind. 1995).

68.14.030 **Inquiry into ability to pay -** The court must determine the defendant's ability to pay. *Shaffer v. State*, 674 N.E.2d 1 (Ind. Ct. App. 1996).

68.14.035 **Payment ability inquiry not required if not probation -** A restitution order that is not a condition of probation may be imposed without inquiry into the defendant's ability to pay. *Bitner v. State*, 546 N.E.2d 117 (Ind. Ct. App. 1989).

68.14.040 **Indirect payment to parent permitted -** The court may order payment to a parent of the victim, who is paying medical expenses. *Ault v. State*, 705 N.E.2d 1078 (Ind. Ct. App. 1999).

68.14.045 **No inquiry into ability to pay if restitution ordered as part of executed sentence -** When restitution is ordered as part of an executed sentence with no probation, the court does not need to inquire into ability to pay. The statute requires such inquiry only if probation is a condition of a suspended sentence. *Ladd v. State*, 710 N.E.2d 188 (Ind. Ct. App. 1999).

68.14.050 **Must fix manner of payment with ability -** Restitution must be a fixed amount not in excess of what the defendant can or be able to pay, and the court must fix the manner of payment. *Savage v. State*, 655 N.E.2d 1223 (Ind. 1995).

68.14.055 **Restitution order a judgment lien -**A restitution order is a judgment lien and can be perfected and enforced. Ind. Code 35-50-5-3.

68.14.060 **Restitution order survives probation period -** The obligation to pay restitution to the victim survives the expiration of the period of probation, and subsequent

action may be taken to collect the restitution ordered. *Winninger v. Purdue University*, 666 N.E.2d 455 (Ind. Ct. App. 1996).

68.14.065 **May suspend fine as condition of restitution payment -** The court may suspend a portion of a fine on the condition that restitution is paid. *Rife v. State*, 424 N.E.2d 188 (Ind. Ct. App. 1981).

68.14.070 **Restitution not an excessive fine -** An order of restitution equal to the damages caused by a criminal act is not a "fine" and does not trigger an excessive fine analysis. *Head v. State*, 683 N.E.2d 1336 (Ind. Ct. App. 1997).

68.14.075 **Restitution may exceed civil jurisdictional limits -** A county court has jurisdiction to enter a restitution order in excess of $10,000.00 despite the $10,000.00 jurisdictional limit for civil judgments. *Winninger v. Purdue University*, 666 N.E.2d 455 (Ind. Ct. App. 1996).

68.14.080 **Cannot later modify sentence to add restitution order -** The court does not have authority to modify a sentence to add a restitution order after the defendant has been sentenced. *Wilson v. State*, 688 N.E.2d 1293 (Ind. Ct. App. 1997).

68.14.085 **Not dischargeable in bankruptcy -** Criminal restitution cannot be discharged in either Chapter 7 or Chapter 13 bankruptcy proceedings. 11 U.S.C. 1328(a)(3); *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990); *Kelly v. Robinson*, 479 U.S. 36 (1986).

68.14.090 **Court may not delegate determination of amount of restitution -** The trial court may not delegate the determination of the amount of the restitution or the manner of its payment to the probation department. *McGuire v. State*, 625 N.E.2d 1281 (Ind. Ct. App. 1993).

68.14.095 **Losses authorized to include in restitution -** Restitution is based upon the actual cost of repair, medical and hospital costs, and lost earnings incurred as a result of the crime. The court may also consider funeral, burial, or cremation costs incurred by the family or estate of a homicide victim as a result of the crime. I.C. 35-50-5-3. *See also Roach v. State*, 695 N.E.2d 934 (Ind. 1998)(funeral expenses).

68.14.100 **Restitution limited to expenses incurred prior to sentencing -** Ind. Code 35-50-5-3 limits restitution for medical expenses and hospital costs incurred prior to the date of sentencing. *Ault v. State*, 705 N.E.2d 1078 (Ind. Ct. App. 1999).

68.14.105 **Restitution must be based upon evidence -** A restitution order for the costs of counseling for a child molesting victim was improper when the court did not hear evidence on the cost of counseling or the length of time counseling would take. *Claussen v. State*, 612 N.E.2d 147 (Ind. Ct. App. 1993).

68.14.110 **May not extend sentencing to permit additional restitution -** The court could not continue sentencing for one (1) year and order the defendant to make restitution for medical expenses incurred prior to the continued sentencing date. *Kotsopoulos v. State*, 654 N.E.2d 44 (Ind. Ct. App. 1995).

68.14.115 **Restitution not precluded by victim's pending civil action -** Restitution may be ordered regardless of whether the victim has filed a civil action to collect damages. The collateral source rule does not apply. A settlement of the victim's civil claims against the defendant does not prevent the court from imposing restitution as a condition of probation. The collateral source rule does not apply in criminal proceedings. Settlements or payments by the defendant's insurer are not a set off against restitution. *Dupin v. State*, 524 N.E.2d 329 (Ind. Ct. App. 1988).

68.14.120 **Must determine ability to pay -** Court must determine the defendant's ability to pay restitution. *Miller v. State*, 502 N.E.2d 92 (Ind. 1986).

68.14.125 **Determining ability to pay not required if not a condition of probation -** When a restitution order is entered along with an executed sentence and no probation, there is no requirement that the court determine the defendant's ability to pay. *Bitner v. State*, 546 N.E.2d 117 (Ind. Ct. App. 1989).

68.14.130 **Modification if unable to comply-**

68.14.135 **May determine ability to pay from presentence report -** The court is not required to hold a hearing before determining the defendant's ability to pay restitution when the court has heard evidence from the defendant and spouse concerning employment history and financial status and the presentence report listed assets and liabilities. *Polen v. State*, 578 N.E.2d 755 (Ind. Ct. App. 1991). *See also Mitchell v. State*, 559 N.E.2d 313 (Ind. Ct. App. 1990).

68.14.140 **Determining ability to pay not required if defendant fails to cooperate -** The defendant's refusal to supply financial information precluded an argument on appeal that the court failed to inquire into the defendant's ability to pay. *Judge v. State*, 659 N.E.2d 608 (Ind. Ct. App. 1995).

68.14.145 **May exceed assets and earning ability -** A court may order an amount of restitution which exceeds the defendant's assets or lifetime discretionary income based upon pay prior to incarceration, but the court must also establish the Ind. Code 35-50-5-4 reimbursement plan which "(1) may not exceed an amount the person can or will be able to pay; (2) does not harm the person's ability to reasonably be self-supporting or to reasonably support any dependent of the person; and (3) takes into consideration and gives priority to any other restitution, reparation, repayment, costs, fine, or child support obligations the person is required to pay." *Savage v. State*, 655 N.E.2d 1223 (Ind. 1995)*, adopting Court of Appeals dissent at* 650 N.E.2d 1156.

68.14.150 **Not for uncharged crimes but agreement may permit -** Restitution is limited to loss attributed to crime for which a conviction was entered, and cannot be for other uncharged crimes. *Hipskind v. State*, 519 N.E.2d 572 (Ind. Ct. App. 1988).

68.14.155 **No restitution for "victimless" crime -** Defendant convicted of possession of marijuana but acquitted on delivery charge could not be ordered to pay restitution because there was no "victim" as required by the statute. Possession of marijuana caused no injury or harm to another. *Rumple v. State*, 529 N.E.2d 861 (Ind. Ct. App. 1988).

68.14.160 **Court may find injury despite verdict no bodily injury -** Court could order restitution as a condition of probation despite the defendant's acquittal for battery causing bodily injury. The court was impliedly authorized by statute to make an independent finding as to the extent of the victim's injuries. *Sales v. State*, 464 N.E.2d 1336 (Ind. Ct. App. 1984).

68.14.165 **Restitution may be ordered paid to survivors -** The court can order restitution for losses to the survivors of the direct victim of the crime. *Reinbold v. State*, 555 N.E.2d 463 (Ind. 1990) (overruled on other grounds by *Wright v. State*, 658 N.E.2d 563 (Ind. 1995))..

68.14.170 **State may be victim -** A state entity can be considered a "victim" in order to be entitled to receive restitution. *Ault v. State*, 705 N.E.2d 1078 (Ind. Ct. App. 1999).

68.14.175 **May order restitution to government on proof of loss -** The court may order restitution to the highway department for expenses to repair a traffic signal pole damaged by the defendant in the commission of a crime. *Kingston v. State*, 479 N.E.2d 1356 (Ind. Ct. App. 1985).

68.14.180 **Restitution improper for drug buy money for drug possession conviction -** Possession of controlled substance offenses have no victims to whom restitution can be ordered. An order that the defendant pay the law enforcement agency the drug buy money it used to purchase the controlled substances from the defendant was reversed. *Rumple v. State*, 529 N.E.2d 861 (Ind. Ct. App. 1988).

68.14.500 **No contact order sentence** - As a condition of an executed sentence, the court may require that the defendant refrain from any direct or indirect contact with a specified individual. Ind. Code 35-38-1-30 (for crimes committed on or after July 1, 2008).

68.15.000 **Order of incapacity to hold public office -**When a person is convicted of a misdemeanor under Ind. Code 35-44.1-1 (offenses against general public administration), the court may order that the person be incapable of holding a public office of trust or profit for a fixed period not to exceed ten (10) years. If the person is the officer of a governmental entity, the court may order removal from that office. Ind. Code 35-50-5-1.1.

68.15.200 **Defendant need not be present for license suspension -** After a full sentencing hearing, the recommendation of a license suspension pursuant to statute need not be done in the defendant's presence. *Dixon v. State*, 685 N.E.2d 715 (Ind. Ct. App. 1997).

68.15.500 **Authority to order to stay away from crime scene -** Ind. Code 35-50-7-2 permits the court to impose as a condition of probation the requirement that defendant not enter the area or property where an offense was committed by the defendant. Ind. Code 35-50-7-3 provides that the order must describe the property with sufficient specificity to allow the defendant to guide his or her conduct and to allow a law enforcement officer to enforce the order. The court is to provide a copy of the order to the defendant who is to acknowledge receipt in

writing. Ind. Code 35-50-7-5. The court is also to provide notice of the order to the law enforcement agency that arrested the person and to the prosecuting attorney. Ind. Code 35-50-7-6.

68.16.000 **Sources of suspension authority -** Authority to suspend felony sentences for crimes committed prior to July 1, 2014 was found in Ind. Code 35-50-2-2. Authority to suspend felony sentences committed on or after July 1, 2014 is found in Ind. Code 35-50-2-2.2. Misdemeanor suspension authority is conferred by Ind. Code 35-50-3-1.

68.16.010 **Exceptions to suspension of felony sentence –crimes committed prior to July 1, 2014 -** Generally any sentence may be suspended. Exceptions which prohibit the suspension of a felony sentence are:
-Death or life without parole for murder, Ind. Code 35-50-2-3(b)
-Habitual violent criminal offender, Ind. Code 35-50-2-8.5
-Juvenile record preclusion, Ind. Code 35-50-2-2.1, construed to require service of only the "minimum sentence" as provided in Ind. Code 35-50-2-2 by *Saintignon v. State*, 749 N.E.2d 1134 (Ind. 2001)
-"Minimum sentence" for specific crimes, Ind. Code 35-50-2-2(b)(4)
-"Minimum sentence" for specified prior adult record, Ind. Code 35-50-2-2(b)(1) to (3).
- Ind. Code 35-50-2-2(e) provides for a ten year limit on probation for certain child victim sex offenses.

68.16.012 **Exceptions to suspension of felony sentence – crimes committed on or after July 1, 2014** – Generally any sentence may be suspended. Exceptions which prohibit the suspension of a felony sentence are:
- Death or life without parole for murder, Ind. Code 35-50-2-3(b)
- Juvenile record preclusion, Ind. Code 35-50-2-2.1, construed to require service of only the "minimum sentence" by *Saintignon v. State*, 749 N.E.2d 1134 (Ind. 2001)
-“Minimum sentence” for murder or Level 1 felony
-“Minimum sentence” for Level 2 or 3 felony and defendant has a prior unrelated felony conviction, unless the felony being sentenced is one “concerning a controlled substance under IC 35-48-4” in which case the entire sentence remains suspendible, but effective July 1, 2016 there is an exception making methamphetamine or heroin Level 2 offenses nonsusendible if the offender has a prior felony conviction for dealing in a controlled substance other than marijuana, hasish, hash oil, salvia divinorum, or a synthetic drug.

68.16.015 **Discretionary with court** - Suspension of a sentence is discretionary with the court. *Reinbold v. State*, 555 N.E.2d 463 (Ind. 1990) (overruled on other grounds by *Wright v. State*, 658 N.E.2d 563 (Ind. 1995)).

68.16.016 **Standard for exercise of discretion to suspend -** In exercising its discretion, the court is required to balance the defendant's rehabilitative needs with society's paramount interest in protection from future criminal behavior before granting probation. *Ewing v. State*, 310 N.E.2d 571 (1974).

68.16.020 **Non-suspendability of sentence not unconstitutional -** Ind. Code 35-50-2-2(b), prohibiting suspension of the minimum sentence in certain instances, is not unconstitutional. *Habig v. State*, 525 N.E.2d 288 (Ind. 1988).

68.16.025 **For crimes committed prior to July 1, 2014, habitual enhancements suspendable if underlying sentence suspendable –**
The habitual criminal offender and habitual controlled substance offender penalty enhancements are not fully suspendable when the I.C. 35-50-2-1 "minimum sentence" for the underlying felony is not suspendable. See *Stanek v. State*, 603 N.E.2d 152 (Ind. 1992), adopting part 3 of Court of Appeals opinion found at 587 N.E.2d 736 (Ind. Ct. App. 1992) (superseded by statute on another issue as noted in *Roberts v. State*, 725 N.E.2d 441 (Ind. Ct. App. 2000)); *Collins v. State*, 583 N.E.2d 761 (Ind. Ct. App. 1991). *Bauer v. State*, 875 N.E.2d 744 (Ind. Ct. App. 2007), held that when the I.C. 35-50-2-1 "minimum sentence" is nonsuspendable then the lowest possible habitual sentence enhancement is also nonsuspendable. In *Bauer*, the defendant had been convicted of a D felony for which the I.C. 35-50-2-1 "minimum sentence" was nonsuspendable and also was found to be an habitual substance offender for which the sentence enhancement was three to eight years; the nonsuspendable portion of the sentence was held in *Bauer* to be the six month I.C. 35-50-2-1 "minimum" plus the three year "minimum" habitual substance offender enhancement, a nonsuspendable total of three years six months. *But see Reffett v. State*, 844 N.E.2d 1072 (Ind. Ct. App. 2006) (when sentence on underlying felony is nonsuspendable then entire habitual enhancement is nonsuspendible, relying on *Williams v. State*, 430 N.E.2d 756 (Ind. 1982), which was decided when statute provided the entire sentence was nonsuspendable if the defendant had a single prior felony conviction). But see also, *Howard v. State*, 873 N.E.2d 685, 690 (Ind. Ct. App. 2007) (holding that a sentence enhanced under the habitual offender statute may not be suspended).

68.16.026 **For crimes committed on or after July 1, 2014, habitual offender enhancements are not suspendible –** Ind. Code 35-50-2-8(i).

68.18.000 **Requirements for sentencing order -** The judgment of conviction must include (1) the crime and its classification, (2) any period for which the defendant is rendered incapable of holding public office of profit or trust, (3) the amount of fines and costs assessed, whether the defendant is indigent, and the method by which fines and costs are to be satisfied, (4) the amount of credit time for confinement prior to sentencing, and the amount to be credited toward payment of fines for confinement before sentencing. Ind. Code 35-38-3-2(b).

68.18.005 **Recommendation on degree of security -** The judgment may include a recommendation as to the degree of security for incarceration. Ind. Code 35-38-3-2(c).

68.18.010 **Forms of judgment within court's discretion, but not favored -**Attorneys may not submit forms of judgment except upon direction by the court. Such directions are not to be given as a matter of course. Ind. Crim. Rule 15.1.

68.18.015 **Judge may be mandated to enter judgment-** If the judge fails to promptly cause the judgment to be prepared, signed, and entered, the judge may be compelled to do so by mandate. Ind. Crim. Rule 15.1.

68.18.020 **Judgment withheld is authorized only in limited circumstances -** We are of the view that as slightly modified the rule long ago expressed is still applicable: the trial court may not withhold judgment but is required to enter judgment of conviction immediately unless a temporary postponement is dictated by good cause shown or the interest of justice so requires. Under some circumstances a trial court is expressly authorized to withhold judgment. See, e.g., I.C. 35-48-4-12 (allowing a court to defer judgment following a plea of guilty to possession of marijuana or hashish as a Class A misdemeanor and place the person under the court's custody subject to conditions); I.C. § 12-23-14.5-15 (allowing a drug court to defer proceedings without entering a judgment of conviction following a guilty plea to an offense in which the use of alcohol or drugs was a contributing factor or material element of the offense and place the person under the court's custody subject to conditions). *Debro v. State*, 821 N.E.2d 367 (Ind. 2005).

68.18.025 **Defendant cannot complain of bargain for withheld judgment** – While withheld judgments are, with some limited exceptions, not authorized by statute, a defendant who enters into a plea agreement calling for judgment to be withheld will not be heard to complain that judgment was accordingly withheld in his case. *Debro v. State*, 821 N.E.2d 367 (Ind. 2005).

68.30.000 **Instructions after sentencing in any case or felony probation revocation –** After imposing a sentence following either a trial in a criminal case [through 2005 felony trials only] or a judgment revoking probation after a contested felony probation revocation proceeding, the court must immediately advise the defendant:

(1) that he or she is entitled to appeal or file a motion to correct error;
(2) that a motion to correct error must be filed within thirty (30) days;
(3) that for an appeal a Notice of Appealmust be filed within thirty (30) days after the sentencing or the denial of the Motion to Correct Error or the right to appeal may be forfeited; and
(4) that the court will appoint counsel at public expenses if the defendant cannot employ an attorney.

The court shall then inquire as to whether the defendant wishes to appeal or file a motion to correct errors, and if so whether the defendant has funds to hire an attorney. Ind. Crim. Rule 11. See Form 68.30.003.

68.30.002 **Instructions after felony sentencing, guilty plea -** After sentencing for a crime following a guilty plea, Criminal Rule 11 advice requirements do not apply. But if the judge had discretion, even if only partial, as to the sentence to be imposed, then the defendant has a right to take a direct appeal of the sentence, under *Collins v. State*, 817 N.E.2d 230 (Ind. 2004). The Benchbook Committee recommends that advice of the right to appeal the sentence be given by the trial judge following felony sentencing of a defendant who has the right to a direct appeal of the sentence. The Committee recommends that the trial judge then

inquire of the defendant whether he or she wishes to appeal and whether defendant has funds to hire counsel for an appeal. See Form 68.30.003.

68.30.005 **Informing of right of appeal insufficient -** Criminal Rule 11 is not met by an advisement by the court that the defendant has a right to appeal. *Blackmon v. State*, 450 N.E.2d 104 (Ind. Ct. App. 1983).

68.30.010 **Defendant must show harm -** The defendant could not complain about the court's failure to comply with the Rule when he exercised those rights that were the subject of the advisement. *Stoehr v. State*, 263 Ind. 208, 328 N.E.2d 422 (1975).

68.40.000 **Sex offender registry** -A person who has been convicted of one of a list of sexual offenses must register with each local law enforcement authority having jurisdiction where the person resides or intends to reside for more than seven (7) days. The person must also advise each local law enforcement authority of any change of address within seven (7) days. Ind. Code 11-8-8.

68.45.000 **Sexually violent predator** - If defendant is being sentenced for a sex offense which makes the defendant a sexually violent predator as a matter of law under IC 35-38-1-7.5 (b), the court must so indicate on the record at the sentencing hearing. Ind. Code 35-38-1-7.5(d). If the defendant is not a sexually violent predator as a matter of law, the prosecutor may file a request for the court to determine whether the defendant is a sexually violent predator under the general definition in IC 35-38-1-7.5 (a). "If the court grants the motion," the court shall appoint two (2) psychologists or psychiatrists who have expertise in criminal behavioral disorders to evaluate the person and testify at the hearing. After conducting the hearing and considering the testimony of the two (2) psychologists or psychiatrists, the court shall determine whether the person is a sexually violent predator under subsection (a). Ind. Code 35-38-1-7.5(e). A hearing conducted under this subsection may be combined with the person's sentencing hearing. Ind. Code 35-38-1-7.5(e). If the defendant is a sexually violent predator, the court shall send notice to the Department of Correction. Ind. Code 35-38-1-7.5(f)(2).

68.50.000 **HIV testing** - Ind. Code 35-38-1-9.5 requires a probation officer to obtain confidential information from the state department of mental health to determine whether a person carries the human immunodeficiency virus (HIV) when convicted of a sex crime relating to a criminal sexual act and the offense created an epidemiologically demonstrated risk of transmission of the human immunodeficiency virus (HIV); or convicted of an offense relating to controlled substances and the offense involved the delivery by any person to another person; or the use by any person on another person of a contaminated sharp or other paraphernalia that creates an epidemiologically demonstrated risk of transmission of HIV contact. Ind. Code 35-38-1-10.5 requires the court to order an HIV screening test for persons convicted of such offenses. If the screening test is positive the court must order a confirmatory test. Ind. Code 35-38-1-10.5(b). If the confirmatory test indicates the presence of HIV antibodies the court shall report the results to the state department of health and require the probation officer to obtain the convicted person's medical record from the state department

of health and determine whether the convicted person has receive risk counseling. Ind. Code 35-38-1-10.5(c).

68.55.000 Commitment of offender

68.55.005 Legislature defines location for imprisonment - Determination of the locale for incarceration rests with the legislature. A contrary court order is superfluous. *Barnes v. State*, 435 N.E.2d 235 (Ind. 1982).

68.55.010 Statutes on location for imprisonment - The statutes do not define the place for imprisonment for particular crimes. The commitment statutes authorize commitment to a "receiving authority," defined either as the Department of Correction or the county jail where imprisonment is authorized in the county jail, I.C. 35-38-3-1 ["receiving authority" definition], I.C. 35-38-3-2 and -3 [commitment provision], but no statutes designate when imprisonment is authorized in the county jail.

68.55.011 Limits on DOC commitment of misdemeanants and Level 6 Felons -

- Statute provide**s** that commitment for misdemeanors cannot be to the Department of Correction unless the convicted person has more than five hundred forty-seven (547) days remaining before the earliest possible release date due to consecutive sentences, placement in the county jail places the person in danger of serious bodily injury or death, placement in the county jail creates a substantial threat to the safety of others, or other good cause. I.C. 35-38-3-3.
- Effective January 1, 2016, statute prohibits commitment of Level 6 felons to the DOC, unless
  - the commitment is for a violation of probation, parole, or community corrections by committing a new criminal offense
  - or the person is convicted of at least two Level 6 felonies that are ordered to be served consecutively and the individual has more than three hundred sixty-five days from sentencing before his earliest possible release date,
  - or the individual's sentence was enhanced under I.C. 35-50-2-8 through I.C. 35-50-2-16 and the individual has more than three hundred sixty-five days from sentencing before his earliest possible release date.
- No statute prohibits imprisonment of a person convicted of a felony in the county jail. The sheriff is to transport the convicted person to the "receiving authority". I.C. 35-38-3-4.

68.55.012 Statutory definitions

"Imprison" means to:

(1) confine in a penal facility;
(2) commit to the department of correction; or
(3) assign to a community transition program under IC 11-10-11.5.

Ind. Code 35-31.5-2-166.

"Penal facility" means a state prison, correctional facility, county jail, penitentiary, house of correction, or any other facility for confinement of persons under sentence, or awaiting trial or sentence, for offenses. The term includes a

correctional facility constructed under IC 4-13.5.
Ind. Code 35-31.5-2-232
"Receiving authority" means:
(1) The department of correction;
(2) A sheriff, if incarceration is authorized in a county jail; or
(3) A facility or place designated by the department of correction.
Ind. Code 35-38-3-1.

68.55.015 **No right to particular institution -** The prohibition against cruel and unusual punishment does not entitle an individual to be assigned to any particular institution. *Ratliff v. Cohn*, 693 N.E.2d 530 (Ind. 1998).

68.55.020 **Waived juvenile's incarceration in adult facility constitutional -** Incarceration of a 14 year old waived juvenile in an adult facility is not unconstitutional. *Ratliff v. Cohn*, 693 N.E.2d 530 (Ind. 1998).

68.55.025 **Juvenile may be committed to juvenile detention facility to serve misdemeanor sentence** - The court may order that the service of a sentence for a misdemeanor conviction by a person less than eighteen (18) years of age be carried out in a juvenile detention facility. The court must first receive the written approval of the judge of the juvenile court. Ind. Code 35-38-1-22.

68.55.030 **Imprisonment begins when sentence imposed unless stayed by law** - A term of imprisonment begins on the date the sentence is imposed, unless execution of the sentence is stayed. Ind. Code 35-38-3-2(d).

68.55.035 **Certification of sentence to receiving authority** - When the court imposes a sentence that includes imprisonment, the court must certify, under court seal, or through any electronic means approved by the department of correction, copies of the judgment of conviction and sentence to the receiving authority. The judgment must include: (1) the crime for which the conviction was entered and the classification; (2) the period, if any, for which the person is rendered incapable of holding an office of trust or profit; (3) the fines and costs and the method by which they are to be satisfied; (4) credit for time spent incarcerated before sentencing; and (5) the amount to be credited toward fines or costs for time spent incarcerated before sentencing. Ind. Code 35-38-3-2.

68.55.040 **Order of Commitment, transmittal of judgment of conviction and sentence to sheriff, and certification of sentence to Department of Correction**
When a defendant is sentenced to the department of corrections the court must send the department a copy of the presentence report, presentence memoranda filed by the defendant, the report of any physical or mental examination, any record made under Ind. Code 35-35-2 (pleadings), the abstract of conviction, the judgment of conviction, and the sentencing order. Ind. Code 35-38-1-14. These materials may be sent by any electronic means approved by the Department. The court may recommend a degree of security.
For a defendant under 16 years of age on the sentencing date and when the court feels that the defendant would benefit, the court may recommend to the department of correction that the defendant be placed initially in a secure private facility until the person becomes 21 years old or the private facility terminates the

placement, at which time the defendant would serve the remainder of his sentence in a department of correction facility or program. Ind. Code 35-50-1-6.

68.55.050 Abstract of judgment

68.55.055 Abstract modified to conform with sentence that was orally pronounced - When the sentence in the chronological case summary and abstract of judgment differed from the sentence the court orally imposed, the subsequent contradictory language was vacated and modified. *Whatley v. State*, 685 N.E.2d 48 (Ind. 1997).

68.55.060 Electronic abstract of judgment required for DOC sentences, including revocations – Ind. Code 35-38-1-31 provides that

(a) If a court imposes on a person convicted of a felony a sentence that involves a commitment to the department of correction, the court shall complete an abstract of judgment in an electronic format approved by the department of correction and the division of state court administration. The abstract of judgment must include, but not be limited to:

(1) each offense the person is convicted of;

(2) the sentence, including whether the sentence includes a suspended sentence, probation, or direct commitment to community corrections; and

(3) whether the person is a credit restricted felon.

(b) If a person convicted of a felony is committed to the department of correction by a court as a result of a violation of the terms of probation or other community placement, the court shall state in the abstract of judgment the specific reasons for revocation if probation, parole, or a community corrections placement has been revoked.

Ind. Code Ann. § 35-38-1-31**.**

68.55.065 Electronic abstracts of judgment required for all felony sentences - Upon sentencing a person for any felony conviction, the court shall complete an abstract of judgment in an electronic format approved by the Division of State Court Administration. The Division of State Court Administration will maintain an automated system for purposes of submitting the electronic abstract of judgment. Ind. R. Crim. P. 15.2 (effective 7/1/12).

68.55.070 Abstract of Judgment: Paperless Process and Level 6 Felony Changes –

- Effective January 1, 2016, the process of transmitting information to the Department of Correction for convicted persons will be PAPERLESS!
- Per Indiana Code 35-38-1-14(a), when a convicted person is sentenced to a term of imprisonment, the court shall send a copy of the presentence investigation report, abstract of judgment, and sentencing order/judgment of conviction.
    - o Presentence reports and abstracts of judgment are prepared electronically in INcite
    - o The sentencing order is also now required to be attached electronically to the abstract record in INcite
    - o Beginning January 1, 2016, physically printing this “packet” of information for the Department of Correction is no longer necessary.
- Beginning January 1, 2016, a Level 6 felon cannot be committed to the Department of Correction (Indiana Code 35-38-3-3(d)) unless:

o Community supervision was revoked on a Level 6 felony due to new offense [Note: as of June 2016, DOC requires conviction of the new offense – DOC will not accept based just on proof of commission by a preponderance at revocation; watch for 2017 legislation on this issue]; or
o Offender has two or more consecutive Level 6 felonies with a release date greater than 365 days [Note: as of June 2016, DOC accepts only if consecutive Level 6 sentences and will not accept with a combination of a Level 6 and a Level 7 or higher; watch for 2017 legislation on this issue]; or
o There is an enhancement on a Level 6 felony resulting in a release date greater than 365 days.

- The sheriff is entitled to a per diem and medical expense reimbursement from the Department of Correction for the cost of incarcerating a Level 6 felon who cannot be committed to the Department of Correction.
- If after review by the Department of Correction it is determined that a Level 6 offender does not meet the criteria under IC 35-38-3-3(d) to be committed to the DOC, an email notification of the ineligibility status will be sent to the INcite user that prepared the Abstract of Judgment. The email notification will include the statutory language and will also provide contact information in the event you wish to address any questions or concerns with the Department of Correction.
- Questions regarding the Abstract of Judgment in INcite or the paperless process should be directed to Lisa Thompson, Project Manager for Trial Court Technology, at (317) 234-6586 or lisa.thompson@courts.in.gov.

68.55.100 **Conditional discharge** -The statute permits a conditional discharge for a possession of marijuana charge under certain circumstances. Ind. Code 35-48-4-12.

68.55.105 **Court may impose sentence if conditional discharge violated -** The court may impose a sentence if the defendant violates the terms of a conditional discharge. *Perkins v. State*, 715 N.E.2d 1016 (Ind. Ct. App. 1999).

68.60.000 **Disposition of property held as evidence** - Property that was admitted into evidence and can be lawfully possessed shall be disposed of as ordered by the trial court. For purposes of appeal, a photograph demonstrating the nature of the property and an adequate description of the property must be taken before the disposition of the property. In the event of a retrial, the photograph and description may be admitted as evidence. Ind. Code 35-33-5-5(d) [court to order disposal of evidence]; Ind. Code 35-33-5-5(f) [may photograph and description of evidence before disposal].

68.60.005 **Court determines disposition of property after trial -** The trial court retains jurisdiction over property taken from an arrestee after the conclusion of the criminal proceedings. The court may enter orders regarding the disposition of such property. *State v. Poxson*, 514 N.E.2d 652 (Ind. Ct. App. 1987).

68.70.000 **Suspension of hunting or fishing privileges** - Ind. Code 14-22-11-15(d) provides that sentencing for a violation of a law for the protection of wildlife, the

court has the discretion to revoke the hunting of fishing license of the defendant for thirty (30) days, sixty (60) days, ninety (90) days, or one (1) year.

68.70.005 **May impose consecutive suspensions for multiple game offenses -** The court may impose consecutive suspensions for each violation. The statute does not limit the court's ability to impose special terms of probation. *Hurst v. State*, 717 N.E.2d 883 (Ind. Ct. App. 1999).

FORMS – CHAPTER 68.00.000 SENTENCING

68.01.090 Order for Presentence Report

STATE OF INDIANA) IN THE _____ COURT
) SS:
COUNTY OF _____) 20__ TERM

CAUSE NO. _____

STATE OF INDIANA)
)
vs.)
)
_____)

ORDER FOR PRE-SENTENCE INVESTIGATION

The State of Indiana appears by _____, [Deputy] Prosecuting Attorney, and the defendant, _____, appears by _____, attorney for the defendant.
The court, having entered judgment of conviction against defendant for the crime[s] of_____, now directs the defendant to appear immediately before a probation officer of the court and directs the probation department to conduct a presentence investigation and to submit a written presentence report concerning defendant and the crimes he/she has been convicted of in this cause. The presentence report is to be submitted to the court and copies provided to counsel for both the State and defendant on or before the ___ day of _____, 20__. The court now orders that a sentencing hearing will be held in this cause on the ___ day of _____, 20__, after which the court will impose its sentence[s} upon the defendant.

[Diagnostic option]
(Sheriff deliver)

The court now directs the defendant to submit to an investigation and evaluation by the Indiana Department of Correction Presentencing Diagnostic Service. The Sheriff of _____ County is directed to transport said defendant to the Reception-Diagnostic Center, Plainfield, Indiana, [Indiana Women's Prison, Indianapolis, Indiana] on the ____ day of _____, 20__. The Department of Correction is ordered to file a diagnostic report in this Court on or before the ___ day of _____, 20__.

(OR)
(Defendant report)

The court now directs the defendant to submit to an investigation and evaluation by the Indiana Department of Correction Presentencing Diagnostic Service. Defendant is directed to report to the Reception-Diagnostic Center, Plainfield, Indiana [Indiana Women's Prison, Indianapolis, Indiana], on the ____ day of _____, 20__. The Department of Correction is ordered to file a diagnostic report in this Court on or before the ___ day of _____, 20__.

SO ORDERED this ____day of_____, 20__.

_____
Judge

68.02.040 Felony sentencing parameters

(Use this form to determine the potential sentences which may be entered upon a felony conviction.)

STANDARD SENTENCING RANGES – CRIME PRIOR TO JULY 1, 2014:

Class	Minimum	Maximum	Advisory	Fines
Murder	45 years	65 years	55 years	$10,000
A	20 years	50 years	30 years	$10,000
B	6 years	20 years	10 years	$10,000
C	2 years	8 years	4 years	$10,000
D	6 months	3 years	1.5 years	$10,000
A misd.	1 yr. max.			$ 5,000
B misd.	180 days max.			$ 1,000
C misd.	60 days max.			$ 500

STANDARD SENTENCING RANGES – CRIME ON OR AFTER JULY 1, 2014:

Level	Minimum	Maximum	Advisory	Fines
Murder	45 years	65 years	55 years	$10,000
1	20 years	50 years	30 years	$10,000
2	10 years	30 years	17.5 years	$10,000
3	3 years	16 years	9 years	$10,000
4	2 years	12 years	6 years	$10,000
5	1 years	6 years	3 years	$10,000
6	6 months	2.5 years	1 year	$10,000
A misd.	1 year max			$ 5,000
B misd.	180 days max			$ 1,000
C misd.	60 days max			$ 500

68.02.045 - Felony Sentencing Enhancements:

FELONY SENTENCING ENHANCEMENTS - CRIME PRIOR TO JULY 1, 2014:

Enhancement Type	Minimum Term	Maximum Term
Habitual Criminal – A, B, or C felony	1 x advisory	3x advisory, up to 30 yrs
Use of firearm in : felony against the person (IC 35-42) resulting in death or serious bodily injury; or kidnapping; or Class B felony criminal confinement		5 years
Use of firearm or possession of handgun, sawed-off shotgun, or machine gun in controlled substance offense		5 years
Use of sawed-off shotgun-controlled substance offense		10 years
Use of machine gun or silencer-controlled substance offense		20 years
Habitual controlled substance offender	3 years (1 year if more than 3 years since last prior)	8 years
Murder or felony murder resulting in the termination of a human pregnancy	6 years	20 years
Repeat sexual offender		20 years
Criminal gang		1 x sentence on highest underlying felony

FELONY SENTENCING ENHANCEMENTS- CRIME ON OR AFTER JULY 1, 2014:

Enhancement Type	Minimum Term	Maximum Term
Habitual Criminal – Level 1, 2, 3, or 4	6 years	20 years
Habitual Criminal – Level 5 or 6	2 years	6 years
Use of firearm in : felony against the person (IC 35-42) resulting in death or serious bodily injury; or kidnapping; or level 2 or 3 felony criminal confinement	5 years	20 years
Use of firearm or possession of handgun, sawed-off shotgun, or machine gun in controlled substance offense		5 years
Use of sawed-off shotgun-controlled substance offense		10 years
Use of machine gun or silencer-controlled substance offense		20 years

Habitual vehicular traffic offender (for crimes committed on or after January 1, 2015)	1 year	8 years
Murder or felony murder resulting in the termination of a human pregnancy	6 years	20 years
Repeat sexual offender		20 years
Criminal organization	1 x sentence on underlying felony if sentencing for one felony only	1 x longest sentence imposed for underlying felonies if sentencing for more than one felony

68.02.050 - Felony Resentencing Ranges - murders 77 to June 30, 2014

Murder - Ind. Code 35-50-2-3

Date of Crime	Presumptive Sentence	Addition (Max. Possible)	Minimum (Min. Possible)
Oct. 1, 1977 to May 4, 1995*	forty [40] years	up to twenty [20] added (60 year maximum)	down to ten [10] sub tracted (30 year minimum)
May 5, 1995 to June 30, 1995	fifty [50] years	up to ten [10] added (60 year maximum)	down to ten [10] sub-tracted (40 year minimum)
July 1, 1995 to June 30, 2014	fifty-five [55] years	up to ten [10] added (65 year maximum)	down to ten [10] sub-tracted (45 year minimum)

*An increase in the presumptive sentence to fifty years was enacted by P.L. 164-1994, effective July 1, 1994, but in the same legislative session P.L. 158-1994 inserted a reference to the "mentally retarded" procedure for avoiding the death penalty while showing a presumptive sentence of forty years for murder. The Indiana Supreme Court has held that the 1994 legislation was in conflict, could not be reconciled, and must be construed as continuing the forty year presumptive sentence until May 5, 1995, the effective date of corrective legislation. *Smith v. State*, 675 N.E.2d 693 (Ind. 1996).

68.02.055 Felony resentencing: A felonies committed from 1977 to June 30, 2014

Class A Felony - Ind. Code 35-50-2-4

Date of Crime	Presumptive Sentence	Addition (Max. Possible)	Minimum (Min. Possible)
Oct. 1, 1977 to June 30, 1994	twenty-five [25] or thirty [30] years?	up to twenty [20] added (45 or 50 year maximum)	down to ten [10] subtracted (15 or 20 year minimum)
July 1, 1994 to June 30, 1995	twenty-five [25] years	up to twenty [20] added (45 year maximum)	down to ten [10] subtracted (15 year minimum)
July 1, 1995 to June 30, 2014	thirty [30] years	up to twenty [20] added (50 year maximum)	down to ten [10] subtracted (20 year minimum)

68.02.060 Felony resentencing: B felonies committed from 1977 to June 30, 2014

Class B felony - Ind. Code 35-50-2-5

Effective dates	Presumptive Sentence	Addition (Max. Possible)	Minimum (Min. Possible)
October 1, 1976 to June 30, 2014	ten [10] years	up to ten [10] added (20 year maximum)	down to four [4] subtracted (6 year minimum)

68.02.065 Felony resentencing: C felonies committed from 1977 to June 30, 2014

Class C felony - Ind. Code 35-50-2-6

Effective dates	Presumptive Sentence	Addition (Max. Possible)	Minimum (Min. Possible)
Oct. 1, 1975 to March 31, 1990	five [5] years by former statute,	up to three [3] years added by former statute (8 year maximum)	down to three [3] years subtracted by former statute (2 year minimum)
April 1, 1990 to June 30, 2014	four [4] years	up to four [4] years added (8 year maximum)	down to two [2] years subtracted (2 year minimum)

68.02.070 Felony resentencing: D felonies committed from 1977 to June 30, 2014

Class D felony - Ind. Code 35-50-2-7

Effective dates	Presumptive Sentence	Addition (Max. Possible)	Minimum (Min. Possible)
Oct. 1, 1977 to June 30, 2014	one and one half [11/2] years	up to one and one half [11/2] years added (3 year maximum)	down to one [1] year subtracted (1/2 year minimum)

68.02.075 Felony resentencing: habitual offender A and B felonies committed from 1977 to June 30, 2014

Date of Crime	Penalty enhancement
Oct. 1, 1977 to Aug. 31, 1980	30 years
Sept. 1, 1980 to Aug. 31, 1983	30 years, but if more than 10 years between current felony's commission and defendant's discharge from parole, probation, or prison on last prior unrelated felony conviction judge may subtract up to 25 years from the 30 year enhancement.
Sept. 1, 1983 to Aug. 31, 1985	30 years, but if more than 10 since years between current felony's commission and defendant's discharge from parole, probation, or prison on last prior unrelated felony conviction judge may subtract up to 25 years from the 30 year enhancement. If more than two offenses relied upon for the habitual determination were "substance offenses," defined in Ind. Code § 35-50-2-10 as A misdemeanor or D felony drug or alcohol crimes, then the 35-50-2-10 "habitual controlled substance offender" enhancement is to be applied.
Sept. 1, 1985 to Aug.31, 1993	30 years, but if more than 10 between current felony's commission and defendant's discharge from parole, probation, or prison on last prior unrelated felony conviction judge may subtract up to 25 years from the 30 year enhancement. If one prior unrelated felony conviction is a D felony, court may reduce the enhancement by up to 10 years. If felony being sentenced for is D felony then judge may subtract up to 20 years. Defendant must receive at least a five (5) year enhancement.*
July 1, 1993 to June 30, 2014	Not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years.

*Note that if more than one of the several provisions for reduction of the enhancement apply to a defendant, it appears the court was intended to have discretion to use all the applicable reduction factors cumulatively. This conclusion follows from the provision that a minimum habitual enhancement of at least 5 years must have been imposed on an habitual offender - construing the statute to limit the court to only one reduction factor even if more than one applies would reduce the provision for the 5 year minimum limit to mere surplusage, contrary to statutory construction principles.

68.02.080 Felony resentencing: habitual offender C and D felonies committed to June 30, 2014

Date of Crime	Penalty enhancement
Oct. 1, 1977 to June 30, 2014	Not less than the advisory (formerly presumptive, prior to April 25, 2005) sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense. However, the additional sentence may not exceed thirty (30) years.*

68.10.100 Sentence Credit Chart – Crime Prior to July 1, 2015

Type of Confinement	**Time Served [Accrued Time] Credit?**	**Credit Time [Good Time Credit]?**	**Authority**
Jail awaiting trial and sentence	Yes	Yes	IC 35-50-6-3 or -3.1
Hospital confinement ordered by court while awaiting trial and sentence	Yes	Yes	*Wilson v. State*, 679 N.E.2d 1333 (Ind. Ct. App. 1997)
Home detention awaiting trial and sentence – crime prior to 7-01-15	Court's discretion	? (No express statute)	*Purcell v. State*, 721 N.E.2d 220 (Ind. 1999); *Senn v. State*, 766 N.E.2d 1190, 1201 (Ind. Ct. App. 2002); *Lewis v. State*, 898 N.E.2d 1286 (Ind. Ct. App. 2009)
Community corrections confinement awaiting trial and sentence	Court's Discretion	? (No express statute)	*Purcell v. State*, 721 N.E.2d 220 (Ind. 1999)); *Lewis v. State*, 898 N.E.2d 1286 (Ind. Ct. App. 2009)
Prison or jail post-sentence	Yes	Yes	IC 35-50-6-3 or -3.1
Jail work release post-sentence	Yes	Yes	IC 35-50-6-3
Secure facility post-sentence direct commitment to community corrections	Yes	Yes	IC 35-50-6-3 or -3.1
Home detention post-sentence direct commitment to community corrections	Yes	Yes	IC 35-38-2.6-6; *Arthur v. State*, 950 N.E.2d 343 (Ind. Ct. App. 2011), (holding 35-38-2.6 applies to all community corrections home detentions)
Jail post-sentence condition of probation	Yes	Yes (no, if intermittent)	IC 35-38-2-2.3(c) and (d)
Work release post-sentence condition of probation	Yes	?	*Senn v. State*, 766 N.E.2d 1190, 1202 (Ind. Ct. App. 2002)
Secure facility post-sentence community corrections condition of probation	Yes	?~~?~~	*Purcell v. State*, 721 N.E.2d 220 (Ind. 1999); *See Senn v. State*, 766 N.E.2d 1190, 1202 (Ind. Ct. App. 2002)
Home detention post-sentence condition of probation	Yes	Yes	Crimes prior to 7-01-14, see *Peterink v. State*, 982 N.E.2d 1009 (Ind. 2013); crimes after 7-01-14 see IC 35-38-2.5-5
Jail post-sentence pending probation revocation	Yes	Yes	*Senn v. State*, 766 N.E.2d 1190, 1202 (Ind. Ct. App. 2002)
Home detention post-sentence pending probation revocation	Yes	No	*Senn v. State*, 766 N.E.2d 1190, 1202 (Ind. Ct. App. 2002)

68.10.120 Sentence Credit Chart – Crime on or after July 1, 2015

Type of Confinement	Accrued time?	Good Time?	Authority
Jail awaiting trial and sentence	Yes	Yes	IC 35-50-6-3.1
Hospital confinement ordered by court while awaiting trial and sentence	Yes	Yes	*Wilson v. State*, 679 N.E.2d 1333 (Ind. Ct. App. 1997)
Home detention awaiting trial	Court's discretion	Prior to 7-01-16: ? (No express statute)**;** On or after 7-01-16 one day for every four days "pretrial home detention"	Prior to 7-01-16: *Purcell v. State*, 721 N.E.2d 220 (Ind. 1999); *Senn v. State*, 766 N.E.2d 1190, 1201 (Ind. Ct. App. 2002); *Lewis v. State*, 898 N.E.2d 1286 (Ind. Ct. App. 2009)**;** On or after 7-01-16: I.C. 35-50-6-4(i)
Community corrections confinement awaiting trial and sentence	Court's Discretion	? (No express statute)	*Purcell v. State*, 721 N.E.2d 220 (Ind. 1999)); *Lewis v. State*, 898 N.E.2d 1286 (Ind. Ct. App. 2009)
Prison or jail post-sentence	Yes	Yes	IC 35-50-6-3.1
Jail work release post-sentence	Yes	Yes	IC 35-50-6-3.1
Secure facility post-sentence direct commitment to community corrections	Yes	Yes	IC 35-38-2.6-6
Home detention post-sentence direct commitment to community corrections	Yes	Yes	IC 35-38-2.6-6
Jail post-sentence condition of probation	Yes	Yes (no, if intermittent)	IC 35-38-2-2.3(c) and (d)
Work release post-sentence condition of probation	Yes	?	*Senn v. State*, 766 N.E.2d 1190, 1202 (Ind. Ct. App. 2002)
Secure facility post-sentence community corrections condition of probation	Yes	?	*Purcell v. State*, 721 N.E.2d 220 (Ind. 1999); *See Senn v. State*, 766 N.E.2d 1190, 1202 (Ind. Ct. App. 2002)
Home detention post-sentence condition of probation	Yes	Yes	IC 35-38-2.5-5
Jail post-sentence pending probation revocation	Yes	Yes	*Senn v. State*, 766 N.E.2d 1190, 1202 (Ind. Ct. App. 2002)
Home detention post-sentence pending probation revocation	Yes	No	*Senn v. State*, 766 N.E.2d 1190, 1202 (Ind. Ct. App. 2002)

68.10.250 CONSECUTIVE SENTENCING DISCRETION:

Basic felony sentence	**Special recidivist or other status enhancements**
"Crimes of violence" whether "single episode" or not: entire basic sentences including standard enhancement periods can be made consecutive*	Habitual offender and other status enhancements may not be included in the consecutivity order**
Crimes not committed in "single episode*": entire basic sentences including standard enhancement periods can be made consecutive	Habitual offender and other status enhancements may not be included in the consecutivity order
"Single episode*" crimes which are not "crimes of violence": upper limit on consecutive service of basic terms of imprisonment equals the advisory term for the next higher class of felony***	Habitual offender and other status enhancements may not be included in the consecutivity order

* "Crime of violence" means: murder, voluntary manslaughter, involuntary manslaughter, reckless homicide, aggravated battery, kidnapping, rape, criminal deviate conduct, child molesting, Level 1 or 2 or Class A or B felony sexual misconduct with a minor, Level 2 or 3 or Class A or B felony robbery, Level 1, 2, 3, or 4 or Class A or B felony burglary, causing death while operating a motor vehicle while intoxicated, operating while intoxicated causing serious bodily injury, and felony resisting law enforcement.

"Episode of criminal conduct" means "offenses or a connected series of offenses that are closely related in time, place, and circumstance."

The habitual criminal offender sentence enhancement portions of multiple terms of imprisonment may not be ordered served consecutively without express legislative authorization for it, and the former Ind. Code 35-50-1-2(a)'s "the court shall determine whether terms of imprisonment shall be served concurrently or consecutively" did not suffice as express authorization for this purpose. *Seay v. State*, 550 N.E.2d 1284 (Ind. 1990). Under *Seay*,** it does not appear that the present version of Ind. Code 35-50-1-2(a) authorizes the habitual criminal offender or habitual substance offender enhancement portions of sentences to be served consecutively, as there is no express authorization for that to be done under the amendments.

***The enhancements for habitual criminal offender and habitual controlled substance offender do not count toward the consecutivity limit; only years which are part of the basic sentences are counted as years subject to the "next-higher-class-of-felony" consecutivity ceiling.

68.12.030 Costs/Fees In Criminal Actions

Cost/Fee	Amount	Collection and Special Conditions to Collection	Deposited	Use
Bail Fee Ind. Code 35-33-8-3.2	$ 5	All admissions to bail on a surety, property, or cash deposit bond	Public Employees Retirement Fund	Special Death Benefit Fund
Criminal Cost Fee Ind. Code 33-37-4-1(a)	$120	All criminal convictions	70% - State General Fund Ind. Code 33-37-7-2(a) 27% - County General Fund Ind. Code 33-37-7-3 3% - Qualified Municipality Share Ind. Code 33-37-7-5	
Jury Fee Ind. Code 33-37-5-19	$ 2	"Each action in which a person is found to have committed a crime."	County User Fee Fund Ind. Code 33-37-8-5	Jury Pay Fund in Ind. Code 33-37-11-2
Law Enforcement Continuing Education Program Fee Ind. Code 33-37-5-8	$4	Collected upon finding defendant committed a crime.	County User Fee Fund. Ind. Code 33-37-8-5	Law enforcement continuing and training. Ind. Code 5-2-8
Marijuana Eradication Program Fee Ind. Code 33-37-5-7	Not to exceed $300	Collected on controlled substance (Ind. Code 35-48-4) convictions if a weed control board has been established in the county per Ind. Code 15-3-4.6-1.	County User Fee Fund Ind. Code 33-37-8-5	Marijuana Eradication Program. Ind. Code 15-3-4.6

Sexual assault victims Ind. Code 33-37-5-23	$250 to $1000	Collected on convictions of rape, Ind. Code 35-42-4-1; Criminal deviate conduct, Ind. Code 35-42-4-2; Child molesting, Ind. Code 35-42-4-3;Child exploitation; Ind. Code 35-42-4-4(b);Vicarious sexual gratification, Ind. Code 35-42-4-5;Child solicitation, Ind. Code 35-42-4-6; Child seduction, Ind. Code 35-42-4-7; Sexual battery,Ind. Code 35-42-4-8; Sexual misconduct with a minor as a Class A or Class B felony, Ind. Code 35-42-4-9; Incest, Ind. Code 35-46-1-3).		Sexual assult victims assistance fund, Ind. Code 16-19-13-6

Late payment fee, Ind. Code 33-37-5-22, provided local rule for fee made by court	$25	Collected from any convicted person who fails to pay costs or fines on later of date imposed or in court's payment schedule		40% in clerk's record perpetuation fund, if ordinance adopted, and 60% in county general fund; if no ordinance, all in county general fund
Alcohol & Drug Services Program Fee Ind. Code 33-37-5-8	Not to exceed $400	Collected from defendant placed in court alcohol/drug services program established under Ind. Code 12-23-14.	County User Fee Fund. Ind. Code 33-37-8-5	Court's alcohol & drug services program. Ind. Code 12-23-14
Drug Abuse Prosecution Interdiction Correction Fee Ind. Code 33-37-5-9	$200 up to $1000	Conviction of controlled substance (Ind. Code 35-48-4) offense.	25% - State User Fee Fund. Ind. Code 33-37-9-2 75% - County Auditor for County Drug Free Community Fund. Ind. Code 33-19-7-1(c)	Various State Funds. Ind. Code 33-37-9-4 County Drug Free Community Fund. Ind. Code 5-2-11-2
Problem Solving Court Fee Ind. Code 33-37-5-24 Ind. Code 33-23-16-23		Collected in a county which has established a problem solving court and the person meets the criteria established by the problem solving court, the judge approves the admission to problem solving court, and the offense for which the person referred is not a forcible felony as defined in Ind. Code 35-41-1-11 or an offense that the local problem solving court committee has agreed to exclude	County User Fee Fund Ind. Code 33-37-8-5	Support drug court program

Alcohol & Drug Countermeasures Fee Ind. Code 33-37-5-10	$200	Upon finding defendant committed Ind. Code 9-30-5 offense (operating while intoxicated chapter) and court suspends driving privileges as a result of the offense.	25% - State User Fee Fund. Ind. Code 33-37-7-2 75% - County Auditor for County Drug Free Community Fund. Ind. Code 33-37-7-2	Various State Funds. Ind. Code 33-37-9-4 County Drug Free Community Fund. Ind. Code 5-2-11-2
Child Abuse Prevention Fee Ind. Code 33-37-5-12	$100	Criminal actions in which defendant is found to have committed one of listed offenses and the victim is less than 18 years of age.	100% to State User Fee Fund. Ind. Code 33-37-9-2; Ind. Code 33-37-7-2	Various Funds Including Family Violence and Victim Assistance Fund. Ind. Code 33-37-9-4

Domestic Violence Prevention Treatment Fee Ind. Code 33-37-5-13	$50	Criminal actions in which defendant is found to have committed a listed offense and the victim is a spouse/former spouse, is or was living as if a spouse or has child in common.	100% to the State User Fee Fund. Ind. Code 33-37-7-2	Various State Funds including Family Violence and Victim Assistance Fund. Ind. Code 33-37-9-4
Safe Schools Fee Ind. Code 33-37-5-18	$200 to $1,000	Conviction of offense in which possession or use of firearm is an element	100% to State User Fee Fund Ind. Code 33-37-7-2	Various State Funds, balance to Safe Schools Fund Ind. Code 33-37-9-4
Highway Work Zone Fee Ind. Code 33-37-5-14	$0.50 or $25.50	Criminal traffic offenses as defined in Ind. Code 9-30-3-5. The $25.50 fee is collected where the criminal traffic offense is exceeding a work site speed limit or failure to merge and the judge orders collection of the fee for exceeding work site speed limit or failure to merge.	100% to State User Fee Fund Ind. Code 33-37-7-2	Various State Funds including DOT for highway work zone patrol. Ind. Code 8-23-2-15
Document Fees: Copy - Ind. Code 33-37-5-1 Authentication - Ind. Code 33-37-5-3 Recording Judg-ment Ind. Code 33-37-5-4	$1 per page $1 per certifi-cate $3 per recording	For preparing a transcript or copy of any record. For authenticating a copy of any record, paper or transcript. For recording judgment	County General Fund. Ind. Code 33-37-7-12)	
Document Storage Fee Ind. Code 33-37-5-20	$ 2	Imposed in every civil, criminal, infraction, and ordinance violation actions	Clerk's record perpetuation fund. Ind. Code 33-37-5-2	Keeping and preservation of records and case management system.

Automated Record Keeping Fee Ind. Code 33-37-5-21	$ 5	Imposed in every every civil, criminal, infraction, and ordinance violation actions	State User Fee Fund Ind. Code 33-37-7-2	Keeping and preservation of records?
Public Defense Administration Fee Ind. Code 33-37-5-21.2	$ 5	Imposed in every criminal ,ordinance, infraction, and small claims case	State general fund Ind. Code 33-37-7-2	
Judicial Insurance Adjustment Fee Ind. Code 33-37-5-25	$ 1	Imposed for every criminal conviction, ordinance or infraction violation or pre-trial case with fee and all proceedings filed in Circuit, Superior, City/Town, and Probate	State general fund Ind. Code 33-37-7-2	
Judicial Salaries Fee Ind. Code 33-37-5-26	$ 20	Imposed for every criminal conviction, ordinance or infraction violation or pre-trial case with fee and all proceedings filed in Circuit, Superior, City/Town, Probate and Small Claims courts	State general fund Ind. Code 33-37-7-2	Judicial compensation
DNA sample processing fee Ind. Code 33-37-5-26.2	$ 2	Imposed for every criminal conviction, ordinance or infraction violation or pre-trial case with fee	State general fund Ind. Code 33-37-7-2	DNA testing
Court adminis-tration fee Ind. Code 33-37-5-27	$ 5	Imposed for every criminal conviction, ordinance or infraction violation or pre-trial case with fee and all proceedings filed in Circuit, Superior, City/Town, Probate and Small Claims courts	State general fund Ind. Code 33-37-7-2	

Deferred Prosecution Fee Ind. Code 33-37-5-17	$120	Imposed in each action in which prosecution is deferred	70% - State General Fund Ind. Code 33-37-7-2, 27% - County General Fund Ind. Code 33-37-7-4, 3% - Qualified Municipality Share Ind. Code 33-37-7-6	
Pre-trial Diversion Program Users Fee Ind. Code 33-39-1-8	Initial Monthly Users Fee $50, Later Months' Fee $10,	Fee is in lieu of Criminal Cost Fee. Collected when prosecutor and defendant enter into a diversion agreement Ind. Code 33-39-1-8	County User Fee Fund. Ind. Code 33-37-8-5	Pre-trial Diversion Program and Prosecuting Attorney's Office. I
Probation User and Administrative Fees Misdemeanor: Initial Monthly Administrative Felony: Initial Monthly Administrative Ind. Code 35-38-2-1	$50 $10-$20 $50 $25-100 $15-30 $100	Conviction of criminal offense and placed on probation. Court has option/discretion to require payment of misdemenor probation user and administrative fees. Court must impose felony user and administrative fees.	County User Fee Fund. Ind. Code 33-37-8-5	Probation Services and to supplement probation officer salaries. Ind. Code 35-38-2-1
Emergency Medical Services Restitution Fee Ind. Code 9-30-5-17 (Fee not listed in Ind. Code 33-19.)	Not to exceed $1,000.	Felony/misdemeanor Ind. Code 9-30-5 convictions. Tied to emergency medical services as result of offense committed. Court to consider what defendant can or will be able to pay.	Emergency Medical Services Restitution Fund. Ind. Code 16-31-8	Emergency Medical Services. Ind. Code 16-31-8

Reimbursement of Jail Costs, Ind. Code 35-50-5-4, if county enacts Ind. Code 36-2-13-15 ordinance	Smaller of $30 a day or per diem figured by auditor	If county enacts Ind. Code 36-2-13-15 ordinance, this fee may be ordered for a felony or misdemeanor conviction if defendant is detained in a county jail for more than 72 hours, not a member of a family making less than 150% of federal poverty income level, and not detained as a child subject to juvenile court jurisdiction.	Nonreverting County Prisoner Reimbursement Fund, Ind. Code 36-2-13-16	Operation, construction, repair, remodeling, enlarging, equipment of county jail or juvenile detention center. . Ind. Code 36-2-13-16
Public representation – partial ability to pay. Ind. Code 35-33-7-6	$100 felony $50 misdemeanor	Imposed if court finds at initial hearing indigency determination and defendant can afford part of the cost of representation.	County Supplemental Public Defender Services Fund	Court-appointed legal services in the county
Costs of public-paid representation. Ind. Code 33-40-3-6	Not to exceed representation expense	Felony or misdemeanor, Court to consider what defendant can or will be able to pay.	County Supplemental Public Defender Services Fund	Court-appointed legal services in the county

68.16.030 Determining suspendibility of felony sentence – Crime committed before July 1, 2014

SUSPENDIBILITY OF FELONY SENTENCE

INSTRUCTIONS:

To determine eligibility for suspended sentence and probation, use the following seven step form. **Step one** simply eliminates the obvious death penalty or "life without parole" situations in which probation is absolutely foreclosed. **Step two** determines whether the juvenile record requires service of the "minimum sentence" (defined below in this box). **Step three** determines if "minimum sentence" probation is not available at all due to the kind of crime committed. **Step four** determines whether the adult criminal record makes the "minimum sentence" either nonsuspendable or suspendable only under limited conditions. A defendant free of restrictions in all four steps may have the entire sentence suspended without any limits on the types of probation conditions. **Step five** determines whether the defendant's maximum period of probation is subject to the 10 year cap for child victim sex offense cases. **Step 6** determines whether the defendant's maximum period of probation is subject to the thirty year cap for child molesting of a victim under 12 with defendant 21 or older. **Step 7** determines whether the sentence is one of the few which miscellaneous provisions make entirely nonsuspendible.

"Minimum sentence" [Ind. Code 35-50-2-1(c)] is:

murder 45 years + enhancements*
A felony 20 years + enhancements*
B felony 6 years + enhancements*
C felony 2 years + enhancements*
D felony 1/2 year + enhancements*

*Note that the habitual criminal offender and habitual controlled substance offender penalty enhancements are not suspendible when the "minimum sentence" for the underlying felony is not suspendable. See *Stanek v. State*, 603 N.E.2d 152 (Ind. 1992), adopting part 3 of Court of Appeals opinion found at 587 N.E.2d 736 (Ind. Ct. App. 1992); *Collins v. State*, 583 N.E.2d 761 (Ind. Ct. App. 1991). The enhancements for use of a firearm, Ind. Code 35-50-2-11, or for controlled substance offenses with use of a firearm or possession of a handgun, sawed-off shotgun, machine gun, or silencer, Ind. Code 35-50-2-13, are probably not suspendable under the same rationale.

STEP 1. DEATH OR LIFE WITHOUT PAROLE SENTENCES PRECLUDE ALL PROBATION

If defendant is charged with murder for which death or life imprisonment without parole penalties are sought and such penalties are imposed, obviously there is no probation. The same is true when defendant is charged with being an habitual violent offender for whom the penalty is to be life imprisonment without parole.

STEP 2. DOES JUVENILE RECORD PRECLUDE OR LIMIT PROBATION?

A defendant's sentence is subject to the "minimum sentence" limits of Ind. Code 35-50-2-2(a)(as held in *Saintignon v. State*, 749 N.E.2d 1134 (Ind. 2001), if pursuant to Ind. Code 35-50-2-2.1 factors (1) and (2) below apply and the court does not make any of the findings in the box below listed under (3):

(1) Crime committed is a felony;

(2) Defendant has a juvenile record of delinquent acts which if he/she were an adult would have been:

(a) A Class A or B felony committed less than three years before the instant felony,
(b) Two Class C or D felonies each committed less than three years before the instant felony, or
(c) One Class C and one Class D felony each committed less than three years before instant felony

(3) But court may suspend entire sentence notwithstanding (2) above if

Instant felony was result of circumstances unlikely to recur, or

Instant felony victim induced or facilitated the offense, or

Substantial grounds tend to excuse or justify the instant felony, though they are not a defense, or

The felonies in the juvenile record are Class C or D, not A or B, and home detention will be used for the "minimum sentence" for instant felony

STEP 3. DOES SPECIFIC CRIME MANDATE EXECUTED "MINIMUM" SENTENCE?

If defendant is charged with any offense on the following list, the defendant cannot have the "minimum sentence" [see INTRODUCTION box above] for the offense suspended:

murder
battery with deadly weapon or battery causing death
sexual battery with deadly weapon
kidnapping
confinement with deadly weapon
rape as Class A felony
criminal deviate conduct as Class A felony
child molesting as Class A or B felony [except B felony, victim over 12, defendant not more than 4 years older than victim (or 5 years if in dating relationship), defendant not in position of authority or influence, defendant had no prior sex offenses or sex delinquencies]
robbery with serious bodily injury or deadly weapon
arson for hire or with serious bodily injury
burglary with serious bodily injury or deadly weapon
resisting law enforcement with deadly weapon
escape with deadly weapon
rioting with deadly weapon
dealing in cocaine, narcotic drug, or methamphetamine, I, II or III Controlled Substance

if with a firearm or with intent to deliver to a minor (at least three years younger) and was on a bus or within 1000 feet of school property, public park, family housing complex, or youth program center

"an offense under Ind. Code 9-30-5 (operating a vehicle while intoxicated)" if the offender "has accumulated at least two (2) prior unrelated convictions under Ind. Code 9-30-5""an offense under IC 9-30-5-5(b) (operating a vehicle while intoxicated causing death)"

aggravated battery

disarming a law enforcement officer

STEP 4. DOES ADULT CRIMINAL RECORD REQUIRE EXECUTED "MINIMUM SENTENCE" OR "MINIMUM SENTENCE" IN COMMUNITY CORRECTIONS?

If defendant's crime is **not on list 3 above** and **any of the following categories under this number apply**, defendant either cannot have any probation for the "minimum sentence" or, unless prohibited by Ind. Code 35-38-2.6-1(b)(see list below in brackets), can have probation for the "minimum sentence" only in a "community corrections" residential/work release or electronic monitoring program [or, for D felonies only, in "home detention" probation]. [Ind. Code 35-38-2.6-1, -3; Ind. Code 35-50-2-2(b)(3)(D felony "home detention")]:

Crime committed is an A or B felony (other than an Ind. Code 35-42 sex offense or incest)* and defendant has a prior, unrelated felony conviction,

OR

Crime committed is a C felony (other than an Ind. Code 35-42 sex offense or incest)* and less than 7 years have passed since discharge from probation, parole, or prison for prior unrelated felony

OR

Crime committed is a D felony (other than an Ind. Code 35-42 sex offense or incest)* and less than 3years have passed since discharge from probation, parole, or prison for prior unrelated felony.

*[Ind. Code 35-38-2.6-1 prohibits "direct commitment to community corrections" for sex offenses under Ind. Code 35-42-4 or 35-46-1-3, for 9-30-5-4.offense (Causing serious bodily injury when operating motor vehicle while intoxicated, or for 9-30-5-5.offense (Causing death of another person when operating motor vehicle) and offenses listed under Step 3. Thus for any of these crimes, when the "minimum sentence" is nonsuspendible the Ind. Code 35-38-2.6 "direct commitment to community corrections" for the "minimum sentence" is not an option and the minimum sentence must be served.]

STEP 5. DO SEX OR VIOLENT OFFENSE LAWS LIMIT THE MAXIMUM PERIOD OF PROBATION FOR THE CRIME?

Sex and violent offenders as defined under Ind. Code 11-8-8-5 are subject to a special ten year limit on probation for their crimes. It appears that Ind. Code 35-50-2-2 as amended in 1994 limits the probation sentence to ten years for these crimes even though the defendants could be given "suspended" sentences of more than 10 years.

The offenses subject to the sex offender 10 year cap on probation are:

rape,
criminal deviate conduct,
child molesting,
child exploitation,
vicarious sexual gratification,
child solicitation,
child seduction,

sexual misconduct with a minor Class A .B, or C felony unless (A) the person is convicted of sexual misconduct with a minor as a Class C felony; (B) the person is not more than: **(i)** four (4) years older than the victim if the offense was committed after June 30, 2007; or **(ii)** five (5) years older than the victim if the offense was committed before July 1, 2007; and **(C)** the sentencing court finds that the person should not be required to register as a sex offender.
incest,
sexual battery,
kidnapping of a victim less than 18 by a non-parent/non-guardian,
criminal confinement of a person less than 18 by a non-parent/non-guardian,
possession of child pornography (IC 35-42-4-4(c)),
promoting prostitution as A Class B felony,
promotion of human trafficking if the victim is less than eighteen (18) years of age,
sexual trafficking of a minor,
human trafficking if the victim is less than eighteen (18) years of age,
murder (IC 35-42-1-1),
voluntary manslaughter,
sexual misconduct by a service provider with a detained child (IC 35-44-1-5(c)).
an attempt or conspiracy to commit a crime listed above, or
an offense in another state substantially equivalent to those above.

STEP 6. DOES CLASS A FELONY CHILD MOLESTING CAP APPLY?

A Class A felony child molester of a child under 12 when the molester was 21 or older can have only that part of the sentence in excess of 30 years suspended. Note that in *Miller v. State*, 943 N.E.2d 348, 349 (Ind. 2011) the Court held that a sentence of less than thirty years could have been imposed because section 2(i) does not set a minimum sentence.

STEP 7. DO MISCELLANEOUS CAPS PREVENT ALL SUSPENSION?

The sentences for a small number of particular offenses, or for particular enhancements, are entirely nonsuspendible:

voluntary manslaughter if committed by means of a deadly weapon
the 5 year enhancement for all IC 35-42 offenses that resulted in death or serious bodily injury
kidnapping, and criminal confinement when they are committed with a firearm
the entire sentence for provision of a firearm to a child if commission of offense was knowing or intentional
the entire sentence for dangerous control of a child if commission of offense was knowing or intentional
the entire sentence for C felony possession of a narcotic drug if defendant was in possession of a firearm
the entire sentence for C felony possession of methamphetamine if defendant was in possession of a firearm

68.16.031 Determining suspendibility of felony sentence – Crime committed on or after July 1, 2014

SUSPENDIBILITY OF FELONY SENTENCE

INSTRUCTIONS:

To determine eligibility for suspended sentence and probation, use the following three step form. **Step one** determines whether the offense is in a category for which the "minimum sentence" is nonsuspendible. **Step two** determines whether the juvenile record requires service of the "minimum sentence" (defined below in this box. **Step three** determines whether the adult criminal record makes the "minimum sentence" nonsuspendable. A defendant free of restrictions in these three steps may have the entire sentence suspended without any limits on the types of probation conditions.

"Minimum sentence" [Ind. Code 35-50-2-1(c)] is:
for murder, forty-five (45) years;
for a Level 1 felony, for a crime committed after June 30, 2014, twenty (20) years;
for a Level 2 felony, for a crime committed after June 30, 2014, ten (10) years;
for a Level 3 felony, for a crime committed after June 30, 2014, three (3) years;
for a Level 4 felony, for a crime committed after June 30, 2014, two (2) years;
for a Level 5 felony, for a crime committed after June 30, 2014, one (1) year; and
for a Level 6 felony, for a crime committed after June 30, 2014, one-half (1/2) year.
*The habitual criminal offender enhancement is not suspendible. I.C. 35-50-2-8(i). [The I.C. 9-30-15.5 habitual vehicular substance offender enhancement (effective Jan. 1. 2015) is silent on any suspendibility limit.] Enhancements for use of a firearm, Ind. Code 35-50-2-11, or for controlled substance offenses with use of a firearm or possession of a handgun, sawed-off shotgun, machine gun, or silencer, Ind. Code 35-50-2-13, are silent on any suspendibility limit.

STEP 1. IS THE FELONY EITHER MURDER OR LEVEL 1?

"Minimum sentences" for murder and Level 1 felonies cannot be suspended.

STEP 2. DOES JUVENILE RECORD PRECLUDE OR LIMIT PROBATION?

A defendant's sentence is subject to the "minimum sentence" limits of Ind. Code 35-50-2-2(a)(as held in *Saintignon v. State*, 749 N.E.2d 1134 (Ind. 2001), if pursuant to Ind. Code 35-50-2-2.1 factors (1) and (2) below apply and the court does not make any of the findings in the box below listed under (3):

(1) Crime committed is a felony;

(2) Defendant has a juvenile record of delinquent acts which if he/she were an adult would have been:

(a) A Class A or B felony committed less than three years before the instant felony, or

(b) Two Class C or D felonies each committed less than three years before the instant felony, or
(c) One Class C and one Class D felony each committed less than three years before instant felony, or
(d) A Level 1, Level 2, Level 3, or Level 4 felony committed less than three years before the instant felony, or
(e) Two Level 5 or Level 6 felonies each committed less than three years before the instant felony, or
(f) One Level 5 and one Level 6 felony each committed less than three years before the instant felony.

(3) But court may suspend entire sentence notwithstanding (2) above if

Instant felony was result of circumstances unlikely to recur, or

Instant felony victim induced or facilitated the offense, or

Substantial grounds tend to excuse or justify the instant felony, though they are not a defense, or

The felonies in the juvenile record are Class C or D or Level 5 or Level 6, not A or B or Level 1 or Level 2 or Level 3 or Level 4 felonies, and home detention will be used for the "minimum sentence" for instant felony.

STEP 3. IS THE FELONY LEVEL 2 OR LEVEL 3 AND NOT "CONCERNING" CONTROLLED SUBSTANCE, AND OFFENDER HAS ANY PRIOR UNRELATED FELONY CONVICTION?

If the instant felony is a Level 2 or Level 3 felony and the offender has any prior unrelated felony conviction, the "minimum sentence" for the instant felony is not suspendible unless the instant felony is one "concerning a controlled substance under IC 35-48-4," but effective July 1, 2016 there is an exception making methamphetamine or heroin Level 2 offense minimum sentences nonsusendible if the offender has a prior felony conviction for dealing in a controlled substance other than marijuana, hasish, hash oil, salvia divinorum, or a synthetic drug.

68.20.000 Credit restricted felon determination and dialogue

Credit Restricted Felon Determination and Dialogue

I.C. 35-38-1-7.8 requires the court[1] at the time of sentencing to determine whether the defendant is a credit restricted felon, based on evidence admitted at trial that is relevant to the credit restricted status, evidence introduced at the sentencing hearing, or a factual basis provided as part of a guilty plea.

If the court determines that the defendant is a credit restricted felon, I.C. 35-38-1-7.8 also requires that the court shall advise the defendant of the consequences of the credit restricted felon determination.

Credit Restricted Felon Criteria		
Felony	**Crime Date**	**Required Felony Circumstances**
Child molesting involving Sexual intercourse Deviate sexual conduct[2] (offense before 7-01-14) Other sexual conduct (offense after 6-30-14)	After June 30, 2008 [3]	1. Defendant at least twenty-one (21) years of age 2. Victim less than twelve (12) years of age
Child molesting	After June 30, 2008*	1. resulting in serious bodily injury, or 2. resulting in death
Murder	After June 30, 2008*	1. if committed while defendant was committing or attempting to commit child molesting, or 2. if the victim was the victim of an I.C. 35-42-4 sex crime for which defendant was convicted, or 3. the victim was listed as a witness by the state or known by the defendant to be a witness against the defendant in an I.C. 35-42-4 sex crime prosecution and the defendant killed the victim with the intent to prevent the victim from testifying

[1] Indiana has no case on the question whether credit restricted status has to be determined by a jury. The majority of decisions from other jurisdictions take the position that facts which restrict or preclude sentence credit earning capacity are not required to be tried by jury under the Sixth Amendment. *See Forster v. State*, 236 P.3d 1157 (Alaska Ct. App. 2010) (citing cases and taking minority position jury is required).

[2] "Deviate sexual conduct," repealed effective June 30, 2014, and "other sexual conduct," effective July 1, 2014, have this identical definition: an act involving: (1) a sex organ of one (1) person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object.

[3] For all the entries in this column, *ex post facto* protections do not permit earlier credit restricted application. *Upton v. State*, 904 N.E.2d 700 (Ind. Ct. App. 2009).

68.21.000 Young offender sentencing alternatives

IC 31-30-4 Sentencing Alternatives – Young Offenders

Eligible defendants:

1. "less than eighteen" [does not specify any context, so it appears at time of sentencing - ?]
2. waived for a felony from juvenile court or not subject to juvenile jurisdiction for a felony (31-30-1-4 lists the offenses[endnote here shows offenses[i]) convicted of the felony but not yet sentenced

Court, prosecutor, or defense counsel may move to impose sentence under the alternative statutes

On motion, court "may" sentence under alternative provisions

DOC must indicate there is space for the defendant in a juvenile facility of its division of youth services

Additional procedural requirements:

1. prosecutor notifies the victim of possible imposition of sentence under alternative provision
2. presentence report is prepared or a DOC diagnostic report is provided to court

Then court:

1. imposes appropriate criminal sentence
2. suspends the sentence, even if it is not suspendible under regular penal code statutes
3. orders defendant placed into DOC's juvenile facility
4. provides that successful completion of the juvenile facility placement is a condition of the sentence suspension

Court may request progress report which DOC then shall provide

Review hearing:

1. if probable cause offender violated a condition of suspension or committed a new crime
2. court finds by preponderance the condition was violated or new crime committed
3. court may
    a. continue offender in the placement
    b. order execution of all or part of suspended sentence in an adult facility recommended by DOC
    c. order any other modifications court considers appropriate

DOC may reclassify and transfer offender to an appropriate adult facility if DOC concludes juvenile facility placement no longer appropriate

1. DOC to give notice to court of reclassification
2. court to hold a review hearing and
3. court may then order execution of all or part of suspended sentence in an adult facility of DOC

not specified what occurs if court does not order execution of sentence in adult facililty
When offender becomes 18 court shall hold a review hearing 1. no later than offender's 19th birthday 2. court may a. continue juvenile facility placement until the objectives of the sentence are met b. discharge offender if objectives of the sentence have been met c. order execution of all or part of the sentence in an adult facility, or d. place offender in: i. home detention as a condition of probation (IC 35-38-2.5) ii. community corrections program specified in IC 35-38-2.6 iii. on probation under 35-50-7 iv. any other appropratae alternative sentencing program 3. if prosecutor objects in writing with reasons, court may not "modify the original sentence" if the offender was convicted of a. murder b. attempted murder c. kidnapping d. rape as Class A or Level 1 felony e. criminal deviate conduct as A felony f. robbery as Class A or Level 2 felony if i. committed while armed with deadly weapon and ii. offense resulted in bodily injury to any person other than a defendant
At any time before offender becomes 21, if DOC finds offender is a security risk to other offenders, staff, or the public the DOC may transfer the offender to an adult facility and provide notice of the transfer circumstances to the court.
If "the suspension" of a criminal sentence is revoked, all time served by the offender in the DOC juvenile facility "shall be credited toward any criminal sentence" imposed under the chapter.

68.25.000. Sentencing Dialogue

SENTENCING DIALOGUE AND SENTENCING ORDER

The Court is now in session for sentencing in State of Indiana v. _____, cause number _____.

Show the appearance of the State of Indiana by _____, [Deputy] Prosecutor, and the appearance of_____, in person, [in custody], and by_____, attorney for the defendant.

The following proceedings in the matter of the sentencing in this case are had this ____ day of _____, 20__.

(To the defendant:)

On the ____ day of _____, 20__, the court found you guilty of the offense(s) of _____.

OR

On the ____ day of _____, 20__, you entered a plea of guilty to the offense(s) of _____ pursuant to a plea agreement, which the court took under advisement until today.

You are now before this court for [a hearing to determine whether the court will accept the plea agreement and] sentencing.

Have you and your attorney received a copy of the presentence report? A._____

Have you and your attorney had an opportunity to read and examine the report and to discuss it as well as any other matters that would be relevant? A._____

Are you satisfied and feel that your attorney is properly representing you? A._____

Do you or your attorney have any statements to make concerning this report? A._____

Do you or your attorney have any evidence to present concerning the sentence the court will impose or wish to make a written submission to the court? A._____

Do you have anything to say prior to sentencing? A._____

Does defense counsel have anything to say prior to sentencing? A._____

Does the prosecuting attorney have any recommendation or any information to offer prior to sentencing? A._____

Ind. Code 35-38-1-2(b) court must inquire whether defendant desires adjournment.

If they are present, the victim[s] of the offense[s] for which the defendant is to be sentenced have a right to make a statement to the Court now. The victim[s] need not identify themselves

or make a statement now, but if they would care to would they please stand now, identify themselves, and address their remarks to the Court? [Have statements, if any, recorded.]

[If a fine is to be imposed, at this point direct the prosecutor to examine the defendant concerning his/her assets, for purposes of making the Ind. Code 35-38-1-18 indigency determination provided for below.]

[CREDIT RESTRICTED FELON, IF APPLICABLE

The Court now finds that the defendant is a credit restricted felon. (See Section 68.20.000 for credit restricted criteria.)**]**

SENTENCE PRONOUNCEMENT AND ORDER

[If the court has not already accepted the plea and found the defendant guilty:] The court accepts the defendant's plea and finds the defendant guilty of _____.]

[The Court finds that the defendant is a credit restricted felon.]

The Court finds the following aggravating factors:

(1) _____. This factor is considered as aggravating because: _____.

(2) _____. This factor is considered as aggravating because: _____.

The Court finds the following mitigating factors:

(1) _____. This factor is considered as mitigating because: _____.

(2) _____. This factor is considered as mitigating because: _____.

The Court considers the balance between aggravating and mitigating factors to be: _____.

The Court now sentences defendant, _____, as follows:

The defendant shall be imprisoned for a term of ____, with _____ suspended and to be served on probation for a period of _____, subject to conditions the Court will specify later in this hearing.

The term of imprisonment shall be served in [the Indiana Department of Corrections] [the_____County Jail] [_____].

The defendant shall receive _____ days credit for time spent incarcerated prior to sentencing.

The Court now advises the defendant that the defendant is sentenced for not less than the earliest release date and for not more than the maximum possible release date.

The term of imprisonment will run [concurrently] [consecutively (for a period of ____ years)(in its entirety)] to sentences imposed for _____ by the _____ court on _____.

The defendant shall pay a fine in the sum of _____ Dollars ($_____).

The defendant is ordered to pay restitution in the sum of _____ Dollars ($_____) to victim _____ and in the sum of _____ Dollars ($_____) to victim _____. Having considered the defendant's ability to pay, those payments shall be in the amount of _____ Dollars ($_____) per week/month.

The defendant shall pay costs in the amount of _____ Dollars ($_____).

SO ORDERED this ____ day of _____, 20__.

_____
Judge

68.27.000.

Determination Crime is "of Domestic Violence" and Advice to Defendant of Loss of Right to Possess a Firearm

As required by IC 35-38-1-7.7, the Court hereby determines [from the evidence introduced at trial] [from the factual basis provided as part of the guilty plea] whether the crime of which Defendant is convicted is one "of domestic violence" under IC 35-31.5-2-78.

The Court finds that the crime [*specify the crime if more than one in the prosecution*] was one of domestic violence because

it has as an element [the use of physical force] [the threatened use of a deadly weapon]

and

was committed against:

Defendant's current or former spouse, Defendant's parent, or Defendant's guardian,

or

a person with whom Defendant shared a child in common,

or

a person who was cohabitating with or had cohabitated with Defendant as a spouse, parent, or guardian,

or

a person who was or had been similarly situated to a spouse, parent, or guardian of the Defendant.

Consequently, the Court now advises the Defendant that, pursuant to IC 35-47-4-6 and 35-47-4-7, the Defendant no longer has any right to possess a firearm. The Court also advises the Defendant that possession of a firearm or ammunition by the Defendant may constitute a crime. The Court further advises the Defendant that parenting time with minor children may be restricted, and other legal penalties may be applicable and should be discussed with an attorney.

Not earlier than five years from [*insert date*], the date of conviction of the crime of domestic violence named above, the Defendant may petition the Court for restoration of the Defendant's right to possess a firearm.

_____ _____

Date Judge

[Note that the Court is required to complete a Domestic Violence Determination form devised by the office of State Court Administration. The form may be obtained at the following web address: http://www.in.gov/judiciary/admin/]

68.30.003 INSTRUCTIONS TO DEFENDANT FOLLOWING FELONY SENTENCING -

ADVICE OF RIGHT TO APPEAL AFTER SENTENCING

1. You have a right to appeal the [conviction and sentence (when there has been a trial)] [the sentence (when there has been a guilty plea)] imposed herein.

2. In order to do so, you much file either a Notice of Appeal or Motion to Correct Error within thirty (30) days of this date.

3. If you elect to file a Motion to Correct Error, you must file your Notice of Appeal within thirty (30) days of an adverse ruling on that Motion.

4. Failure to comply with these requirements will result in the forfeiture of your right to appeal.

5. You have a right to be represented by counsel at all stages of these proceedings, including any appeal which you may wish to pursue. If you are unable to afford an attorney, I am obligated to appoint one to represent you at no cost to you.

COMMENT

This dialogue is for use with sentences which are not completely fixed by a plea bargain.

68.40.000 Order of Commitment, transmittal of judgment of conviction and sentence to sheriff, and certification of sentence to county jail

STATE OF INDIANA) IN THE _____ COURT
)SS:
COUNTY OF _____) 20__ TERM

CAUSE NO._____

STATE OF INDIANA)
)
VS.)
)
_____)

COMMITMENT TO THE _____ COUNTY JAIL

TO: The Sheriff of _____ County

GREETINGS:

WHEREAS the defendant has this day been tried and adjudged guilty before the _____ Court upon the charge of _____ in this cause, and for the punishment it was determined that the defendant be imprisoned in the _____ County Jail for a period of _____ days allowing _____ days credit for time heretofore spent in incarceration, and allowing the defendant _____ days of good time credit.

THEREFORE, in the name of the State of Indiana, I command you to receive the Defendant into your custody and to obey this judgment.

IF A LATER REPORT DATE IS SET, THE DEFENDANT SHALL NOT CONSUME ANY ALCOHOLIC BEVERAGES AND IF THE DEFENDANT APPEARS WITH ANY ALCOHOL IN HIS OR HER SYSTEM, HE OR SHE MAY BE SUBJECTED TO FURTHER PUNISHMENT, INCLUDING BEING FOUND IN CONTEMPT OF COURT

SO ORDERED this ____ day of _____, 20__.

_____
JUDGE
_____ Court

STATE OF INDIANA

COUNTY OF _____

ATTACH JUDGMENT OF CONVICTION AND SENTENCE.

CERTIFICATION OF JUDGMENT OF CONVICTION AND SENTENCE:

I, _____, certify that the foregoing is a true and complete copy of the judgement of conviction and sentence of said Court in the above, entitled cause as appears on record in my office.

Witness my hand and seal of the Court this ____ day of _____, 20__.

_____
Clerk of _____ Court

(SEAL)

By_____
Deputy

NOTE: The court shall, without delay, certify, under seal of the court, copies of the judgment of conviction and sentence to the receiving authority. Ind. Code 35-38-3-2.
The court shall send a copy of the presentence report, any presentence memorandum filed by the convicted person, the report of any physical or mental examination made incident to the question of sentence, and any record made under Ind. Code 35-35-2 (pleadings). Ind. Code 35-38-1-14.

71.00.000 Appeals Of Conviction Contents

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71.02.015	Interlocutory Appeal
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71.02.025	Bail Order Is Appealable
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71.06.020	Electronic Or Stenographic Record Required
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71.06.150	Authority Of Trial Court Once Appellate Court Has Jurisdiction
71.06.300	Bail Pending Appeal
71.06.325	No Constitutional Right To Bail Pending Appeal
71.08.000	Appeals By State
71.08.100	States Right To Appeal Is Solely Statutory
71.08.200	State May Seek Interlocutory Appeal

71.00.000 Appeals Of Conviction

71.01.000 **Jurisdiction of Appeals** - Appeals of judgments imposing a sentence of death must be taken to the Indiana Supreme Court under the state constitution. Ind. Constitution Art. 7, Sec. 4. By court rule not just death sentence case direct appeals but also life without parole case direct appeals must be taken to the Indiana Supreme Court. Appellate Rule 4(A). Post-conviction relief cases in which the sentence was death must be appealed to the Supreme Court. Appellate Rule 4(A). Judgements declaring a state or federal statute unconstitutional must be appealed to the Supreme Court. *Id.* All other criminal cases are appealed to the Court of Appeals, with any subsequent appeal from or review of the Court of Appeals pursuant to court rules. Ind. Constitution Art. 7, Sec. 4 [Supreme Court jurisdiction]; Ind. Constitution Art. 7, Sec. 6 [Court of Appeals jurisdiction].

71.01.010 **Defendants Right To Direct Appeal** - A defendant may take a direct appeal of his conviction after a trial as a matter of right. Ind. Code 35-38-4-1.

71.02.015 **Interlocutory Appeal -** An interlocutory order that is certified by the trial court may be appealed. Indiana Appellate Rule 14. *See also Dingman v. State*, 602 N.E.2d 184 (Ind.App. 1992).

71.02.020 **Rulings On Pre-Trial Motions Not Final Appealable Judgments -** Rulings on motions in limine and motions to suppress are not final, appealable judgments. *Green v. State*, 469 N.E.2d 1169 (Ind. 1984); *Watson v. State*, 261 Ind. 354, 300 N.E.2d 354 (1973).

71.02.025 **Bail Order Is Appealable -** A ruling regarding bail is a final, appealable order even in the absence of a statute authorizing such an appeal. *Certain v. State*, 261 Ind. 101, 300 N.E.2d 345 (1973).

71.02.030 **Appeal Not A Remedy To Challenge Guilty Plea -**The defendant is not permitted to appeal a conviction arising out of a guilty plea, but must pursue post-conviction relief. *Tumulty v. State*, 666 N.E.2d 394 (Ind. 1996). A defendant may, however, take a direct appeal of the sentence imposed following a guilty plea when the trial court was not constrained by a plea agreement to impose a particular sentence. *Collins v. State*, 817 N.E.2d 230 (Ind. 2004).

71.02.100 **Right To Appeal Lost Or Suspended When Defendant Evades Custody** - The defendant's act of escape was not itself a knowing relinquishment of the right to appeal, but his absence during which the time to appeal expired prevented an appeal. *Evolga v. State*, 519 N.E.2d 532 (Ind. 1988).

71.02.105 **Cannot Appeal While A Fugitive -** A defendant, who absented himself from the state, could not prosecute an appeal while a fugitive. *Mason v. State*, 440 N.E.2d 457 (Ind. 1982).

71.02.030 **Death Moots Appeal -** Absent a question of public interest, issues involved in an appeal are rendered moot by the death of the defendant. *Whitehouse v. State*,

266 Ind. 1015, 364 N.E.2d 1015 (1977); *Kenner v. State*, 470 N.E.2d 1361 (Ind. Ct. App.1984).

71.03.010 **Right To Appellate Counsel -** The indigent defendant's right to counsel at public expense extends to the right to be represented by counsel at public expense to prosecute an appeal. *Blinn v. State*, 441 N.E.2d 49 (Ind. 1982).

71.03.105 **Court May Request Appellate Counsel From State Public Defender** - If the court determines that it is unable, within a reasonable time, to appoint a competent attorney, the judge may make a written request for the public defender of Indiana to provide a qualified attorney. Ind. Code 33-9-11-1.

71.03.125 **Indigent Defendant Entitled To Transcript -** As a matter of equal protection an indigent defendant is entitled to a transcript at public expense to directly appeal a conviction. *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L.Ed. 891 (1955).

71.04.000 **Time For Notice Of Appeal Or Motion To Correct Error** - A notice of appeal or motion to correct error must be filed within thirty (30) days after sentencing or within thirty (30) days after the ruling on the motion to correct error. Ind. Crim. Rule 19. The right to appeal is forfeited if the notice of appeal is not timely filed. Ind. Rule of Criminal Procedure 19.

71.05.000 **Belated Notice Of Appeal -** After a conviction by trial or plea, the defendant may file a petition for permission to file a belated notice of appeal if failure to timely file was not due to the fault of the defendant and the defendant has been diligent in requesting permission to belatedly file a notice of appeal. The hearing on the petition is to be conducted pursuant to Post-Conviction Rule 1, Section 5. If the court finds no grounds for the petition, the defendant may appeal the denial by filing a notice of appeal within thirty (30) days. Post-Conviction Rule 2.

71.05.005 **Belated Motion To Correct Error -** After a conviction by trial or plea, the defendant may file a petition for permission to file a belated motion to correct error if no timely or adequate motion to correct error was filed, failure to timely file was not due to the fault of the defendant, and the defendant has been diligent in requesting permission to belatedly file a motion. The hearing on the petition is to be conducted pursuant to Post-Conviction Rule 1, Section 5. If the court finds grounds to permit the filing of a belated motion to correct error, the motion shall then be treated as though it had been timely filed. If the court finds no grounds for the petition, the defendant may appeal the denial by filing a notice of appeal within thirty (30) days. Post-Conviction Rule 2.

71.05.010 **Permission To File Belated Appeal - Post-Conviction Rule 2** - The defendant may petition the appellate tribunal that would have jurisdiction for permission to file a belated appeal where the notice of appeal was timely filed but the appeal was not perfected. Post-Conviction Rule. 2.

71.05.020 **Belated Notice Of Appeal Permitted After Resentencing -** Notice of appeal for appeal of resentencing on remand followed a “trial for purposes of P.C. Rule 2 so that trial court had authority to allow defendant file a belated appeal. *Becker v. State*, 719 N.E.2d 858 (Ind. Ct. App. 1999).

71.05.040 **Post-Conviction Rule 2 Only For Direct Appeal Of Conviction -** The version of P.C. Rule 2 in effect since 1994 only permits a belated notice of appeal for the direct appeal of a conviction. *Greer v. State*, 685 N.E.2d 700 (Ind. 1997).

71.06.005 **Time For Preparation Of Record** - Unless the time is extended, the Clerks Record must be completed and the clerks Notice of Completion must be filed with the Clerk of the Supreme Court and Court of Appeals within thirty (30) days from the date the notice of appeal is filed. Appellate Rule 10.

71.06.020 **Electronic Or Stenographic Record Required** - Criminal Rule 5 requires the electronic recording or stenographic reporting with computer-aided transcription capability of all oral evidence and testimony.

71.06.050 **Transcription By One Appointed By Trial Court -** Criminal Rule 5 provides that the court may "direct the court reporter or any other responsible, competent person" to make a transcription from courts recording.

71.06.075 **Court Reporter Certifies Transcript -** Appellate Rule 11(A).

71.06.100 **When Jurisdiction Attaches In Appellate Court** -The appellate court acquires jurisdiction when the trial court clerk issues its Notice of Completion of Clerk's Record. Appellate Rule 8.

71.06.150 **Authority Of Trial Court Once Appellate Court Has Jurisdiction** - The trial court loses authority over the case once jurisdiction attaches with the appellate court. See, e.g., *Nehring v. Raikos*, 181 Ind. App. 125, 390 N.E.2d 1092 (1979).

71.06.300 **Bail Pending Appeal** - The trial court has discretion to admit a convicted defendant to bail pending direct appeal provided the conviction was not for a Class A felony or a felony which is nonsuspendable under Ind. Code 35-50-2-2. Ind. Code 35-33-9-1 [court may permit bail pending appeal]. See also Ind. Code 35-33-9-2 [petition for bail], Ind. Code 35-33-9-3 [conditions], Ind. Code 35-33-9-4 [amount of bond, failure to comply with terms], Ind. Code 35-33-9-5 [stay of sentence], Ind. Code 35-38-4-6(a)(2) and (b) [stay of judgment of fines and costs only].

71.06.325 **No Constitutional Right To Bail Pending Appeal -** There is no constitutional right to bail pending appeal. Any such opportunity is controlled by statute. *State ex rel. Scott v. St. Joseph Superior Court*, 413 N.E.2d 565 (Ind. 1980).

71.08.000 **Appeals By State** - Appeals by the state are limited to the following situations listed in Ind. Code 35-38-4-2:

Appeals to the Supreme Court or to the court of appeals, if the court rules so provide, may be taken by the state in the following cases:
(1) From an order granting a motion to dismiss an indictment or information.
(2) From an order or judgment for the defendant, upon his motion for discharge because of delay of his trial not caused by his act, or upon his plea of former jeopardy, presented and ruled upon prior to trial.
(3) From an order granting a motion to correct errors.
(4) Upon a question reserved by the state, if the defendant is acquitted.

(5) From an order granting a motion to suppress evidence, if the ultimate effect of the order is to preclude further prosecution.
(6) From any interlocutory order if the trial court certifies and the court on appeal or a judge thereof finds on petition that:

(A) The appellant will suffer substantial expense, damage, or injury if the order is erroneous and the determination thereof is withheld until after judgment;
(B) The order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case; or
(C) The remedy by appeal after judgment is otherwise inadequate.

Ind. Code 35-38-4-2.

71.08.100 **States Right To Appeal Is Solely Statutory -** The state may only appeal when permitted by statute. *State v. Peters*, 637 N.E.2d 145 (Ind. 1994).

71.08.200 **State May Seek Interlocutory Appeal** - The state is entitled to interlocutory appeals as permitted by appellate rule in areas permitted by statute. *State v. Peters*, 637 N.E.2d 145 (Ind. 1994).

74.00.000 Probation Contents

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74.02.055 Longer misdemeanor probation for substance contribution
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74.03.000 Procedures for ordering probation
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74.04.030 Proof defendant received terms at sentencing
74.04.035 Failure to provide terms harmless if revoked for committing new crime
74.04.040 Administrative details not required on court's statement
74.04.045 Not required to specify specific counselor
74.04.050 Not required to state successful completion of counseling required
74.04.055 Probation officer may direct defendant to type of counseling
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74.04.070 Probation officer may supply administrative terms
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74.08.000 Probation conditions

74.08.005 Broad discretion to impose conditions
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74.08.015 Payment of child support
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74,08.035 No contact with minors
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74.10.000 Payment of fines and costs
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74.12.010 Counseling to address criminal conduct implied
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74.00.000 Probation

74.01.000 Probation exclusively statutory - The suspension of a sentence and revocation of a suspended sentence is an exclusively statutory procedure. *State ex rel. Gash v. Morgan County Superior Court*, 258 Ind. 485, 283 N.E.2d 349 (1972).

74.02.000 Probation distinguished from suspension - The imposition of additional conditions distinguishes probation from a mere suspended sentence. *Ewing v. State*, 160 Ind.App. 571, 310 N.E.2d 571 (1974).

74.02.005 Crimes committed prior to July 1, 2014 - felony period of probation - Whenever the

court suspends a sentence for a felony, it shall place the person on probation under IC 35-38-2 for a fixed period to end not later than the date that the maximum sentence that may be imposed for the felony will expire." Ind. Code 35-50-2-2 (c). This statute allows the period of suspension to exceed the period of probation: "Because five years of his twenty-year sentence were suspended, the trial court could have required Sheets to serve five years on probation. It elected for him to serve only three. In sum, the only limitation in the felony statute is that the term of probation may not extend beyond the maximum sentence for the crime. Here, Sheets's term of probation is two years short of the maximum. [Footnote omitted.] Accordingly, the trial court did not abuse its discretion in sentencing Sheets on his B felony conviction, as the sentence complies with relevant statutory provisions." *Sheets v. State*, 972 N.E.d 420 (Ind.Ct. App. 2012)(UNPUBLISHED MEMORANDUM DECISION).

74.02.010 Crimes committed on or after July 1, 2014 – felony period of probation – The court may suspend any part of the sentence for a felony, except for:

- murder or Level 1 felonies, for which the minimum sentence cannot be suspended
- Level 2 or 3 felonies when the defendant has any prior unrelated felony conviction, for which the court may suspend only that part of the sentence which is in excess of the minimum sentence
    - but Level 2 or 3 felonies concerning a controlled substance under IC 35-48-4 may be suspended entirely or in part, regardless of any prior convictions
    - except that a person convicted of Level 2 dealing in a controlled or narcotic substance involving manufacture, delivery, or financing of manufacture or delivery and the person has a prior unrelated felony conviction, including an attempt or conspiracy, for dealing in a controlled substance other than marijuana, hashish, hash oil, salvia divonorum, or synthetic drug, the court may suspend only that part of the sentence which is in excess of the minimum sentence.

I.C. 35-50-2-2.2.

The court may not suspend a sentence for a felony for a person with a juvenile record when:
(1) The juvenile record includes findings that the juvenile acts, if committed by an adult, would constitute:

(A) one (1) Class A or Class B felony;
(B) two (2) Class C or Class D felonies;
(C) one (1) Class C and one (1) Class D felony;
(D) one (1) Level 1, Level 2, Level 3, or Level 4 felony;
(E) two (2) Level 5 or Level 6 felonies; or
(F) one (1) Level 5 and one (1) Level 6 felony; and

(2) Less than three (3) years have elapsed between commission of the juvenile acts that would be felonies if committed by an adult and the commission of the felony for which the person is being sentenced.

But notwithstanding the circumstances in (1) and (2) above, the court may suspend any part of the sentence for a felony if it finds that:

(1) the crime was the result of circumstances unlikely to recur;
(2) the victim of the crime induced or facilitated the offense;
(3) there are substantial grounds tending to excuse or justify the crime, although failing to establish a defense; or
(4) the acts in the juvenile record would not be Class A, Class B, Level 1, Level 2, Level 3, or Level 4 felonies if committed by an adult, and the convicted person is to undergo home detention under IC 35-38-1-21 instead of the minimum sentence specified for the crime under this chapter.

74.02.050 **Misdemeanor period of probation** - IC 35-50-3-1 provides that the court may impose a period of probation of up to one year for all misdemeanors "notwithstanding the maximum term of imprisonment for the misdemeanor." "For the purpose of Indiana Code § 35-50-3-1, 'term of imprisonment' means the total amount of time a misdemeanant is incarcerated. Further, regardless of the maximum sentence available under Indiana Code §§ 35-50-3-2, 35-50-3-3, and 35-50-3-4, the combined term of imprisonment and probation for a misdemeanor may not exceed one year." *Jennings v. State*, 982 N.E.2d 1003 (Ind. 2013).

74.02.055 **Longer misdemeanor probation for alcohol or drug offense factor** - Ind. Code 35-50-2-2(e) provides for up to a two (2) year period of probation for misdemeanors if the court finds that "the use or abuse of alcohol, drugs, or harmful substances is a contributing factor or a material element of the offense". If probation is longer than one (1) year, there must be a report that substantiates the need for probation that is longer than one year in order to complete substance abuse treatment, and the probation may not be longer than needed for that purpose.

74.02.075 **Must suspend portion of sentence -** Probation was improper when the court did not suspend any portion of the sentence. *Willis v. State*, 498 N.E.2d 1029 (Ind. Ct. App. 1986).

74.02.080 **May not exceed suspended sentence -** The period of felony probation may not exceed the period of the suspended sentence. *Day v. State*, 669 N.E.2d 1072 (Ind. Ct. App. 1996).

74.03.000 **Procedures for ordering probation -** The court must specify the conditions of probation in the record and advise the defendant that if the conditions are violated a petition to revoke probation may be filed the earlier of one (1) year after the termination of probation or forty-five (45) days after the state receives

notice of the violation. The conditions may be specified either orally or in writing. Ind. Code 35-38-2-1(a).

74.03.005 **Must specify terms except for no additional crimes -** Except for not committing additional crimes, the conditions of probation must be specified at the time of sentencing. *Harder v. State*, 501 N.E.2d 1117 (Ind. Ct. App. 1986).

74.03.010 **Must orally state terms or provide written order -** The court must either orally state the conditions of probation on the record or enter a written order that states the conditions and becomes part of the record. *Ratliff v. State*, 546 N.E.2d 309 (Ind. Ct. App. 1989).

74.03.015 **Harmless error for failure to provide written terms -** The failure to provide the written terms of probation to the probationer was harmless error and oral condition that he was to report to the probation officer "as directed" was not so vague or ambiguous so as to excuse the failure to contact the probation officer. *Seals v. State*, 700 N.E.2d 1189 (Ind. Ct. App. 1998).

74.03.020 **Community corrections placement can be revoked for a violation of the law without an advisement -** The defendant's placement in community corrections program could be revoked when he admitted that he smoked marijuana even though no conditions of placement were in the record. The condition that the defendant not violate the law does not have to be stated. *Decker v. State*, 704 N.E.2d 1101 (Ind. Ct. App. 1999).

74.03.023 **Advice revocation may be filed if condition violated** - The failure to advise the defendant of the statutory time limits for the filing of a petition to revoke probation deprives the court of jurisdiction to revoke probation if the petition is filed after the period of probation ended. The failure is harmless if the petition to revoke is filed within the period of probation. Ind. Code 35-38-2-1(a) [statutory time limits]; Ind. Code 35-38-2-2.3(b) [written advisement required].

74.03.025 **Terms must apprise defendant of behavior required -** An oral advisement of probation terms must adequately apprise the defendant of the definite terms of behavior required, must be addressed to the defendant, and must be identified as requirements to remain on probation. *Menifee v. State*, 600 N.E.2d 967 (Ind. Ct. App. 1992).

74.03.027 **May not revoke after period without advisement -** Probation may not be revoked after the initial probationary period has ended if the defendant is not advised of that possibility when he or she is placed on probation. *Taylor v. State*, 675 N.E.2d 1128 (Ind. Ct. App. 1997).

74.03.030 **Lack of advice harmless if petition filed within period of probation -** The defendant must have been informed of the statutory time limits for the court to have jurisdiction to revoke probation. The failure is harmless and the court has jurisdiction to revoke if the petition to revoke probation is filed within the period of time that probation was imposed. *Layne v. State*, 691 N.E.2d 1305 (Ind. Ct. App. 1998).

74.04.000 **Written statement of conditions** - The court is required to give the defendant written terms of probation. *Atkins v. State*, 546 N.E.2d 863 (Ind. Ct. App. 1989) [in a case involving shock probation]; *Kerrigan v. State*, 540 N.E.2d 1251 (Ind. Ct. App. 1989).

74.04.005 **Oral advisement may cure failure to give written list -** The failure to provide written terms of probation was harmless error and oral condition that the defendant was to report to the probation officer "as directed" was not so vague or ambiguous so as to excuse the failure to contact the probation officer. *Seals v. State*, 700 N.E.2d 1189 (Ind. Ct. App. 1998).

74.04.010 **Substantial compliance sufficient -** Court substantially complied with the intent of the requirement of giving the defendant written notice of the terms of probation when they had been specified in the record as given in open court in the defendant's presence and a delay in providing the defendant with written conditions was not error. *White v. State*, 560 N.E.2d 45 (Ind. 1990).

74.04.015 **Must provide at sentencing -** Defendant's receipt and signing of written terms of probation about three weeks after sentencing did not satisfy the requirement that the defendant be advised of the terms of probation and to give a written statement of those terms. *Disney v. State*, 441 N.E.2d 489 (Ind. Ct. App. 1982).

74.04.020 **May provide in writing or orally -** Court may fulfill its duty to specify conditions by orally stating the conditions on the record or by entering a written order that states the conditions and becomes part of the record. An oral advisement must be addressed to the defendant, must be identified as terms of probation, and must apprise the defendant in definite terms of the behavior required. *Ratliff v. State*, 546 N.E.2d 309 (Ind. Ct. App. 1989).

74.04.025 **Harmless when court complied with intent of statute -** Failure to give the defendant a written statement of home detention conditions was harmless when the court otherwise substantially complied with the intent of the statute. *Menifee v. State*, 600 N.E.2d 967 (Ind. Ct. App. 1992).

74.04.030 **Proof defendant received terms at sentencing -** The date by the judge's signature stamp which was the same day as the guilty plea and sentencing was sufficient to show that the defendant, who signed the sheet but did not date his signature, received the written terms on that date. *Bryce v. State*, 545 N.E.2d 1094 (Ind. Ct. App. 1989).

74.04.035 **Failure to provide terms harmless if revoked for committing new crime -** Any error in the court's failure to provide a statement of the terms of probation is harmless where the court revokes probation for the commission of an additional crime. *Wilburn v. State*, 671 N.E.2d 143 (Ind. Ct. App. 1996).

74.04.040 **Administrative details not required on court's statement** - The court need not specify specific administrative details in its order of probation. It is sufficient that the defendant is adequately apprised of the conduct expected and of the steps that must be taken to successfully complete probation. There is a division in authority as to whether the court must specify a date by which community service

must be completed. *Disney v. State*, 441 N.E.2d 489 (Ind. Ct. App. 1982), *followed in Buck v. State*, 580 N.E.2d 730 (Ind. Ct. App. 1992).

74.04.045 **Not required to specify particular counselor -** Order for counseling and therapy did not have to specify source of counseling service or that sessions be attended regularly. *Lind v. State*, 550 N.E.2d 823 (Ind. Ct. App. 1990) .

74.04.050 **Not required to state successful completion of counseling required -** Order for drug and alcohol treatment did not have to specify successful completion of the treatment or submission to urine testing. *Bryce v. State*, 545 N.E.2d 1094 (Ind. Ct. App. 1989).

74.04.055 **Probation officer may direct defendant to type of counseling -** The probation department could properly require sexual abuse therapy for a defendant convicted of child molesting even though the court had only ordered "counseling" as a condition of probation. *Gilfillen v. State*, 582 N.E.2d 821 (Ind. Ct. App. 1991).

74.04.060 **Date for completion of task can be set by probation officer -** Date by which order of alternative service was to be completed properly left to probation officer to determine. *White v. State*, 560 N.E.2d 45 (Ind. 1990).

74.04.065 **Court erred in not setting completion date for community service -** The court's failure to inform the defendant in writing of the time within which community service was to be performed was error. *Kerrigan v. State*, 540 N.E.2d 1251 (Ind. Ct. App. 1989).

74.04.070 **Probation officer may supply administrative terms -** "Supervised probation" sufficed as a condition and included the probation officer's list of administrative conditions furnished to probationer. *Buck v. State*, 580 N.E.2d 730 (Ind. Ct. App. 1991).

74.05.000 **Sex offender registration** - As a condition of probation the court shall require a person convicted of any of the offense listed in Ind. Code 5-2-12-4 to register with a local law enforcement authority under Ind. Code 5-2-12. Ind. Code 35-38-2-2.2.

74.06.000 **Impermissible conditions -** To determine whether a term of probation is permissible, the appellate courts use a balancing test. The court balances the purpose to be served by probation, the extent that constitutional rights enjoyed by law-abiding citizens should be afforded to probationers, and the legitimate needs of law enforcement.

74.06.005 **May not be too vague -** Term that defendant could not reside in an "area where children congregate" was too vague and was subject to the whim of where children decided to congregate. The court could be more precise and cover specific places such as schools and playgrounds where children can be expected to congregate. *Carswell v. State*, 721 N.E.2d 1255 (Ind. Ct. App. 1999). *See also Smith v. State*, 727 N.E.2d 763 (Ind. Ct. App. 2000)(dictum that condition based on Ind. Code 35-38-2-2.4 to avoid all contact with children would be overbroad if interpreted to apply to any incidental or inadvertent contact); *McVey v. State*, 863

N.E.2d 434 (Ind. Ct. App. 2007), *transfer denied* (conditions not to possess "pornographic and sexually explicit material," to notify probation officer of any "dating" or "intimate" relationships, not to have "incidental contact" with persons under eighteen, or to be in parks "where children congregate" all insufficiently specific and consequently unenforceable conditions). [Note: The Indiana Judicial Center's standard adult sex offender probation conditions have been amended to reflect the *McVey* holding; the conditions may be accessed at: http://www.in.gov/judiciary/probation/docs/sex-offender-conditions-adult.pdf]

74.06.010 **Balancing test to determine validity of probation term -** In determining whether a probation condition impermissibly impinges a constitutional right, the court balances the purpose to be served by probation, the extent that constitutional rights enjoyed by law-abiding citizens should be afforded to probationers, and the legitimate needs of law enforcement. *Gordy v. State,* 674 N.E.2d 190 (Ind. Ct. App. 1996); *Johnson v. State,* 659 N.E.2d 194 (Ind. Ct. App. 1995).

74.06.015 **No indeterminate conditions -** Enforcement was refused for condition "defendant is to conduct himself in such a manner that no one has any occasion to question whether or not he has violated the law". *Dulin v. State*, 346 N.E.2d 1094 (Ind. Ct. App. 1976).

74.06.020 **May not require admission of guilt when convicted at trial -** When the defendant did not plead guilty or admit guilt, the court may not require an admission of guilt as a condition of probation. The refusal to admit guilt should properly be considered as a factor in determining whether the defendant is an appropriate candidate for probation. *Gilfillen v. State*, 582 N.E.2d 821 (Ind. 1991).

74.06.025 **May not require unlimited admissibility of polygraph -** A probation condition that required unlimited admissibility into evidence of defendant's subsequent polygraph examination results in any subsequent proceeding was improper. *Patton v. State*, 580 N.E.2d 693 (Ind. Ct. App. 1991). But a probationer may be required to submit to polygraph exams. *Johnson v. State*, 716 N.E.2d 983 (Ind. Ct. App. 1999) .

74.07.000 **Limitations imposed by accepted plea bargain** - The court is bound by the terms of a plea agreement that has been accepted (**SEE** section 68.04.000, et. seq., above). That limitation extends to terms of probation. The courts have permitted the trial court to impose administrative terms and terms that are implied by the agreement.

74.07.010 **May add conditions which are not punitive** - When the court is bound to sentence in accordance with the terms of a plea bargain, the court may not add conditions that are punitive or penal, but may impose terms outside the agreement that are reasonably related to rehabilitation. *Malone v. State*, 571 N.E.2d 329 (Ind. Ct. App. 1991). Conditions which have been held to be punitive: community service, *Johnson v. State*,968 N.E.2d 328 (Ind. Ct. App. 2012); restitution, *Sinn v. State*, 693 N.E.2d 78 (Ind. Ct. App. 1998). See also *Freije v. State*, 709 N.E.2d 323 (Ind. 1999) (restitution and community service both punitive).

74.07.015 **May add condition of abstinence from alcohol -** Court could impose abstinence from alcohol as a condition of probation even though that condition was not included in the plea agreement. *Malone v. State*, 571 N.E.2d 329 (Ind. Ct. App. 1991).

74.07.020 **May add obligation to inform of address -** Court could require defendant to inform the court of his current address as an administrative or ministerial term of probation even though that term was not included in the plea agreement accepted by the court. *Buck v. State*, 580 N.E.2d 730 (Ind. Ct. App. 1991).

74.07.025 **May not require restitution if bargain does not allow -** Court could not require restitution as a condition of probation when that condition was not included in the plea recommendation accepted by the court. *Disney v. State*, 441 N.E.2d 862 (Ind. Ct. App. 1982).

74.07.030 **Requiring submission to polygraph permissible -** The court could require the defendant to submit to polygraph examinations as a condition of probation even though such a condition was not included in the plea agreement. *Johnson v. State*, 716 N.E.2d 983 (Ind. Ct. App. 1999).

74.08.000 **Probation conditions** - Ind. Code 35-38-2-2.3(a) lists many terms of probation that may be imposed. Beyond those listed, trial courts are given broad discretion in setting terms of probation..

74.08.005 **Broad discretion to impose conditions -** The trial court has broad discretion to impose probation terms to produce a law-abiding citizen and to protect the public and within certain limitations may impinge upon otherwise constitutionally protected rights. *Garrett v. State*, 680 N.E.2d 1 (Ind. Ct. App. 1997); *Gordy v. State*, 674 N.E.2d 190 (Ind. Ct. App. 1996) .

74.08.010 **Balancing test to determine validity of probation term -** When determining whether a probation term impermissibly impinges a constitutional right, the court must balance the purpose sought to be served by probation, the extent to which constitutional rights enjoyed by law abiding citizens should be afforded to probationers, and the legitimate needs of law enforcement. *Gordy v. State*, 674 N.E.2d 190 (Ind. Ct. App.. 1996); *Johnson v. State*, 659 N.E.2d 194 (Ind. Ct. App. 1995).

74.08.015 **Payment of child support -** Payment of child support as a term of probation for a conviction of criminal non-support was proper despite the defendant's indigence. *Gustman v. State*, 660 N.E.2d 353 (Ind. Ct. App. 1996).

74.08.020 **May condition suspension of fine -** Court could suspend a fine on the condition that the defendant not take a charitable income tax deduction for alternative contribution made to a university when the defendant was convicted of theft of university funds. *Campbell v. State*, 551 N.E.2d 1164 (Ind. Ct. App. 1990).

74.08.025 **Court may modify -** The court may modify the terms of probation. *Clark v. State*, 580 N.E.2d 708 (Ind. Ct. App. 1991).

74.08.030 **Abstinence from alcohol permitted -** Although there was no evidence of past alcohol or drug use, it was not an abuse of discretion to require abstinence from alcohol and testing for the use of alcohol and drugs as a condition of probation for child molesting. *Carswell v. State*, 721 N.E.2d 1255 (Ind. Ct. App. 1999).

74.08.035 **No contact with minors -** A condition that probationer have no intentional contact with persons less than sixteen years of age is constitutional, but it is inherent in I.C. 35-38-2-2.4 that a probationer is not required to avoid inadvertent or unintentional contact with such persons. *Rexroat v. State*, 966 N.E.2d 165 (Ind. Ct. App. 2012).

74.08.100 **Specific and understandable conditions required** - Conditions of probation should be specific and understandable. Conditions that are unreasonably vague are not authorized by statute and will not be enforced on appeal, but details of conditions fairly implied will be enforced. The court may permissibly leave details of administration of conditions to be established by the probation officer.

74.08.105 **Successful completion of drug treatment program implied -** Condition of probation that the defendant receive drug and alcohol treatment implied successful participation in the program and mere participation did not suffice. *Bryce v. State*, 545 N.E.2d 1094 (Ind. Ct. App. 1989).

74.08.110 **Probation officer may supply administrative terms -** "Supervised probation" sufficed as a condition and included the probation officer's list of administrative conditions furnished to probationer. *Buck v. State*, 580 N.E.2d 730 (Ind. Ct. App. 1991).

74.08.115 **"Good behavior" not too vague -** Condition that defendant remain on "good behavior" is not invalid for vagueness. *Shumaker v. State*, 431 N.E.2d 862 (Ind. Ct. App. 1982).

74.08.120 **Lawful behavior** - Lawful behavior is a condition of probation imposed as a matter of law and need not be specified in the court's probation order. The better practice is to specify it in the probation conditions. *Hoffa v. State*, 267 Ind. 133, 368 N.E.2d 250 (1977).

74.08.125 **Lawful behavior is a term of any suspended sentence -** Refraining from the commission of crime is the term of any suspended sentence regardless of whether it is specified by the court. *Braxton v. State*, 651 N.E.2d 261 (Ind. 1995).

74.08.130 **"Good behavior" means lawful conduct -** The term "good behavior" means refraining from the commission of a crime. *State ex rel. Gash v. Morgan County Superior Court*, 258 Ind. 485, 283 N.E.2d 349 (1972).

74.09.000 **Probation user's fee** - The court shall order each defendant placed on probation to pay a probation user's fee. The fee consists of an initial fee and a monthly fee. For felony convictions the initial fee may be not lees than twenty-five dollars ($25.00) or more than one hundred dollars ($100.00), and the monthly fee may be not less than five dollars ($5.00) or more than fifteen dollars ($15.00) per month.. For misdemeanor convictions the initial fee may be no more than fifty

dollars ($50.00), and the monthly fee may be not more than ten dollars ($10.00) per month. If a person is placed on probation for more than one (1) crime, no more than one (1) initial probation user's fee or one (1) monthly probation user's fee may be imposed. If a misdemeanant is on probation for more than one (1) year to complete substance abuse treatment pursuant to Ind. Code 35-50-3-1(c), the monthly probation user's fee after the first 12 months may not exceed five dollars ($5.00), which is fifty percent (50%) of the maximum user's fee otherwise permitted. Ind. Code 35-38-2-1; Ind. Code 35-50-3-1(c) [limit on fee for second year of misdemeanor probation].

74.10.000 **Payment of fines and costs** may be made a condition of probation.. A portion of the fine may be suspended on the condition that restitution is paid. *Rife v. State*, 424 N.E.2d 188 (Ind. Ct. App. 1981).

74.11.000 **Payment for law-mandated HIV tests** - In addition to probation user's fees, the defendant must be ordered to pay the costs of the laboratory test or series of tests to detect or confirm the presence of the human immunodeficiency virus (HIV) antigen or antibodies to the human immunodeficiency virus (HIV) that are required. Ind. Code 35-38-2-1(c)(3) and (d)(3).

74.12.000 **Substance abuse or psychological treatment**

74.12.005 **Probation officer may direct to appropriate type of counseling -** The probation department was authorized to require a probationer to undergo sexual abuse therapy when the court ordered probation term required the probationer to undergo "counseling". *Gilfillon v. State*, 582 N.E.2d 821 (Ind. 1991).

74.12.010 **Counseling to address criminal conduct implied -** Order for defendant who pled guilty to child molesting to undergo counseling inherently required counseling necessary to overcome his problems relating to his criminal conviction. *Lind v. State*, 550 N.E.2d 823 (Ind. Ct. App. 1990).

74.12.015 **May not require admission of guilt after a trial -** Defendant, convicted of child molesting while continuing to protest his innocence, could not be required to admit that he had a probation with child molesting or face revocation of probation which included counseling, a part of which required an admission of guilt. Such facts, however can be used to determine whether the defendant is an appropriate candidate for probation. *Gilfillen v. State*, 582 N.E.2d 821 (Ind. 1991).

74.13.000 **Alcohol and drug countermeasure fee** - For criminal offenses and infractions under Ind. Code 9-30-5 or juveniles that have been adjudicated delinquent for an act that would be an offense under Ind. Code 9-30-5, the court is required to impose a $200.00 alcohol and drug countermeasure fee. For criminal offenses under Ind. Code 35-48-4 the court is required to impose a drug abuse, prosecution, interdiction, and correction fee of between $200.00 and $1,000.00. In setting the fee, the court must consider the person's ability to pay the fee. Ind. Code 35-38-2-2.1 [imposition of alcohol and drug countermeasure fee]; Ind. Code 33-19-6-10 and 11 [collection of alcohol and drug countermeasure fee].

74.13.003 **Polygraph condition -** The court may require the defendant to submit to polygraph examinations as a condition of probation. *Johnson v. State*, 716 N.E.2d 983 (Ind. Ct. App. 1999).

74.13.005 **May not require stipulation to admissibility -** A probation condition that any polygraph tests taken by the defendant would subsequently be admissible in evidence in any proceeding was improper. The term did not violate the defendant's Fifth Amendment right against self-incrimination because it did not require that the defendant answer any incriminating questions. Such a condition is appropriate if it bears a reasonable relationship to the rehabilitative aspect of probation. *Patton v. State*, 580 N.E.2d 693 (Ind. Ct. App. 1991).

74.14.000 **May not require admission of guilt following jury trial** - Defendant convicted of child molesting while continuing to protest his innocence could not be required to admit that he had a probation with child molesting or face revocation of probation which included counseling, a part of which required an admission of guilt. Such facts, however can be used to determine whether the defendant is an appropriate candidate for probation. *Gilfillen v. State*, 582 N.E.2d 821 (Ind. 1991).

74.20.000 **Modification of conditions** - The court is permitted by statute to modify the terms of probation (except for the probation user's fee) or to terminate probation. Obviously, the defendant must be advised of the modification. Although no authority exists, the safest method of modifying conditions of probation is to do so in open court in the presence of the defendant. Ind. Code 35-38-2-1(b).

74.25.000 **Reimbursement of incarceration costs** - As a condition of probation, "[i]f the person was confined in a penal facility" the court may order the defendant to "execute a reimbursement plan as directed by the court and make repayments under the plan to the authority that operates the penal facility for all or part of the costs of the person's confinement in the penal facility". "The court shall fix the amount that:
(A) may not exceed the amount the person can or will be able to pay;
(B) does not harm the person's ability to reasonably be self supporting or to reasonably support any dependent of the person; and
(C) takes into consideration and gives priority to any other restitution, reparation, repayment, or fine the person is required to pay under this section". Ind. Code 35-38-2-2.3(a)(20) . Note that arguments can readily be made that this provision (a) must be construed to authorize reimbursement only for pre-sentence incarceration (e.g., it authorizes reimbursement only "[i]f the person was confined", and how can "costs of confinement" be known until the confinement has occurred and been to the court before it sentences) or (b) must be construed to include post-sentence incarceration (by, e.g., assuming that the "costs of the person's confinement" will exceed whatever the convicted person will be able to pay once he or she is on probation, which the court is to evaluate at the time of sentencing rather that on discharge from prison) The Benchbook Committee suggests that construction (a) be utilized until an appellate opinion or clearer statutory language leaves no doubt that the more punitive (b) was intended.

74.30.000 **Imprisonment as condition of probation** - As a condition of probation the court may order the defendant to serve a term of imprisonment, either consecutive or

intermittent. Intermittent imprisonment as a term of probation cannot exceed sixty (60) days and must be served in the county jail or local penal facility. A person does not earn credit time while serving an intermittent term of imprisonment as probation. Ind. Code 35-38-2-2.3.

74.30.005 **May order service of prison sentence as term of probation -** In sentencing for a Class C Felony, the court could sentence the defendant to eight years, suspended, and require the defendant to serve a seven year sentence as a term of probation despite the fact that the defendant spent 352 days in jail prior to sentencing. The probation ended on the same day that the eight year sentence did. *Sutton v. State*, 562 N.E.2d 1310 (Ind. Ct. App. 1990).

74.35.000 **Probationer searches without suspicion -** "Indiana probationers and community corrections participants, who have consented or been clearly informed that the conditions of their probation or community corrections program unambiguously authorize warrantless and suspicionless searches, may thereafter be subject to such searches during the period of their probationary or community corrections status." *State v. Vanderkolk*, 32 N.E.3d 775, 779 (Ind. 2015). *See State v. Terrell*, 40 N.E.3d 501 (Ind. Ct. App. 2015) (condition requiring submission to "reasonable search and seizure" allowed suspicionless search but left question whether the search performed was "reasonable"); *Hodges v. State*, 54 N.E.3d 1055 (Ind. Ct. App. 2016) (reasonable suspicion not required for search, but concurrence states *Vanderkolk* holding is limited to home detention cases).

74.40.000 **Home detention as probation condition** - Ind. Code 35-38-2.5 authorizes home detention as a condition of probation. See also *Greer v. State*, 669 N.E.2d 751 (Ind. Ct. App. 1996).

74.40.010 **Home detention as probation condition for certain sex crimes** - Home detention is prohibited for a person that has been convicted an I.C. 35-42-4 sex offense or incest unless the offender agrees to abide by all probation conditions, the home detention is supervised by a court approved home detention program, and the home detention includes twenty-four hour per day supervision and twenty-four hour per day GPS location monitoring. Ind. Code 35-38-2.5-7.

74.40.015 **Out-of-county resident must be supervised in home county** – "A court may not place an offender who resides in a different county on home detention unless (1) the offender is eligible for home detention in the county in which the person resides, and (2) supervision of the offender will be conducted by the probation department or community corrections program located in the county in which the offender resides." A person serving home detention on July 1, 2001 and being supervised by a probation department in another county shall have supervision transferred by order of the court to the "probation department or community corrections program located in the county where the offender resides." Ind. Code 35-38-2.5-5.5.

74.40.020 **Home detention order requirements** - Ind. Code 35-38-2.5-6 sets forth the mandatory contents of the home detention order.

74.40.025 **"Home" defined for home detention as probation condition -**In defining the term "home", Ind. Code 35-38-2.5-2 includes a hospital, group home, residential treatment facility, health care facility, hospice, group home, maternity home, and boarding house. It does not include a public correctional facility or the residence of another person who is not part of the social unit formed by the defendant's immediate family.

74.40.030 **May forbid visitors during home detention -** Court could forbid defendant to have any visitors in his house during the period of home detention imposed for possession of marijuana. *Brock v. State*, 558 N.E.2d 872 (Ind. Ct. App. 1990).

74.40.050 **Time minimums and maximums for home detention as probation** - The period of home detention, by statute, must be at least sixty (60) days and may be consecutive or nonconsecutive. The period may not exceed the "minimum sentence" for a felony established in Ind. Code 35-50-2 or the "maximum sentence" for a misdemeanor under Ind. Code 35-50-3. Ind. Code 35-38-2.5-5(a) [minimum period]; Ind. Code 35-38-2.5-5(b) [maximum period].

74.40.075 **Home detention probation continuous or intermittent** - The period of home detention probation may be "consecutive or nonconsecutive," apparently in the sense of continuously or intermittently. Ind. Code 35-38-2.5-5(b).

74.40.080 **Home detention "minimum sentence" cap** - The period may not exceed the "minimum sentence" for a felony established in Ind. Code 35-50-2 or the "maximum sentence" for a misdemeanor under Ind. Code 35-50-3. Ind. Code 35-38-2.5-5.

74.45.000 **Credit for time served on home detention as a term of probation** - A person placed on home detention as a term of probation earns one day of accrued credit per day of detention. A person placed on probation home detention earns good time credit under I.C. 35-50-6-3 or I.C. 35-50-6-3.1.

74.50.000 **Direct placement in community corrections** - A person convicted of a crime for which the minimum sentence is nonsuspendable under Ind. Code 35-50-2-2 or Ind. Code 35-50-2-2.1, may still have the minimum sentence suspended and be placed in a community corrections program, unless the crime was incest, a sex offense listed in Ind. Code 35-42-4, murder, battery with a deadly weapon or battery causing death, kidnapping, criminal confinement with a deadly weapon, robbery resulting in serious bodily injury or with a deadly weapon, arson for hire resulting in serious bodily injury, burglary resulting in serious bodily injury, resisting law enforcement with a deadly weapon, escape with a deadly weapon, rioting with a deadly weapon, aggravated battery, disarming a law enforcement officer, or an I.C. 9-30-5-4 or -5 alcohol or drug vehicle operation offense.) Ind. Code 35-38-2.6-1.

74.50.010 **Nature of community corrections direct placement program -** The community corrections program in which a nonsuspendable minimum sentence must be served is defined as a program consisting of residential and work release, electronic monitoring, day treatment, or day reporting that is operated either by a community corrections plan funded in part by state subsidy or by or under contract with a court or county. Ind. Code 35-38-2.6-2.

74.50.015 **Home detention direct commitment of out-of-county resident must be in county of residence -** Out-of-county residents directly committed to community corrections under Ind. Code 35-38-2.6 can only be placed in home detention subject to Ind. Code 35-38-2.5, described above in Section 74.40.015: "A court may not place an offender who resides in a different county on home detention unless (1) the offender is eligible for home detention in the county in which the person resides, and (2) supervision of the offender will be conducted by the probation department or community corrections program located in the county in which the offender resides." A person serving home detention on July 1, 2001 and being supervised by a probation department in another county shall have supervision transferred by order of the court to the "probation department or community corrections program located in the county where the offender resides." Ind. Code 35-38-2.6-4.5 (providing Ind. Code 35-38-2.6 home detention "must comply with Ind. Code 35-38-2.5").

74.50.020 **Reasonable conditions for direct commitment -** In making a direct placement to a community corrections program, the court may impose any reasonable conditions. Ind. Code 35-38-2.6-3(a).

74.50.030 **Notice of terms of placement required -** A defendant placed into a community corrections program is entitled to notice of the conditions of that placement, but that notice may be oral. *Million v. State*, 646 N.E.2d 998 (Ind. Ct. App. 1995).

74.50.040 **Credit for home detention as a direct commitment -** A person on home detention as a direct commitment to a community corrections program earns credit for time served and good time “credit time” if placed in the person's "home", defined as "the actual living area of the temporary or permanent residence of a person". IC 35-38-2.6-6(a); *Cottingham v. State*, 971 N.E.2d 82 (Ind. 2012); *Arthur v. State*, 950 N.E.2d 343 (Ind. Ct. App. 2011).

74.50.050 **Direct commitment placement ends when suspension for it ends** - The placement must end when the suspension underlying the placement expires. Ind. Code 35-38-2.6-4.

74.50.060 **Regular probation may follow placement's end** - Ind. Code 35-38-2.6-7 provides that the court shall place the defendant on probation after a community corrections placement has been completed.

74.50.100 **Violation of commitment procedures and dispositions -** If, after a hearing, the court finds that the defendant has violated the terms of placement, the court may change the terms of the placement, continue the placement, or revoke the placement and commit the person to the department of correction "for the remainder of the person's sentence". Ind. Code 35-38-2.6-5.

74.50.105 **Community corrections violation procedure like probation violation -** Violation of a community corrections sentence is treated like a petition to revoke probation, with the same constitutional rights for the defendant and limits on the court's ability to act. *Cox v. State*, 706 N.E.2d 547 (Ind. 1999).

74.57.000 **Modification of probation without revocation.** The trial court may hold a new probation hearing at any time during the probationary period, on its own motion or the motion of the probation department, after notice to the probationer. Ind. Code 35-38-2-1.8. The court may modify the conditions of probation, even if there has been no violation of a probation condition or no petition to revoke probation has been filed. Modification without a violation of probation or a revocation proceeding does not violate federal or Indiana due process protections, and application of the modification statute to a person whose crime was committed before its enactment does not violate federal or state ex post facto protections. *Collins v. State*, 911 N.E.2d 700 (Ind. Ct. App. 2009), *transfer denied*. If the court modifies the conditions, the court must specify the conditions in the record and advise the petitioner that, if a condition is violated, a revocation proceeding may be filed before the end of one year after the termination of probation or forty-five days after the state receives notice of the violation, whichever occurs earlier.

74.57.100 **Checklist - hearing to modify probation without revocation.**

1. Statutory authority is IC 35-38-2-1.8. [Note-this statute was enacted in 2005 and there are few decided cases concerning its use, so the items below are Committee observations rather than "best practices" suggestions based on case decisions.]
2. Statute authorizes the court or the probation officer to move for modification. Consideration of a motion by the defendant or the State is discretionary with the court.
3. Notice must be given to probationer and State.
4. The Benchbook Committee believes that the probationer can waive the hearing. The Committee strongly recommends that a written waiver of the hearing be signed by the probationer. (The Committee notes that an unreported decision of the Court of Appeals affirmed a revocation based on probation condition changes made in an agreement to modify probation entered into by the probationer and the probation officer without counsel and without a hearing before the court. *Richard v. State*, No. 27A02-0905-CR-466 (Ind. Ct. App., Sept. 11, 2009) (unreported memorandum decision not-for-publication).)
5. <u>If</u> the hearing is waived, the court must be sure to provide probationer with a copy of the probation conditions as modified.
6. Does the probationer have a right to counsel? Statute is silent, no caselaw to date.
7. A plea bargain which fixed the specific terms of probation may limit modification authority. For the binding effect of plea bargains, see such cases as *Freije v. State*, 709 N.E.2d 323 (Ind. 1999); *State ex rel. Goldsmith v. Marion Superior Court*, 419 N.E.2d 109 (Ind. 1981). Agreement to the modified conditions, by the probationer or or the State, may waive objections that the modifications contravene the original sentence bargain.
8. Forms containing waivers of hearing and agreements to modify, motions to modify, and orders to modify are found at 74.80.070 (no probation violation pending) and 74.80.074 (possible violation).

The Benchbook Committee believes that the modification statute allows the court to extend probation**.**

74.60.000 **Probation revocation - basic authority** - The court may revoke probation if the conditions of probation are violated during the probationary period. The petition to revoke must be filed either during the probationary period or after the probationary period has ended, but then before the earlier of one (1) year after the termination of probation or forty-five (45) days after the state receives notice of the violation. When a petition to revoke probation is filed, the court may issue a summons or issue an arrest warrant if there is a risk the defendant will flee the jurisdiction or cause harm to others. Ind. Code 35-38-2-3.

74.60.005 **Court may initiate proceedings on its own motion -** A verified petition to revoke probation is not required and the court may initiate hearings on its own motion and in the exercise of its discretion. *State ex rel. Wilson v. Lowdermilk*, 195 Ind. 93, 195 N.E.2d 476 (1964).

74.60.010 **Consolidation of revocation hearing with new charges -** It was not error for the court to consolidate sentencing on new charges with a hearing on a petition to revoke probation. *Bane v. State*, 579 N.E.2d 1339 (Ind. Ct. App. 1991).

74.60.015 **Revocation is a civil proceeding** - Probation revocation proceedings are civil in nature. *King v. State*, 642 N.E.2d 1389 (Ind. Ct. App. 1994).

74.60.055 **Petition to revoke may be filed by probation officer or prosecuting attorney -** A petition to revoke probation may be filed by either a probation officer or the prosecuting attorney. *Louth v. State*, 705 N.E.2d 1053 (Ind. Ct. App. 1999).

74.60.060 **Court must consent to dismissal of petition -** Petition to revoke probation may not be dismissed without court's permission. Court may relieve a prosecutor who does not wish to pursue the petition. *Isaac v. State*, 605 N.E.2d 144 (Ind. 1992).

74.60.080 **Must file written notice -** Due process requires the filing of a written petition to revoke probation, giving the probationer prior written notice of the grounds supporting revocation. *England v. State*, 670 N.E.2d 104 (Ind. Ct. App. 1996).

74.60.085 **Revocation must be for an alleged violation -** Due process requires a written petition of the alleged violation of the conditions of probation. Without a petition alleging a particular violation, the court may not find that condition violated. *Hubbard v. State*, 638 N.E.2d 618 (Ind. Ct. App. 1997).

74.60.090 **May waive receipt of written notice -** There was no fundamental error when the defendant did not receive a written notice of the probation revocation but received actual notice and appeared at the hearing with his counsel and failed to object. *Bryce v. State*, 545 N.E.2d 1094 (Ind. Ct. App. 1989).

74.60.200 **Petition may be filed at any time during probationary period -** The petition to revoke probation may be filed at any time during the probationary period. The requirement that a petition be filed within 45 days after receiving notice of the violation applies only if the petition is filed after the end of the probationary period. *Louth v. State*, 705 N.E.2d 1053 (Ind. Ct. App.1999).

74.60.205 **Post-probation filing limit applies only after probation ends -** The requirement that a petition to revoke probation be filed within 45 days after the

state receives notice of the violation only applies when notice is received less than 45 days before the end of the probationary period or when notice is received after the end of the probationary period. *Louth v. State*, 705 N.E.2d 1053 (Ind. Ct. App. 1999).

74.60.210 **Court loses jurisdiction after time limits expire -** Once the term of probation has expired, the court loses jurisdiction over the person and the court may not enforce conditions even though it is aware that the defendant failed to meet them. *White v. State*, 560 N.E.2d 45 (Ind. 1990).

74.60.215 **No violation for conduct after maximum probation period expires -** The court may not find a violation of the conditions of probation for acts that occurred after the maximum period of probation ended. *Slayton v. State*, 534 N.E.2d 1130 (Ind. Ct. App. 1989).

74.60.220 **May revoke before probation begins for parole violation -** Probation may be revoked before the defendant completes an executed portion of the sentence and before probation begins for an offense committed while on parole. *Ashba v. State,* 570 N.E.2d 937 (Ind. Ct. App. 1991), *aff'd* 580 N.E.2d 244 (Ind 1991).

74.60.225 **May not revoke after full sentence served -** Court may not revoke probation when the sentence has been executed and served in full. *Patton v. State*, 242 Ind. 477, 179 N.E.2d 867 (1962).

74.60.250 **Probation term tolled by timely warrant or summons -** The term of probation is tolled by a timely summons or warrant and the revocation hearing and disposition may take place after the original period of probation expires. Ind. Code 35-38-2-3. *State ex rel. Wilson v. Lowdermilk*, 245 Ind. 93, 195 N.E.2d 476 (1963); *Perry v. State*, 642 N.E.2d 436 (Ind. Ct. App. 1994).

74.60.255 **May file subsequent petitions during tolled period -** A second petition to revoke probation was timely filed because the issuance of a summons or warrant for the first petition tolled the period of probation. *Alley v. State*, 556 N.E.2d 15 (Ind. Ct. App. 1990).

74.60.260 **Conditions of probation in effect while probation period is tolled -** Conditions of probation are not tolled after a violation has been filed but before a determination by the court. The defendant can violate conditions of probation during this time period. *Perry v. State*, 642 N.E.2d 536 (Ind. Ct. App. 1994).

74.60.270 **Limit for post-probation violation on pending petition -** The court may not revoke probation for a violation occurring after probation would have ended but for the filing of the first petition when no violation was found as alleged in the initial petition. *Slinkard v. State*, 625 N..E.2d 1282 (Ind. Ct. App. 1993).

74.60.275 **Probation term tolled when probationer becomes a fugitive -** When the defendant becomes a fugitive after the filing of a petition to revoke probation during the original term of probation, the probation period is tolled. *Mumford v. State*, 651 N.E.2d 1176 (Ind. Ct. App. 1995).

74.60.300 **Interstate Agreement on Detainers does not apply -** Article III of the Interstate Agreement on Detainers (Ind. Code 35-33-10-4) does not apply to probation revocation proceedings and failure to comply does not warrant dismissal, citing *Carchman v. Nash*, 473 U.S. 716, 105 S.Ct. 3401, 87 L.Ed.2d 516 (1985). *State v. Thompson*, 687 N.E.2d 225 (Ind. Ct. App. 1997).

74.60.320 **No speedy trial requirement for probation revocation -** There is no duty that once a revocation petition is filed that in be disposed of in a timely manner and there is no "speedy trial" requirement. *Oliver v. State*, 431 N.E.2d 98 (Ind. 1982); *Alley v. State*, 556 N.E.2d 15 (Ind. Ct. App. 1990).

74.60.330 **Post-probation filing time limit not for filings during probation -**The requirement that a petition to revoke probation be filed within the earlier of one year after probation has terminated or 45 days after the State receives notice of a violation did not apply when the petition is filed during the probationary period. When filed during the original probation period the petition need not be filed within 45 days after receiving notice that a violation occurred. *Ashley v. State*, 717 N.E.2d 927 (Ind. Ct. App. 1999).

74.60.340 **45 day "notice" requires more than hint to state of violation -** The state is not required to commence revocation proceedings under the Ind. Code 35-38-2-1 45 day post-probation period filing provision in response to flimsy hints of a violation. Once the state receives facts a reasonable time is permitted to make inquiry and to investigate. Whether "notice" has been received is left to the trial court's discretion. *Louth v. State*, 705 N.E.2d 1053 (Ind. Ct. App. 1999).

74.60.345 **Advice of filing times required for valid post-probation filing --**The court may not revoke probation on a petition filed after the probationary period has ended unless the defendant was advised at sentencing as provided by Ind. Code 35-38-2-1 that a revocation petition may be filed before the earlier of one year after end of probation period or 45 days after the State receives notice of the violation. *Taylor v. State*, 675 N.E.2d 1128 (Ind. Ct. App. 1997).

74.60.350 **Failure to advise harmless if petition filed during probation -** The failure to advise the defendant at sentencing that a petition to revoke probation can be filed after the term of probation expires is not a defense to a petition that was filed during the term of probation. *Layne v. State*, 691 N.E.2d 1305 (Ind. Ct. App. 1998).

74.60.400 **Summons or warrant may be issued** - Statute provides for the petition to revoke probation to be served by the issuance of a summons, or by means of an arrest warrant if there is a risk of the probationer fleeing or harming another. Ind. Code 35-38-2-3(b).

74.60.405 **Probable cause required if probationer incarcerated -** If the probationer is incarcerated pending revocation of probation, due process requires the court to find probable cause for the probation violation alleged. If the probationer is not held in custody, a probable cause determination is not required. *Curtis v. State*, 370 N.E.2d 385 (Ind. Ct. App. 1977).

74.60.410 **Preliminary hearing not required when no prejudice shown -** The defendant was not entitled to a preliminary hearing prior to incarceration and after his arrest

on a probation violation warrant where the defendant could not show prejudice. Wilson v. State, 403 N.E.2d 1104 (Ind. Ct. App. 1980).

74.60.500 **Bail** - The court may admit the defendant to bail pending a probation revocation hearing. A person may be detained for up to fifteen (15) days without bail when charged with a new offense while on parole or probation. The prosecuting attorney is to notify the appropriate authorities of the desire to have the probationer held to permit the initiation of revocation proceedings. Ind. Code 35-38-2-3(d)[bail authorization]; Ind. Code 35-33-8-6 [fifteen day hold for filing of revocation proceedings].

74.60.525 **Extradition waiver by law for interstate compact probationers** - If the probationer is in another state under the Interstate Compact on probation, all extradition requirements and procedures for his or her return to face probation revocation proceedings are waived. Ind. Code 11-13-4-1(3).

74.60.535 **Failure to strictly comply with Interstate Compact –** Failure to strictly comply with the Interstate Compact for Adult Offender Supervision (in this case with the preliminary probable cause hearing requirement) does not deprive an Indiana court of either subject matter jurisdiction over a probation revocation or personal judrisdiction over the probationer.

74.60.550 **Revocation due process and statutory requirements -** Due process and Indiana statute require a written notice of the alleged violations, disclosure of evidence against the defendant, an opportunity to be heard and present evidence, the right to confront and cross-examine, and a neutral hearing before the trial court. *Pavey v. State*, 710 N.E.2d 219 (Ind. Ct. App. 1999).

74.60.575 **Special prosecutor may be appointed or judge may question-** If the regular prosecuting attorney refuses to present evidence at a probation revocation proceeding, a special prosecutor may be appointed. In some cases the judge may ask questions to elicit evidence. *Isaac v. State*, 605 N.E.2d 144 (Ind. 1992).

74.60.590 **Statutory right of counsel for probationer** - The court must advise the probationer of the right to counsel and provide counsel if the probationer is indigent. If the probationer wishes to proceed without benefit of counsel, the court must determine that the waiver of counsel is voluntary. Ind. Code 35-38-2-3(e).

74.60.595 **Due process right to counsel; determination of waiver of right -** Among the due process protections in a probation revocation proceeding is the right to counsel. To proceed without counsel, the court must ascertain on the record that the defendant has voluntarily waived the right to counsel. *Bell v. State*, 695 N.E.2d 997 (Ind. Ct. App. 1998).

74.60.600 **Advice of dangers of self representation -** For a valid waiver of counsel in probation revocation proceedings, the court is required to advise the probationer of the dangers of self representation only if the probationer contests revocation. *Greer v. State*, 690 N.E.2d 1214 (Ind. Ct. App.1998). A totality of the circumstances test is applied to allegations of inadequate advice for revocation counsel waivers. *Hopper v. State*, 957 N.E.2d 613 (Ind. 2011). Under the totality

analysis, an important factor is whether the probationer shows he was prejudiced by inadequate advice of self-representation's dangers. *Hammerlund v. State*, 967 N.E.2d 525 (Ind. Ct. App. 2012).

74.60.625 **Proof of any violation will support revocation -** Proof of any violation will support revocation of probation. *Menifee v. State*, 600 N.E.2d 967, *clarified on denial of rehearing*, 605 N.E.2d 1207 (Ind. Ct. App. 1992).

74.60.630 **May combine revocation hearing with trial on new charges -** As a matter of judicial economy, court could combine trial on new offense with a probation revocation hearing. The jury was not informed of the pending probation revocation proceeding and the defendant could cross examine witnesses and was represented by counsel. *Strowmatt v. State*, 686 N.E.2d 154 (Ind. Ct. App. 1997).

74.60.635 **May incorporate trial evidence at revocation –** A trial court may incorporate the evidence presented at the probationer's trial on an offense committed while on probation in a revocation hearing based on that offense. *Lightcap v. State*, 863 N.E.2d 907 (Ind. Ct. App. 2007) (affirming incorporation of evidence from trial at which probationer was acquitted of the new offense; note same judge presided over both trial and revocation).

74.60.640 **Rights at hearing -** Defendant in revocation proceeding entitled to written notice of alleged violations, disclosure of the evidence against him or her, an opportunity to be heard and to present evidence, the right to confront and cross-examine witnesses, and the right to a hearing before a neutral and detached body. *Fields v. State*, 676 N.E.2d 27 (Ind. Ct. App. 1997); *Davis v. State*, 669 N.E.2d 1005 (Ind. Ct. App. 1996) proceeding to revoke placement in community corrections].

74.60.645 **Failure to hold evidentiary hearing fundamental error -** Failure to hold an evidentiary hearing violated statutory and constitutional law and was fundamental error. *Eckes v. State*, 562 N.E.2d 443 (Ind. Ct. App. 1990); *Dalton v. State*, 560 N.E.2d 558 (Ind. Ct. App. 1990).

74.60.650 **Same due process for community corrections placement revocation -** The same due process requirements for probation revocation apply to proceedings to revoke placement in community corrections. *Cox v. State*, 706 N.E.2d 547 (Ind. 1999).

74.60.680 **Right to confrontation and cross-examination** - By statute, the probationer has the right to confront and cross-examine at the probation revocation hearing. Ind. Code 35-38-2-3(e).

74.60.690 **Urinalysis report does not violate right to confrontation -** The use at a revocation hearing of a regular urinalysis report prepared by a company whose professional business it is to conduct such tests does not infringe upon the right to confront. *Cox v. State*, 706 N.E.2d 547 (Ind. 1999).

74.60.700 **Preponderance burden on state by statute** - By statute, the State must prove the violation of the terms of probation by a preponderance of evidence. Ind.

Code 35-38-2-3(e). See also *Heaton v. State*, 984 N.E.2d 614 (Ind. 2013) (holds that preponderance statute applies and overrules pre-statute cases applying probable cause standard).

74.60.710 **Preponderance used to revoke community corrections placement -** Although the statute is silent, a hearing to revoke a community corrections placement is civil in nature and the state's burden is by a preponderance of the evidence. *Decker v. State*, 704 N.E.2d 1101 (Ind. Ct. App. 1999).

74.60.730 **Revocation only on grounds alleged in petition -** Due process requires that probation be revoked only for the reasons in the written petition and not based upon proof of another act even though it is similar in nature to the violation in the written petition. *Long v. State*, 717 N.E.2d 1238 (Ind. Ct. App. 1999). *See also Hubbard v. State*, 638 N.E.2d 618 (Ind. Ct. App. 1997); *Harder v. State*, 501 N.E.2d 1117 (Ind. Ct. App. 1986).

74.60.740 **Disposition limited to request in petition -** When the petition sought termination of in-home detention privileges as a condition of probation, the court could not revoke probation. *Braxton v. State*, 638 N.E.2d 440 (Ind. Ct. App.1994).

74.60.800 **Indiana and Common-law rules of evidence do not apply -** Neither the rules of evidence nor the prior common law rules of evidence apply in probation revocation or community corrections revocation proceedings. *Cox v. State*, 706 N.E.2d 547 (Ind. 1999).

74.60.805 **Any relevant evidence with reliability can be admissible -** In a probation revocation, the judge may consider any relevant evidence bearing some substantial indicia of reliability, including reliable hearsay. *Cox v. State*, 706 N.E.2d 547 (Ind. 1999). If hearsay is to be admitted, the probationer's Due Process right of confrontation demands that the hearsay have "substantial trustworthiness," and the trial court should state its reasons for concluding the "substantial trustworthiness" test is met before admitting the evidence. *Reyes v. State*, 868 N.E.2d 438 (Ind. 2007) (affirming admission of urinalysis lab director's affidavit reciting his qualifications and his opinion that the test demonstrated probationer had used cocaine within 72 hours before urine sample was taken); *Smith v. State*, 971 N.E.2d 86 (Ind. 2012) (rejects argument that "substantial trustworthiness" test was eclipsed by Sixth Amendment *Crawford v. Washington* confrontation holding and affirms admission of lab tests and lab director affidavit as substantially trustworthy).

74.60.810 **Probation revocation evidence rules apply to community corrections placement revocation -** The evidentiary rules apply to both probation revocation proceedings and proceedings to revoke placement in community corrections. *Cox v. State*, 706 N.E.2d 549 (Ind. 1999).

74.60.815 **Court to assess evidence weight, sufficiency, and reliability -**Admission of urinalysis results properly based on the weight, sufficiency, and reliability of the proffered evidence. Here, the witness did not need to qualify as an expert and

neither the Rules of Evidence nor the *Frye* test applied. *Carter v. State*, 706 N.E.2d 522 (Ind. 1999).

74.60.820 **Court should not conduct examination -** The court violated its responsibility to serve as a fact finder when evidence at the probation revocation hearing was procured by the court's questioning. The burden of proof is upon the state and not the court. *Ratliff v. State*, 546 N.E.2d 309 (Ind. Ct. App. 1989).

74.60.830 **Right to confront requires hearsay to be reliable -** The probationer and community corrections subject has the right to confront and cross-examine witnesses in a neutral hearing before the trial court. The probation and community corrections confrontation right is satisifed by limiting hearsay evidence to relevant hearsay that bears some substantial indicia of reliability. *Cox v. State*, 706 N.E.2d 547 (Ind. 1999). *See also Reyes v. State*, 868 N.E.2d 438 (Ind. 2007) (confrontation right requires hearsay have “substantial trustworthiness”); *Smith v. State*, 971 N.E.2d 86 (Ind. 2012) (rejects argument that “substantial trustworthiness” test was eclipsed by Sixth Amendment *Crawford v. Washington* confrontation holding and affirms admission of lab tests and lab director affidavit as substantially trustworthy)..

74.60.850 **Exclusionary rule not fully applicable -** The Fourth Amendment exclusionary rule is not fully applicable in probation revocation hearings. Evidence that was illegally seized will be excluded only if it was seized as part of a continuing plan of police harassment or in a particularly offensive manner. *Dulin v. State*, 346 N.E.2d 746 (1976). *See also Plue v. State*, 721 N.E.2d 308 (Ind. Ct. App. 1999) (applying *Dulin* rule). *And see Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998) (observing that “we have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials,” in holding that the 4th Amendment exclusionary rule does not apply to parole revocations). Note that Indiana cases have held that the Fourth Amendment requires that searches of probationer homes based on probation supervision authority must be "reasonable" if the fruits of the search are to be admissible in a prosecution for a new offense. *Fitzgerald v. State*, 805 N.E.2d 857 (Ind. Ct. App., 2004) (condition for waiver of right “against unreasonable searches” was facially invalid under the Fourth Amendment, as it would not permit an inference that any search under the waiver had to be reasonable). The Committee believes that under *Dulin* above the fruits of an unreasonable supervisory search may be admissible in a revocation proceeding even though they would have to be suppressed under the Fourth Amendment exclusionary rule in a prosecution for a new crime.

74.60.875 **No Fifth Amendment privilege to refuse to testify -** A probationer has no Fifth Amendment right privilege to refuse to testify at a revocation hearing and may be compelled to testify regarding basic identifying information and disclosures necessary to monitor probation. The probationer may invoke the Fifth Amendment privilege with regard to testimony that might be incriminating in a subsequent criminal prosecution. *State v. Cass*, 635 N.E.2d 225 (Ind. Ct. App. 1994).

74.60.900 **Standard procedural default applies to confession -** The court did not err in denying the defendant's request to testify as to voluntariness of his confession.

A separate hearing was never requested on the admissibility and he did not present evidence in his case in chief. *Richeson v. State*, 648 N.E.2d 384 (Ind. Ct. App. 1995).

74.60.925 **Double jeopardy does not apply -** The right against double jeopardy only applies in criminal proceedings and since a probation revocation proceeding is civil in nature, double jeopardy does not apply. *Childers v. State*, 656 N.E.2d 514 (Ind. Ct. App. 1995).

74.60.930 **Res judicata bars subsequent hearing -** The State will be barred by res judicata from filing subsequent revocations alleging a violation which it failed to prove on the merits in a prior revocation proceeding; here, an appellate decision holding the evidence in the prior revocation was insufficient to prove the alleged violation was a judgment on the merits precluding the State from relitigating the same issue in a second revocation. *Shumate v. State*, 718 N.E.2d 1133 (Ind. Ct. App. 1999).

74.60.940 **Judicial notice of matters in same or another court –** Under the 2010 amendment of Evidence Rule 201(b), a court may take judicial notice of its own records in another case previously before the court or of records in a case in another Indiana court , even on a related subject and with related parties. *Bane v. State*, 579 N.E.2d 1339 (Ind. Ct. App. 1991). *See, e.g.*, *Christie v. State*, 939 N.E.2d 691 (Ind. Ct. App. 2011) (affirming community corrections revocation based on trial court's judicially noticing town court's records of a new conviction). Note that it had been held before the amendment of Evidence Rule 201(b) that the former rule against taking judicial notice of the records in another case was not applicable to probation revocation proceedings. *Whatley v. State*, 847 N.E.2d 1007 (Ind. Ct. App. 2006) (citing *Henderson v. State*, 544 N.E.2d 507 (Ind. 1989)).

74.60.950 **Supervising probation officer not required to *Mirandize* -** The probation officer was not required to give Miranda warnings prior to questioning the defendant after a petition to revoke probation had been filed because the officer was acting as an arm of the court and not as a governmental agent or police officer. Further, the defendant is not in custody. *Alspach v. State*, 440 N.E.2d 502 (Ind. Ct. App. 1982).

74.61.005 **May revoke probation for willful refusal or failure to acquire resources with which to pay -** The Fourteenth Amendment does not prohibit revoking probation of one who has willfully refused to pay restitution or has failed to acquire the resources to pay. Even if there has been a bona fide effort to acquire the resources to pay, the court may revoke probation after considering the alternative measures to revocation and concluding that alternatives are not adequate to meet the State's interest in punishment and deterrence. *Bearden v. Georgia*, 461 U.S. 660 (1983).

74.61.010 **Statute requires knowing, intentional, or reckless refusal to pay -**Statute requires that for revocation for failure to comply with a condition that imposes financial obligations on the probationer, the State must prove that the probationer recklessly, knowingly, or intentionally failed to pay. Ind. Code 35-38-2-3(g). This

statute requires proof by the State of "both the violation and the requisite state of mind." *Runyon v. State*, 939 N.E.2d 613 (Ind. 2010).

74.61.015 **Court must inquire into reasons for nonpayment -** Before revoking probation for failure to pay restitution, the court must inquire into the reason for the non-payment. *Garrett v. State*, 680 N.E.2d 1 (Ind. Ct. App. 1997); *Barnes v. State*, 616 N.E.2d 764 (Ind. Ct. App. 1997).

74.61.020 **Probationer burden to prove inability to pay –** Ind. Code 35-38-2-3(g) is silent as to the burden of proof on inability to pay; "it is the State's burden to prove both the violation and the requisite state of mind in order to obtain a probation revocation"; it is the probationer's burden to "show facts related to an inability to pay and indicating sufficient bona fide efforts to pay." *Runyon v. State*, 939 N.E.2d 613 (Ind. 2010). *See Smith v. State*, 963 N.E.2d 1110 (Ind. 2012)(probationer established he was employed part of the period in question and "gave extensive testimony about his various medical problems," apparently trying to show that he was unable to work and unable to pay, but he failed to show he was incapable of working so that trial judge reasonably concluded he had not proved he was unable to pay); *Sparkman v. State*, 432 N.E.2d 437 (Ind. Ct. App. 1982) (court could revoke probation for knowingly or intentionally failing to pay court ordered restitution when the defendant made no attempt to contact the court or prosecuting attorney regarding his ability to make restitution, paid nothing on the obligation, left the State when the revocation petition was filed, and although briefly employed made no attempt to fulfill his obligation; note this decision preceded the holdings in *Runyon v. State* above this section and *Bearden v. Georgia*, 461 U.S. 660 (1983) (see 74.61.005)).

74.61.030 **May not imprison if inability to pay is not through fault of probationer -** Probation may be revoked for the willful refusal to pay ordered restitution. A defendant may not be imprisoned for the failure to pay ordered restitution if unable to do so through no fault of his or her own. *Barnes v. State*, 676 N.E.2d 764 (Ind. Ct. App. 1997).

74.61.035 **May revoke if probationer caused inability to pay -** Probation may be revoked for the failure to pay ordered restitution if the defendant engaged in conduct that made him or her unable to do so. *Barnes v. State*, 676 N.E.2d 764 (Ind. Ct. App. 1997); *Bahr v. State*, 634 N.E.2d 543 (Ind. Ct. App. 1994).

74.61.040 **Incarceration is not a defense -** Probation may be revoked for the willful refusal to pay ordered restitution when the defendant could not pay because of incarceration. The defendant was indigent by choice in deciding to violate the law. *Barnes v. State*, 676 N.E.2d 764 (Ind. Ct. App. 1997).

74.61.100 **Failure to pay fines or costs not a sole basis for DOC commitment -** Ind. Code 35-38-2-3(m) provides that failure to pay fines or costs cannot be the sole basis for commitment to the department of correction.

74.61.105 **Failure to pay public defender fees no basis for revoking** - Ind. Code 35-38-2-3(n) provides that failure to pay public defender fees cannot serve as a basis to revoke probation.

74.61.200 **Revoking for criminal conduct -** Probation may be revoked if an additional crime is committed. Ind. Code 35-38-2-1(b).

74.61.205 **Violation of good behavior condition means unlawful activity -** In revoking probation for violation of the condition of "good behavior", the court must find by a preponderance of the evidence that the defendant engaged in unlawful activity. *Justice v. State*, 550 N.E.2d 809 (Ind. Ct. App. 1990).

74.61.210 **Unlawful conduct need not be included in a plea agreement -** Court can revoke probation for committing a crime even though that condition was not expressly included in the plea agreement. Childers v. State, 656 N.E.2d 514 (Ind.App. 1995)

74.61.215 **Conviction collaterally estops relitigation** - A criminal conviction proved beyond a reasonable doubt collaterally estops the defendant from relitigating that issue. *Sheron v. State*, 682 N.E.2d 552 (Ind. Ct. App. 1997).

74.61.220 **Conviction is prima facie evidence of violation -** A criminal conviction is prima facie evidence of a probation violation and is sufficient by itself to support revocation of probation. *Gleason v. State*, 634 N.E.2d 67 (Ind. Ct. App. 1994).

74.61.225 **Unlawful conduct revocation need not follow conviction; proof by a preponderance -** It is not necessary that a criminal conviction precede revocation of probation for unlawful conduct. A conviction is prima facia evidence and will by itself support revocation. An arrest, standing alone, does not support revocation of probation. Evidence of the commission of a crime must be supported by substantial evidence, but not proof beyond a reasonable doubt. *Hoffa v. State*, 267 Ind. 133, 368 N.E.2d 250 (1977).

74.61.230 **Arrest alone does not warrant revocation -** An arrest alone without a conviction does not warrant revocation of probation. *Louth v. State*, 705 N.E.2d 1053 (Ind. Ct. App. 1999).

74.61.235 **May revoke following acquittal -** Probation may be revoked for the commission of an offense even though the defendant was acquitted of the new crime. *Justice v. State*, 550 N.E.2d 809 (Ind. Ct. App. 1990).

74.61.240 **Evidence of reversed conviction alone is insufficient -** Without more evidence, a reversed conviction will not support probation revocation. *Brown v. State*, 458 N.E.2d 245 (Ind. Ct. App. 1983).

74.61.245 **Reversible conviction may provide basis -** A conviction could be the basis for probation revocation even though the new conviction could be collaterally attacked because of the failure to waive the right to counsel when the later conviction was entered. *Sims v. State*, 549 N.E.2d 53 (Ind. Ct. App. 1990).

74.61.250 **Conduct must be illegal -** Without evidence that concealment of pills were a violation of county jail regulations or constituted a crime, probation could not be revoked for such conduct. Violation of jail rules could violate a jail commitment that was a term of probation. *Gee v. State*, 454 N.E.2d 1265 (Ind. Ct. App. 1983).

74.61.255 **Confession to new crime supports revocation -** Defendant's confession to the commission of a crime supported probation revocation. *Smith v. State*, 504 N.E.2d 333 (Ind. Ct. App. 1987).

74.61.265 **No contest plea will support revocation -** The conviction of a probationer in another jurisdiction upon entering an *Alford* or no contest plea is sufficient to support revocation of probation. *Williams v. State*, 695 N.E.2d 1017 (Ind. Ct. App. 1998).

74.61.270 **Evidence from persons at trial establishes a new crime committed -** Testimony of the trial court judge who presided and witnesses who were present at the proceeding and testified as to the defendant's identity, were sufficient evidence to revoke probation for the commission of a new crime. *Szymenski v. State*, 500 N.E.2d 213 (Ind. Ct. App. 1986).

74.61.275 **Speedy trial discharge does not bar revocation -** The dismissal of criminal charges under the speedy trial rule (Rule of Criminal Procedure 4) does not prevent revocation of probation based upon the same charges. *Justice v. State*, 550 N.E.2d 809 (Ind. Ct. App. 1990).

74.61.280 **Crime committed prior to probation not a basis -** Probation could not be revoked because of a crime committed before the imposition of probation. *Weatherly v. State*, 564 N.E.2d 350 (Ind. Ct. App. 1990)**.**

74.61.300 **Not associating with felon requires knowledge of status -** To violate probation terms by knowingly associate with a felon, the defendant must know that the person with whom he or she associates is a felon. *Monroe v. State*, 419 N.E.2d 831 (Ind. Ct. App. 1981).

74.61.325 **May revoke before probation commences -** Probation may be revoked before the defendant begins the probationary period. *Childers v. State*, 656 N.E.2d 514 (Ind. Ct. App. 1995).

74.61.330 **May revoke for conduct in community corrections -** Probation can be revoked because of conduct in a community corrections program regardless of whether the sentence that precedes probation is considered executed. *Gardner v. State*, 678 N.E.2d 398 (Ind. Ct. App. 1997) .

74.61.335 **May revoke community corrections placement prior to placement -** A commitment to community corrections can be revoked for conduct occurring after sentencing but before commencement of the placement. *Million v. State*, 646 N.E.2d 998 (Ind. Ct. App. 1995).

74.61.350 **Failure to report to jail -** Probationer's failure to report to jail on weekends as required as a condition of probation supported revocation of probation. *Wilson v. State*, 403 N.E.2d 1104 (Ind. Ct. App. 1980).

74.61.355 **May infer service will not be completed -** A finding of a violation of probation was proper for failure to complete community service, even though the defendant had one year to complete the requirement and the petition was filed prior to the end of the year where the defendant moved from Indiana to Florida without court permission and did not so without advising the community service supervisor or court. It could be inferred that the defendant did not intend to complete the community service. *Buck v. State*, 580 N.E.2d 730 (Ind. Ct. App. 1991).

74.61.375 **Lawsuit did not violate no contact order -** Filing of a lawsuit did not violate an order of no contact with the defendant of the lawsuit absent a finding that the lawsuit was frivolous, unreasonable, or groundless. *Wright v. State,* 688 N.E.2d 224 (Ind. Ct. App. 1997).

74.61.500 **Options on finding of violation** - Upon a finding of a violation of the terms of probation, the court may continue the defendant on probation either with or without modifying the conditions, may extend the period of probation for up to one (1) year beyond the original probationary period, or may order the execution of the suspended sentence. Ind. Code 35-38-2-3(g).

74.61.505 **Option to reinstate probation** - Ind. Code 35-38-2-3(h)(1) provides that if the court finds a violation of the terms of probation that occurred during the probationary period and the petition to revoked was filed after the probationary period ended, the court may reinstate the person on probation, with or without enlarging the conditions, if the sum of the length of the original probation and the reinstated probation does not exceed the maximum sentence for the offense.

74.61.525 **Whether to revoke probation is within court's discretion -** The decision whether to revoke probation or a community corrections placement is within the discretion of the trial court. *Pavey v. State*, 710 N.E.2d 219 (Ind. Ct. App. 1999).

74.61.530 **Defendant entitled to present evidence in mitigation -** When revoking probation, the court must determine that the terms of probation had been violated, and if so, then find that the violation warrants revocation. The defendant is entitled to present evidence to explain or mitigate the violation. *Parker v. State*, 676 N.E.2d 1083 (Ind. Ct. App. 1997).

74.61.535 **Consideration of probationer's psychiatric condition -** The court is not required to consider the probationer's psychiatric condition prior to ordering execution of suspended sentence because of a violation of probation terms. *Mitchell v. State*, 619 N.E.2d 961 (Ind. Ct. App. 1993). *But see Patterson v. State*, 619 N.E.2d 961 (Ind. Ct. App. 1995)(court required to consider defendant's psychiatric condition prior to ordering execution of suspended sentence, but insanity is not a complete defense in a probation revocation proceeding).

74.61.550 **Option to extend probation -** Ind. Code 35-38-2-3(g)(2) provides that if the court finds a violation of the terms of probation and the petition was filed within the probationary period, the court may extend the person's probationary period for not more than one (1) year beyond the original probationary period. Ind. Code 35-50-2-2(c) provides that when the court suspends a sentence it may place the person on probation for not more than the date the maximum sentence for the felony would expire. The extension of probation option may be used even

if the total period of probation including the extension exceeds the maximum sentence which could have been imposed at the time of sentencing, but if the probation is revoked during the period of extended probation the court may order the probationer to serve only the sentence originally imposed, so that the actual period of time spent incarcerated will not exceed the imposed at the sentencing. *See Bailey v. State*, 731 N.E.2d 447 (Ind. Ct. App. 2000).

74.61.575 **No sentence credit for time spent serving unrelated charges -** The defendant was not entitled to good time credit for confinement resulting from charges unrelated to the probation violation. *Dolan v. State*, 420 N.E.2d 1364 (Ind. Ct. App. 1981).

74.61.580 **Only mandatory sentence consecutivity applies to revocation -** In a revocation the court has no authority to order, as a matter of discretion, that the sentence originally imposed be served consecutively to a sentence for an unrelated offense. If consecutivity is mandatory by law, as when a new crime is committed during probation, the revoking court may provide in its order that the suspended sentence is to be served consecutively to the sentence for the new crime. In the latter case, the revocation record must clearly show the new crime was committed during the probation, not merely that the conviction for the new crime was entered during the term of probation. *Pawloski v. State*, 555 N.E.2d 851 Ind. Ct. App. 1990).

74.61.600 **Master commissioner may enter final order -** A master commissioner has the power to enter a final order in a probation revocation proceeding. *Offringa v. State*, 637 N.E.2d 190 (Ind. Ct. App. 1994).

74.61.605 **New presentence report not required -** The court is not required to consider a new presentence report prior to revoking probation and ordering the execution of the suspended sentence. *Boyd v. State*, 481 N.E.2d 1124 (Ind. Ct. App. 1985).

74.61.625 **Statement for revocation reasons required -** Due process requires the court to state its reasons and evidence relied upon when revoking probation. The failure to do so requires remand to the trial court for inclusion of such a statement. *Breaziel v. State*, 568 N.E.2d 1072 (Ind. Ct. App. 1991 .

74.61.635 **Oral statement sufficient -** The trial court's oral statement of the evidence relied upon and the reasons for revocation that are reduced to writing in a hearing transcript are sufficient. *Wilson v. State*, 708 N.E.2d 32 (Ind. Ct. App. 1999).

74.61.640 **Statement must be sufficiently specific -** The court's statement at a probation revocation hearing that the defendant violated terms of probation and any "violation of the term of good and lawful behavior" did not satisfy the due process requirement of a written statement of the evidence considered or reasons for revoking probation. *Medicus v. State*, 664 N.E.2d 1163 (Ind. 1996).

74.61.650 **Not required to consider alternatives to incarceration -** A written statement that the court considered alternatives to incarceration after a violation has been found is not required. *Monday v. State*, 671 N.E.2d 467 (Ind. Ct. App. 1996).

74.61.655 **Not required to consider aggravating and mitigating factors -** The court is not required to consider aggravating and mitigating factors when imposing a sentence in a probation revocation proceeding. *Mitchell v. State*, 619 N.E.2d 961 (Ind. Ct. App. 1993).

74.61.675 **Order revoking probation appealable -** A judgment revoking probation is a final, appealable order. Ind. Code 35-38-2-3(I).

74.61.680 **Post-Conviction relief Rule 1 may challenge revocation-** A post-conviction petition may be used by one claiming probation was unlawfully revoked. Post-Conviction Rule 1 sec. 1(a).

74.80.050 Order Imposing Conditions Of Probation

STATE OF INDIANA
_____ COURT
ORDER OF PROBATION

NAME OF DEFENDANT:

CAUSE NO.: _____ OFFENSE:

SENTENCE: _____ DURATION OF PROBATION:

__ 1. You shall meet with the _____County Probation Department forthwith. Thereafter, you shall report to your Probation Officer as directed by him or her. You shall answer all reasonable inquiries of your officer.

__ 2. You must not commit another criminal offense. If you do commit another criminal offense, your probation may be revoked. You shall advise your Probation Officer immediately if you are arrested or detained for questioning by a law enforcement officer.

__ 3. If you change your address you shall notify your Probation Officer of your new address within twenty-four (24) hours

__ 4. You shall work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip you for suitable employment.

__ 5. You shall promptly notify your Probation Officer of any change in employment.

__ 6. You shall support your dependents and meet all other family responsibilities.

__ 7. If this conviction is for a misdemeanor, you shall pay an initial probationer's fee of $50.00 and a monthly supervision fee of $10.00 for each subsequent month of your probation. If this conviction is for a felony, you shall pay an initial probationers fee of $100.00 and a monthly supervision fee of $15.00 for each subsequent month of your probation. These sums are due and payable in advance on or before the first day of each month.

__ 8. You shall not possess or use any firearm, destructive device or other dangerous weapon.

__ 9. You shall permit any Probation Officer, or anyone acting on behalf of the Probation Department, to search your person, your home, or any other place at any time without a warrant and without any suspicion you have violated probation conditions. [Note that the language of the condition determines the time and circumstances under which a home search can be made without warrant or suspicion; the suggested condition allows a suspicionless search at any time.]

__ 10. You shall not remove your residence from _____ County, without first obtaining written permission from your Probation Officer. If granted written permission to leave Indiana, you shall agree to waive extradition and agree to voluntarily return to Indiana when so ordered by this Court.

__ 11. You shall not use, possess, or consume any alcohol (except in a lawful manner), narcotic, drug, or controlled substance unless prescribed by a physician or dentist, and you shall permit any type of test or sample to be taken for the purpose of discovering alcohol or drug use at the request of any probation officer, anyone acting upon the request of the Probation Department, or upon order of this Court. You shall be responsible for any costs associated with such testing.

__ 12. You shall not associate with any person of bad character or reputation or with any person who is likely to influence you to commit any crime.

__ 13. You shall serve intermittent imprisonment in the _____ County Jail for a total of ___ days (no more than 60 days), with good time credit, to be served in the manner as set out in the commitment order. You shall pay at least $____ per month to the Probation Department until a total of
$____ is paid to reimburse for your incarceration.

__ 14. You shall pay to the _____ County Probation Department the sum of
$____ per week/month until a total of $___ is paid in full as restitution.

__ 15. Within seven (7) calendar days from this date, you shall make arrangements with an appropriate, state certified, mental health or addictions services provider approved by the Court, for a substance abuse evaluation and you shall satisfactorily complete any recommended treatment. You shall be responsible for the costs of any program on a timely basis and shall execute any and all releases of information for the agency to forward information to the Probation Department.

__ 16. Within seven (7) calendar days from this date, you shall make arrangements with an appropriate, state certified, mental health provider approved by the Court for a psychological evaluation and you shall satisfactorily complete any recommended treatment. You shall execute any and all releases of information for the agency to forward information to the Probation Department.

__ 17. You shall pay the sum of $____ per week on your child support arrearage and shall pay the arrearage of $____ in full during the term of probation, PLUS the court ordered current child support. You shall execute wage assignments for payment of your current child support and arrearage while on probation.

__ 18. You shall pay the fine in the amount of $_____ and the costs in the amount of $_____ in this matter on or before _____ .

__ 19. You shall pay the sum of $____ per month to the Probation Department of this Court until a total of $____ is paid for your Public Defender's fee.

__ 20. Pursuant to the direction of your Officer, you shall enroll in a literacy or General Equivalency Degree Program and make satisfactory progress towards becoming literate and obtaining your General Equivalency Degree certificate and you shall attend at least three (3) out of each four (4) meetings of such program. You shall supply your Officer with evidence of such attendance.

__ 21. You shall immediately enroll in and attend English language classes. You shall attend at least three (3) out of each four (4) meetings of such program. You shall supply your Officer with evidence of such attendance.

__ 22. You shall serve a term of _____ home detention with/without an alcosensor and comply with all terms and conditions associated therewith as directed by the Probation Department of this Court.

__ 23. You shall not initiate contact, directly or indirectly, with _____.

__ 24. You shall immediately enroll in and complete an anger management course.

__ 25. You shall forthwith write letters of apology to _____in a manner acceptable to your probation officer.

__ 26. You shall perform no less than _____ hours of community service as directed by the _____ County Community Service director.

__ 27. You shall attend the victim impact panel program on _____, 2000, to be held at _____ and shall arrive by 6:15 p.m. for registration. FAILURE TO ATTEND FOR ANY REASON WILL BE A VIOLATION OF YOUR PROBATION.

__ 28. Your driving privileges shall be suspended for _____ days.

__ 29. Special Conditions:

During the period of probation, if it appears to the Court that you have violated any one of these conditions of your probation, the Court may, after hearing, modify or enlarge the conditions of your probation or revoke probation and order execution of the suspended sentence. A petition to revoke probation may be filed one (1) year after the termination of probation or forty-five (45) days after the State receives notice of the violation.

So ORDERED this _____ day of _____, 2____.

Honorable _____
Judge, _____ Court

I have read the above conditions. I have discussed those questions I do not understand with the Court. I now understand all of the conditions and I agree to comply with each of them and fully understand the consequences of violating any of them.

Defendant Date

I have explained the above probation terms to _____ and he assures me that he understands them.

Attorney for Defendant Date

74.80.070 Modification of Probation Hearing Waiver, No Violation Pending
Motion to Modify Probation
Order Modifying Probation

STATE OF INDIANA) IN THE _____ COURT
) SS:
COUNTY OF _____) OF _____ COUNTY

STATE OF INDIANA
v. CAUSE NO. _____

_____
Defendant

WAIVER OF HEARING AND AGREEMENT TO MODIFY PROBATION

(no violation pending)

____ I understand that my probation officer is recommending a modification of the conditions of my probation to include the following modified/additional term(s):

_____

_____

_____

____ I further understand that under Indiana Code 35-38-2-1.8, I have the right to have notice of any modification and to have a hearing before the court before any modification can be made. This is true whether the modification is based on an alleged violation of probation or for some other reason.

____ My probation officer has informed me that I am not in violation of my probation.

____ I understand that if I violate a condition of probation during my probationary period, including a new term or a modified term agreed to by me, that a petition to revoke probation may be filed before the earlier of either one year after the termination of my probation or 45 days after the State has received notice of the violation.

Knowing and understanding all these things and without any threats or promises being made to me, I waive all these rights, including my right to a hearing, and voluntarily agree to the modification of my probation that is set out above.

_____ _____
Date Defendant

_____ _____
Date Probation Officer

STATE OF INDIANA) IN THE _____COURT
) SS:
COUNTY OF _____) OF _____ COUNTY

STATE OF INDIANA
v. CAUSE NO. _____

_____
Defendant

MOTION TO MODIFY PROBATION

Comes now the _____ County Department of Probation Services by Probation Officer_____, and moves the Court to modify the Defendant's probation as follows: _____

_____

_____

_____

_____

____ The _____ County Department of Probation Services requests the court to set this motion for a hearing.

OR

____ In support of its motion, the _____ County Department of Probation Services attaches hereto the Defendant's Waiver of Hearing and Agreement to Modify Probation.

_____ _____
Date Probation Officer

Certificate of Service

I hereby certify that a true and correct copy of this motion has been served on the Prosecuting Attorney for _____ County and on any current counsel of record for the Defendant by placing a copy of it in the courthouse mailbox designed for that purpose or by U.S. Mail and have given a copy to the Defendant personally.

_____ _____
Date Probation Officer

STATE OF INDIANA) IN THE _____COURT

) SS:
COUNTY OF _____) OF _____ COUNTY

STATE OF INDIANA

v. CAUSE NO. 29D05-_____

_____
Defendant

ORDER ON MOTION TO MODIFY PROBATION

The _____ County Department of Probation Services having filed its Motion to Modify Probation and having attached thereto the Defendant's Waiver of Hearing and Agreement to Modify Probation, and the Court being duly advised in the premises, does now grant such motion, and modifies the terms and conditions of the Defendant's probation as follows:

_____

_____

_____

_____

_____

_____.

The Defendant is advised that if he/she violates a condition of probation during the probationary period, whether it be an original condition or one of the now modified/added conditions, that a petition to revoke probation may be filed before the earlier of either one year after the termination of probation or 45 days after the State received notice of the violation.

So ordered this_____ day of_____, 20_____.

_____
Judge, _____ Court

74.80.074 Modification of Probation Hearing Waiver, Possible Violation
Motion to Modify Probation
Order Modifying Probation

STATE OF INDIANA) IN THE _____ COURT
) SS:
COUNTY OF _____) OF _____ COUNTY

STATE OF INDIANA
v. CAUSE NO. _____

_____
Defendant

WAIVER OF HEARING AND AGREEMENT TO MODIFY PROBATION

(possible violation)

____ I understand that my probation officer is recommending a modification of the conditions of my probation to include the following modified/additional term(s):

_____
_____
_____
_____

____ I further understand that under Indiana Code 35-38-2-1.8, I have the right to have notice of any modification and to have a hearing before the court before any modification can be made. This is true whether the modification is based on an alleged violation of probation or for some other reason.

____ My probation officer has informed me that I may be in violation of my probation as follows:

_____
_____
_____
_____

____ I understand that a petition to revoke probation has not been filed against me at this time, but that if one would be filed, and if the court determined that I did violate my probation, the court would have the right to continue me on probation, to extend my probation, to modify any of the terms or conditions of my probation, or to revoke my probation and order execution of all or any part of my originally-suspended sentence.

____ If a petition to revoke probation is filed against me, I would have the following rights:

1. I would have the right to have an attorney to represent me. If I wanted an attorney but was indigent and could not afford one, the court would appoint an attorney for me.

2. I would have the right to have the hearing on the petition to revoke probation. At this hearing, the State would have to prove one or more of the allegations in the petition by a preponderance of the evidence. I would have the right to confront and cross-examine the witnesses called against me and would have the right to testify on my own behalf and to subpoena witnesses to testify on my behalf.

3. I would have the right to remain silent regarding any allegation that I have committed a criminal offense. As to all other allegations, I understand that I could be placed under oath and called to give testimony about my probation.

4. If I was arrested because a petition to revoke probation was filed, I understand that I could be released on bond until my hearing.

5. Should the court find that I violated my probation and modify or revoke my probation, I understand that I would have the right to appeal the court's decision.

____ I understand that if I violate a condition of probation during my probationary period, including a new term or a modified term agreed to by me, that a petition to revoke probation may be filed before the earlier of either one year after the termination of my probation or 45 days after the State has received notice of the violation.

____ I understand that my agreement to this modification is not an admission of any violation, but it also does not mean that a petition to revoke probation may not still be filed be filed, either now in or in the future, either on the possible violations listed above or other different or new alleged violations.

Knowing and understanding all these things and without any threats or promises being made to me, I waive all these rights, including my right to a hearing, and voluntarily agree to the modification of my probation that is set out above.

_____	_____
Date	Defendant
_____	_____
Date	Probation Officer

STATE OF INDIANA)
) SS:
COUNTY OF _____)

IN THE _____ COURT
OF _____ COUNTY

STATE OF INDIANA
v. CAUSE NO. _____

_____
Defendant

MOTION TO MODIFY PROBATION

Comes now the _____ County Department of Probation Services by Probation Officer_____, and moves the Court to modify the Defendant's probation as follows: _____

_____

_____

_____

_____

____ The _____ County Department of Probation Services requests the court to set this motion for a hearing.

OR

____ In support of its motion, the _____ County Department of Probation Services attaches hereto the Defendant's Waiver of Hearing and Agreement to Modify Probation.

_____ _____
Date Probation Officer

Certificate of Service

I hereby certify that a true and correct copy of this motion has been served on the Prosecuting Attorney for _____ County and on any current counsel of record for the Defendant by placing a copy of it in the courthouse mailbox designed for that purpose or by U.S. Mail and have given a copy to the Defendant personally.

_____ _____
Date Probation Officer

STATE OF INDIANA)
) SS:
COUNTY OF _____)

IN THE _____ _ COURT
OF _____ COUNTY

STATE OF INDIANA

v. CAUSE NO. _____

_____
Defendant

ORDER ON MOTION TO MODIFY PROBATION

The _____ County Department of Probation Services having filed its Motion to Modify Probation and having attached thereto the Defendant's Waiver of Hearing and Agreement to Modify Probation, and the Court being duly advised in the premises, does now grant such motion, and modifies the terms and conditions of the Defendant's probation as follows:

_____

_____

_____

_____

_____

_____.

The Defendant is advised that if he/she violates a condition of probation during the probationary period, whether it be an original condition or one of the now modified/added conditions, that a petition to revoke probation may be filed before the earlier of either one year after the termination of probation or 45 days after the State received notice of the violation.

So ordered this_____ day of_____, 20_____.

_____
Judge, _____ Court

74.80.100 Petition To Revoke Probation -

STATE OF INDIANA) IN THE _____ COURT
)SS:
COUNTY OF _____) 20__ TERM

CAUSE NO. _____

STATE OF INDIANA)
)
vs.)
)
_____)

PETITION FOR REVOCATION OF PROBATION

The undersigned Probation Officer represents and states to the Court:

1. That the above named _____, hereinafter referred in this Petition as the "probationer," was placed upon probation by the Court in the above entitled cause on _____, after having been found guilty of _____.

2. That by the terms of the probation established herein, it was required that:_____ _____.

3. That the probationer has violated the terms of the probation established herein in that: _____ _ _____.

4. That is a risk of the probationer fleeing the jurisdiction or causing harm to others because of the following reasons: _____ _____ _____.

WHEREFORE, Petitioner request that the court order a warrant [a summons] issued so as to cause the probationer to be brought or to appeal before the Court for hearing upon this petition, to be served upon probationer residing at_____ _____.

I affirm under the penalties of perjury that the foregoing representations and statements are true.

Dated: _____

_____
Probation Officer

The undersigned has examined the petition and requests that the petition be filed, and states that the State of Indiana desires to prosecute the petition.

Dated: _____

_____
[Deputy] Prosecuting Attorney

77.00.000 Post-Trial Proceedings Contents

77.01.000 Motion to correct erroneous sentence
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FORMS

77.02.500 Order setting modification hearing
77.02.525 Order for sentence modification

77.00.000 Post-Trial Proceedings

77.01.000 **Motion to correct erroneous sentence -** An erroneous sentence does not render a sentence void. The sentence may be corrected after written notice to the defendant. The defendant and counsel must be present when the sentence is ordered corrected. A motion to correct an erroneous sentence must be in writing and supported by a memorandum. Ind. Code 35-38-1-15.

77.01.005 **Motion to correct fundamental errors -** The motion to correct erroneous sentence is to raise errors that on appeal a court would find fundamental and would correct *sua sponte*, such as violation of express statutory authority. *Gaddie v. State*, 566 N.E.2d 535 (Ind. 1991); *Jones v. State*, 544 N.E.2d 492 (Ind. 1989).

77.01.020 **Service of sentence does not moot issue -** Courts are duty found to correct an erroneous sentence even after the defendant is no longer subject to the sentence. *Sinn v. State*, 609 N.E.2d 434 (Ind. Ct. App. 1993).

77.01.040 **Defendant to be present** - The defendant is entitled to be present when the court corrects the sentence. *Edwards v. State*, 518 N.E.2d 1137 (Ind. Ct. App. 1988).

77.01.050 **May result in increased sentence -** The court may correct an erroneous sentence even when it results in an increased sentence and the sentence has already been partially executed. *Niece v. State*, 456 N.E.2d 1081 (Ind. Ct. App. 1983).

77.01.075 **Method of disposition irrelevant -** An erroneous sentence may be corrected regardless of whether it has been imposed following a guilty plea or a trial. *Niece v. State*, 456 N.E.2d 1081 (Ind. Ct. App. 1983).

77.01.085 **Court should permit withdrawal of sentence bargain plea** - Where the defendant has entered a plea pursuant to an agreement which calls for a suspended sentence which the court could not grant, based upon voluntariness the court should permit the plea to be withdrawn. *Niece v. State*, 456 N.E.2d 1081 (Ind. Ct. App. 1983).

77.01.100 **No time restrictions -** A motion to correct an erroneous sentence is exempt from the requirement that hearings for post-conviction relief must be set within 30 days. *State ex rel. Gordon v. Vanderburgh Circuit Court*, 616 N.E.2d 8 (Ind. 1993).

77.01.120 **Not subject to prosecutors objection after one year -** The statutory limitation which permits the prosecutor to veto a sentence modification does not apply to the correction of an erroneous sentence. *Beliles v. State*, 663 N.E.2d 1168 (Ind. Ct. App. 1996).

77.01.150 **Motion to correct erroneous sentence to be written - A** motion to correct erroneous sentence must be in writing and supported by a memorandum of law. Ind. Code 35-38-1-15.

77.01.160 **Must file motion to bring before court -** The State may not address an erroneous sentence on the defendants appeal but must file the proper written motion along with a written memorandum. *Griffin v. State*, 493 N.E.2d 439 (Ind. 1986); *Thompson v. State*, 270 Ind. 677, 389 N.E.2d 274 (1979).

77.01.200 **May use post-conviction relief as alternative** - A defendant may utilize either procedures to correct an erroneous sentence or post conviction procedures if the defendant believes an erroneous sentence has been imposed. *Thompson v. State*, 389 N.E.2d 274 (Ind. 1979).

77.01.225 **Post-sentence matters are not relevant -** The defendants behavior subsequent to sentencing is not a proper consideration in a petition to correct an erroneous sentence. *Edwards v. State*, 518 N.E.2d 1127 (Ind. Ct. App. 1988).

77.01.250 **Motion to correct fundamental errors -** The procedure to correct an erroneous sentence is limited to a sentence that is erroneous on its face, in violation of express statutory authority or erroneous interpretation of the statutory penalty. *Beliles v. State*, 663 N.E.2d 1168 (Ind. Ct. App. 1996).

77.01.270 **Not to attack habitual offender enhancement -** A motion to correct an erroneous sentence was improper to challenge a habitual offender enhancement. The dismissal of the motion is without prejudice to any post-conviction claim. *Poore v. State*, 613 N.E.2d 478 (Ind. Ct. App. 1993).

77.01.280 **Notice of correction to department of correction-** When the court corrects a sentence and the person is to be incarcerated by the department of correction, the court shall immediately send certified copies of the corrected or modified sentence to the department of correction. Ind. Code 35-38-1-16.

77.01.700 **No hearing required to correct clerical error -** Correction of a clerical error does not require a hearing and may be done by a nunc pro tunc entry. *Beliles v. State*, 663 N.E.2d 1168 (Ind. Ct. App. 1996).

77.02.000 **Modification of Sentence -** Statute allows the convicted defendant to petition the sentencing court to reduce or suspend a sentence under specified circumstances. I.C. 35-38-1-17. Amendments to the modification statute in 2014 and 2015 have raised issues about the appropriate version of the statute to apply depending on the date the crime was committed and the date the modification petition was filed. The following chart summarizes the pertinent changes in the statute:

Effective Date	Basic Remedy
Before 7-01-14	State's consent to a modification not required if petition is filed within 365 days of sentence; State's consent is required if petition filed more than 365 days after sentencing
7-01-14 until 5-05-15	State's consent not required for any modification petition, whether filed within or after 365 days of sentencing
5-05-15	Amendment expressly provides that the statute as changed applies to petitions to modify sentences for crimes committed before or after 7-01-14. State's consent not

	required for any modification petition whether filed before or after 365 days of sentencing, unless petitioner is a "violent criminal" as defined in the statute in which case one petition may be filed without State consent if petition is filed within 365 days after sentencing; after 365 days from sentencing no "violent criminal's" petition may be filed without State's consent

The modification statute proves that the court may reduce or suspend a sentence if: (1) it does so with the State's consent where required; (2) after a hearing at which the defendant is present and of which the prosecutor is given notice; and (3) after the court obtains a report from the department of correction concerning the defendants behavior while imprisoned. The court may not reduce or suspend a nonsuspendable sentence. The court may summarily deny a request to reduce or suspend a sentence without making findings. Ind. Code 35-38-1-17.

77.02.003 **Cases on 2014 Modification Changes' Application to Earlier Crimes -** As of August 2015, Court of Appeals decisions had split, 3 to 1, as to whether the 2014 abolition of requirements for State's consent applies to petitions to modify sentences for crimes committed prior to July 1, 2014; on August 13, 2015 the Supreme Court denied petitions for transfer in two of the three cases which had held that the 2014 amendment of the statute does not apply to petitions to modify for crimes committed before July 1, 2014. *Carr v. State*, 33 N.E.3d (Ind. Ct. App. May 12, 2015), *trans. denied Aug. 13, 2015; Swallows v. State*, 31 N.E.3d 544 (Ind. Ct. App. April 30, 2015), *trans. denied Aug. 13, 2015.*

77.02.005 **Does 2015 Retroactivity Amendment Apply to Petitions Filed Before Effective Date –** Effective 5-05-15, the modification statute was amended to provide that the 2014 changes apply to crimes committed prior to 7-01-14. For petitions filed before the 5-05-15 effective date, there is a question whether the new retroactivity provision applies to them. As of December 2015, there have been no published decisions clearly addressing the issue. But see *Johnson v. State*, 36 N.E.3d 1130, 1137, n. 5 (Ind. Ct. App. 2015) (petition filed in 2013 but not heard until August 2014; 2015 amendment noted, but as it "did not become effective until May 5, 2015, it is not applicable to this case").

77.02.007 **"Violent Criminal" Consent Requirement Issue –** The sentence modification amendments effective 5-05-15 expressly provide that State's consent is not required for petitions to modify sentences for crimes committed prior to July 1, 2014, unless the petitioner's crime makes him a "violent criminal." The "violent criminal" definition in the 5-05-15 legislation lists a number of offenses by name without referring to their Levels or former Class. Those offenses would thus appear to make the offender a "violent criminal" whether the listed offense was committed before July 1, 2014 and hence was a "Class" category of felony or instead was committed on or after July 1, 2014 so that it accordingly was a "Level" category of felony. But in contrast a few "violent criminal" offenses, listed in 35-38-1-17(d)(11) to (13), are identified by their "Level," which would, at least literally, confine them to crimes committed on or after July 1, 2014. Thus, for example, a Class B armed robbery committed June 30, 2014 would not be a "violent crime" for which the State must consent to modification, but a Level 3 armed robbery committed a day later, July 1, 2014, would be a "violent crime"

requiring State consent. The Benchbook Committee notes the issue but takes no position on its proper resolution.

77.02.010 **Right to File Modification Cannot Be Waived -** Any waiver in a plea agreement of the right to seek a sentence modification violates public policy and is unenforceable. I.C. 35-38-1-17(l). The Benchbook Committee notes it is an open issue whether this statutory policy against waivers of the modification remedy will apply to plea agreement waivers of modification accepted prior to the policy's effective date of July 1, 2014, given the adoption effective May 5, 2015 of I.C. 35-38-1-17(a) which provides that the modification remedy applies retroactively "[n]otwithstanding" the I.C. 1-1-5.5-21 savings statute.

77.02.025 **No Inherent Power to Modify -** A trial court does not have inherent power to modify a sentence. *Wilson v. State*, 688 N.E.2d 1293 (Ind. Ct. App. 1997).

77.02.050 **Modifying Court Must Follow Statute -** When the court did not give notice to the victims and had not obtained a report from the department of correction, the court lacked authority to modify the sentence. *Johnston v. State*, 702 N.E.2d 1085 (Ind. Ct. App. 1998).

77.02.060 **Limit on Number of Petitions -** Statute allows a nonviolent criminal to file only one petition every 365 days, and only two petitions during any consecutive sentence, unless the prosecuting attorney consents to the filing of additional petitions. I.C. 35-38-1-17(j).
Violent criminals may, within 365 days of sentencing, file *one* petition without consent of the prosecuting attorney; all other petitions may be filed only with the prosecuting attorney's consent. I.C. 35-38-1-17(k).

77.02.075 **Decision to Modify is Discretionary -** The fact that rehabilitation has begun does not compel the court to grant a sentence modification. *Marshall v. State*, 563 N.E.2d 1341 (Ind. Ct. App. 1990).

77.02.100 **Modification Before Sentence Starts or After Served Unclear -** Caselaw has not addressed whether current statute allows the court to modify a sentence before it starts to be served or after it has been completed. Under a prior version of the modification statute which provided modification could be sought "after the defendant begins serving his sentence," it was held that the defendant could not seek modification before beginning to serve the sentence, so that modification was not permitted when defendant was serving a different**,** consecutive sentence. *Liggin v. State*, 665 N.E.2d 618 (Ind. Ct. App. 1996). <u>The language on which *Liggin* relied has been removed from the statute.</u>

77.02.120 **Where Required, State's Consent Must Be Given -** The court lacks authority to grant a sentence modification when the State's consent is required and has not been given. See *Schweitzer v. State*, 700 N.E.2d 489 (Ind. Ct. App. 1998).

77.02.150 **State's Veto Power is Constitutional -** The requirement of prosecutorial consent does not violate the defendant's constitutional right to rehabilitation or equal protection. *Schweitzer v. State*, 700 N.E.2d 489 (Ind. Ct. App. 1998); *Beanblossom v. State*, 637 N.E.2d 1345 (Ind. Ct. App. 1994).

77.02.160 **Modification Within Court's Discretion If State's Consent Given -** If the prosecutor's consent is required by statute and the prosecutor acquiesces ~~in~~ to a motion for sentence modification filed after 365 days, the decision to modify lies within the courts discretion. If the prosecutor opposes the motion, the court has no discretion to modify the sentence. See *Sanders v. State*, 638 N.E.2d 840 (Ind. Ct. App. 1994).

77.02.175 **No Sentence Modification Suspension If Sentence Nonsuspendable -** The court may suspend a sentence in a modification only if suspension of sentence is permitted under I.C. 35-50-2-2**.2**. I.C. 35-38-1-17(g).

77.02.200 **Modification Not Permitted Unless Bargain Allows -** When a plea agreement has been accepted, the court may not reduce or modify a sentence unless the agreement specifically permits to the court to so act. *Pannarale v. State*, 638 N.E.2d 1247 (Ind. 1994).

77.02.205 **Modification Permitted If Within Bargain -** The court may reduce or modify a sentence if the plea agreement permitted a range for the sentence term or simply imposed a sentence cap and the reduced or modified sentence is within the range limits or the cap in the agreement. *Pannarale v. State*, 638 N.E.2d 1247 (Ind. 1994).

77.02.220 **May Deny Without Making Findings -** The court may deny a request without making written findings and conclusions. I.C. 35-38-1-17(h).

77.02.225 **Notice to Victim** - The 2014 and 2015 versions of the modification statute, I.C. 35-38-1-17, require the State to give notice to the victim after the State has received notice from the court that a hearing will be held on a modification petition.

77.02.250 **Defendant's Presence for Modification** - The court may not modify a sentence when neither defendant nor defense counsel are in open court, unless the defendant files a waiver of the right to be present . See *Disney v. State*, 441 N.E.2d 489 (Ind. Ct. App. 1982). Statute now provides expressly that the hearing may be waived in writing by defendant if the prosecutor has filed a written agreement to the modification reduction or suspension. Ind. Code 35-38-1-17(i). If the court determines it will deny a modification petition, a hearing is not required for the entry denying the petition. *Reichard v. State*, 510 N.E.2d 163 (Ind. 1987). Note that the statute was silent on this issue when *Reichard* was decided and remains silent now, so that *Reichard* appears to be applicable to both the 2014 and 2015 versions of the modification statute.

77.02.320 **Counsel Need Not Be Present** - Only the presence of the convicted person is required for a modification as opposed to a motion to correct an erroneous sentence where both the convicted person and counsel are required. *Flowers v. State,* 421 N.E.2d 632 (Ind. 1982).

77.02.500 Order setting modification hearing

STATE OF INDIANA

_____ COURT

STATE OF INDIANA
V. CAUSE NO.

ORDER SETTING HEARING ON MODIFICATION OF SENTENCE [Ind. Code 35-38-1-17]

The court, having reviewed defendant's Petition for Sentence Modification and the diagnostic report of the Indiana Department of Correction, now sets hearing for the ___ day of _____, 20__, at o'clock, _M., for a hearing on the defendant's petition.

The clerk is directed to transmit two (2) certified copies of this order to the Sheriff of _____ County, Indiana and one (1) copy of this order to the Superintendent of the Department of Corrections of the State of Indiana.

The Sheriff of _____ County, Indiana shall proceed to the penal institution in which the defendant has been placed by the Department of Correction, then and there take custody of the defendant from the Superintendent of said institution, and thereafter return and produce the defendant in this court for the purpose of this hearing.

SO ORDERED this _____ day of - -, 20__.

Judge

77.02.525 Order for sentence modification

STATE OF INDIANA

_____ COURT

STATE OF INDIANA
V. CAUSE NO.

ORDER FOR MODIFICATION OF SENTENCE (SUSPENSION)

The State of Indiana appears by _____, Deputy/Prosecuting Attorney. The defendant, _____, appears in person, in custody, and by _____, attorney for the defendant.

Hearing was held to determine whether the court should suspend further execution for the sentence of imprisonment. The court finds that by reason of the character of the defendant and the facts and circumstances surrounding the commission of the crime, the interest of society does not demand or require that the defendant shall suffer further imprisonment.

The court therefore finds that the further execution of the sentence of imprisonment herein be suspended during defendant's good behavior and so long as he/she complies with all terms and conditions of probation.

The defendant is placed on probation for a period of _____, upon the following terms and conditions: (set out terms)

If the defendant violates any of the terms or conditions of probation within any period of probation, the court may, after hearing, modify or enlarge the conditions of probation or revoke probation and order execution of the suspended sentence.

The defendant is hereby released from custody upon the above terms and conditions.

SO ORDERED this _____ day of _____, 20__.

Judge

80.00.000 Post-Conviction Relief Contents

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80.11.500 Direct Appeal Pending
80.12.000 Bases For Relief
80.12.100 Relief For Constitutional Violations Established After Trial
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80.13.240 Court Should Return Unverified Petition
80.13.300 Second Or Successive Petitions
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80.00.000 Post-Conviction Relief.

80.10.000 Post-Conviction Rule 1

80.11.000 Nature Of Remedy - A Post-Conviction Rule 1 action is a quasi-civil remedy whereby a party can present an error, which was not available or known at the time of the original trial or appeal. *McHugh v. State,* 471 N.E.2d 923 (Ind. 1984). Post-Conviction Rule 1 procedures do not afford a convicted person a "super appeal"; rather, they create a narrower remedy for subsequent collateral challenges to convictions which must be based on grounds enumerated in the Post-Conviction Rules, and issues which were or could have been raised on direct appeal are not available for review. *Weatherford v. State*, 619 N.E.2d 915 (Ind. 1993).

80.11.500 Direct Appeal Pending -When a direct appeal has been perfected and the appellant/defendant wants to raise additional issues outside the record which would obviate the need for continuing the appeal, the appellant/defendant may seek leave from the appellate court to proceed under Post-Conviction Rule 1. *Davis v. State*, 368 N.E.2d 1149 (Ind. Ct. App.1977).

80.12.000 Bases For Relief - Post-Conviction Rule 1 is not a substitute for direct appeal; it may be used to challenge validity of conviction or sentence on the basis of: (1) constitutional violation; (2). Sentencing court without jurisdiction; (3) erroneous sentence; (4) material evidence not presented- [petitioner must establish the evidence was not available at trial and that petitioner used due diligence to discover evidence, Wisehart *v. State*, 693 N.E.2d 23 (Ind.1998)]; (6) unlawful detainment; (7) the conviction is subject to collateral attack; or (8) entitlement to relief based on potentially exculpatory advances in technology which did not exist at the time of the conviction. *Sewell v. State*, 592 N.E.2d 705 (Ind.1992).

80.12.100 Relief For Constitutional Violations Established After Trial - A petitioner may be able to obtain relief on the basis of a constitutional violation established by a decision following conviction. Such a decision may be retroactively applied to petitions if it meets a three step analysis on post-conviction review: (1) is the petitioner's conviction final and not in the appeal process; (2) does the new decision invoked by the petitioner set new precedent; and (3) does the new decision indicate whether it applies retroactively? *Daniels v. State*, 561 N.E.2d 487 (Ind. 1990).

Examples of retroactive analysis:

Abandonment of depraved sexual instinct rule doesn't retroactively apply to post-conviction relief petitions. *Cossel v. State*, 675 N.E. 2d 355 (Ind. Ct. App. 1996).

Controlled excise tax as jeopardy rule of *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995) was not applied retroactively. *Mohler v. State*, 694 N.E.2d 1129 (Ind. 1998).

80.12.200 Post-Conviction Rule 1 Required For Guilty Plea Challenges - A conviction based upon a guilty plea cannot be challenged by direct appeal; the appropriate

procedure is the Post-Conviction Rule 1 remedy. *Tumulty v. State*, 666 N.E. 2d 394 (Ind. 1996).

80.13.000 Filing Procedures

80.13.100 Form Requirements - The standard form for Post-Conviction Rule 1 petitions is found in the Appendix to the Rule. The petition must be made under oath and the petitioner must verify the correctness of the petition, the authenticity of all attached documents and exhibits, and the fact that every ground for relief has been included. Post-Conviction Rule 1, § 3(b).

80.13.200 Petition Averments - Post-Conviction Rule 1 proceedings are commenced by filing three copies of a verified petition with the clerk of the Court where the conviction took place; no deposit or filing fee is required; the clerk is to deliver a copy of the petition to the prosecutor. Post-Conviction Rule 1, § 2 and 3.

80.13.220 Petition's Lack Of Verification -The requirement of verification is not "Jurisdictional", and if the state fails to object to the absence of verification the defect is waived. *Brown v. State*, 458 N.E.2d 245 (Ind. Ct. App.1983).

80.13.240 Court Should Return Unverified Petition - The trial court should return a petition filed without the required verification that every ground for relief is included, but if the court proceeds to reach the merits of the petition, the petitioner is not barred from raising in a subsequent petition grounds for relief which should have been included in the earlier petition. *Barnes v. State*, 496 N.E.2d 816 (Ind. Ct. App.1986).

80.13.300 Second Or Successive Petitions - A second or successive petition may not be filed with the trial court; Post-Conviction Rule 1, § 12 requires such petitions to be filed with the Court of Appeals in a special format, from which the Court of Appeals determines whether the petition must be referred to the trial court for trial.

80.13.320 Summary Disposition Of Second Or Successive Petitions - A successive petition referred to a trial court by the Court of Appeals may be disposed of in appropriate cases without a hearing, based on the amendment of Post-Conviction Rule 1, § 12(c) to remove the phrase that the petition is referred "for a hearing on the issues presented in the petition" and replacing it with "for consideration pursuant to this rule". Post-Conviction Rule 1, § 12(c) (1998). Amendment appears intended to avoid holding in *Everroad v. State*, 678 N.E.2d 1135 (Ind. Ct. App. 1997), which held that the pre-amendment Rule required a hearing on every successive petition referred by the appellate court.

80.13.400 Amendment or Withdrawal Of Petition - "At any time prior to entry of judgment the court may grant leave to withdraw the petition, and the petitioner shall be given leave to amend the petition as a matter of right". Post-Conviction Rule 1, § 4(c). The Rule confers a conditional right to withdraw and an absolute right for petitioner to amend. *Neeley v. State*, 382 N.E.2d 714 (Ind. 1978), *overruled on other grounds*, *German v. State*, 428 N.E.2d 234 (Ind. 1981).

80.14.000 **No Constitutional Right To Counsel** - The Due Process and the Equal Protection guarantees of the federal Constitution and the Indiana Constitution do not confer a right to counsel in post-conviction proceedings. *Von Hagel V. State*, 568 N.E.2d 1014 (Ind. Ct. App.1990).

80.14.200 **Statutory Right To State Public Defender** - Petitioner may proceed with retained counsel or proceed pro se, but the trial court is not required to appoint any counsel other than the public defender. Post-Conviction Rule 1, § 9(a). If counsel withdraws, the petitioner retains the right to proceed pro se and in forma pauperis if indigent, and the trial court may order the public defender to represent the petitioner if the court makes a preliminary finding that the proceedings are meritorious and in the interests of justice. Post-Conviction Rule 1, § 5(e).

80.14.220 **Determination Of Indigency** - When a petition is filed with an affidavit of indigency, and the court determines that the petitioner is indigent, it shall allow the petitioner to proceed in forma pauperis and, if it also finds that the petitioner is incarcerated in the department of correction, it shall order a copy of the petition to be sent to the state public defender's office. Post-Conviction Rule 1, § 2(b).

80.14.250 **Public Defender Discretion To Withdraw** - The State Public Defender may represent a petitioner committed to the department of corrections if the public defender determines the proceedings are meritorious and in the interests of justice; the public defender is not required to represent petitioners in any case in which the conviction or sentence being challenged "has no present penal consequences". Post-Conviction Rule 1, § 9(a).

If counsel determines that the proceeding is not meritorious or in the interests of justice, either before or after an evidentiary hearing is held, counsel may file a withdrawal with the court certifying: (1) that the petitioner has been consulted regarding grounds for relief in the petition as initially submitted by petitioner and any other possible grounds; and (2) that appropriate investigation has been conducted. After counsel withdraws, the petitioner has the right to proceed pro se and in forma pauperis if indigent. Post-Conviction Rule 1, § 9(c).

80.14.300 **Pro Se Petitioner** - A petitioner has the right to proceed pro se and in forma pauperis if indigent. Post-Conviction Rule 1, § 9(c).

80.14.310 **No Right To Be Present By Pro Se Petitioner** - A pro se petitioner has no right to be present in court to litigate the petition, and the court may order the cause submitted on affidavit and not order the petitioner's personal presence unless it is required for a full and fair determination of the issues raised at an evidentiary hearing. Post-Conviction Rule 1, § 9(b).

80.14.680 **Law Issues Versus Fact Issues** – Post-Conviction 1 dispenses with the need for an evidentiary hearing when the issues raised are of law only, but when the determination of the petition depends, in whole or part, upon facts not resolved, a hearing is required even though it appears unlikely that the petitioner will be able to produce evidence sufficient to establish the claim. *Armstead v. State*, 596 N.E.2d 291 (Ind. Ct. App.1992). *See, e.g., Joseph v. State*, 603 N.E.2d 873 Ind. Ct. App. 1992) when the State raises the affirmative defense of laches, the petitioner is entitled to an evidentiary hearing upon the issue.

80.15.000 Pre-Hearing Procedures

80.15.100 Petitioner's Subpoena Procedures - To obtain subpoenas for witnesses, the pro se petitioner must send a subpoena request to the court with an affidavit specifically stating the reason the witness' testimony is required and the substance of the expected testimony; if the court finds the testimony would be "relevant and probative" it "shall order" the subpoena to be issued, but if not the court "shall enter a finding on the record and refuse to issue the subpoena". Post-Conviction Rule 1 § 9(b).

80.15.200 Transcripts - Pro se indigent petitioners "shall be entitled to production of guilty plea and sentencing transcripts at public expense, prior to a hearing, if the petition is not dismissed", and such petitioners are also entitled to a free transcript of the post-conviction proceeding to appeal the denial or dismissal of their petitions. Post-Conviction Rule 1 § 9(b).

80.15.500 Change Of Judge - A petitioner has a right conferred by the Rule to seek a change of judge. Post-Conviction Rule 1 § 4(b)

80.15.540 Change Of Judge Time Limits And Affidavit Requirement - Within ten days of the filing of the petition, or for good cause shown, a change of judge may be obtained if an affidavit is filed stating the facts and reasons for petitioner's belief that the judge has a personal bias or prejudice against the petitioner. If petitioner is represented by counsel, the affidavit shall also be accompanied by a certificate of counsel's good faith belief that the historical facts recited in the affidavit are true. Post-Conviction Rule 1 § 4(b).

80.15.580 Burden Required For Change Of Judge – "The provisions for change of judge in post-conviction cases are neither 'automatic' as might be said under Indiana Trial Rule 76(B) nor 'discretionary' as under Indiana Criminal Rule 13. Instead . . . the rule requires the judge to examine the affidavit, treat the historical facts recited in the affidavit as true, and determine whether these facts support a rational inference of bias or prejudice." *State ex rel. Whitehead v. Madison County Circuit Court*, 626 N.E.2d 802, 803 (Ind. 1993).

80.16.400 Affirmative Defenses Waived By State's Failure To Answer - Failure of the state to raise "affirmative defenses" in an answer generally waives those defenses: See *Mickens v. State*, 596 N.E.2d 1379 (Ind. 1992), *adopting on this point Court of Appeals Mickens* opinion found at 579 N.E.2d 615. Exceptions discussed below under "Affirmative Defenses."

80.17.000 Waiver Or Prior Adjudication - Failure to have raised available issues at trial or on direct appeal is referred to as "waiver" and is an affirmative defense to a petition for post-conviction relief. *Langley v. State*, 267 N.E.2d 538 (Ind. 1971); *Mickens v. State*, 596 N.E. 2d 1379 (Ind. 1992) (*Langley* "remains good law"). But see *Harrington v. State*, 466 N.E.2d 1379 (Ind. Ct. App.1984) (failure of the state to raise an affirmative defense in an answer does not waive the defense if the parties try the defense by consent).

80.17.200 Avoiding Waiver By Showing Ineffective Assistance Of Counsel - A defendant may avoid a waiver assertion based on failure to have raised issues in

a prior post-conviction relief proceeding by showing that counsel in that proceeding was not effective: if counsel appeared in the prior Post-Conviction Rule proceeding and represented the petitioner in a procedurally fair setting, a special standard is used to determine whether the prior counsel's representation was ineffective. *Hendrix v. State*, 557 N.E.2d 1012 (Ind. 1990).

80.17.400 **Burden Of Proof - Res Judicata** - The express resolution of an issue on direct appeal is "prior adjudication" or res judicata and is an affirmative defense in a post-conviction relief petition.

80.17.440 **State Must Raise And Prove Waiver** - The burden of raising waiver or prior adjudication by a preponderance of the evidence rests upon the state, and if the state litigates (or the trial judge without objection by the state resolves) the petition on its merits without addressing waiver or prior adjudication, the appellate court will review on the merits. *Gross v. State*, 320 N.E.2d 817 (Ind. Ct. App.1974). *But see Williams v. State*, 489 N.E.2d 594 (Ind. Ct. App.1986) ("we agree that the defense of res judicata, or prior adjudication, must be interposed by the State or the court").

80.17.460 **Court Notice Of Waived Issues In Direct Appeal** - Although the burden to raise the defense of waiver is normally on the state, the post-conviction court may judicially notice a prior appellate decision in the case and find that specific appealable issues were waived because not properly raised in the appeal. *Lindley v. State*, 426 N.E. 2d 398 (Ind. 1981).

80.17.480 **"Fundamental Error" Exception To Waiver Defense** - The defense of waiver does not apply to errors which are "fundamental" but the petitioner must raise those errors "within the rules of post-conviction procedure" by raising them in the petition and complying with the post-conviction rules in all other respects. *Bailey v. State*, 472 N.E.2d 1260 (Ind. 1985); *Swallows v. State*, 674 N.E.2d 1317 (Ind. 1996).

Omission of specific intent element of attempted murder instruction was not fundamental error if there was no issue at trial as to defendant's intent. *State v. Winders*, 678 N.E.2d 415 (Ind. Ct. App. 1997), *trans. denied*. Bailiff's failure to transmit questions to judge violated rights of defendant, but error was not fundamental. *Smith v. State*, 678 N.E.2d 1136 (Ind. Ct. App. 1997), *trans. denied*.

Violation of criminal statute of limitations was fundamental error; if information charges offense within limitation period but proof establishes that offense was not committed within statute of limitations, defendant was entitled to discharge. *Smith v. State*, 681 N.E. 2d 687 (Ind. 1997). Error in prima facie (.10%) intoxication instruction was innocuous and did not constitute fundamental error. *Emerson v. State*, 695 N.E. 2d 912(1998), *vacating Smith v. State*, 674 N.E. 2d 217 (Ind. Ct. App. 1996).

[NOTE that there does not appear to have been any Indiana decision as to whether the defense of laches can apply to "fundamental" errors - if defendant unreasonably delayed seeking relief on such errors and the state shows prejudice from the delay, factors which are not entailed in a waiver finding, will the result be different than that for waiver in *Bailey v. State*, 472 N.E.2d 1260 (Ind. 1985)(fundamental error not subject to waiver)?]

80.17.500 **State's Laches Defense** - The State bears the burden of proving the laches defense by a preponderance of the evidence; the state must demonstrate not only that delay in filing the petition was unreasonable but also that the state was prejudiced by the resulting delay. *Gould v. State*, 578 N.E.2d 382 (Ind. Ct. App. 1991).

80.17.520 **Evidence Relevant To Unreasonable Delay Element** - Repeated contact with the criminal justice system, consultation with attorneys, and incarceration in penal institutions with legal facilities can raise an inference of acquiescence in post-conviction remedy inactivity, and the inference may suffice to support the "unreasonable delay" element of laches defense: *Slone v. State*, 590 N.E.2d 635 (Ind. Ct. App. 1992).

80.17.540 **Prejudice Element** - The "prejudice element of the laches defense requires the state to demonstrate that it would be extremely difficult or impossible to retry the petitioner. *Gould v. State*, 578 N.E.2d 382 (Ind. Ct. App.1991).

80.18.000 **Disposition Without Hearing**

80.18.100 **Summary Disposition Improper Prior To Assistance Of Counsel** - Summary denial of an initial pro se petition before petitioner has had a sufficient opportunity to confer with the public defender is inappropriate. *Hamilton v. State*, 618 N.E.2d 52 (Ind. Ct. App. 1993). Post-Conviction Rule 1's provision for counsel for indigents contemplates that the public defender will have time to interview the client, the trial and appellate attorneys, to read appropriate records of the proceedings, and to investigate all relevant legal and factual matters. *Joseph v. State*, 603 N.E.2d 873 (Ind. Ct. App.1992).

80.18.200 **Summmary Disposition If Pleadings Do Not State A Basis For Relief** - If the pleadings show conclusively that the petitioner is entitled to no relief, and the State Public Defender has filed an appearance and 60 days to respond to State's answer, the court may deny the petition without further proceedings. Post-Conviction Rule 1 § 4(f).

80.18.400 **Motion For Summary Disposition** - Either party may move for summary disposition of the petition and the court may grant the motion if it appears from the pleadings, depositions, answers to interrogatories, admissions, stipulations of fact, and any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law; the court may in its discretion order oral argument on the legal issues raised by a motion for summary disposition. Post-Conviction Rule 1 § 4(g).

80.19.000 **Hearing Requirements**

80.19.200 **Hearing-Bench Trial** - The petition is heard without a jury and a record of the proceeding is made.

80.19.300 **Civil Procedure And Evidence Rules Apply** - All rules and statutes applicable in civil proceedings including pre-trial and discovery procedures are available to

the parties. Post-Conviction Rule 1 § 5. The Evidence Rules apply. Ind. Evidence Rule 101(a).

80.19.320 **Use Of Affidavits, Depositions, Testimony And Discovery** - "The court may receive affidavits, depositions, oral testimony, or other evidence and may at its discretion order the applicant brought before it for the hearing." Post-Conviction Rule 1 § 5. The court has substantial discretion as to whether affidavits will be admitted. *See Roche v. State*, 690 N.E.2d 1115 (Ind. 1997).

80.19.340 **Discretion To Authorize New Technology Which May Be Exculpatory -T**he court may order the state to provide the petitioner with information or evidentiary material in its possession needed to make use of new technology. Petitioner was entitled to have a "rape kit" and laboratory records disclosing the rapist's blood type, in order to have DNA testing performed on it, when petitioner's conviction rested largely on identification evidence and when advanced technology could definitively establish petitioner's innocence; rejects "flood of convicted" rapists contention. *Sewell v. State*, 592 N.E.2d 705 (Ind. Ct. App. 1992).

80.19.360 **Petition As Evidence** - The "admission of affidavits into evidence at a post-conviction hearing is a matter left to the sound discretion of the court, subject to the principals of due process". *Gould v. State*, 578 N.E.2d 383 (Ind. Ct. App. 1991).

Even though a post-conviction relief petition was not offered or admitted as evidence, if it was properly verified and treated without objection by the parties as though it had been entered into evidence as an affidavit, it will be so considered on appeal as well. *State v. Cleland*, 477 N.E.2d 537 (Ind. 1985).

80.19.380 **Judicial Notice Of Trial Transcripts** – "[W]e understand amended Evidence Rule 201(b)(5) to allow a post-conviction court to judicially notice the transcript of the evidence from the petitioner's underlying criminal proceedings to appraise counsel's performance and evaluate claims of ineffective assistance." *Mitchell v. State*, 946 N.E.2d 640, 644 (Ind. Ct. App. 2011).

80.19.500 **Petitioner's Preponderance Burden** - The Petitioner has the burden of establishing grounds for relief by a preponderance of the evidence. Post-Conviction Rule 1 § 5.

80.19.600 **Specific Findings Required** - The Post-Conviction Rule 1 trial court must make specific findings of fact and conclusions of law on all issues presented, whether or not a hearing is held. Post-Conviction Rule 1 § 6.

80.19.800 **Order For Relief** - If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to arraignment, retrial, custody, bail, discharge, correction or sentence, or other matters that may be necessary and proper. Post-Conviction Rule 1 § 6.

80.20.000 **Appeal**

80.20.100 **Either Party May Appeal** - Either the petitioner or the state may appeal from the final judgment, under the rules applicable to civil actions. Post-Conviction Rule 1 § 7.

80.20.200 **No Belated Appeal** - The current version of Post-Conviction Rule 2 does not authorize the trial court to grant permission for a belated appeal of the ruling on a Post-Conviction Rule 1 petition; Post-Conviction Rule 2 applies only to direct appeals of convictions, not post-conviction relief petitions. *Sceifers v. State*, 663 N.E.2d 1191 (Ind. Ct. App. 1996).

80.21.000 **Resentencing Limits** - If a sentence is set aside or if the conviction is set aside and the petitioner is convicted following a retrial, the sentencing court may not impose a more severe sentence than the one originally imposed unless: (1) the court finds, relies upon, and states in its sentence identifiable conduct by petitioner which occurred after the original sentence, or (2) a conviction based upon a plea agreement was set aside, the state filed an offer within twenty days of the date the conviction was set aside to abide by the terms of the original plea agreement, but the defendant failed to accept the state's offer within twenty days of the date the offer was made. Post-Conviction Rule 1 § 10.

80.30.000 **Post Conviction Rule 2 - Belated Notice of Appeal Or Motion To Correct Errors**

80.30.100 **Relief Available And Grounds For Obtaining It** - "Where a defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where: (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule." Post-Conviction Rule 2 § 1 and 2.

80.30.200 **Limited To Belated Direct Appeals Of Conviction-** "The 1994 amendments transformed Post-Conviction Rule 2(1) into a 'vehicle for belated direct appeals alone", *Howard v. State*, 653 N.E.2d 1389 (Ind. Ct. App. 1995), so that Post-Conviction Rule 2(1) "does not permit belated consideration of appeals of other post-judgment petitions, such as a belated appeal of the revocation of probation or the denial of credit time following revocation. *Greer v. State*, 685N.E.2d 700 (Ind. 1997).

80.30.300 **Factors Relevant To "Fault" And "Diligence"** - There are no set standards defining fault or diligence, and each case must be resolved on its own facts; matters affecting the determination include the defendant's level of awareness of procedural requirements, age, education, familiarity or past experience with the legal system, whether defendant was informed of his or her appellate rights, and whether defendant committed any act or omission which contributed to the delay. *Long v. State*, 570 N.E.2d 1316 (Ind. Ct. App. 1991). The trial court shall not consider the merits of matters sought to be appealed in making this determination.

80.30.400 **Hearing Discretionary Absent Factual Disputes** - Even though the decision to grant a hearing for a Post-Conviction Rule 2 petitioner is discretionary, a hearing

should be conducted (Sec. 5, Post-Conviction Rule 1) when the petition raises a genuine factual dispute as to the existence of grounds for relief; the trial court may consider its records in determining whether there is such a genuine factual dispute. *Green v. State*, 593 N.E.2d 1237 (Ind. Ct. App. 1992).

80.30.500 **Appeal Of Denial Under Post-Conviction Rule 2** - If the trial court finds no grounds for permitting the filing of a belated notice of appeal, the defendant may appeal such denial by filing a notice of appeal within thirty (30) days of said denial.

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83.70.025	Instruction On Parole Appropriate
83.70.050	Lesser Included Offenses Must Be Instructed On
83.70.060	Lesser Instruction Not Required By Federal Law If Limitations Bar
83.70.100	Instruction On Burden On Each Aggravator And Presumption Of Innocence Not Required
83.70.150	Adequate Instructions Defining Aggravating Circumstance
83.70.400	Mitigating Circumstances Instruction Only If Mitigating Evidence Presented
83.70.500	Presumption Of Innocence Instruction Not Required In Penalty Phase
83.70.520	Instruction Against Decision On Mere Sentiment Permissible
83.70.550	Instruction On Jury As Judges Of Law
83.75.000	Jury Recommendation and Judge Sentencing
83.75.050	Error To Rule Out Discretion of Jury to Not Recommend Death
83.75.100	Jury To Determine Sentence
83.75.150	Sixth Amendment Requires that Jury Find Aggravating Factor
83.75.200	Jury Hung on Aggravator Requires Sentence Phase Mistrial
83.75.250	If Jury Finds Aggravator But Cannot Recommend, Court May Balance Factors and Impose Sentence
83.75.500	Jury May Recommend Death, Life Without Parole, Or Neither

83.85.050	Insufficient Order
83.85.100	General Sentencing Statement Of Reasons Applies
83.90.000	Post-Conviction
83.90.100	Order To Department Of Correction And Copy To Supreme Court
83.90.150	Order Immediate Preparation Of Transcript
83.90.200	Immediate Appointment Of Appellate Counsel
83.90.300	Execution Date One Year From Date Of Judgment Of Conviction
83.90.400	Copy Of Order Setting Execution Date To Supreme Court
83.95.000	Post-Conviction Relief Petition To Be Filed 30 Days After Appeal
83.95.050	Setting Of Post-Conviction Hearing To Be Within 90 Days Of Filing
83.95.100	Prosecutor To Assist Attorney General If Latter Requests It
83.95.500	Court To Enter Findings Within 90 Days After Hearing
83.95.700	Supreme Court Sets Execution Date Following Post-Conviction

83.00.000 Death Penalty

83.01.000 Constitutional Issues

83.01.050 Constitutionality In General - The Indiana death penalty scheme is not unconstitutional. *Games v. State*, 535 N.E.2d 530 (Ind. 1989), *cert. denied*, 493 U.S. 874, 110 S. Ct. 205, 107 L. Ed. 2d 158, *reh'g denied*, 493 U.S. 985, 110 S. Ct. 523, 107 L. Ed. 2d 523 (1989); *Evans v. State*, 563 N.E.2d 1251 (Ind. 1990), *aff'd in part, rev'd in part on other grounds*, 598 N.E.2d 517 (Ind. 1992); *Harrison v. State*, 644 N.E.2d 1243 (Ind. 1995); *Laux v. State*, 821 N.E.2d 816 (Ind. 2005).

83.01.100 Indiana Statute Establishes Adequate Standards - Indiana's death penalty statute establishes definite standards by which Indiana juries are given adequate and specific guidance. *Resnover v. State*, 460 N.E.2d 922 (Ind.), *cert. denied*, 469 U.S. 873, 105 S. Ct. 231, 83 L. Ed. 2d 160 (1984). [Editor's note: This case law applied to the Indiana death penalty statute prior to the most recent amendments.]

83.01.175 Indiana Statute and Indiana Pattern Jury Instructions Require Jury to Specify Aggravating Circumstances – The Indiana death penalty statute requires the Court hearing a capital case to provide the jury with special verdict forms pertaining to each alleged aggravating circumstance. Ind. Code 35-50-2-9(d). Furthermore, the Indiana pattern jury instructions require that the jury sign and return each special verdict form noting whether the jury unanimously agrees that the aggravating circumstance exists.

83.02.000 Life Without Parole For Murders After 6-30-93 - As an alternative sentence in a capital case, life imprisonment without parole is authorized by Ind. Code 35-50-2-9 only for those murders committed after June 30, 1993; and it does not violate Equal Protection or other constitutional provisions for Indiana law to allow for life without parole only for defendants guilty of murders committed after that date. *State v. Alcorn*, 638 N.E.2d 1242 (Ind. 1994).

83.03.000 Application To Accessories - The death sentence may be constitutionally imposed upon one who is an accessory to murder. *Brewer v. State*, 275 Ind. 338, 417 N.E.2d 889 (1981), *cert. denied*, 458 U.S. 1122, 102 S. Ct. 3510, 73 L. Ed. 2d 1384, *rehearing denied*, 458 U.S. 1132, 102 S. Ct. 18, 73 L. Ed. 2d 1403 (1982).

83.03.050 Capital Liability Of Accomplice Depends On His Own Culpability -Although vicarious liability for crimes perpetrated by one's confederates can justify one's conviction for those crimes, the imposition of death upon a vicariously guilty defendant must be based on his culpability, not on that of those who committed the robbery and killed the victims. *Landress v. State*, 600 N.E.2d 938 (Ind. 1992).

83.04.000 No Application To Juveniles 17 Or Under - The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under age eighteen at the time of their offense. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).

83.10.000 **Capital Pleading** - The State may seek either a sentence of death or a sentence of life imprisonment without parole for murder by alleging on a page separate from the rest of the charging instrument at least one of the aggravating circumstances in Ind. Code 35-50-2-9(b). Ind. Code 35-50-2-9(a).

83.11.000 **Prosecutor's Notice To Supreme Court** - After filing a request for the death penalty, the prosecutor must file a copy of the request with the Indiana Supreme Court Administrator. Criminal Rule (24)(A).

83.12.000 **Computer Aided Transcription** - In a capital case, the trial court must provide for stenographic reporting with computer-aided transcription of any matters required to be reported under Criminal Rule 5 (e.g. in C.R. 5, "any and all oral evidence and testimony given in all cases and hearings, including both questions and answers, all rulings of the judge in respect to the admission and rejection of evidence and objections thereto, and any other oral matters occurring during the hearing in any proceeding"). Criminal Rule 24 (D).

83.13.000 **Appointment And Compensation Of Qualified Trial Counsel** - An indigent capital defendant is entitled to appointment of two qualified attorneys in prosecution where death penalty is sought. The provisions of Criminal Rule 24(B) do not apply to capital murder defendants who employ defense counsel at their expense. Criminal Rule 24(B). *Bellmore v. State*, 602 N.E.2d 111 (Ind. 1992), *rehg denied.*

83.13.010 **Constitution Does Not Mandate Two Defense Attorneys -** Constitutional considerations do not necessarily require the appointment of two defense attorneys in a death penalty case. *Marshall v. State*, 621 N.E.2d 308 (Ind. 1993). [Editor's note: In *Marshall*, the Court reasoned that Appellant had failed to show how he was harmed by the fact that he was only represented by one trial counsel and noted that Appellant did not receive the death penalty. That Court also noted that Criminal Rule 24(B) (amended after the trial in *Marshall*) requires the appointment of two qualified attorneys for an indigent defendant.]

83.13.020 **Speedy Trial Motion Displaced By Death Filing -** Defendant is not entitled to choose his Criminal Rule 4(B) 70-day speedy trial right over the Criminal Rule 24 requirement of two court-appointed attorneys qualified under the Rule; a late filing for the death penalty and the need for Criminal Rule 24 counsel and trial preparation may supersede a defendants Criminal Rule 4(B) motion, and the trial date set to accommodate it, if the defendant does not have private counsel and has not waived his right to counsel; the trial court should make a Criminal Rule 4(B) finding of an "emergency" or "congestion" (latter on basis of unavailability of essential personnel - the Criminal Rule 24 attorneys). *Lowrimore v. State*, 728 N.E.2d 860 (Ind. 2000).
Note - even if defendant has retained counsel so that the C.R. 24 court-appointed attorney qualifications do not apply, the "essential personnel" prong of "court congestion" may nonetheless justify setting a date outside the period of defendants C.R. 4(B) 70-day right on the basis that jurors for a capital case are "essential personnel" which cannot be obtained within the C.R. 4(B) period. *See Lowrimore, supra*.

83.13.050 **Counsel Qualifications -** Qualifications for lead and co-counsel for indigent capital defendant. Criminal Rule 24(B)(1) and (2).

83.13.100 **Judges Duty To Assess Appointed Counsels Workload -** The trial judge has a duty to assess an attorney's workload and the impact the appointment to represent an indigent capital defendant at trial will have on it. Criminal Rule 24(B)(3)(b).

83.13.150 **Salaried Or Contract Defenders -** Salaried or contractual public defenders may be appointed to represent an indigent capital defendant if the attorneys workload and trial calendars meet specific limitations set out in C.R. 24. Criminal Rule 24(B)(3)(c).

83.13.200 **Hourly Compensation Rate -** Compensation of hourly rate appointed trial counsel in a capital case is to be based on written claims for services "detailing the date, activity, and time duration for which compensation is sought"; the "trial judge" (also identified in C.R. 24 as the "appointing judge") is to determine the hours "reasonable and necessary for the defense" which will be compensated; appointed counsel shall also be provided with adequate funds for investigation, experts, and other services necessary to prepare and present an adequate defense, as well as "reasonable and necessary incidental expenses;" if counsel appointed is "generally employed" by the court to provide other defense services, the court may adjust the rate of compensation to reflect the limits on case assignment imposed by appointment to the capital case. Criminal Rule 24(C). The hourly rate to be paid to hourly rate appointed counsel is determined by the Division of State Court Administration. Id. The rate from January 1, 2007 through December 31, 2008 has been set by the Division at $101. Check with the Division for trials taking place in 2009 or later.

83.13.250 **Change Of Counsel And Compensation On Change Of Venue –** Statute provides that when a change of county is granted in any criminal case, "the original trial court shall furnish pauper counsel" but the "trial court to which the case was venued" may remove the pauper counsel appointed by the original court and either appoint new pauper counsel, have the original court appoint new counsel, or have the state Public Defender provide counsel; whether the original attorney is kept or replaced, statute appears in all instances to provide that "the original trial court shall determine the amount of the fee and the expenses incurred by the pauper counsel." Ind. Code 35-36-6-9(b) and (c).

83.20.300 **Mental Retardation Death Penalty Prohibition** - Statute provides for a death penalty defendant to have the capital sentence pleading dismissed if the defendant proves to the trial judge that the defendant is a "mentally retarded individual," defined as one "who, before becoming twenty-two (22) years of age, manifests . . . significantly subaverage intellectual functioning and substantial impairment of adaptive behavior that is documented in a court ordered evaluation report." Ind. Code 35-36-9-1 *et seq.*

83.20.310 **Mental Retardation Petition From Defendant Required** - Defendant must file a petition asserting "mentally retarded individual" status "not later than twenty (20) days before the omnibus date." Ind. Code 35-36-9-3.

83.20.320 **Mental Evaluation Required -** The trial court must order an evaluation "for the purpose of providing evidence" as to whether the defendant is a "mentally retarded individual." Ind. Code 35-36-9-3.

83.20.350 **Defense Mental Expert May Be Constitutionally Required -** An indigent defendant may be entitled to the assistance of a defense expert to assist with a "mentally retarded individual" capital proceeding. *Cf. Ake v. Oklahoma*, 470 U.S. 68 (1985) (indigent capital defendant had due process right to state-provided psychiatrist based on defense showing that sanity would be a significant factor in the guilt phase as well as on the dangerousness issue at the penalty phase); *Stevens v. McBride*, 2005 U.S. Dist. LEXIS 745 (N.D. Ind., 2005)

83.20.400 **Defendant Has Burden At Mental Hearing -** There must be a hearing on the petition and the defendant must prove by clear and convincing evidence that the defendant "is a mentally retarded individual." Ind. Code 35-36-9-4.

83.20.450 **Mental Retardation Findings Required -** The court must determine no later than ten days before the "initial trial date" whether the defendant is a "mentally retarded individual" and shall articulate findings supporting its determination. Ind. Code 35-36-9-5.

83.20.500 **Death Penalty Proscribed On Mentally Retarded Finding -** If the court finds the defendant is "mentally retarded," the death penalty pleading shall be dismissed and if the defendant is convicted he may be sentenced only to a fixed term of imprisonment under Ind. Code 35-50-2-3(a). Ind. Code 35-36-9-6 and -7.

83.20.550 **Life Without Parole Proscribed On Mentally Retarded Finding** – Although the pretrial procedure for determination of mental retardation in capital cases only explicitly refers to death penalty cases, it applies equally to life without parole cases. *Smallwood v. State*, 773 N.E. 2d 259, 262 (Ind. 2002).

83.25.000 **Pleas**

83.25.100 **Guilty But Mentally Ill -** Trial court's imposition of the death penalty after accepting the plea of guilty but mentally ill to charges of murder, kidnapping and rape did not violate any statutory right to treatment or the eighth amendment prohibition against cruel and unusual punishment. *Harris v. State*, 499 N.E.2d 723 (Ind. 1986), *cert. denied*, 482 U.S. 909, 107 S. Ct. 2490, 96 L. Ed. 2d 382 (1987). See also *Matheney v. State*, 833 N.E. 2d 454, 457 (2005).

83.25.200 **Guilty Plea** - In a capital case, a trial court abuses its discretion when it fails to set aside a guilty plea when the defendant denies criminal intent at sentencing. *Patton v. State*, 517 N.E.2d 374 (Ind. 1987); *Trueblood v. State*, 587 N.E. 2d 105 (Ind. 1992); *Carter v. State*, 739 N.E. 2d 126 (Ind. 2000).

83.25.300 **Plea Agreement For Death Penalty -** Indiana statutes do not prohibit negotiated plea agreements for a defendant to receive the death penalty. A trial court must make the findings specified in the death penalty statute before it may approve an agreement calling for death. The court must also find the defendant competent to make the plea agreement, and, as in this case in which the defendant preferred death to the "slow death" of life without parole, a court can conclude

that a defendant's decision to make a plea agreement for death was a rational, voluntary decision. *Smith v. State*, 686 N.E.2d 1264 (Ind.1997).

83.30.000 Jury Issues

83.30.050 Defendants Right To Have Sequestration - The defendant in a capital case has the right to have the jury sequestered during the trial upon timely demand. *Lowery v. State*, 434 N.E.2d 868 (Ind. 1982); *Johnson v. State*, 749 N.E. 2d 1103, 1107 (Ind. 2001).

83.30.100 No Right To Sequestering As Jurors Are Accepted - In a capital case, the defendant is not entitled to have jurors sequestered as they are accepted. *Baird v. State*, 604 N.E. 2d 1170 (Ind. 1992).

83.30.150 Sequestration Not Usually Required During Voir Dire - Murder defendant was not entitled to have prospective jurors separated during *voir dire* absent allegation or proof of highly unusual circumstances. *Concepcion v. State*, 567 N.E.2d 784 (Ind. 1991).

83.35.100 Twelve Jurors Required - Unless the defendant and the state agree to a lesser number, the jury in a capital case shall consist of 12 jurors. Ind. Code 35-37-1-1.

83.35.150 Peremptory Challenges - In a capital case, the defendant and the state are each entitled to twenty peremptory challenges. Ind. Code 35-37-1-3 and Ind. Code 35-37-1-4; Jury Rule 18.

83.36.000 Challenge For Cause For Opposition To Death Penalty - A juror may be challenged for cause on the grounds he or she entertains such conscientious opinions as would preclude his or her recommending that the death penalty be imposed. Ind. Code 35-37-1-5(a)(3).

83.36.025 Constitutional Standard For Dismissal For Cause For Opposition - The U.S. Constitution permits a juror in a capital case to be dismissed for cause if the jurors views on the death penalty would prevent or substantially impair the performance of the jurors duties in accordance with the jurors oath and the courts instructions. *Wainright v. Witt*, 469 U.S. 412 (1985).

83.36.050 "Death Qualified" Jury Not Unconstitutional - A "death qualified" jury, from which jurors have been removed for cause due to their inability to obey their oath and the court's instructions because of their views on the death penalty, does not violate a capital defendant's Seventh Amendment right to trial by jury. *Lockhart v. McCree*, 476 U.S. 162 (1986). *See also Evans v. State*, 563 N.E.2d 1251 (Ind. 1990).

83.36.100 Unequivocal Refusal To Recommend Death Required - Only if jurors state without equivocation or self-contradiction that they would not vote for death in any case, can jurors be excluded on basis of jurors opinion of the death penalty. *Baird v. State*, 604 N.E.2d 1170 (Ind. 1992). *See also Benirschke v. State*, 577 N.E.2d 576 (Ind. 1991).

83.36.125 **Juror Views Must Prevent Or Impair Ability To Perform -** Test for exclusion for cause of juror opposed to capital punishment is whether jurors views would prevent or substantially impair performance of his or her duties as a juror in accordance with his or her instructions and oath. *Benirschke v. State*, 577 N.E.2d 576 (Ind. 1991).

83.36.150 **Particular Procedure Not Required For Death-Qualification** - There need be no ritualistic adherence to the requirement that a prospective juror make it unmistakably clear that he or she would automatically vote against imposition of the death penalty in order to excuse prospective juror for opposition to the death penalty. *Davis v. State*, 598 N.E.2d 1041 (Ind. 1992).

83.36.200 **Death Qualification Not Equivalent To Extra Peremptories -**Excusing jurors for cause under "death qualification" standard was not the same as providing the State with additional peremptory challenges, and thus there was no violation of defendant's due process and equal protection rights by such practice. *Cox v. State*, 475 N.E.2d 664 (Ind. 1985).

83.36.225 **Cross-Exam Of Unequivocal Objectors Not Required -** Failure to permit defendant to cross-examine prospective jurors excused for cause because of their objections to the death penalty did not violate defendant's due process rights. *Hoskins v. State*, 441 N.E.2d 419 (Ind. 1982).

83.36.250 **Statute Need Not Mandate Removal Of "Automatic" Capital Juror –**Ind. Code 35-50-2-9 is not unconstitutional because it does not require removal of any juror who says he will automatically vote to impose the death penalty following conviction. The statute does not permit an automatic recommendation of death. It mandates a procedure where juries must apply a high standard of proof of aggravation as a threshold matter and then weigh countervailing circumstances against it. It is highly unlikely that a trial court would permit a juror to serve who states that he or she could not follow the law. *Burris v. State*, 465 N.E.2d 171 (Ind. 1984), *cert. denied*, 469 U.S. 1132, 105 S. Ct. 816, 83 L. Ed. 2d 809 (1985).

83.37.000 **Racial Bias Voir Dire For Interracial Capital Case -** A capital defendant accused of an interracial murder has a Sixth Amendment right to have the prospective jurors informed of the victims race and questioned regarding racial bias. *Turner v. Murray*, 476 U.S. 28 (1986); *Roach v. State*, 624 N.E. 2d 524 (Ind. Ct. App., 1993).

83.38.000 **No Right To Voir Dire Jurors One At A Time -** Defendant in death penalty case is not entitled to individualized, sequestered *voir dire* of prospective jurors, absent evidence in record of highly unusual or potentially damaging circumstances from conduct of *voir dire* in presence of other jurors and press. *Conner v. State*, 580 N.E.2d 214 (Ind. 1991).

83.50.000 **Aggravating and Mitigating Factors**

83.50.100 **Only Statutory Aggravating Circumstances Permitted** - When the death sentence is sought, courts must limit the aggravating circumstances eligible for

consideration to those specified in the death penalty statute, Ind. Code 35-50-2-9(b). *Bivins v. State*, 642 N.E.2d 928, 955-956 (Ind. 1994) (*overruling Minnick v. State*, 544 N.E.2d 471 (Ind. 1989) which held court may consider the aggravating factors in the general sentencing statute once the alleged death penalty statutory aggravating factor is found).

83.50.200 **Pleading And Proof** - In seeking the death penalty under Indiana law, the state must allege and prove beyond a reasonable doubt the existence of at least one aggravating circumstances. *Bivins v. State,* 642 N.E.2d 928 (Ind. 1994).

83.50.250 **Unrelated Murders Without Conviction Impermissible Aggravator -** The State may not use an unrelated murder not reduced to conviction as an aggravating circumstance. *State v. McCormick*, 272 Ind. 272, 397 N.E.2d 276 (1979). [Editor's Note: *McCormick* was questioned in *Groves v. State*, 787 N.E. 2d 401 (Ind. Ct. App., 2003) (a case involving an interlocutory appeal by the State in order to determine the meaning of the word "unrelated").]

83.50.255 **Unrelated Murder Reduced To Conviction -** The aggravator in Ind. Code 35-50-2-9(b)(7) contemplates the situation in which the defendant has committed a murder unrelated to the principal murder charged, for which he has already been tried and convicted in a separate proceeding. *Hough v. State*, 560 N.E.2d 511 (Ind. 1990).

83.50.260 **Multiple Related Murders Need Not Be Reduced To Conviction -** Allowing consideration of the aggravating circumstance of multiple related murders, unlike the use of Ind. Code 35-50-2-9(b)(8) when the additional murder is unrelated to the instant murder and has not been reduced to a conviction, does not deprive a defendant of equal protection. *Townsend v. State*, 533 N.E.2d 1215 (Ind. 1989), *cert. denied*, 494 U.S. 1020, 496 U.S. 931, *reh'g denied*, 497 U.S. 1047 (1990).

83.50.300 **Enumerated Felony Aggravator** - The substantially contemporaneous presence of the intent to kill and the intent to commit one of the serious enumerated felonies in subsection (b)(1) is the gravamen of this aggravating circumstance, and it serves to place the person convicted of murder as an initial matter in the class of those who are subject to the death sentence. It is not unconstitutional. *Woods v. State*, 547 N.E.2d 772 (Ind. 1989), *cert. denied*, 501 U.S. 1259 (1991).

83.50.500 **Lying In Wait Definition** - The elements of lying in wait include watching, waiting, and concealment from the person killed. *Matheney v. State*, 583 N.E.2d 1202 (Ind. 1992), *cert. denied*, 504 U.S. 962, 112 S. Ct. 2320, 119 L. Ed. 2d 238 (1992); *Ingle v. State*, 746 N.E. 2d 927 (Ind. 2001).

83.50.600 **Murder Of Law Enforcement Officer** - The Ind. Code 35-50-2-9 (b)(6) aggravator is not constitutionally applied where the evidence clearly establishes that the defendant had the ability and timely opportunity to ascertain that his victim was a law enforcement officer acting in the course of his duty as previously held in *Moore v. State*, 479 N.E.2d 1264 (Ind.), *cert. denied*, 474 U.S. 1026, 106 S. Ct. 583, 88 L. Ed. 2d 565 (1985). "A defendant can only be sentenced to death for murdering a law enforcement officer if the trier of fact is convinced beyond a reasonable doubt that, at the time of the shooting, the defendant knew

that he was shooting at a law enforcement officer." *Castor v. State*, 587 N.E.2d 1281, 1290 (Ind. 1992); see also *Stevens v. State*, 691 N.E.2d 412, 427 (Ind. 1997) (noting that, "without specifically overruling *Moore*, a bare majority of this Court determined that the aggravator required 'actual knowledge' on the part of the defendant, rather than the lesser 'should have known' standard.").

83.55.000 **Sentencing Hearing - Jury Or Bench -** If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. Ind. Code 35-50-2-9(d).

83.55.025 **No Infirmity In States Opening And Closing** - The capital sentencing statute is not unconstitutional because the state is permitted to open and close final argument, as per Ind. Code 35-37-2-2. It is well-established procedure in this and most other jurisdictions that the party having the burden of proof opens and closes argument, and the sentencing in a death penalty case is no different than any other phase of that case or in fact of any other litigation as to the procedure to be followed concerning those having the burden of proof. *Miller v. State*, 623 N.E.2d 403 (Ind. 1993).

83.55.100 **Weight For Aggravators And Mitigators Not A "Fact" and Need Not Be Found Beyond A Reasonable Doubt** - The determination of the weight to be accorded the aggravating and mitigating circumstances is not a "fact" which must be proved beyond a reasonable doubt but is a balancing process; the Indiana death penalty statute does not shift the factual burden of proof in violation of the Eighth and Fourteenth Amendments. *Bivins v. State*, 642 N.E.2d 928 (Ind. 1994); *Losch v. State*, 834 N.E. 2d 1012 (Ind. 2005). Because there is no constitutional requirement that the weighing factor be found beyond a reasonable doubt, the omission of such a requirement in the Indiana death penalty statute does not violate the constitution. *State v. Barker*, 809 N.E.2d 312, 315 (Ind., 2004)

83.55.200 **No Infirmity In Having Guilt Jury Make Sentencing Recommendation** There is no error in submitting the question of capital sentencing to the same jury that heard the guilt phase of the trial. *Smith v. State*, 465 N.E.2d 1105 (Ind. 1984). The amended Indiana death penalty statute requires that the same jury that heard the guilt phase of the trial must hear the sentencing phase of the trial. Ind. Code 35-50-2-9(d).

83.60.010 **All Trial Evidence May Be Considered At Sentence Hearing** - The jury or the court may consider all evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. Ind. Code 35-50-2-9(d).

83.60.050 **Defendants Trial Testimony May Be Considered At Sentencing** - When testimony which defendant gave at trial is used again at the sentencing hearing, there is no violation of any constitutional right since the issue of guilt or innocence has already been determined. *Dillon v. State*, 454 N.E.2d 845 (Ind. 1983), *cert. denied*, 465 U.S. 1109 (1984).

83.60.075 **Confrontation Not Violated By Guilty Plea Hearing Evidence** - The Sixth Amendment's right to confront adverse witnesses was not violated by the incorporation of evidence from the guilty plea hearing, including the presentence report, into the record of the sentencing hearing. The defendant was given the opportunity to rebut any and all of the matters contained in the report and, by pleading guilty, he waived his sixth amendment right. *Moore v. State*, 479 N.E.2d 1264, 1280 (Ind. 1985), *cert. denied*, 474 U.S. 1026 (1985).

83.60.100 **Victim Impact Must Be Relevant To Aggravator Or Mitigator** - While victim-impact statements are not barred *per se* by the U.S. Constitution as evidence in capital cases, *Payne v. Tennessee*, 501 U.S. 808 (1992) (holding that such evidence is improper to use as an aggravating factor); under the Indiana Constitution victim-impact statements are admissible only to the extent they are relevant to the statutory aggravating and mitigating death penalty factors. *Bivins v. State*, 642 N.E. 928 (Ind. 1994). [Editor's note: Under the current Indiana death penalty statute, a single victim impact statement is allowed after the court pronounces the sentence. Ind. Code 35-50-2-9(e).]

83.65.000 **Mitigating Circumstances** - The capital fact finder and sentencer is required to consider any relevant mitigating evidence during the penalty phase; however, a defendant is not given carte blanche to introduce any evidence concerning the death penalty. The trial court may exclude as irrelevant that evidence not bearing on the defendant's character, prior record, or the circumstances of his offense. *Huffman v. State*, 543 N.E.2d 360 (Ind. 1989), *cert. denied*, 497 U.S. 1011 (1990), *overruled on other grounds*, 567 N.E.2d 102 (Ind. 1991); *Underwood v. State*, 535 N.E.2d 507 (Ind. 1989), *cert. denied*, 493 U.S. 900, *reh'g denied*, 493 U.S. 985 (1989); *Wisehart v. State*, 693 N.E. 2d 23, 64-65 (Ind. 1998). A defendant may introduce other circumstances appropriate for consideration as mitigating circumstances. See Ind. Code 35-50-2-9(c)(8).

83.65.010 **Eighth Amendment Requires Consideration Of Relevant Mitigators** -Under the Eighth Amendment protection against cruel and unusual punishment, the sentencer in capital cases may not refuse to consider or be precluded from considering any relevant mitigating factors. *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Baird v. Davis*, 388 F. 3d 1110, 1115 (7th Cir. Ind., 2004).

83.65.025 **Eighth Amendment Right To Present Mitigating Evidence** - The Eighth Amendment requires that the defendant be allowed to present and have considered evidence of any relevant factor, which might mitigate against imposing the death penalty. *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (family history); *Skipper v. North Carolina*, 476 U.S. 1 (1986) (evidence of defendants good adjustment to jail pending trial); *Kansas v. Marsh*, 126 S.Ct. 2516 (2006).

83.65.050 **Eighth Amendment Prohibits Unanimity Rule On Mitigators** - A requirement that the jury must find a mitigating circumstance unanimously before it can be considered violates the Eighth Amendment. *McKoy v. North Carolina*, 494 U.S 433 (1990).

83.65.075 **Opinion On Religious Or Social Issues Irrelevant** - Opinion testimony on religious or social issues related to the death penalty is properly excluded on relevancy grounds. *Wisehart v. State*, 484 N.E.2d 949 (Ind. 1985).

83.65.100 **Inmate Opinion On Rehabilitation Or Death Penalty Irrelevant** - Testimony of a former death row inmate about his or her rehabilitation, as well as inmates opinion about the death penalty, may in some cases be excluded on relevancy grounds. *Spranger v. State*, 498 N.E.2d 931 (Ind. 1986).

83.65.200 **Sentencer Decides Whether A Factor Is Mitigating -** A capital case sentencer is under no duty to deem mitigating every factor so alleged by the defendant simply because it is supported by some evidence in the record. *Bivins v. State*, 642 N.E.2d 928 (Ind. 1994).

83.65.225 **Jury Failure To Reach Recommendation Not Mitigating -** The failure of a jury to reach a recommendation should not be considered as a mitigating factor during the penalty phase. *Roche v. State*, 596 N.E.2d 896 (Ind. 1992).

83.65.250 **Mental Condition May Be Mitigating** - The trial court can consider as a mitigating circumstance the mental condition of the defendant regardless of whether it might not have been so apparent as to merit a finding of not guilty of the commission of the crime. *Benirschke v. State*, 577 N.E.2d 576 (Ind.), *reh'g denied*, 582 N.E.2d 355 (Ind. 1991), *cert. denied*, 506 U.S. 853 (1992).

83.65.300 **Intoxication May Be Mitigating** - Intoxication at the time of the offense, when proven to be of such a degree as to substantially impair the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, is a statutory mitigating circumstance which must be given mitigating weight in the process of determining the appropriateness of the death penalty. *Johnson v. State*, 584 N.E.2d 1092 (Ind.), cert. denied, - U.S. 113 S. Ct. 155, 121 L. Ed. 2d 105 (1992); *Archer v. State*, 689 N.E. 2d 678, 685 (Ind. 1997).

83.65.900 **State May Present Rebuttal To Mitigating Evidence -** The death sentence statute permits the prosecution to introduce rebuttal evidence tending to disprove mitigating circumstances shown by the defendant's evidence. *Woods v. State*, 547 N.E.2d 772, 796 (Ind. 1989), *cert. denied*, - U.S. 111 S. Ct. 2911, 115 L. Ed. 2d 1074 (1991).

83.70.000 **Jury Instructions**

83.70.010 **Jury Instructions** - The court shall instruct the jury concerning the statutory penalties for murder and other offenses for which the defendant was convicted, the potential for consecutive or concurrent sentencing, and the availability of good time and credit and clemency. Ind. Code 35-50-2-9(d).

83.70.025 **Instruction On Parole Appropriate -** In proceeding to determine whether to impose the death sentence, it was not error for the court, in response to a question by the jury, to inform them as to provisions for parole if a death sentence was not imposed. *Brewer v. State*, 275 Ind. 338, 372-373, 417 N.E.2d 889 (1981), *cert. denied*, 458 U.S. 1122, *rehearing denied*, 458 U.S. 1132 (1982).

83.70.050 **Lesser Included Offenses Must Be Instructed On -** Imposition of the death penalty upon conviction by state jury which was not permitted to consider a verdict of guilty on a lesser included offense violates Fourteenth Amendment due process protections. *Beck v. Alabama*, 447 U.S. 625 (1980). [Editor's Note: *Wright v. State*, 658 N.E. 2d 563 (Ind. 1995) sets forth a three-step analysis for determining when a court should give a lesser included offense instruction. See also *Stevens v. State*, 691 N.E.2d 412 (Ind., 1997) (holding that the trial court did not err by not instructing on the lesser included offense of manslaughter when the defendant failed to show any serious evidentiary dispute (the third step of the analysis).]

83.70.060 **Lesser Instruction Not Required By Federal Law If Limitations Bar -** U.S. Constitution does not require trial judge to give a lesser included offense instruction in a case where the period of limitations has expired on the lesser offense. *Spaziano v. Florida*, 468 U.S. 447 (1984). Note: Indiana has held that a trial judge properly refuses to instruct on a lesser which would be barred by the statute of limitations, *Gurley v. State*, 264 Ind. 552, 348 N.E.2d 16 (1976) and *Patterson v. State* 532 N.E. 2d 604 (Ind. 1988), but there has been no recent reconsideration of the holding, particularly in a death penalty context.

83.70.100 **Instruction On Burden On Each Aggravator And Presumption Of Innocence Not Required** - The absence of instructions that the burden of proof applies to each element of the aggravating circumstances or that the defendant is presumed innocent as to circumstances in the penalty phase does not violate the due process clause. *Bellmore v. State*, 602 N.E.2d 111, 125-127 (Ind. 1992).

83.70.150 **Adequate Instructions Defining Aggravating Circumstance -** The jury was adequately instructed about the aggravating factor that needed to be proved before a recommendation of death could be returned where the jury was informed in a final instruction that, before a recommendation of death could be returned, it first must find beyond a reasonable doubt that defendant intentionally killed the victim while defendant was committing a robbery, and preliminary instructions stated that the intentional murder during the course of robbery was the aggravating circumstance and defined "intentionally." *Burris v. State*, 465 N.E.2d 171, 190 (Ind. 1984), *cert. denied*, 469 U.S. 1132 (1985).

83.70.400 **Mitigating Circumstances Instruction Only If Mitigating Evidence Presented** - The U.S. Constitution does not obligate state courts in capital sentencing proceedings to instruct on a mitigating circumstance for which no evidence is presented. *Delo v. Lashley*, 507 U.S. 272 (1993).

83.70.500 **Presumption Of Innocence Instruction Not Required In Penalty Phase** - Defendant in a capital murder trial is not entitled, under the U.S. Constitution, to a presumption of innocence instruction in the penalty phase. *Delo v. Lashley*, 507 U.S. 272 (1993); *Woods v. Anderson*, 302 F.Supp. 2d 915, 929 (S.D. Ind., 2004).

83.70.520 **Instruction Against Decision On Mere Sentiment Permissible** - An instruction that jurors not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or feeling in penalty phase of capital murder trial held not to violate the Eighth and Fourteenth Amendment. *California v. Brown*, 479 U.S. 538 (1987).

83.70.550 **Instruction On Jury As Judges Of Law** - Where the jury was instructed that although they were the judges of the law they must apply the law as they find it, and they were not to disregard the law, such instruction was proper and the capital sentencing statute sufficiently guided the jury's discretion. *Miller v. State*, 623 N.E.2d 403 (Ind. 1993); *Hough v. State*, 690 N.E. 2d 267, 276 (Ind. 1997).

83.75.000 **Jury Recommendation and Judge Sentencing**

83.75.050 **Error To Rule Out Discretion of Jury to Not Recommend Death** - When an instruction directed the jury to return a recommendation of death even if the jury felt the sentence was inappropriate, the erroneous instruction required a new sentencing hearing since the jury is not required to return a recommendation for the death penalty even if the state proves that the aggravating factors outweigh the mitigating circumstances under subsection (e). *Williams v. State*, 525 N.E.2d 1238 (Ind. 1988).

83.75.100 **Jury To Determine Sentence**-The jury shall recommend to the court whether the death penalty shall be imposed and the court shall apply the jury's recommendation. Ind. Code 35-50-2-9(e).

83.75.150 **Sixth Amendment Requires that Jury Find Aggravating Factor -** The Defendant's Sixth Amendment jury trial right requires that the jury must find the aggravating factor or factors for a death or life imprisonment without parole sentence beyond a reasonable doubt. *Ring v. Arizona*, 536 U.S. 584 (2002); *Pruitt v. State*, 834 N.E.2d 90 (Ind. 2005).

83.75.200 **Jury Hung on Aggravator Requires Sentence Phase Mistrial** – If the jury cannot unanimously agree on whether the alleged aggravating factor or factors were proved beyond a reasonable doubt, the court must declare a mistrial and there must be another penalty phase trial. *State v. Barker*, 809 N.E.2d 312 (Ind. 2004).

83.75.250 **If Jury Finds Aggravator But Cannot Recommend, Court May Balance Factors and Impose Sentence –** Defendant's Sixth Amendment right requires the jury to find an aggravating factor, and if the jury finds the aggravator but cannot then agree on a recommendation for or against death or life without parole then the court may discharge the jury and sentence the defendant. Ind. Code 35-50-2-9(f); *State v. Barker*, 809 N.E.2d 312 (Ind. 2004).

83.75.500 **Jury May Recommend Death, Life Without Parole, Or Neither** - Except as provided by Ind. Code 35-36-9-6, if the hearing is by jury, the jury shall recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed. To recommend the death penalty or life imprisonment without parole, the jury must make findings described in subsection (d) of the statute. Ind. Code 35-50-2-9(e).

83.85.050 **Insufficient Order** - Sentencing order was insufficient by not setting forth specific facts and reasons which led the court to find the existence of each aggravating and mitigating circumstance, not establishing that the trial court found that the state proved beyond a reasonable doubt that at least one

aggravating circumstance existed, not indicating that the trial court considered the jury's recommendation, and not containing the personal conclusion of the trial court that death was the appropriate punishment for this offender and this crime. *Harrison v. State*, 644 N.E.2d 1243 (Ind. 1995); *Washington v. State*, 808 N.E. 2d 617, 629 (Ind. 2004).

83.85.100 **General Sentencing Statement Of Reasons Applies** - Provision of Ind. Code 35-50-1-3(a) [now Ind. Code 35-38-1-3] that the sentencing judge include a statement of the reasons for selecting the sentence he imposes is applicable when a death sentence is to be imposed. *Brewer v. State*, 275 Ind. 338, 417 N.E.2d 889 (1981), *cert. denied*, 458 U.S. 1122, *rehearing denied*, 458 U.S. 1132 (1982); Ind. Code 35-38-1-3.

83.90.000 **Post-Conviction**

83.90.100 **Order To Department Of Correction And Copy To Supreme Court** - Whenever a court sentences a defendant to death, the court shall pronounce said sentence and issue its order to the Department of Correction for the defendant to be held in an appropriate facility. A copy of the order of conviction, order sentencing the defendant to death, and order committing the death-sentence inmate to the Department of Correction shall be forwarded by the court imposing sentence to the Indiana Supreme Court Administrators Office. Criminal Rule 24(E).

83.90.150 **Order Immediate Preparation Of Transcript** - When a trial court imposes a death sentence, it shall on the same day sentence is imposed order the court reporter and the clerk to begin immediate preparation of the record of proceedings. Criminal Rule 24(E) AND (I).

83.90.200 **Immediate Appointment Of Appellate Counsel** - Upon finding of indigence, the trial court imposing a sentence of death shall immediately enter a written order specifically naming counsel meeting the required qualifications under Criminal Rule 24(J) as appellate counsel; in appointing counsel for appeal, the trial court must assess counsel's work load to assure counsel can direct sufficient attention to the appeal; if trial counsel is so qualified, trial counsel shall be appointed as sole or co-counsel for appeal; compensation of appellate counsel shall be as provided in Criminal Rule 24(K). Criminal Rule 24(J) and (K).

83.90.300 **Execution Date One Year From Date Of Judgment Of Conviction** - In the sentencing order, the trial court shall set an execution date one (1) year from the date of judgment of conviction. Copies of said order shall be sent by the trial court to the prosecuting attorney; the defendant; the defendants attorney; the appellate counsel; if such has been appointed; the Attorney General; the Commissioner of the Department of Correction; the warden of the institution where the defendant is confined; and the State Public Defender. Criminal Rule 24(F); Ind. Code 35-50-2-9(h).

83.90.400 **Copy Of Order Setting Execution Date To Supreme Court** - Contemporaneously with the service of the order setting the date of execution to the parties listed in this section, the trial court shall forward to the Supreme Court Administrators Office a copy of the order, with a certification by the clerk of the

court that the parties listed in this section were served a copy of the order setting the date of execution. Criminal Rule 24(F).

83.95.000 **Post-Conviction Relief Petition To Be Filed 30 Days After Appeal** -Within thirty (30) days following completion of rehearing, private counsel retained by the inmate or the State Public Defender (by deputy or by special assistant in the event of a conflict of interest) shall enter an appearance in the trial court, advise the trial court of the intent to petition for post-conviction relief, and request the Supreme Court to extend the stay of execution of the death sentence. A copy of said appearance and notice of intent to file a petition for post- conviction relief shall be served by counsel on the Supreme Court Administrator. Supreme Court. Criminal Rule 24(H).

83.95.050 **Setting Of Post-Conviction Hearing To Be Within 90 Days Of Filing** - If a person sentenced to death by a court files a petition for post-conviction relief, the court, not later than ninety (90) days after the date the petition is filed, shall set a date to hold a hearing to consider the petition. If a court does not within the ninety (90) day period, set the date to hold the hearing to consider the petition, the court's failure to set the hearing date is not a basis for additional post-conviction relief on behalf of the state. Ind. Code 35-50-2-9(i).

83.95.100 **Prosecutor To Assist Attorney General If Latter Requests It** -At the request of the attorney general, a prosecuting attorney shall assist the attorney general. Ind. Code 35-50-2-9(i).

83.95.500 **Court To Enter Findings Within 90 Days After Hearing** - The court shall enter written findings of fact and conclusions of law concerning the petition not later than ninety (90) days after the date the hearing concludes. However, if the court determines that the petition is without merit, the court may dismiss the petition within ninety (90) days without conducting a hearing under this subsection. Ind. Code 35-50-2-9(i).

83.95.700 **Supreme Court Sets Execution Date Following Post-Conviction** - When the request to extend the stay is received, the Supreme Court will direct the trial court to submit a case management schedule consistent with Ind. Code 35-50-2-9(i) for approval. On the thirtieth (30th) day following completion of any appellate review of the decision in the post-conviction proceeding, the Supreme Court shall enter an order setting the execution date. It shall be the duty of counsel of record to provide notice to the Supreme Court Administrator of any action filed with or decision rendered by a federal court that relates to a defendant sentenced to death by a court in Indiana. Criminal Rule 24(H).

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